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NO. 52204-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TYCAMERON LAKE,  
Appellant.

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

The Honorable Scott A. Collier, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	<b>Page</b>
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
Substantive Facts.....	2
3.5/3.6 Hearing.....	7
Procedural Facts.....	9
C. ARGUMENT.....	10
1. THE TRIAL COURT ERRED WHEN IT DENIED MS. LAKE’S MOTION TO DISMISS COUNT SIX AT THE CLOSE OF THE STATE’S CASE-IN-CHIEF BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF MS. LAKE COMMITTING THEFT AGAINST A “MERCANTILE ESTABLISHMENT” .....	10
a. Insufficient Evidence Retail Theft.....	11
2. THE TRIAL COURT ERRED WHEN IT DENIED MS. LAKE’S MOTION TO SUPPRESS AND DISMISS UNDER CRIMINAL RULE 3.6 BECAUSE MS. BEALE WAS ACTING AS AN AGENT OF THE STATE WHEN SHE ENTERED MS. LAKE’S APARTMENT AND OBSERVED MERCHANDISE THAT WAS ALLEGEDLY STOLEN .....	17

**TABLE OF CONTENTS**

	<b>Page</b>
3. THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING MS. LAKE'S EVIDENTIARY HEARING AS IS REQUIRED UNDER CRIMINAL RULE 3.6 .....	23
D. CONCLUSION.....	25

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON CASES</b>	
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002) .....	15
<i>State v. Barbee</i> , 187 Wn.2d 375, 386 P.3d 729 (2017) .....	15
<i>State v. Blizzard</i> , 195 Wn. App. 717, 381 P.3d 1241 (2016).....	22
<i>State v. Chacon Arreola</i> , 176 Wn.2d 284, 290 P.3d 983 (2012) .....	18
<i>State v. Clark</i> , 48 Wn. App. 850, 743 P.2d 822 (1987).....	19
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010) .....	14, 15
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996) .....	16
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998) .....	24
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998) .....	16
<i>State v. Hinton</i> , 179 Wn.2d 862, 319 P.3d 9 (2014) .....	18
<i>State v. Hoggatt</i> , 108 Wn. App. 257, 30 P.3d 488 (2001).....	21
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014) .....	11

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON CASES, continued</b>	
<i>State v. Krajewski</i> , 104 Wn. App. 377, 16 P.3d 69 (2001) .....	18
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015) .....	14
<i>State v. Mallory</i> , 69 Wn.2d 532, 419 P.2d 324 (1966) .....	24
<i>State v. Ortega</i> , 177 Wn.2d 116, 297 P.3d 57 (2013) .....	18
<i>State v. Otis</i> , 151 Wn. App. 572, 213 P.3d 613 (2009) .....	24
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013) .....	11
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) .....	23
<i>State v. Reeder</i> , 184 Wn.2d 805, 365 P.3d 1243 (2015) .....	18
<i>State v. Ridgway</i> , 57 Wn. App. 915, 790 P.2d 1263 (1990) .....	22
<i>State v. Spring</i> , 128 Wn. App. 398, 115 P.3d 1052 (2005) .....	22
<b>FEDERAL CASES</b>	
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971) .....	19
<i>Jackson v. Virginia</i> , 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	11

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL CASES, continued</b>	
<i>United States v. Reed</i> , 15 F.3d 928 (9 <sup>th</sup> Cir. 1994).....	19
<b>RULES, STATUTES, AND OTHERS</b>	
CrR 3.5 .....	7
CrR 3.6 .....	1, 7, 17, 23, 25
<a href="https://www.merriam-webster.com/dictionary/establishment">https://www.merriam-webster.com/dictionary/establishment</a> . .....	16
RCW 10.31.100. ....	18
RCW 4.24.220 .....	12, 13
RCW 9.35.020 .....	9
RCW 90.35.020 .....	9
RCW 9A.56.350.....	9, 11, 15, 25
RCW 9A.56.360.....	12, 13, 14, 15
RCW 9A.65.350.....	15
U.S. Const. Amend. IV.....	17, 18
Wash. Const. art. I, § 7 .....	17, 18

A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove beyond a reasonable doubt that Ms. Lake committed organized retail theft from a “mercantile establishment” because all of the allegations against Ms. Lake involve internet orders and internet retailers do not constitute “mercantile establishments” under Washington’s statutory scheme.

2. The trial court erred when it denied Ms. Lake’s motion to suppress and dismiss due to an illegal search because Ms. Deale was acting as an agent of the state when she entered Ms. Lake’s apartment and reported to law enforcement, the presence of incriminating evidence.

3. The trial court erred by failing to enter written findings of fact and conclusions of law required under CrR 3.6(b) following Ms. Lake’s suppression hearing, and the oral record is insufficient for appellate review.

Issues Presented on Appeal

1. Did the state present sufficient evidence to prove beyond a reasonable doubt that Ms. Lake committed

organized retail theft when the state only alleged she committed theft by placing orders on the internet, and the legislature's use of the term "mercantile establishment" suggests the term only encompasses "brick and mortar" stores?

2. Did the trial court err by denying Ms. Lake's motion to suppress and dismiss when Ms. Deale performed a warrantless search of Ms. Lake's apartment as an agent of the state and that search produced significant incriminating evidence?

3. Did the trial court err when it failed to enter written findings of fact and conclusions of law following Ms. Lake's evidentiary hearing and the oral record is insufficient to allow appellate review?

## B. STATEMENT OF THE CASE

### Substantive Facts

Before the events at issue in this case, Tycameron lived in apartment 507 of the Van Vista assisted living facility in Vancouver, Washington. RP 158, 162-63, 182, 443. Ms. Lake suffers from multiple medical conditions as the result of being hit by a car as a

pedestrian. RP 443.

In February of 2017, a resident of Van Vista named Susan Odenbach reported that someone else had placed an order using her credit account with a catalog named "Montgomery Ward" on February 15, 2017. RP 160-61, 202. The order was for a LG television, a wireless printer, a Faberware set of knives, and two cotton pillows. These items cost \$851.94. RP 250; Ex. 4. The order had a "giftee" listed as "Ticamera Lakes" and was shipped to Ms. Lake's apartment in Van Vista. RP 249. The order listed the buyer's phone number as 360-606-0547 and contained a greeting reading "Happy Birthday. From auntie." RP 249-50.

Ms. Odenbach later discovered a second order she did not place on her credit account with a catalog named "Monroe and Main." RP 164-65; Ex. 6. The order contained several items of women's clothing that were not the correct size for Ms. Odenbach and totaled \$488.30 in purchases. RP 175-76. This order also had a giftee listed as "Ticameran Lakes" and was shipped to Ms. Lake's apartment in Van Vista. RP 252. The order listed the buyer's phone number as 360-660-8148. RP 251-52.

During the same time period Ms. Odenbach reported the

suspicious orders on her account, another Van Vista resident named Betty Lane noticed that someone else had placed an order using her credit account with a catalog named "ASHRO Lifestyles." RP 175. This order was ultimately canceled. RP 255. The order listed the buyer's phone number as 360-606-0547 and email address as "bettylane1941@yahoo.com." RP 254. It also had a giftee listed as "Tycanaroo Lakes" and the shipping address was Ms. Lake's apartment in Van Vista. RP 255; Ex. 5.

Cynthia Welch worked at Van Vista as the Resident Care Coordinator. RP 192. Part of her duties involved storing larger packages that were delivered to Van Vista in the nurse's office until residents could pick them up. RP 192-93. She testified that she had been working on February 20, 2017 when a television was delivered to the nurse's office that was addressed to "Tycameron Lake." RP 194, 196. Ms. Lake retrieved the television from the office and brought it up to her apartment. RP 195.

Julia Deale is the property manager at Van Vista. RP 180. Ms. Deale testified that once she learned there was an investigation into Ms. Lake, she began to hold her packages in her office. RP 184. She testified that she held three packages, including one from

Monroe and Main, addressed to Ms. Lake and that Ms. Lake had written her a letter requesting the packages be returned. RP 184-86; Ex. 2. She also testified that Ms. Lake had at some point returned a purse to the front desk that belonged to Barbara Freeman, a resident at Van Vista who passed away in October of 2016. RP 187.

The catalogs that were used to place these orders all send customers their catalog issues by mail. RP 261. These catalogs come with shipping labels that include customer identification numbers and an "EZ" number that allow anyone in possession of the shipping label to access that customer's preapproved credit. RP 261-62. Ms. Lane testified that she never tore the shipping label off the catalogs she received in the mail and that she threw them away in the unsecured dumpster behind the building. RP 176. Ms. Odenbach received multiple catalogs in the mail per day and would often give them away to other residents when she was done with them. RP 166-67.

Based on the reports from Ms. Odenbach and Ms. Lane, police interviewed Ms. Lake multiple times. RP 203-04. Ms. Lake initially denied ordering any items or knowing anything about the

orders placed on Ms. Odenbach and Ms. Lane's accounts. RP 203. During the second interview, Ms. Lake informed the officers that she had found a television outside her apartment but did not order it and had returned it to the Van Vista office. RP 205.

Investigators sought and were granted a search warrant to collect evidence from inside Ms. Lake's apartment. RP 208-09. The police executed the warrant on March 9, 2017. RP 265. Inside Ms. Lake's apartment, the police found a LG television, a wireless printer, several cotton pillows, and women's clothing matching the items from the Monroe and Main order. RP 265-66.

The police also found mail addressed to Tycameron Lake, catalogs addressed to Susan Odenbach and Betty Lane, and a checkbook associated with Barbara Freeman. RP 187, 275, 283. The police also discovered records of orders from August and September of 2016 made with Montgomery Ward and another catalog called "Midnight Velvet." Ex. 7-10. These orders were all to be shipped to Ms. Lake's apartment and contained her contact information, but they were canceled due to "credit refusal." RP 242-48.

The police also found handwritten notes purported to be

from Barbara Freeman. RP 282. The notes were admitted into evidence over Ms. Lake's objections. RP 282-86. The notes describe Ms. Lake as Ms. Freeman's niece and discuss purchasing birthday gifts for Ms. Lake and having them shipped to her apartment instead of Ms. Freeman's. RP 286-88.

#### 3.5/3.6 Hearing

Before trial, the trial court held hearings pursuant to CrR 3.5 and 3.6 to determine the admissibility of Ms. Lake's statements to law enforcement and whether there was an unlawful search of Ms. Lake's apartment when Julia Deale, an employee of Van Vista, entered Ms. Lake's apartment at the request of a police officer and reported its contents to him. RP 6-7, 56-57. The trial court found that Ms. Lake's statements to law enforcement before the arrest were admissible because she was not in-custody. RP 41-42. Ms. Lake argued that Ms. Deale was acting as an agent of the state when she entered Ms. Lake's apartment and reported its contents to the police. RP 79-81. The trial court ruled that there was no illegal search of Ms. Lake's apartment because Ms. Deale was the only person who entered the apartment and she was not acting as an agent of the state during the time she was there:

As we all kind of been addressing was Ms. Deale a state actor at this time? And we get to the questions saying was this private citizen instigated, encouraged, counseled, directed, or controlled. Clearly, by the testimony that's here there wasn't any instigation, any encouragement, counsel --maybe not by Ms. Lake's standard, her testimony is potentially directed saying, "Officer Lear said, 'Take the walker up to her apartment.'" That's the best reading in favor of the defense, but the defense carries the burden here because this is presumptively a valid warrant, going through a neutral magistrate process.

The other case law talks about whether the government knew of or acquiesced in the intrusive conduct. As testified by Officer Lear, it was like, the walker can't go, because I can appreciate you can't bring a private walker into the jail. . . . Like I said, he thought someone took it in, he wasn't sure what was going on. He wasn't paying that much attention to it. So, I think it's clear by that testimony he didn't really know of or acquiesced in ultimately the intrusive conduct, which was the entry of Ms. Lake's apartment. The fact that there are just contacts with these citizens with police governmental agency does not create that agency relationship where Ms. Deale became a state actor. Applying the preponderance, the defense has to at least get to a preponderance of the evidence. It doesn't even rise to that level. We have Ms. Lake's testimony, which is, you know, memory admittedly is less than maybe she would like it to be, and hearing --and I have to agree with the State --hearing Ms. Deale, neutral, independent party on this is saying, "I asked." Here's this walker. You know, I can see they're out beside the patrol car. Officer Lear has got her into the patrol car and said, "This cannot go." Ms. Deale is there. She goes, "Do you want me to take it to your apartment?" And she indicates Ms. Lake indicated, yes, she did. And she did that. She wasn't instructed, encouraged, or

anything by any governmental agency to do so, and that's consistent with her testimony, meaning Ms. Deale, and Officer Lear's. . . . So, I am not going to suppress any of the evidence obtained from the warrant at this time, and deny the defense motion to suppress.

RP 81-83. The trial court denied Ms. Lake's motion and admitted evidence seized as a result of the search warrant at trial. RP 83.

#### Procedural Facts

The state charged Ms. Lake with three counts of identity theft in the first degree, two counts of possession of stolen property in the second degree, and one count of organized retail theft in the second degree. CP 61-63. The state charged identity theft in the first degree under RCW 9.35.020(2), which elevates the crime of identity theft in the second degree if the defendant "knowingly targets a senior or vulnerable individual." CP 61; RCW 90.35.020(2). Ms. Lake proceeded to a jury trial. RP 6.

At the close of the state's case-in-chief, Ms. Lake made a motion to the trial court to dismiss the organized retail theft charge in count six on the grounds that the state presented insufficient evidence for a trier of fact to find that Ms. Lake had obtained goods from a "mercantile establishment," an essential element under RCW 9A.56.350(1)(c). RP 316. The trial court denied this motion.

RP 316-17.

At the state's request, the trial court instructed the jury on the lesser included offense of identity theft in the second degree for counts 1-3. CP 87-89. The jury found Ms. Lake guilty as charged on all counts except count three, where they acquitted her of identity theft in the first degree but found her guilty of the lesser included offense identity theft in the second degree. RP 385-87.

At sentencing, the state requested a high-end sentence in the standard range while Ms. Lake requested an exceptional sentence downward based on her medical conditions. RP 442-44. The trial court imposed a mid-range sentence of 45 months. RP 447. Ms. Lake filed a timely notice of appeal. CP 166-67.

### C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MS. LAKE'S MOTION TO DISMISS COUNT SIX AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF MS. LAKE COMMITTING THEFT AGAINST A "MERCANTILE ESTABLISHMENT"

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494,

502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

a. Insufficient Evidence Retail Theft

At the close of the state’s case-in-chief, Ms. Lake moved the court to dismiss count six on grounds that the state had failed to present any evidence that Ms. Lake had stolen from a “mercantile establishment” because the allegations against Ms. Lake involved online retailers and not physical stores. RP 316. The trial court denied this motion but permitted both parties to argue the issue of whether online retailers qualify as “mercantile establishments” during closing arguments. RP 310.

To convict a defendant of organized retail theft in the first degree, the state must prove that the defendant committed “theft of property with a cumulative value of at least seven hundred fifty dollars from one or more mercantile establishments within a period of up to one hundred eighty days.” RCW 9A.56.350(1)(c).

The term “mercantile establishment” is not defined by statute, but the legislature refers to a “mercantile establishment” to mean brick and mortar stores in RCW 9A.56.360, which addresses retail theft with special circumstances. This statute provides in relevant part as follows:

(1) A person commits retail theft with special circumstances if he or she commits theft of property **from a mercantile establishment** with one of the following special circumstances:

(a) To facilitate the theft, the person **leaves the mercantile establishment through a designated emergency exit;**

(b) The person was, at the time of the theft, in possession of an item, article, implement, or device used, under circumstances evincing an intent to use or employ, or **designed to overcome security systems including, but not limited to, lined bags or tag removers; or**

(c) The person committed theft at three or more separate and distinct mercantile establishments within a one hundred eighty-day period.

(2) A person is guilty of retail theft with special

(Emphasis added).

RCW 4.24.220 (shopkeeper’s privilege to detain individuals suspected of theft) also exclusively refers to a “mercantile establishment” as a brick and mortar store. It provides as follows:

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the

ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his or her authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

Both RCW 4.24.220 and RCW 9A.56.360 refer to "mercantile establishment" in accord with the plain and ordinary meaning of the term –which refers exclusively to brick and mortar stores. The plain language of the organized retail theft statute explains that a person can only commit a retail theft by stealing from a "mercantile establishment" by leaving through an emergency exit. RCW 9A.56.360(1)(a). Similarly, a person is also guilty of retail theft with special circumstances if they steal from a "mercantile establishment" while in possession of any device or item designed

to overcome the store's security system. RCW 9A.56.360(1)(b). The third way a person commits retail theft with special circumstances is by stealing from three or more "mercantile establishments" in a 180-day period. RCW 9A.56.360(1)(c).

The legislature's use of the term "mercantile establishment" contemplates only theft from "brick and mortar" stores. The term mercantile establishment is not ambiguous, it means a brick and mortar store.

If, this Court believes the term is ambiguous, under the principles of statutory interpretation, the Court must "determine and give effect to the intent of the legislature." *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). First, the Court looks to the plain language of the statute as "[t]he surest indication of legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Larson*, 184 Wn.2d at 848 (citations omitted).

The Court may determine a statute's plain language by looking to "the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related

provisions, and the statutory scheme as a whole.” *Ervin*, 169 Wn.2d at 820 (citation omitted). Following these principles, the fact that RCW 9A.56.360 refers to “mercantile establishments” exclusively as brick and mortar requires interpreting the same term in RCW 9A.65.350 to have the same meaning. Moreover, if the legislature intended to include internet business in the definition of retail theft, in RCW 9A.56.350, it would have so stated and would not have provided a special circumstances retail theft that plainly could not apply to the internet.

Additionally, the Court must “constructions that yield ‘unlikely, absurd, or strained consequences.’” *State v. Barbee*, 187 Wn.2d 375, 389, 386 P.3d 729 (2017) (citing *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)). It would be absurd to include online service providers in the definition of “mercantile establishments” because to do so would render RCW 9A.56.350 and .360 unlikely, absurd and strained.

The dictionary definition also supports construing “mercantile establishment” as referring exclusively to brick and mortar stores. “Establishment” means “a place of business or residence with its furnishings and staff.” <https://www.merriam->

webster.com/dictionary/establishment. “Establishment” is synonymous with “parlor, place or salon”. Id. These are all physical locations. “Mercantile” means “of, relating to, or having the characteristics of mercantilism”. Id. Together these terms establish that a “mercantile establishment” must be a physical “place”.

When examining the sufficiency of the evidence, the state failed to prove every element of organized retail theft in the first degree because it failed to prove that Ms. Lake stole from a “mercantile establishment. The trial court erred when it denied Ms. Lake’s halftime motion to dismiss count six. The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Ms. Lake’s conviction for organized retail theft and dismiss the charge with prejudice.

2. THE TRIAL COURT ERRED WHEN IT DENIED MS. LAKE'S MOTION TO SUPPRESS AND DISMISS UNDER CRIMINAL RULE 3.6 BECAUSE MS. BEALE WAS ACTING AS AN AGENT OF THE STATE WHEN SHE ENTERED MS. LAKE'S APARTMENT AND OBSERVED MERCHANDISE THAT WAS ALLEGEDLY STOLEN

When Ms. Lake was arrested, she was not allowed to bring her walker to jail. RP 70-71. The state offered that Ms. Lake gave Ms. Deale permission to return Ms. Lake's walker to Ms. Lake's apartment. RP 66. Ms. Lake did not give Ms. Deale permission to enter her apartment to replace the walker. Instead, Ms. Lake explained that the arresting officer instructed Ms. Deale to take the walker to Ms. Lake's apartment. RP 57. While inside the apartment, Ms. Deale observed a LG television and wireless printer and relayed this information to the arresting officer. RP 72. This information was later included in an affidavit to secure a search warrant authorizing the search of Ms. Lake's apartment. RP 72.

Both the Fourth Amendment to the United States Constitution and art. I, § 7 protect Washington citizens from unreasonable searches and seizures. U.S. Const. Amend. IV; Wash. Const. art. I, § 7. Art I, § 7 provides defendants with even

greater protections than the Fourth Amendment. *State v. Reeder*, 184 Wn.2d 805, 813-14, 365 P.3d 1243 (2015).

“Under article I, section 7 a search occurs when the government disturbs ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (citation omitted). This privacy right protects citizens from governmental intrusion into their private affairs without “the authority of law”. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

The “authority of law” required by art. I, § 7 is a valid warrant unless the state shows that the search or seizure falls within one of the “jealously guarded and carefully drawn exceptions to the warrant requirement.” *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013) (police may not arrest, search and seize drugs on a person suspected of committing a misdemeanor outside the officer’s presence); RCW 10.31.100.

The federal and state constitutions normally only limit government action. *State v. Krajewski*, 104 Wn. App. 377, 382, 16 P.3d 69 (2001) (citing *United States v. Reed*, 15 F.3d 928, 930 (9<sup>th</sup>

Cir. 1994)). However, they also limit searches by private citizens who are acting as government instruments or agents. *Krajeski*, 104 Wn. App. at 383 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971)). “The critical factors for determining whether a private party is acting as a government instrument or agent are: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further [their] own ends.” *Krajeski*, 104 Wn. App. at 383 (citing *State v. Clark*, 48 Wn. App. 850, 856, 743 P.2d 822 (1987)).

Ms. Beale’s entry into Ms. Lake’s apartment meets these two criteria because she was instructed by the police to enter Ms. Lake’s apartment and the police acquiesced by using the illegally obtained information Ms. Deale provided. Ms. Beale’s entry into Ms. Lake’s apartment and subsequent reporting of its contents to the police constitutes an unreasonable warrantless search. The information derived from this search was later used to obtain a search warrant that was executed and yielded numerous pieces of evidence admitted against Ms. Lake at trial. CP 37.

The record shows that the police officer arresting Ms. Lake

decided that her walker could not accompany her to the jail. RP 56-57, 70-71. At that point, the officer told Ms. Deale to take the walker and put it back in Ms. Lake's apartment. RP 57. Based on this record, the officer arresting Ms. Lake was aware that Ms. Deale was going to enter Ms. Lake's apartment and acquiesced to it by making the request that she place the walker inside.

The record also establishes that Ms. Deale intended to aid law enforcement by searching Ms. Lake's apartment. Upon entering Ms. Lake's apartment, Ms. Deale noticed a LG television and wireless printer matching descriptions of the items that had been ordered to Ms. Lake's apartment under other people's credit accounts. RP 67. Ms. Deale admitted that she knew these items were being investigated and that she informed officers of their presence after leaving. RP 67.

The record demonstrates that Ms. Deale was acting as an agent of the state at the time she entered Ms. Lake's apartment. She intended to aid law enforcement in their investigation and a police officer was aware of the search and acquiesced to it. Thus, the information gained from Ms. Deale entering Ms. Lake's apartment is the product of a warrantless government search. A

warrantless search of a home can only be valid if the homeowner gives consent or the search is the result of exigent circumstances. *State v. Hoggatt*, 108 Wn. App. 257, 262, 30 P.3d 488 (2001). The record does not contain any evidence that an exception to the warrant requirement applies in this case. Ms. Lake testified that she never consented to the search. RP 57. Furthermore, the record contains no evidence of exigent circumstances and the state never alleged exigent circumstances as a reason for entering Ms. Lake's apartment.

The information derived from Ms. Deale's search was included in the state's affidavit for a search warrant. CP 37. This warrant ultimately yielded numerous pieces of evidence admitted against Ms. Lake. When executing the warrant in Ms. Lake's apartment, the police discovered the items ordered on Ms. Odenbach and Ms. Lane's account, Barbara Freeman's checkbook, numerous catalogs sent to Ms. Odenbach and Ms. Lane, and handwritten notes indicating the intent to use the checkbook unlawfully. RP 282-90.

"Illegally obtained information cannot be used to support probable cause for a warrant." *State v. Blizzard*, 195 Wn. App. 717,

730, 381 P.3d 1241 (2016) (citing *State v. Ridgway*, 57 Wn. App. 915, 919, 790 P.2d 1263 (1990)). A warrant may still be valid if it contains illegally obtained information, but the warrant affidavit must contain “otherwise sufficient facts to establish probable cause independent of the illegally obtained information.” *State v. Spring*, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005).

Without Ms. Deale’s information, the warrant affidavit to search Ms. Lake’s apartment is insufficient to allow intrusion into her residence. The affidavit discusses the orders on Ms. Odenbach and Ms. Lane’s accounts and how they were shipped to Ms. Lake’s apartment. CP 32-35. It also discusses how Ms. Lake had informed officers that there was a television shipped to her apartment, but she did not order it and brought it back to the mail room. CP 36. The only evidence in the affidavit that any of the items were present in Ms. Lake’s apartment came from Ms. Deale’s comments to the officers that she had seen the television and printer in the apartment when she entered with Ms. Lake’s walker. CP 37.

A trial court’s error in admitting evidence prejudices the defendant if there is a reasonable probability the outcome of their trial would have been different had the evidence been excluded.

*State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). The evidence erroneously admitted in this case is substantial. The merchandise alleged to have been stolen was found in Ms. Lake's apartment, as well as the financial information used to order it. RP 282-90. There is a reasonable probability the outcome of Ms. Lake's trial would have been different had this evidence been excluded. The trial court's error was prejudicial to Ms. Lake and this court should reverse her convictions and remand for a new trial.

3. THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING MS. LAKE'S EVIDENTIARY HEARING AS IS REQUIRED UNDER CRIMINAL RULE 3.6

Washington courts are required to hold an evidentiary hearing whenever a defendant challenges a search and seeks the suppression of physical evidence. CrR 3.6(a). At the conclusion of these hearings, courts are required to enter written findings of fact and conclusions of law when determining admissibility. CrR 3.6(b).

The requirement to memorialize findings and conclusions into writing is to facilitate appellate review. *State v. Head*, 136

Wn.2d 619, 622, 964 P.2d 1187 (1998). “A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered.” *Head*, 136 Wn.2d at 622 (citing *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). “An oral opinion ‘has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.’” *Head*, 136 Wn.2d at 622 (quoting *Mallory*, 69 Wn.2d at 533-34). “An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Head*, 136 Wn.2d at 624.

When a trial court fails to enter written findings of fact and conclusions of law, appellate review is precluded unless the oral record is so clear that it is sufficient for review in the absence of written findings. *State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009). When the record requires written findings for an appellate court to properly review the case, failure to enter such findings is error and remand for entry of findings of fact and conclusions of law is the proper course. *Head*, 136 Wn.2d at 624-25.

In this case, the court held a full evidentiary hearing under

CrR 3.6 and ruled that the search was lawful but failed to enter any written findings of fact or conclusions of law. RP 50-83. The record is insufficient to facilitate appellate review in the absence of these written findings. The search at issue in Ms. Lake's case involves a determination of whether Ms. Beale was acting as an agent of the state based on conflicting testimony from multiple witnesses. The record is insufficient to allow appellate review in the absence of written findings of fact and conclusions of law. This court should remand Ms. Lake's case to the trial court for entry of findings of fact and conclusions of law regarding the search of Ms. Lake's apartment so that an appellate court may properly review her assignments of error.

#### D. CONCLUSION

The state presented insufficient evidence to prove Ms. Lake stole any merchandise from a "mercantile establishment" as is required to convict her of organized retail theft in the first degree under RCW 9A.56.350(1)(c). For this reason, this court should reverse her conviction in count six and dismiss the charge with prejudice. The trial court erred when it denied Ms. Lake's motion to suppress and dismiss pursuant to CrR 3.6 because Ms. Deale was

acting as an agent of the state when she entered Ms. Lake's apartment and reported the presence of incriminating evidence to law enforcement. Finally, the trial court erred by failing to enter written findings of fact and conclusions of law following Ms. Lake's evidentiary hearing under CrR 3.6. This error precludes appellate review and requires remand to the trial court. Based on the foregoing errors, this court should reverse Ms. Lake's convictions and remand the case for a new trial. In the alternative, this court should at least remand the case to the trial court with instructions to enter written findings of fact and conclusions of law so that this court may perform its appellate function while considering a complete record.

DATED this 21<sup>st</sup> day of March 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov and Tycameron Lake/DOC#822751, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed on March 21, 2019. Service was made by electronically to the prosecutor and Tycameron Lake by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

\_\_\_\_\_  
Signature

**LAW OFFICES OF LISE ELLNER**

**March 21, 2019 - 11:25 AM**

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