

**FILED**

NOV 18 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 296776

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA VIENTO BOJORQUEZ,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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TANESHA LA'TRELLE CANZATER  
Attorney for Appellant  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied the motion to suppress.

(CP 70-73; CP 74-77)

2. Police violated Mr. Bojorquez's constitutional right to privacy when they stopped his car without any reasonable articulable suspicion he was involved in the shooting. (CP 70-73; CP 74-77)

3. The trial court erred when it refused to quash the warrant issued to search Mr. Bojorquez's car. (CP 70-73; CP 74-77)

4. The trial court only served to inflame the passion of the jury when it admitted irrelevant and highly prejudicial evidence against Mr. Bojorquez.

5. The trial court abused its discretion when it refused to either dismiss the case because of repeated discovery violations or to suppress prejudicial expert testimony.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the evidence taken from Mr. Bojorquez's car unconstitutionally seized?

2. Did Mr. Bojorquez receive a fair trial when the trial court admitted evidence that was totally unrelated to the crime charged and that only served to prejudice the jury?

3. Was Mr. Bojorquez's ability to prepare for trial and to present a complete defense hampered by untimely discovery?

## C. STATEMENT OF THE CASE

### 1. The Stop

Police were dispatched to known Sureños gang territory when local residents reported gunshots fired. 12/17/10 RP 65-66. Residents also reported that a man dressed in a white jacket with a dark jacket ran towards an alley after the shooting. 12/17/10 RP 71-72.

The first officer at the scene noticed a car leave the alley at a rather fast speed. According to the officer, when the driver noticed him, he abruptly stopped the car and then immediately signaled to turn towards the patrol car. The officer claimed that suspect drivers commonly turn towards patrol cars to make it more difficult for law enforcement to engage them. 12/17/ RP 72.

The officer told the court that in his mind the car was somehow involved or its occupants would be able to provide some type of information about the shooting. 5/7/10 RP 33. So, the officer shone his spotlight on the car and ordered everyone inside to raise his hands. 12/17/10 RP 73.

The officer called for back-up assistance and then approached the car. As he got closer to the car, the officer noticed that the driver wore a red shirt. 12/17/10 RP 75. The officer considered this rather odd because Sureños members were typically identified by the color blue. 12/17/10 RP 61. Their rival, the Norteños, was identified by the color red. 12/17/10 RP 60. According to the officer, no one wore red in that neighborhood unless they wanted trouble. 5/7/10 RP 36-37.

The officer asked everyone in the car if they heard any gunshots fired. No one did. The officer then asked for their names. Joshua Bojorquez (Mr. Bojorquez) was the driver; both Jesse Moreno (Moreno) and Sebastian Lopez (Lopez) were passengers. 12/17/10 RP 74.

The officer did not recognize Mr. Bojorquez but he recognized his last name. He asked Mr. Bojorquez if he was related to Christopher Bojorquez, a known Norteños gang member, whose street name was Sicko.

Mr. Bojorquez was not a member of the gang culture. He had never before been arrested and he worked a steady job. But because of his brother, Christopher Bojorquez, people always assumed that he too was affiliated with gangs. 1/14/11 RP 12-13. So, Mr. Bojorquez denied that Christopher Bojorquez was his brother. 12/17/10 RP 76.

Officers immediately recognized Moreno, whose street name was Little Dreamer. Moreno associated with Norteños. But he was a member of Brown Pride. 12/8/10 RP 35. His haircut, the Mongolian, signified Norteños ties. 12/17/10 RP 77. Like Moreno, Lopez also associated with Norteños gang members. But he was a member of a tagger crew, known as the Crazy Bombers. 12/8/10 RP 38.

When back-up units arrived at the scene, the officer ordered Mr. Bojorquez, Moreno, and Lopez out of the car. Mr. Bojorquez told the officer they were only there smoking marijuana. 12/17/10 RP 76. The officer placed Mr. Bojorquez in a patrol car until another officer who was

qualified detect signs of marijuana impairment arrived at the scene.

12/17/10 RP 79. Moreno and Lopez were also detained. 12/8/10 RP 72;

12/20/10 RP 86.

The officer rendered Miranda warnings and asked to search the car. 12/17/10 RP 82. Mr. Bojorquez gave officers permission to search the cabin of his car; but he required a search warrant for the trunk.

12/8/10 RP 44.

Police searched the alley and found a Mariner's baseball cap and a black cotton glove that was turned partially inside out. 12/8/10 RP 42.

They also recovered a bullet slug from a mobile home. 12/8/10 RP 86;

12/21/10 RP 23. Police processed the items and forwarded them for

testing. 12/23/10 RP 99- 102; 12/23/10 RP 21.

A young man approached officers at the scene. According to the young man, as he walked home, someone in the front passenger seat of a blue car yelled out to him "Southside LVL." The car then turned a corner.

12/21/10 RP 71-72.

The young man continued on his way. Moments later, someone came around the corner, pulled a gun, and started to shoot at him. The young man gave chase and the shooter followed. He told police the shooter was a Mexican male dressed in a gray zip up hoodie that covered a hat. 12/21/10 RP 73-74; 12/21/10 RP 78.

## 2. The Warrant

The officer, who applied for the warrant, told the magistrate that officers witnessed the shooter run towards the alley. In actuality, that never happened. 12/22/10 RP 80. The officer also told the magistrate they recovered a .22 caliber bullet from the back seat of Mr. Bojorquez's car. 12/9/10 RP 32. Police never recovered any bullets from Mr. Bojorquez's car. 12/22/10 RP 80. The officer even claimed the hoodie found in Mr. Bojorquez's car matched the hoodie supposedly worn by the shooter. But, the hoodie recovered from Mr. Bojorquez's car did not match the shooter's clothing and was not even retained as evidence. 8/13/10 RP 78.

Based on that information, the magistrate granted a warrant to search the trunk of Mr. Bojorquez's car. Inside the trunk, officers recovered a .357 Magnum, a 12-gauge shotgun with the barrel sawed off, 12-gauge shotgun shells, .357 caliber casings, 3 black hooded sweatshirts, and a black cotton glove. 12/9/10 RP 32.

## 3. The Trial

The State charged Mr. Bojorquez with first-degree assault. The State included a gang aggravator. CP 17-18; CP 21-22. At pre-trial, Mr. Bojorquez moved to suppress the evidence seized from the trunk of his car. CP 39. He argued officers did not have articulable suspicion to stop his car. He also challenged the veracity of the search warrant given that it

was based on a number of misrepresentations. 5/7/10 RP 20-21; 8/13/10 RP 26; CP 39.

The court denied the motion to suppress. It found that officers were authorized to stop Mr. Bojorquez because they received reports about gunshots fired in or near the area where Mr. Bojorquez's car was spotted. 12/10/10 RP 2; CP 70-73; CP 74-77. The trial court further found Mr. Bojorquez and Moreno were dressed in red, the chosen color of the Norteños gang, and were in a high-crime Sureños neighborhood. CP 70-73; CP 74-77; 5/7/10 RP 29.

Mr. Bojorquez also moved the court to exclude from the evidence the sawed-off shotgun and gang affiliation information. He argued the shotgun was irrelevant because it was not used in the shooting. Expert testimony later proved the bullet slug extracted from the mobile home came from a .357 Magnum. 12/23/10 RP 21. He further argued gang affiliation evidence was irrelevant to crime because neither the person who was allegedly shot at nor Mr. Bojorquez was a member of gang.

The court denied those motions as well. It found that the shotgun was not illegal and would not necessarily cast Mr. Bojorquez in a negative light. 12/17/10 RP 56. The court also found gang evidence was relevant as to motive and would not unduly prejudice Mr. Bojorquez at trial. 12/14/10 RP 83-84.

During trial, Mr. Bojorquez made a number of motions regarding discovery violations. He moved the court to either suppress evidence that

was untimely filed or to dismiss the case. The court acknowledged there had been varying levels of violations, but refused to either suppress or dismiss. 12/14/10 RP 60.

Mr. Bojorquez moved the court to reconsider the motion when the State introduced a rather lengthy and complicated ballistics report a day or so before the expert witness was scheduled to testify in court. The witness was expected to testify with practical certainty that the bullet recovered from the mobile home came from the .357 Magnum found in Mr. Bojorquez's trunk. 12/23/10 RP 21.

Mr. Bojorquez explained that he was completely ill prepared to respond to such damning scientific evidence. 12/22/10 RP 111. But the trial court denied the motion. It basically found Mr. Bojorquez could have requested a Frye hearing, which would have required an expert. The court concluded it was left to speculate about prejudice unless Mr. Bojorquez could provide some evidence that his inability to present a defense was prejudiced. 12/22/10 RP 124.

The jury considered the evidence presented against Mr. Bojorquez and found him guilty of first-degree assault. The jury also made special findings that Mr. Bojorquez was armed with a firearm when he committed the crime that he committed the crime to either directly or indirectly benefit a gang. 12/28/10 RP 5-6; CP 206; CP 207; CP 208. The court sentenced Mr. Bojorquez to 228 months incarceration and imposed a variety of court fees. CP 240-247. This appeal followed. CP 249-259.

D. ARGUMENT

I. THE TRIAL COURT ADMITTED EVIDENCE THAT WAS UNCONSTITUTIONALLY SEIZED TO CONVICT MR. BOJORQUEZ.

A. The trial court erred when it denied the motion to suppress.

This Court will review the trial court's decision after a suppression hearing to determine whether substantial evidence supports the findings of fact and whether those findings support the conclusions of law. State v. Hill, 123 Wash.2d 647, 870 P.2d 313 (1994); State v. Ross, 106 Wash.App. 880, 26 P.3d 298 (2001), review denied, 145 Wash.2d 1016, 41 P.3d 483 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wash.2d at 644, 870 P.2d 313 (citing State v. Halstien, 122 Wash.2d 129, 857 P.2d 270 (1993)).

This Court will review the trial court's written conclusions of law de novo to determine whether the findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. Scott v. Trans-System, Inc., 148 Wash.2d 707-08, 64 P.3d 1 (2003). Unchallenged findings are verities on appeal. Hill, 123 Wash.2d at 644, 870 P.2d 313.

Here, Mr. Bojorquez moved the court to suppress evidence illegally seized from the trunk of his car. He argued that police, without authority, stopped and searched his car. The trial court found police had

ample authority to stop Mr. Bojorquez's car and denied the motion to suppress. 12/10/10 RP 2; CP 70-73; CP 74-77.

1. Mr. Bojorquez had a guaranteed right to privacy. The Fourth Amendment to the United States Constitution protects an individual's right to privacy. It provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV.

Our state constitution similarly protects our right to privacy in article I, section 7, which mandates, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, section 7; State v. Grande, 164 Wash.2d 141, 187 P.3d 248 (2008). This provision protects "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. Myrick, 102 Wash.2d 511, 688 P.2d 151 (1984). Article I, section 7 differs from the Fourth Amendment in that it recognizes an individual's right to privacy with no express limitations. State v. White, 97 Wash.2d 110, 640 P.2d 1061 (1982).

Our courts find warrantless searches or seizures per se unconstitutional unless one of the few exceptions to the warrant requirement applies. State v. Ladson, 138 Wash.2d 349, 979 P.2d 833 (1999). State v. Rankin, 151 Wash.2d 699, 92 P.3d 202 (2004). In fact, "[a]ny analysis of article I, section 7 in Washington begins with the

proposition warrantless searches are unreasonable per se. State v. White, 135 Wash.2d 769, 958 P.2d 982 (1998) (citing State v. Hendrickson, 129 Wash.2d 70, 917 P.2d 563 (1996)). This is a strict rule. White, 135 Wash.2d at 769, 958 P.2d 982. Therefore, exceptions to the warrant requirement are limited and narrowly drawn. White, 135 Wash.2d at 769, 958 P.2d 982; Hendrickson, 129 Wash.2d at 70-71, 917 P.2d 563. The few carefully drawn exceptions to the warrant requirement include consent, exigent circumstances, plain view searches, inventory searches, searches incident to arrest, and investigatory stops pursuant to Terry v. Ohio. State v. Duncan, 146 Wash.2d 171-72, 43 P.3d 513 (2002); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The State bears a heavy burden to prove one of those exceptions applies. See State v. Johnson, 128 Wash.2d 447, 909 P.2d 293 (1996); State v. Houser, 95 Wash.2d 149, 622 P.2d 1218 (1980).

2. The stop far exceeded the scope of Terry. Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. This exception to the warrant requirement is often referred to as a “Terry stop.” E.g., State v. Mendez, 137 Wash.2d 223, 970 P.2d 722 (1999).

To justify a Terry stop under the Fourth Amendment and article I, section 7, a police officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant {an} intrusion.” State v. Mendez, 137 Wn.2d at

223, (quoting Terry v. Ohio, 392 U.S. at 21). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” Id. (quoting State v. Kennedy, 107 Wash.2d 6, 726 P.2d 445 (1986)).

Reasonableness is determined from the totality of circumstances known by the officer. State v. Glover, 116 Wash.2d 514, 806 P.2d 760 (1991). The factual basis for an investigatory stop need not arise out of the officer’s personal observation, but may be supplied by information acquired from another person. Adams v. Williams, 407 U.S. 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); State v. Randall, 73 Wash. App. 227, 868 P.2d 207 (1994).

In determining whether a stop falls within the proper scope of an investigatory stop, courts must consider three factors: (i) the purpose of the stop; (ii) the amount of physical intrusion on the defendant’s liberty; and (iii) the length of time the defendant is detained. State v. Williams, 102 Wash.2d 740, 689 P.2d 1065 (1984).

i. Purpose of the stop. A traffic stop is valid when a law enforcement officer has an articulable suspicion of unlawful conduct on the part of the driver. State v. Ladson, 138 Wash.2d 349–350, 979 P.2d 833 (1999); Terry v. Ohio, 392 U.S. at 21. But when the officer stops a citizen not to enforce the traffic code, but to investigate suspicions unrelated to driving, the stop is a pretext. Ladson, 138 Wash.2d at 349, 979 P.2d 833.

Pretextual stops violate article I, section 7 of the Washington Constitution “because they are seizures absent the ‘authority of law’ which a warrant would bring.” Ladson, at 358, 979 P.2d 833. “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” Id. at 358–59, 979 P.2d 833.

Innocuous facts do not justify a stop. State v. Martinez, 135 Wash.App. 180, 143 P.3d 855 (2006) citing State v. Armenta, 134 Wash.2d 1, 948 P.2d 1280 (1997). An officer may, however, rely on experience in evaluating arguably innocuous facts. State v. Samsel, 39 Wash.App. 570–71, 694 P.2d 670 (1985). The question then becomes whether arguably innocuous facts plus the officer’s experience amount to an articulable suspicion or merely an inchoate hunch. State v. Martinez, 135 Wash.App. 180, 143 P.3d 855 (2006).

Here, the officer testified that in his mind Mr. Bojorquez’s car was somehow involved or its occupants would be able to provide some type of information about the shooting. 5/7/10 RP 33. The first thing that struck the officer as odd was that Mr. Bojorquez wore a red shirt. According to the officer, nobody wore red in that neighborhood unless they wanted trouble. 5/7/10 RP 36-37. Another thing that struck the officer as odd was when Mr. Bojorquez signaled towards the patrol car. The officer claimed that was common practice for suspect drivers because it forces the officer

to make a U-turn and makes it more difficult for law enforcement to engage them. 12/17/ RP 72.

The trial court concluded the officers were authorized to stop Mr. Bojorquez's car. They had received reports about gunshots fired in or near the area where Mr. Bojorquez's car was spotted and both Mr. Bojorquez and Moreno were dressed in red, the chosen color of the Norteños gang. The court concluded it would be unreasonable to believe members of the Norteños gang, would smoke marijuana and casually lounge in an area neighborhood occupied by a rival gang. 12/10/10 RP 2; 5/7/10 RP 29; CP 70-73; CP 74-77.

Our Courts have consistently found that a person's presence in a high crime area, or association with known criminals, are not sufficient bases for a Terry stop. See State v. Ellwood, 52 Wash.App. 74, 757 P.2d 547 (1988) (defendant's presence in a high crime area was not sufficient for a lawful stop); State v. Richardson, 64 Wash.App. 697, 825 P.2d 754 (1992) (defendant's presence in a high crime area and association with known traffickers was not sufficient for a lawful stop).

For example, in State v. Larson, 93 Wash.2d 638, 611 P.2d 771 (1980), our Supreme Court held that passengers of a vehicle were unlawfully seized when the officer stopped it solely because it was parked late at night in a high crime area near a closed park and it started to pull away as the police car approached.

The officers, in that case, asked everyone in the car, including passengers, for identification. Larson, 93 Wash.2d at 640, 611 P.2d 771. As one passenger, Larson, reached inside her purse to retrieve identification, an officer shone his flashlight into the purse where he noticed a plastic bag containing marijuana. Larson, 93 Wash.2d at 640, 611 P.2d 771. The officer arrested Larson and a subsequent search yielded evidence of several additional crimes. Larson, 93 Wash.2d at 640, 611 P.2d 771. Larson moved to suppress all the evidence on the basis that there was a seizure that violated her Fourth Amendment rights. Larson, 93 Wash.2d at 640, 611 P.2d 771.

Our Supreme Court held Larson was not detained because of a reasonable suspicion based on objective facts that she was involved in criminal activity; rather, she was detained because of her presence in a particular location, even though she had a legal right to be there. Id.

More recently, in State v. Doughty, 170 Wash.2d 57, 239 P.3d 573 (2010), our Supreme Court rejected the notion that proximity to suspected criminal activity, without more, can justify a Terry stop. Doughty noted that neither a person's presence in a high-crime area at a late hour, nor a person's mere proximity to others independently suspected of criminal activity are sufficient to justify a Terry stop. 170 Wash.2d at 62 (quoting State v. Ellwood, 52 Wash. App. 70, 74, 757 P.2d 547 (1988); State v. Thompson, 93 Wash.2d 841, 613 P.2d 525 (1980)). And the Court held that a Terry stop of Doughty was not justified based solely on a police

officer observing Doughty approach and then leave a suspected drug house at 3:20 am. Doughty, 170 Wash.2d at 64.

Similarly in State v. Ozuna, this Court concluded that a stop and search were not constitutionally justifiable because officers had no information, such as a description, tying the defendants to the crime, particularly given that suspects had been reported running away from the location of the defendants' car. State v. Ozuna, 80 Wash.App. 684, 911 P.2d 395 (1996).

Police, in State v. Wakely, 29 Wash.App. 239, 628 P.2d 835 (1981), had specific information that the person they stopped had been involved in a shooting incident. In that case, witnesses reported gunshots being fired at an apartment complex. The witnesses gave a detailed description of Wakeley's car, a description of Wakeley himself, and information that Wakeley had acted in a suspicious manner after the shots had been fired.

As the officer approached the vicinity of where the reported shots, he observed a vehicle matching the description given by witnesses. He observed Wakeley attempt to hide something. The officer pursued and stopped Wakeley's car. State v. Wakeley, 29 Wn.App. at 240.

Because he believed the occupants of the car had been involved in a shooting incident, the officer radioed for backup assistance. Two other officers arrived; all the officers unholstered their revolvers and directed the occupants to exit the vehicle, one at a time. Wakeley, the driver, was

the first to exit. He was frisked for weapons, handcuffed, and instructed to kneel on the ground behind the car. The passenger was then subjected to the same procedure. As the passenger exited, one of the officers observed, in plain view, a plastic bag of green vegetable matter, which he recognized to be marijuana. The officers then arrested Wakeley and his companion for possession of marijuana. State v. Wakeley, 29 Wn.App. at 240.

This Court found that officers had a well-founded suspicion based on objective facts that Wakeley was connected to the shooting. Therefore, the officers were lawfully in a position to view the marijuana and their seizure of the contraband was proper. Wakeley, 29 Wn.App. at 243.

Unlike the officers in Wakeley, the officers here did not have a well-founded suspicion based on objective facts that Mr. Bojorquez was involved in any criminal activity when they stopped him. No one reported a vehicle used in the commission of the crime. 5/7/10 RP 36; 7/9/10 RP 14; 7/9/10 RP 24. Also, no one described Mr. Bojorquez as the shooter. And it is questionable whether anyone truly identified Moreno as the shooter. 7/9/10 RP 16; 12/21/10 RP 40-41.

Moreover, contrary to what the officer claimed, Mr. Bojorquez did not abruptly stop his car when he drove out of the alley. 5/7/10 RP 33; CP 70-73; CP 74-77; 7/9/10 RP 14. In fact, another officer testified that Mr. Bojorquez drove out of the alley at normal speed. 12/21/10 RP 30-33. Finally, there was nothing in the record to prove the officer's theory that

Mr. Bojorquez signaled to turn towards the patrol car in an effort to avoid capture.

Given that police did not stop Mr. Borjorquez to enforce a traffic law, but rather to conduct an unrelated investigation, the purpose of the traffic stop was pretextual.

ii. The amount of physical intrusion on the defendant's liberty. The means of investigation need not be the least intrusive available, provided the police do not act unreasonably "in failing to recognize or to pursue" a less intrusive alternative. United States v. Sharpe, 470 U.S. 687, 105 S. Ct. 1576, 84 L. Ed. 2d 616 (1985).

The purpose of the minimally intrusive Terry stop ... is to allow the police to make an intermediate response to a situation for which there is no probable cause to arrest but which calls for further investigation. As the Terry Court noted, a temporary seizure must be "reasonably related in scope to the justification for [its] initiation." The logical corollary to this is that if, at its inception, there is nothing, which reasonably and in good faith can be ascertained during a Terry stop, the stop is unreasonable. State v. Armenta, 134 Wash.2d 1, 948 P.2d 1280 (1997) citing State v. Kennedy, 107 Wash.2d 17, 726 P.2d 445 (1986).

Here, without any independent information to link Mr. Bojorquez or his car to the shooting, police cornered Mr. Bojorquez, shone a spotlight in his and his passengers' faces, and directed everyone in the car to raise his hands. The officer held them there, in that state, while he

waited for assistance. Then, he ordered everyone out of the car to question them. 5/7/10 RP 38-42.

This level of intrusion was anything but minimal or reasonable. The officer had only an inchoate hunch that people who wore red in that neighborhood wanted trouble. 5/7/10 RP 36-37.

iii. The length of time the defendant is detained. The United States Supreme Court has declined to set an absolute limit on the permissible duration of a Terry stop in terms of minutes or hours. The duration of a stop is evaluated in terms of whether “the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect].” United States v. Sharpe, 470 U.S. 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 616 (1985); see Florida v. Royer, 460 U.S. 500, 103 S. Ct. 1325, 75 L. Ed. 2d 238 (1983) (noting that a stop may “last no longer than is necessary to effectuate the purpose of the stop”); cf. State v. Cunningham, 116 Wash. App. 228-29, 65 P.3d 329 (2003) (finding a 45-minute wait with suspect in handcuffs to be a permissible *Terry* stop and not a formal arrest because officer’s questions related only to the identification of the suspect and suspect’s actions caused the lengthy delay). The police, however, may detain a person for a reasonable period of time to ascertain whether the person is involved in criminal activity, as long as the investigation is focused upon the person detained. State v. Moon, 45 Wash.App. 695, 726 P.2d 1263 (1986).

Here, it is unclear exactly how long Mr. Bojorquez was detained, but the record showed Moreno was detained in the back of a patrol car for over an hour. 12/8/10 RP 71. It seemed likely police detained Mr. Bojorquez for that same amount of time. 12/21/10 RP 59. Even if he was not detained for over an hour, the fact officers held him there while they looked for something with which to charge him was contrary to Terry. 12/22/10 RP 88.

The facts here amount to an improper stop under Terry. The purpose of the stop was pretextual, the amount of physical intrusion on Mr. Bojorquez's liberty was significant, and the length of time Mr. Bojorquez was detained was unreasonable. Consequently, the trial court erred when it concluded the officers had authority to stop Mr. Bojorquez.

B. The magistrate relied on material misrepresentations to establish probable cause. In reviewing whether facts are sufficient to support probable cause in an affidavit for a search warrant, this Court must employ a de novo standard of review. State v. Perez, 92 Wash.App. 1, 4, 963 P.2d 881 (1998), review denied, 137 Wash.2d 1035, 980 P.2d 1286 (1999).

The issuance of a search warrant is a "highly discretionary" act. State v. Ollivier, 161 Wash.App. 317, 254 P.3d 883 (2011) citing State v. Chenoweth, 160 Wash.2d 477, 158 P.3d 595 (2007). Misstatements in search warrant affidavits affect a warrant's validity if the court determines that the misstatements were made deliberately or recklessly. State v.

O'Connor, 39 Wash.App. 116-17, 692 P.2d 208 (1984). If the court determines that the misstatements were made deliberately or recklessly, the court determines whether the misstatements were material to the magistrate's determination of probable cause. State v. Taylor, 74 Wash.App. 117, 872 P.2d 53 (1994).

The United States Supreme Court has continually emphasized the importance of the constitutional requirement that a warrant cannot be obtained through governmental misrepresentation. Franks v. Delaware, 438 U.S. 165, 98 S.Ct. 2681 (1978). Even cases expanding the police power and diminishing the coverage of the exclusionary rule have taken care to state that the Franks rule remains intact. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); State v. Thetford, 109 Wash.2d 392, 745 P.2d 496 (1987).

In Franks, the United States Supreme Court held that in order to establish a violation of the Fourth Amendment, a defendant must prove by a preponderance of the evidence "that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth." 41 Suffolk U. L. Rev. 445 citing, Franks v. Delaware, 438 U.S. at 154, 155-56. The Federal Courts of Appeals have generally concluded that "[t]he Supreme Court in 'Franks gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases, except to state that "negligence or innocent mistake [is] insufficient.'"" 41 Suffolk U. L. Rev. at 470 citing United

States v. Yusuf, 461 F.3d 383 (3d Cir. 2006) (quoting Wilson v. Russo, 212 F.3d 787 (3d Cir. 2000)).

Our Supreme Court has adopted the Franks decision, State v. Garrison, 118 Wash.2d 870, 827 P.2d 1388 (1992), and has applied it to allegations of material omissions as well as to misrepresentations. State v. Cord, 103 Wash.2d 367, 693 P.2d 81 (1985). To be material, the challenged misstatements must be relevant to the magistrate's finding of probable cause. Id. If the misstatements are material, the misstatements are deleted from the affidavit. Id. If the affidavit is sufficient with the misstatements removed, the suppression motion fails. Id. (quoting State v. Garrison, 118 Wn.2d at 873.

Here, the officer made several misrepresentations to the magistrate when he applied for the search warrant. First, the officer told the magistrate that officers saw the shooter run towards the alley. That never happened. Officers had received reports that the shooter ran towards the alley. 12/22/10 RP 80; 12/17/10 RP 71-72. Secondly, the officer told the magistrate that officers recovered a .22 caliber bullet from the back seat of Mr. Bojorquez's car. 7/9/10 RP 25; 12/8/10 RP 61; 12/22/10 RP 86. Police never recovered any bullets from Mr. Bojorquez's car. 12/22/10 RP 80. Next, the officer claimed the hoodie found in Mr. Bojorquez's car matched the hoodie supposedly worn by the shooter. But, the hoodie recovered from Mr. Bojorquez's car did not match the shooter's clothing and was not even retained as evidence. 8/13/10 RP 78; 12/9/10 RP 88.

The trial court found these material misrepresentations used to establish probable cause as minor inconsistencies that had no substantive impact. CP 70-73; CP 74-77. However, this inaccurate information left the magistrate with a flawed impression of the situation. The policy governing the Franks holding requires a court to take into account all information necessary for a determination of probable cause. The purpose of a search warrant affidavit is to facilitate the detached and independent evaluation of evidence by an issuing magistrate. State v. Thein, 138 Wash.2d 133, 977 P. 585 (1999). The magistrate, here, was left with an incomplete and an erroneous picture of the facts. That practice is not in accord with the Franks policy to promote unbiased probable cause determinations. Moreover, these material misrepresentations established the basis for the search warrant. If they were deleted from the warrant affidavit, the magistrate would not have had a sufficient basis to issue the search warrant.

C. Evidence used to convict Mr. Bojorquez was seized as a result of an illegal Terry stop. Here, police violated Mr. Bojorquez's constitutional right to privacy. When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wash.2d 343, 359, 979 P.2d 833 (1999) (citing Kennedy, 107 Wash.2d 4, 726 P.2d 445 (1986)).

II. MR. BOJORQUEZ'S RIGHT TO A FAIR TRIAL WAS SEVERELY PREJUDICED BECAUSE THE TRIAL COURT ADMITTED EVIDENCE UNRELATED TO THE CRIME CHARGED AND THAT ONLY SERVED TO INFLAME THE PASSIONS OF THE JURY

This Court reviews a trial court's decisions regarding the admissibility of evidence under an abuse of discretion standard. State v. Stenson, 132 Wash.2d 701, 940 P.2d 1239 (1997). A trial judge has wide discretion in balancing the probative value of evidence against its prejudicial impact. Stenson, 132 Wash.2d at 702 (citing State v. Rivers, 129 Wash.2d 710, 921 P.2d 495 (1996)). A trial court does not abuse its discretion unless its decision is manifestly unreasonable or based upon untenable grounds or reasons. Stenson, 132 Wash.2d at 701 (citing State v. Powell, 126 Wash.2d 258, 893 P.2d 615 (1995)).

Evidence is relevant and admissible 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 than it would be without the evidence." ER 401. Generally, there must be a logical nexus between the evidence and the fact to be established. State v. Peterson, 35 Wash.App. 484, 667 P.2d 645 (1983) (citing State v. Whalon, 1 Wash.App. 791, 464 P.2d 730 (1970)). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The focus must be on whether the admitted evidence was unfairly prejudicial. State v. Bernson, 40 Wash.App. 736, 700 P.2d 758 (1985). Evidence likely to provoke an emotional response rather than a rational

decision is unfairly prejudicial. State v. Johnson, 90 Wash.App. 62, 950 P.2d 981 (1998).

For that reason, our Supreme Court has long since held that weapons or other articles not used in the commission of a crime are inadmissible. State v. Robinson, 24 Wash.2d 915, 167 P.2d 986 (1946).

In State v. Robinson, the Court ordered a new trial because the trial court erroneously admitted exhibits and permitted testimony to describe the exhibits that reached far beyond the scope of any proper examination. Robinson, 24 Wash.2d 911, 167 P.2d 986. The Court found “the greatest stretch of human imagination cannot bring to life in any manner a connection between the exhibits, a gas can and a railway switch key, and the crimes charged in the information, rape and assault. It was reversible error to admit the articles in evidence and to allow the extensive examination touching their use.” Robinson at 917.

Similarly, in State v. Rupe 101 Wash.2d 664, 683 P.2d 571 (1984), cert. denied, 486 U.S. 1061 (1988), our Supreme Court found that evidence of ownership of guns unrelated to the crime in the sentencing phase of a capital trial is both irrelevant and highly prejudicial. The weapons discussed in that case were mostly assault-type firearms. Rupe, 101 Wn.2d at 703-04. The court painted a severe picture of the potential prejudice caused by irrelevant evidence of gun ownership:

Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may

consider certain weapons as acceptable but others as “dangerous.” A third type may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that defendant was a dangerous individual and therefore deserved to die, just because he owned guns. Rupe, 101 Wn.2d at 708.

This case is not a capital case. However, the effect of prejudice on the trial’s outcome is equally severe. The trial court allowed the State to present to the jury the sawed-off shotgun that was found in the trunk of Mr. Bojorquez’s car. The shotgun was totally irrelevant to the crime. Bullet analysis proved the bullets fired during the shooting came from a .357 not a sawed-off shotgun. 12/23/10 RP 21.

The effect this gun had on the jury may have been quite profound. A jury is “made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.” State v. Hager, 171 Wash.2d 162, 248 P.3d 512 (2011) citing State v. Robinson, 24 Wash.2d 917, 167 P.2d 986 (1946).

In addition to the sawed off shotgun, the court admitted unfairly prejudicial evidence about gangs and gang membership. Evidence of a defendant’s gang membership may be relevant to show motive to commit the crime if the trial court finds a sufficient nexus between gang affiliation and motive for committing the crime. State v. Boot, 89 Wash. App. 780, 789, 950 P.2d 964, review denied, 135 Wash.2d 1015 (1998). Such

evidence has probative value when it tends to prove such mental states as intent, motive, or a witness's bias. United States v. Abel, 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (bias and motive of witness); State v. Johnson, 124 Wash.2d 69, 873 P.2d 514 (1994).

“Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association.” State v. Scott, 151 Wash. App. 526, 213 P.3d 71 (2009), review denied, 168 Wash.2d 1004 (2010). However, evidence of gang affiliation is considered highly prejudicial. State v. Asaeli, 150 Wash. App. 543, 208 P.3d 1155–1156 (2009). And admission of such evidence must be measured under the standards of ER 404(b). State v. Boot, 89 Wash. App. at 788–790; State v. Yarbrough, 151 Wash. App. 66, 210 P.3d 1029 (2009).

ER 404(b) provides that evidence of other crimes, wrongs, or acts, while not admissible to prove the character of a person in order to show action in conformity therewith, “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” In addition to the purposes listed in ER 404(b), evidence of other crimes, wrongs or acts may also be admitted as part of the “same transaction” or “res gestae” in order to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Lane, 125 Wash.2d 831, 889 P.2d 929 (1995).

Where evidence of gang activity or membership is not relevant, courts have recognized the significant potential for prejudice. In fact, our courts have been reluctant to allow the State to introduce gang affiliation alone to suggest a defendant's "guilt by association" in violation of ER 404(b)'s bar against propensity evidence. See, e.g., State v. Scott, 151 Wash.App. 520, 213 P.3d 71 (2009).

For example, in State v. Scott, this Court reversed the trial court's admission of gang-related activities in an assault and burglary prosecution because the State failed to connect the defendant's gang activities to a motive for the crimes charged.

In that case, Scott was a methamphetamine dealer and also a member of the West Side 18th Street Gang, a subset of the Sureños. He provided the drug to his associate, Younger, who in turn sold the drug to others. State v. Scott, 151 Wash.App. at 522. One of Younger's clients, Wendy, who was also his girlfriend at the time, owed money for drugs and for damage done to his car. She also never returned a .32 caliber handgun that Younger gave to her during their relationship.

Wendy ended the relationship with Younger and moved in with another man, Jeramie. Id. One night after a party, Wendy and Jeramie went to sleep in their bedroom. Around 4:00 am, Scott and another man broke down the bedroom door. Scott and two other men rushed in. They beat and stabbed Jeramie ruthlessly. Throughout the ordeal, Scott repeatedly told Wendy that this was how he helped his friends and that he

was “not going to let his friends get taken.” Wendy called 911 for help.

Id. at 522.

Police arrived and Jeramie identified Scott as one of his attackers. Id. at 523. Scott was charged with 2 counts of first-degree assault. He also was charged with one count of first-degree burglary. Deadly weapon enhancements were included in all three counts. Id. at 524.

The State moved in limine to admit evidence that Scott was a member of the West Side 18th Street Gang and that he committed the crimes because Wendy had shown the gang “disrespect.” The court concluded that the evidence was admissible and the jury found him guilty.

On appeal, this Court reversed Scott’s convictions. It found the evidence elicited at trial showed that only Scott, of the numerous actors in this affair, was a gang member. Without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony was that Scott was a bad person. Id. at 530.

The facts in Scott are similar to the facts here. Moreno was the only occupant in Mr. Bojorquez’s car who claimed to belong to a gang set. 12/8/10 RP 35. The young man who was an alleged target did not belong to a gang and did not have any affiliations with gang members. 12/21/10 RP 84. Even the houses hit did not belong to gang members. The only connection Mr. Bojorquez had to the crime was the red shirt he wore on the wrong side of town.

Without any other connection to the crime, the jury could only infer from the evidence that Mr. Bojorquez was a bad person. Any probative value this evidence may have had was significantly outweighed by its prejudicial effect. As a result, said evidence should not have been admitted.

### III. A SIGNIFICANT DISCOVERY VIOLATION DENIED MR. BOJORQUEZ THE ABILITY TO PREPARE AN EFFECTIVE DEFENSE AT TRIAL.

The trial court has wide latitude to grant or deny a motion to dismiss a criminal prosecution for discovery violations. State v. Woods, 143 Wash.2d 582, 23 P.3d 1046, cert. denied, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001). Consequently, an order denying a motion to dismiss is reviewed for manifest abuse of discretion. State v. Beliz, 104 Wash.App. 211, 15 P.3d 683 (2001). Dismissal of criminal prosecution due to arbitrary action or governmental misconduct is an extraordinary remedy that is warranted if a defendant can show prejudice that materially affected his right to a fair trial. Woods, 143 Wash.2d at 582.

The purpose of the discovery rules is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government. See State v. Blackwell, 120 Wash.2d 831, 845 P.2d 1017 (1993); State v. Bradfield, 29 Wash.App. 682, 630 P.2d 494, review denied, 96 Wash.2d 1018, 643 P.2d 882 (1981).

Simple mismanagement is sufficient to show governmental misconduct. State v. Michielli, 132 Wash.2d 239, 937 P.2d 587 (1997).

No evil or dishonest governmental action is required. Michielli, 132 Wash.2d at 239. Prejudice includes prejudice against the right to be represented by counsel who has sufficient opportunity to prepare a material part of the defense. Michielli, 132 Wash.2d at 240.

If the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights. State v. Price, 94 Wash.2d 814, 620 P.2d 994 (1980); see State v. Ralph Vernon G., 90 Wash.App. 21, 950 P.2d 971 (1998).

To require a defendant to request a continuance in these circumstances would present him with sacrificing either the right to a speedy trial or the right to be represented by effective counsel. State v. Sherman, 59 Wash.App. 769, 801 P.2d 274 (1990).

Here, Mr. Bojorquez moved the court to dismiss the case against him. He argued the State made a number of discovery violations that prejudiced his ability to effectively prepare for trial. The trial court

acknowledged those violations, but denied the motion to dismiss. The trial court reasoned it would be irresponsible to dismiss the case because each of the violations could be cured. 12/14/10 RP 46-58; 12/22/10 RP 125-127.

During the week of trial, the State introduced a ballistics report from an expert witness who was expected to testify that the bullet slug retrieved from the motor home came from the .357 Magnum found in Mr. Bojorquez's trunk. CP 93-171; 12/14/10 RP 47; 12/22/10 RP 108-109. In fact, the expert was expected to testify that it would be practically impossible for that slug to have come from another gun. 12/23/10 RP 21.

Mr. Bojorquez moved to exclude the testimony because the State violated discovery rules, when it presented this evidence, a day or so before the expert was expected in court. CP 93-171; 12/22/10 RP 111. Mr. Bojorquez explained that he was completely ill prepared to respond to such damning scientific evidence. 12/22/10 RP 111.

The State maintained that ballistics evidence was not new evidence and that Mr. Bojorquez had ample opportunity to ask for a continuance so that he could hire an expert. The State further added that any prejudice Mr. Bojorquez perceived was only speculative. 12/22/10 RP 113.

The trial court denied Mr. Bojorquez's motion. It basically found Mr. Bojorquez could have requested a Frye hearing at the outset, which would have required an expert. The court concluded it was left to speculate about prejudice unless Mr. Bojorquez could provide some

evidence that his inability to present a defense was prejudiced. 12/22/10  
RP 124.

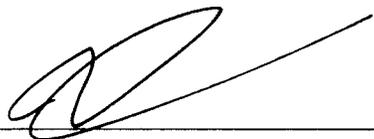
Here, the trial court did nothing to ensure that the State's failure to act with due diligence did not prejudice Mr. Bojorquez. It did not order a continuance so that Mr. Bojorquez could hire a defense expert and it did not exclude the testimony. Even if the evidence was not new evidence, the timeliness of the report coupled with the fact that the expert was due to testify, put Mr. Bojorquez at a great disadvantage and ultimately violated his right to due process. "Due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wash.2d 474-75, 880 P.2d 517 (1994).

Given that, the trial court's inactions disabled Mr. Bojorquez and severely thwarted his efforts to present a complete defense, nothing short of a new trial can ensure that Mr. Bojorquez will receive a fair trial. State v. Bourgeois, 133 Wash.2d 406, 945 P.2d 1120 (1997).

E. CONCLUSION

Given the reasons set forth above, Mr. Bojorquez respectfully asks this Court to reverse his convictions and to grant him a new trial.

Respectfully submitted this 14<sup>th</sup> day of November, 2011.



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Tanesha La'Trelle Canzater, WSBA# 34341  
Attorney for Appellant

**TANESHA LA'TRELLE CANZATER, ESQUIRE**  
Law Offices of Tanesha L. Canzater  
Post Office Box 29737  
Bellingham, Washington 98228-1737  
(360) 362-2435 (mobile)  
[Canz2@aol.com](mailto:Canz2@aol.com)

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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## **DECLARATION OF MAILING**

November 14, 2011

Court of Appeals Case No. 296776  
Superior Court Case No. 09-1-01938-5  
Case Name: *State of Washington v. Joshua Viento Bojorquez*

I declare under penalty and perjury of the laws of the State of Washington that on or around **Monday, November 14, 2011** I filed an APPELLANT'S OPENING BRIEF plus one copy with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties, by depositing in the United States of America mails an addressed postage paid envelope to the following:

DIVISION THREE COURT OF APPEALS  
Renee S. Townsley, Clerk/Administrator  
500 North Cedar Street  
Spokane, WA 99201-1905

YAKIMA COUNTY PROSECUTING ATTORNEY  
James P. Hagarty, Attorney at Law  
128 North Second Street  
Room 211  
Yakima, WA 98901

YAKIMA COUNTY PROSECUTING ATTORNEY  
David B. Trefry, Attorney at Law  
Post Office Box 4846  
Spokane, WA 99220

STAFFORD CREEK CORRECTIONS CENTER  
Joshua Viento Bojorquez, DOC# 346390  
191 Constantine Way  
Aberdeen, WA 98520



**Tanesha L. Canzater, WSBA # 34341**  
**Attorney for Joshua Viento Bojorquez**