NO. 44232-9-II

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

STATE OF WASHINGTON, Respondent

v.

NICHOLAS KEITH MAYER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00311-4

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

A. RESPONSE TO ASSIGNEMNTS OF ERROR

I. SUBSTANTIAL EVIDENCE SUPPORTS MAYER'S CONVICTION FOR BURGLARY IN THE FIRST DEGREE

II. MAYER RECEIVED A UNANIMOUS VERDICT

III. THE TRIAL COURT CORRECTLY DENIED MAYER'S MOTION TO SUPPRESS EVIDENCE

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS MAYER MADE TO POLICE

V. THE TRIAL COURT DID NOT ERR IN PERMITTING THE WITNESS' ANSWER REGARDING THE CONSISTENCY OF HER PRIOR STATEMENTS

VI. THE TRIAL COURT PROPERLY DENIED MAYER'S MOTION TO CONTINUE

B. STATEMENT OF THE CASE

The State filed an information on February 12, 2012, and later amended charging Nicholas Keith Mayer (hereafter 'Mayer') with 13 counts including Robbery in the First Degree with two firearm enhancements, Burglary in the First Degree with two firearm enhancements, Residential burglary, three counts of Theft of a Firearm, three counts of Unlawful Possession of a Firearm in the Second Degree, Theft in the third degree, Attempted Trafficking in Stolen Property in the First Degree, and two counts of Possession of a

Stolen Firearm. CP 2-3, 6-9. These charges are based on the following facts:

A robbery occurred at a small restaurant in Vancouver, Washington on February 9, 2012. 2 RP at 267-74. The restaurant was owned by Hui Choe. 2 RP at 267-70. Aljuarsmi Ortiz was working at the restaurant on February 9, 2012. 2RP at 267. The restaurant normally closes at 9pm, but on this evening, a customer came in minutes before 9pm and Mr. Choe delayed locking up the business to attend to this customer. 3A RP at 296-99. Mr. Choe had already removed the money from the day and put it in a bank bag, along with his own wallet, as per his usual closing protocol. 3A RP at 300. On February 9, 2012, Mr. Choe placed the bag of money on a stool near the register. 3A RP at 313. Mr. Choe went to the kitchen to prepare the customer's food. 3A RP at 296-99. As Mr. Choe's employee, Mr. Ortiz, was leaving the restaurant through the side door, Mr. Ortiz was greeted by two men, wearing bandanas, brandishing guns and asking for the deposit money. 2RP at 273. The side door used by the two men is a door used by employees to exit and to take out the trash. 2RP at 272; 3A RP at 306-09. Customers use the main, front entrance to the restaurant. 2RP at 272; 3A RP at 306. Both men had guns, and a revolver was pointed at Mr. Ortiz's stomach. 2RP at 274. The two men

had entered the restaurant, and were demanding money. 2RP at 274. One of the men grabbed the deposit bag off the stool and then both men fled. 2RP at 276-77. Mr. Ortiz called 911 and informed Mr. Choe. 2 RP at 277.

Police arrived and interviewed the witnesses, including Mr. Choe, Mr. Ortiz and a customer who was inside the restaurant as well as her husband. RP at 462. The customer, Bonnie Woodworth had come to the restaurant to order take out. 3A RP at 317. She observed two people try to push Mr. Ortiz; she saw a scuffle and saw one of the men had a gun. 3A RP at 318. She saw the man point the gun at Mr. Ortiz and then saw them grab something from under the counter and leave. 3A RP at 318-19. Mrs. Woodworth's husband, Mr. Woodworth saw two men, with their faces covered, running from the side of the restaurant, one of them carrying a gun in his hand. 3A RP at 336.

In attempting to determine possible suspects, the police asked Mr. Choe if he had any disgruntled ex-employees; Mr. Choe gave them the name of Emily Mayer. 3A RP at 299. Mr. Choe fired Emily Mayer a few months prior believing she had been stealing money. 3A RP at 299. The police learned Emily Mayer had a brother named Nicholas Mayer, who had a drug problem. 3B RP at 463-67. The police

considered Emily Mayer and Nicholas Mayer to be suspects. 3B RP at 463-67.

The next evening, the police received a call from a person who identified himself as "Matt" and gave his phone number. 3B RP at 463-67. Matt told the 911 operator that he had overheard Mayer bragging about robbing a restaurant and that he had a lot of cash on him and that Mayer was riding in a grey pickup and was with his girlfriend. 3B RP at 463-67; CP 487. Police found Mayer riding in the pickup near the bar that Matt hold told 911 he would be at; police detained the vehicle's occupants, including Mayer. 3A RP at 362-65; 3B RP at 463-67. After Mayer was detained, police called the person known as Matt and convinced him to give a statement. 1RP at 63-69.

At the precinct, police spoke with Mayer in an interview room. 3B RP at 549-52. Mayer was advised of his *Miranda* rights and the police asked if they could record the interview. 1RP at 72-75, 126. Prior to being recorded, Mayer was read his *Miranda* rights, and waived them. 1RP at 73. Once the recording was turned on, Mayer was again informed of his *Miranda* rights. 1RP at 74. Mayer questioned how he would get a lawyer if he couldn't afford one. 1 RP at 79. The officer interpreted this to be simply Mayer wondering about the procedure for obtaining an attorney; he did not take it as a request for an attorney. 1

RP at 82. Mayer agreed to speak with police about the restaurant robbery and gave incriminating statements, admitting he was one of the robbers involving in the restaurant robbery. 3B 558-574.

Police obtained and served a search warrant where Mayer's sister Emily Mayer and her boyfriend John Taylor were living. 4A RP at 608-12. Inside the back bedroom police found the bank bag taken during the robbery, Mr. Choe's wallet, a .44 caliber pistol, a shotgun, jewelry, a laptop computer and many other items. 4A RP at 616-30. The shotgun, jewelry and laptop were discovered to be stolen items that went missing during a burglary at the residence of Nicholas and Gayleen Lies on February 11, 2012. 3B RP at 497-507. The Lies are acquainted with Mayer and Emily Mayer and both of them had lived in the house when they were children. 3B RP at 493-96. The police then arrested Emily Mayer and John Taylor. 5A RP at 924-25. Emily Mayer and John Taylor told police that Mayer showed up at her residence on February 11, 2012 with items that he said he had stolen out of the Lies' home. 4B RP at 752-55. Emily then drove Mayer back to the Lies home to attempt to wipe his prints from inside the home; they entered and took a number of items, hiding them back at Emily Mayer's residence. 4B at 755-60. They also told police that Mayer suggested they rob the restaurant at closing time. 4B RP at 770-81, 5A

RP at 897-920. Emily Mayer had told John Taylor and Mayer that it would be easy to rob this restaurant because of their lax closing procedures. 4B RP at 770-81, 5A RP at 897-920. Mayer and John Taylor each armed themselves with a gun, and Emily Mayer drove them to the vicinity of the restaurant and dropped them off. 4B RP at 770-81, 5A RP at 897-920. Mayer and John Taylor then waited in the bushes at the side door until it opened, then they pushed Mr. Ortiz back in, went inside, grabbed the bank bag and fled. 4B RP at 770-81, 5A RP at 897-920. They called Emily Mayer to come pick them up. 4B RP at 770-81, 5A RP at 897-920.

Police also received information that Brandon Sheldon was holding a gun for Mayer. 3B RP at 437-43. Mr. Sheldon gave them a .22 caliber pistol wrapped in a white bandana. 3B RP at 445-47. Both this gun and the bandana were tested for DNA; the results were inconclusive on the gun, but the bandana came back for the presence of DNA of at least two persons, one major contributor being Mayer. 5B RP at 1036-46.

Prior to trial, Mayer filed a motion to suppress the evidence obtained as a result of police's seizure of him, and a motion to suppress the statements he made to police. CP 15-19, 62-70. The trial court denied these motions and issued findings of fact and conclusions

of law. CP 480-89. Mayer moved for a continuance less than a week prior to trial at the Readiness hearing on the basis that he wished to hire an expert to analyze the DNA evidence; the court denied his motion to continue. 2 RP at 240. The case proceeded to trial. In addition to the facts summarized above, Emily Mayer was questioned extensively about the plea bargain she entered into with the State in exchange for her testimony at trial. 4B RP at 799-803. On redirect by the State, the State asked clarifying questions about the plea bargain and whether Emily Mayer's agreement as for truthful testimony. 4B RP at 831-33.

At the close of the State's case the court dismissed the trafficking charge. 6A RP at 1143-44. The jury returned verdicts of guilty on all counts and as proven on four firearm enhancements. CP 278-91. At sentencing, the trial court found the burglary and robbery at the restaurant constituted same criminal conduct. 7RP at 1407-10. Mayer was sentenced to standard range sentences for a total of 306 months, this included 240 months for firearm enhancements. CP 507. Mayer timely appeals. CP 529.

C. ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS MAYER'S CONVICTION FOR BURGLARY IN THE FIRST DEGREE

Mayer argues that he did not commit the crime of Burglary in the First degree because the restaurant in which he entered was open to the public at the time of his commission of the crime and he did not enter any parts of the premises which were not open to the public. Though Mayer is correct in his recitation of the facts, he is incorrect in his analysis of these facts. Though Mayer entered a public portion of the victim restaurant, this does not render the evidence insufficient to support the crime of Burglary in the First Degree. Mayer's invitation to enter the restaurant, as a general member of the public, was expressly limited to a single purpose, a purpose which the facts show he clearly did not have. Mayer's entry into the restaurant was unlawful.

Mayer argues the evidence is insufficient to support his conviction for Burglary in the first Degree. When reviewing a claim of insufficiency, the court of appeals must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the

sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A person is guilty of burglary in the First Degree when he or she enters or remains unlawfully in a building with intent to commit and crime therein and was armed with a deadly weapon or assaults a person, either inside or while fleeing. RCW 9A.52.020. Entry is unlawful if it is without invitation, license or privilege. *State v. Grimes*, 92 Wn. App. 973, 978, 966 P.2d 394 (1998).

A private property owner can restrict the use of his or her property so long as the restrictions are not discriminatory. *State v. Blair*, 65 Wn. App. 64, 67, 827 P.2d 356 (1992). It is possible for an individual's presence to become unlawful by revocation of the privilege to be there. *State v. Bellerouche*, 129 Wn. App. 912, 915-16, 120 P.3d 971 (2005) (citing *State v. Collins,* 110 Wn.2d 253, 258, 751 P.2d 837 (1988)). This type of revocation, or right of a property owner to exclude someone's presence exists even on properties open to the public. *Id.* at 916 (citing *State v. McDaniels*, 39 Wn. App. 236, 692 P.2d 894 (1984)).

First, Mayer had no authority to enter from the side door of the restaurant, where customers do not enter or leave. Though the owner of the restaurant, Hui Choe, and his employee Aljuarsmi Ortiz, testified differently as to whether the side door is used by customers, it is likely the

jury gave more weight to Hui Choe's testimony than to that of his employee who had only been working at the restaurant for a short time. Mr. Choe testified that there is a main door that customers use, and a side door that he and his employees use for taking out the trash. 3A RP at 305-06. Mr. Choe, speaking of the side door where Mayer entered, said, "nobody use that one." And later testified, "this is back door, and they have a – a bush, so nobody use that one." 3A RP at 306, 309. He indicated the door is kept closed except in emergencies. 3A RP at 307. This back door faces bushes, not the parking lot. 3A RP at 309. When buildings are only partly open to the public, any license or invitation to enter a building does not extend to the unopen parts of the building. *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). It is clear from Mr. Choe's testimony that the side door that Mayer entered through is not open to the public and Mayer had no license to enter. This becomes more clear when we consider how Mayer entered the building. He did not open the door himself and enter, but rather, he laid in wait outside the side door of the restaurant, where there are bushes, and waited until an employee opened the door, attempting to leave the restaurant. He then used that opportunity to enter the building through the side door. This contributes to the conclusion that Mayer did not have license or invitation to enter through the side door.

Even if this Court finds that the side door was open to the public, Mayer did not have license to enter the way he did. The Supreme Court in Washington has analyzed this issue and decided that whether an implied limitation on the invitation or license to enter a building exists should be determined on a case by case basis. *State v. Collins*, 110 Wn.2d 253, 258, 751 P.2d 837 (1988). In *Collins,* the defendant was invited into a stranger's home to use the telephone. However, once he used the phone, the defendant then grabbed two women in the home, dragged them to a bedroom, raped one of them. *Id.* at 255. One of the victims escaped and ran to the kitchen, but the defendant caught her and dragged her back to the bedroom, dislocating her shoulder in the struggle. *Id.* The Court concluded that the defendant exceeded the scope of his invitation and once his lawful purpose of using the telephone was accomplished his license expired and he committed burglary in the first degree by remaining in the house and committing crimes. *Id.* The Court ruled that this issue should be decided on a case by case basis. *Id.* at 258.

In deciding the case, the Court in *Collins*, in determining whether a burglary could be committed when no express limitations are placed on an individual's invitation or license to enter a building, boiled down the issue to whether "an implied limitation on an invitation or license can be recognized in connection with the 'enters or remains unlawfully' language

of the burglary statute...." *Id.* at 259. To answer this question, the Supreme Court looked to *State v. McDaniels*, 39 Wn. App. 236, 692 P.2d 894 (1984). In *McDaniels*, a defendant who entered a church that was open to the public for worship and prayer was convicted of Burglary in the Second degree because the evidence showed that he did not enter for the purpose of worship and prayer, and while in the course of being inside the church did steal a coat. *McDaniels*, 39 Wn. App. at 240. The *Collins* court noted that the limitation of the church's invitation or license to the public was "plain from the circumstances, and was sufficient to support his burglary conviction." *Collins*, 110 Wn.2d at 260.

The Court in *Collins* also considered a Wisconsin case, *State v. Schantek*, 120 Wis. 2d 79, 353 N.W.2d 832 (Ct. App. 1984) and adopted the reasoning of that court. *Collins*, 110 Wn.2d at 261. In *Schantek*, an employee of a gas station had been provided a key to the station. *Id.* at 260. The employee used the key to enter the station and steal and bank bag of money. *Id.* The employer had never placed any express restrictions on the employee's presence in the business after working hours, but the Wisconsin court found his presence to commit the crime of theft was "nonconsensual" and stated that

> ...the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus

> beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes—including criminal adventure.

Id. at 260-61 (quoting *State v. Schantek*, 120 Wis. 2d at 85). The Court here "adopt[ed] the Wisconsin court's analysis." *Id.* at 261.

The Court in *Collins* further stated that "while the formation of criminal intent per se will not always render the presence of the accused unlawful, that presence may be unlawful because of an implied limitation on, or revocation of, his privilege to be on the premises." *Id.* at 258. The Court found that there was an implied limitation to the defendant's invitation or license and that his invitation or license was limited to a specific area and a single purpose. *Id.* at 261.

The Court also adopted a second theory that is to be applied on a case by case basis as well. *Id.* at 261. The Court adopted this theory from a case out of the State of Georgia, *Hambrick v. State*, 174 Ga. App. 444, 330 S.E.2d 383, 385-86 (1985) in which the Georgia court found that once a person who has been invited in for a friendly visit starts using offensive and aggressive behavior, the authority to remain may cease. *Id.* at 261 (quoting *Hambrick*, 174 Ga. App. at 447). Therefore, a second way of completing a burglary may be when the invitation to remain impliedly ends due to offensive behavior by the defendant.

The Court in *Collins* concluded its analysis of this subject by stating,

> ...in some cases, depending on the actual facts of the case, a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of the case. That neither renders part of the statute superfluous nor converts all indoor crimes to burglaries. Not all such cases will support the inference we find justified here.

Id. at 261-62.

The facts in Mayer's case clearly call for application of either of the two theories adopted by the Supreme Court in *Collins, supra*. Though the victim restaurant was not quite closed for the evening, though the open sign was turned off and the owner had started his closing procedures, it is clear from the facts that Mayer and his co-defendant entered with one single intent: to rob the owner of the restaurant. The owner of the restaurant testified that the door used by Mayer was never used by customers and only available to them for an emergency exit; it is an iron, metal door and it is kept closed during business hours. 3A RP at 306-07. The outside of this door is immediately in the bushes, and it is a door that you cannot see from the road. 3A RP at 309. Mayer entered the restaurant with his gun drawn, immediately pointed the gun at Mr. Ortiz and obtained money. Mayer never entered the restaurant for the purpose of the implied license or invitation he could have held: to patronize the

restaurant. The only available inference from the totality of the evidence is that Mayer entered through a side door with the intent to steal money. Mayer did not take advantage of the invitation to the public to enter the restaurant to patronize it; instead he unlawfully entered a restaurant with the intent to rob the business. This constitutes the crime of Burglary in the First Degree.

In *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001), the Court of Appeals found a defendant committed burglary when he was not invited into the apartment of his girlfriend, even though she left the door ajar and gave him a glass of water once he was inside the residence. *Gohl*, 109 Wn. App. at 820, 823-24. The Court stated in its decision that "[a] reasonable person would not conclude that [the victim] extended an invitation or a license to Gohl to be in the apartment." *Id.* at 823-24. The Court further found that even if Gohl had a license to be in the apartment, it was for the express purpose of getting a quarter and some water. *Id.* at 824. The license for Gohl to be in the apartment did not include assaulting his girlfriend and her roommate, and his girlfriend revoked any license he may have given by screaming for help and being victim of Gohl's assault. *Id.*

Though the Third Division of this Court has found that proof of intent to commit a crime will not establish unlawful entry in a building

open to the public, that holding was both improperly broad and is distinguishable from Mayer's case. *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998). In *Miller,* the court vacated a defendant's burglary conviction when his actions only included entering a carwash open to the public, washing his car, and then stealing money from the car wash. *Id.* at 730. Though the court in *Miller* held that proof that a defendant had an unlawful intent at the time of his entry into a public building does not render that entry unlawful, those facts are significantly different than those before this Court. Mayer and his cohort pre-planned a time to enter a restaurant when they could most easily accomplish their task of robbing the owner of the day's earnings. Mayer had a firearm in his hand and pointed it at the restaurant worker as he entered through a side door of the building. This forced entry, even though the door was unlocked and open for customers, constitutes an unlawful entry for burglary purposes. Unlike the defendant in *Miller*, who entered the carwash without incident and remained initially to wash his car, Mayer had no lawful purpose in entering the restaurant and he did so in a violent and forceful manner which negates any lawful basis for his entry. The State urges this Court to find the holding in *Miller* inapplicable here.

Further, the court in *Miller* seems to discount the significance of the Supreme Court's analysis in *Collins, supra.* In *Collins*, the Supreme

Court considered a case where a defendant was charged with burglary of a business. This consideration shows that its holding is not limited only to residential burglaries, or to those places that are always closed to the public. *Collins*, 110 Wn.2d at 260-61.The evidence is substantial that Mayer pre-planned this robbery and entered the restaurant with the sole intent of robbing the business. He never entered as a customer intent on purchasing food and paying for it. Mayer was not licensed or invited to enter the business through a side door, with a gun drawn.

Even if this Court finds Mayer did have license to enter the restaurant, that license ended once his offensive behavior began, which was immediately. *See Collins, supra* at 261. Mayer and his co-defendant both had guns drawn as they entered the establishment. Their faces were hidden behind masks or bandanas, and they immediately went about committing the robbery. This is not a situation in which Mayer studied the menu, or ordered food, or sat down at a table to consume his food. The evidence shows that Mayer committed this robbery immediately upon entering. Any possible invitation he had ended as soon as he began his criminal conduct.

There was sufficient evidence to convict Mayer of Burglary in the First Degree and this court should affirm his conviction.

II. MAYER RECEIVED A UNANIMOUS VERDICT

Mayer argues that the State failed to prove both alternative means of Burglary in the First Degree and he was denied a unanimous verdict. Substantial evidence supports that Mayer both unlawfully entered and unlawfully remained in the restaurant. Thus Mayer was not denied a unanimous verdict.

Jury verdicts in a criminal case must be unanimous as to the defendant's guilt of the charged crime. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When a crime has alternate means by which the defendant can commit the crime, the jury verdict is unanimous if there was substantial evidence to support both alternate means. *State v. Whitney*, 108 Wn.2d 506, 508, 739 P.2d 1150 (1987).

Assuming without conceding that burglary is an alternative means crime, there is substantial evidence that Mayer both unlawfully entered and unlawfully remained in the restaurant with the intent to commit a crime therein. As discussed in the section above, there was substantial evidence presented to the jury that supported either that Mayer entered unlawfully or remained unlawfully in the restaurant. He entered with a gun drawn and the intent to rob the business. Mayer then remained unlawfully while he completed the robbery. Substantial evidence supports either

means of committing this burglary and therefore Mayer was not denied a unanimous verdict.

In most burglary cases juries can be instructed as to both means of committing the crime (unlawfully remain or unlawfully enter) and prosecutorial election of means is not required nor is a special jury instruction. *State v. Johnson*, 132 Wn. App. 400, 409-10, 132 P.3d 737 (2006) (citing *State v. Allen*, 127 Wn. App. 125, 130, 133, 135-36, 110 P.3d 849 (2005)).

> So long as there is sufficient evidence as to each means or so long as a reviewing court can tell that the verdict was based on only one means which was supported by substantial evidence, a general verdict finding the defendant guilty of burglary will stand.

Id. (citing *Allen*, 127 Wn. App. at 130, 135-36).

In reviewing the record, it is clear that the State here presented substantial evidence that allowed the jury to conclude beyond a reasonable doubt that Mayer committed the crime of burglary either by unlawfully entering or by unlawfully remaining in the restaurant.

III. THE TRIAL COURT CORRECTLY DENIED MAYER'S MOTION TO SUPPRESS EVIDENCE

The trial court correctly ruled in denying Mayer's motion to suppress evidence. The information received from the informant was reliable and the police had reasonable, articulable suspicion of criminal

activity which warranted a *Terry* stop of Mayer. As the initial seizure was lawful, the trial court properly denied Mayer's motion to suppress and properly admitted the evidence obtained as a result of the seizure in trial.

On appeal, this court should accept as verity the trial court's findings of fact that the petitioner does not challenge, *see State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), and review those challenged for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The court should review conclusions of law de novo and the constitutionality of a warrantless stop de novo as well. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Mayer does not challenge any findings of fact therefore the trial court's findings are verities on appeal. All conclusions of law should be reviewed de novo.

A seizure for investigative purposes is permissible when a police officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). Probable cause is not required for this type of seizure because it is significantly less intrusive than an arrest. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357

(1979). When reviewing a police officer's seizure of an individual for an investigatory reason, the reviewing court should look at the "whole picture" to determine whether the police officer's suspicion of criminal activity was reasonable. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009) (quoting *State v. Randall*, 73 Wn. App. 225, 229, 868 P.2d 207 (1994)). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. Not only should a reviewing court evaluate the totality of the circumstances presented to the investigating officer, but it should also take into account the officer's training and experience when determining the reasonableness of the *Terry* stop, as well as other factors such as the location of the seizure and the conduct of the person detained. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Under this test, an officer may rely on a combination of otherwise innocent observations to briefly stop a suspect. *U.S. v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). The investigative detention must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984).

The factual basis for an investigatory stop need not arise out of an officer's personal observation, but may be supplied by information acquired from another person. *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921 (1972). Police may rely on information known to its agency and relayed through dispatch. *State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d 872 (2004); *State v. Mance*, 82 Wn. App. 539, 542-44, 918 P.2d 527 (1996). Furthermore, an informant's tip can provide police with reasonable suspicion to make an investigatory stop, but the informant's tip must be reliable. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). The State establishes a tip's reliability when "(1) the *informant* is reliable *and* (2) the informant's *tip* contains enough objective facts to justify the pursuit and detention of the suspect *or* the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion." *State v. Hart*, 66 Wn. App. 1, 7, 830 P.2d 696 (1992) (citing on *Sieler*, *supra*) (emphasis original).

The trial court below found that the informant was not an "anonymous tipster." CP 487. This person who provided information to police gave them his name and phone number and then later met with police to give a statement. CP 484. He provided police with highly reliable details regarding Mayer: he identified him by name and provided specific

information about a recent armed robbery; he indicated that Mayer had a lot of cash on him and had recently had a revolver; he also indicated Mayer was known to carry heroin on him. CP 487. This information corroborated much of what the police already suspected about the robbery. Police knew that the owner of the victim restaurant had fired Mayer's sister in recent months; the suspects in the robbery stole a bank bag with $800 cash and the owner's wallet; the suspects in the robbery used a revolver and the other used a semi-automatic pistol. CP 481-82. Even if the informant is treated as an 'anonymous tipster,' the information he provided was highly reliable. This informant told police where Mayer currently was; police immediately found him near where the informant indicated they would. CP 487.

Mayer relies upon *State v. Hopkins*, 128 Wn. App. 855, 117 P.3d 377 (2005) in arguing that the court erred in failing to suppress the evidence obtained as a result of the *Terry* stop on him. Br of Appellant, p. 28-29. Mayer's reliance on *Hopkins* is misplaced. The facts in *Hopkins* differ significantly from those in Mayer's case. In *Hopkins*, an anonymous person called 911, refused to give his phone number, and gave police information about the defendant's whereabouts and that he had a gun. *Hopkins*, 128 Wn. App. at 858. The only corroboration police had was that a person matching the description was at a payphone near where the

informant said he would be. *Id.* at 859. In Mayer's case, the informant gave far more information and proved himself to be reliable: he gave his first name and phone number; he indicated the source of his information (his personal observations) and he gave police information which corroborated in several ways information already known to police about an ongoing armed robbery investigation, and this informant called police only 25 hours after the robbery occurred. CP 482. The informant told police Mayer was with his girlfriend, Sarah Baker, and that they were traveling in a grey Dodge Dakota pick up truck and they were at a particular bar. CP 482. When police arrived at the bar, they saw a grey Dodge Dakota pickup leaving the bar; the registered owner of that truck was Sarah Baker, Mayer's girlfriend. CP 482.

Considering the totality of the circumstances, the police officers were clearly justified in effecting an investigatory *Terry* stop on the vehicle to locate and detain Mayer to investigate his involvement in the armed robbery of the restaurant. The trial court properly made this finding and its ruling should be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENTS MAYER MADE TO POLICE

Mayer alleges the trial court erred in admitting statements Mayer made to police because Mayer alleges he requested an attorney prior to

questioning. Mayer knowingly, voluntarily and intelligently waived his *Miranda* rights and the statements he made were properly admitted at trial.

A trial court's findings are reviewed for substantial evidence and its conclusions are reviewed for support by the findings. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). A person may waive his or her *Miranda* rights; the government bears the burden of showing, by a preponderance of the evidence, that the suspect understood his rights and voluntarily waived them. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008) (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880 (1981)). In addition, a suspect's request for an attorney at the time of police questioning must be unequivocal to invoke his constitutional right for counsel under *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) and *State v. Radcliffe, supra.*

The evidence supports the trial court's finding that Mayer initially made a valid, intelligent and voluntary waiver of his right to remain silent and to counsel after properly being advised of his rights. CP 487. Once a person has waived his rights to counsel under *Miranda,* a later request for counsel must be unequivocal. *Davis*, 512 U.S. at 462. The trial court found that Mayer first waived his rights and said to police, "let's talk." CP 484. He then asked how he would go about getting an attorney if he could not afford one. CP 485. The deputy understood Mayer to be asking how an

attorney is assigned to him after being arrested and he explained the process of getting an attorney to him. CP 485. Mayer then agreed to speak to the officers and made a number of statements CP 485. Substantial evidence supports these findings and Mayer does not challenge these findings on appeal, so they must be upheld. *See State v. Broadway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Mayer's inquiry about how he could get an attorney was not an unequivocal request for an attorney. Before police must stop questioning a suspect, the suspect must unambiguously request counsel. *State v. Copeland*, 89 Wn. App. 492, 500, 949 P.2d 458 (1998) (citing *Davis*, 512 U.S. at 459). "A suspect invoking his right to counsel 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Id.* (quoting *Davis*, 512 U.S. at 459). Officers do not need to cease questioning a suspect without an unequivocal request for counsel. *Id.*

In *State v. Copeland*, during a police interrogation, after being read *Miranda*, Copeland said that he would need a court-appointed attorney because he could not afford one. *Copeland*, 89 Wn. App. at 499. The police office told Copeland that he would be afforded one when they got back to Washington. *Id.* Copeland told police he was willing to speak at that time. *Id.* In finding Copeland's statement to be equivocal, the court

stated "[h]is request that he 'needed' a 'court-appointed' attorney could have been reasonably understood to be a statement about his perceived indigency." *Id.* at 501As Copeland's statement was reasonably understood to be about his perceived indigency, it was reasonable for the police officers to understand Mayer's question to be about the procedure for getting an attorney.

In this case, Deputy Dennison read to Nicholas Mayer his *Miranda* warnings not once, but twice. Both times, Nicholas indicated he understood his rights, and wished to continue to talk to the police about the restaurant robbery. Mayer's inquiry about how would he go about getting an attorney if he could not afford one, is not an unequivocal request for counsel. This question did not vitiate his valid waiver of his *Miranda* rights. Further, Mayer had been arrested numerous times in the past and was intimately familiar with the contents of a suspect's *Miranda* rights. CP 120. Mayer's statements to police were properly admitted.

V. THE TRIAL COURT DID NOT ERR IN PERMITTING THE WITNESS' ANSWER REGARDING THE CONSISTENCY OF HER PRIOR STATEMENTS

Mayer argues the prosecutor essentially testified as to a witness' veracity and that this denied him a fair trial. Mayer's claim that the prosecutor's line of questioning was inappropriate is without merit. The

trial court did not allow the State to testify and the witness did not improperly vouch for her own credibility.

Mayer objected to the State's question of a witness as to whether her prior statement was consistent with her testimony in court. 4B RP at 833. This occurred after Mayer cross-examined the witness, Emily Mayer, about reasons to doubt her credibility, such as the fact that she received a plea bargain in exchange for testifying. 4B RP at 799-801. Mayer also questioned Emily Mayer about the agreement to "testify truthfully" and "according to what you told them earlier." 4B RP at 802-03. This line of questioning clearly was intended to give the jury the impression that Emily Mayer's testimony was not credible and could not be trusted because she received a benefit from testifying, and this is evidenced by Mayer's focus on Emily Mayer's part in the crime in his closing argument and Mayer's assertion that Emily Mayer was only trying to improve her position and insinuates that the jury should ignore her testimony because of the fact she received a plea bargain, and that more likely Emily Mayer is the culprit. 6B RP at 1288-89, 1298-99.

Evidence designed to bolster a witness' credibility is admissible only where the witness' credibility has been attacked by the opposing party. *State v. Froehlich*, 96 Wn.2d 301, 311, 635 P.2d 127 (1981) (citing *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 P. 825 (1909); *State v.*

Braniff, 105 Wash. 327, 177 P. 801 (1919); *State v. Lynch*, 176 Wash. 349, 29 P.2d 393 (1934); *Choate v. Robertson*, 31 Wn.2d 118, 195 P.2d 630 (1948); *Perkins v. United States*, 315 F.2d 120 (9th Cir.), *cert. denied*, 375 U.S. 916, 11 L. Ed. 2d 155, 84 S. Ct. 201 (1963)). Once a defendant opens the door to the subject of a witness' credibility, it may be addressed on redirect by the prosecution. *See State v. O'Neal,* 126 Wn. App. 395, 409, 109 P.3d 429 (2005).

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.

O'Neal, 126 Wn. App. at 409 (quoting *State v. Jones*, 26 Wn. App. 1, 9, 612 P.2d 404, *rev. denied*, 94 Wn.2d 1013 (1980)). The rules of fairness in our judicial system dictate that an opposing party is allowed to question a witness about a subject matter that the proponent first introduced through the witness. *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100 (2002). This is what occurred in Mayer's case. Mayer fails to inform the court that the line of questioning he objects to was on redirect examination of the witness, Emily Mayer, after Mayer himself brought up the subject of her plea agreement and inferred she had reason to be inculpate Mayer. The State was within the bounds of fairness and its rights to follow up on questioning started by defense to rehabilitate its witness.

A trial court's decision as to the scope of redirect examination and whether to admit or exclude evidence it within its wide discretion and appellate courts do not reverse absent a manifest abuse of discretion. *State v.* Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Gould,* 58 Wn. App. 175, 186, 791 P.2d 569 (1990). The trial court was proper in overruling Mayer's objection to this question and did not abuse its discretion as defense opened the door to the line of questioning regarding the truthfulness of Emily Mayer's testimony. It is clear, from the totality of the questioning of this witness, both by Mayer and by the State, that the State's questions on redirect were not out of line and did not constitute the State testifying to vouching for this witness. Mayer's claims are unfounded.

VI. THE TRIAL COURT PROPERLY DENIED MAYER'S MOTION TO CONTINUE

Mayer claims the trial court denial of his motion to continue the trial date to obtain an expert on DNA denied him effective assistance of counsel. The trial court did not abuse its discretion in denying Mayer's motion to continue.

The decision of whether to grant or deny a motion to continue is within the sound discretion of the trial court *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970). On review, this Court should not disturb the

trial court's ruling on this matter unless Mayer can show that the trial court's discretion was manifestly unreasonable, exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959)). In deciding whether to grant or deny a motion to continue, the trial courts may consider many factors, such as surprise, diligence, redundancy, due process, materiality and maintenance of orderly procedure. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

In *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004), the defendant moved for a continuance in order to secure an expert witness. The court found that the trial court did not abuse its discretion in denying the defendant's motion. *Id.* at 274. The trial court there had found the expert's testimony would not change material facts. *Id.* In finding the trial court did not abuse its discretion, the Supreme Court stated that "[w]hile reasonable minds may differ, we cannot say that the trial court's determination that the maintenance of orderly procedure outweighed the reasons favoring a continuance, such as surprise and due diligence, was manifestly unreasonable." *Id.*

We have a similar situation here. Mayer requested a continuance less than a week prior to trial based on information he had had for over a week. It is clear the trial court felt this was not an exercise in diligence on

his part. 2 RP at 240. Further, the trial court found his expert would not be material to the case as DNA was not a central part of the case. 2 RP at 240. The court also considered the delay on the case and witnesses in rescheduling the trial. 2 RP at 240. These are all appropriate factors for the court to consider, and though, as in *Downing*, reasonable minds may differ on her decision, the trial court's decision on this issue should not be disturbed absent manifest abuse of discretion. It is clear the trial court made its ruling based on tenable reasons. The trial court should be affirmed.

Mayer also alleges his trial counsel was ineffective because he was unprepared for trial due to the court's refusal to grant a continuance. Br of Appellant at 45-46. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *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). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v.*

Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

It is clear from the transcripts of the proceedings below that Mayer's attorney was a zealous advocate who extensively cross-examined the State's DNA witness. 5B RP at 1049-96. It is clear from his cross-examination that the defense attorney was well-prepared and had a significant breadth of knowledge regarding testing of DNA and the interpretation of the results. Mayer cannot show his attorney was ineffective and cannot show any prejudice to him by his counsel's performance.

Mayer's convictions should be affirmed.

D. CONCLUSION

Mayer's claims fail and the trial court should be affirmed in all respects. There was substantial evidence to support his burglary conviction even though he entered a restaurant that is open to the public. The jury's verdict was unanimous as substantial evidence supported any alternate means of burglary on the restaurant. The trial court properly ruled on Mayer's motions to suppress evidence and his statements and properly admitted the evidence at trial. The trial court did not impermissibly allow a witness to vouch for her own credibility or the State to testify, and the trial court's refusal to grant Mayer's motion to continue did not deny him of a fair trial. Mayer received a fair trial where he was convicted by overwhelming evidence. The trial below was proper and fair and Mayer's convictions should be affirmed.

DATED this 30th day of October, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD
WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

October 30, 2013 - 4:53 PM

Transmittal Letter

Document Uploaded: 442329-Respondent's Brief.pdf

Case Name: State v. Mayer

Court of Appeals Case Number: 44232-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Connie A Utterback - Email: **connie.utterback@clark.wa.gov**

A copy of this document has been emailed to the following addresses:

jahays@3equitycourt.com