

71837-1

71837-1

NO. 71837-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DELANTE HOWERTON,

Appellant.

2011 COURT REPORTER
2:38

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF FACTS</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. THERE WAS REASONABLE SUSPICION TO DETAIN HOWERTON BASED ON THE TOTALITY OF THE CIRCUMSTANCES: PARKS WAS A RELIABLE CITIZEN INFORMANT, THE INFORMATION WAS OBTAINED IN A RELIABLE FASHION, AND HUTCHINSON CORROBORATED PARKS' TIP.....	6
a. Parks Was A Reliable Citizen Informant	9
b. Information About The Crime Was Obtained In A Reliable Fashion	13
c. Police Corroborated Details Of Parks' Tip.....	14
2. HOWERTON WAS NOT PREJUDICED BY THE DELAY IN ENTRY OF CrR 3.6 FINDINGS	17
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Adams v. Williams, 407 U.S. 143,
92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) 7, 8

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 6, 7, 15

Ewing v. City of Stockton, 588 F.3d 1218
(9th Cir. 2009) 9

Illinois v. Gates, 462 U.S. 213,
103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) 8

Illinois v. Wardlow, 528 U.S. 119,
120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) 7

Navarette v. California, ___ U.S. ___,
134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014) 10, 12, 13, 14

United States v. Fernandez-Castillo, 324 F.3d 1114
(9th Cir. 2003), cert. denied,
540 U.S. 959 (2003) 8, 11

Washington State:

State v. Bailey, 154 Wn. App. 295,
224 P.3d 852 (2010) 6

State v. Gaddy, 152 Wn.2d 64,
93 P.3d 872 (2004) 9

State v. Gatewood, 163 Wn.2d 534,
182 P.3d 426 (2008) 15

State v. Hopkins, 128 Wn. App. 855,
117 P.3d 377 (2005) 11

<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	7, 9, 14, 15
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000).....	7
<u>State v. Lee</u> , 147 Wn. App. 912, 199 P.3d 445 (2008).....	8
<u>State v. Lesnick</u> , 84 Wn.2d 940, 530 P.2d 243 (1975).....	7, 9
<u>State v. Luther</u> , 157 Wn.2d 63, 134 P.3d 205 (2006).....	6
<u>State v. Mercer</u> , 45 Wn. App. 769, 727 P.2d 676 (1986).....	8
<u>State v. Moreno</u> , 173 Wn. App. 479, 294 P.3d 812 (2013).....	15
<u>State v. Quincy</u> , 122 Wn. App. 395, 95 P.3d 353 (2004), <u>review denied</u> , 153 Wn.2d 1028 (2005).....	18
<u>State v. Randall</u> , 73 Wn. App. 225, 868 P.2d 207 (1994).....	8
<u>State v. Saggars</u> , ___ Wn. App. ___, 332 P.3d 1034 (2014).....	7, 9, 13, 14
<u>State v. Sieler</u> , 95 Wn.2d 43, 621 P.2d 1272 (1980).....	8, 9
<u>State v. Smith</u> , 68 Wn. App. 201, 842 P.2d 494 (1992).....	18
<u>State v. Vandover</u> , 63 Wn. App. 754, 822 P.2d 784 (1992).....	9
<u>State v. Z.U.E.</u> , 178 Wn. App. 769, 315 P.3d 1158 (2014).....	16, 17

Constitutional Provisions

Federal:

U.S. Const. amend. IV 8

Washington State:

Const. art. I, § 7..... 8

Rules and Regulations

Washington State:

CrR 3.5..... 2

CrR 3.6..... 2, 3, 17, 19

A. ISSUES PRESENTED

1. Courts consider the totality of the circumstances when determining whether there was reasonable suspicion justifying an investigatory detention. Here, Laura Parks called 911 immediately after she witnessed a suspect break into a car across the street from her home. She gave her full name, phone number, and address, the suspect changed direction to walk away from the patrol car when police arrived, and the suspect matched the description that Parks gave. Did the trial court correctly conclude that the brief detention was supported by reasonable suspicion?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Did the trial court properly enter written findings in this case?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged defendant Delante Howerton by information with attempted theft of a motor vehicle, making or having vehicle theft tools, and intimidating a public servant. CP 1-2. Howerton moved to suppress evidence obtained as a result of the investigatory detention. CP 8-21. Following a CrR 3.5 and 3.6 hearing, the trial court denied Howerton's motion to suppress. 1RP 53-56.¹ The trial court likewise denied Howerton's motion to reconsider the court's ruling on his motion to suppress. 2RP 5-13; CP 39-46.

During trial, the court granted Howerton's motion to dismiss the charge of intimidating a public servant for insufficient evidence after both parties rested. 3RP 14. A jury convicted Howerton of attempted taking of a motor vehicle without permission in the second degree, a lesser-included crime of attempted theft of a motor vehicle, and making or having vehicle theft tools. CP 51-52. On each count, the trial court imposed suspended sentences of 364

¹ The verbatim report of the trial court proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (3/10/14); 2RP (3/11/14); 3RP (3/12/14, 3/28/14).

days, on condition that Howerton serve 150 days of confinement, to run consecutively. CP 85-87. Howerton appeals. CP 88-89.

2. SUBSTANTIVE FACTS²

On September 29, 2013, at 2:03 a.m., King County Sheriff's Deputy David Hutchinson was dispatched to a vehicle prowl in the 13200 block of Second Avenue Southwest in Burien. 1RP 6-8, 12. At 2:00 a.m., Laura Parks had called 911 to report that she had just seen a robbery. CP 23. She provided her full name, address, and phone number. CP 23-24. Parks explained what she had seen by stating, "They broke into a car," and she confirmed that the suspect did actually enter the car. CP 23-24.³ When the dispatcher asked Parks how much time had passed between the incident and her 911 call, she clarified that "[i]t just now happened." CP 24.

Parks provided a thorough description of the suspect as a black male, average build, short hair, five feet and seven inches tall, wearing a baggy black leather jacket and baggy pants.

² Because the issue on appeal relates solely to the pre-trial CrR 3.6 hearing, the substantive facts are taken from that hearing.

³ Although Parks used the pronoun "they" to refer to the sole male involved in the incident, there was never an allegation that multiple suspects were implicated.

CP 24-25. Further, Parks described the vehicle that the suspect had broken into as "a blue minivan...a Dodge, looks like a Caravan. Late model, '90s," and that it was one of four vehicles outside. CP 25. When asked if an officer could contact her if needed, Parks said "Yeah, that's fine." CP 25.

When Hutchinson arrived at the 13200 block of Second Avenue Southwest at 2:06 a.m., he saw Howerton walking southbound. 1RP 8, 12. Hutchinson was driving northbound toward Howerton. 1RP 9. At that late hour it was dark except for streetlights. 1RP 11. Howerton turned around and began walking northbound when he saw the patrol car approaching. 1RP 10. He matched the description of the suspect in Parks' 911 call, based on his physical appearance and the clothing he was wearing. 1RP 10, 12. Hutchinson stopped the patrol car and told Howerton to stop. 1RP 10. Howerton complied and was detained in handcuffs. 1RP 11. While checking for weapons, Hutchinson found a 12-inch bread knife and a screwdriver in the right sleeve of Howerton's jacket. 1RP 13.

Deputy Kelley Kinser arrived shortly after Hutchinson. 1RP 30-31. He found Hutchinson and Howerton standing at the front of Hutchinson's patrol car. 1RP 31. Once Kinser checked in with Hutchinson, he spoke with Parks over the phone. 1RP 31. Parks had seen Hutchinson detain Howerton. 1RP 14. She could see Howerton and the deputies from where she was standing outside her house, not far from where Howerton was detained. 1RP 32. She confirmed that Howerton was the person whom she had seen break into her neighbor's vehicle. 1RP 14. At that time, 10 minutes after Hutchinson had detained him, Howerton was read his constitutional rights. 1RP 14, 27.

The van that Parks had seen Howerton break into was damaged. 1RP 17. The front passenger window was smashed, there was significant damage to the steering column and ignition, the dome light was on, and the engine was running. 1RP 17, 37. Gretchen Lemon, the owner of the van, confirmed that the van was not damaged when she parked it near her house the night before. 1RP 17; CP 1. Lemon did not know Howerton and did not give him permission to enter her vehicle. 1RP 17.

C. ARGUMENT

1. THERE WAS REASONABLE SUSPICION TO DETAIN HOWERTON BASED ON THE TOTALITY OF THE CIRCUMSTANCES: PARKS WAS A RELIABLE CITIZEN INFORMANT, THE INFORMATION WAS OBTAINED IN A RELIABLE FASHION, AND HUTCHINSON CORROBORATED PARKS' TIP.

Howerton argues that the trial court erred by denying his motion to suppress because there was insufficient indicia of reliability surrounding the 911 call and police did not corroborate any suspicious activity before seizing him. His claim should be rejected. Here, a citizen informant provided her name, phone number, and address, described the crime she had just witnessed, and the responding deputy corroborated details of the tip. There was reasonable, articulable suspicion, based on the totality of the circumstances, justifying the investigatory detention. When deciding whether a trial court properly denied a motion to suppress, Washington courts review conclusions of law de novo. State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852 (2010). Unchallenged findings are verities on appeal. State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006).

Brief, investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are

unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975). A Terry stop is justified when police officers have specific and articulable facts that give rise to a reasonable suspicion that criminal activity is afoot. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

Reasonable suspicion is “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). When police observe activity consistent with criminal activity, although also consistent with noncriminal activity, a brief detention may be justified. Id. Further, determining whether reasonable suspicion existed must be “based on commonsense judgments and inferences about human behavior.” State v. Saggars, ___ Wn. App. ___, 332 P.3d 1034, 1038 (2014) (quoting Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

It is generally accepted that crime prevention and crime detection are legitimate purposes for investigative detentions. See Terry, 392 U.S. 1; Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). Despite the risk that officers may stop innocent people, “courts have repeatedly encouraged law

enforcement officers to investigate suspicious situations.” State v. Lee, 147 Wn. App. 912, 918, 199 P.3d 445 (2008) (quoting State v. Mercer, 45 Wn. App. 769, 775, 727 P.2d 676 (1986)).

For decades, courts have applied the totality of the circumstances test when deciding if there was reasonable suspicion sufficient to justify an investigatory detention under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution. Lee, 147 Wn. App. at 916 (citing Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); State v. Randall, 73 Wn. App. 225, 228-29, 868 P.2d 207 (1994)). Consistent with a totality of the circumstances analysis, courts can consider dispatchers’ and police officers’ cumulative knowledge in determining whether an investigatory detention was lawful. United States v. Fernandez-Castillo, 324 F.3d 1114, 1118 (9th Cir. 2003), cert. denied, 540 U.S. 959 (2003); Randall, 73 Wn. App. at 230. Reasonable suspicion may be based on information from a citizen informant if the tip has sufficient indicia of reliability. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (citing Adams v. Williams, 407 U.S. 143). Courts generally consider the following factors when deciding if the necessary indicia of reliability exist: (1) whether the informant is

reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether officers can corroborate any details of the informant's tip. Sieler, 95 Wn.2d at 47; Lesnick, 84 Wn.2d at 944.

a. Parks Was A Reliable Citizen Informant.

In Howerton's case, there is evidence supporting each factor of the analysis for indicia of reliability. First, known citizen witnesses are generally presumed to be reliable. Ewing v. City of Stockton, 588 F.3d 1218, 1224 (9th Cir. 2009); State v. Gaddy, 152 Wn.2d 64, 72-73, 93 P.3d 872 (2004); Saggers, 332 P.3d at 1038. In State v. Kennedy, the court noted that information supplied by neighbors did not require a showing of the same degree of reliability as the "professional" informant's tip, since the neighbors were citizen informants. 107 Wn.2d at 8. Here, Laura Parks gave her first and last name, phone number, and address when she called 911 from her home. CP 23-24. She also agreed to be available to speak with officers about the incident, tending to indicate that she had been truthful about her identity. CP 25.

A citizen's credibility is enhanced when that person purports to be an eyewitness to the reported incident. State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992). Parks' firsthand

observation of the incident was evident: she stated, "I just saw a robbery." CP 23. Following that assertion, Parks explained her belief that she had witnessed a crime: the suspect "broke into a car" and he actually entered the car. CP 23-24.

Further, Parks was reliable because she called 911 immediately after witnessing the incident. She explained that "it just now happened" when dispatch asked how much time had passed since the incident. CP 24. This kind of contemporaneous report has traditionally been treated as particularly reliable. Navarette v. California, __ U.S. __, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014). In Navarette, the United States Supreme Court found reasonable suspicion for drunk driving, based on the totality of the circumstances, when the timeline of events suggested that the 911 caller reported the incident soon after she was run off the road. Id. at 1689, 1692. The timing of the report and the location of Navarette's truck gave reason to think that the caller was telling the truth. Id. at 1689. By analogizing to evidence law, the Court found that a contemporaneous report, or one made right after the incident, is "especially reliable." Id. Similar to the circumstances in Navarette, Howerton was found leaving on foot in

the same direction and in the same location that Parks described, only six minutes after she called 911. 1RP 8-10, 12; CP 23-24, 27.

Also indicative of Parks' reliability is the accurate detail in her description of Howerton and the vehicle. She said Howerton was a black man of thin or average build, with short hair, standing five feet and seven inches tall, wearing a baggy black leather jacket and baggy pants. CP 24-25. Parks also provided a detailed description of the vehicle involved: a blue minivan, specifically a Dodge Caravan, made in the nineties, and one of four vehicles in the area. CP 25.

Howerton relies on State v. Hopkins to argue that Hutchinson lacked knowledge about the 911 caller and therefore the tip was unreliable. 128 Wn. App. 855, 117 P.3d 377 (2005). Even when a dispatcher distilled and paraphrased information before passing it on to an officer, the dispatcher's knowledge is properly considered part of the reasonable suspicion calculus. Fernandez-Castillo, 324 F.3d at 1118. Howerton erroneously parses out information known to each law enforcement actor, ignoring the requisite totality of the circumstances analysis.

In Hopkins, the caller reported inaccurate information about Hopkins' height, weight, and age. 128 Wn. App. at 864. The caller

gave a vague description of criminal activity involving a minor scratching his leg with what appeared to be a gun. Id. The caller thought the gun was in Hopkins' right pocket. Id. When police found Hopkins, they did not see him act suspiciously; rather, he was standing at a pay phone. Id.

In contrast, here Parks accurately described Howerton's physical appearance, including his clothing. 1RP 10, 12. She gave specifics as to what Howerton did to cause her to call 911: he broke into a car and he actually entered the car. CP 23-24. Unlike Hopkins' innocuous behavior when police arrived, Howerton reacted suspiciously to police presence by changing his direction of travel when he saw the police car. 1RP 10, 26. Moreover, dispatch had significant information about Parks, including her full name, phone number, address, and that she called from her home. CP 23-24.

The present case more closely tracks the facts of Navarette, where the Court held that a 911 call reporting that the suspect had run the caller off the roadway had sufficient indicia of reliability, even if the call was anonymous. Navarette, 134 S. Ct. at 1688-89. Law enforcement in Navarette knew the location, make, model, and license plate of the suspect vehicle that was last seen about five

minutes before the call. Id. at 1686-87. An officer followed Navarette's vehicle for five minutes and did not see additional suspicious conduct, but reasonable suspicion of drunk driving existed nonetheless. Id. at 1691. The quality and quantity of the information known in Navarette, from a reliable citizen informant, was similar to the information available to law enforcement in this case. CP 23-25, 27. Parks provided her name, phone number, address, and a firsthand account of events in her call to police immediately after the incident. Given the totality of the circumstances, Parks was a reliable citizen informant.

b. Information About The Crime Was Obtained In A Reliable Fashion.

The second factor, whether the information Parks had about the crime was gathered in a reliable fashion, is likewise satisfied. An indicator of veracity of a citizen's tip is the use of the 911 emergency system. Navarette, 134 S. Ct. at 1689. Although 911 calls are not per se reliable, this Court acknowledged that in Navarette the United States Supreme Court held that calls originating from the 911 system have an increased presumption of reliability. Saggers, 332 P.3d at 1042 (citing Navarette, 134 S. Ct.

at 1689-90). Safeguards within that structure permit law enforcement to identify and trace callers, and these safeguards protect against callers “making false reports with immunity.” Navarette, 134 S. Ct. at 1689. For example, the 911 system has caller identification, GPS locators, and does not allow a person to block caller identification. Id. at 1689-90.

Here, Parks utilized the 911 system to call police from her own home, across the street from where Howerton’s crime took place. CP 23. She gave permission for an officer to contact her, thereby making herself available for law enforcement to verify her tip. CP 25. Parks could have been held accountable if she had provided any false information to police. Thus, the information about Howerton’s crime was collected in a reliable fashion.

c. Police Corroborated Details Of Parks’ Tip.

Finally, Parks’ tip was corroborated when Hutchinson arrived on the scene only six minutes after Parks called 911 and three minutes after he was dispatched. 1RP 12; CP 27, 109 (finding of fact 14). “Eyewitness observations and corroboration of details can be important indicia of reliability.” Saggers, 332 P.3d at 1042. In State v. Kennedy, for example, the Washington State Supreme

Court considered an officer's observation of Kennedy leaving a drug house and entering a car described by the informant to be corroboration of the informant's tip. 107 Wn.2d at 8. Here, like the details that police corroborated in Kennedy, just after 2:00 a.m. Howerton was found in the same location and matched the description Parks gave immediately after the crime occurred. 1RP 8, 10-12; CP 109 (finding of fact 13). Further, he reacted to police presence by turning around and walking the other direction when he saw the patrol car. 1RP 10, 12; CP 109 (finding of fact 12).

Although a suspect's flight from police alone is not enough to justify a Terry stop, it is one factor that may be considered in determining whether reasonable suspicion existed. State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). Facts that seem innocuous to an ordinary citizen may be suspicious to a police officer in light of past experience. State v. Moreno, 173 Wn. App. 479, 492-93, 294 P.3d 812 (2013).

Howerton claims that Hutchinson failed to corroborate any suspicious activity and therefore the detention was unlawful under

State v. Z.U.E., 178 Wn. App. 769, 315 P.3d 1158 (2014).⁴ The facts of Z.U.E. are distinguishable. In that case, there were several 911 calls reporting suspicious activity consisting of (1) a young woman handing a gun to a man, (2) a shirtless, bald man running with the gun, and (3) a disturbance where eight people involved were last seen in a gray car. Id. at 775. Police saw a woman matching the description given but saw no suspicious behavior; rather, she was walking near a park. Id. at 787-88. Police did not contact her at that time. Id. at 776. Moreover, officers never found anyone matching the description of a shirtless, bald man. Id. at 788. Instead, police approached a gray car and detained Z.U.E. when there was no testimony that Z.U.E. or the other male occupant of the car “even slightly resembled the description of the shirtless bald man from the park.” Id.

By comparison, Deputy Hutchinson corroborated details of Parks’ 911 call. He saw Howerton react to police by turning around and walking the other direction once the patrol vehicle came into view, whereas police in Z.U.E. did not see any illegal or suspicious behavior. 1RP 9-10; Z.U.E. at 787-88. There was no discrepancy

⁴ The Washington State Supreme Court accepted review of this case (No. 89894-4). Oral argument was held on September 18, 2014, but at the time this brief was filed an opinion had not yet been issued.

between Parks' account of Howerton's appearance and his actual appearance, whereas in Z.U.E. the officers never saw the shirtless bald man that the callers mentioned and Z.U.E. did not match that description. 1RP 10, 12; Z.U.E. at 788. Finally, Hutchinson lawfully detained Howerton shortly after recognizing him as the suspect, but the Z.U.E. officers did not approach the female matching the description the first time they spotted her. 1RP 9-11; Z.U.E. at 787-88. The factual disparities between Howerton's case and Z.U.E. are significant. There was sufficient corroboration of Parks' 911 call in this case.

The totality of the circumstances establishes that law enforcement had reasonable suspicion justifying an investigatory stop of Howerton. This Court should affirm the trial court's denial of Howerton's motion to suppress.

2. HOWERTON WAS NOT PREJUDICED BY THE
DELAY IN ENTRY OF CrR 3.6 FINDINGS.

Howerton argues that his case should be remanded for entry of findings of fact and conclusions of law under CrR 3.6(b). This argument fails because the trial court entered written findings on

October 2, 2014, and Howerton cannot show any prejudice.

CP 103-12.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if the delay does not prejudice the defendant and there is no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

A delay in the entry of the findings does not by itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). Here, unlike Smith, the court entered findings that have not delayed resolution of Howerton's appeal. There is no resulting prejudice.

Nor can Howerton establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 103-12. The language of the findings is consistent with the trial court's oral ruling. 2RP 42-44.

Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 101-02.

In light of the above, Howerton cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For the reasons set forth above, the State asks this Court to affirm Howerton's convictions.

DATED this 23 day of October, 2014.

Respectfully submitted,

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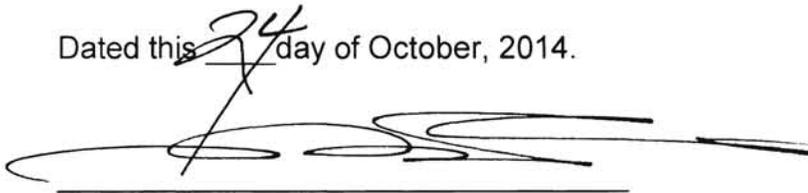
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Delante Ian Howerton, Cause No. 71837-1, in the Court of Appeals, Division I, 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.

Dated this 24 day of October, 2014.

A handwritten signature in black ink, appearing to read 'Bora Ly', written over a horizontal line.

Bora Ly
Done in Seattle, Washington