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NO. 53438-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES SCHEIBE,  
Appellant.

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

The Honorable Robert A. Lewis, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting statements Scheibe allegedly made after he was illegally detained. Specifically, Scheibe assigns error to the following findings of facts and conclusions of law entered after the CrR 3.5 hearing:

That Detective Swenson was on duty on June 16, 2018 and that on that date he came into contact with the defendant, James Scheibe, because he was dispatched to a disturbance with a possible shot fired in the area of 11206 NE 79<sup>th</sup> Street, La Center, Washington. (Supp. CP, 3.5 FFCL, CrR 3.5, FF 1).

...Once seated, Detective Swenson began a conversation with the defendant while other deputies contacted the witness to the disturbance. (Supp. CP, 3.5 FFCL, CrR 3.5, FF 3).

Detective Swenson did not make any threats or promises to the defendant and did not put him under duress so that the defendant would speak with him. (Supp. CP, 3.5 FFCL, CrR 3.5, FF 8).

Deputy Maxfield did not make any threats or promises to the defendant to get him to speak, nor did he put him under duress. (Supp. CP, 3.5 FFCL, CrR 3.5, FF 15).

The defendant's second and third sets of statements are admissible. Because he demonstrated that he knew he could stop talking after the first statements and did stop talking on two separate occasions and then reinitiated contact with officers, his actions demonstrate an implied waiver of his right to remain

silent. (Supp. CP, 3.5 FFCL, CrR 3.5, CL 5).

2. The trial erred when it denied Schiebe's motion to suppress his alleged statements because the police did not have reasonable articulable suspicion of criminal activity to justify the initial seizure of Scheibe. Specifically, Scheibe assigns error to the following findings of fact and conclusions of law entered after the CrR 3.6 hearing:

Officers came upon a chaotic scene having received information from *multiple sources indicating that there was something going on and shots may have been fired and that* there was indication of a car accident or some dispute. (emphasis in original) (Supp. CP, FFCL CrR 3.6, FF 2).

Officers had very little information, but they did have a description of the involved person in general terms (Supp. CP, FFCL CrR 3.6, FF 3).

When officers arrived, the defendant came out into the middle of the roadway and put his hands up. He matched the description that the officers had of the involved person. (Supp. CP, FFCL CrR 3.6, FF4).

Detaining the defendant under these circumstances and asking him questions was a lawful *Terry* detention. (Supp. CP, FFCL CrR 3.6, CL 1).

These circumstances created a reasonable suspicion that the defendant was a person involved in the criminal activity they were called out to investigate and may have been the suspect. (Supp. CP, FFCL CrR 3.6,

CL 2).

The length of the detention was not unreasonable given the circumstances. (Supp. CP, FFCL CrR 3.6, CL 3).

It was reasonable to put the defendant in handcuffs for officer safety, the safety of others, and to control the scene. (Supp. CP, FFCL CrR 3.6, CL 4).

Placing the defendant in handcuffs did not taint his subsequent lawful arrest or somehow make the defendant's second and third sets of statements involuntary. (Supp. CP, FFCL CrR 3.6, CL 5).

3. Defense counsel was ineffective when he failed to move to suppress the shoulder holster as the fruit of Scheibe's illegal seizure.

4. The trial court violated Schiebe's Sixth Amendment right to a present his defense when it precluded relevant, admissible evidence that would have created reasonable doubt that did not otherwise exist, and the trial court's error was not harmless.

#### B. ISSUES ON APPEAL

1. Did the trial court err when it admitted statements allegedly made by Scheibe after he was illegally detained?

2. Did the trial court err when it denied Schiebe's motion to suppress his statements when the police did not have

reasonable articulable suspicion of criminal activity to justify the initial detention?

3. Was defense counsel ineffective when he failed to move to suppress the shoulder holster as fruit of Scheibe's illegal seizure when it was discovered as a direct result of the illegal seizure?

4. Did the trial court violate Schiebe's Sixth Amendment right to a present his defense when it precluded relevant, admissible evidence about Randall's motive and previous attempt to frame Scheibe?

C. STATEMENT OF THE CASE

1. Procedural History

James Scheibe was charged by second amended information with Count 1 Assault in the Second Degree (domestic violence) (RCW 9A.36.041(4) and 9A.36.021(1)(c)); Count 3 Domestic Violence Court Order Violation (RCW 9A.36.041(4) and 26.50.110(1)); Count 2 Unlawful Possession of a Firearm in the Second Degree (RCW 9.41.040(2)(a)); Count 4 Reckless Endangerment (domestic violence) (RCW 10.99.020 and 9A.36.050); and Count 5 Reckless Endangerment (domestic

violence) (RCW 9A.36.041(4) and 9A.36.050). CP 66. In addition, the state alleged a special allegation of domestic violence on counts 1, 4, and 5. CP 66.

The trial court held a CrR 3.5 and 3.6 hearing together because some of the testimony overlapped, but the 3.6 hearing continued after the trial began. RP 5, 13, 112. The trial court admitted two sets of Scheibe's statements under CrR 3.5 and denied the defense motion to suppress those same statements as fruit of an illegal seizure. RP 110, 112; Supp. CP, FFCL 3.5; FFCL 3.6.

After the 3.5 hearing the trial court entered the following findings and conclusions:

1. That Detective Swenson was on duty on June 16, 2018 and that on that date he came into contact with the defendant, James Scheibe, because he was dispatched to a disturbance with a possible shot fired in the area of 11206 NE 79<sup>th</sup> Street, La Center, Washington.
2. *Upon arrival, Detective Swenson used his car as a rolling bunker allowing other officers to use the car as cover as they were arriving on foot. Those other officers likely had their guns drawn.*

3. As the officers were arriving, Detective Swenson observed the defendant, from about 100 yards away, come into the middle street and put his hands up without being asked. He was then handcuffed and patted down for weapons because of the allegations of a shot being fired and a gun possibly being involved. Once seated, Detective Swenson began a conversation with the defendant while other deputies contacted the witness to the disturbance.

4. The defendant made no statements before he was handcuffed.

5. Detective Swenson explained who he was to the defendant and read him his *Miranda* rights from his State-issued *Miranda* card.

6. The defendant was told:

“You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and to have them present with you while you’re being questioned. If you cannot afford to hire a lawyer, one can be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer my questions or make any statements. Do you understand each of these rights that I’ve explained to you?”

7. Detective Swenson cannot remember if he asked the

defendant if he wished to speak to him.

8. Detective Swenson did not make any threats or promises to the defendant and did not put him under duress so that the defendant would speak with him.

9. The defendant stated that he understood his rights and the detective began a conversation with him.

10. The defendant stated that the child involved in the incident was his son, W.S. He denied having a gun. He indicated that he lived under a tarp on the westside of the driveway of the property. And he stated that he was aware there were protective orders in place between he and Ms. [Maria] Sexton, but that she had come there and he did not go to her. The defendant did not answer the question about whether he attempted to avoid Ms. Sexton or whether he initiated a confrontation.

11. Sometime later, another deputy told Detective Swenson that the defendant would like to speak with him again.

12. When Detective Swenson asked the defendant what he wanted to talk about, the defendant asked about having

contact with Maria [Sexton] (who he referred to as his girlfriend) and W.S. Detective Swenson explained that wouldn't be possible and the defendant ceased talking.

13. That Deputy Maxfield was also on duty on June 16<sup>th</sup> and was dispatched to the same call. On that day, Deputy Maxfield transported the defendant to the jail after he had been read his *Miranda* rights by Detective Swenson. The defendant was in handcuffs in the patrol car.

14. While the defendant was being transported, he made the unsolicited statements "I was only trying to see my kid." When asked why his ex-girlfriend was there, he said she had come over to score some meth, but he didn't have any so she made [sic] and was going to leave. When asked what happened next, the defendant said "she tried to run me over. I just want to see my kid." Upon clarification about the gunshot, the defendant stated when she hit me, the gun went off. Deputy Maxfield asked the defendant if it was in a holster and or out and the defendant replied that it was in a hip holster. When asked if it was a shoulder holster, the defendant stalled and then indicated yes when asked if it was a hip

holster.

15. Deputy Maxfield did not make any threats or promises to the defendant to get him to speak, nor did he put him under duress.

16. The defendant never stated that he didn't want to talk and never requested an attorney.

Supp. CP, FFCL CrR 3.5 (emphasis in original).

The trial court entered the following conclusions of law:

1. The defendant was immediately placed into custody at the time he was contacted by law enforcement officers.

2. The defendant was correctly informed of his constitutional rights.

3. The defendant never expressly waived his right to remain silent.<sup>1</sup>

4. The defendant's first set of statements made on the scene are inadmissible because the State has not proved that the defendant impliedly waived his right to remain silent.<sup>2</sup>

5. The defendant's second and third sets of statements are admissible. Because he demonstrated that he knew he

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1 This finding of fact was mistakenly labeled as a second "2" instead of 3"

2 This finding of fact was mistakenly labeled as "3" instead of "4"

could stop talking after the first statements and hid not talking on two separate occasions and then reinitiated contact with officers, his actions demonstrate an implied waiver of his right to remain silent.<sup>3</sup>

Supp. CP, FFCL CrR 3.5.

After the CrR 3.6 hearing the court entered the following findings of fact:

1. That Detective Eric Swenson, Deputy Samir Vejo, and Deputy Tom Maxfield are trained and experienced law enforcement officers. Detective Swenson has over three thousand hours of training and has a procedure for how to respond to calls of shots fired.
2. Officers came upon a chaotic scene having received information from *multiple sources indication that there was something going on and shot may have been fired and that there was indication of a car accident or some dispute.*
3. Officers had very little information, but they did have a description of the involved person in general terms.
4. When officers arrived, the defendant came out into the

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<sup>3</sup> This finding of fact was mistakenly labeled as “4” instead of “5”.

middle of the roadway and put his hands up. He matched the description that the officers had of the involved person.

5. The defendant was detained, questioned, and held for an additional period of time in handcuffs for a period of 20 to 30 minutes while officers talked with him, talked with other people, and looked around the area. He was frisked for weapons and found to have knives and syringes, but not firearm. At this time, officers did not know the location of the firearm.

6. The length of the detention was the time it took to speak with all witnesses and search for and locate the firearm.

Supp. CP, FFCL CrR 3.6 (emphasis in original).

The court made the following conclusions of law:

1. Detaining the defendant under these circumstances and asking him questions was a lawful *Terry* detention.

2. These circumstances created a reasonable suspicion that the defendant was a person involved in the criminal activity they were called out to investigate and may have been the suspect.

3. Then length of the detention was not unreasonable

given the circumstances.

4. It was reasonable to put the defendant in handcuffs for officer safety, the safety of others, and to control the scene.

5. Placing the defendant in handcuffs did not taint his subsequent lawful arrest or somehow make e the defendant's second and third sets of statements involuntary.

Supp. CP, FFCL CrR 3.6.

After a jury trial, Scheibe was convicted as charged and the jury answered yes to the special verdicts of domestic violence. CP 121-24, 131, 146. This timely appeal follows. CP 156.

2. Substantive Facts

a. The June 2018 incident

Police officers responded to multiple 911 calls in a neighborhood called the "View" in rural Clark County. RP 125, 224, 251, 307. On the night of the 911 call, some neighbors heard what sounded like a gunshot followed by a crash. RP 146, 156-57, 174. Gunshot were not unusual for in this neighborhood. RP 147, 174.

Officers from two different departments arrived in full riot gear to a chaotic crowded scene where several people were standing around. RP 17, 95, 149, 165-66, 225. A damaged Toyota Avalon

completely blocked one lane of the road. RP 256. Another damaged car was close by and both drivers were injured from a collision involving both vehicles. RP 256-57, 258. One driver had a cut on her head, the other had a contusion to the sternum and injured her left arm. RP 163, 259.

One of the damaged cars belonged to Maria Sexton. RP 279. Sexton and Scheibe were in a dating relationship and share a son, W.S. RP 262. In December 2017 Sexton obtained an order of protection against Scheibe under which he was prohibited from contacting Sexton and W.S. or possessing firearms RP 219, 263; Exh. 3.

In June 2018, Scheibe lived on a property owned by the Cunningham's. RP 172, 452, 453, 476. Maria Sexton knew Scheibe stayed on the property and she frequently visited despite Mrs. Cunningham's request that Sexton not to come to the property. RP 183, 454. On the day of the incident, Sexton and Scheibe were the only witnesses and they each told a different version of events.

i. Schiebe's version of events

Sexton and Scheibe planned for Scheibe to visit W.S. on Father's Day, but a few days before that Sexton came to the

property, became upset that Scheibe had no drugs and changed her mind about allowing the visit. RP 455, 456, 463. The two argued in the driveway, which escalated until Scheibe punched the side of her truck, and Sexton threatened he would never see W.S. again. RP 463, 465.

When Sexton said she was leaving, Scheibe stepped in front of the vehicle and Sexton hit him with the car as Scheibe grabbed a hold of the hood. RP 465-46. Scheibe saw a car approaching from the main road and yelled for Sexton to stop but she kept going and collided with Leslie Griffin's car. RP 160-61.

Scheibe owned three bb guns that looked like real guns, but he did not have any of them in his possession when Sexton was at the property, and never fired any other gun that day. RP 468-69.

ii. Sexton's version of events

According to Sexton she went to the property to check on her cousin, Ryan Sexton's, daughter who also lived at the property and had severely cut her finger. RP 285. While remaining in her car, Scheibe delivered a piece of mail to Scheibe, which Scheibe opened to discover it related to child support. RP 285.

In response, according to Sexton, Scheibe yelled at her, took

a gun from under his arm and pointed it at her. RP 271. In response, Sexton took off in reverse but Scheibe jumped on the running board of the car and held onto the rack on top on the car to avoid being injured RP 289. Scheibe's position on the running board inadvertently blocked Sexton's line of sight when she collided with Griffin's car. RP 278. At some point the gun went off. RP 274.

After the collision, according to Sexton, Scheibe threw a gun under a Connex storage box, at the end of the driveway. RP 281; Exh. 12. The gun the police retrieved belonged to Zachary Randall. RP 285.

b. Other evidence at the scene

Police found a colt .45 pistol under a connex box at the end of the driveway, which defense witness Charlotte Frias also identified as belonging to her former boyfriend, Zachary Randall, who stayed at the property the night before and was on the property earlier that day. RP 442, 453, 459. Police also found a spent .45 shell casing in the driveway. RP 241, 351. The state's ballistics expert testified that the bullets in the magazine of the gun appeared to be from the same manufacturer as the spent shell casing. RP 374.

c. Facts elicited at the CrR 3.5 and 3.6 hearing

The trial court's findings and conclusions are set forth above and the relevant 3.5 and 3.6 testimony is set forth below.

Deputy Swenson testified he identified Scheibe as the subject of the call "sort of by his actions and description." RP 95. However, the state did not present evidence that any of the callers provided a description of the shooter, or that the shot fired was related to the accident. RP 95. Further, there was no evidence any of the callers reported a disturbance.

Deputy Maxfield stated the traffic accident was the subject of the investigation and then other callers reported shots fired. RP 53. When the police arrived, officer Swenson saw Scheibe, approximately thirty feet from one of the damaged cars walking into the street with his hands up. The police, in full riot gear, ordered Scheibe to get down on the ground to be handcuffed. RP 17, 24.

Swenson searched Scheibe and placed him in handcuffs on the side of the road. RP 17. During the search Swenson found several pocketknives and some syringes. RP 32, 98. After Scheibe was handcuffed, he identified himself. RP 18. Swenson told Scheibe

he was not under arrest but read Scheibe his *Miranda*<sup>4</sup> rights from a card he carried in his pocket. RP 18. After reading the *Miranda* card Scheibe said W.S. was his son and that he was aware of a protection order prohibiting him from having contact with Sexton, the mother of his son. RP 20.

Swenson left Scheibe in detention in handcuffs on the side of the road with another officer. RP 21. Swenson testified that Deputy Kramer informed him Scheibe wanted to talk to Swenson. RP 21. According to Swenson, when he approached Scheibe, Scheibe asked to talk to Sexton and W.S. RP 21. When Swenson said that was not possible Scheibe “ceased talking.” RP 21-22.

Officer Swenson observed a damaged vehicle in the driveway but did not investigate it because he was “focused on Mr. Scheibe”. RP 23-24. After Scheibe was in handcuffs for approximately 30 minutes Swenson placed him under formal arrest and conducted a second search where he found the shoulder holster. RP 54, 101. Swenson did not provide new *Miranda* warnings when Scheibe was arrested. RP 32, 101; Supp. CP, FFCL 3.5, FF 13.

According to Deputy Maxfield, while he transported Scheibe

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to jail, Scheibe stated he only spoke with Sexton to ask to see his son. RP 54. Maxfield questioned Scheibe about why Sexton was at the property and what happened next. RP 54. According to Maxfield, Scheibe stated that Sexton entered the property without permission and became upset when he did not have any drugs. RP 54. Maxfield questioned Scheibe about the gunshot and, according to Maxfield, Scheibe stated that Sexton tried to run him over and when she hit him the gun went off. RP 54. Maxfield inquired whether the gun was in a holster and, according to Maxfield, Scheibe stated the gun was in a hip holster. RP 54.

The state moved to admit the three sets of statements allegedly made by Scheibe:

1. Scheibe's statement made immediately after being placed into handcuffs, that Scheibe W.S. was his son and he was aware of a protection order prohibiting him from having contact with Sexton;
2. Scheibe's statements made when Swenson spoke to him the second time at Schiebe's request, that he wanted to talk to Sexton and W.S.; and
3. Scheibe's statements made in the patrol car to Maxfield

that (a) Scheibe only spoke with Sexton to see his son, (b) Sexton entered the property without permission and became upset when he did not have any drugs, and (c) Sexton tried to run over Scheibe and when she hit him the gun went off.

RP 20, 54, 65.

The trial court found the first set was inadmissible under CrR 3.5 but admitted the second and third sets. Supp. CP, FFCL CrR 3.5, CL 4-5 (incorrectly labeled in the FFCL as 3-4).

The defense moved to suppress the statements elicited during the initial detention regarding the no contact order, Scheibe's second conversation with Swenson and Scheibe's statements to Maxfield under CrR 3.5 and 3.6 as the fruit of an illegal seizure. RP 71. However, defense counsel did not move to suppress the shoulder holster as an illegal search incident to an unlawful arrest. RP 71. The Court admitted the second and third set of statements under CrR 3.5. Supp. CP, FFCL CrR 3.5, CL 4-5 (incorrectly labeled in the FFCL as 3-4).

Further the trial court denied Scheibe's motion to suppress those same statements concluding the seizure was a proper *Terry*

stop, which did not taint Scheibe's subsequent lawful arrest. Supp. CP, FFCL CrR 3.6, CL 1, 5.

d. Testimony supporting Schiebe's defense excluded

Schiebe asserted a general denial defense based on facts supporting his theory that Sexton and Randall conspired to frame him because Scheibe was dating Randall's former girlfriend Frias. RP 211. Scheibe attempted to admit testimony from Frias and Scheibe that prior to this incident Randall alleged Scheibe stole Randall's .45 pistol but the police investigation turned up nothing. RP 213.

Schiebe was allowed to testify that the gun belonged to Randall, but he was not allowed to explain that Randall shot his own Colt .45 into the air and then placed it under the Connex box in order to frame Scheibe. RP 208-14, 442. According to Sexton, after the collision Scheibe threw a gun under a Connex storage box, at the end of the driveway, but the gun the police retrieved from under the box belonged to Zachary Randall. RP 281, 285; Exh. 12.

The defense argued this testimony showed Randall not only had a motive to frame Scheibe, but that he had previously, but unsuccessfully attempted to frame Scheibe. RP 212-13. The trial

court excluded this evidence finding that “Randall’s motives... aren’t at issue in anything in this case” and excluded any testimony about Randall’s accusation or motive. RP 213.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED SCHEIBE’S MOTION TO SUPPRESS HIS STATEMENTS BECAUSE THE POLICE DID NOT HAVE REASONABLE ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY A TERRY STOP

The trial court erred when it failed to suppress Scheibe’s statements because they were the fruit of an improper seizure under the Fourth Amendment and Wash. Const. art. I, § 7; *State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

a. Standard of review For trial court’s denial of a CrR 3.6 suppression motion

This court reviews a trial court's denial of a CrR 3.6 suppression motion to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Conclusions

of law are reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *Cole*, 122 Wn. App. at 323.

#### Fourth Amendment

When the state seeks to introduce evidence obtained through a warrantless search or seizure, the state bears the burden to prove one of the narrowly drawn and jealously guarded exceptions to the warrant requirement applies. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

A so-called *Terry* stop is one of those exceptions. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Under the *Terry* exception to the warrant requirement, officers may briefly detain a suspect for investigation where there is a “reasonable articulable suspicion” that the detained person is or has been involved in a crime. *State v. Alexander*, 5 Wn. App. 2d 154, 159, 425 P.3d 920 (2018); *Terry*, 392 U.S. at 21.

Additionally, the *Terry* stop is “limited in scope and duration to fulfilling the investigative purpose of the stop.” *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). And “[t]he investigative methods employed must be the least intrusive means reasonably

available to verify or dispel the officer's suspicion in a short period of time." *Williams*, 102 Wn. 2d at 738 (citing *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319 (1983)).

i. Art. I, § 7

It is well established that art. I, § 7 is more protective than the Fourth Amendment. *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). While the Fourth Amendment is grounded in "notions of reasonableness," art. I, § 7 "prohibits any disturbance of an individual's private affairs without authority of law." *State v. Wisdom*, 187 Wn. App. 652, 668, 349 P.3d 953 (2015) (citations omitted).

Because art. I, § 7 is more protective than the Fourth Amendment, it "generally requires a stronger showing by the State" that the search or seizure was justified. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015).

b. Deputy Swenson conducted an impermissible Terry stop in violation of the Fourth Amendment and art. I, § 7

Deputy Swenson conducted an impermissible *Terry* stop in violation of the Fourth Amendment and art. I, § 7 because he did not have reasonable articulable suspicion based on objective facts that Scheibe had been or was about to be engaged in criminal conduct.

*United States v. Castle*, 825 F.3d 625, 634 (D.C. Cir. 2016) (citing *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752 (1980)).

When Swenson arrived, Scheibe was walking in the street, 30 feet from the car collision. He was not involved in suspicious activity: he had his hands raised in response to the police in riot gear with their weapons drawn. RP 97. This behavior does not give rise to reasonable articulable suspicion of criminal activity.

There was no reasonable articulable suspicion of criminal activity to justify a *Terry* stop. An unidentified person shooting a firearm, alone, is not a crime. Likewise, colliding with another car in a traffic accident alone is not a crime. When the police arrived, this was the sum total of their information: someone shot a gun and someone was involved in a collision, but there was no evidence Scheibe was involved with either incident.

When an officer bases his or her suspicion on an informant's tip, the state must show that the tip bears some "indicia of reliability" under the totality of the circumstances. *Z.U.E.*, 183 Wn.2d at 618. This requires either (1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b)

that the informer's information was obtained in a reliable fashion. *Z.U.E.*, 183 Wn.2d at 618 (citing *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). The officer's observation must corroborate more than just innocuous facts. *Z.U.E.*, 183 Wn.2d at 618.

In *Z.U.E.* the police detained the occupants of a car after receiving a 911 call regarding a female minor age 17 or 18 in possession of a firearm. *Z.U.E.*, 183 Wn.2d at 622-23. The caller did not provide a factual basis for her knowledge. The Washington Supreme Court held the State failed to establish a series of 911 calls provided the officers with any articulable reason to suspect any of the passengers in *Z.U.E.*'s car were engaged in criminal activity and, thus, a *Terry* stop was not justified. *Z.U.E.*, 183 Wn.2d at 624.

The caller could not identify the person with the handgun as one the other occupants of the car, and her description of the car involved did not match *Z.U.E.*'s car. *Z.U.E.*, 183 Wn.2d at 614-15, 622. These facts were insufficient to support a reasonable suspicion that the suspect was in the car. *Z.U.E.*, 183 Wn.2d at 622.

In contrast, in *State v. Rice*, the seizure was justified as a *Terry* stop by the informant's statements and the circumstances corroborated by the officer's own observations. *State v. Rice*, 59 Wn.

App. 23, 28, 795 P.2d 739 (1990). There, officer Saucier responded to a report of shots fired at an apartment complex. When Saucier arrived, he observed Rice in the parking lot. Rice walked toward Saucier but hesitated slightly and moved his hands toward his waistband, then made a half-turn away from the officer and put his hand in his pocket. Saucier grabbed Rice's wrists and told Rice to open his hand. *Rice*, 59 Wn. App. at 25. Saucier had no reason to single out Rice as a criminal suspect based on Rice's presence in the parking lot but Saucier was justified in attempting to talk to the only person available to him at the time. *Rice*, 59 Wn. App. at 27.

Importantly, while the Court of Appeals in *Rice* found that the firing of shots indicates the presence of firearms and probable illegal conduct (*Rice*, 59 Wn. App. at 28) the Washington Supreme Court recently dispelled that notion by affirming that the presence of a firearm, standing alone, is insufficient to support an investigatory stop. *State v. Tarango*, \_\_\_ Wn. App. \_\_\_, 434 P.3d 77, 83 (2019), published in part<sup>5</sup>.

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<sup>5</sup> This brief only cites to the published portion of *Tarango*. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

Here, the circumstances are more like *Z.U.E.* than *Rice*. Like in *Z.U.E.*, Swenson's justification for the investigation was based on a series of 911 calls regarding an unidentified possible gunshot and a vehicle collision. RP 125, 224, 251, 307. However, as in *Z.U.E.*, Swenson could not corroborate the report with any of his own observations. Unlike in *Rice*, Scheibe was not the only person at the scene available to speak with Swenson. Further, by his own admission Swenson did not investigate the vehicle collision, and he had no reason to believe Scheibe was involved in the vehicle collision. RP 23-24. Although Scheibe walked toward the patrol cars with his hands up there was no testimony he was the only one who did that. This was a reasonable response to police fully armed in riot gear with weapons drawn.

At the time Swenson detained Scheibe he did not have reasonable articulable suspicion that Scheibe was involved in illegal conduct or that he had legally fired a gun or been involved in a collision.

The State failed to establish that any of the 911 callers' statements regarding a gunshot or the collision provided Swenson with reasonable articulable suspicion that Scheibe was engaged in

criminal activity, thus, the seizure was not justified by the *Terry* exception to the warrant requirement. *Z.U.E.*, 183 Wn.2d at 624.

The trial court's findings that the officers had a general description of the involved person and that Scheibe matched that description is not supported by substantial evidence. Supp. CP, FFCL CrR 3.6, FF 3-4). According to Deputy Maxfield, the subject of the call was a traffic accident and coincidentally other callers reported shots fired. RP 53.

Therefore, the trial court's conclusion that the seizure was an appropriate *Terry* stop was not supported by substantial evidence. RP 111; Supp. CP, FFCL CrR 3.6, FF 1-5).

c. Scheibe's statements were tainted by the illegal detention

Statements following issuance of *Miranda* warnings may nevertheless be tainted by an illegal detention and therefore inadmissible. *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997) (citing *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)).

In *Armenta*, the Washington Supreme Court reversed the defendants' convictions and held the defendants' illegal detention tainted their confession even though they consented to the search of

their vehicle, which led to their formal arrest and they confessed after given proper *Miranda* warnings. *Armenta*, 134 Wn.2d at 17.

*Armenta* was decided based on the federal attenuation doctrine which provides less protection to the defendant than the recently adopted state-specific attenuation doctrine. *State v. Mayfield*, 192 Wn.2d 871, 897, 434 P.3d 58 (2019).

The state attenuation doctrine is only satisfied if the state proves an unforeseeable intervening act genuinely severed the causal connection between official misconduct and the discovery of evidence. *Mayfield*, 192 Wn.2d at 898.

In *Mayfield* the Court reversed Mayfield's conviction because the police did not have reasonable articulable suspicion to detain and search Mayfield. But the police asked to search. Under these circumstances the police asking to search was not unforeseeable. To the contrary, it was a "purposeful component" of an unjustified drug investigation. *Mayfield*, 192 Wn.2d at 876, 899.

The Supreme Court rejected the Court of Appeals' conclusion that although Mayfield was unlawfully seized the evidence was attenuated from the unlawful seizure because the officer's *Ferrier*

warnings<sup>6</sup> constituted an intervening circumstance. *Mayfield*, 192 Wn.2d at 877 (citing *State v. Mayfield*, No. 48800-1-II, slip op. at 5-7, 2018 WL 286810 (Wash. Ct. App. Jan. 4, 2018) (unpublished<sup>7</sup>) (Mayfield II)).

To the contrary, the Supreme Court held that when an officer asks a defendant for consent to search during an unlawful seizure, the defendant's ultimate consent is entirely foreseeable and not an independent act of free will even if the request is preceded by *Ferrier* warnings. *Mayfield*, 192 Wn.2d at 900; *Armenta*, 134 Wn. 2d at 17 (prior illegal detention vitiates consent) (citing *Brown*, 422 U.S. 590). Therefore, the Court remanded with direction to grant *Mayfield*'s motion to suppress. *Mayfield*, 192 Wn.2d at 902.

Just like in *Armenta* and *Mayfield*, here, Scheibe's statements were not attenuated from his unlawful seizure. Here, the *Miranda*

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<sup>6</sup> To obtain valid consent, police must "inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home." *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

<sup>7</sup> Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

warnings, like the *Ferrier* warnings in *Mayfield*, are not an intervening circumstance. Once the police illegally detained Scheibe in handcuffs without reasonable articulable suspicion, Scheibe's later statements were entirely foreseeable as a result of the officers' continued questioning. Scheibe's statements despite the *Miranda* warnings were inadmissible because he was at all times involuntarily detained. Therefore, Scheibe's statements must be suppressed as the fruit of his illegal detention. *Armenta*, 134 Wn. 2d at 17; *Brown* 422 U.S. 590. Likewise, because the shoulder holster was discovered as a direct result of Scheibe's illegal detention it, too, must be suppressed. *Armenta*, 134 Wn. 2d at 17.

2. DEFENSE COUNSEL WAS  
INEFFECTIVE WHEN HE FAILED TO  
MOVE TO SUPPRESS THE SHOULD  
HOLSTER AS FRUIT OF THE ILLEGAL  
SEIZURE

Defense counsel was ineffective when he failed to move to suppress the shoulder holster as fruit of the illegal seizure.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22, guarantee the right to effective assistance of counsel. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). This Court reviews ineffective assistance of counsel claims

de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance that falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Woods*, 138 Wn. App. at 197. (quoting *Studd*, 137 Wn.2d at 551 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995))). The defendant must also demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *McFarland*, 127 Wn.2d at 336.

In *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014), the Court of Appeals reversed Hamilton's conviction holding defense counsel was ineffective because there was no conceivable tactical reason for failing to argue that evidence seized from her

purse was the result of an unlawful warrantless search. After police requested that a private citizen retrieve items from Hamilton's home, he brought the police Hamilton's purse which the officers searched without a warrant and found methamphetamine. *Hamilton*, 179 Wn. App. at 876. During a suppression motion defense counsel argued the evidence should be suppressed because the officers conducted an unlawful search of Hamilton's home when the private citizen acted on their behalf but did not argue the evidence should be suppressed because the search of the purse was unlawful. *Hamilton*, 179 Wn. App. at 878-79.

Hamilton was prejudiced by counsel's deficient performance because had defense counsel moved to suppress the evidence based on the unlawful search of the purse the trial court likely would have granted it. *Hamilton*, 179 Wn. App. at 888.

While Hamilton's counsel moved to suppress evidence but did not argue the obvious legal theory, here, defense counsel argued the correct legal theory that Scheibe's initial seizure was illegal but failed to move to suppress the shoulder holster discovered as a direct result of that illegal seizure.

Under *Armenta*, the trial court should have suppressed the

shoulder holster. *Armenta*, 134 Wn.2d at 17. Although the trial court found Scheibe's seizure was justified there was no strategic or tactical reason not to move to suppress the holster along with the statements to preserve the issue for appeal. The failure to raise the issue in the trial court prejudiced the defendant by not properly preserving the issue.

3. THE TRIAL COURT VIOLATED  
SCHEIBE'S SIXTH AMENDMENT  
RIGHT TO PRESENT HIS DEFENSE

The trial court violated Scheibe's Sixth Amendment right to present his defense.

This Court reviews a trial court's evidentiary rulings for abuse of discretion, but "when a trial court's discretionary ruling excludes relevant evidence, the more the exclusion of that evidence prejudices an articulated defense theory, the more likely [the reviewing court] will find that the trial court abused its discretion." *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017), *review denied sub nom. State v. Vela*, 190 Wn.2d 1005, 413 P.3d 11 (2018) (citing *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)).

A trial court abuses its discretion when there is a clear showing that the exercise of discretion was manifestly unreasonable,

based on untenable grounds, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable or untenable if it is outside the range of acceptable choices, if the factual findings are unsupported by the record; or it is based on an incorrect standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

This Court reviews a claim of a denial of Sixth Amendment rights de novo. *Jones*, 168 Wn.2d at 719 (citing *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009)). Therefore, if the trial court excluded relevant defense evidence, this Court determines as a matter of law whether the exclusion violated the defendant's Sixth Amendment right to present a defense. *Jones*, 168 Wn.2d at 719.

Generally, all relevant evidence is admissible. ER 402. Evidence is relevant if it makes "the existence of any fact of consequence to the determination of the action more probable or less probable..." ER 401. Even evidence of minimal relevance should be admitted if it is probative of the defendant's version of events. *Duarte Vela*, 200 Wn. App. at 323 (citing *Jones*, 168 Wn.2d at 720-21).

If the evidence is relevant, the burden shifts to the state to show the relevant evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720; ER 403. The state's interest in excluding prejudicial evidence must be balanced against the defendant's need for the information sought and the relevant information can be withheld only if the state's interest outweighs the defendant's need. *Jones*, 168 Wn.2d at 720; ER 403.

Because the right to present testimony in one's defense is guaranteed by both the United States and the Washington Constitutions "the ER 403 balancing of probative value versus unfair prejudice is weighed differently when the defense seeks to admit evidence that is central to its defense." *Duarte Vela*, 200 Wn. App. at 320; U.S. Const. Amend. VI; art. I, § 22.

A criminal defendant's right to due process is "the right to a fair opportunity to defend against the State's accusations." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038 (1973)).

A trial court's decision to exclude testimony violates the defendant's Sixth Amendment right to present a defense if the

omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist. *Duarte Vela*, 200 Wn. App. at 326 (citing *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006)).

*Jones*, is illustrative to show when omitted evidence is of such high probative value that excluding it violates the Sixth Amendment right to present a defense. In *Jones*, the trial court suppressed under the rape shield statute, Jones' testimony and any cross-examination about the night of the alleged rape. *Jones*, 168 Wn.2d at 719-21. The Washington Supreme Court held the rape shield statute did not apply and that even if it did apply it could not be used to bar Jones' testimony about the night of the alleged rape because his testimony was of such high probative value to his defense of consent. *Jones*, 168 Wn.2d at 720, 722.

Jones' entire defense was that K.D. consented to sex during a drug induced sex party. *Jones*, 168 Wn.2d at 720. If believed, Jones' testimony would have provided a complete defense to the charge of second-degree rape. *Jones*, 168 Wn.2d at 721.

Even though the trial court allowed Jones to testify to the issue of consent alone, the court's suppression of the circumstances of the

party, were relevant, and admissible under the Sixth Amendment. *Jones*, 168 Wn.2d 721.

Even if the evidence supporting a defendant's theory of defense is weak or the court believes it is false, it should still be admitted because it will allow the jury to "retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false." *Duarte Vela*, 200 Wn. App. at 321 (emphasis in original).

Here, similar to *Jones*, the court allowed limited testimony about the nature of Scheibe's relationship with Sexton and circumstance of the Colt .45 pistol found at the scene. Scheibe was allowed to testify that the gun belonged to Randall, but he was not allowed to explain that Randall shot his own Colt .45 into the air and then placed it under the connex box in order to frame Scheibe. RP 208-14, 442.

The Court also prohibited Scheibe was from testifying that Randall had motive to frame Scheibe because Scheibe was dating Randall's former girlfriend, Frias. RP 208-13. Further, prior to this incident Randall unsuccessfully attempted to frame Scheibe by reporting to the police that Scheibe stole his gun. RP 208-13.

This evidence was crucial to Scheibe's defense because like

understanding about the sex party in *Jones* which provided reasonable doubt that did not otherwise exist, here understanding Randall was angry about Scheibe dating Frias and that Randall previously accused Scheibe of committing a crime involving the same firearm would have created reasonable doubt that did not otherwise exist. Without this information on the jury likely could not understand why Randall would wish Scheibe harm.

Even if the trial court believed this evidence was weak or far-fetched the evidence was admissible under *Duarte Vela* for the jury to assess as the jury is the sole trier of fact. *Duarte Vela*, 200 Wn. App. at 321.

The trial court's error was not harmless. *Jones*, 168 Wn.2d at 724-25. Regardless of the strength of the state's case, the trial court's error in omitting the circumstances surrounding the alleged crime, such as the sex party in *Jones*, was not harmless because the jury could have reached a different result if understood the circumstances- regardless of the strength of the state's case. *Jones*, 168 Wn.2d at 724-25.

Here, the state's case regarding the assault, unlawful possession of a firearm and reckless endangerment were based

entirely on Sexton's word. The trial court's error in omitting evidence that would explain the basis of Scheibe's defense and provide the jury with a completely different viewpoint of the events leading up to the charges was not harmless because the jury could have reached a different result if it heard Scheibe's and Frias' explanation of why Scheibe may have been framed again. *Jones*, 168 Wn.2d at 724–25.

Because the trial court's order suppressing valuable testimony denied Scheibe his constitutional right to present a defense which could have altered the outcome, the error was not harmless and Scheibe's conviction for second degree assault, unlawful possession of a firearm, and reckless endangerment must be reversed and remanded for a new trial. *Jones*, 168 Wn.2d at 725.

#### E. CONCLUSION

James Scheibe respectfully requests that this court reverse his convictions for second degree assault, unlawful possession of a firearm, and reckless endangerment. Scheibe further requests that this court remand with direction to suppress the shoulder holster and all statements he allegedly made to Swenson and Maxfield as fruit of his illegal seizure.

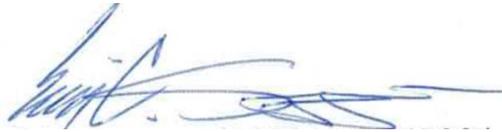
DATED this 18<sup>th</sup> day of October 2019.

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 CntyPA.GeneralDelivery@clark.wa.gov and James Scheibe/DOC#416012, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on October 18, 2019. Service was made by electronically to the prosecutor and James Scheibe by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**October 18, 2019 - 1:19 PM**

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