NO. 90846-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

NICHOLAS KEITH MAYER, Petitioner

From the Court of Appeals for the State of Washington
44232-9-II

PETITION FOR DISCRETIONARY REVIEW

BARBARA COREY
Attorney for Petitioner
902 South 10th Street
Tacoma, WA 98405
(253) 779-0844

ORIGINAL

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A. IDENTITY OF PETITIONER

Nicholas Mayer requests this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Mayer requests review of the opinion set forth at State v. Mayer, Court of Appeals – No. 44232-9-II [2014 Wash. App. LEXIS 2188] filed September 3, 2014. A copy of the decision is attached as Appendix C.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals, contrary to established Washington State case law, erroneously hold that Mr. Mayer had waived review of the CrR 3.6 suppression issue as well as the CrR 3.5 confession issue because trial counsel failed to assign error to the findings of fact and conclusions of law where Mr. Mayer assigned error to the findings and conclusions in his Statement of Additional Grounds [SAG]?

2. Did the Court of Appeals, contrary to established Washington State case law, erroneously consider the properly raised issue of pretextual stop and instead wrongly decided that the police stopped Baker's car as during an "investigative stop"?

3. Did the Court of Appeals, contrary to established Washington State case law, erroneously find that Mr. Mayer's statement was properly admitted at trial where the detective purposefully and deceptively did failed to inform him that he could contact an attorney from the police station, the venue of the interview?

D. STATEMENT OF THE CASE

Mr. Mayer incorporates by reference the statement of the case from the opinion with additional facts from Mr. Mayer's Statement of Additional Grounds [SAG][1].

Mr. Mayer was a passenger in a car registered to Sarah Baker and driven by her when Clark County Sheriff's Deputy Smith stopped the car ostensibly for a traffic violation. RP 47-48.

Of course, there was no traffic violation and the officer never said anything to Baker about a traffic violation. RP 52. The officer affirmed to the Ms. Baker that the registration was valid. RP 52. He also acknowledged that there had been no "furtive" movements inside the car prior to the stop, no speeding, no other traffic violation. RP 52. Rather, the stop was a pretext.

[1] Attached as Appendix A

After the stop, Dep. Smith ordered all three occupants out of the car: Ms. Baker, Mr. Mayer, and a friend named "Mark." RP 362-365, 463-467.

Mr. Mayer was taken into custody. RP 63-69. Det. Dennison responded to the scene and told Mr. Mayer he was under arrest and he was placed in handcuffs. RP 83.

Police had based the stop on the pretext of a traffic stop after receiving a tip from an individual [1] that Mr. Mayer had just left the restaurant from which the anonymous informant was calling; [2] that Mr. Mayer had bragged about robbing a restaurant *in Vancouver*; [3]that he had a lot of money; [4] that he recently given away a pistol, [5] that he had left the restaurant in a vehicle driven by Sarah Baker and another individual. Id; Slip Opinion, page 3.

However, this information contrasted with that police had about the robbery being investigated. Police were investigating the robbery of a teriyaki restaurant that had occurred in another location, to-wit: Salmon Creek. The anonymous informant had not seen Emily Mayer at the restaurant or with Nicholas Mayer at any relevant time. Further, there had been no identification of any vehicle, any suspects except that there were two males. The store owner had informed police that: [1] Mayer's sister Emily Mayer previously worked at the Salmon Creek restaurant and had

been fired because she was believed to have been stealing; [2] Emily Mayer had said that her older brother did drugs; [3] based on the reported facts of the robbery, police believed the robbery was an "inside job"; [4] a review of police data bases showed that Mr. Mayer was Emily's older brother.

Subsequent to Mr. Mayer's arrest of the pretextual stop, Det. Dennison took him to the police station and advised Mr. Mayer of his Miranda rights[2] . RP 72. When Mr. Mayer said he would talk to the detective, the detective guessed that he wanted to talk to him about drugs that had been found on his person. RP 76.

Det. Dennison re-advised Mr. Mayer of his *Miranda* at the police station. During the second advisement of *Miranda* rights at the police station, Mr. Mayer asked Det. Dennison how he would get an attorney since he did not have any money. Det. Dennison answered that he would get n attorney if he was arrested, taken to jail and *brought before a judge*. RP 79, 80.

There is no dispute that the police correctly advised Mr. Mayer of his *Miranda* rights: "You have the right to an attorney before any questioning. If you cannot afford an attorney, one will be appointed for

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[2] State v. Miranda, 401 P.2d 721 (Ariz. 1965)

you without cost to you, if you so desire. You can exercise these rights at rights at any time."

Det. Dennison knew that Mr. Mayer was asking how to get a lawyer if he could not afford one. RP 143. Det. Dennison also knew there was a list of lawyers that Mr. Mayer could call by the BAC machine just down the hall in the police station. RP 142-143. Det. Dennison failed to tell Mr. Mayer about that list. *Id.*

Had Mr. Mayer known that he contact an attorney at the time of questioning he would have done so. RP 145. Det. Dennison deceived him by failing to inform him of available immediate access to counsel. RP 145.

The trial court found that Det. Dennison "believed" Mr. Mayer was asking how to get an attorney if he later was charged with a crime. CP 485, Finding of Fact No. 26.[3]

After this convoluted discussion about whether Mr. Mayer was entitled to an attorney, Mr. Mayer simply caved in, waived his rights, and made a statement. RP 80.

After the CrR 3.5 hearing, the trial court found that Mr. Mayer had made a knowingly, intelligent, and voluntary waiver of his rights, the trial

[3] The State argued in its reply that Mr. Mayer had waived this issue because his appellate had failed to assign error to any of the trial court's findings of fact and conclusions of law from the CrR 3.5 hearing. Although this is true, Mr. Mayer himself assigned error to them in the Statement of Additional Grounds. Appendix B, Page 1.

court admitted his Statement. The trial court entered the following relevant findings of fact and conclusion of law.

Mr. Mayer raised these issues, in his SAG. However, in its opinion, the Court of Appeals ignored the SAG, holding,

> Unchallenged findings of fact are considered verities on appeal...We review de novo the trial court's conclusion of law pertaining to the suppression of evidence...Here Nicholas does not assign error to any of the findings of fact from the CrR 3.6 hearing. Accordingly, our review is limited to a de novo determination of whether the trial court derived proper conclusions from the unchallenged findings.

Slip Opinion page 8 [citations omitted].

Of course, Mr. Mayer did assign error to these findings and conclusions, SAG Assignment of Error No.1. He argued the issue in his first legal argument.

The Court of Appeals should have considered the issue as raised in the SAG.

Likewise, the Court of Appeals declined to consider the CrR 3.5 issue because appellate counsel failed to assign error to the findings of fact and conclusions of law and considered them verities on appeal. Slip Opinion, page 12. Again, Mr. Mayer properly assigned error to them in his SAG, page 1.

1.

This Court should accept review not only because the Court of Appeals erred in its holdings regarding the CrR 3.6 ruling without the required consideration of the findings of fact where Mr. Mayer made proper assignments of error, the CrR 3.5 ruling without the required consideration of the findings of fact where Mr. Mayer made proper assignment of error.

E. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED

Rules of Appellate Procedure 13.4[b] set forth considerations governing acceptance of review. In pertinent part, RAP 13.4[b], these considerations mandate the acceptance of discretionary review:

> [1] (*If*) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> [2] (*If*) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; of
> [3] (*If*) a significant question of law under the Constitution of the State of Washington or of the United State is involved;

This Court should accept review in this because Mr. Mayer's conviction was obtained after police arrested him on a pretext and then obtained a statement from him after deliberately misleading him regarding his right to counsel and access thereto. The Court of Appeals decision conflicts with decisions of this Court, other decisions of the court of

appeals, and concerns significant questions of law under the Constitution of the State of Washington or of the United State is involved; the Court of Appeals also failed to even address a properly raised claim of ineffective assistance of counsel.

Mr. Mayer properly presented the issues for appellate review. In his SAG, he assigned error to Findings of Fact [FOF] and Conclusions of Law [COL] Re: Defense Motion to Suppress Statements [note: these findings also address the CrR 3.6 issue]. Appendix B. He assigned error to FOF 12, 13, 14, 16, 17, 21, 23, 24, 25, 26, 27, 28, and COL 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

(a) *The decision of the Court of Appeals conflicts with well-established case law from this Court and the Court of Appeals, and implicates significant questions of the law the Washington Constitution regarding pretextual stops.*

Warrantless searches and seizures are unconstitutional. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Article I, § 7 of the Washington State Constitution[4] and the Fourth Amendment of the United States Constitution[5] protect these fundamental rights. An investigative

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[4] **SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

[5] Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

stop, known as a *Terry* stop, is an exception that requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing *Terry*, 392 U.S. at 21). The officers' actions must be justified at their inception. *Ladson*, 138 Wn.2d at 350 (citing *Terry*, 392 U.S. at 20). In this case, police stopped a vehicle driven by Sarah Banker, who was not a suspect in any crime and had committed no offense hoping to find Mr. Mayer. Police had no "reasonable, culpable suspicion" that he had robbed Salmon Creek Teriyaki restaurant. Thus, their stop was pretextual and illegal. All evidence flowing therefrom should have been suppressed. The Court of Appeals Opinion finds a valid *Terry* stop is wrong for the following reasons:

> "Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime. This probable cause requirement is derived from the language of the Fourth Amendment to the United States Constitution, which provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ... ." Our state constitution similarly protects our right to privacy in article I, section 7, stating, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

In this case, the Court of Appeals opinion relied on "facts" that were not present in the report of proceedings or even in the Court's own statement of the case. For example, the Court held that the informant was reliable because he had informed officers that Mr. Mayer "frequently had heroin in his possession" as well as as to "*what type of vehicle he was driving*" when he left the restaurant shortly before police contacted Sarah Baker's vehicle. Slip Opinion, page 11.

Of course, the informant had told police that Sarah Baker drove the vehicle. RP 47-48. He did not tell the police anything about heroin possession. All of the statements that he made to police are summarized at page 3 of the slip opinion. These do not rise to equisite level of reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing *Terry*, 392 U.S. at 21). The officers' actions must be justified at their inception. *Ladson*, 138 Wn.2d at 350 (citing *Terry*, 392 U.S. at 20).

A pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code. *State v. Ladson*, 138 Wn.2d 343, 349, 351, 979 P.2d 833 (1999). " 'Pretext is, by definition, a false reason used to disguise a real motive.' " *Id.* at 359 n.11 (quoting

Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 Temp. L. Rev. 1007, 1038 (1996)). The reasonable articulable suspicion that a traffic infraction has occurred, which justifies an ordinary warrantless traffic stop, does not justify a stop for criminal investigation. *Id.* at 349. Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest. *Id.* at 358.

In this case, there is no dispute that Dep. Smith stopped the Baker vehicle entirely on pretext. He readily acknowledged that there had been no "furtive" movements inside the car prior to the stop, no speeding, no other traffic violation. RP 52. He stopped the car solely because it matched a description reportedly occupied by someone who reportedly had stated that he earlier had robbed a restaurant somewhere. RP 47-48. He wanted to conduct a criminal investigation. *Id.* He did not even mention the subject of a traffic violation to the *driver* Sarah Baker but rather confirmed to her that her registration was current before ordering everyone out of the vehicle. RP 52, 362-365, 463-467.

To determine whether a stop is pretextual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's behavior. *Id.* at 358-59. If the court finds the stop is pretextual, all subsequently obtained evidence flowing from the stop must be suppressed as derivative of the unconstitutional seizure. *Id.* at 359 (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

Thus the Terry stop was not justified. Police clearly knew this at the time and did not even attempt to so justify as such to the court. Rather, they admitted that it was a pretext and unabashedly moved on from there.

(d) *The decision of the Court of Appeals conflicts with well-established case law from this Court and the Court of Appeals, and implicates significant questions of the law the Washington Constitution regarding the admissibility of a defendant's statements taken in violation of Miranda.*

It is well-settled that police must cease questioning when a arrestee makes an unequivocal request for counsel. *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (quoting *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)). In other words, law enforcement officials are required to "scrupulously honor" an accused's "right to cut off questioning"—such that the failure to do so precludes admission of the accused's statements at trial—only where the accused has actually asserted that right. "To avoid difficulties of proof

and to provide guidance to officers conducting interrogations, this is an objective inquiry." *Davis*, 512 U.S. at 458-59.

An accused's invocation of either the right to remain silent or the right to counsel must be unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (noting that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*"); *Davis*, 512 U.S. at 458-59 (holding that an accused must unambiguously invoke the right to counsel).

The Court of Appeals erred when it erroneously held that Det. Dennison apparently reasonably believed that Mr. Mayer was asking about an attorney for a future court proceeding. In the context of Mr. Mayer's question, that is, during an advisement of rights in a taped statement, that holding defies credence.

"Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire ... sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [an assertion of his rights]." *Davis*, 512 U.S. at 459 (citation omitted) (quoting *Davis*, 512 U.S. at 476 (Souter , J., concurring in judgment)). Where an accused makes an ambiguous or

equivocal statement regarding the invocation of his or her rights, law enforcement officers have no obligation to ask clarifying questions or to cease the interrogation. *Berghuis*, 560 U.S. at 381; *Davis*, 512 U.S. at 461-62. The Supreme Court has determined that requiring officers to cease interrogation where a suspect makes a statement that *might* be an invocation of his or her rights would create an unacceptable hindrance to effective law enforcement. *Davis*, 512 U.S. at 461.

An invocation of *Miranda* rights is unequivocal so long as a "reasonable police officer in the circumstances" would understand it to be an assertion of the suspect's rights. *Davis*, 512 U.S. at 459. This test encompasses both the plain language and the context of the suspect's purported invocation. *Smith v. Illinois*, 469 U.S. 91, 93, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984). Plain language can be, on its own, telling. For instance, a suspect invoked his *Miranda* rights when he clearly stated, "'I would rather not talk about it.'" *State v. Gutierrez*, 50 Wn. App. 583, 589, 749 P.2d 213 (1988) (emphasis omitted).

In *Smith*, the defendant was advised of his right to have counsel present and told the police, "'Uh, yeah, I'd like to do that.'" *Id.* at 93 (emphasis omitted). Rather than cutting off discussion, the police finished reading Smith his *Miranda* rights and asked him, "'Do you wish to talk to me at this time without a lawyer being present?'" Smith

answered, "'Yeah and no, uh, I don't know what's what, really.'" *Id.* The trial court seized on Smith's latter statement as proof that Smith's invocation of *Miranda* was equivocal and admitted evidence of Smith's statements to police. The Supreme Court disagreed, holding that "[w]here nothing about the request or the circumstances *leading up to* the request would render it ambiguous, all questioning must cease." *Id.* at 98 (emphasis added). In other words, what the accused said *after* invoking his *Miranda* rights might be relevant to waiver but it was not relevant to the invocation itself. *Id.*

In this case, Mr. Mayer unequivocally asked how he would exercise the right to talk to an attorney before answering any questions as well as the right to have an attorney present during questioning. RP 79,80. Having heard during the *Miranda* advisement, he asked how he could get an attorney appointed for him at no cost because he court not afford one. RP 79, 80. Although the detective knew full well that there was a list of available attorneys just down the hall by the breathalyzer machine, the detective did not so advise Mr. Mayer. RP 153, 142-143. Instead the detective feigned a misunderstanding that Mr. Mayer was jumping ahead in his thinking and asking how he would get a lawyer in court after charging. RP 79. The facts of this case do not support the detective's unreasonable and unsupportable inference. The detective wanted to

question Mr. Mayer They both knew that. Mr. Mayer was not charged with any crime. The detective was advising Mr. Mayer of his right prior to taking that statement. There is no reasonable interpretation from these facts that Mr. Mayer was contemplating any criminal charges or future court appearances.

F. CONCLUSION

This Court should grant review of the Court of Appeals affirmance of the attempted murder charges and remand for dismissal with prejudice or in the alternative remand for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

/s/BARBARA COREY, WSBA#11778
Attorney for Petitioner

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws
Of the State of Washington that the following is a true
and correct: That on this date, I delivered via ABC- Legal
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Prosecutor's Office, 1013 Franklin Street, PO Box 5000
Vancouver WA 98666-5000 and to Jake Musga
DOC#368830, Washington State Penitentiary,
1313 North 13th Ave., Walla Walla, WA 99362

10/3/14 /s/Kim Redford
Legal Assistant

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Attached:

Kim Redford
Legal Assistant

kim@bcoreylaw.com
www.bcoreylaw.com

Law Offices of Barbara Corey
Attorney at Law
902 South 10th Street
Tacoma, WA 98405
phone: 253-779-0844 fax: 253-272-6439

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APPENDIX A

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

An officer may not use a **traffic infraction** as a **pretext** to stop a citizen and search for evidence of criminal wrongdoing that is unrelated to the reason for the stop. *State v. Snapp,* 174 Wn.2d 177, 199, 275 P.3d 289 (2012), citing *State v. Ladson,* 138 Wn.2d 343, 357-358, 979 P.2d 833 (1999). The officer's motivation in making the stop must be the traffic infraction, not a desire to arrest the driver and search for evidence. Police officers may enforce the traffic code, so long as they do not use the authority to do so as a pretext to conduct an unrelated criminal investigation. In determining whether a stop is pretextual, the court considers the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior. *Id.*

Citizens who are in cars receive their constitutional protections because the courts have barred them from making "pretextual stops." A pretextual stop happens when a police officer stops a car for no real/legitimate reason in order to make an arrest or illegal search. The Washington courts strictly prohibit this. State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). The Ladson court called a pretext stop a stop where the real reason [arrest or search] is something other than the is not the stated reason for the stop and thus the stop itself is based on an superficial lie.

With a few exceptions, warrantless searches and seizures are per se unreasonable and violate article I, section 7 of the Washington Constitution. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). One such exception is a search incident to *the arrest of a person in possession of a vehicle,* which permits an officer to "search the passenger compartment of a vehicle for weapons or destructible evidence." *State v. Stroud,* 106 Wn.2d 144, 152, 720 P.2d 436 (1986). But "arrest may not be used as a pretext to search for evidence." *State v. Michaels,* 60 Wn.2d 638, 644, 374 P.2d 989 (1962). Accordingly, "a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." *Ladson,* 138 Wn.2d at 353. That is exactly what happened in my case.

If a pretextual stop occurs, the Washington Constitution requires that "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Id.* at 359.

There is a "fundamental difference between the detention of a citizen for the purpose of discovering evidence of crimes and a community caretaking stop aimed at enforcing the traffic code." *State v. DeSantiago,* 97 Wn. App. 446, 451, 983 P.2d 1173 (1999) (citing *Ladson,* 138 Wn.2d at 358 n.10). Under *Ladson,* the inquiry is "whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not

otherwise be permitted absent that 'authority of law' represented by a warrant." *Ladson*, 138 Wn.2d at 352.

To determine whether a traffic stop is a pretext for accomplishing a search, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." *Id.* at 359. To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. *Id.*

In my case the State did not present any evidence at all that Sarah had committed any traffic violation. Rather, knowing the "informant" Matt Smith had told police that Mr. Mayer left the tavern in Sarah Baker's pick-up, Deputy Smith ran her license plate, contacted dispatch, and was informed that the pick-up indeed was registered to Sarah Baker. RP 47-48. Armed with the obvious, Deputy Smith then stopped the pick-up. RP 47. He was the first police officer to make contact with the occupants of the pick-up. RP 47. There is no issue that Deputy Smith stopped the pick-up for a traffic stop. As Deputy Butterfield testified that "the vehicle was seen by Deputy Smith *and a traffic stop occurred*." RP 30 [emphasis added].

Of course, there was no traffic violation. Instead the officer stopped her car and then immediately ordered us out of the pick-up. The officer never said anything about any traffic infraction. The officer said never said anything to the occupants about any traffic infractions. The officer had confirmed that the registration was valid before the stop. Deputy Smith testified that there were no traffic infractions, no speeding, no independent reason to stop the vehicle. RP 52. There were no furtive movements inside the car. RP 53-54.

That speaks volumes about the officer's true purpose. There simply was no traffic infraction. This was an unlawful pretext stop.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson*, 138 Wn.2d at 359. Suppression is constitutionally required under article I, section 7. *Id.* The traffic stop in this case was without authority of law because the investigatory reason **[*263]** for the stop was not exempt from the warrant requirement. The court erred by denying the suppression motion.

The Washington Constitution requires that "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."

In my case, and as a result of this unlawful and unconstitutional stop, the police unlawfully obtained a lot of evidence that the State could was forbidden to use against me. This includes my statements to the police, all of the physical items found in the car including money found on my person, heroin in the car, as well as statements made by Sarah Baker, who

should not have been arrested either. There is also something called "derivative evidence" and that means that the State also is prohibited from using any evidence that they learned about and obtained as a result of illegally and unconstitutionally taken evidence, such as everything taken in the illegal stop of the pick-up. *State v. Chapin*, 75 Wn. App. 460, 463, 879 P.2d 300 (1994) (discussing derivative evidence rule and citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)), *review denied*, 125 Wash. 2d 1024 (1995).

The State's case falls like a house of card because the stop of the pick-up was a pretext search.

The trial court tried to clean up the issue by entering the findings of fact and conclusions of law that I have assigned error to. The problem with the findings of fact and conclusions of law is that they totally ignore the evidence. The trial court decided to ignore the testimony of the police who testified that they stopped the car for a traffic infraction! The trial court however tried to say this was a Terry stop. It is interesting that no one testified to this at trial. The only testimony was that this was a stop for a traffic infraction. The trial court should not be allowed to ignore the record and make up its version of events to change a pretextual stop into a lawful stop. The findings of fact are supposed to be supported by the evidence. The appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Then the appellate court reviews a trial court's ruling on a motion to suppress to determine whether factual findings support its conclusions of law. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

I was taken into custody as a result of a pretext stop where the police had absolutely no reason for the stop. As a result of this unlawful stop, the police obtained a statement from me, Sarah, and Nicholas [my codefendant]. The police also found many items, including cash and heroin. All of these items are "fruit of the poisonous tree" and must be suppressed. **This is so because the Washington Constitution requires that "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."**

2. Mr. Mayer's statement was taken in violation of his rights under Miranda because he asked for an attorney and the detective deflected that request, instructing Mr. Mayer how he would get an attorney after he appeared before the court for arraignment. As a result, the law requires suppression of this statement.

The trial court's findings of fact nos. 22, 23, 24, 25, 26, and 28, are not supported by substantial evidence and as a result conclusions of law nos. 7, 8, 9, 10 are not supported by the findings of fact.

The right to *Miranda* warnings arises from the right not to incriminate oneself. U.S. Const. amend. V ("No person ... shall be compelled in any

criminal case to be a witness against himself ... ."); Wash. Const. art. I, § 9 ("No person shall be compelled in any criminal case to give evidence against himself ... ."); *Miranda*, 384 U.S. at 461 (" '[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment ... commanding that no person "shall be compelled in any criminal case to be a witness against himself." ' " (alteration in original) (quoting *Bram v. United States*, 168 U.S. 532, 542, 18 S. Ct. 183, 42 L. Ed. 568 (1897))).

Miranda rights, of course, may be waived. The government bears the burden of showing, by a preponderance, that the suspect understood his rights and voluntarily waived them. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

That United States Supreme Court ruling came 12 years later in *Davis*, 512 U.S. 452. The Court held that the later request must be explicit if the right to counsel has once been waived; an equivocal request will not do

After the stop, Officer Dennison testified that I was arrested. RP 83. He testified that I was in handcuffs. RP 83. He testified that I was not free to go. RP 83. At the police station, he said it was "a pretty normal procedure" to advise people of their rights and so that's what he did. RP 72. He said that Sgt. Sample was "probably" with him. RP 72. This was not recorded. RP 73. He didn't tell me what he wanted to talk to me about. RP 76. Officer Dennison guessed that I thought he wanted to talk to me about drugs. RP 76.

When Officer Dennison took custody of Mr. Mayer, Mr. Mayer was under the influence of heroin, methamphetamine, and Klonopin. RP 149. He had taken these at the bar approximately twenty minutes before being pulled over. RP 149.

Officer Dennison kept me in handcuffs at the police station. RP 139. My hands were cuffed behind my back. RP 139. Officer Dennison did give me a soda pop but the police had to pour it down my throat in order for me to have any. RP 139-140. Officer Dennison equivocated whether Mr. Mayer was under arrested. RP 83, 140, 141.

At the police station, Mr. Mayer did not know he was being recorded until he brought the recording out. RP 150.

Mr. Mayer felt "really confused" about the advisement about the attorney. RP 151. He knew he wanted an attorney but Officer Dennison made it seem like he couldn't get an attorney until he went to court and that he should still need to talk to the police. RP 151. He felt pressured to talk by the police statements such as "you have to talk to us . . . we know what happened." RP 151

Officer Dennison knew that Mr. Mayer was asking how to get a lawyer if he could not afford one. RP 143. Officer Dennison knew there was a list of lawyers Mr. Mayer could call down by the BAC machine in the police department. RP 142-143. Officer Dennison did not tell Mr. Mayer about that list. RP 142-143.

In this case, I did my best to ask for an attorney. I asked the police officer how I would get an attorney since I did not have any money. I wanted to know how to get an attorney at that time, but the police officer did not tell me that. He told me that I would get one if I was under arrest, taken to jail, and then brought before a judge. RP 79, 80 Officer Dennison said that I would get an attorney then. RP 79, 80. After he told me this, I understood him to say that I would not be able to have an attorney before then. I figured that since I could not have an attorney even though I had asked how to get one, I should just go ahead and answer his questions.

Officer Dennison even told me that I was not under arrest. RP 80. I really did not know how I could not be under arrest, yet sitting in the police office wearing handcuffs, being told that I had the right to an attorney, and then being told that I did not have that right just yet and maybe not ever unless I was brought before a judge. I said I understood this convoluted explanation because that is exactly what I had ben told.

I do know that if I had been told that I could have an attorney at that time and that if there was any way to contact an attorney, I would have done that. I think I was tricked. I think the police officer knew what he was doing when he pretended to think that I was asking about getting an attorney later on --- why would I want to know that? I was sitting there handcuffed in an interview room. I could not leave. Police officers were pouring soda pop down my throat when I was thirsty. They had total control over me. I was worried about what was happening to me then. I wanted an attorney then. I had no idea whether I would end up in court. I knew I was in a dangerous place then and I wanted an attorney. That is exactly why I asked the police how a poor person could get a lawyer. Now I know that the police knew all along how I could get one and that they did not tell me.

The police officers told Mr. Mayer that he knew something about the robbery, that he had a drug habit, needed to feed his addiction, and therefore needed to talk to them. RP 145.

3. The trial court erred when it denied Mr. Mayer's motion for continuance based on the State's tardy disclosure of incriminating DNA evidence which the State relied on to link him to the robbery.

On May 17, 2012, the prosecutor mentioned that DNA testing was not yet done. RP 102.

On October 8, 2012, defense counsel moved for a continuance of the trial, noting that the State had been late in providing the results of DNA tests and also that the State had provided wildly variable numbers for DNA results on a bandana. RP 234, 235. The State's DNA report had not been provided to the defense until September 20, 2012. RP 235. The bandana was important because the witness from the Teriyaki restaurant

said that the robbers wore bandanas. RP 275, 283. The witness was confused, though, and sometimes said "bandana" and other times said "ski mask." RP 284, 285. The State's expert gave three different numbers for the DNA on the same bandana --one out of five quintillion in one spot; one out of seventeen million in one spot; and one out of three thousand seven hundred in another spot. RP 236. The defense attorney wanted to have this testing reviewed but did not get the lab report until very close to the readiness hearing and therefore did not have adequate time for the defense expert Dr. Grimsbo to examine it. RP 235-236, 237.

The prosecutor opposed the motion for continuance and said that the DNA evidence was not dispositive but rather corroborative. RP 237. The prosecutor said that the defense attorney could always cross-examine on probabilities, statistics. RP 238. The prosecutor also stated that the State was ready for trial. RO 238.

Defense counsel further noted that the first DNA report from the State said that the result on the revolver was "inconclusive." RP 242. Obviously this report was in his favor.

The court decided to proceed with the trial and said that the DNA issue did not require a continuance at this point. RP 241.

The prosecutor argued the significance of the DNA results in closing and urged the jury to convict me based on those results. RP 1321-1323. The prosecutor argued that the testing was valid, that there was no cross-contamination, that were no mixed samples and only a single contributor. *Id.* These are technical issues that an expert should have been permitted to examine for my defense. Likewise, the State offered astronomical numbers to show how guilty I was in terms of the so-called uniqueness of my DNA. An expert would have been able to check the validity of those calculations. Our Supreme Court has held that possible pitfalls of DNA testing, "such as degradation, starring, cross contamination, etc., and the lack of controls" are questions for the jury. *State v. Cauthron*, 120 Wn.2d 879, 899, 846 P.2d 502 [1993].

Without an expert, a criminal defendant is unable to review and/or challenge the State's DNA testimony. The trial court's failure to grant the requested continuance when the State produced its DNA report on the eve of trial was so prejudicial to the defense that we lacked any means to intelligently evaluate and cross-examine this evidence. We needed an expert.

4. MY TRIAL ATTORNEY WAS INEFFECTIVE WHEN HE REFUSED TO STIPULATE TO MY PRIOR CONVICTIONS FOR PURPOSES OF THE PREDICATE FELONY FOR THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM.

The law requires a person who claims their attorney to be ineffective to show two facts: (1) that the attorney performed deficiently, and (2) that the deficient performance resulted in prejudice. State v. McFarland. 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

My appellate attorney's ineffectiveness for failing to preserve the issues regarding the admission of my confession and the suppression of other evidence from the pretextual traffic stop have been briefed in argument no. 1 and also in my motion to fire my attorney. I want this court to incorporate that motion in this brief. Basically, my attorney should have known that he is required to assign error to the findings of fact and conclusions of law. He is an attorney, not a pro se litigant. I have to assume that he would know how to make assignments of error and make excellent arguments in support of them. I have done my best. Did he do his best?

The law allows a defendant who is charged with unlawful possession a firearm to stipulate to the existence of the predicate felony. In *Old Chief v. United States*, 519 U.S. 172, 117 S. CT. 644, 136 L.Ed.2d. 574 (1997) the Court held that if a defendant stipulates that he has a prior felony conviction for purposes of an unlawful possession of firearm charge, the trial court cannot allow the State to introduce into evidence the details of the conviction and punishment. In ***Old Chief***, 519 U.S. at 191-92. The Court reasoned that there is "no question"

that "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." ***Old*** *Chief, 519 U.S. at 185. Old Chief* is the law in Washington. *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998).

I was charged with three counts of unlawful possession of a firearm in the second degree. The State had to prove beyond a reasonable doubt: "A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly had a firearm in his possession in his possession or control and he or she had been previously been adjudicated as a juvenile of a felony." *RCW 9.41.040(2)(a); WPIC 133.02.01.*

The prosecutor asked my attorney if he wanted to stipulate that I had been convicted/adjudicated of a felony. RP 255. This would have kept the jury from knowing all of my criminal history and still would have given that element of the crime to the State. My attorney refused to do this. RP 255.

Because of my attorney's refusal, the State put on evidence that I had been convicted of the following felonies: 2007 conviction for bail jumping; residential burglary and unlawful possession of a firearm in the same case number from 4/2/2003. RP 1254-1255.

My juvenile burglary convictions would not have been admissible if my own attorney had stipulated to the existence of an unnamed felony for purposes of the firearm charge. Although the burglaries might have been admissible for impeachment if I had committed them as adults, I had committed them as a juvenile. Evidence Rule 609[d] says that the court cannot consider the admissibility of convictions of a juvenile defendant for impeachment *ever*. Thus,

there was no way that the jury would have heard anything about the names of my juvenile convictions.

Further, the prosecutor went beyond proving the fact of the conviction. The prosecutor read into the record my statement on plea of guilty. That is not allowed by the law. RP 1255. The statute simply requires the State to prove the fact of conviction by, for example, the judgment and sentence. The State was not required to read in my statement of what I did that made my guilty. That did not enhance the proof of the element, was not relevant, and was done only for purposes of unfair prejudice.

My attorney was constitutionally ineffective when he made the State prove these predicate felonies instead of stipulating to them because they were convictions for the very same crimes that I was charged with. The jury of course naturally concluded that since I had committed the same crimes in the past, I would keep on committing the same crimes in this case.

In addition, my attorney did not ask the court to tell the jury that they could not consider these convictions as evidence that I tended to commit the same kind of crime over and over. This naturally caused the jury to think that I was guilty without even seriously considering the evidence. The jury is not supposed to use prior convictions as evidence that a person is the kind of guy who would naturally commit the same kind of crime. This is called a "limiting instruction" and should have been given.

Dated _____

_____
NICHOLAS KEITH MAYER

I declare under penalty of perjury under the laws of the State of Washington that on ___ May 2014, I personally placed in the out-going Mail at the Department of Corrections Center – Coyote Ridge, Connell, Washington 99326, a copy of this motion to:

Clerk
The Court of Appeals- Division II
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402-4454

Anne Mowry Cruser
Deputy Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000

Dated: May ___, 2014 at Connell, Washington

_____

NICHOLAS KEITH MAYER

APPENDIX B

10

FILED
NOV 20 2012
3:57
Scott G. Weber, Clerk, Clark Co.

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

STATE OF WASHINGTON, Plaintiff, v. NICHOLAS KEITH MAYER, Defendant.	No. 12-1-00311-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENSE MOTION TO SUPPRESS STATEMENTS

THIS MATTER having come regularly before the above-entitled Court, State of Washington represented by Kasey T. Vu, Senior Deputy Prosecuting Attorney, and the defendant being present and represented by his attorney, James J. Sowder, and the Court having held a CrR 3.6 and CrR 3.5 hearing on May 17, 2012, June 7, 2012, and July 2, 2012, and the Court further having reviewed the briefs and exhibits, and heard during that time from the following witnesses: Clark County Sheriff Deputies Marc Butterfield, Glen Smyth, Tom Dennison, and Phil Sample, and Defendant Nicholas Mayer, and after argument of counsel, hereby makes its:

FINDINGS OF FACT

1. Just after 9 PM on February 9, 2012, Clark County Sheriff (CCSO) Deputies were dispatched to investigate a report of an armed robbery that had just occurred at KC

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

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Teriyaki, a restaurant located at 800 NE Tenney Road in the Salmon Creek area of Vancouver, WA.

2. The victim and eyewitnesses described the robbery suspects as two white males in their late teens to early twenties, wearing dark-colored hoodies over their heads and bandanas over their faces, and brandishing two handguns. The two armed robbers forced their way into the restaurant from the side door, pointed the guns at the clerk, demanded money, grabbed the bank bag near the cash register that contained money and the restaurant owner's wallet, and fled out the side door.

3. The robbery occurred at around 9 PM, the restaurant's regular closing time, after the cash from the day's sales was placed in the bank bag and left by the cash register.

4. The robbers got away with approximately $800 in cash, as well as the restaurant owner's wallet. The police were unable to locate the two robbers that evening.

5. The restaurant is located at the end of a building in a shopping strip, with the main entrance at the front, facing the parking lot.

6. The side door of the restaurant is not commonly used by customers to go in or out of the restaurant.

7. Based upon how the robbery was conducted, the police suspected that it was either an inside job, or someone who had information about the closing procedures of the restaurant.

8. The restaurant owner told the police that he had fired a 19-year old female employee named Emily Mayer about two to three months before, after her till kept coming up short; and that Emily had an older brother who had a drug problem. He later provided an

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address for Emily Mayer, which corresponded with the address that the police had on her for an unrelated theft investigation.

9. At approximately 10:10 PM the following evening (February 10, 2012), a person named Matt called 911 to report the following: He had a friend named Nicholas Mayer, who was about 24 or 25 years old; Nicholas had been bragging about committing an armed robbery of a restaurant in Vancouver within the past several days; Nicholas had a "butt load of cash on him," which is not normal for Nicholas; Nicholas had a revolver, which he recently gave to someone; Nicholas was with his girlfriend, named Sarah Baker; Nicholas and Sarah were traveling in a grey Dodge Dakota (pick up truck), and that they had just arrived at a bar at Dollars Corner (in Battleground); and Nicholas was known to have Heroin on him. The substance of Matt's 911 call was reproduced in a typewritten log and admitted as Exhibit 2.

10. The information provided by Matt was relayed to CCSO deputies who were on duty at the time via the mobile computers in their patrol cars.

11. Matt wanted to remain anonymous and did not want to provide his last name, but provided his first name, and confirmed that his phone number was 635-1434.

12. Deputy Glen Smyth was on duty at the time of the 911 call from Matt, and was dispatched to Dollars Corner in Battleground to investigate. Deputy Smyth was also on duty the previous evening, and even though he was not one of the deputies who responded to the robbery call, he was aware of the armed robbery at KC Teriyaki and the basic facts of that incident. Deputy Smyth knew that the primary officer who responded to the robbery call the previous evening was Deputy Marc Butterfield. Deputy Smyth contacted Deputy Butterfield to update him with the additional information from Matt in the 911 call.

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13. Deputy Butterfield had conducted some follow up investigation after taking the initial robbery report the previous evening. Based on his investigation, Deputy Butterfield had already determined that Emily Mayer (recently fired from KC Teriyaki) had two older brothers, one of whom was named Nicholas Mayer, who was in his twenties. With the information provided by Matt in the 911 call, Deputy Butterfield believed Nicholas Mayer was a suspect in the armed robbery.

14. Deputy Tom Dennison was on duty on both February 9 and 10, and had responded with Deputy Butterfield to the KC Teriyaki robbery. Deputy Dennison talked to witnesses at the restaurant, took their statements, and conferred with Deputy Butterfield on the investigation. Deputy Dennison also received the dispatched information from Matt's 911 call on his mobile computer in his patrol car the evening of February 10. Similar to Deputy Butterfield, he also believed that Nicholas Mayer was a suspect in the armed robbery of KC Teriyaki.

15. The CCSO deputies were not aware of any other armed robberies of any other restaurants in Clark County around that time.

16. Deputy Smyth arrived near the location of the bar at Dollars Corner, and saw a grey Dodge Dakota pickup truck driving from the direction of the bar, got behind it, ran the license plate, and pulled it over. Dispatch returned that the Dodge Dakota was registered to Sarah Baker.

17. The police contacted the occupants of the truck, and identified them. The driver was Sarah Baker, the front seat passenger was Nicholas Mayer, and the back seat passenger was another male. Due to the nature of the investigation, all three were detained and

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transported to CCSO West Precinct in Ridgefield to be interviewed.

18. While the three occupants of the truck were being transported to the police precinct, Deputy Dennison contacted Matt on his cell phone, and then met Matt in person. This happened within 30 minutes of the stop of the truck.

19. When he met with Matt, Deputy Dennison verified that Matt was the person who called 911 that evening to report the admission by Nicholas Mayer about robbing the restaurant. Deputy Dennison also confirmed with Matt the information that he provided to the 911 operator.

20. At the police precinct, Deputy Dennison and Sergeant Phil Sample first interviewed Sarah Baker. Sarah told Deputy Dennison and Sergeant Sample the following: She and Nicholas Mayer were dating; she picked up Nicholas and gave him a ride on Thursday (February 9); Nicholas admitted to her that he had robbed a teriyaki restaurant, and that he was on the run from the police; Nicholas bragged to her about having a large amount of cash; Nicholas told her his sister, Emily, had driven him and another male, who she believed to be Emily's boyfriend, and dropped them off before the robbery, and picked them up afterward.

21. Deputy Dennison and Sergeant Sample then interviewed Nicholas Mayer after talking with Sarah Baker. The interview of Nicholas Mayer was video and audio-recorded. A portion of the audio recording was admitted as Exhibit 3 and played for the Court. A typed transcript of the interview was prepared and admitted as Exhibit 5.

22. Prior to asking Nicholas any questions of substance, Deputy Dennison read to Nicholas his *Miranda* warnings from a card that he carried with him. Nicholas affirmatively waived his rights and agreed answer questions from Deputy Dennison and Sergeant Sample by saying, "Let's talk."

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23. Deputy Dennison then asked Nicholas for permission to record the interview. Nicholas gave his permission. Deputy Dennison again, read Nicholas his *Miranda* warnings from the card that he carried.

24. Nicholas indicated that he understood his rights, and was willing to answer questions.

25. After indicating that he understood his rights, Nicholas asked Deputy Dennison how he would go about getting an attorney if he could not afford one.

26. Deputy Dennison thought Nicholas' question pertained to the procedures for getting an attorney appointed by the Court after being arrested, and explained the process to Nicholas.

27. Nicholas then agreed to talk to Deputy Dennison and Sergeant Sample, and made a number of incriminating statements.

28. At no point in the interview, did Nicholas tell Deputy Dennison that he wanted an attorney, or stop talking or answer questions.

29. The police spoke to Nicholas in English, and he answered in English; there was no language barrier.

30. Nicholas did not exhibit signs or symptoms of being under the influence of drugs or alcohol at the time.

31. The police did not make any threats or promises to Nicholas to get him to talk.

32. The current incident was not Nicholas Mayer's first interaction with the police, nor was it the first time he was read his *Miranda* warnings by the police.

33. Nicholas Mayer had been arrested by the police numerous times in the past, and

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1013 FRANKLIN STREET • PO BOX 5000
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has an extensive criminal record with over 10 criminal convictions, both as a juvenile and as an adult, consisting of both misdemeanors and felonies, that dates back to 2003.

Based on the foregoing findings of fact, the Court makes its:

CONCLUSIONS OF LAW

1. The Court has proper venue and jurisdiction to hear the above-entitled matter.

2. The Court perceives that there are three issues pertinent in the current motion: 1) the validity of the initial stop of the truck in which Defendant Nicholas Mayer was riding as a passenger; 2) whether the length of detention was reasonable; and 3) whether Defendant Nicholas Mayer's statements to the police were obtained based on a valid waiver of his constitutional rights.

3. The stop of the truck was a valid *Terry* investigatory stop, based on the totality of the circumstances known to the police at the time. The police had sufficient reasonable suspicion based on specific and articulable facts that Nicholas Mayer was involved in the armed robbery of KC Teriyaki on February 9, 2010, and that he was an occupant of the grey Dodge Dakota pick up truck to justify the investigatory stop the evening of February 10, 2010. Furthermore, the violent nature of the crime being reported and investigated in this case also played a role in the overall analysis, pursuant to *State v. Randall*, 73 Wn. App. 225 (1995).

4. The fact that the investigatory stop involved the police pulling over a vehicle is immaterial; the police could have detained Nicholas Mayer to conduct the investigation in the bar, in the parking lot, or any public location, as long as they had sufficient articluable reasonable suspicion to do so. In this case, the location of the suspect being in a moving vehicle does not require a heighten level of articulable

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
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(360) 397-2261 (OFFICE)
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reasonable suspicion under *Terry*.

5. Under the facts and circumstances presented in this case, Matt is not an anonymous tipster, and the police were justified in relying on the information that he provided to the 911 operator, and then relayed to the deputies in the field. He provided his first name, as well as his phone number to the 911 operator. Even if Matt were treated as an anonymous tipster, the information that he provided in the 911 call was highly reliable: He identified Nicholas Mayer by name and provided specific information about a recent armed robbery of a restaurant that Nichols admitted to committing; that Nicholas had a lot of cash on him; that Nicholas had a revolver that he recently gave to someone; that Nicholas was known to carry heroin on him. The majority of these are facts that corroborate what the police had already developed independently in their investigation. Hence, when Deputy Smyth saw the grey Dodge Dakota pick up truck traveling from the direction of the bar, this further corroborated Matt's information regarding the whereabouts of Nicholas Mayer.

6. The length of detention in this case was not unduly long. The police were continuously taking active steps to further the investigation from the inception of the investigatory stop. Contemporaneous with the transport of the three occupants to the police precinct by other officers for questioning, Deputy Dennison contacted, and then met up with Matt to verify that he was a real person, and confirm the information that he had provided to the 911 operator. Deputy Dennison then interviewed Sarah Baker, the driver of the pick up truck and girlfriend of Nicholas Mayer, before interviewing him. During each of these investigative steps, Deputy Dennison gained additional information that justified the continued detention of Nicholas Mayer as the suspect in the robbery.

7. Nicholas Mayer made a valid, intelligent, and voluntary waiver of his right to remain silent and right to counsel under *Miranda*, after being properly advised of his

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

constitutional rights by Deputy Dennison. It is absolutely clear that his statement of "Let's talk" to Deputy Dennison and Sergeant Sample, following the first advisement of his rights, was a valid waiver of his rights. Furthermore, Nicholas Mayer was not a novice in the area of police procedures following a suspect's detention or arrest. On the contrary, he was intimately familiar with the contents of a suspect's *Miranda* rights, as well as procedures following an arrest, due to his numerous prior arrests and extensive criminal record.

8. Nicolas Mayer's inquiry about how he could get an attorney if he could not afford one, was not an unequivocal request for an attorney. Under *Davis v. United States*, 512 U.S. 452 (1994) and *State v. Radcliffe*, 164 Wn.2d 900 (2008), once a suspect has waived his rights to an attorney and to remain silent, he must unequivocally indicate that he is requesting an attorney for the revocation to be effective. Furthermore, article 1 section 9 of the Washington State Constitution is co-extensive with, not broader than the protection under the Fifth Amendment of the U.S. Constitution, pursuant to *State v. Earls*, 116 Wn.2d 364 (1991).

9. The explanation that Deputy Dennison provided to Nicholas Mayer about how the Court appoints him an attorney once he is arrested and taken to court is correct and not misleading.

10. The statements that Nicholas Mayer made in response to questions by Deputy Dennison and Sergeant Sample were made freely, voluntarily, and without threats or promises, and are admissible.

11. Based on the above, the Defendant's Motion to Suppress Statements is hereby denied.

DONE IN OPEN COURT this 20 day of November, 2012.

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

The Honorable Barbara D. Johnson
Judge of the Superior Court of Clark County

Presented by:

Kasey T. Vu, WSBA #31528
Senior Deputy Prosecuting Attorney

Service accepted, ~~copy received, notice of~~ presentation waived and consent to entry granted this 20 day of November, 2012.

James J. Sowder, WSBA #09072
Attorney for Defendant

OBJECTIONS ON FILE

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1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

APPENDIX C

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DIVISION II
2014 SEP -3 AM 3:22
STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS KEITH MAYER,

Appellant.

No. 44232-9-II

UNPUBLISHED OPINION

Melnick, J. — Nicholas Mayer appeals his convictions for first degree robbery with two firearm enhancements, first degree burglary with two firearm enhancements, residential burglary, three counts of theft of a firearm, three counts of second degree unlawful possession of a firearm, and third degree theft. Nicholas[1] argues (1) insufficient evidence supported his first degree burglary conviction, (2) the jury instructions for first degree burglary violated his right to a unanimous jury verdict, (3) the trial court erred by denying his motions to suppress statements he made to the officers, (4) the State improperly vouched for one of its key witnesses' credibility, and (5) the trial court's denial of his motion to continue the trial denied him effective assistance of counsel. We affirm Nicholas's convictions.

FACTS

I. BACKGROUND

On February 9, 2012, just after 9:00 P.M., officers responded to a 911 call regarding a robbery at the KC Teriyaki restaurant in Salmon Creek, Washington. When the officers arrived, they interviewed the restaurant's owner, Hui Choe, a restaurant employee, Aljuarsmi Ortiz, and

[1] We refer to Nicholas Mayer and Emily Mayer by their first names to avoid confusion.

two other witnesses. The officers believed that it was likely an "inside job," because the suspects obviously knew about the side entrance and the restaurant's closing procedures. 1 Report of Proceedings (RP) at 21.

Choe told the officers about his former employee, Emily Mayer, whom he had fired a few months prior because he suspected her of stealing money. Choe also told the officers that Emily had told him she had an older brother who did drugs. After reviewing their databases, the officers determined that Nicholas was Emily's older brother. At that point, the officers listed Nicholas and Emily as potential suspects.

KC Teriyaki's closes at 9:00 P.M. Choe's usual closing procedure is to turn off the open sign and put the money from the day's sales into a bank bag. At closing on February 9, Choe removed the money from the register, approximately $800, and put it in a bank bag with his wallet. He set the bag on a stool behind the counter. Choe then went into the kitchen to prepare an order for a customer who had come in late; Choe told Ortiz he could leave for the night. Ortiz stated that when Ortiz opened the side door to leave, two young men, approximately six feet tall, wearing hoodies and bandanas over their faces and holding guns, pushed open the door, entered the restaurant, and demanded money. The two men noticed the bank bag on the chair, grabbed it, left through the side door, and ran across the street. Ortiz stated that it seemed as though the two men were waiting for someone to open the side door so they could get into the restaurant.

A customer in the restaurant witnessed two men and Ortiz scuffle. She stated that one of the two men had a handgun pointed at Ortiz, while the other grabbed something from under the counter. The customer's husband, who was waiting in his car outside the restaurant, saw two men with covered faces running from the side of the restaurant. He stated that one of them carried a gun. According to Choe, the restaurant's side door is an iron door that is kept closed

during business hours and, except in cases of emergencies, is used only by employees. The side door is hidden by bushes and cannot be seen from the road. Ortiz further explained that customers use the main, front entrance to enter the restaurant, and that the side door is used only by employees, usually to take out the trash and exit at the end of a shift.

The following night the officers received a call from a person who identified himself as "Matt." Clerk's Papers (CP) at 484. He provided the police his phone number. Matt stated (1) that a person named Nicholas Mayer was bragging about having recently robbed a Vancouver restaurant; (2) that Nicholas had a revolver that he recently gave away to someone; and (3) that Nicholas had a lot of cash, which was unusual for him. Matt also gave specific information that Nicholas was with his girlfriend Sarah Baker, riding in a grey pickup. Based on Matt's information and their investigation, the officers went to the particular location Matt provided and stopped a grey pickup. Inside the pickup were Nicholas, Baker, and another passenger, all of whom went to the police precinct for interviews.

Subsequently, Deputy Tom Dennison called Matt, who agreed to and did provide a statement. Dennison then interviewed Baker, who stated that Nicholas admitted to her that he had robbed a teriyaki restaurant.

Dennison later interviewed Nicholas. Before talking to him, Dennison read Nicholas his *Miranda*[2] rights from a card that he carried with him. Nicholas understood his rights, waived them, and agreed to have his interview recorded. After starting the recording, Dennison re-read Nicholas his *Miranda* rights. When asked if he understood his rights, Nicholas asked what he would do if he wanted an attorney and could not afford one. Dennison responded that if Nicholas was arrested and charged with a crime, when he went before a judge he would be

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

appointed an attorney if he could not afford one. Nicholas stated that he understood his rights and would talk to Dennison. Nicholas admitted his involvement in the KC Teriyaki restaurant robbery.

II. PROCEDURAL HISTORY

On February 24, 2012, the State charged Nicholas by amended information with first degree robbery with two firearm enhancements, first degree burglary with two firearm enhancements, residential burglary, three counts of theft of a firearm, three counts of second degree unlawful possession of a firearm, third degree theft, and first degree attempted trafficking in stolen property. Nicholas moved, under CrR 3.6, to suppress his statements, arguing that the officers unlawfully stopped and detained him. Nicholas also moved, under CrR 3.5, to suppress his alleged confession to the crimes, arguing that the officers gave him improper *Miranda* warnings. The trial court denied both motions and entered findings of fact and conclusions of law.

At the close of the State's case, the trial court dismissed the trafficking charge. The jury found Nicholas guilty on all other counts and the four firearm enhancements. Nicholas received a 306-month sentence, which included 240 months for the firearm enhancements. Nicholas appeals.

ANALYSIS

I. SUFFICIENT EVIDENCE SUPPORTS NICHOLAS'S FIRST DEGREE BURGLARY CONVICTION

Nicholas argues there is insufficient evidence to support his burglary conviction because he remained only in places open to the public in the KC Teriyaki restaurant. We disagree and hold that there is sufficient evidence beyond a reasonable doubt that Nicholas unlawfully entered and unlawfully remained in the restaurant.

Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom," which should be interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

> A person is guilty of first degree burglary
>
> if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1). "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5). A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. RCW 9A.52.010(5).

Whether a defendant enters or remains unlawfully in a building is decided on a case by case basis. *State v. Collins*, 110 Wn.2d 253, 258, 751 P.2d 837 (1988). An individual's presence "may be unlawful because of an implied limitation on, or revocation of, his privilege to be on the premises." *Collins*, 110 Wn.2d at 258. If an individual exceeds the scope of his invitation into a building, he has remained unlawfully therein. *Collins*, 110 Wn.2d at 255. Where a defendant's initial entry was clearly unlawful, the sufficiency of evidence that he or she remained unlawfully follows automatically. *State v. Cordero*, 170 Wn. App. 351, 366, 284 P.3d 773 (2012).

Here, Nicholas hid outside a side door to the KC Teriyaki restaurant. This iron door, not usually used by customers except in emergencies, is kept closed during business hours. It is used by employees to take the trash out and exit the restaurant at the end of a work shift. When Ortiz exited the side door after the restaurant's business hours, Nicholas pushed him back into the restaurant, entered the door with a gun drawn, and demanded money.

When drawing all reasonable inferences in the State's favor, we hold there is sufficient evidence that Nicholas entered and remained unlawfully in the KC Teriyaki restaurant. He exceeded the scope of his invitation. The time of Nicholas's entry occurred after the restaurant's normal business hours. Nicholas did not enter the restaurant through the front entrance or for the purpose of ordering or eating food; he forcefully entered through a hidden side entrance with the intent to steal money. Accordingly, we hold there is sufficient evidence that Nicholas unlawfully entered the restaurant. Thus, there is also sufficient evidence that he unlawfully remained in the closed restaurant while he completed the robbery.

II. THE TO CONVICT INSTRUCTION FOR FIRST DEGREE BURGLARY DID NOT VIOLATE NICHOLAS'S RIGHT TO A UNANIMOUS JURY VERDICT.

Nicholas argues there is insufficient evidence that he unlawfully remained in the restaurant and because the jury instructions stated the jury could find him guilty for either unlawful entering or unlawful remaining without requiring jury unanimity on either alternative, he was deprived of his constitutional right to a unanimous jury verdict. Because sufficient evidence supports that Nicholas *both* unlawfully entered and unlawfully remained in the restaurant, Nicholas received his constitutional right to a unanimous jury verdict.

We review alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). We also review constitutional challenges de novo. *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005).

Nicholas contends *State v. Klimes*, 117 Wn. App. 758, 73 P.3d 416 (2003), *overruled in part by State v. Allen*, 127 Wn. App. 125, 110 P.3d 849 (2005), supports this argument. But *Klimes* is no longer good law. In *Allen*, Division One of this court retreated from its overstatement in *Klimes* that the unlawful entering and unlawful remaining ways of committing burglary are repugnant to one another. 127 Wn. App. at 132. "Regardless of whether the defendant possessed an intent to commit a crime at the time of the unlawful entry, if the defendant unlawfully remains with the intent to commit a crime, we see no reason such conduct does not satisfy the requirements for burglary." *Allen*, 127 Wn. App. at 133. Thus, in most burglary cases, juries can be instructed as to both means and no special jury instruction or prosecutorial election of means is required. *State v. Johnson*, 132 Wn. App. 400, 409-10, 132 P.3d 737 (2006).

> 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.

Johnson, 132 Wn. App. at 410.

Here, we already have found that there is sufficient evidence that Nicholas both unlawfully entered and unlawfully remained in the restaurant. Thus, this argument fails.

III. THE OFFICERS PROPERLY STOPPED AND DETAINED NICHOLAS

Nicholas argues the trial court erred by denying his motion to suppress because the officers improperly relied on an anonymous tip to stop him. Nicholas argues this stop violated his federal and state constitutional right to be free from unreasonable searches and seizures. Because the officers had corroborated the tip they received from an unknown but named informant with information the officers already knew, the officers' stop did not violate

Nicholas's constitutional right to be free from unreasonable searches and seizures. We hold the trial court did not err by denying Nicholas's motion to suppress.

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Garvin*, 166 Wn.2d at 249 (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Unchallenged findings of fact are considered verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *Garvin*, 166 Wn.2d at 249.

Here, Nicholas does not assign error to any of the trial court's findings of fact from the CrR 3.6 hearing. Accordingly, our review is limited to a de novo determination of whether the trial court derived proper conclusions from the unchallenged findings.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). Generally, warrantless searches and seizures are unreasonable and violate the Fourth Amendment and article I, section 7. *Garvin*, 166 Wn.2d at 249. There are "a few 'jealously and carefully drawn exceptions' to the warrant requirement," including *Terry*[3] investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (quoting *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). A police officer may conduct a warrantless investigative stop based upon less evidence than is needed to establish probable cause to make an arrest. *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003).

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

But the officer must have "a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *Acrey*, 148 Wn.2d at 747. "A reasonable, articulable suspicion means that there 'is a substantial possibility that criminal conduct has occurred or is about to occur.'" *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012) (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). The officer's suspicion must relate to a particular crime rather than a generalized suspicion that the person detained is "up to no good." *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009).

Information supplied by another person may authorize an investigative stop if the informer's tip demonstrates some "'indicia of reliability.'" *State v. Lesnick*, 84 Wn.2d 940, 943, 530 P.2d 243 (1975) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). Our Supreme Court first stated that reliability can be established if (1) the informant was reliable or (2) the officer's corroborative observation suggests either the presence of criminal activity or that the information was obtained in a reliable fashion. *State v. Z.U.E.*, 178 Wn. App. 769, 781, 315 P.3d 1158 (2014) (citing *Lesnick*, 84 Wn.2d at 944). Our Supreme Court subsequently clarified that "'reliability by itself generally does not justify an investigatory detention.' Instead, a reliable informant's tip also must be supported by a 'sufficient factual basis' or 'underlying factual justification' so officers can assess the probable accuracy of the informant's conclusion." *Z.U.E.*, 178 Wn. App. at 781 (quoting *State v. Sieler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980)). Thus, "an informant's report can provide reasonable justification for an officer's investigative stop in two situations: (1) when the information available to the officer showed that the informant was reliable or (2) when the officer's observations corroborate either the presence of criminal activity or that the informant's report was obtained in a reliable

fashion." *Z.U.E.*, 178 Wn. App. at 782 (citing *Sieler*, 95 Wn.2d at 47-48; *Lesnick*, 84 Wn.2d at 944).

We determine the propriety of an investigative stop—the reasonableness of the officer's suspicion—based on the "totality of the circumstances." *Snapp*, 174 Wn.2d at 198. The focus is on what the officer knew at the time of the stop. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). A court must base its evaluation of reasonable suspicion on "'commonsense judgments and inferences about human behavior.'" *Lee*, 147 Wn. App. at 917 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

Whether a warrantless investigative stop was justified or represents a constitutional violation is a question of law, which we review de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852 (2010). The State bears the burden of showing the propriety of an investigative stop. *Acrey*, 148 Wn.2d at 746. If the initial stop was unlawful, the evidence discovered during that stop is not admissible because it is fruit of the poisonous tree. *Kennedy*, 107 Wn.2d at 4.

In this case, considering the totality of the circumstances, the information available to the officer demonstrated the informant's reliability. Thus, the *Terry* stop was proper. The day after the incident at the KC Teriyaki restaurant,

> a person named Matt called 911 to report the following: He had a friend named Nicholas Mayer, who was about 24 or 25 years old; Nicholas had been bragging about committing an armed robbery of a restaurant in Vancouver within the past several days; Nicholas had a "butt load of cash on him," which is not normal for Nicholas; Nicholas had a revolver, which he recently gave to someone; Nicholas was with his girlfriend, named Sarah Baker; Nicholas and Sarah were traveling in a grey Dodge Dakota (pick up truck), and that they had just arrived at a bar at Dollars Corner (in Battleground); and Nicholas was known to have Heroin on him.

CP at 484. Matt did not want to provide his last name, but he did provide his telephone number. Matt, therefore, is classified as an unknown, but named, informant and cannot be characterized as an anonymous informant.

Although Matt did not want to provide any additional personal information, he did provide significant corroborating information regarding the armed robbery of the KC Teriyaki restaurant. The officers were aware that Choe had recently fired Emily for suspected stealing and that she had an older brother who had "a drug problem." 1 RP at 22. Matt told officers that Nicholas was bragging about having recently robbed a Vancouver restaurant and that he frequently had heroin in his possession. Through their independent investigation, the officers knew of Emily's brother, Nicholas. The police considered Nicholas and Emily to be possible suspects. Matt identified the individual he called about as Nicholas Mayer. The officers were aware that the suspects were armed at the time of the robbery. Matt stated that Nicholas had recently given away a gun. The officers were also aware that approximately $800 had been taken from the KC Teriyaki restaurant. Matt stated that Nicholas had a lot of cash on hand, which was unusual. Thus, the information Matt provided corroborated information that the officers already knew. Additionally, Matt provided specific information as to Nicholas's location, whom he was with, and what type of vehicle he was driving. The officers found the pickup where Matt said it could be located. When the officers stopped the grey pickup, there were three occupants, including Nicholas and Baker.

Matt's reliable tip corroborated the information the police already possessed. The officers' stop did not violate Nicholas's constitutional right to be free from unreasonable searches and seizures. We hold the trial court did not err by denying Nicholas's motion to suppress.

IV. NICHOLAS RECEIVED PROPER *MIRANDA* WARNINGS

Nicholas also argues the trial court erred by denying his motion to suppress his statements because the officer's *Miranda* warnings did not properly apprise him of his right to an attorney. The officer read Nicholas his *Miranda* warnings and then explained the process to obtain an attorney if Nicholas could not afford one. We hold that the warnings Nicholas received satisfied *Miranda* and the trial court did not err by denying Nicholas's motion to suppress his statements.

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law. *Garvin*, 166 Wn.2d at 249. "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Garvin*, 166 Wn.2d at 249 (quoting *Reid*, 98 Wn. App. at 156). Unchallenged findings of fact are considered verities on appeal. *Lohr*, 164 Wn. App. at 418. We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *Garvin*, 166 Wn.2d at 249.

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington State Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection provided by the state provision is coextensive with that provided by the Fifth Amendment. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

Prior to any custodial interrogation, a suspect must be informed that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed

for him prior to any questioning." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Although no magic words are required, *Miranda* warnings must "clearly inform[]" the individual of his rights. *Miranda*, 384 U.S. at 471. The *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably "'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)) (alteration in original).

In *Duckworth*, the officers told the suspect "that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had this right to the advice and presence of a lawyer even if [he could] not afford to hire one, and that he had the right to stop answering at any time until [he] talked to a lawyer." 492 U.S. at 203 (alteration in original) (internal quotation marks omitted). The officers then added "that they could not provide respondent with a lawyer, but that one would be appointed if and when you go to court." *Duckworth*, 492 U.S. at 203 (internal quotation marks omitted). The Supreme Court stated that "[w]e think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask when he will obtain counsel," and held that these initial warnings satisfied *Miranda*. *Duckworth*, 492 U.S. at 204-05.

Here, the officers read Nicholas his *Miranda* warnings, and he waived his rights by stating, "Let's talk." CP at 486. The officers then asked to record Nicholas's interview, to which Nicholas agreed. Once the officers began recording, the following exchange occurred:

> DEPUTY DENNISON: Okay. Do I have your permission to record this statement?
>
> MR. MAYER: Yes.
>
> . . . .
>
> DEPUTY DENNISON: Okay. So you (inaudible). I read you your *Miranda* prior to it, but now that we're on—on recording, I'm going to read it to you again, okay? You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights as I've explained them to you?
>
> MR. MAYER: Yes. Um, If I wanted an attorney and I can't afford one, what—what would—?
>
> DEPUTY DENNISON: If you wanted an attorney—you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?
>
> MR. MAYER: Yeah, but how would that work? Will you be—how it—how I—
>
> DEPUTY DENNISON: You're not under arrest at this point, right?
>
> MR. MAYER: Oh, okay. Okay.
>
> DEPUTY DENNISON: So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would be afforded an attorney if you couldn't hi—you know, if you weren't able to afford one.
>
> MR. MAYER: All right. I understand.
>
> DEPUTY DENNISON: Understand?
>
> MR. MAYER: Yeah.
>
> DEPUTY DENNISON: Okay. So you do understand your rights?
>
> MR. MAYER: Yes.
>
> DEPUTY DENNISON: Keep your rights in mind. Do you want to explain to us or talk to us about—all right, you know, I told you why you're here. There was a robbery at the—at KC Teriyaki and your name has come up. So, keeping your rights in mind, do you want to talk to us about it?
>
> MR. MAYER: Okay.

1 RP at 78-80.

In this case, like in *Duckworth*, Nicholas received *Miranda* warnings and then was also told the process to have an attorney appointed if he could not afford one. Deputy Dennison believed Nicholas's question about an attorney pertained to how he could get an attorney if he could not afford one and that he did not request an attorney at that time. For this reason Deputy Dennison explained the process for having an attorney appointed. As the *Duckworth* Court noted, it is relatively common for a suspect to ask when and how he will obtain counsel if he cannot afford one. 492 U.S. at 204-05. Thus, we hold that the warnings Nicholas received satisfied *Miranda*, and the trial court did not err by denying Nicholas's motion to suppress his statements.

V. STATE WITNESS'S TESTIMONY REGARDING PLEA BARGAIN DID NOT VIOLATE NICHOLAS'S RIGHT TO HAVE A FAIR AND IMPARTIAL JURY BE THE SOLE JUDGE OF THE FACTS

Nicholas argues the State improperly bolstered Emily's credibility by questioning her about a condition of her plea bargain to testify truthfully. Nicholas argues that by allowing Emily's testimony, the trial court violated his constitutional right to have the jury be the sole judge of the facts and to determine the credibility of witnesses. We hold that the State did not improperly vouch for Emily's credibility by questioning her about the condition of her plea bargain to testify truthfully.

Generally, the State cannot admit evidence that a witness has agreed to testify truthfully in its case in chief. *State v. Ish*, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). On redirect, however, the State may question its witness about an agreement to testify truthfully where the

defense first questioned the witness about the agreement on cross-examination.[4] *Ish*, 170 Wn.2d at 198-99.

Here, a condition of Emily's plea bargain was to testify truthfully in Nicholas's trial. On cross-examination, Nicholas questioned Emily about reasons to doubt her credibility, including that she had received a plea bargain. Nicholas specifically asked Emily, "And the agreement says you're supposed to testify truthfully" and "according to what you told them earlier?" 4B RP at 802-03. On redirect, the State questioned Emily about her plea bargain and her obligation under the plea bargain to testify truthfully.

Because Nicholas questioned Emily about her plea bargain on cross-examination, he opened the door to this subject for redirect. Thus, the trial court did not err by allowing the State to question Emily on redirect about her obligation to testify truthfully. Nicholas was not denied his right to have the jury be the sole judge of witness credibility.

VI. TRIAL COURT DID NOT ERR BY DENYING NICHOLAS'S MOTION TO CONTINUE

Nicholas argues he was denied effective assistance of counsel because the trial court denied his motion for a continuance of the trial date. We disagree and hold the trial court did not err and that Nicholas was not denied effective assistance of counsel.

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[4] A defendant may, however, impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony. During such cross-examination, the agreement may be marked as an exhibit, but not necessarily admitted, and relevant portions may be disclosed to the jury. If the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness's credibility.

Ish, 170 Wn.2d at 198-99.

A. MOTION TO CONTINUE

We review a trial court's decision to deny a continuance to determine if the trial court exercised its discretion based on untenable grounds or reasons. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006). A court considers various factors when it decides a motion to continue, including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether the court previously granted continuances. *V.R.R.*, 134 Wn. App. at 581. To show that the denial of a continuance violated the right to due process, the defendant must show either that he was prejudiced by the denial or that the outcome would have been different if the continuance had been granted. *V.R.R.*, 134 Wn. App. at 581.

Nicholas argues he was prejudiced because his counsel received late DNA evidence and therefore did not have time to employ an expert to evaluate and counter the DNA evidence to prepare a defense. The record, however, does not support Nicholas's assertion. Instead, the record demonstrates that Nicholas's counsel was well-prepared and made a strong case for him. Nicholas's counsel extensively cross-examined the State's DNA witness, questioning the DNA witness about, among other things, the DNA locations on a chromosome used to evaluate the DNA evidence; the collection, storage, and testing processes; the precautions taken to avoid contamination; and the statistical analysis performed. Nicholas fails to show prejudice and does not establish ineffective assistance of counsel. Thus, his due process argument fails.

Further, Nicholas received the DNA evidence on September 24, but did not move for a continuance until the readiness hearing on October 4, four days before trial was set to begin. The trial court noted the "somewhat short on provision of this evidence," but that Nicholas did not move to continue until the readiness hearing, "which makes it very short notice to reschedule the entire trial, which does have a number of witnesses." 2 RP at 240. The trial court also stated

that it was familiar with a portion of the evidence from the CrR 3.5 and CrR 3.6 hearings and that the DNA evidence was not a central part of the State's case and was not critical evidence. Thus, considering the importance of evidence, the timeframe of when the evidence was introduced and when Nicholas moved to continue, and that trial was set to begin in only four days, the trial court concluded that a continuance was not justified.

In a similar case, our Supreme Court affirmed the trial court's denial of the defendant's motion to continue to obtain an expert witness. *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004). The court held that although the defendant was surprised and did act diligently to secure an expert, a continuance was unnecessary because the expert testimony would not change any material facts. *Downing*, 151 Wn.2d at 274. In so holding, the court stated: "While 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." *Downing*, 151 Wn.2d at 274.

Similarly, here, we determine that the DNA evidence was not central to the State's case. Instead, the DNA evidence merely corroborated extensive witness testimony and Nicholas's confession during his interview after arrest. The trial court weighed the timeline of events against the evidence at issue and concluded that a continuance was not necessary. Although reasonable minds may differ, we hold that the trial court's decision was not manifestly unreasonable. We hold the trial court did not err by denying Nicholas's motion to continue.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

To prove ineffective assistance of counsel, Nicholas must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). There is a strong presumption that defense counsel's performance was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Performance was not deficient if counsel's conduct can be characterized as a legitimate trial strategy. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). To establish prejudice, the defendant must show a reasonable probability that the deficient performance affected the outcome of the trial. *Thomas*, 109 Wn.2d at 226. We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Nicholas's counsel was well-prepared and had a significant breadth of knowledge regarding DNA testing and interpretation of the results. Nicholas's counsel extensively cross-examined the State's DNA witness. Thus, Nicholas does not establish deficient performance. Furthermore, as we established above, the trial court's denial of Nicholas motion to continue did not prejudice him. Having failed to meet both prongs of the test, Nicholas does not show that his counsel rendered ineffective assistance.

We affirm Nicholas's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Hunt, J.

Bjorgen, A.C.J.

Bjorgen, J.

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Attached:

Kim Redford
Legal Assistant

kim@bcoreylaw.com
www.bcoreylaw.com

Law Offices of Barbara Corey
Attorney at Law
902 South 10th Street
Tacoma, WA 98405
phone: 253-779-0844 fax: 253-272-6439

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