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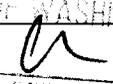
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DIVISION II

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STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

BY

  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DERRICK HUNTER, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable D. Gary Steiner, Judge

No. 07-1-00612-7

**BRIEF OF RESPONDENT**

MARK LINDQUIST  
Prosecuting Attorney

By  
KAREN PLATT  
Deputy Prosecuting Attorney  
WSB # 17290

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the trial court properly upheld the search warrant as it established a reasonable inference of the existence of criminal activity at that location and showed a sufficient nexus between the items to be searched for and the places to be searched. .... 1

2. Whether the defendant has failed to show that the trial court abused its discretion when it admitted, under ER 404(b), a few exhibits regarding uncharged victims which were seized at the same time and location as the documents pertaining to charged victims ..... 1

3. Whether the trial court properly overruled a hearsay objection to an answer that did not contain an out of court statement. Whether this Court should refuse to review defendant’s claims regarding the admission of alleged hearsay when he failed to preserve these claims in the trial court..... 1

4. Whether defendant has failed to meet his burden of showing defective performance when his counsel chose to preserve a challenge to the validity of a warrant rather than relitigate the issue when the warrant has been upheld by another court in a related proceedings, and whether he has failed to show prejudice as he cannot show a different outcome had the claim been reargued. .... 1

5. Whether the Court should reject defendant’s claim that eth State failed to adduce sufficient evidence to prove that the defendant actually or constructively possessed the personal and financial information of other persons when documents containing such information were found in his bedroom and car. .... 2

6.	Whether defendant has failed to show that the trial court has abused its discretion when it denied his motion for arrest of judgment that was predicated on a federal case that does not control the elements of the state statute at issue in this case. ....	2
7.	Whether defendant has failed to show any error, much less such an accumulation of prejudicial error, that would entitle him to relief under the cumulative error doctrine. ....	2
B.	<u>STATEMENT OF THE CASE</u> . ....	2
1.	Procedure .....	2
2.	Facts .....	5
C.	<u>ARGUMENT</u> .....	8
1.	THE TRIAL COURT PROPERLY UPHELD THE VALIDITY OF THE SEARCH WARRANT AS IT SHOWED SUFFICIENT NEXUS BETWEEN THE PLACE TO BE SEARCHED AND THE ITEMS TO BE SEARCHED FOR. ....	8
2.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS EVIDENTIARY RULINGS.....	15
3.	THE TRIAL COURT PROPLERLY OVERRULED DEFENDANT’S SINGLE HEARSAY OBJECTION TO MR. ROGERS’S TESTIMONY .....	22
4.	DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL .....	25

5.	THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT POSSESSED PERSONAL AND FINANCIAL INFORMATION WHICH BELONGED TO OTHER PERSONS.....	31
6.	THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR ARREST OF JUDGMENT SINCE HIS MOTION WAS PREDICATED ON A FEDERAL CASE THAT WAS NOT APPLICABLE TO THE STATE STATUTE UNDER WHICH DEFENDANT WAS CONVICTED.....	41
7.	AS DEFENDANT HAS NOT SHOWN ANY ERROR, MUCH LESS AN ACCUMULATION OF PREJUDICIAL ERROR, HE IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR DOUBT.....	44
D.	<u>CONCLUSION</u> .....	48

## Table of Authorities

### State Cases

<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994) .....	45
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	31
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	47
<i>State v. Anderson</i> , 72 Wn. App. 453, 458, 864 P.2d 1001, <i>review denied</i> , 124 Wn.2d 1013 (1994).....	31
<i>State v. Askham</i> , 120 Wn. App. 872, 878, 86 P.3d 1224 (2004) .....	10
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	47
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988) .....	31
<i>State v. Clark</i> , 68 Wn. App. 592, 844 P.2d 1029 (1993) .....	14, 15
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984) .....	45, 47
<i>State v. Cole</i> , 128 Wn.2d 262, 286, 906 P.2d 925 (1995).....	9
<i>State v. Feeman</i> , 47 Wn. App. 870, 737 P.2d 704 (1987).....	9
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743 (1982).....	9
<i>State v. Galisia</i> , 63 Wn. App. 833, 838, 822 P.2d 303 (1992), <i>review denied</i> , 119 Wn.2d 1003, 832 P.2d 487 (1992) .....	32
<i>State v. Goble</i> , 88 Wn. App. 503, 509, 945 P.2d 263 (1997).....	9
<i>State v. Goebel</i> , 40 Wn.2d 18, 21, 240 P.2d 251 (1952), <i>overruled on</i> <i>other grounds by State v. Lough</i> , 125 Wn.2d 847, 860 n.19, 889 P.2d 487 (1995) .....	17
<i>State v. Green</i> , 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).....	31
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	15, 22
<i>State v. Hendrickson</i> , 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) ....	24

<i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994).....	10
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	31
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 .....	25
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) .....	45, 46
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654, 659 (1993).....	31
<i>State v. Kinard</i> , 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979).....	47
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	45
<i>State v. Lord</i> , 117 Wn. 2d 829, 883, 822 P.2d 177 (1991).....	26, 27
<i>State v. Lough</i> , 125 Wn. 2d 847, 856, 889 P. 2d 487 (1995).....	20, 21
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	31
<i>State v. Maddox</i> , 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).....	9
<i>State v. Madison</i> , 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989).....	22
<i>State v. Mance</i> , 82 Wn. App. 539, 544, 918 P.2d 527 (1996) .....	9
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	31
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).....	26
<i>State v. Powell</i> , 126 Wn.2d 244, 259, 893 P.2d 615 (1995) .....	17
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 834 P.2d 651 (1992), <i>review denied</i> , 120 Wn.2d 1022 (1992) .....	15, 16, 22
<i>State v. Russell</i> , 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994) <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995).....	46
<i>State v. Scott</i> , 110 Wn.2d 682, 687-688, 757 P.2d 492 (1988.).....	22
<i>State v. Smith</i> , 93 Wn.2d 329, 352, 610 P.2d 869, <i>cert. denied</i> , 449 U.S. 873 (1980) .....	9

<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>rev. denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	46, 48
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 790 P.2d 510 (1990) .....	15
<i>State v. Tharp</i> . 96 Wn. 2d. 591, 596, 637 P.2d 961 (1981) .....	17
<i>State v. Thein</i> , 138 Wn.2d 133, 140, 977 P.2d 582 (1999).....	8, 9, 12, 13
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	47
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988).....	47
<i>State v. Walton</i> , 64 Wn. App. 410, 415-16, 824 P.2d 533, <i>review denied</i> , 119 Wn.2d 1001, 833 P.2d 386 (1992).....	32
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	46
<i>State v. Yokley</i> , 139 Wn.2d 581, 596, 989 P.2d 512 (1999) .....	9

**Federal and Other Jurisdictions**

<i>Brown v. United States</i> , 411 U.S. 223, 232 (1973).....	45
<i>Flores-Figueroa v. U.S.</i> , 129 S. Ct. 1886, 173 L.Ed.2d 853 (2009).....	41, 42, 43, 44
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305, (1986).....	25
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999).....	45
<i>People v. Lisenba</i> , 14 Cal. 2d 403, 94 P. 2d 569 (1939).....	20
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986).....	44, 45
<i>Strickland v. Washington</i> , 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674, (1984).....	25, 26, 27, 29

**Constitutional Provisions**

Article 1, Sec. 22 of the Constitution of the State of Washington .....25  
Article 1, Ssection 7 of the Washington Constitution .....8  
Fourth Amendment of the United States Constitution .....8  
Sixth Amendment to the United States Constitution.....25  
18 U.S.C.A. section 1028A(a)(1) .....43

**Statutes**

RCW 9.35.020(1) .....42  
RCW 9.35.020(3) .....33

**Rules and Regulations**

CrR 7.4(b).....41  
ER 103 ..... 15, 22  
ER 401 .....16  
ER 403 .....16  
ER 404(b) ..... 16, 18, 19, 21, 29  
ER 801(c).....22

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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5. Whether the Court should reject defendant's claim that the State failed to adduce sufficient evidence to prove that the defendant actually or constructively possessed the personal and financial information of other persons when documents containing such information were found in his bedroom and car.

6. Whether defendant has failed to show that the trial court has abused its discretion when it denied his motion for arrest of judgment that was predicated on a federal case that does not control the elements of the state statute at issue in this case.

7. Whether defendant has failed to show any error, much less such an accumulation of prejudicial error, that would entitle him to relief under the cumulative error doctrine.

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office filed an information on March 15, 2007, charging Derrick Lang Hunter, hereinafter "defendant," with identity theft in the first degree, and two counts of identity theft in the second degree, in Pierce County cause number 07-1-01406-5. CP 1-6.

The trial on an amended information, which reduced count one from identity theft in the first degree to second degree, and which added eleven

counts of identity theft in the second degree, commenced before the Honorable James R. Orlando on April 15, 2009. 1 RP 1, CP 77-82.

The evidence in this case derived from a search warrant which had led to defendant being charged with failure to register as a sex offender and other crimes in cause number 07-1-00612-7, as well as the charges in this case.<sup>1</sup> Defendant was represented by the same counsel in both cause numbers, Mr. Sepe, who brought a motion to suppress evidence discovered pursuant to the warrant in both cause numbers. 00612-7 RP 24-44, 1 00612-7 RP 4-5, CP 10-21. The validity of the warrant was fully litigated in the other case before the Honorable D. Gary Steiner.<sup>2</sup> 00612-7 RP 24-45, 1 RP 4-5. Judge Steiner ruled that the search warrant was valid, and that evidence seized with the warrant would be admissible at trial. CP 10-21, CP 180-207.

The motion to suppress the evidence from the search warrant filed in this case was identical. 1 RP 4-5, CP 10-21. The parties agreed that Judge Steiner's previous ruling was *res judicata* in this case and Judge Orlando made that ruling applicable to this case.<sup>3</sup> 1 RP 4-5. As a result of

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<sup>1</sup> The transcript of the June 24, 2008, hearing in cause number 07-1-00612-7 is referenced as "00612-7 RP" followed by a page number.

<sup>2</sup> Defense argued in cause number 07-1-00612-7 that the search warrant did not provide sufficient nexus between the crime and the places to be searched, and so did not establish probable cause. Defendant's motion to reconsider argued that the statements attributed to defendant, that the photos and studio were in his room in the house and car, were not made by him. CP 163, 177, CP 180-207

<sup>3</sup> Judge Orlando suggested that the parties prepare an order stating that he was bound by Judge Steiner's ruling as to the warrant. 1 RP 5. No such order was found in the court's filings.

this understanding, the validity of the search warrant was not relitigated by Judge Orlando.

The search warrant at issue was designed to seize evidence of failure to register as a sex offender and other crimes. 1 RP 4. When the warrant was executed on defendant's house and car, the officers found at least 81 documents which were the bases for the charges filed here. CP 214-218. Some of the documents were social security cards, bank and credit card account information, driver's licenses and applications. 2 RP 94-107. Defendant brought a motion *in limine* to exclude any seized document which did not pertain to the 14 victims on which charges in this case were based. 1 RP 6, 2 RP 96. Judge Orlando ruled that all of the evidence seized was admissible. 2 RP 107-110.

During trial, defendant objected to every piece of evidence the State sought to admit on the grounds of hearsay and lack of authentication. 2 RP 191-207. Judge Orlando admitted the evidence over defendant's objections. 2 RP 191-207. Defense also objected once to testimony by Mr. Rogers, a special agent with the Social Security Administration (SSA) office of Inspector General, on hearsay grounds. 2 RP 192-193. This objection was also overruled. 2 RP 192-193.

On April 23, 2009, the jury convicted defendant of 6 counts of identity theft in the second degree but was unable to reach a verdict on the 7 remaining counts. CP 116-128. Defendant filed a motion to arrest judgment on May 6, 2009, more than 10 days after the verdict was

entered. CP 129-147. The parties argued this motion on December 18, 2009. The court denied defendant's motion to arrest and sentenced the defendant. The court ordered that defendant serve 57 months consecutive to the sentence he was already serving. 3 RP 332.

## 2. Facts

Darin Sale<sup>4</sup> is a detective with the Lakewood Police Department. 2 RP 118. He served a search warrant on the room in the house where defendant lived at 4703 101<sup>st</sup> Street Southwest in Lakewood, Washington, as well as on a car affiliated with him. 2 RP 120-122. Detective Sale testified that he located several briefcases and backpacks in the house and the car, and that he retained the documents inside them. 2 RP 122. Included among the documents seized pursuant to the search were various pieces of identification for Moses Thomas, Daryl Benjamin, Shannon Brown, Sabrina Montgomery, Antonio Montgomery, Kondalia Montgomery, Demetrius Sanders, Isaiah Brown, Jerry Johnson, Gordon Wilborn, Able Correa, Michael Backman, Claudia Longpre, Ronald Booker, Anthony Brown, Carl Hunter, Niko McCoy and Robert Tucker. 2RP 214-218.

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<sup>4</sup> Detective Miller legally changed his name to Sale after the warrant was served. 2 RP 118.

Keith Brown testified that he has lived at 4704 101<sup>st</sup> Street Southwest in March of 2007, when defendant also lived at that address. 2 RP 227. Mr. Brown was present at that location when the police executed the search warrant. 2 RP 230. Mr. Brown saw the police take a briefcase and personal bags out of the defendant's bedroom, and search the trunk of his car. 2 RP 230.

Mr. Brown has a son named Isaiah who is nine years old and unemployed. 2 RP 228. To his knowledge, Isaiah has never applied for a credit card, nor has he authorized anyone to apply for a credit card on his son's behalf. 2 RP 231. Mr. Brown viewed a letter from Chase Bank to Isaiah Brown and testified that it contains the address on 101<sup>st</sup> Street Southwest and his son's name. 2 RP 231-232, exhibit 42. Mr. Brown also reviewed a Citibank credit card application which contains his son's name and address. 2 RP 232, exhibit 41. Mr. Brown testified that he did not apply for a credit card for his son, and that no one in his family had done so. 3 RP 231-232.

Mr. Brown testified that he also knows Sabrina Montgomery and her son Antonio Montgomery, and believes that they have moved to Georgia. 2 RP 232-233. He testified that neither he nor anyone at his house should have had a photocopy of Ms. Montgomery's or her children's social security cards, social security numbers, or dates of birth. 2 RP 233-234.

Mr. Brown testified that he gets a lot of mail for "Moses Thomas" at his address, but does not know who he is. 2 RP 234. He had never seen any of the exhibits which were found at his house including those which

have to do with his son Isaiah. 2 RP 234 242, exhibits 1, 3, 4, 6, 14, 15, 19, 20, 21, 22, 23, 24, 27, 28, 41, 42, 59, 62, 70, 71, 72 or 79. Nor was his handwriting on any of the exhibits. 3 RP 234-242. He testified that none of the exhibits shown to him were his. 2 RP 234-241.

Gordon Wilburn testified that he is a truck driver by profession, and has medical waiver certifications relevant to his occupation. 2 RP 152. Mr. Wilburn identified trial exhibits 39, 40 and 41 driver's license, medical waiver and a medical examination certificate which contain his name, address, and social security number. 2 RP 152-153. He also testified that he did not know defendant, and had not given defendant permission to possess these three documents. 2 RP 152-153.

Claudia Longpre testified that her name, her old phone number and her old bank account information appeared on the back of a letter sent to defendant. 2 RP 155 – 157, exhibit 22. She testified that she had not given defendant permission to possess her information. 2 RP 157.

Joe Rogers is a Special Agent for the Social Security Administration (SSA) office of Inspector General. 2 RP 182. He has been trained on, works with, and is familiar with the SSA computer data system. 2 RP 181-183, 188-189, 190-193. He testified that the SSA issues a social security number to each baby as it is born. 2 RP 184. An applicant's personal information is entered into the SSA database which is maintained by the federal government to ensure the integrity of the

system. 2 RP 188-189. A person's information is updated as they collect wages, change their names and lose their issued cards. 2 RP 183-190.

Mr. Rogers examined various social security cards which had been found in the possession of the defendant and determined whether they were properly issued documents or forged.<sup>5</sup> 2 RP 192-207. He looked up the social security numbers which were on the documents and sheets of paper and determined that they had been issued to the persons named on the State's exhibits.<sup>6</sup> 2 RP 192-207.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY UPHELD THE VALIDITY OF THE SEARCH WARRANT AS IT SHOWED SUFFICIENT NEXUS BETWEEN THE PLACE TO BE SEARCHED AND THE ITEMS TO BE SEARCHED FOR.

The Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based on "facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)

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<sup>5</sup> Exhibit numbers 3, 4, 6, 63, 73, and 80.

<sup>6</sup> Exhibit numbers 33, 4, 1, 17, 16, 34, 23, 72, 37, and 40.

(citing *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, cert. denied, 449 U.S. 873 (1980)). A warrant must particularly describe the place to be searched, and the persons or things to be seized. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Accordingly, “probable 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 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

A magistrate’s decision to issue a warrant is an exercise of judicial discretion, which is reviewed for abuse of discretion. The reviewing court accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Id.* When a search warrant has been authorized by a judge or magistrate, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982); *State v. Mance*, 82 Wn. App. 539, 544, 918 P.2d 527 (1996). Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The court or magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

Defendant challenged the validity of the search warrant on two theories: 1) there were not sufficient facts and circumstances to establish a reasonable inference of criminal activity to support the warrant, and 2) the affidavit supporting the search warrant did not show a nexus between the defendant's house and car, and the items to be searched for there. As will be discussed below, both claims are without merit. As described earlier in the procedural section of this brief, Judge Steiner entered findings of fact and conclusions of law regarding his ruling that the warrant is valid. CP 10-21. Defendant has not assigned error to any of the findings. Therefore, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

a. The Affidavit In This Case Contains Sufficient Facts And Circumstances To Establish A Reasonable Inference That One Could Find Evidence Of A Crime In Defendant's House And Car.

The Court of Appeals reviews the legal sufficiency of a search warrant de novo. *State v. Askham*, 120 Wn. App. 872, 878, 86 P.3d 1224 (2004). The court also assesses the validity of each warrant on a case by case basis. *Id.* Because this Court does not rely on the findings or conclusions of the trial court in assessing the validity of the warrant in this case, the findings and conclusions entered before are superfluous.

This search warrant was developed to support a search of defendant's home address. Appendix B. This evidence was material to the charge of failure to register as a sex offender. CP 210-211. The warrant's affidavit states:

- 4) Indicia of occupancy, residence, 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.

ALL OF WHICH WILL BE EVIDENCE OF THE OFFENSE OF....

Fail to Register as a Sex Offender RCW 9A.44.130.

CP 10-21, 163-177. The last page of the warrant reads:

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.

CP 10-21, 163-177.

Judge Steiner properly ruled that the warrant contained sufficient facts to establish a nexus to search for evidence of failure to register as a sex offender as well as communication with a minor for immoral purposes, the nature of the investigation in the first case. CP 10-21, 163-177, Appendix B. The warrant also established probable cause to search for documentation of defendant's legal residence. CP 10-21, 163-177, Appendix C.

It was reasonable for the court to believe that one might find evidence of defendant's residency in the home where defendant resided, and in his car, which should be registered to his home address. The warrant is valid in its authorization to search for documents of defendant's residence. The documents in this case are mail to and from banks and credit companies, applications for bank accounts and credit cards, and social security cards which would establish residency. These documents were seized pursuant to a valid warrant and should not be suppressed at trial.

Defendant argues that *Thein* requires more than a generalized belief that evidence sought may be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 977 P. 2d 582 (1999). *Thein* presents a different factual pattern than the case at bar. In *Thein*, officers knew that Thein delivered drugs by using his car. The warrant they submitted to search his house and car stated their belief that drug dealers usually keep drugs at their homes. The Washington Supreme Court found that such generalized belief did not establish a sufficient nexus to justify a search of Thein's house.

In this case, the object to be searched for was proof of defendant's residency. It is much clearer that evidence of residency, such as mortgage or rental documents, utility bills and bank statements would likely be

found in defendant's current home. It is also likely that evidence of defendant's residence, such as insurance and vehicle registration documents, would be found in his car. The search warrant in this case did establish a nexus between the object of the search and the place to be searched, defendant's house and car. *Thein* is not applicable to this case, and does not render this warrant suspect.

Judge Steiner reasoned that the magistrate who issued the warrant is entitled to great deference. CP 180-207, Appendix A. He articulated the test of whether a nexus had been established as "whether a reasonable person given the evidence presented would believe that item the item sought is likely to be found in the place searched" had been met. CP180-207, Appendix A. He stated that he believed that the items the police sought were to be found either in defendant's home or car, and ruled that the warrant was valid. CP 180-207, Appendix A. He did not abuse his discretion in ruling that this warrant was supported by a reasonable inference that the evidence sought in this case would be found at the locations to be searched. His ruling should be upheld.

- b. Evidence Derived From The Search Warrant Is Admissible Since Judge Steiner Considered Only Evidence From The Affidavit When He Ruled On Its Validity.

It is clear under Washington State law that an untrue or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard

for the truth. *State v. Clark*, 68 Wn. App. 592, 844 P.2d 1029 (1993).

Even if a warrant contains information made with “reckless disregard for the truth”, it may still be found to be valid. *Clark* at 600-601.

While defendant raises a claim that Judge Steiner considered incorrect information, he fails to identify any untrue or incorrect statement made in the affidavit supporting the warrant. Rather, defendant points to a portion of a conclusion entered by Judge Steiner, arguing that it was based on information which was found in the warrant’s affidavit.

The challenged portion of the conclusion is emphasized below:

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 of the home. *The defendant stated that they were in the car and a photo studio in the home.*

CP 180-207, page 5, paragraph VI (emphasis added.) The affidavit provided information that defendant was operating a “photo studio” out of his home, but this information did not come from the defendant.

One student claimed the photos did not look professional but rather home based....Another student indicated Hunter had told them his studio was out of his home.

CP 180-207, Appendix B.

The fact that Judge Steiner cited the incorrect source for this information is irrelevant. This court reviews the validity of the search warrant *de novo*, and does not rely on the findings or conclusions of Judge Steiner.

Incorrect information contained in the court's conclusion of law is not synonymous with that in *Clark* since no misstatement was made by the warrant's affiant. This, defendant's reliance on *Clark*, is misplaced.

Based on the evidence contained in the affidavit to the search warrant, this Court can find, as Judge Steiner did, that there are sufficient facts to establish a reasonable inference of criminal activity to support the warrant. The warrant is valid and the evidence derived from its service was properly admissible at trial.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS EVIDENTIARY RULINGS.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 510 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion,

which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak, Id.*

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is so prejudicial as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

The trial court in this case allowed the admission of two types of evidence: documents which contained information about charged victims, and documents which contained information about uncharged victims. The evidence regarding uncharged persons was relevant to prove defendant's "intent," and admissible pursuant to the common or plan exception of ER 404(b).

Evidence of prior acts may be admissible pursuant to ER 404(b) which allows:

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.<sup>7</sup>

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<sup>7</sup> Defendant's brief cites to ER 404(b) as referring to "bad" acts. Appellant's brief page 34. It simply refers to "acts".

But "[t]his list of exceptions is not necessarily exclusive, the true test being whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 860 n.19, 889 P.2d 487 (1995). Evidence is relevant and necessary if the purpose for admitting it is of consequence to the action and makes the existence of the identified fact more probable. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The admissibility of unrelated crimes was examined in *State v. Tharp*. 96 Wn. 2d. 591, 596, 637 P.2d 961 (1981). There, the Washington Supreme Court gave the true test for the admission of other crimes in a trial; "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *Id.*

The information alleges crimes against 14 victims, but some exhibits were admitted that pertained solely to persons who were not named victims, such as Niko McCoy and Anthony Brown. CP 214-218. There are nine exhibits which pertain to Niko McCoy, 49, and 63-70. They are a social security card, two ID cards, a copy of a medical billing statement addressed to McCoy but showing defendant's address, and a Bank of America application for a Visa card in McCoy's name with defendant's address. Niko McCoy was named on the documents as

defendant's son. 2 RP 105-107. Four trial exhibits pertain solely to Anthony Brown, 12, 14, 17, and 36. 2 RP 164-166. Five exhibits are sheets which contain compilations of names, dates of birth and social security numbers. Exhibits 20, 24, 27, 54, and 72. The remaining five exhibits that pertain to people are mail or other financial documents for uncharged victims. 2 RP 142. Exhibits 21, 25, 26, 28, 35. The evidence which relates to uncharged victims was necessary to prove an essential ingredient of the crime charged, "intent."

The State's bases for the common scheme and plan exception to ER 404(b) are: 1) all of the evidence was all found at the same time and place, and 2) the evidence shows defendant's manipulation or use of the information contained in the documents to commit theft. 2 RP 94-96, 105-107. This combination of evidence constitutes parts of the same plan, and demonstrates intent. These documents are the *res gestae* of the charges in this case. 2 RP 107.

The gravamen of identity theft is the possession of another's personal or financial information with intent to commit a crime. CP 84-113, instruction number 11. Had the prosecutor shown only that defendant possessed personal and financial information belonging to others, the jury may have concluded that defendant was guilty only of possessing stolen property. That some information had been cataloged,

used to apply for credit cards, and to alter authorized users on open accounts shows the added element of possession with intent to commit a further crime.

Defendant made notes about the documents, such as social security numbers, credit card account numbers and dates of birth. Trial exhibits 19, 20, 21, 23, 54, and 72. These notes regarding personal and financial information were on pages which contained notes on multiple identities. Such compilations of information are known as “profiles” which identity thieves gather in order to complete a set of personal and financial information on a victim. Since the notes were intermingled and difficult to segregate, there was an indication that the documents were all relevant to a common scheme or plan. 2 RP 95-96. Judge Orlando properly agreed that the documents referring to uncharged victims were evidence of defendant’s intent; they were part of his scheme and were admissible to tell the whole story of defendant’s plan. 2 RP 107-110.

Defendant brought a pretrial 404(b) motion to suppress any evidence which did not pertain to any victim named in the Information. This motion was overruled. 2 RP 94-107. Defendant now argues that the uncharged documents did not meet the ER 404(b) exception which allows the admission of evidence to show “plan or scheme.” He argues that a common plan or scheme can be present only where the State can show

specific and unique features in common between the offenses which the suspect uses repeatedly, or when several crimes constitute parts of a larger overarching plan. Appellant's Brief, page 37.

Defendant fails to acknowledge that the crime of identity theft does involve a series of lesser crimes. Even if the preliminary step of "possession" is complete, the State must show the intent to complete the ultimate step, "with intent to commit a crime." Documents of compiled profiles, faxes showing account manipulation and documents of other personal or financial information are relevant to show steps taken to fulfill the "intent" element which completes the crime.

Defendant also argues that the evidence of uncharged crimes may only come in when there are enough specific and unique features in common to show that the plan or scheme was carried out by committing the charged offense. Appellant's Brief, page 36. Defendant references a case in which the suspect committed murder of two spouses by drowning them in a bathtub after he had purchased a life insurance policy on each wife. *People v. Lisenba*, 14 Cal. 2d 403, 94 P. 2d 569 (1939), cited by *State v. Lough*, 125 Wn. 2d 847, 856, 889 P. 2d 487 (1995).

The *Lough* case held that other acts may be admissible in a case if there are "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." *Id.* at 490-491. The specific and unique features in the *Lough* case involved rendering women unconscious by the

surreptitious use of drugs for the purpose of sexually abusing them. *Id.* **Lough** attempted to suppress the testimony of four other women who had been drugged and abused by him at his trial. These prior acts were found to be admissible. **Lough** also discussed the situation in which a screwdriver was stolen and later used in a crime. *Id.* at 855. This example shows a causal connection between the prior acts and the act charged. The case at bar does not need such a causal connection since it concerns the admission of a complete body of evidence discovered pursuant to the service of a single search warrant. **Lough** does not militate against the entry of the evidence in this case.

Defense argues that the only way an uncharged crime can show intent or knowledge is by “forbidden inferences” of propensity, and that admitting prior acts doesn’t show intent, it shows propensity.” 2 RP 103. In this case, the documents the State admitted were all found together in one search, they were intermingled and there was evidence that they had been manipulated in tandem. This evidence showed the various stages of an overarching plan or scheme. It did not involve prior crimes or occurrences. Because it did not reference previous crimes or occurrences, it could not show propensity. Judge Orlando properly admitted the exhibits relating to uncharged victims under ER 404(b). This ruling should not be disturbed.

3. THE TRIAL COURT PROPLERLY OVERRULED  
DEFENDANT’S SINGLE HEARSAY OBJECTION TO  
MR. ROGERS’S TESTIMONY.

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Appellate courts will not approve a party's failure to object at trial when the error is one which the trial court might correct through striking the testimony and/or a curative jury instruction. *State v. Scott*, 110 Wn.2d 682, 687-688, 757 P.2d 492 (1988.) A party’s failure to object deprives the trial court of an opportunity to prevent or cure the error. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. *State v. Madison*, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989). The trial court's decision to admit evidence will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Hearsay is defined as:

(c) “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c). During trial defendant objected once to Mr. Rogers’s testimony on hearsay grounds. 2 RP 192. This objection came during Mr. Rogers’s

discussion regarding defendant's social security card, which was exhibit 10. 2  
RP 192-193.

PROSECUTOR: Did you research the Social Security number  
associated with Darrick, Lang Hunter[sic]"  
MR. ROGERS: Yes I did.  
PROSECUTOR: And referring to your notes and Exhibit No. 10,  
did you achieve a match between those two numbers?  
MR. ROGERS: I did.  
MR. SEPE: Objection, hearsay Your Honor.  
THE COURT: Overruled

2 RP 192. Mr. Rogers's response "I did" is not hearsay since it is not an  
out of court statement being offered to prove the truth of the matter  
asserted. Mr. Rogers was testifying that he had compared documents, a  
step he took as a part of his investigation. He had not testified about the  
content of any of the SSA records he reviewed, or the content of any trial  
exhibits. The court properly overruled the hearsay objection to this  
testimony.

The prosecutor continued to ask Mr. Rogers questions about the  
trial exhibits he had researched. 2 RP 192-207. During the remaining  
direct examination, defendant never again objected to testimony from Mr.  
Rogers. Because his objections were not preserved below, defendant is  
limited on appeal to challenge only this one question to Mr. Rogers  
regarding exhibit 10. *Id.*

Defendant argues that Mr. Rogers' testimony was hearsay, and was comparable to his testimony which had been disallowed in *State v. Hendrickson*, 138 Wn. App, 827, 833, 158 P.3d 1257 (2007). Defendant misunderstands the facts in *Hendrickson*. In that case, Mr. Rogers was allowed to testify the social security cards had been issued by the SSA to specific people. *Id.* At one point in his testimony, Mr. Rogers repeated what a victim had told him about the loss of his social security card. There was no objection to this testimony. Regardless of the lack of an objection to the hearsay, the Court of Appeals properly found that the statements about how the victim lost his card were hearsay and should not have been admitted. *Id.* Therefore, the Court of Appeals reversed the conviction on that count. Such hearsay was not present in this case.

In this case, Mr. Rogers testified that he had reviewed the social security numbers which were affiliated with the exhibits, and that he then used the SSA computerized database to compare the information on those cards or other documents to numbers issued by the SSA. 2 RP 191-207. By this method, Mr. Rogers was able to establish that the personal information defendant possessed, social security numbers, belonged to an actual person. 2 RP 186-207.

The trial court's decision to overrule defendant's hearsay objection to Mr. Rogers's testimony was not an abuse of discretion. The question to which defendant objected did not call for hearsay. Any reasonable person

would have taken the position adopted by the trial court. The trial court's ruling should not be disturbed.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The U.S. Supreme Court has stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305, (1986). In determining whether defense counsel was ineffective, the judicial scrutiny of counsel's performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674, (1984).

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922

(1986). The *Strickland* test has two prongs, both of which must be met by defendant. The first prong is:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed to the defendant by the Sixth Amendment.

The Washington State Supreme Court gave further clarification to the application of the first prong of the *Strickland* test. The Supreme Court in *State v. Lord* stated:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*State v. Lord*, 117 Wn. 2d 829, 883, 822 P.2d 177 (1991). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* Because the presumption runs in favor of effective representation, the defendant must show from the record an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

The second prong of the *Strickland* test is:

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*State v. Lord*, 117 Wn. 2d 829, 883, 822 P.2d 177 (1991).

Under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lord, supra* at 883-884. Because the defendant must prove both prongs of *Strickland*, it may be found that he did not meet his burden based upon a lack of prejudice, without determining if counsel's performance was deficient. *Id.*

Defendant asserts that his counsel was deficient in this case for failing to object to evidence derived from the search warrant. As will be discussed below, defendant's claim of ineffectiveness is without merit, and he fails to show prejudice.

- a. Defendant Has Failed To Show That Counsel Made Serious Errors Or Failed To Exercise Reasonable Professional Judgment Since He Did Object To The Validity Of The Search Warrant Which Was Served In This Case.

Mr. Sepe was the trial attorney on three of defendant's cases. 1 RP  
3. He was familiar with the search warrant at issue in this case and had

argued the validity of the search warrant in a previous case. 1 RP 4. When this trial commenced, he conceded that validity of the search warrant had been ruled on by Judge Steiner and that he was bound by that ruling. 1 RP 4.

Defense disputes that Judge Orlando was bound by Judge Steiner's ruling on the admissibility of the evidence, and that Mr. Sepe was ineffective when he did not argue in this case that the search warrant was not valid.

Defendant argues that counsel should have again challenged the validity of the warrant. However, such an objection was made and preserved by Mr. Sepe. CP 10-21. Mr. Sepe was acting professionally when he notified Judge Orlando that there had already been a ruling by Judge Steiner on the validity of the search warrant. To do otherwise would have been unethical. Furthermore, had Mr. Sepe failed to notify the court of this prior ruling, the prosecutor would doubtless have done so.

Because Mr. Sepe was aware from the outset that defendant had the trilogy of cases, he properly and fully litigated the search warrant and the evidence obtained from it. 00612-7 RP 35-38. His motion to suppress in this case was identical to the brief filed in the prior case. CP 10-21, 163-177. He had no new law of facts to present which might alter the outcome of a new

hearing. Defense was not ineffective for realizing that he was bound by the ruling in the previous case. His acknowledgment of this fact was reasonable professional conduct, not ineffective.

Moreover, *Strickland* directs that trial counsel's performance be judged in light of all of the circumstances in a particular case. During the trial, counsel made other motions to suppress evidence and numerous objections. Counsel preserved his objection to the search warrant, even though he believed that the issue was *res judicata*. CP 10-21. He brought a pretrial motion under ER 404(b) to exclude evidence which did not relate to the charged counts. 1 RP 4. He objected to testimony from Mr. Rogers which he described as hearsay. 2 RP 192-192. He also objected to trial exhibits 1, 4, 6, 12, 14, 15, 19, 20, 21, 22, 23, 24, 27, 28, 41, 42, 59 70, 71, 72, and 79 as hearsay and unauthenticated. 2 RP 191-207. 208-210. Defense counsel cross examined the State's witnesses. Finally, defense counsel argued post-trial motions to arrest the judgment and to exclude Oregon convictions from this client's offender score. 3 RP 313 and 327.

Based on all of these actions, Mr. Sepe rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Defendant fails to meet the first prong of *Strickland*. Because defendant must prove both prongs of *Strickland* for his claim of ineffective assistance to succeed, this failure means that his allegation fails. His allegation of ineffective assistance of counsel is without merit.

b. Defendant Has Failed To Show That He Was Prejudiced By Counsel's Decision Not To Contest The Validity Of The Search Warrant As It Was *Res Judicata*.

To prevail in a claim of ineffective assistance of counsel, defendant must prove not only that his attorney was deficient, but also he must show that counsel's errors were so serious as to deprive him of a fair trial. Defendant argues that Mr. Sepe was ineffective for relitigating the validity of the search warrant in this case before Judge Orlando. In order to show prejudice, defendant must show that had Mr. Sepe again argued that the search warrant was invalid, the outcome would have differed. As stated in section one of this brief, the search warrant contained sufficient facts and circumstances to establish a reasonable inference of criminal activity to support the warrant. Defendant has not shown that the argument against the search warrant would have been persuasive in a second court where it had not succeeded in the first court. Judge Orlando, faced with the same argument, and bound by the same obligation to accord deference to the issuing magistrate, would be unlikely to reach a different conclusion about the validity of the warrant.

Defendant has not shown evidence that Mr. Sepe's representation was deficient. He has not established a reasonable probability that but for counsel's errors, the result of this trial would have been different. He has not shown that his counsel was ineffective.

5. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT POSSESSED PERSONAL AND FINANCIAL INFORMATION WHICH BELONGED TO OTHER PERSONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is that, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654, 659 (1993); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001, *review denied*, 124 Wn.2d 1013 (1994).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.

*State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1001, 833 P.2d 386 (1992).

In this case, the jury was instructed as to the elements of identity theft as follows:

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

- (1) That on or about the 7<sup>th</sup> day of March, 2007, the defendant knowingly obtained, possessed, or transferred a means of identification of [name of victim relevant to count];
- (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 \$1,500 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) That any of these acts occurred in the State of Washington.

CP 84-113. Defendant took one exception to the court's "to convict" instructions on a basis not pursued in this appeal.<sup>8</sup> 3 RP 248, instructions number 11, 13, 14, 15, 17, and 22. Although charged with 14 counts, the jury reached agreement on only six: counts 1, 3, 4, 5, 7, and 13. CP 116-128.

Defendant contends there was insufficient evidence for the jury to find actual or constructive possession of the documents which contained the information. Defendant's claim lacks merit.

The jury received the following instruction defining "possession:"

Possession means having an item in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual; physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is domain or control over the item. Dominion and control need not be exclusive to support a finding of constructive possession.

Proximity alone without proof of dominion and control over the item is insufficient to establish constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors you may consider, among others, are whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

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<sup>8</sup> RCW 9.35.020(3) states: "a person is guilty of identity theft in the second degree when he or she violates subsection (1)...." Defendant took exception to the omission of the word "when" in each of the "to convict" instructions.

CP 84-113, instruction number 10.

Although the evidence supporting each count will be discussed below, the following information regarding all of the documents is relevant to the defendant's possession of them. Detective Sale testified that he served the warrant on defendant's car and on his bedroom. 2 RP 120, 3 RP 227-230. As the exhibits were introduced in this case, he testified that each was found pursuant to the search warrant. 2 RP 122-149, 158-173, 176. Mr. Brown testified that he lived at the same address as defendant when the search warrant was served. 3 RP 227-230. He testified that the officers who served the warrant took bags and a briefcase from defendant's room and car, and from nowhere else. 3 RP 229-230. Mr. Brown testified the police did not take any material that belonged to him when they searched the house. 2 RP 230. He also testified that he did not possess any of the information contained in the trial exhibits. 3 RP 235.

Based on the testimony of Detective Sale and Mr. Brown, the jury could find that the defendant had actual physical possession as well as dominion and control over the documents which contained the personal and financial information of other persons.

For each named victim, the State presented sufficient evidence to prove beyond a reasonable doubt that the defendant possessed his or her personal and financial information.

1. Count 1: Moses Thomas.

Moses Perry Thomas is the victim named in count 1. CP 77-82.

During the search of defendant's residence and car, Detective Sale located a Visa credit card, a photo ID card, a Capitol 1 Platinum Visa card, a First National card, and an Oregon birth certificate in the name of Mr. Thomas. 2 RP 146-147, exhibits 44, 45, 46, 47 and 48. The photo ID was purported to be from the Tacoma News Tribune circulation department and was in Mr. Thomas's name, but it showed defendant's photo. 2 RP 146, exhibit 45.

Defendant also possessed a blank check with Mr. Thomas's name and an address of 815 East 64<sup>th</sup> Street. 2 RP 161, exhibit 57. In his search of defendant's house and car, Detective Sale located a United States Postal Service change of address form for "Moses Thomas" changing his address from 815 East 64<sup>th</sup> Street to the defendant's address at 4703 101<sup>st</sup> Street South West in Lakewood. 2 RP 158, exhibit 59.

Detective Sale located a Washington Mutual offer of a VISA credit card sent to Mr. Thomas at defendant's address. 2 RP 160, exhibit 55. Also found in the search were sheets of paper containing notes of personal and financial information for many people. Exhibits 8, 19, 20, 23, 27, 54, 58, and 72. Mr. Thomas's name, date of birth and social security number was on two

of these lists. 2 RP 161-162, 205-206; exhibits 54 and 72. These notations are consistent with the information the defendant might need in order to fill out a credit card application or to confirm identity.

The detective found a response to an application for a Premier Bank MasterCard addressed to Mr. Thomas at defendant's address, as well as a billing statement from Capitol One showing a balance of \$1,038 addressed to Mr. Thomas at 815 East 64<sup>th</sup> Street. 2 RP 163, exhibits 60 and 61. Also admitted into evidence was a bank statement from Chase Credit Cards addressed to "Mr. Thomas" at defendant's address. 2 RP 162-163, exhibit 62. Detective Sale also testified that during the search he found exhibits 50, and 51, which are a Chase credit card and Bank of America letter addressed to Mr. Thomas at 815 East 64<sup>th</sup> Street. 2 RP 159. The Bank of America letter notified Mr. Thomas that he had been issued a Visa credit card. *Id.* Detective Sale also found a Bank of America application for a MBNA American Express card in Mr. Thomas's name but showing defendant's address. 2 RP 159.

Mr. Rogers testified that the SSA had issued Moses Thomas a social security card and that this number could be found in the documents seized from defendant. He identified Mr. Brown's social security number on exhibits which contained several names, dates of birth and social security numbers, exhibit 72. 2 RP 205. From this evidence the jury could reasonably conclude that the defendant had created a false identification card with his picture but Mr. Thomas's name which could be used to facilitate the fraudulent use of credit cards and checking accounts legitimately established in Mr. Thomas's

name. The jury could also infer that defendant intended to use Mr. Thomas's personal and financial information to fraudulently obtain credit cards that could be sent to defendant's address. Based on this evidence, the jury could draw the conclusion that Mr. Thomas was a real person, and that defendant had possessed his personal and financial information with the intent to commit theft.

2. Count 3: Shannon Brown.

Shannon Brown is the victim named in count 3. CP 77-82. Defendant possessed a social security card belonging to Shannon Brown, exhibit 3. 2 RP 126. Mr. Rogers testified that Ms. Brown's social security card was authentic as it matched the number in the SSA database. 2 RP 194-195, 197, 214, 218. His testimony is also evidence from which the jury could infer that Shannon Brown was a real person. As the jury heard considerable information that defendant had used other people's personal and financial information, such as Niko McCoy's, to fraudulently obtain credit cards, the jury could infer that defendant also intended to use Ms. Brown's information for this purpose in the future.

3. Count 4: Sabrina Montgomery.

Sabrina Montgomery is the victim named in count 4. CP 77-82. Defendant was in possession of a social security card in her name and a checkbook with her name showing a Tacoma address. 2 RP 129; exhibits 6 and 7. Mr. Brown identified Sabrina Montgomery as defendant's cousin, who now lives in Georgia, with her son Antonio. 3 RP 233.

Mr. Rogers testified that he had researched Ms. Montgomery's social security number and that the number on her card matched her number in the SSA database, exhibit 6. 2 RP 198. From this evidence, the jury could conclude that Ms. Montgomery is a real person. This coupled with the evidence regarding defendant's use of other victim's personal and financial information is sufficient evidence for a jury to infer he possessed her information with intent to commit a crime.

4. Count 5: Antonio Montgomery.

Antonio Montgomery was the named victim in count 5. In the defendant's house or car, Detective Sale located a letter from Capitol One sent to "Antonio Montgomery" at defendant's address. Exhibit 71. 2 RP 166. He also located an original and a photocopy of a social security card belonging to Antonio Montgomery (exhibits 73 and 80), a MBNA letter regarding a cancelled Platinum credit card issued to Antonio Montgomery at defendant's address (exhibit 75), a Community Health Plan document regarding Antonio Montgomery (exhibit 77), a set of credit card checks from MBNA America addressed to Antonio Montgomery at defendant's address (exhibit 78), and an American Visa credit card for Antonio Montgomery (exhibit 79). 2 RP 167-171.

Mr. Rogers testified that he researched the social security number issued to Antonio Montgomery by the SSA, and it matched those found on his social security cards which defendant possessed. 2 RP 196-199, 206, exhibits 6, 73, and 80. He examined the social security card issued to

Antonio Montgomery and found in defendant's possession, and testified that it was authentic. 2 RP 196-197. Exhibit 80. Based on this evidence, a reasonable jury could find that Antonio Montgomery was a real person and that defendant possessed his personal information and defendant used it to fraudulently apply for credit cards in Mr. Montgomery's name.

5. Count 7: Demetrius Sanders.

Demetrius Sanders is the victim named in count 7. CP 77-82. During the search, Detective Sale located two Bank of America documents sent to "Demetrius Sanders" at the defendant's address, exhibit 13 and 15. 2 RP 132-133. The search also revealed a sheet of paper which contained names, dates of birth and social security numbers for Mr. Sanders, as well as Moses Thomas and two others, exhibit 72. 2 RP 132-133. Mr. Brown testified that no one by the name of "Demetrius Sander" lived with him and the defendant. 3 RP 238.

Mr. Rogers researched the SSA database and determined that Mr. Sander's date of birth shown on the document in defendant's possession were within one digit of the social security number for Demetrius Sanders in the SSA database. 2 RP 207, exhibit 72. This evidence, in conjunction with the documents showing the manipulation of other victims' personal information, would lead a reasonable jury to conclude that defendant possessed Mr. Sander's information with intent to commit a crime.

6. Count 13: Claudia Longpre

Claudia Longpre is the victim named in count 13. CP 77-82. As she testified in court, the jury could reasonably conclude that she is a real person. Detective Sale testified that during the search of defendant's house and car, he located a document from Legacy Health System addressed to Ms. Longpre. 2 RP 178, exhibit 22. The reverse side of the sheet contained other people's names, addresses, and credit card numbers. 2 RP 178, exhibit 22. Ms. Longpre testified that exhibit number 22 had her old address and bank account number. 2 RP 155-157. She testified that she did not know defendant and that he did not have her permission to possess her personal or financial information. 2 RP 157.

The State adduced sufficient information to establish that defendant had personal or financial information belonging to each victim. Viewing this evidence in its entirety, the State has shown that defendant manipulated the personal and financial information of some of the victims in order to divert their mail to him, to get credit in their names, and in one instance to get an ID card with another's name but with his photo. Based on the evidence, a reasonable jury could infer that defendant possessed the information of these victims with intent to commit further crimes. When considered as a whole and in the light most favorable to the State, there is sufficient evidence to find the defendant guilty of each of the six counts of identity theft on which he was convicted.

6. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR ARREST OF JUDGMENT SINCE HIS MOTION WAS PREDICATED ON A FEDERAL CASE THAT WAS NOT APPLICABLE TO THE STATE STATUTE UNDER WHICH DEFENDANT WAS CONVICTED.

Criminal Rule 7.4(b) (CrR) sets the time within which a defendant must move for arrest of judgment.

Time for Motion; Contents of Motion. A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as the judgment is entered.

CrR 7.4(b).

The jury verdicts in this case were returned on April 23, 2009. CP 116-128. Defendant filed his motion for arrest of judgment on May 6, 2009. CP 129-147. It was not timely. Nevertheless, the court heard defendant's motion on January 29, 2010. 3 RP 313-325. Mr. Sepe argued that a new federal case, *Flores-Figueroa v. U.S.*, 129 S. Ct. 1886, 173 L.Ed.2d 853 (2009), added a new "knowledge" element to identity theft cases. 3 RP 315. He argued that, because the state and federal statutes contain similar language, the federal ruling was binding on the state as well. 3 RP 314-315. Mr. Sepe argued that the defendant's convictions were invalid since the state failed to prove that the defendant knew that the

victims whose information he possessed were real persons. 3 RP 314-324, CP 212-213.

The trial court did not agree that the federal ruling was binding on state cases, and discussed the fact that the federal statute which provided an aggravating factor. 3 RP 324. The court did not grant defendant's motion to arrest the judgment. 3 RP 324-325. The court sentenced defendant on that same date. 3 RP 327-333.

The crime of identity theft which was leveled against defendant is codified in RCW 9.35.020(1), which states:

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.

This statute does not include an element that defendant know the financial or personal information he possessed belonged to a real person.

Defense argues that the State failed to prove the charges of identity theft because it provided no evidence that defendant knew that the social security numbers he possessed were assigned to real people. To support the claim that the State must prove defendant possessed this knowledge, defense cites *Flores-Figueroa v. U.S.*, 129 S. Ct. 1886 (2009).

Defendant's brief asking the trial court to arrest judgment stated that the U. S. Supreme Court had decided *Flores-Figueroa* and so the

State was required to prove knowledge that a victim was real as an element under the State statute. CP 129-147. Defendant offered this case as if it is controlling authority, but he engaged in no analysis of the legislative intent to the wording of the statutes. Defendant's reliance in the *Flores-Figueroa* case is misplaced since an analysis of the federal statute is not controlling over interpretation of the State statute under which defendant was convicted.

*Flores-Figueroa* is a federal case which discusses 18 U.S.C.A. section 1028A(a)(1):

Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, *in addition to the punishment provided for such felony*, be sentenced to a term of imprisonment of two years.

(Emphasis added.) This statute states that “in addition to the punishment provided for such felony,” there shall be a two year sentence. This is clearly a sentencing enhancement of two years, to be served after the original felony sentence. The United States Supreme Court held that for *Flores-Figueroa* to receive an additional two year sentence under the federal aggravated identity theft statute, the government must prove that the defendant knew that the identification he used actually belonged to another individual. *Id* at 1888.

Defendant's appellate brief on "arrest of judgment" concedes that Washington courts have "not yet decided whether the State must also prove that the defendant knew the identification documents belonged to a real person." Appellant's brief page 31. Nor has defendant provided any analysis to persuade this Court that the State should be bound by this Federal case.

Based on the lack of State interpretation of the *Flores-Figueroa* case, and the differences in the State and Federal statutes, defendant's argument that the elements of the State's identity theft statute should include an additional element is without merit.

7. AS DEFENDANT HAS NOT SHOWN ANY ERROR, MUCH LESS AN ACCUMULATION OF PREJUDICIAL ERROR, HE IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United*

*States*, 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (*internal quotation omitted*).

"[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232 (1973) (*internal quotation omitted*). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125

Wn.2d 24, 93 94, 882 P.2d 747 (1994) *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.*

Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *rev. denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors

amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976)

(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *State v. Stevens*, 58 Wn. App. at 498.

As addressed earlier in the brief, defendant has failed to show the existence of any error, much less an accumulation of prejudicial error. As such, he has failed to show that he is entitled to relief under the doctrine of cumulative error.

D. CONCLUSION.

For the foregoing reasons, the State requests that this court affirm the judgment entered below.

DATED: October 6, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KAREN PLATT  
Deputy Prosecuting Attorney  
WSB # 17290

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COURT OF APPEALS  
DIVISION II

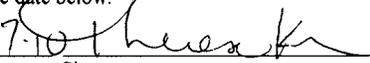
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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.7.10   
Date Signature

# **APPENDIX “A”**

*Opinion*

Westlaw.

Page 1

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
(Cite as: 2010 WL 3064972 (Wash.App. Div. 2))

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA  
2.06.040

Court of Appeals of Washington,  
Division 2.  
STATE of Washington, Respondent,  
v.  
**Derrick Lang HUNTER**, Appellant.  
No. 38828-6-II.

Aug. 6, 2010.

Appeal from Pierce County Superior Court; Honorable Gary Steiner, Bryan Chushcoff, Frank Cuthbertson, JJ.  
Valerie Marushige, Attorney at Law, Kent, WA, for Appellant.

Thomas Charles Roberts, Attorney at Law, Tacoma, WA, for Respondent.

#### UNPUBLISHED OPINION

HUNT, J.

\*1 **Derrick Lang Hunter** appeals his exceptional sentence and bench trial convictions for one count of failure to register as a sex offender and four counts of communication with a minor for immoral purposes. He argues that the trial court erred in imposing the exceptional sentence because it failed to classify his prior Oregon felony convictions properly by comparing their elements to Washington felony offenses. In his Statement of Additional Grounds (SAG),<sup>FN1</sup> Hunter asserts that (1) the evidence is insufficient to prove that his communications with three of the four victims (counts III, IV, VI) were for purposes of a sexual nature; (2) the evidence is insufficient to prove that he communicated with a minor for immoral purposes (count V)

because the fourth victim did not identify him; (3) he received inadequate notice of his obligation to register as a sex offender; (4) the trial court erred by allowing the State to amend the charging information one day before trial; (5) the search warrant affidavit was deficient and failed to establish probable cause; and (6) defense counsel rendered ineffective assistance by failing to make a hearsay objection. We affirm.

FN1. RAP 10.10.

#### FACTS <sup>FN2</sup>

FN2. The trial court entered two sets of findings of fact and conclusions of law, one for Hunter's bench trial verdict and one for Hunter's exceptional sentence. We derive these facts from the trial court's unchallenged findings of fact following Hunter's bench trial.

Hunter challenges two of the trial court's findings of fact concerning his exceptional sentence, and one of the trial court's conclusions of law regarding his exceptional sentence. He does not challenge the other findings, which we accept as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820 (1969)).

#### I. Crimes

In both 1990 and 1997, the State of Oregon convicted Derek Lang Hunter of first degree sex abuse. In both 1992 and 2005,<sup>FN3</sup> the State of Oregon notified Hunter about his obligation to register as a sex offender and that if he moved from Oregon, he should contact the appropriate state agency about that state's registration requirements. By 2008, Hunter relocated from Oregon to Washington, but

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
(Cite as: 2010 WL 3064972 (Wash.App. Div. 2))

he failed to register with the State of Washington as required.

FN3. Although not part of the trial court's findings of fact, Hunter concedes in his SAG that he received such notice in 2005.

In May 2006, DML,<sup>FN4</sup> a 15-year-old female, was at the Tacoma Mall with a friend. Thirty-seven-year-old Hunter approached her and asked if she had done any modeling. When DML responded, "No," Report of Proceedings (RP) at 276, Hunter told her that models made thousands of dollars and could earn \$500 as starting pay. He asked her to twirl around for him; asked what size pants, shirt, bra, and underwear she wore; and asked whether she was a virgin. Hunter told her that he had a studio at his house where he photographs models, and he offered to take her there. He asked for her phone number, and she gave him her mother's cell phone number. DML wanted to speak to her mother before accepting any modeling opportunity. But Hunter told her not to tell anyone about the opportunity and that, because of the money involved, it was a secret job.

FN4. Under RAP 3.4, we use the juveniles' initials throughout this opinion to protect their right to confidentiality.

In late September, early October, SP, a 16-year-old female, was meeting with friends outside a Lake-wood K-Mart store when Hunter approached her. Using a false name, Hunter mentioned that he was compiling and advertising a catalogue and that he wanted SP to pose for the catalogue at his studio. She refused to take the business card he offered. Hunter then asked SP sexually suggestive questions<sup>FN5</sup> and asked her to twirl and then to bend over. She refused and walked away.

FN5. These questions included the following: "[H]ave you ever kissed a girl?" "What is your bra size?" "Would you pose in undergarments?" "Have you posed in a catalogue before?" CP at 148, Finding of

#### Fact IV.

\*2 After school one day in November, Hunter approached MO, a 15-year-old female, inside the library near her Clover Park High School. Using a false name, he claimed to be involved in the modeling industry, showed her photographs of woman modeling lingerie, asked whether she was a virgin, and told her that "to lose [her] virginity would make [her] hips right." RP at 378. When MO explained that she did not want to get pregnant, Hunter then used his fingers to demonstrate that if the man inserted his penis just slightly then she would not get pregnant. Hunter and MO agreed to meet the following day to discuss further the modeling business. Hunter cancelled this meeting.

After school one day in January 2007, Hunter approached AS, a 15-year-old female, inside the same library where he had approached MO. He asked if she had ever modeled or wanted to model, offered to show her photographs from a modeling website, and said that he had modeling photographs in his car if she wanted to see them. AS refused. When Hunter asked for her phone number, she gave him a false one. Hunter told her that she could make \$500 for a modeling interview and as much as \$5,000 for a photo shoot. AS again declined the offer. Hunter then told her she had "nice hips and nice thighs," RP at 316, and asked if she would stand up so he could look at her figure. AS declined to stand up.

After at least one of Hunter's victims approached officials, Clover Park High School teachers warned their classes about "a man going around asking girls to do modeling for him." RP at 286-87. Shortly after, police asked the victims for statements. Looking at a police photo montage, DML, MO, and AS each identified Hunter as the person who had approached them. SP chose no one from the montage.

#### II. Procedure

The State charged Hunter with one count of failure

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
(Cite as: 2010 WL 3064972 (Wash.App. Div. 2))

to register as a sex offender (RCW 9A.44.130), four counts of communication with a minor for immoral purposes (RCW 9.68A.090), and other charges not relevant to this appeal.<sup>FN6</sup>

FN6. The State filed its original information on January 31, 2007. On February 27, 2007, the State obtained a warrant to search Hunter's residence. The State filed its "Amended Information" on September 4, 2007. CP at 3.

DML, SP, MO and AS each testified at Hunter's July 2008 bench trial. All except SP, who was "not sure," positively identified him in court. RP at 425. Hunter did not object to a police detective's testimony about results from an internet-based data search that ultimately led to Hunter. Hunter did not testify. The trial court found Hunter guilty of failure to register as a sex offender and of all four counts of communication with a minor for immoral purposes.

Sentencing memoranda from the State and Hunter discussed the comparability of Hunter's five prior Oregon felony convictions with Washington felonies, which prior convictions Hunter did not contest. The State argued that the elements of Hunter's Oregon felonies corresponded to the elements of comparable Washington felonies. Hunter argued that the felonies were not comparable. The trial court agreed with the State's comparability analysis and used Hunter's Oregon felonies to calculate his offender score.

\*3 The State also argued that the trial court should impose an exceptional sentence under RCW 9.94A.535(2)(c) because Hunter's offender score was so high that some of his current offenses would go unpunished.<sup>FN7</sup> The State asked for an exceptional sentence of 252 months.<sup>FN8</sup> Hunter asked for a standard range sentence of 60 months, with the sentences for all counts to run concurrently. The trial court imposed an exceptional sentence totaling 120 months of confinement.<sup>FN9</sup> Hunter appeals his convictions and his exceptional sentence.

FN7. The State argued that Hunter had 13 offender points from prior offenses and 12 points from current offenses, yielding an offender score of 25. Offender points above 9 do not result in a higher standard sentencing range. See RCW 9.94A.510.

FN8. According to the State, each of Hunter's four counts of communication with a minor for immoral purposes carried a standard range of 60 months confinement. The State asked for 60 months on each conviction (the standard range), plus 12 months for Hunter's failure to register, each running consecutively to the others, resulting in a total of 252 months.

FN9. The trial court imposed the following sentences for the following counts: Count II, 12 months; Count III, 60 months; Count IV, 60 months; Count V, 60 months; and Count VI, 60 months. The trial court ran the sentences for II, III, IV, and V; it ran the sentence on VI consecutively.

## ANALYSIS

### I. Classification of Out-of-State Offenses

Hunter argues generally that the trial court failed to classify his out-of-state offenses properly under RCW 9.94A.525(3), for purposes of calculating his offender score for sentencing. Br. of Appellant at 9. Hunter generally alludes to the superior court's failure to "compar[e] ... elements of potentially comparable Washington crimes," Br. of Appellant at 9, but he fails to specify how the trial court erred. This argument fails.

When a defendant has prior convictions for out-of-state criminal offenses, the trial court must classify them by comparing them to offenses under Washington law. RCW 9.94A.525(3); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998).

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
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To conduct such comparability analysis, the trial court compares the elements of the out-of-state offense with the elements of the Washington criminal statutes in effect when the defendant committed the out-of-state offense. *Morley*, 134 Wn.2d at 605-606. See also *In re the Pers. Restraint of Crawford*, 150 Wn.App. 787, 209 P.3d 507 (2009).

Both Hunter's and the State's sentencing memoranda compared in detail Hunter's Oregon convictions under Oregon Revised Statutes (ORS) 163.425 and ORS 163.305(6) with Washington felonies under former RCW 9A.44.100(1) (1986) and former RCW 9A.44.100(2) (1986), element-by-element. At Hunter's sentencing hearing, both parties argued their respective positions at length, including the statutory comparisons. The crux of Hunter's argument at sentencing was that the Oregon statute did not have a *mens rea* that was comparable to Washington's former indecent liberties statute, former RCW 9A.44.100 (1986), or the then current child molestation statutes, RCW 9A.44.083 and RCW 9A.44.086. The State pointed out that the Oregon statutes and case law required the element of intent and, therefore, the offenses were comparable.

It is clear from the record that the trial court read the parties' detailed sentencing memoranda and was familiar with the issues presented. After hearing argument, the trial court indicated that it agreed with the State's memorandum and argument outlining the basis for an exceptional sentence and its recitation of the law as it related to the case.<sup>FN10</sup> Thus, contrary to Hunter's assertion, the record shows that the trial court conducted the required comparability analysis.

FN10. Hunter argues that the trial court erred in its comparability analysis. But he fails to specify how, and he fails to provide meaningful "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record," as RAP 10.3(a)(6) requires. Thus, we do not fur-

ther consider this argument. See also *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.") (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992), review denied, 135 Wn.2d 1015, 966 P.2d 1278 (1998)).

## II. SAG

### A. Sufficiency of Evidence

\*4 In his SAG, Hunter challenges the evidence as insufficient to support his convictions for his communications-with-a-minor convictions. More specifically, he asserts that the State failed to produce sufficient evidence to prove that he communicated with his minor victims for immoral purposes of a sexual nature in Counts III, IV and VI. For Count V, he argues that the evidence is insufficient to show that he was the perpetrator. Hunter's challenges to the evidence fail.

A person commits the crime of communication with a minor for immoral purposes when he or she communicated with a minor "for immoral purposes of a sexual nature." *State v. McNallie*, 120 Wn.2d 925, 930, 846 P.2d 1358 (1993); RCW 9.68A.090(1). The test for determining the sufficiency of the evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). We draw all reasonable inferences from the evidence in favor of the State and interpret it most strongly against the defendant. *Gentry*, 125 Wn.2d at 597. There is sufficient evidence to support the element that Hunter communicated with his minor victims "for immoral purposes of a sexual nature." *McNallie*, 120 Wn.2d at 930.

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
(Cite as: 2010 WL 3064972 (Wash.App. Div. 2))

Evidence adduced at trial showed that while at the mall, Hunter asked DML if she had ever modeled, whether she had ever had sex, and what size bra and underwear she wore. He then asked her to “twirl in a circle,” RP at 277. Taken in the light most favorable to the State, this evidence is sufficient to show that Hunter communicated with DML for purposes of a sexual nature, Count IV.

Similarly, the evidence showed that Hunter approached MO at the library, showed her photographs of women modeling lingerie, then asked her whether she was a virgin. He then told her that “to lose [her] virginity would make [her] hips right.” RP at 378. When MO explained that she did not want to get pregnant, Hunter used his fingers to demonstrate that if the man inserted his penis just slightly, then she would not get pregnant. The evidence also showed that Hunter approached AS at the library, asked her if she was interested in modeling, told her she had “nice hips and nice thighs,” RP at 316, and asked if she would stand up so he could look at her figure. Taken in the light most favorable to the State, the evidence is sufficient to show that Hunter communicated with both MO and AS for purposes of a sexual nature, Counts III and VI, respectively.

And although SP failed to identify Hunter, either by photo montage or in court, as the man who had approached her, SAG at 3, the circumstantial evidence, taken in the light most favorable to the State, is sufficient to show that it was Hunter who approached SP. Specifically, SP testified that (1) a male of “African-American mix,” RP at 412, approached her, inviting her to model for a catalog he was putting together; (2) he attempted to offer her a business card, which she refused, then asked her bra size and whether she had ever had sex, kissed a girl, or posed in a catalog; (3) he then asked her if she could bend over so he could look at her figure; and he asked for her phone number. All of this evidence—the targeted female teen, the modeling agent pretense, the promise of money, the offer to photograph, the questions about sexual history, the

request to bend over, and the request for a phone number—is consistent with the ruse Hunter used with the other victims. Under ER 404, “Evidence of other crimes, wrongs, or acts ... may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity.”

\*5 Moreover, circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). And it is not necessary that circumstantial evidence exclude “every reasonable hypothesis consistent with the accused’s innocence [but only] that the trier of fact is convinced beyond a reasonable doubt that the defendant is guilty.” *State v. Isom*, 18 Wn.App. 62, 66, 567 P.2d 246 (1977) (citing *Gosby*, 85 Wn.2d 758). Taken in the light most favorable to the State, this evidence is sufficient to show that it was Hunter who approached SP. See *State v. Valencia*, 148 Wn.App. 302, 315-16, 198 P.3d 1065 (2009) (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)), review granted, 166 Wn.2d 1010 (2009).

#### B. Failure to Register as a Sex Offender

Hunter next challenges the “knowing” element of his conviction for failure to register as a sex offender. He argues that the State of Oregon’s 2005 notice to contact “the appropriate agency” in Washington upon relocating there, SAG at 6 (quoting Aug. 15, 2005 notice), was [in]adequate<sup>FN11</sup> because (1) it failed to direct him “who the appropriate agency is and ... where and how to contact the appropriate agency,” SAG at 7; and (2) he would have to “go on a treasure hunt to find the appropriate agency to contact.” SAG at 7. This challenge also fails.

FN11. Hunter actually says such notice was “adequate,” SAG at 6, but we presume this was in error and he intended to say *inadequate*.

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
(Cite as: 2010 WL 3064972 (Wash.App. Div. 2))

RCW 9A.44.130(11)(a) makes it a crime for a convicted sex offender to “*knowingly* fail[ ] to [register].” (Emphasis added). “Lack of notice of the duty to register constitutes a defense to the crime of knowingly failing to register as a sex offender.” *State v. Clark*, 75 Wn.App. 827, 832, 880 P.2d 562 (1994). First, the record shows that Hunter had notice of his duty to register—he acknowledges the State of Oregon’s 2005 notice. And the trial court found that he also had received similar notification in 1992.<sup>FN12</sup> Second, Hunter had multiple avenues for obtaining the information he needed to register in his new community. He cannot nullify his duty to register simply by choosing to avoid these avenues. We hold that Hunter has failed to demonstrate that he received inadequate notice of his duty to register; thus, he has not established a defense to this charged crime.

FN12. We treat this unchallenged finding as a verity on appeal. *Hill*, 123 Wn.2d at 644 (citing *Riley*, 76 Wn.2d at 33).

#### C. Amending Information

Hunter also asserts that the trial court prejudiced his case by allowing the State “to amend the information one day before trial,” which “surprised” defense counsel and made his case “more complex.” SAG at 1. It is unclear to which amendment Hunter refers. The record shows that the State filed its last “Amended Information” in September 2007. CP at 3. But Hunter’s bench trial began more than ten months later in July 2008. We find nothing in the record to support Hunter’s assertion that the trial court allowed an amendment the day before trial.

\*6 Assuming that Hunter is referring to this September 2007 amended information, filed over ten months before his trial, he fails to show the prejudice that he alleges. On the contrary, this amended information contains each offense of which he was ultimately convicted. Moreover, nothing in the record suggests that any amendment of the information necessitated a continuance to al-

low for further preparation or that the trial court denied such a request.

#### D. Search Warrant Affidavit

Hunter next asserts that (1) the trial court “improperly relied on information not contained in the [search warrant] affidavit of probable cause to conclude probable cause and a valid nexus existed to support the [search] warrant,” SAG at 4; (2) the affidavit failed to explain “how discovering the photo studio or photo’s [sic] in the residence and vehicle would link [Hunter] to the crime,” SAG at 4; and (3) the trial court “improperly relied on a child pornography profile to find a nexus in the search warrant.” SAG at 4. These challenges also fail.

We do not address the first challenge because Hunter fails to identify the “information” on which the issuing court relied that the affidavit of probable cause lacked. RAP 10.10(c) provides: “[T]he appellate court will not consider a[n] ... appellant’s statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.”

As for Hunter’s second challenge, we review an issuing court’s issuance of a search warrant for abuse of discretion:

Issuance of a warrant is a matter of judicial discretion and is, therefore, reviewed under the abuse of discretion standard.... [Appellate courts] accord great deference to the issuing magistrate’s determination of probable cause and resolve any doubts in favor of the validity of the warrant.

*State v. Olson*, 73 Wn.App. 348, 354, 869 P.2d 110 (1994) (citing *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993); *State v. Remboldt*, 64 Wn.App. 505, 509, 827 P.2d 282 (1992)). Hunter fails to show that the issuing court abused its discretion in issuing the search warrant. On the contrary, the search warrant affidavit explains how discovering a photo studio or photographs in

Not Reported in P.3d, 2010 WL 3064972 (Wash.App. Div. 2)  
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Hunter's residence and vehicle would link Hunter to the charged crimes: Hunter's crimes involved "present[ing] himself as a modeling agent" to numerous victims, CP at 63, and "show[ing] [victims] explicit photos of either naked girls or girls dressed in sexually provocative lingerie." CP at 64. Moreover, the affidavit stated that one victim claimed the photographs Hunter displayed "did not look professional but rather home based photos," CP at 64, and that Hunter had told another victim that his studio "was out of his home." CP at 64. Probable cause supports the search warrant; thus, Hunter's argument that the issuing court abused its discretion in issuing it fails.

With respect to Hunter's third challenge, that the trial court improperly relied on a child pornography profile to find a nexus in the search warrant, the affidavit does not mention child pornography as Hunter alleges. The record thus does not support Hunter's allegation of trial court error in this regard.

#### E. Effective Assistance of Counsel

\*7 Hunter next argues that his defense counsel denied him effective assistance by failing to make hearsay and "best evidence," SAG at 5, objections when a police detective testified for the State about results he obtained from an internet-based data search, which ultimately led to Hunter, without "providing the physical item itself," namely, the computer printouts. SAG at 5. Even assuming, without deciding, that the detective's testimony constituted impermissible hearsay and was not "the best evidence," this argument fails.

To prove ineffective assistance of counsel, Hunter must show that (1) counsel's performance was deficient, and (2) that this deficient performance prejudiced the outcome of his case. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To satisfy the prejudice prong, Hunter must show there is a reasonable probability that, except for defense counsel's error, the result of the proceeding would have differed. *State v. McFarland*, 127 Wn.2d 322,

334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). But "[c]ounsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions"; and we presume that a failure to object constituted a legitimate strategy or tactic. *State v. Johnston*, 143 Wn.App. 1, 19, 21, 177 P.3d 1127 (2007) (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989)). Hunter fails to meet his burden of "demonstrat[ing] an absence of legitimate strategy or tactics in failing to object." *Johnston*, 143 Wn. App at 21. Thus, Hunter fails to satisfy the deficiency prong of the test.

Moreover, although Hunter vaguely asserts that the detective's testimony "violated [the best evidence rule] denying [Hunter] a fair trial," SAG at 5, he fails to explain adequately how defense counsel's failure to object prejudiced the outcome of his case. On the contrary, as we have just explained in the earlier section outlining the sufficient evidence to support each of the communications with a minor convictions, nothing in the record or in Hunter's argument persuades us that the outcome of the case would have differed but for this alleged failure by counsel.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: ARMSTRONG, P.J., and QUINN-BRINTNALL, J.

Wash.App. Div. 2, 2010.

State v. Hunter

Not Reported in P.3d, 2010 WL 3064972  
(Wash.App. Div. 2)

END OF DOCUMENT

# **APPENDIX “B”**

*Search Warrant*

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

FILED  
COUNTY CLERK'S OFFICE  
A.M. MAR 0 2 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 1<sup>st</sup> (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 envelopes, registration certificates, and/or keys.
  - 5) Video tapes, and/or photographs of co-conspirators, assets, and or other involved subjects.

CP170

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 101<sup>st</sup> 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

*Shean M. ...*  
Superior Court Judge

CP171

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 1<sup>st</sup> (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 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.

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

CP 172

*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 101<sup>st</sup> 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 2G4WBST6M1841896.*

**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 101<sup>st</sup> 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.

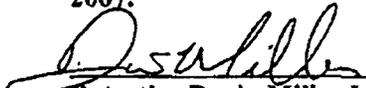
Hunter is a convicted sex offender out of Oregon and is required to register in the State of Washington. Hunter has failed to comply and register himself in Pierce County as a Sex Offender.

**CONCLUSION:**

CP 174

Based on all of the foregoing information your affiant verily believes that Derrick Hunter committed Attempt Kidnapping 1<sup>st</sup> (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 101<sup>st</sup> 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 101<sup>st</sup> 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 27<sup>th</sup> DAY OF FEBRUARY,  
2007.

  
\_\_\_\_\_  
Detective Darin Miller LK63  
Affiant

  
\_\_\_\_\_  
JUDGE, PIERCE COUNTY SUPERIOR COURT

