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Court of Appeals
Division III
State of Washington

NO. 34229-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD BARTON,

Appellant.

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

The Honorable Harold Clarke
The Honorable Kathleen O'Connor

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence under CrR 3.6.

2. The trial court erred in concluding there was probable cause to stop appellant for third degree theft or attempted third degree theft.

3. The trial court erred in entering conclusions of law 2-5.[1]

4. Defense counsel was ineffective for promising witness testimony during opening statement and then failing to secure that witness's presence at trial with a timely material witness warrant.

Issues Pertaining to Assignments of Error

1. In general, a police officer may not arrest an individual without a warrant for a misdemeanor committed outside the officer's presence. RCW 10.31.100 specifies several exceptions to this rule, but does not include attempted theft. As a result, did a police officer unlawfully stop appellant on suspicion of attempted third degree theft, a misdemeanor, that was committed outside the officer's presence?

2. Did the same police officer lack reasonable, individualized suspicion to stop appellant for third degree theft where a store clerk informed the officer that appellant did not take anything from the store?

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[1] The trial court's written findings of fact and conclusions of law denying appellant's motion to suppress are attached to this brief as Appendix A.

3. Where the police officer had no lawful basis to stop appellant, must all subsequently discovered evidence be suppressed, including appellant's identity?

4. Was defense counsel ineffective where she promised the jury in opening statement it would hear from a certain witness during trial, and then failed to secure that witness's presence at trial with a timely material witness warrant, undermining defense counsel's credibility and resulting in an unbalanced evidentiary picture?

B. STATEMENT OF THE CASE

The State charged Harold Barton with possession of a stolen motor vehicle.[2] CP 1. The State alleged that on or about July 14, 2015, Barton knowingly received, retained, possessed, concealed, or disposed of a stolen vehicle, specifically a 1993 Ford F-250 truck belonging to Bryan DeCamp. CP 1-7; CP 77 (second amended information).

1. CrR 3.6 Suppression Motion

Brett Crownover works at Yoke's Fresh Markets (formerly Yoke's Pac-n-Save) in Airway Heights, Washington. CP 46, 51. On July 14, 2015, a coworker alerted Crownover to a man, later identified as Barton, with a cart "packed full of product" walking around the store. CP 46. Crownover

[2] The State also charged Barton with one count of making or possessing a motor vehicle theft tool. CP 1. This charge was later dropped after the State lost a suppression motion. CP 32-33, 76-77.

said he watched Barton stand in front of one of the aisles and then start "walking at a fast pace straight toward the exit." CP 47. Crownover stopped Barton "as he got to the front door and he quickly left without the groceries saying he forgot his wallet." CP 47.

Crownover called the Airway Heights Police Department directly and spoke with an officer. CP 47. Crownover informed the officer "the individual did not take any property." CP 47. While on the phone, Crownover followed Barton outside, where Barton joined another man, and drove away in a truck. CP 47. Crownover described the truck to the officer, but did not see a license plate. CP 47.

Officer Matthew Keetch responded. CP 52. He wrote in his police report that Crownover told him Barton forgot his wallet at home and would return with money to pay for the merchandise. CP 52. Crownover told Keetch that Barton left the parking lot heading south in "an older Ford pickup, white in color with a grey strip down the side of the truck." CP 52. Keetch observed a Ford truck matching that description driving away from Yoke's and pulled the truck over. CP 52. After stopping Barton and concluding the truck was stolen, Keetch placed Barton under arrest for possession of a stolen vehicle. CP 53-54.

In a defense interview, Keetch said Crownover told him Barton had not taken anything from the store. CP 73. Keetch explained he stopped

Barton because he believed it was possible Barton could have concealed stolen items in his pockets. CP 73. But Keetch was uncertain whether this was based on his experience with prior theft incidents or this one in particular. CP 73. Keetch further stated he did not know at the time of the stop whether Barton had anything concealed in his pockets, and neither did Crownover. CP 73.

Before trial, Barton moved to suppress all evidence discovered as a result of Keetch's seizure of Barton, because it was not based on reasonable, articulable suspicion of a crime. CP 37-44; 1RP 18-22.[3] Specifically, Barton argued his identity and the fact that the truck was stolen were discovered as a result of the unlawful seizure. CP 44. Barton asserted Officer Keetch did not have individualized suspicion that Barton left Yoke's with stolen items in his pockets. 1RP 19.

The court denied the motion to suppress, concluding, "Objectively speaking, regardless of the officer's subjective belief at the time, I think that there is probable cause to stop for either third-degree theft or an attempted third-degree theft at the time." 1RP 25. In its written findings and conclusions, the trial court concluded Barton "could have had unauthorized control over Yoke's property when he went passed [sic] all points of sale or

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[3] This brief refers to the verbatim reports of proceedings as follows: 1RP – September 24 and October 29, 2015; 2RP – November 11, 12, 13, 2015; 3RP – November 12, 2015; 4RP – February 29, 2016.

he could have abandoned the property." CP 75 (Conclusion of Law 2). The court reiterated "[t]here was probable cause to stop the listed vehicle for a theft third or attempted theft third." CP 75 (Conclusion of Law 3).

Upon defense motion, the trial court excluded any testimony at trial regarding the reason Officer Keetch stopped Barton. CP 81-84; 2RP 8-9.

2. Jury Trial: State's Case

DeCamp typically parked his Ford truck across the street from his house, where his daughter Elizabeth also lived. 2RP 66. Elizabeth worked from 2:00 to 10:00 p.m. on July 10, 2015. 2RP 61. She recalled the truck was parked across the street as usual when she returned home around 10:45 p.m. 2RP 62. She left for work around 5:45 a.m. the next morning. 2RP 63. When she returned around 2:15 p.m. the same day, she noticed the truck was gone, so she called her father to see if he had it. 2RP 63. DeCamp did not, so he reported the vehicle missing on July 11. 2RP 73, 97-98. DeCamp was unsure the last time he had seen the truck, because he had not been home in several days. 2RP 66, 73.

The DeCamps' elderly neighbor, John Smith, testified that around 6:00 a.m. on July 11, he saw "this gentleman walk across the street to the truck, get in and drive off." 2RP 80-81. Smith did not recognize the man. 2RP 81. Smith explained he did not call the police because the man

appeared to the start the car without trouble, so Smith thought he had bought it from DeCamp. 2RP 85-86.

Officer Keetch testified he pulled over a white Ford pickup truck with a gray stripe around 6:40 p.m. on July 14 in Airway Heights. 2RP 91-92. He ran the license plate and then contacted the driver. 2RP 92. The man identified himself as Barton, but did not have his driver's license with him. 2RP 92. Keetch then returned to his patrol car and discovered the license plate was associated with a maroon Ford truck. 2RP 92. Keetch checked the Spokane County "hot sheet" of recently stolen vehicles and found a white and gray Ford truck listed. 2RP 92-94. Keetch then checked the vehicle identification number of the truck Barton was driving and confirmed it was stolen. 2RP 94-96.

Keetch then asked Barton about the truck, who responded that he had just purchased it. 2RP 95. Barton produced a bill of sale signed and dated July 10, 2015, which specified, "I, Cynthia DeCamp, sell a 1993 Ford F250 to Harold Neville Barton, mileage 211,535, for the amount of $1200." 2RP 95-96. Keetch arrested Barton for possession of stolen vehicle. 2RP 96. Barton denied involvement and said he must have been scammed by the people who sold him the truck. 2RP 96-97. Barton explained he met "Cynthia DeCamp and Jake" in a Safeway parking lot on July 10 and purchased the truck from them. 2RP 96-97.

Keetch called DeCamp and confirmed the truck was reported stolen. 2RP 97-98. DeCamp informed Keetch his wife Cynthia had passed away on September 17, 2014. 2RP 68-69, 99-100. When Keetch informed Barton that Cynthia was actually deceased, Barton's "facial expression changed from frustration of being stopped to surprise." 2RP 100. Keetch testified Barton "didn't have much else to say after that, other than this is the same Cynthia DeCamp that he has always known, it's the same Cynthia DeCamp that he purchased the vehicle from in the Safeway parking lot." 2RP 101.

Keetch then searched the truck and found a license plate under the driver's seat that belonged to a dark green Ford truck and another license plate behind the rear jump seat that belonged to the white Ford truck at issue. 2RP 101. Keetch also seized the key from the ignition and later concluded it looked altered because of "obvious grinding, filing, sandpaper marks." 2RP 102-04. Keetch acknowledged, however, he was not an expert in identifying altered keys and, given the truck's age, it could have needed a replacement key. 2RP 113. Keetch further agreed there was no apparent damage to the ignition, locks, or the rest of the vehicle. 2RP 115-16.

3. Jury Trial: Defense Case

Barton testified that on July 10, "a girl from the neighborhood" named Cindy approached him and asked if he wanted to buy an older truck. 2RP 121-22. Barton had known Cindy for a few months, but only knew her

first name. 2RP 122-24. Barton was interested, so they agreed on a potential price of $1,200, and met later that day at Safeway. 2RP 122-23.

Barton liked the truck and it was in good condition except "[i]t smelled like dog." 2RP 123. However, Cindy told him there as something wrong with the title and showed him, "in lieu of title paperwork[,] with the last name DeCamp on it." 2RP 123. At that point, Barton was wary of the deal, so offered her $600 up front and $600 later so she could take care of the paperwork. 2RP 123-24. Cindy agreed and they made an appointment to meet the following week to finish the transaction. 2RP 124. Barton said Cindy then "wrote me a bill of sale, gave me a key, and I drove the truck back to the house." 2RP 124. Barton explained he presumed Cynthia DeCamp was Cindy's full name. 2RP 124-25.

Defense counsel argued in closing that Barton did not knowingly possess the stolen vehicle. 2RP 159. Counsel pointed to the fact that Smith did not identify Barton as the man who took the vehicle. 2RP 162. And, when he purchased the truck, Barton saw no signs the truck had been stolen—it was in good condition, with a working key and no punched ignition. 2RP 163-65. Counsel further pointed out Barton was entirely cooperative when he was pulled over and looked genuinely surprised when he was informed Cynthia DeCamp was deceased. 2RP 166-68. Ultimately, counsel argued, Barton got scammed. 2RP 168.

The jury found Barton guilty as charged of possession of a stolen vehicle. CP 104. The trial court found Barton's chemical dependency contributed to the offense and imposed a prison-based drug offender sentencing alternative (DOSA). CP 114-17; 4RP 18-19.

Barton filed a timely notice of appeal. CP 127.

C. ARGUMENT

1. BARTON'S CONVICTION SHOULD BE DISMISSED BECAUSE OFFICER KEETCH LACKED REASONABLE SUSPICION TO STOP BARTON FOR THEFT OR ATTEMPTED THEFT.

When a trial court denies a motion to suppress, this Court reviews the trial court's conclusions of law de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). "As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article 1, section 7 of the Washington State Constitution." State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State bears the "heavy burden" of demonstrating a warrantless search or seizure falls into one of the "'jealously and carefully drawn'" exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

a. Officer Keetch could not stop Barton without a warrant on suspicion of attempted third degree theft because it was not committed in his presence.

The trial court concluded Officer Keetch had probable cause to stop Barton for third degree theft or attempted third degree theft. CP 75; 1RP 25. One definition of theft is to "wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). A person is guilty of third degree theft is he or she steals property not exceeding $750 in value. RCW 9A.56.050(1). Third degree theft is a gross misdemeanor and attempted third degree theft is a misdemeanor. RCW 9A.56.050(2); RCW 9A.28.020(3)(e).

Warrantless arrests must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982). Under the common law, however, an officer was not permitted to arrest a suspect for a misdemeanor without a warrant unless the offense was committed in the officer's presence. State v. Ortega, 177 Wn.2d 116, 123, 297 P.3d 57 (2013). The presence requirement is satisfied when the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed. Id.

In derogation of the common law, RCW 10.31.100 provides that an officer with probable cause may arrest a suspect for certain enumerated misdemeanors and gross misdemeanors committed outside the officer's

presence. RCW 10.31.100(1)-(12); State v. Walker, 157 Wn.2d 307, 316, 138 P.3d 113 (2006). Some exceptions are physical harm or threats of harm to persons or property, criminal trespass, protection order violations, domestic violence, and indecent exposure. RCW 10.31.100(1)-(10). One specific exception is "the unlawful taking of property." RCW 10.31.100(1).

Statutory interpretation is a question of law reviewed de novo. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). This Court's fundamental objective is to ascertain and carry out the legislature's intent. Id. Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related provisions, and the statutory scheme as a whole. Id. at 926-27. If the statute is unambiguous, the court's inquiry ends. Id. at 927.

Statutes in derogation of the common law "are always strictly construed." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37, 593 P.2d 546 (1979). In McDonald, an officer investigating a one-car accident arrested the driver at the hospital, where he had been taken for treatment. Id. at 36. Former RCW 46.64.017 (1975) permitted an officer investigating a car accident to arrest the driver if the officer had probable cause to believe the driver violated traffic laws. Id. at 36-37.

Observing this statute was in derogation of the common law rule prohibiting misdemeanor arrests for crimes not committed in the officer's

presence, the supreme court strictly construed the statute to prohibit the arrest at the hospital. Id. at 37. The court held the rule of lenity compelled the same result. Id. at 37-38. The court explained: "If the legislature in fact wishes an officer to be permitted to arrest in this situation, it should do so with clear, unambiguous and unequivocal language." Id. at 38.

RCW 10.31.100(1) specifies "[a]ny police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the unlawful taking of property . . . shall have the authority to arrest the person." This plain language encompasses only the "taking of property," not attempted taking of property. As in McDonald, the statute must be strictly construed because it is in derogation of the common law. Strict construction of this language does not include an inchoate offense like attempted theft. At best, the statute is ambiguous, which dictates interpretation in Barton's favor under the rule of lenity. McDonald, 92 Wn.2d at 37-38. As such, Officer Keetch did not have lawful authority to stop Barton without a warrant for attempted third degree theft committed outside his presence.

Walker supports this result. There, a police officer ran a registration check of Walker's car as she drove by. Walker, 129 Wn. App. at 574. He discovered the car had been sold months earlier, but the title had not been transferred. Id. He pulled Walker over to investigate the misdemeanor

offense of failure to transfer title. Id. at 574-75. During the stop, the officer learned Walker's license was suspended, so he arrested her and found methamphetamine in her purse in a search incident to arrest. Id. at 574.

The court of appeals held the officer lacked authority to stop Walker to investigate failure to transfer title, a misdemeanor. Id. at 575-78. Failure to transfer title is not one of the statutory exemptions to the warrant requirement under RCW 10.31.100. "Therefore, without a warrant, the seizure of Ms. Walker for failure to transfer title was lawful only if the offense was committed in [the officer's] presence." Id. at 576. Because the failure to transfer title offense was completed 45 days after the date the vehicle was delivered, the offense was not committed in the officer's presence and the warrantless seizure was unlawful. Id. The officer could not investigate because "[t]here was simply nothing to investigate." Id. at 577.

Walker establishes that an officer cannot stop an individual to investigate a completed misdemeanor offense committed outside the officer's presence. Like the completed failure to transfer title offense in Walker, any attempted theft was completed when Barton left the shopping cart behind in the grocery store and drove away. There were no successive takings or continuing criminal impulse necessary to make theft an ongoing crime. See State v. Reeder, 181 Wn. App. 897, 924, 330 P.3d 786 (2014). Keetch therefore could not stop Barton to investigate the attempted theft.

The trial court erred in concluding Keetch's stop was justified because he had probable cause to believe Barton committed attempted third degree theft. CP 75 (Conclusion of Law 3). The only remaining basis for Keetch to stop Barton was to investigate a completed theft. However, as discussed in the section below, Keetch lacked reasonable, individualized suspicion that Barton had committed third degree theft.

b. Officer Keetch lacked reasonable, individualized suspicion that Barton committed third degree theft.

A person operating a vehicle is seized when a police officer conducts a traffic stop. State v. Walker, 129 Wn. App. 572, 575, 119 P.3d 399 (2005). There is no question Barton was seized when Officer Keetch pulled him over. However, Keetch lacked either probable cause or reasonable suspicion to stop Barton for third degree theft, contrary to the trial court's conclusion. Keetch's initial stop of Barton was therefore unlawful, necessitating suppression of all the subsequently discovered evidence.

Probable cause exists only "when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed." State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). The belief must be specific to the person to be searched or seized. State v. Grande, 164 Wn.2d 135, 144, 187 P.3d 248 (2008).

An investigatory stop short of an arrest—a Terry[4] stop—may be made on less than probable cause. State v. Thompson, 93 Wn.2d 838, 840, 613 P.2d 525 (1980). To justify such a seizure, "Terry requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). "Specific and articulable facts" means the circumstances must show "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). An officer's "inarticulate hunch[]" is insufficient. Doughty, 170 Wn.2d at 62 (quoting Terry, 392 U.S. at 22).

To determine whether a Terry stop was valid, the reviewing court "must evaluate the totality of circumstances presented to the investigating officer." Id. These circumstances are judged against an objective standard. Terry, 392 U.S. at 21-22. The officer's actions "must be justified at their inception," meaning circumstances arising after the seizure begins cannot inform the analysis. State v. Gatewood, 162 Wn.2d 534, 539, 182 P.3d 426 (2008); accord Terry, 392 U.S. at 21-22 (considering only "facts available to the officer at the moment of the seizure").

The level of suspicion required for a Terry stop "is obviously less demanding than that for probable cause." United States v. Sokolow, 490

[4] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). This brief therefore analyzes reasonable suspicion rather than probable cause, because even the lower standard was not met.[5] See Thompson, 93 Wn.2d at 841 (analyzing only reasonable suspicion where "even the lesser standard for a stop, short of an arrest, was not met").

Reasonable suspicion must be individualized. Id. In Doughty, an officer saw Doughty park his car at 3:20 a.m., approach a suspected drug house, stay for only two minutes, and then drive away. 170 Wn.2d at 60. The officer could not see any of Doughty's actions inside the house or even if he interacted with anyone inside. Id. Nevertheless, the officer stopped Doughty on suspicion of drug-related activity and discovered Doughty's license was suspended. Id. The officer arrested Doughty and found methamphetamine in Doughty's car in a search incident to arrest. Id.

The supreme court held the totality of the circumstances were insufficient to warrant intrusion into Doughty's private affairs. Id. at 64. The officer had no information *specific to Doughty* that he was involved in criminal activity. Id. Similarly, in Thompson, Thompson's rapid walking

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[5] Oddly, the trial court later applied the Terry standard in ruling Barton's statements to police were admissible under CrR 3.5. CP 105-08. The court found Keetch stopped Barton "as part of [an] investigatory stop regarding a possible theft at Yoke's Fresh Market." CP 105. The court concluded "[t]he defendant's statements to Officer Keetch as to the defendant's identification and the Yoke's incident were made as a result of a Terry stop and were voluntary, and not a result of custodial interrogation." CP 108.

away from the police did not give rise to the individualized suspicion necessary for a Terry stop. 93 Wn.2d at 841-42.

Nor can an officer's hunch justify a Terry stop. Id. at 842. In State v. Fuentes, 183 Wn.2d 149, 352 P.3d 152 (2015), the supreme court evaluated to two Terry stops in the consolidated cases State v. Sandoz and State v. Fuentes. In Sandoz, an officer was patrolling an apartment building with high number of documented criminal incidents, including drug-related activity. Id. at 153. When the officer drove by an illegally parked Jeep, the driver slumped down as if to hide from the officer. Id. The officer contacted the driver and asked why he was there. Id. at 154. During the contact, the officer saw Sandoz leave an apartment he knew to be occupied by an individual with a drug conviction. Id. Sandoz's eyes widened when he saw the officer. Id. Upon questioning, Sandoz admitted he had a crack pipe in his pocket. Id.

The supreme court held the totality of the circumstances did not justify a Terry stop. Id. at 161. The court reached this conclusion by "examining each fact identified by the officer as contributing to that suspicion." Id. at 159. For instance, the fact that the driver of the Jeep slumped down as the officer drove by did not suggest Sandoz was engaged in criminal activity. Id. at 160-61. Rather, the officer "just felt 'the entire

circumstance was suspicious.'" Id. at 161 (quoting VRPs). Acting on a mere hunch, like the officer did in Sandoz, does not justify a stop. Id.

Like Doughty and Sandoz, Officer Keetch lacked reasonable, individualized suspicion that Barton committed third degree theft. This Court must examine each fact identified by Keetch as contributing to his purported suspicion. Fuentes, 183 Wn.2d at 159.

Crownover saw Barton walk at a fast pace towards the store exit with a full cart. CP 46-47. When Crownover stopped Barton, Barton explained he forgot his wallet at home and exited the store without the cart. CP 47. Crownover called the police and spoke with Officer Keetch. CP 47. Crownover informed Keetch that Barton did not take any property from the store. CP 47. Keetch later acknowledged Crownover informed him Barton did not take anything from the store. CP 73. This alone establishes Keetch lacked reasonable suspicion that Barton committed theft. The only information Keetch had was that Barton did not take anything from the store.

The only basis Keetch gave for stopping Barton was he believed it was possible Barton could have concealed stolen items in his pockets. CP 73. But this suspicion was not individualized to Barton, given that Keetch knew Barton did not take anything from the store. Keetch acknowledged he was uncertain whether this suspicion was based on his experience with prior incidents or this particular incident. CP 73. The evidence established it

could only be the former, which Doughty and Sandoz hold is insufficient for a Terry stop.

There was no actual basis to believe Barton had concealed stolen items in his pockets, except for Keetch's general knowledge that people sometimes do so when shoplifting. The same was true in Doughty and Sandoz. The officers had general knowledge that the suspects entered apartments known for drug activity and stayed there a short amount of time. In general, people who enter known drugs houses may do so for drug-related purposes. But the officers lacked any individualized suspicion that Doughty and Sandoz had actually engaged in drug-related activities. Likewise, Keetch's mere hunch that Barton may have stolen items in his pockets does not establish the reasonable suspicion necessary for a valid Terry stop.

Below, the State argued "[i]t is not necessary for someone to leave a retail establishment with stolen items for them to commit the crime of theft," citing State v. Jones, 63 Wn. App. 703, 821 P.2d 543 (1992), and State v. Britten, 46 Wn. App. 571, 731 P.2d 508 (1986). Appendix B, at 3.[6] This Court should reject any such argument on appeal because Jones and Britten are readily distinguishable from Barton's case.

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[6] Undersigned counsel has filed a supplemental designation of clerk's papers. At the time of filing this brief, counsel has not yet received the index to those clerk's papers. Counsel has accordingly attached the supplemental clerk's papers as appendices to this brief.

In Jones, two store clerks saw Jones push a shopping cart full of cigarettes the wrong way down an aisle to within 10 feet of the store entrance. 63 Wn. App. at 708. The cart was covered in cardboard, which is often used to cover shoplifted goods. Id. at 704. When a clerk stopped Jones to ask what he was doing, Jones offered no reasonable explanation. Id. Instead, Jones denied he was taking the cigarettes, immediately tried to exit the store, and then swung at the store clerk when he tried to detain Jones. Id. The court concluded these facts were sufficient to sustain Jones's theft conviction. Id.

In Britten, a security guard saw Britten go in and out of a dressing room several times with various pairs of pants. 46 Wn. App. at 572. At one point Britten went in with two pairs and came out with one, and then went back in with several more pairs and stayed an unusually long time. Id. The security guard started looking through the dressing rooms and found one with several tags from the same pants Britten had taken in there. Id. The guard finally found Britten crouched in another dressing room wearing five pairs of the same type of pants. Id. Britten then gave the security guard a false name. Id. at 573. Even though Britten did not leave the store with the pants, the court held there was sufficient evidence that Britten wrongfully assumed ownership of the jeans. Id. at 574.

Jones and Britten do not stand for the extremely broad proposition, as the State would have it, that simply going past the point of sale in a store constitutes theft. Rather, the facts in those cases, taken together, were sufficient to establish the defendants wrongfully exerted unauthorized control over store property, with intent to deprive the store of that property. By contrast, Barton simply moved towards the exit with a cart and offered a reasonable explanation for why he had done so. Many, if not most of us, have inadvertently forgotten our wallet in the car or at home. Barton then left the store without any further altercation or suggestion that he intended to steal the merchandise, unlike Jones who tried to hit a store clerk or Britten who gave a false name.

Furthermore, RCW 10.31.100(1) permits a police officer to stop an individual without a warrant only for "the unlawful taking of property" committed outside the officer's presence. (Emphasis added.) Barton did not take any property from the grocery store. RCW 10.31.100(1) does not specify "theft," which includes exerting unauthorized control over property, like in Jones and Britten. Rather, it applies only to the "taking of property," which is narrower than theft, particularly given that RCW 10.31.100(1) must be strictly construed. McDonald, 92 Wn.2d at 37. Again, the statute is at best ambiguous as to what "taking" means and therefore must be interpreted in Barton's favor under the rule of lenity. Id. at 37-38.

Officer Keetch unlawfully seized Barton when he pulled Barton over, because he lacked reasonable, individualized suspicion that Barton had committed theft. Because even the lower standard of reasonable suspicion was not met here, the trial court erred in concluding Keetch had probable cause to stop Barton for theft. The only remaining question is the remedy.

c. Reversal and remand for dismissal with prejudice is the appropriate remedy.

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Thus, if an initial stop is unlawful, evidence discovered during any subsequent search is inadmissible as fruit of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

The same corollary applies to an arrest following an unlawful stop. Walker, 129 Wn. App. at 575. If an officer finds grounds for an arrest during the unlawful stop, the arrest is tainted and any evidence discovered during the unlawful stop must be suppressed. Id. This includes the unlawfully seized individual's identity. See, e.g., Doughty, 170 Wn.2d at 60, 65 (suppressing all evidence obtained after the unlawful seizure, including Doughty's identity); State v. Ellwood, 52 Wn. App. 70, 72, 74-75, 757 P.2d

547 (1988) (suppressing Ellwood's name, discovered as a result of an unlawful detention).

Barton's identity was discovered because Officer Keetch illegally stopped him. Keetch further learned Barton was driving a stolen vehicle as a result of the unlawful stop. He discovered the other license plates and shaved key when he searched the vehicle. None of this evidence would have been obtained absent the illegal seizure. All of it must therefore be suppressed as fruit of the poisonous tree. Without it, the State cannot prove possession of stolen vehicle. This Court should therefore reverse Barton's conviction and remand for dismissal of the charge with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR PROMISING A WITNESS'S TESTIMONY IN OPENING STATEMENT AND THEN FAILING TO SECURE THAT WITNESS'S PRESENCE AT TRIAL.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

a. Relevant facts

Defense counsel declared Shannon Bristlyn as a potential witness for the defense.[7] Appendix C. In opening statement, Barton's counsel summarized the expected defense theory that Barton bought the truck from his friend Cindy, unaware it was stolen. 3RP 184-86. Counsel continued:

> With regard to this incident, Mr. Barton was not the only one present and Cindy wasn't the only one present.

[7] Defense counsel spelled Bristlyn's name "Bristlin." However, her name is spelled "Bristlyn" in the transcripts. For consistency, this brief uses "Bristlyn."

> There was also a friend of Mr. Barton named Shannon Bristlyn, and she'll testify today as well. Shannon Bristlyn isn't Mr. Barton's girlfriend, she isn't Mr. Barton's family. She's just a neighbor who lives in the same apartment complex. She knows him, he knows her, and they both walk to the same Safeway, the Safeway where this occurred.
>
> Shannon Bristlyn went that day to buy some makeup. She was lucky and got money from her mom so she was gonna get more stuff. When she walked out of the Safeway store, she saw Mr. Barton and Cindy standing outside talking about this truck. Ms. Bristlyn will describe the truck and she will describe the interaction that she saw. She saw Mr. Barton exchange the money to Cindy. She saw Cindy hand Mr. Barton a bill of sale and she saw Mr. Barton drive away. She heard the exchange about confirming the title, that there was only 600 up front, and that the 600 remaining would be paid in the future when the title was authenticated. Basically, when he was able to get title. And she watched Mr. Barton drive away and she walked back to her apartment.

3RP 186-87.

On Tuesday, November 10, 2015, before jury selection, the trial court asked if Bristlyn was scheduled to testify. 2RP 6. Defense counsel responded, "We have contacted her, your Honor, so we're hoping. We're expecting her Thursday afternoon." 2RP 6. The court insisted defense counsel have Bristlyn arrive by 10:00 a.m. on Thursday, November 12, to expedite the trial. 2RP 6-7. Counsel explained she was let her investigator know to call Bristlyn again. 2RP 7.

After the State rested its case, Barton testified. 2RP 119-20. At the end of Barton's testimony, defense counsel told the court, "I am hoping Ms.

Bristlyn (Phonetic) is outside." 2RP 130. The State informed the court it had not been given an opportunity to interview Bristlyn yet. Bristlyn was not outside, so the court released the jury for lunch. 2RP 130-31.

Once the jury left the courtroom, defense counsel explained:

> I've been trying to get a hold of Randle, my investigator. I do not know if he was able to get a hold of her Tuesday. I called this morning to check in on the number that I have and I was able to speak to a gentleman. He said he would leave work and go make sure that she knows she needs to be here at, I said 11:00. He said she knew she had court today and was planning on being here, so I'm hoping he is bringing her over.

2RP 132. Defense counsel had not yet interviewed Bristlyn, because she took over the case from another defense attorney. 2RP 132; Appendix D.

The court asked counsel's plan if Bristlyn did not appear. 2RP 132. Counsel responded, "She's under subpoena, judge. I don't know what other options or recourse I have for her." 2RP 132-33. The court explained, "You can ask her to be identified as a material witness and get a warrant for her. But I don't know that I'm going to be inclined to stop the case, because I'd have to stop the case." 2RP 133. Unsure of what to do, counsel said, "I'd like to consult with some of my betters to figure out what to do in this matter." 2RP 133. The court recessed until the afternoon. 2RP 133.

Defense counsel was not able to locate Bristlyn during the recess. 2RP 134. Counsel explained her investigator contacted Bristlyn on

November 10 and told her when to appear in court. 2RP 134. Counsel said she "contacted the person who lives with Ms. Bristlyn today, and he indicated he would go get her and bring her here." 2RP 134. Counsel informed the court:

> She is not here. I do think she's material to the defense's case. We did subpoena her, and that subpoena was given to her on the 26th of October at 9:30 by [the defense investigator]. I'd ask the court for a material witness warrant with regard to this witness. I understand the court's indicated it's not inclined to give one in this case.

2RP 134-35. The court agreed it was uninclined to do so: "We're ready to go to the jury on this case." 2RP 135.

The trial court asked defense counsel the likelihood that she would be able to secure Bristlyn's presence within 24 hours. 2RP 135. Counsel said the man Bristlyn lives with told her and her investigator two different stories. 2RP 135. She explained Bristlyn was "not staying at the address she left me" and is only at that address once a month. 2RP 135. The State expressed doubts about securing Bristlyn's presence, explaining, "she just pled guilty on October 22nd, 2015 to a whole bunch of felonies. I'm just concerned we're never gonna get her." 2RP 137. Defense counsel acknowledged, "What I'm saying, judge, is obviously we have to do some realistic and diligent investigation to try to get this girl in." 2RP 135-36. Counsel noted "this matter didn't come up yesterday." 2RP 136.

After debating what to do, defense counsel informed the court, "Your honor, my client is telling me that he would like to go to the jury today. He would not like to wait until Monday." 2RP 138-39. Counsel accordingly withdrew her request for a material witness warrant. 2RP 139. The court noted it would be willing to continue to the case until Monday. 2RP 139. The prosecutor asked the court "to instruct defense not to bring up Shannon Bristlyn in their closing. I know they had an opening string of things she would testify to. Obviously none of that came into evidence." 2RP 141. The court instructed both parties not to discuss Bristlyn in closing. 2RP 141. The court called the jury in and the defense rested. 2RP 142.

b. Defense counsel was deficient in promising the jury Bristlyn's testimony then failing to timely secure her presence at trial.

Generally a defense attorney's decision not to call a witness is a matter of legitimate trial tactics. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). The presumption of competence can be overcome by showing counsel failed to secure a necessary witness's presence at trial. Id.; see also State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) ("Tactics cannot serve as a basis for a claim of inadequate representation, unless those tactics would be considered incompetent by lawyers of ordinary training and skill in the criminal law.").

A witness who has been placed under subpoena "may be compelled to attend and testify in open court." RCW 10.52.040. CrR 4.10(a) allows trial courts to issue "a warrant, subject to reasonable bail, for the arrest of a material witness," where "[t]he witness has refused to obey a lawfully issued subpoena" or "[i]t may become impracticable to secure the presence of the witness by subpoena." The burden of showing materiality is met where the accused "establish[es] a colorable need for the person to be summoned." State v. Smith, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984).

Here, defense counsel's colloquy with the court demonstrated she knew Bristlyn's presence may be difficult to secure at trial, especially given Bristlyn's recent convictions. 2RP 134-36. Defense counsel mistakenly believed a subpoena would be enough. When it appeared it would not, defense counsel explained, "I don't know what other options or recourse I have for her." 2RP 132-33. The court had to explain to counsel that she could identify Bristlyn as a material witness and get a warrant for her appearance. 2RP 133. This exchange demonstrated defense counsel's failure to timely request a material witness warrant was not tactical. Rather, her failure to timely request a material witness warrant was based on her unfamiliarity with that procedure.

Counsel's failure to timely request a material witness warrant for Bristlyn fell below the standard expected for effective representation. Any

reasonable criminal defense attorney should be familiar with the process for securing a material witness warrant. This is particularly true with recalcitrant defense witnesses, who may have outstanding warrants or prior convictions, as in Bristlyn did. It should be relatively easy to anticipate a witness's reluctance to appear in such circumstances. Counsel was also on notice that Bristlyn was difficult to contact and may not appear. No reasonable strategy can explain counsel's failure to secure Bristlyn's presence, where the importance of her testimony was obvious.

Such neglect constitutes deficient performance. Two cases are particularly instructive in this regard. In Washington v. Smith, 219 F.3d 620 (7th Cir. 2000), defense counsel was ineffective for failing to subpoena witnesses, including a "hard to reach" alibi witness until two days before her scheduled testimony. Id. at 629, 631-32. Washington was charged as an accomplice to an armed robbery. Id. at 622. Gola Richardson was listed as a defense alibi witness based on her anticipated testimony that Washington was at her house during the robbery. Id. at 624-25.

Defense counsel attempted to reach Richardson by visiting her home three times, and left a business card with someone there. Id. at 625, 629. Richardson did not respond. Id. at 629. Counsel did not interview Richardson, did not seek the assistance of an investigator to contact her, and did not serve her with a subpoena until two days before her scheduled

testimony. Id. By the time defense counsel served the subpoena, Richardson had left town for a week and therefore could not testify. Id. at 625, 629.

Several reviewing courts found counsel's attempts to secure Richardson's presence were reasonable. Id. at 626-30. The Seventh Circuit "emphatically" disagreed. Id. at 629. The court noted there was no tactical reason for the delayed subpoena given that counsel was aware Richardson was hard to find. Id. at 629-30. The court concluded defense counsel's failure to subpoena Richardson until two days before her scheduled testimony fell "wide of the mark" of "'the range of professionally competent assistance.'" Id. at 630 (quoting Strickland, 466 U.S. at 690).

In Young v. Washington, 747 F. Supp. 2d 1213, 1214-15, 1223 (W.D. Wash. 2010), the court concluded defense counsel's failure to subpoena Young's son and acquitted co-defendant, Matthew, was ineffective. Young was charged with first degree murder for an incident involving his son and several other people. Id. at 1215. Although undisputed that Matthew shot the victim, he was nonetheless acquitted of first degree murder under a felony murder theory with a predicate felony of robbery. Id. at 1215-16. Matthew testified at his own trial that he shot the victim not in the course of a robbery but as part of a drug deal gone bad, which supported only a second degree murder charge. Id. at 1215.

Young's defense counsel informed the trial court he intended to call Matthew as a witness. Id. at 1216. Before trial, counsel understood Matthew would be available as a witness. Id. As trial approached, however, counsel learned Matthew did not intend to testify. Id. Nevertheless, Young's counsel did not serve Matthew with a subpoena. Id. at 1216-17.

On Young's petition for habeas corpus, the federal district court found defense counsel's failure to subpoena Matthew constituted ineffective assistance of counsel. Id. at 1218-19. The court noted that while counsel may have had a reasonable belief Matthew would voluntarily appear, that mistaken belief nonetheless undermined the fundamental fairness of Young's trial. Id. at 1220. Had counsel subpoenaed Matthew, the jury would have been presented with a more balanced evidentiary picture. Id. at 1222. As a result, there was a reasonable probability the jury would have doubted Young was involved in the robbery. Id. at 1222-23.

Like Washington and Young, counsel failed to secure the presence of a witness necessary to Barton's defense. Counsel was aware Bristlyn was difficult to reach, given the difficulty both she and her investigator had in contacting Bristlyn in person or by telephone. 2RP 132-36. But counsel was also aware of the material, corroborating nature of Bristlyn's

anticipated testimony, given her opening statement. 3RP 186-87. Under the discussed case law, counsel's failure to timely request a material witness warrant was not tactical under these circumstances. This is especially true given counsel's indication she did not know what a material witness warrant was—clearly falling "wide of the mark" of reasonable performance by a criminal defense attorney.

If counsel had acted in a timely manner to request a material witness warrant, Barton would not have been forced to choose between Bristlyn's testimony and a speedy resolution of his case. 2RP 138-39. Moreover, it was ultimately defense counsel's, not Barton's decision, about whether to continue without Bristlyn's testimony. The Washington Supreme Court has recognized the strategic decisions of selecting witnesses and introducing evidence rest with defense counsel, not the client. State v. Grier, 171 Wn.2d 17, 31-32, 246 P.3d 1260 (2011). Barton's wish to proceed with the case does not nullify counsel's deficient performance, because it was her decision to make. Withdrawing her request for a material witness warrant was therefore not a legitimate strategy, but an unreasonable decision that deprived the client of her professional judgment that Grier contemplates.

Counsel's failure to secure Bristlyn's presence through a timely material witness warrant constituted deficient performance. Barton has therefore satisfied the first prong of Strickland.

c. Counsel's deficient performance resulted in an unbalanced evidentiary picture, prejudicing the outcome of Barton's trial.

Bristlyn's testimony was extremely important corroborating evidence of the defense theory that Barton did not knowingly possess the stolen vehicle. Barton explained at trial that he purchased the truck from his friend Cindy and had no reason to believe the truck was stolen. 2RP 121-25. The truck had no obvious damage and Cindy provided Barton with a bill of sale in Cynthia DeCamp's name, which Barton presumed was Cindy's full name. 2RP 123-24. Officer Keetch testified Barton's facial expression changed from frustration to surprise when he learned Cynthia DeCamp was actually deceased, consistent with Barton's version of events. 2RP 100.

The problem with Barton's testimony, however, was that Barton had an obvious stake in the outcome of the trial: to avoid a criminal conviction and prison sentence. This was where Bristlyn's testimony was critical. In opening, defense counsel emphasized Bristlyn's relative disinterest in the outcome of the trial: "Bristlyn isn't Mr. Barton's girlfriend, she isn't Mr. Barton's family. She's just a neighbor who lives in the same apartment

complex." 3RP 186. A neighbor without close ties to Barton would not likely have compelling reasons to lie on Barton's behalf.

Defense counsel then explained Bristlyn saw the transaction between Barton and Cindy, just as Barton described it. Bristlyn's testimony would have corroborated Barton's testimony and potentially been more convincing, given her lack of bias. The facts of the case could be just as easily explained by the State's theory or the defense's theory. Without Bristlyn's testimony, the jury was presented with an unbalanced evidentiary picture, skewed significantly in the State's favor.[8] See Young, 747 F. Supp. 2d at 1221 (explaining numerous courts have found prejudice where attorney error results in a skewed evidentiary picture).

Counsel's failure to secure Bristlyn's was further prejudicial because she promised the jury in opening statement that it would hear Bristlyn's corroborating testimony at trial. 3RP 186-87. The Washington Supreme Court has recognized counsel's failure to follow up on promises to elicit certain evidence is "quite serious." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

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[8] See, e.g., Luna v. Cambra, 306 F.3d 954, 961, 966 (9th Cir. 2002) (counsel's failure to interview and subpoena alibi witnesses left defendant's alibi uncorroborated, prejudicing the outcome of the trial); Goodman v. Bertrand, 467 F.3d 1022, 1024, 1030 (7th Cir. 2006) (testimony from a disinterested eyewitness, who defense counsel failed to subpoena, was "undoubtedly important to creating reasonable doubt in the state's case" against the defendant).

In Greiff, defense counsel told jurors in opening that they would hear a police officer's testimony that the victim repeatedly denied any sexual assault. Id. at 916-17. In making this representation to the jury, counsel relied on the officer's testimony from Greiff's first trial. Id. at 917. However, the officer testified at Greiff's second trial he never asked the victim whether she had been raped, explaining he had confused another case with Greiff's. Id. at 917-18.

The Greiff court acknowledged the seriousness of defense counsel's inability to follow through on his representation during opening statement, noting such lack of follow up was "quite serious" because of the damage it caused to defense counsel's credibility. Id. at 921. However, the court did not find undue prejudice in part because the trial court concluded "it would be 'obvious' to the jury that the reason [the officer] did not testify the way Greiff's counsel said he would is because [the officer] had made a mistake in his earlier testimony." Id. at 922. In addition, the trial court "took appropriate curative steps to lessen any negative impact the opening statement may have had on Greiff's counsel's credibility," including admitting the officer's testimony from the previous trial and instructing the jury to use it to assess the officer's credibility. Id.

The Greiff court also rejected an ineffective assistance argument because "Greiff's claim was not based on the incompetence of his attorney"

but on the fact that the State failed to disclose the change in the officer's testimony before defense counsel's opening statement. Id. at 925. "Because Greiff [did] not claim his counsel acted in a manner that was objectively substandard," the court held Greiff failed to advance a true ineffective assistance claim. Id. at 925-26.

Greiff compels the conclusion that counsel's deficient performance prejudiced Barton. Defense counsel promised testimony from a relatively disinterested observer corroborating Barton's version of events, but failed to follow through on that promise. Given how short Barton's trial would, the jury did not likely forget defense counsel's emphasis on Bristlyn's testimony in opening. The serious damage caused to defense counsel's credibility by this broken promise far surpassed any harm in Greiff. Moreover, unlike Greiff, defense counsel unreasonably failed to secure Bristlyn's testimony at trial. As discussed, counsel had no legitimate basis for not requesting a material witness warrant until the day Bristlyn was scheduled testify.

Also unlike Greiff, the trial court took no curative steps to lessen the prejudice, instead forbidding defense counsel from discussing Bristlyn again. 2RP 141. Short of a mistrial, there was nothing available to the trial court that could cure the prejudice of counsel's unfulfilled promises to present corroborating evidence. Failing to demand the only sufficient remedy—mistrial—was itself extremely prejudicial. The jury was left with the

impression that counsel was overreaching or dishonest in promising corroborating evidence. One can only guess the negative inferences the jury drew from counsel's failure to produce Bristlyn or explain her absence.

Bristlyn's testimony was essential evidence corroborating the defense theory. Defense counsel's failure to deliver on her promise of this critical testimony wounded her credibility beyond repair. This Court should reverse and remand for a new trial because Barton was denied effective assistance of counsel.

3. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Barton does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for costs).

Barton's ability to pay must be determined before discretionary legal financial obligations (LFOs) can be imposed. State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). The trial court made no such finding, instead waiving all discretionary LFOs. CP 119-20; 4RP 19. Barton was 50 years

old at the time of sentencing. 4RP 10. He has been addicted to drugs almost his entire life and has a long history of drug offenses. 4RP 10-11; CP 109-12. The last time he worked was in 2011. 4RP 13. In his motion for indigency, Barton reported zero savings or assets, and noted that he receives food assistance from the State.[9] CP 144-45. The court granted Barton's request for a DOSA to give him the opportunity to turn his life around. 4RP 18-19. This Court should honor the trial court's decision and give Barton the same opportunity.

The trial court also found Barton indigent for purposes of the appeal. CP 147-48. If an individual qualifies as indigent, "courts should seriously question that person's ability to pay LFOs." State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). There has been no order finding Wilson's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume Barton remains indigent and give him the benefits of that indigency. RAP 15.2(f).

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[9] See Blazina, 182 Wn.2d at 838 (pointing to GR 34, which specifies courts must find a person indigent "if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps").

For these reasons, this Court should not assess appellate costs against Barton in the event he does not substantially prevail on appeal.

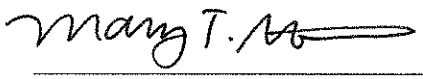
D. CONCLUSION

This Court should reverse and dismiss Barton's conviction because the initial stop that led to discovery of the stolen vehicle was unlawful. Alternatively, this Court should reverse and remand for a new trial because Barton's counsel was ineffective for failing to secure a key witness's presence at trial.

DATED this 30th day of December, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

FILED

NOV 04 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. HAROLD N. BARTON WM 10/30/1966 Defendant(s).	)	No. 15-1-02620-9 FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER having come for motion hearing on October 29, 2015 for Defendant's Motion to Suppress, and the defendant, HAROLD N. BARTON, having been present as well as counsel for defendant, BROOKE D. HAGARA, and counsel for the State of Washington, JENNIFER J. ZAPPONE, Deputy Prosecuting Attorney, and the court having heard from the parties above, and having reviewed the relevant statutes and case law, this Court FINDS that

FINDINGS OF FACT

1. On July 14, 2015, Officer Keetch received a call from Yoke's Fresh Market in Airway Heights;

2. The Yokes employee advised that a male subject had passed by all points of sale and did not make an attempt to pay for the merchandise. He further advised that the male stated that he forgot his wallet;

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3. The Yokes employee gave Officer Keetch a description of the vehicle;

4. Officer Keetch stopped a vehicle matching the description given by the Yoke's employee.

5. Officer Keetch made contact with the driver of the vehicle, who was identified as the defendant, Mr. Harold Barton.

6. Officer Keetch determined the vehicle was listed as stolen.

7. The defendant was arrested for possessing a stolen vehicle.

8. This Court also hereby incorporates its oral findings.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this Court CONCLUDES that:

1. Probable cause is an objective standard;
2. The Defendant could have had unauthorized control over Yoke's property when he went passed all points of sale or he could have abandoned the property;
3. There was probable cause to stop the listed vehicle for a theft third or attempted theft third;
4. This Court also hereby incorporates its oral conclusions of law; and
5. This Court therefore denies Defendant's Motion to Suppress.

IT IS SO ORDERED this 3 day of Nov, 2015.

THE HONORABLE SALVATORE COZZA

Presented by:

JENNIFER J. ZAPPONE
Deputy Prosecuting Attorney
WSBA # 41956

electronical approval
11/3/2015

BROOKE D. HAGARA
Defense Attorney
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Appendix B

FILED

OCT 26 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON Plaintiff, v. HAROLD NEVILLE BARTON WM 10/30/66 Defendant(s).	)	No. 15-1-02620-9 PA# 15-9-57609-0 STATE'S RESPONSE TO THE DEFENDANT'S MOTION TO SUPPRESS

COMES NOW, State of Washington, represented by LAWRENCE H. HASKELL, Spokane County Prosecuting Attorney, by and through his Deputy Prosecuting Attorney JENNIFER J. ZAPPONE, and now makes the following response to the defendant's motion to suppress evidence:

I. FACTS

The State is relying on the facts contained in the police report and the declarations of Brett Crownover and Randall Fichte. They indicate that on July 14, 2015, Brent Crownover was employed by Yokes Foods and that he was at work that day. While he was at work, he was contacted by another employee, Nathan, who noticed an individual with a cart full of merchandise walking around the store. Mr. Crownover began to watch the man as he walked around the pharmacy area. When the man got to aisle 6, he started to walk at a fast pace straight toward the

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exit. The man passed the cash registers and made no attempt to pay for any of the merchandise. Mr. Crownover caught the man as he got to the front door and the man quickly left saying that he forgot his wallet. Mr. Crownover called the Airway Heights Police Department. While he was on the phone he followed the man outside. Another man was waiting outside and they both went to a truck. The man who had been in the store drove the truck away. Mr. Crownover described the truck to the police. He was unable to give a license plate number to the police because he did not see one. Mr. Crownover told the police that the man did not take any property.

Officer Keetch of the Airway Heights Police Department responded to the call. As he arrived at Yoke's he saw a truck matching the description given by Mr. Crownover and the officer followed the truck. The officer stopped the truck and identified the driver as the defendant, Harold Barton. Mr. Barton confirmed that he had just left Yoke's after not paying for merchandise. He said that the shopping cart had never left the exterior doors and that he was going to get his wallet and return. The defendant mentioned that he had been contacted by a Yoke's employee, but that he had not been detained.

During the course of the stop, the officer determined that the defendant was in possession of a stolen vehicle and he was then detained for further investigation of that crime. Once the investigation was complete, the defendant was booked on that charge.

II. ISSUES PRESENTED

I. Was there a valid basis for Officer Keetch's stop of the defendant?

III. LAW AND ARGUMENT

I. The stop was valid because the officer had probable cause to arrest the defendant.

When the court reviews the facts in this case it is clear that whatever the officer's subjective reasons were for making the stop, there are sufficient objective facts present for the court to determine that at the time of the stop the officer had probable cause to arrest the defendant.

RCW 9A.56.020(1)(a) defines theft as: "To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services". When the court looks at the defendant's conduct it is clear that his actions manifested the intent to deprive Yoke's of their merchandise. The defendant was observed with a cart full of groceries walking around Yoke's for a while. Mr. Crownover saw the defendant standing in front of Aisle #6, and he then started walking at a fast pace towards the exit with the groceries. The defendant passed all the cash registers without making any attempt to pay. When Mr. Crownover contacted the defendant as he got to the front door, and the defendant quickly left without the groceries. The defendant told Mr. Crownover that he forgot his wallet.

This is not a case where the defendant got to a cash register, had the groceries scanned, and then realized that he didn't have his wallet. There is no indication in the facts that the defendant realized while he was shopping that he didn't have his wallet, and then abandoned the cart in an aisle and left the store. The defendant went past the cash registers and only stopped when he was contacted by Mr. Crownover. From the defendant's statements that his wallet was at home, it is reasonable to conclude that he entered the store without the ability to pay for anything and was planning to steal from Yoke's. It is not necessary for someone to leave a retail establishment with stolen items for them to commit the crime of theft. State v. Britten, 46 Wn. App. 571, 731 P.2d 508 (1986); State v. Jones, 63 Wn. App. 703, *review denied,* 118 Wn. 2d (1992). RCW 10.31.100(1) permits the warrantless arrest of a person who is unlawfully taking property, regardless of whether the crime occurs in the officer's presence. Since there is no indication of the value of the items in the shopping cart the facts support an arrest for third degree theft, or attempted third degree theft.

The defendant's arguments cite to cases where there were no facts to support an inference that a particular individual was involved in criminal activity. The facts in this case support a reasonable belief that the defendant had just been involved in criminal activity.

On page 11 of Officer Keetch's report there is an indication that the officer was aware that there was "a possible attempted theft" situation at Yoke's. The fact that the officer might be mistaken as to whether the defendant had any Yoke's property on him at the time of the stop does not negate the fact that there was probable cause to arrest the defendant at the time of the stop. The probable cause standard is an objective one and does not rely on a police officer's subjective belief. State v. Huff, 64 Wn. App. 641, 645-46, 826 P.2d 698 (1992). This was a valid stop and the court should deny the defendant's motion to suppress evidence.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this court deny the defendant's motion to suppress evidence.

DATED this 26th day of October, 2015

Respectfully submitted,
LAWRENCE H. HASKELL
Prosecuting Attorney

JENNIFER J. ZAPPONE
Deputy Prosecuting Attorney
WSBA# 41956

Appendix C

FILED

NOV 13 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. HAROLD N. BARTON, (DOB: 10/30/1966) Defendant.	))))))))))	No. 15-1-02620-9 LIST OF DEFENSE WITNESSES

The defendant hereby notifies the Court and the prosecutor that the following witnesses may be called to testify at trial:

Shannon Bristlin

Harold Barton

DATED this 9th day of November, 2015.

Respectfully submitted,

Jocelyn Cook, WSBA # 37625
Attorney for Defendant

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Appendix D

FILED

OCT 22 2015

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. HAROLD N. BARTON, Defendant.	)))))))	No. 15-1-02620-9 NOTICE OF APPEARANCE OF CO-COUNSEL (NTAPR)

TO: Clerk of the above named court, and
TO: The State of Washington, Plaintiff, and
TO: Attorney for Plaintiff.

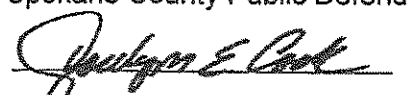
RE: MAKING OR POSSESSING A MOTOR VEHICLE THEFT TOOL,
POSSESSION OF STOLEN MOTOR VEHICLE

YOU AND EACH OF YOU PLEASE TAKE NOTICE that the Office of the Spokane County Public Defender having been appointed to represent the above defendant in the above-entitled cause, hereby appears in the above cause and requests that all further papers and pleadings herein, except original process, be served upon the undersigned attorney at the address stated below.

Request an ADR

DATED this 21st day of October, 2015.

Spokane County Public Defenders



JOCELYN COOK
WSBA # 37625
Attorney for Defendant

FE2015-02103

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State V. Harold Barton

No. 34229-8-III

Certificate of Service

On December 30, 2016 I mailed or e-served the brief of appellant directed to:

Harold Barton 914594
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PO Box 2049
Airway Heights, WA 99001

Brian O'Brien
Spokane Co Pros Atty
Via Email Per Agreement
bobrien@spokanecounty.org
SCPAappeals@spokanecounty.org

Re: Barton
Cause No., 34229-8-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

12-30-2016
Date
Done in Seattle, Washington