

34229-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HAROLD BARTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. SUMMARY OF THE CASE

Defendant claims he was unlawfully stopped for a misdemeanor theft from the grocery store while driving away from the scene. Defendant argues that there was no legal basis under RCW 10.31.100 to stop him based upon a misdemeanor attempted theft, claiming such a stop is prohibited under RCW 10.31.100. This argument fails for a number of reasons. First, RCW 10.31.100 prohibits an *arrest* based upon a probable cause for a non-exempted misdemeanor, *but does not prevent an investigation* into criminal conduct for a misdemeanor crime. Here defendant was never arrested for the theft. Second, RCW 10.31.100 does not differentiate between completed crimes and attempted crimes for theft, because both crimes *involve* theft.

Additionally, defendant argues there was no reasonable suspicion to believe that a theft occurred because never exited the store and did not conceal the items in his cart. In this regard, the defendant misperceives the evidence and the law in his case. One does not have to leave a store to exert unauthorized control over the store's property, where, as here, the defendant passed all checkouts without paying, was stopped just prior to exiting the doors of the store, had no money to pay for his cart full of goods, and thereafter left in a hurry without the goods claiming he was going home to get his wallet.

II. APPELLANT'S 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.
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.

III. ISSUES PRESENTED

1. When an officer makes a *Terry* stop of a person to investigate a crime, does that brief detention constitute an arrest for the purposes of RCW 10.31.100?
2. Could Officer Keetch stop the defendant for theft after being informed the defendant had passed by all points of sale at Yoke's Fresh Market and proceeded to the store's exit with a cart full of merchandise without making any attempt to pay for the items, and when confronted by store security, did not have the present ability to pay for any of the items?

3. Was counsel ineffective for not obtaining the presence of a subpoenaed witness for trial where the witness was highly impeachable and where the defendant and his attorney both requested to proceed to trial without this fugitive witness?

IV. STATEMENT OF THE CASE

1. Suppression Hearing.

The defendant claimed Officer Keetch had no reason for stopping him, and that all derivative evidence resulting from the stop should be suppressed. CP 37-73; RP Supp. 17-26.¹

On July 14, 2015, Officer Keetch received a call from Yoke's Fresh Market in Airway Heights. CP 74, Finding of Fact 1.² The Yoke's employee, Mr. Crownover, advised that a male subject had passed by all points of sale and failed to make any attempt to pay for merchandise. CP 74,

¹ "RP Supp." is the report of proceedings for the suppression hearings held before Judge Cozza on October 29, 2015, transcribed by Wittstock that are paginated 1 through 26. "RP" designates the trial proceedings, transcribed by Sanchez, paginated 1 through 179. "RPO" designates the opening statements separately transcribed by Sanchez, paginated 180 through 187.

² Judge Cozza's findings of fact and conclusions of law are found at CP 74-75. Appellant does not challenge any finding of fact. Unchallenged findings are deemed verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). In essence, defendant argues the trial court's findings do not support its conclusion that the officer had reasonable suspicion to stop the defendant for theft or attempted theft.

Finding of Fact 2. Crownover had observed Barton walk at a fast pace towards the store exit with a full cart. CP 46-47. When Crownover stopped Barton at the doors, Barton explained he forgot his wallet at home and exited the store without the cart. CP 74, Finding of Fact 2; CP 47.

Crownover gave Officer Keetch a description of the vehicle. CP 75, Finding of Fact 3. Officer Keetch stopped a vehicle matching the description given by the Yoke's employee. CP 75, Finding of Fact 4. Officer Keetch made contact with the driver of the vehicle, who was identified as the defendant, Mr. Harold Barton. CP 75, Finding of Fact 5. Officer Keetch determined the vehicle was listed as stolen. CP 75, Finding of Fact 6. The defendant was arrested for possessing a stolen vehicle. CP 75, Finding of Fact 7. From these factual findings, the trial court concluded 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.

CP 75, Conclusions of Law.

2. Jury Trial

Mr. DeCamp typically parked his Ford truck across the street from his house, where his daughter Elizabeth also lived. RP 66. Elizabeth worked from 2:00 p.m. to 10:00 p.m. on July 10, 2015. RP 61. She recalled the truck was parked across the street as usual when she returned home that day around 10:45 p.m. RP 62. She left for work on July 11, 2015, around 5:45 a.m. RP 63. When she returned around 2:15 p.m. that day, she noticed the truck was gone; concerned, she called her father to see if he had it. RP 63. He did not, so he reported the vehicle missing that day (July 11). RP 73, 97-98. The DeCamps' neighbor, John Smith, had observed the theft of the truck around 6:00 a.m. on July 11, when he saw a man he did not recognize get into the truck and drive away. RP 80-81.

On July 14, Officer Keetch stopped the Ford truck driven by the defendant.³ The truck was white and gray in color. Keetch ran the displayed rear license plate which returned as belonging to a maroon-colored Ford

³ The facts surrounding the theft at Yoke's giving rise to the initial *Terry stop* of the vehicle were not submitted to the jury as the court determined the legal issue regarding the stop was not relevant information:

THE COURT: We'll just start out with officer saying he stopped Mr. Barton. So we're not - it's fine to talk here about he was contacted by Yoke's, etc., but that's not going to actually be in front of the jury.

RP 42-43.

pickup. RP 93. When Officer Keetch contacted the defendant, the defendant verbally identified himself as Harold N. Barton. RP 92. He stated he did not have his driver's license with him. RP 92.

Officer Keetch looked at his "hot sheet" which listed recently stolen vehicles and noticed there was a white and gray Ford truck on the list. RP 94. The VIN (vehicle identification number) for the stolen Ford matched the truck the defendant was driving. *Id.* The defendant stated he purchased the vehicle from Cynthia DeCamp on July 10, 2015, at a Safeway parking lot. RP 97. He provided a bill of sale dated July 10, 2015, stating: "I Cynthia DeCamp sell 1993 Ford 250 to Harold Neville Barton, millage (sic) 211,535 for \$1,200." RP 96. He claimed he had known Cynthia DeCamp for a while. RP 96, 100. Unknown to him was the fact that Cynthia DeCamp, the former wife of Mr. DeCamp was deceased, having passed away on September 17, 2014. RP 69.

The defendant was detained for the investigation of a stolen vehicle. RP 96. Officer Keetch searched the vehicle and found an additional license plate underneath the driver's seat that did not belong to the stolen truck, but belonged to a separate dark green Ford truck. RP 101-102. Additionally, the license plate actually belonging to the white and gray Ford truck belonging to Mr. DeCamp was located behind the rear jump seat. RP 101-02. The

officer discovered the ignition key in the truck had been filed and sanded down. RP 103-04.

The defendant testified that he had purchased the truck on July 10, 2015, but that he did not receive the registration or title to the vehicle at the time he purchased it. RP 125. He also stated he purchased the vehicle from the same Cindy he had always known. RP 125.

V. ARGUMENT

A. WHEN AN OFFICER MAKES A *TERRY* STOP OF A PERSON TO INVESTIGATE A CRIME, THE ENSUING BRIEF DETENTION DOES NOT CONSTITUTE AN ARREST FOR THE PURPOSES OF RCW 10.31.100.

Defendant argues that there was no basis to stop him upon a reasonable suspicion that a misdemeanor of attempted theft had occurred, claiming such a *Terry* stop is prohibited under RCW 10.31.100.⁴

First, RCW 10.31.100 prohibits an *arrest* based upon a probable cause for a non-exempted misdemeanor, but the statute does not prevent an *investigation*, not involving an arrest, pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).⁵ Here it is uncontested that the

⁴ As discussed later, the theft was completed, and RCW 10.31.100 does not differentiate between attempts and completed crimes, but only differentiates between misdemeanors and felonies.

⁵ RCW 10.31.100(1):

Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or

defendant was *never* arrested for the theft at Yoke's. The court's *uncontested* finding was that the defendant was arrested for possessing a stolen vehicle.⁶ CP 75, Finding of Fact 7. The defendant was stopped to

gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority *to arrest* the person.

(Emphasis added).

⁶ In *State v. Ortega*, 177 Wn.2d 116, 128, 297 P.3d 57 (2013), our court decided the “fellow officer rule” did not apply to misdemeanors not exempted from the presence rule under RCW 10.31.100. In doing so, the court discussed what the term “arresting officer” meant under that statute, stating it was:

useful to consider the actions that constitute an “arrest.” ““An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person.”” *Patton*, 167 Wn.2d at 387, 219 P.3d 651 (quoting 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 3104, at 741 (3d ed. 2004)). The inquiry is whether a reasonable person under the circumstances would consider himself or herself under arrest. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Examples of conduct that would cause a reasonable person to believe he or she was under arrest include handcuffing the suspect, placing the suspect in a patrol vehicle for transport, and telling the suspect that he or she is under arrest. *State v. Radka*, 120 Wn. App. 43, 49-50, 83 P.3d 1038 (2004).

Ortega, 177 Wn.2d at 128.

investigate the Yoke's theft, but almost immediately the nature of the investigation changed when it was discovered the vehicle was stolen.

However, defendant argues that this Court's decision in *State v. Jacqueline Walker*,⁷ 129 Wn. App. 572, 577, 119 P.3d 399 (2005), stands for the proposition that an officer cannot temporarily detain a person pursuant to an otherwise valid *Terry* stop to investigate a misdemeanor where that misdemeanor did not occur in the officer's presence, and is not one of the misdemeanors excluded by RCW 10.31.100. The continued viability of this decision is questionable.

In *State v. Jacqueline Walker*, the defendant was stopped by law enforcement to investigate the misdemeanor failure to transfer title of an automobile. This misdemeanor was not committed in the officer's presence, and was an offense not among the exceptions to the warrant requirement for *arrest* for misdemeanors. After investigating this misdemeanor, the defendant was arrested for driving while license suspended and illegal drugs were found pursuant to that arrest. This Court found the stop was unlawful:

If the initial stop was unlawful, the subsequent search and evidence discovered during that search are inadmissible as fruits 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), and *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980)). The same

⁷ The first names are used in the two separate *Walker* cases as they address similar issues.

corollary applies to an arrest subsequent to an unlawful stop. If an officer finds grounds for an arrest as a result of an unlawful stop, the arrest is tainted and any evidence discovered during a search incident to the arrest cannot be admitted. *State v. Ellwood*, 52 Wn. App. 70, 74, 757 P.2d 547 (1988).

Jacqueline Walker, 129 Wn. App. at 575. In a terse, but cogent dissent,

Judge Brown stated:

An investigative stop was permitted here under *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986), because Officer Anthony Meyer articulated reasonable suspicion to believe Jacqueline C. Walker was involved in a title transfer crime. *See also State v. Belieu*, 112 Wn.2d 587, 594, 773 P.2d 46 (1989) (finding certain investigative stops to be permitted under the Fourth Amendment without probable cause to support a full arrest). Although this investigative stop was a seizure, it was not, under our facts, a full arrest.

While this title transfer crime would have been a misdemeanor not committed in Officer Meyer's presence, which would preclude an arrest without a warrant, the facts show Officer Meyer did not arrest Ms. Walker for a title transfer crime. Instead, she was arrested for driving with a suspended license, a separate matter that surfaced during his investigative stop. The search incident to the ensuing arrest for driving with suspended license was lawful. Thus, Ms. Walker's emphasis on *State v. Green*, 150 Wn.2d 740, 82 P.3d 239 (2004), is misplaced. Further, no issue of pretext is presented in our facts. Therefore, *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), has no application here.

Jacqueline Walker, 129 Wn. App. at 578 (Brown, J. dissenting).

It appears the majority's opinion in *Jacqueline Walker* rested on constitutional grounds. In support of its position, the majority cited

Kennedy, Wong Sun, Larson, and Ellwood. These cases all dealt with constitutionally defective searches. This constitutional reliance is misplaced. As our State Supreme Court noted in *State v. Ashley Walker*, 157 Wn.2d 307, 138 P.3d 113 (2006), decided just months *after* this Court’s decision in *Jaqueline Walker*, RCW 10.31.100 is not grounded in the constitution, but is, instead, a legislative act:

We find no constitutional basis to support an absolute right to be free from warrantless misdemeanor arrests in the state of Washington. The legislature may provide exceptions to the common law “in the presence” rule to allow for such arrests in response to changing social conditions. We also find the Fourth Amendment did not incorporate the common law “in the presence” rule for warrantless misdemeanor arrests.

Ashley Walker, 157 Wn.2d at 322.⁸

More recently, and inapposite to *Jacqueline Walker*, our State Supreme Court addressed the scope of RCW 10.31.100, stating:

Simply because an officer is not present during the commission of a misdemeanor, and therefore may not arrest the suspect, does not mean that the officer is powerless to enforce the law. *An officer who did not witness a misdemeanor may still stop and detain a person reasonably suspected of criminal activity. Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also Duncan*, 146 Wn.2d at 172, 43 P.3d 513.

⁸ The *Ashley Walker* Court also noted “[i]t is for the legislature to extend the authority of law enforcement officers to arrest for misdemeanors not committed in their presence.’ *State ex rel. McDonald v. Whatcom County Dist. Court*, 92 Wn.2d 35, 38, 593 P.2d 546 (1979).” 157 Wn.2d at 315.

In this case, assuming Officer Hockett reasonably suspected that Ortega had committed a criminal act, *he could have detained Ortega* until Officer McLaughlin arrived to make the arrest. Alternatively, if Officer Hockett lacked even reasonable suspicion of illegal activity, *he could have made contact with Ortega and attempted to establish probable cause*. See, e.g., *State v. Belanger*, 36 Wn. App. 818, 821, 677 P.2d 781 (1984) (finding that the officer at first lacked a well-founded suspicion of criminal activity to justify detaining the defendant, but “*he did have the limited right and duty to approach and inquire about what appeared to be suspicious circumstances*”).

Ortega, 177 Wn.2d at 130-31 (emphasis added). *Ortega* is on point.

Statutory analysis also favors the conclusion that RCW 10.31.100 prevents arrests, but not non-arrest investigations under *Terry v. Ohio*. The statute uses the term “arrest” but not the terms contact, investigate or investigation, or stop. Because the plain meaning of RCW 10.31.100 encompasses *arrests*, not *investigations* constitutionally permitted under *Terry v. Ohio*, the statute should be limited to its plain terms. In this analysis, a court begins by looking at the plain meaning of the statute as expressed through the words themselves. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008). If the meaning is plain on its face, the court applies the plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Only if the language is ambiguous does the court look to aids of construction. *Id.* at 110-11. There

is a vast difference in the terms “arrest” and “investigate.” The legislature meant what it said.

Moreover, the above interpretation does no harm to intent of the statute - the prevention of arrests for misdemeanor not observed by an officer. While an investigation, authorized and limited under *Terry*,⁹ may ultimately culminate in the issuance of a prosecutor’s summons and complaint under CrRLJ 2.1 and 2.2,¹⁰ with a concomitant probable cause determination by an independent magistrate, the intent of the legislature to prevent *custodial* arrests for misdemeanors occurring outside an officer’s presence is preserved, because *Terry* only allow a brief detention for the limited purposes of determining whether a crime has occurred or not.¹¹

⁹ Here, the identity of the defendant was not known to the Yoke’s employee and was relevant to the theft investigation.

¹⁰ Misdemeanors are charged by a summons and complaint. CrRLJ 2.1 and 2.2. If an arrest warrant is necessary, the court must make a probable cause determination before it issues it. *Id.*

¹¹ A *Terry* stop permits an officer to briefly detain and question a person reasonably suspected of criminal activity. *Terry*, 392 U.S. at 27-28. A valid *Terry* stop “must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop,” and “the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984). “If the results of the initial stop dispel an officer’s suspicions, then the officer must end the investigative stop.” *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). But if the officer’s initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. *Id.*

Because the brief *Terry* detention of the vehicle the defendant was operating did not constitute an arrest, the limitations regarding arrest set forth in RCW 10.31.100 should have no application to the brief investigation. Therefore, the arrest for possession of a stolen vehicle was a lawful result of the license plate check that immediately followed the stop of the stolen vehicle.

B. THE DEFENDANT’S CLAIM THAT RCW 10.31.100 DOES NOT ALLOW FOR ARRESTS OR DETENTION OF A PERSON FOR AN *ATTEMPTED* THIRD DEGREE THEFT IS NOT SUPPORTED BY THE STATUTE.

The defendant claims RCW 10.31.100 does not allow for a stop or arrest for an attempted third degree theft. Appellant Br. at 10-14. This claim is not supported by a plain reading of the statute. RCW 10.31.100(1) uses the term “involving” four times in one sentence.

Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, *involving* physical harm or threats of harm to any person or property or the unlawful taking of property or *involving* the use or possession of cannabis, or *involving* the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or *involving* criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

In a theft case, the statute requires an officer to reasonably believe that the person has committed a *misdemeanor* or gross misdemeanor *involving* the unlawful taking of property. “Involving” is not defined in the

statute. The court is to employ the plain and ordinary meaning of words as found in the dictionary in the absence of a statutory definition of words. *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). Synonymous with the transitive verb “involving” are the words “concerning,” and “implicating.”¹² Under these definitions, the defendant was *involved* in the unlawful taking of property, a misdemeanor. His claim that the theft was not a completed crime does not lessen or excuse his involvement. Neither legal nor factual impossibility is a defense to a charge of attempt. RCW 9A.28.020(2), nor is abandonment a defense to attempt, unless the crime was abandoned before any substantial step was taken. *State v. Workman*, 90 Wn.2d 443, 450, 584 P.2d 382 (1978). Even if the theft were an attempt, it *involved* theft, the exercise of unauthorized control over the property of Yoke’s. RCW 10.31.100 does not distinguish between attempts and completed crimes, but only differentiates between misdemeanors and felonies.

¹² Oxford English Dictionary 466 (Compact ed. 1971) defines “involve” as “6. To implicate in a charge or crime, to cause to prove (a person) to be concerned in it.” *See also* Roget’s Super Thesaurus 326 (4th ed. 2010) for “**involve** v. include, comprise, engage, contain, incorporate, concern, affect, entail, encompass, comprehend, implicate.”

C. THE DEFENDANT'S CLAIM THAT THERE WAS NO PROBABLE CAUSE OR REASONABLE SUSPICION TO BELIEVE A THEFT HAD OCCURRED IS BELIED BY THE FACTS OF THE CASE.

The trial court set forth its findings of fact and conclusions of law after hearing the suppression motion. The defendant does not challenge any of the trial court's factual findings. Challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, when the findings are unchallenged, they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Evidence is substantial if it persuades a fair-minded, rational person of the declared premise. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). When the parties present conflicting evidence, appeal courts defer to the trial court. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The defendant asserts that there was no probable cause or reasonable suspicion to believe a theft or attempted theft had occurred at Yoke's Fresh Market, and therefore there was no reason to conduct a *Terry* stop of the defendant. Appellant Br. at 14-23. He claims that a reasonable suspicion for the crime of theft or attempted theft does not arise when a person without

means to pay for any merchandise¹³ quickly passes by all points of sale¹⁴ with a shopping cart loaded with merchandise and is stopped just short of the store exit.¹⁵ This position is untenable.

A person may be guilty of theft whether or not they have left the store if the person intended to deprive the store of such property. *State v. Graham*, 182 Wn. App. 180, 184, 327 P.3d 717 (2014), citing *State v. Britten*, 46 Wn. App. 571, 572-74, 731 P.2d 508 (1986) (defendant put several jeans on under his own clothes and, although he had not yet left the store, he was guilty of theft because he intended to deprive the store of the items). The defendant distinguishes the facts of *Britten* and crafts the issue as whether a person may be convicted of a completed theft when he neither conceals the item nor successfully exits the store. Even accepting that this is the issue, his claim still fails.

Theft is now and always has been the asportation of an item belonging to another with an intent to steal it. *See State v. Scott*,

¹³ The male stated he did not have his wallet. CP 74, Findings of Fact 2.

¹⁴ The “male subject had passed by all points of sale.” CP 74, Findings of Fact 2.

¹⁵ *See* CP 75, Findings of Fact 8, (court incorporates its oral findings) and RP Supp. 24, where the Court acknowledged: “Now in this particular case we have a situation where I think both sides agree that Mr. Barton was past the points of sale and somewhere near the door when he’s challenged or stopped by an employee and then leaves the premises.”

86 Wash. 296, 298, 150 P. 423 (1915) (explaining that the corpus delicti of larceny involved the asportation of the item, the criminal act, shown by the moving of the property from one place to another, and that some person wrongfully brought about that fact.), *and see e.g., Craig v. State*, 410 So. 2d 449, 453 (Ala. Crim. App., 1981) (“it is clear that if a shopper moves merchandise from one place to another within a store with the intention to steal it, there has been asportation and the shopper may be found guilty of larceny”).

Many cases support the position that the intent of the defendant to exercise the unauthorized control over the property is controlling. While intent is more easily discerned when one conceals the items to be purloined, that is an issue of fact and not law. Moreover, as recognized here by the trial court, these cases affirm *convictions*, which demand a far higher standard of proof than that required to establish a reasonable suspicion.¹⁶ *See Groomes v. United States*, 155 A.2d 73, 75 (U.S. App. D.C. 1959) (customer secreted items in purse but then removed them when she noticed she was being watched: ‘The fact that the possession was brief or that the person was detected before the goods could be removed from the owner’s premises is immaterial’); *State v. White*, 404 So. 2d 1202 (La. 1981) (defendant took

¹⁶ Court’s Ruling, RP Supp. 24-25.

jewelry from display case when employee stepped away); *Commonwealth v. Davis*, 41 Mass. App. Ct. 901, 667 N.E.2d 1167 (1996) (defendant removed magnetic sticker from item, hid sticker behind other merchandise, and carried goods for which he had no means of paying past one set of cash registers and into another area of store), *review denied*, 423 Mass. 1107 (1996). These principles are well-summarized in *People v. Robinson*, 60 N.Y.2d 982, 459 N.E.2d 483, 471 N.Y.S.2d 258 (1983):

A person commits larceny when, “with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.” (Penal Law, § 155.05, subd. 1.) Where a larceny is committed by trespassory taking, a thief’s responsibility for the crime is not diminished because his act of carrying away the loot (asportation) is frustrated at an early stage. Thus, a shoplifter who exercises dominion and control over the goods wholly inconsistent with the continued rights of the owner can be guilty of larceny even if apprehended before leaving the store (*People v. Olivo*, 52 N.Y.2d 309, 438 N.Y.S.2d 242, 420 N.E.2d 40), a car thief who starts the car can commit larceny before he actually drives the automobile away (*People v. Alamo*, 34 N.Y.2d 453, 358 N.Y.S.2d 375, 315 N.E.2d 446), and a pickpocket can be guilty of larceny even though his removal of the victim’s possessions is interrupted.

Robinson, 60 N.Y.2d at 983-84.

With these precepts in mind, the closest set of facts to this case are from a Virginia case, *Welch v. Commonwealth*, 15 Va. App. 518, 520, 425 S.E.2d 101 (1992). There, the defendant was apprehended while wheeling a cart with two plainly visible television sets through the lawn and

garden section of a Lowes store, in a fenced area outside the store's building. The court explained that when an individual harbors the requisite intent to steal and permanently deprive the owner of property, acts on such intent by taking possession of the property even for an instant, and moves the targeted property, larceny has been committed. The slightest asportation is sufficient, even though the property may be abandoned immediately. *Welch*, 15 Va. App. at 522-23. In *Welch*, the court ultimately held that removal of the targeted property from the owner's premises is not required. "One may be said to have taken another's property by a trespass though he has not removed it from the other's premises. All that is required is that a defendant remove the items from the locations in the store where they were displayed by the owner." *Welch*, 15 Va. App. at 524, quoting Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 8.2(i) (2d ed. 1986).

The facts in *Welch* are similar to those here, in that Welch did not conceal the items and did not leave the store's premises. Barton argues that he did not do any act that manifested his intent to steal. But Barton misperceives the evidence in his case. The evidence of his intent to steal was logically established both by the fact he lacked funds to pay for the merchandise and the fact that he was stopped just inside the exit doors after passing all opportunities for purchase. These unchallenged findings support the trial court's conclusions of law that there was sufficient reasonable

suspicion or probable cause to stop the defendant for theft or attempted theft. There was no error in that regard.

D. COUNSEL WAS NOT INEFFECTIVE FOR NOT OBTAINING A MATERIAL WITNESS WARRANT FOR A SUBPOENAED TRIAL WITNESS WHERE THE WITNESS WAS HIGHLY IMPEACHABLE AND WHERE THE DEFENDANT AND HIS ATTORNEY REQUESTED THAT THE COURT PROCEED TO TRIAL WITHOUT THIS FUGITIVE WITNESS.

The defendant claims that counsel was ineffective for promising a witness's testimony in his opening statement and then failing to secure the witness's presence at trial. However, the issue is not reachable because any error was invited. Both defendant and counsel affirmatively requested that the trial proceed without the witness. This choice was a tactical one made after discovering the fugitive witness was extremely impeachable due to her very recent felony convictions and her apparent reluctance to attend court proceedings. The following facts are relevant to this issue.

During defendant's opening statement, defendant's counsel prefaced her remarks to the jury by stating she would "tell you the story we think you'll hear from evidence, and we often tell a different story. And we *presume that different evidence will be presented to you.*" RPO 184 (emphasis added). Later in her statement she outlined the evidence she expected, including testimony from defendant's friend, Shannon Bristlyn,

who was alleged to have been present with the defendant when he purchased and obtained the vehicle the day before it was reported stolen.¹⁷

Ms. Bristlyn never appeared for trial. Apparently she was subpoenaed. The defendant suggested continuing the case to obtain the appearance of this witness. RP 134-35. This discussion took place on Thursday, November 12, 2015. RP 134-36. The trial court expressed its concerns with doing the case the next day, stating that if that happened, the attorneys would be “at my beck and call as to exactly when I can do it.” RP 136. The prosecutor expressed some reservations regarding the likelihood of the witness ever showing up. She informed the court and the defendant that Ms. Bristlyn had entered guilty pleas to “*a whole bunch of felonies*” just a few weeks earlier, on October 22, 2015. RP 137 (emphasis added). Additionally, Ms. Bristlyn was placed on 12 months community supervision, yet was not living at the address she had given for her legal financial obligations (LFOs). RP 137. She was only at that address one day a month. RP 135, 138.

¹⁷ The defendant stated he bought the vehicle from Cynthia DeCamp on July 10, 2015, at a Safeway parking lot. RP 97. He provided a bill of sale dated July 10, 2015, stating: “I Cynthia DeCamp sell 1993 Ford 250 to Harold Neville Barton, millage (sic) 211,535 for \$1,200.” RP 96. The victim’s neighbor saw the vehicle being stolen on July 11, 2015.

The trial court made plans to accommodate the procurement of Ms. Bristlyn by continuing the case four days, to Monday, as the court had nothing scheduled on that day. RP 136-38. At that point, both the defendant's attorney and Mr. Barton unconditionally withdrew their request for a continuance to obtain the witness's testimony, even though the court expressed a willingness to continue the case to the following Monday. It is likely that the discovery of Ms. Bristlyn's recent "whole bunch of felonies" was a surprise to the defendant and counsel, as defendant had been in jail since his July arrest. RP 128. The court carefully inquired of *both* the defendant and defendant's counsel if this was their request:

MS. COOK: 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, so I will...

THE COURT: You're going to withdraw your request?

MS. COOK: I'm going to withdraw my request.

THE COURT: Is that correct, Mr. Barton?

THE DEFENDANT: Yes, ma'am.

THE COURT: I guess that's correct. If that's what -- I think the record should reflect that I would be willing to continue the case until Monday morning. I would say there's a caveat. I would have to inquire of the jury and make sure I have no juror who absolutely has -- can't make it. Because nobody had a problem with it being done this week. But if you've

withdrawn, I won't make that request because obviously the case will be done this week. Is that?

MS. COOK: That's what Mr. Barton's requested.

RP 138-39.

1. Standard of review for claim on ineffective assistance of counsel.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

In order to rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any “*conceivable* legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel’s conduct fell below an objective standard of reasonableness. To demonstrate prejudice, he must show that his trial counsel’s performance was so inadequate that there is a reasonable probability that the result at trial would have been different. *Strickland*, 466 U.S. at 694. A failure to prove either element defeats his claim. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

2. Discussion

Defendant’s claim of ineffective assistance of counsel fails under both prongs in this case. As to the objective standard of reasonableness, “the decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.” *State v. Kolesnik*, 146 Wn. App. 790, 812, 192 P.3d 937 (2008). Here, it was discovered that the potential witness, Ms. Birstlyn, was just recently convicted of a “*whole bunch of felonies*,” making her that much more impeachable. Trial counsel and defendant, after considering this new information and conferring with each other, most likely decided to forgo

whatever aid Ms. Bristlyn hypothetically could add to the case to avoid the age-old inference expressed in the adage “birds of a feather flock together.” *See State v. Gassman*, 160 Wn. App. 600, 612, 248 P.3d 155, *review denied*, 172 Wn.2d 1002 (2011). (“Moreover, Mr. Kongchunji was an unpredictable witness with varying statements; the decision not to compel his testimony may have been tactical. Thus, Mr. Gassman’s ineffective assistance of counsel claim fails”).

In evaluating ineffectiveness claims, courts must be highly deferential and where, as here, a potential witness has acquired numerous recent impeachable felonies, the decision of trial counsel should not be subject to second guessing.

Here, defendant fails to establish any prejudice as required under *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). It is pure speculation as to what Ms. Birstlyn would have actually testified to under oath. Her recalcitrance at appearing after being subpoenaed may reflect a desire not to harm the defendant, who was apparently her friend. The defendant testified. The jury found his testimony not credible. There is no showing that Ms. Bristlyn’s testimony would have aided and not hurt his case. *See Gassman*, 160 Wn. App. at 612 (“Mr. Gassman has not shown that the outcome of his trial would have been any different with Mr. Kongchunji’s testimony. Without this showing, Mr. Gassman cannot

establish prejudice. *See McFarland*, 127 Wn.2d at 335 (prejudice requires showing trial outcome would have been different”). That counsel suggested in opening that she may call a witness is of no import. The jury was clearly instructed that “if evidence was not admitted or was stricken from the record” that occurrence was not to be considered in reaching a verdict, and the “lawyer’s statements and arguments” are not evidence. RP 146-147; CP 91-93, Jury Instruction no. 1. “Juries are presumed to follow the court’s instructions absent evidence to the contrary.” *State v. Dye*, 170 Wn. App. 340, 348, 283 P.3d 1130 (2012). The defendant provides no evidence to the contrary.

Finally, any error in the failure to call the witness was invited by both the defendant and his counsel. The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To determine whether the invited error doctrine is applicable to a case, the court considers whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Pers. Restraint of Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013).

Here, the trial court agreed to continue the case to Monday to allow the defendant the ability to obtain his recalcitrant witness. Thereafter, counsel and the defendant, individually and together, *affirmatively* withdrew their request for a continuance and *affirmatively* requested to have the case go to the jury that day. RP 138-39. Any error was clearly invited.

E. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be

required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of his appeal on March 18, 2016, based on a declaration filed that date by the defendant. CP 147-48, 143-146. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

VI. CONCLUSION

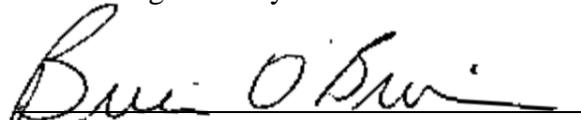
When an officer makes a *Terry* stop of a person to investigate a crime, the ensuing brief detention does not constitute an arrest for the purposes of RCW 10.31.100. The defendant’s claim that RCW 10.31.100 allows a stop or arrest for third degree theft, but does not allow for arrest or detention of a person for an *attempted* third degree theft, is not supported by the statute or the facts of this case.

Counsel was not ineffective for not obtaining a material witness warrant for a subpoenaed trial witness where the witness was highly impeachable, and the issue is not reviewable where the defendant and his

attorney invited any error in that regard by affirmatively requesting that the case be sent to the jury without this fugitive witness.

Dated this 30 day of March, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921

Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD N. BARTON,

Appellant.

NO. 34229-8-III

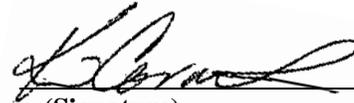
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 30, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Mary Swift
swiftm@nwattorney.net; sloanej@nwattorney.net

3/30/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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