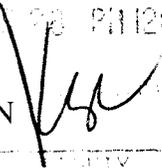


FILED
COURT OF APPEALS

NO. 33930-7-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

05 27 2010 12:34

BY  THORNE

STATE OF WASHINGTON

Respondent,

v.

MILO SHAWN THORNE

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Chris Wickham, Judge
the Honorable Wm. Thomas McPhee, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court judge erred in denying the Appellant's Motion to Suppress Evidence pursuant to Criminal Rule 3.5 and 3.6.
2. The trial court erred in concluding that the law enforcement officer had a reasonable and articulable suspicion of criminal activity at the time he got out of his patrol vehicle and contacted the Appellant.
3. The trial court erred in concluding that it was reasonable under the circumstances for the law enforcement officer to be suspicious that the Appellant had been or was involved in criminal activity or wrongdoing.
4. The trial court erred in entering Finding of Fact 2.1:
 - 2.1 The defendant testified that he had revealed to Officer Quiles that he was aware of an outstanding warrant (for his arrest) prior to the officer checking with dispatch.
5. The trial court erred in entering Finding of Fact 2.2:
 - 2.2 The defendant further testified that he was commanded – (told to stand in a particular position by the officer) – to remain at the scene.
6. The trial court erred in entering the following unnumbered

Conclusion of Law:

The officer's testimony is credible – and more credible than that of the defendant. The defendant was not ordered to remain anywhere, and until the warrant information was relayed to the officer, the

defendant was not “seized.”

7. The trial court erred in entering Conclusion of Law 3.1:

3.1 The contact of the defendant by Officer Quiles initially was inadvertent and one of information-gathering by the officer of a citizen (the defendant) who appeared to be a potential witness.

8. The trial court erred in entering Conclusion of Law 3.2:

3.2 Officer Quiles took no action, verbally or otherwise, to restrain or detain the defendant in any way. The defendant was free to walk away at all times until the warrant was discovered. The duration of the initial contact to the discovery of the warrant was quite brief.

9. The trial court erred in entering Conclusion of Law 3.3:

3.3 Officer Quiles engaged in no behavior that had coercive elements of constitutional implications. The request for identification by the officer was in a manner and in a context that implicated no privacy rights of the defendant. Given the totality of the circumstances the defendant was free to leave and a reasonable person would have felt free to go (until the warrant was discovered).

10. The Appellant was seized for purposes of detention pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

11. The trial court erred by admitting evidence of the Kirkland incident and the untried burglary charge in Puyallup under ER 404(b) to show “identity.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that law enforcement officer had a reasonable and articulable suspicion of criminal activity justifying stopping and questioning of the Appellant, where the officer was dispatched to the 3100 block of Capitol Boulevard in Tumwater regarding a complaint of a “suspicious vehicle” parked in the parking lot of the State Crime Laboratory building, where the officer saw a man walking on the sidewalk and stopped his patrol vehicle and got out and contacted him, where the man was “sweating profusely” and was “extremely nervous,” wearing a denim jacket and brown gardening gloves, and where the man said that he was coming from a friend’s apartment behind a Seven Eleven store, and where the officer stated that there were no apartment behind the Seven Eleven, which was located a block from the scene of the contact? Assignments of Error No. 1, 2, 3, and 4.

2. Did the trial court err in concluding that law enforcement officer had a reasonable and articulable suspicion of criminal activity justifying stopping and questioning of the Appellant, where the officer was dispatched regarding a complaint of a “suspicious vehicle,” where the officer saw a man walking on the sidewalk and stopped his patrol vehicle and got out and contacted the man, who was “sweating profusely” and was “extremely nervous,” wearing a denim jacket and brown gardening gloves, and where the

man said that he was coming from a friend's apartment behind the Seven Eleven store, and where the officer stated that there were no apartment behind the Seven Eleven, which was located a block from the scene of the contact? Assignments of Error No. 1, 2, 6, 7, 8, and 9.

3. Whether the lower court erred in finding that the Appellant was "seized" by the officer when the individual was on foot, the officer was in a police vehicle, where the stop occurred at 3:36 a.m., where the officer asked the Appellant if he had seen anyone in the vicinity sitting in a vehicle, and said that he was coming from a friend's residence, where the officer then asked about the friend's name and asked the Appellant for his identification, wrote down the name from the identification, and then asked him "minded" if he "ran him for warrants" and where the Appellant testified that he was commanded to remain in place at the scene? Assignments of Error No. 4, 5, 6, 7, 8, 9, and 10.

4. Did the lower court err in concluding that the Appellant was not ordered to remain at the scene and that the Appellant was not "seized", where the officer asked the Appellant if he had seen anyone in the vicinity sitting in a vehicle, and said that he was coming from a friend's residence, where the officer then asked about the friend's name, and asked the Appellant for his identification, wrote down the name from the identification, and then asked him "minded" if he "ran him for warrants" and where the Appellant

testified that he was commanded to remain in place at the scene?
Assignments of Error No. 6, 7, 8, 9, and 10.

5. Did the trial court err in concluding that evidence obtained as result of the stop was admissible, where the evidence was obtained pursuant to a detention for which the officer did not have a reasonable, articulable suspicion of criminal activity at the time he observed the Appellant on the sidewalk and at the time of the initial inquiry? Assignments of Error No. 1 and 2.

6. Did the trial court err in admitting, pursuant to ER 404(b), evidence of an incident in which the Appellant was found in the early morning outside a business near Kirkland on April 13, 2003, with a portion of the door lock removed and on the ground and where he had gloves, a flat head screwdriver, a pair of vise grip pliers, and a flashlight, and that he was found in a business in Puyallup in the early morning hours of March 1, 2005, where the Appellant was found with a pry tool, a screwdriver, flashlight, gloves, and vise grips during those incidents, where the incidents were geographically and temporally removed from the current offenses? Assignment of Error No. 11.

7. Did the prejudicial effect of testimony regarding an incident in which the Appellant was found outside a business Near Kirkland early in the morning with a portion for the door lock removed and on the ground, and

found in a business in the early morning hours in Puyallup outweigh the probative value of the incidents? Assignment of Error No. 11.

C. STATEMENT OF THE CASE¹

The Appellant, Milo Shawn Thorne, appeals his convictions for three counts of burglary in the second degree. The issues presented are whether the trial court judge erred in denying Mr. Thorne's Criminal Rule 3.5 and 3.6 motion to suppress evidence obtained by law enforcement, and whether the trial court erred by allowing testimony regarding two alleged incidents in which Mr. Thorne was found either outside a business or inside a business in the early morning hours with tools, pursuant to Evidence Rule 404(b), for the purpose of showing "identity."

1. Procedural Facts:

Mr. Thorne was charged by Information filed in Thurston County Superior Court² on August 6, 2004, with three counts of second degree burglary, contrary to RCW 9A.52.030.³ Clerk's Papers [CP] at 5. The State

¹This Court should note that in compliance with RAP 10.3(a)(4), the Statement of the Case set forth relates solely to the issues presented.

²Thurston County Cause No. 04-1-01435-6.

³9A.52.030 provides:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

alleged that Mr. Thorne burglarized a business known as Tammy's Ceramic (Count I), a business called Cosa Bella (Count II), and a business called Bonsai Teriyaki (Count III) on July 5 or July 6, 2004. CP at 5.

2. CrR 3.5/3.6 Suppression Hearing:

The defense moved to suppress pursuant to Criminal Rule 3.5 and 3.6 statements, a screwdriver, and statements regarding other tools and coins obtained by Officer Carlos Quiles during a search of Mr. Thorne on July 6, 2004. The motion was heard by the Honorable Wm. Thomas McPhee on August 15, 2005. Report of Proceedings [RP] (8.15.05) at 1-78.

Carlos Quiles, a police officer employed by the Tumwater Police Department, was dispatched to the 3100 block of Capitol Boulevard in Tumwater regarding a report of a suspicious vehicle early in the morning of July 6, 2004. He stated that he was advised that a red Toyota 4-Runner was in the parking lot of the State Crime Laboratory. RP (8.15.05) at 9-10. He went through the parking lot of the crime lab with his lights and brake lights turned off. RP (8.15.05) at 11. He did not see the suspicious vehicle. RP (8.15.05) at 12. As he drove in an alleyway, shortly before he pulled onto Cleveland Avenue, he saw a man walking on the sidewalk in front of a liquor store. He testified that the man "almost walked into the front of [his] patrol car." RP (8.15.05) at 12. This contact occurred at 4:17 a.m. RP (8.15.05) at

21. Officer Quiles described him as “walking very fast, very hurriedly, fast enough that he didn’t notice” the patrol car until he “almost walked into the front of [the car].” RP (8.15.05) at 12. Officer Quiles stated that Mr. Thorne was wearing a jacket and brown gardening gloves at the time of the contact. RP (8.15.05) at 13. He stated that Mr. Thorne appeared to be “very nervous” and was “sweating profusely.” RP (8.15.05) at 14. Officer Quiles asked him whether he had seen any suspicious vehicles in the area. RP (8.15.05) at 14. Mr. Thorne stated that he had not seen anything and that he had just left a friend’s house. RP (8.15.05) at 14.

Officer Quiles asked Mr. Thorne for identification. RP (8.15.05) at 17. Mr. Thorne produced a Washington State ID card. RP (8.15.05) at 17. He asked Mr. Thorne if he had any outstanding warrants, and Mr. Thorne told him that he did not. RP (8.15.05) at 19. Officer Quiles learned that Mr. Thorne had a Thurston County warrant for first degree negligent driving. RP (8.15.05) at 20. He stated that he learned about the warrant at 4:26 a.m. RP (8.15.05) at 21. After the existence of the warrant was confirmed, the officer placed Mr. Thorne under arrest and searched him. He had two pockets that contained quarters and dimes. He also had a pair of vice grips, a flat head screwdriver, and a small flashlight. RP (8.15.05) at 22. Mr. Thorne stated that the coins were winnings from playing pool in Everett. RP (8.15.05) at

22.

Officer Quiles stated that Thorne was free to leave. RP (8.15.05) at 18.

Mr. Thorne testified that he was walking on the sidewalk, stopped in front of the car, and then walked up to the officer. RP (8.15.05) at 41. He stated that Officer Quiles got out of his car and asked him if he had seen a suspicious car in the area. RP (8.15.05) at 41. Mr. Thorne stated that he had not. RP (8.15.05) at 41. After he gave him his Washington ID, he stated that Officer Quiles told him to stand next to his car by the driver's side. RP (8.15.05) at 42. He stated that he did not feel that he was free to leave the area. RP (8.15.05) at 42.

Mr. Thorne stated that he did not tell Officer Quiles that he got the change from playing pool, but from winning pull tabs. RP (8.15.05) at 46.

After hearing testimony, Judge McPhee denied the motion to suppress evidence obtained by the officer. RP (8.15.05) at 75-76.

The court entered the following findings of fact and conclusions of law:

I. UNDISPUTED FACTS

- 1.1 On July 6, 2004, at approximately 3:56 a.m. Tumwater Police Officer Carlos Quiles was dispatched to the vicinity of the 3100 block of Capitol

Boulevard for a “suspicious vehicle complaint.” Apparently a surveillance camera at a state crime laboratory building had picked up a vehicle – not related to an employee – parking in the lot.

- 1.2 Officer Quiles, in a marked patrol car, cruised the area checking for signs of a “suspicious vehicle”. As he drove east on an alley way approaching Cleveland Avenue, he encountered a pedestrian – later identified as the defendant – walking hurriedly on the sidewalk (in front of the liquor store at 408 Cleveland) Officer Quiles had his lights out as he moved the patrol car through the alley. The defendant was moving so rapidly that as the car neared the intersection of the sidewalk and alleyway the defendant nearly contacted the car.
- 1.3 Officer Quiles stopped his car, got out, and contacted the defendant. Dispatch logs indicate that Officer Quiles radioed “out with one in front of the liquor store” at 4 17:34 a.m.
- 1.4 Officer Quiles asked Thorne if he had seen anyone in the vicinity sitting in a vehicle. The defendant replied in the negative, and said he had just come from a friend’s house nearby at “the 7-11.”
- 1.5 During his initial contact with Thorne, Office Quiles noted that he was sweating profusely – as if he had” come a long way”, was “extremely nervous” , was wearing a denim jack (Quiles, on the other hand,
- 1.6 The colloquy between the officer and the defendant continued by Officer Quiles’ asking Thorne the name of his friend, and was told “Rick Pashell; “but Thorne said he did not know his friend’s address – only that he (the friend) lived in an apartment located behind the 7-11. Officer Quiles is familiar with the area and knew that there were no apartments located behind the

7-11 (a block away from the instant location). Thorne further stated that he was headed to Safeway (a short distance away, and open at that hour).

- 1.7 Officer Quiles asked Thorne if he had an identification. At the hearing, Officer Quiles explained that he nearly always asks people for their name or identification, regardless of the nature of the contact. Thorne produced an identification card for Officer Quiles, who wrote down the name and date of birth, and returned the ID card to Thorne.
- 1.8 Officer Quiles asked Thorne if he “minded” if he (the officer) “ran him for warrants.” Thorne – Officer Quiles said – replied “no.” This records check revealed that a warrant for Negligent Driving in the First Degree from Thurston County was outstanding. Officer Quiles asked that his warrant be confirmed, and “a few minutes later,” the warrant was “confirmed.” The radio log indicates confirmation at 4:26:15 a.m.
- 1.9 Search of the defendant incident to arrest revealed the presence of a small flashlight, vice grips, a flat-head screwdriver, and “two pockets full of quarters and dimes.” Thorne said that he had won the money playing pool in Everett.
- 1.10 Until he learned of the outstanding warrant, Officer Quiles did not believe that he had sufficient ground to detain the defendant. He testified that until he learned of the warrant that the defendant was free to walk away and go about his business. Although he had some “suspicions”, Officer Quiles stated that he did not believe that he had sufficient grounds for a “Terry stop”, and that Thorne was free to go (until the warrant was revealed).

II. DISPUTED FACTS:

Whether the defendant was “seized by the officer.

- 2.1 The defendant testified that he had revealed to Officer Quiles that he was aware of an outstanding warrant (for his arrest) prior to the officer checking with dispatch.
- 2.2 The defendant further testified that he was commanded – (told to stand in a particular position by the officer) – to remain at the scene.

III. CONCLUSIONS AS TO THE DISPUTED FACTS

The officer’s testimony is credible – and more credible than that of the defendant. The defendant was not ordered to remain anywhere, and until the warrant information was relayed to the officer, the defendant was not “seized.”

- 3.1 The contact of the defendant by Officer Quiles initially was inadvertent and one of information-gathering by the officer of a citizen (the defendant) who appeared to be a potential witness.
- 3.2 Officer Quiles took no action, verbally or otherwise, to restrain or detain the defendant in any way. The defendant was free to walk away at all times until the warrant was discovered. The duration of the initial contact to the discovery of the warrant was quite brief.
- 3.3 Officer Quiles engaged in no behavior that had coercive elements of constitutional implications. The request for identification by the officer was in a manner and in a context that implicated no privacy rights of the defendant. Given the totality of the circumstances the defendant was free to leave and a reasonable person would have felt free to go (until the warrant was discovered).

CP at 65-68. Appendix A-1 through A-4.

Thorne also brought a motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). Judge McPhee also denied the motion to dismiss. RP (8.15.05) at 77.

3. 404 Motion

The matter was sent to a jury on August 24, and 25, 2005, the Honorable Chris Wickham presiding. The morning of trial, the State moved to introduce evidence of two prior incidents that occurring in or in front of small business. The State argued that the *modus operandi* of Mr. Thorne of each incident was the same and that testimony regarding the incidents should be introduced pursuant to Evidence Rule 404(b) in order to show “identity.” The incidents occurred near Kirkland in 2003, and in Puyallup in 2005. Trial RP at 6. The State argued that Mr. Thorne was wearing gloves and had vise grips on his person in both cases. In the Puyallup case he was found by police inside a building and was wearing gloves and had vise grips, a screwdriver, and a small flashlight. Trial RP at 6. After considering the prejudicial effect of the testimony under ER 403, the trial court judge ruled that testimony regarding both incidents could be used to show identity. Trial RP at 22-25.

4. Trial Testimony:

Donna Moreland testified that the building in which her business is located was burglarized on July 5 or 6, 2004. Trial RP at 28-29. Her business is located at 5801 Capitol Boulevard in Tumwater. Trial RP at 28. The lock in the door to Moreland's business was missing. Trial RP at 30-31. A ceramics shop adjoined Moreland's business, and items in the business were disheveled. Trial RP at 31. Exhibits 1-A, 1-B. Nothing was taken from Moreland's business. Trial RP at 32, 38.

The daughter of the owner of the ceramic store testified that the cash register in the business was open and nothing was in it except some credit card receipts and one check. Trial RP at 48. There was "a little pry mark" on the register "where it had been pried open." Trial RP at 48. Exhibit 4. The witness testified, without objection, that her mother told her that the register contained \$350.00 in cash and change. Trial RP at 48-49. The lock was missing from the door of a gift boutique called Cosa Bella, a shop next door to Moreland's business. Trial RP at 32, 57, 58. Exhibits 16 and 17. Kim Logan, the former co-owner of the business, stated that when she arrived the morning of July 6, 2004, papers and supplies were strewn around the shop, and that approximately \$200.00 in change was missing from a coin box. Trial RP at 59. Exhibits 16 through 23.

Officer Quiles testified that he encountered a man at approximately 4:00 a.m. the morning of July 6, 2004 while responding to a report of a suspicious Toyota 4-Runner. Trial RP at 66-68. He stated that while driving through an alleyway, he “saw an individual almost walk into the front right portion” of his patrol car. Trial RP at 68. He identified the person he encountered as Mr. Thorne. Trial RP at 70. He stated that Mr. Thorne was “sweating profusely” and as wearing a denim jacket and gardening gloves. Trial RP at 76. He searched Mr. Thorne and found two pockets were filled with coins. Trial RP at 82. He also obtained a flat blade screwdriver, a pair of vise grips, and a small flashlight from him. Trial RP at 82-83.

He asked for Mr. Thorne’s identification. Trial RP at 79. He discovered that Mr. Thorne had a warrant for first degree negligent driving, and he placed him under arrest. Trial RP at 80-81, 85. He took Mr. Thorne to the Thurston County Jail, where he was booked. Trial RP 83. The items were returned to Mr. Thorne, except the screwdriver, which was placed “into safe keeping” at the Tumwater Police Department. Trial RP at 84. Exhibit 3. The coins obtained from Mr. Thorne were sufficient to fill a small paper lunch bag to a depth of approximately one to two inches. Trial RP at 86, 112. Officer Quiles stated that Thorne told him the coins were from playing pool in Everett. Trial RP at 86. Officer Quiles testified, again without objection,

that Mr. Thorne told him that he was sweating because he had used methamphetamine approximately one hour prior to contact with him. Trial RP at 87.

Later that day Officer Quiles learned that a dead bolt lock on the door to nearby restaurant had been removed the previous night. Trial RP at 91. The cash register had been opened and things were strewn around the floor. Trial RP at 92. Approximately \$150.00 in change was missing. Trial RP at 92. The restaurant is located approximately 1.7 miles from the ceramics store. Trial RP at 173. Exhibit 1.

Officer Glen Stahle of the Tumwater Police Department testified that had investigated “a couple hundred” burglaries, and that he had only seen one other case in which a lock was ‘spun out’ of the door and removed. Trial RP at 129-30.

Jay Mason, a detective with the Tumwater Police Department, compared the screwdriver obtained from Mr. Thorne by Officer Quiles with the pry mark on the cash register from the ceramic store. Trial RP at 164-65. He stated that the “blade of the screwdriver matched the indentations on the cash register, from what I could tell, nearly identical.” Trial RP at 165.

Raymond Kusumi, a forensic scientist employed at the State Patrol Crime Lab, testified that the screwdriver obtained by Officer Quiles from Mr.

Thorne made the tool mark on the cash drawer of the register. Trial RP at 239.

Following a reading of an instruction cautioning the jury that the testimony was introduced for the limited purpose of identity, Jason Brunson testified regarding the burglary of a business north of Kirkland in King County on April 13, 2003. Trial RP at 195-96. He testified that he discovered Mr. Thorne “fooling around with the door lock mechanism” of a restaurant at 2:38 a.m. Trial RP at 196. He performed a ‘pat down’ search of Mr. Thorne and discovered a flat-head screw driver, a pair of vise grip pliers, and a flashlight. Trial RP at 201. Part of the lock mechanism was removed from the door and was on the ground. Trial RP at 202.

Puyallup Police Officer Mike Kowalski testified that on March 1, 2005, he responded to silent alarm at a business at 2:15 a.m. Trial RP at 210. He stated that the door to the business was ajar and that they found Mr. Thorne inside the building. Trial RP at 213. Police found on his person a “forked pry tool commonly used as ball joint splitter,” cash, a screwdriver, and a flashlight. Trial RP at 214. Vise grips were found on the lock from the front door. Trial RP at 214.

No objections to jury instructions given or exceptions to instructions proposed but not given were made by either counsel. Trial RP at 256.

The jury returned verdicts of guilty as charged in the Information. Trial RP at 308-09; CP at 62, 63, 64.

5. Sentencing

The matter proceeded to sentencing on September 16, 2005. RP (9.16.05) at 3-13. The parties agreed that Mr. Thorne had an Offender Score of 9+ and that his standard range sentence is 51 to 68 months. RP (9.16.05) at 5. The State noted that Mr. Thorne was charged with the alleged burglary in Puyallup, and that it had allegedly occurred while Mr. Thorne was released on bail in the instant offense. RP (9.16.05) at 4. The Pierce County charge was still pending at the time of sentencing and the prosecution requested that the court order any sentence to be served consequently to the Pierce County matter. RP (9.16.05) at 4. The State asked for the top of the range of 68 months. RP (9.16.05) at 4.

Defense counsel requested a sentence at the bottom of the range. RP (9.16.05) at 5.

Mr. Thorne was afforded an opportunity for allocution. RP (9.16.05) at 8. Judge McPhee imposed 68 months, to be served consecutively to any sentence in Pierce County. RP (9.16.05) at 8-9. The court also imposed court costs of \$110.00, a victim assessment of \$500.00, jail fee of \$500.00, a \$100 DNA collection fee, a \$100.00 crime lab fee, and restitution in the total

amount of \$735.06. CP at 73-74; RP (9.16.05) at 9-10.

Timely notice of appeal was filed October 13, 2005. CP at 80-89.

This appeal follows.

D. ARGUMENT

1. OFFICER QUILES ILLEGALLY SEIZED MILO THORNE WHEN HE STOPPED HIM AND ASKED FOR HIS IDENTIFICATION, AND THEREFORE BOTH THE FRUITS OF THE SEARCH AND MR. THORNE'S STATEMENTS FOLLOWING HIS ARREST SHOULD BE EXCLUDED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 7 OF THE WASHINGTON CONSTITUTION

a. Standard of review.

Factual findings in a motion to suppress are reviewed to determine if substantial evidence exists. A lower court's conclusions of law in a suppression motion are reviewed *de novo*. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Under both the Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington State Constitution warrantless search and seizures are per se unreasonable except for few carefully drawn exceptions. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). *State v.*

Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996), citing *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed 2d 235 (1979); *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). Courts recognize a few carefully drawn exceptions to the warrant requirement. Among those exceptions to the warrant requirement in which it is predetermined that a warrantless seizure is reasonable are brief investigative stops, also referred to as “stop and frisk” searches or “*Terry* stops.” *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003).

The United States Supreme Court held in *Terry v. Ohio* that police officers “in appropriate circumstances and in an appropriate manner [may] approach a person for purposes of investigating possibly criminal behavior even if there is no probable cause to make an arrest.” *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See also, *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). An officer may conduct a *Terry* investigative stop if he or she has “a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime.” *Duncan*, 146 Wn.2d at 172 (emphasis omitted); See also, *State v. Jacobs*, 121 Wn. App. 669, 679, 89 P.3d 232 (2004). If the initial stop is justified, the officer may make a limited search for weapons if he or she reasonably believes that his or her safety or the safety of others is

endangered. *Terry v. Ohio*, 392 U.S. at 21. *Duncan*, 146 Wn.2d at 172; *State v. Baro*, 55 Wn. App. 443, 777 P.2d 1086 (1989).

The search of Thorne's person in this case was conducted without a warrant and was therefore *per se* unreasonable under the Fourth Amendment and Article I, § 7 of the Washington State Constitution. *State v. Miller*, 91 Wn. App. 181, 185, 955 P.2d 810 (1998); *State v. Williams*, 102 Wn.2d 773, 736, 689 P.2d 1065 (1984). In this case, the only conceivable justification for the warrantless search is the "Terry stop" exception to the warrant requirement. *See, Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The *Terry* stop exception allows an officer to stop and frisk an individual when: (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The burden is on the State to establish that the warrantless search and seizure in this case falls within the *Terry* exception. *State v. Williams, supra*, at 102 Wn.2d 736. However, the warrantless search of Thorne's person in this case was not valid under *Terry* because the police did not have the requisite reasonable suspicion to believe that Thorne was involved in criminal activity when they detained him.

A warrantless investigatory stop must be reasonable under the state and federal constitutions. *Duncan*, 146 Wn.2d at 171. The burden is on the State to prove that an investigatory stop is reasonable. *Id.*, 146 Wn.2d at 171. An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. *Armenta*, 134 Wn.2d at 10; *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

b. Officer Quiles lacked authority to stop and interrogate Thorne.

As stated above, in order to justify a *Terry* stop and frisk, the State must first show that the initial stop of Duncan was legitimate. Under *Terry*, “an officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information.” *State v. Miller*, 91 Wn. App. at 814; *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). However, investigative stops are carefully circumscribed—the officer’s suspicion must be based on specific, objective facts. *State v. Tocki*, 32 Wn. App. 457, 460,

648 P.2d 99 (1982).

Moreover, our courts have consistently held that a *Terry* stop must generally be based on reasonable suspicion of *criminal* activity. *See, State v. Tocki, supra*, at 460 (emphasis added). For example, in *Florida v. Royer*, 460 U.S. 491, 498-499, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), the U. S. Supreme Court noted that the *Terry* rule may “warrant temporary detention for questioning on less than probable cause where the public interest involved is the suppression of illegal transactions in drugs or of any other serious crime.”

The U. S. Supreme Court later held that *Terry* applied “if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony. *United States v. Hensley*, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). Finally, in his noted treatise, Professor LaFave states that “the *Terry* rule should be expressly limited to investigation of *serious* offenses. 4 WAYNE R. LA FAVE, *SEARCH & SEIZURE*, § 9.2(c) at 32 (3rd Ed. (1996) (emphasis added)).

It is therefore clear that the *Terry* exception to the warrant requirement is primarily designed to give police limited latitude to briefly detain persons that they reasonably suspect are involved in serious criminal

offenses. However, the officers in this case could not have based their detention of Duncan on a reasonable suspicion of serious criminal activity under *Terry*.

The threshold determination that must be made is when Mr. Thorne was seized. Whether a stop is a permissive encounter or a seizure is a question of mixed law and fact. *Armenta*, 134 Wn.2d at 9; *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

Under Article I, § 7, a person is seized when, in view of all the objective circumstances, a reasonable person would not feel free to leave. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). In a police-questioning context, this means that a seizure occurs if a reasonable person would not feel free to refuse the officer's request for identification and end the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citing *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)). Under Article I, § 7, a person is seized ““only when, by means of physical force or a show of authority”” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, (*Young*, 135 Wn.2d at 511, (quoting *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) and citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980))), or

(2) would not feel free to otherwise decline an officer's request and terminate the encounter. See *Thorn*, 129 Wn.2d at 352.

Generally, a seizure occurs if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985), quoting *United States v. Mendenhall*, 466 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d (1980). Whether a reasonable person would believe he or she has been detained depends upon the objective facts surrounding the encounter. *State v. Mennegar*, 114 Wn.2d 304, 314, 787 P.2d 1347 (1990), citing *Mendenhall*, 446 U.S. at 554.

Officer Quiles lacked lawful authority to stop and question Mr. Thorne. Officer Quiles was dispatched to Capital Boulevard pursuant to a suspicious vehicle complaint. While in the area, he saw Mr. Thorne walking on the sidewalk and almost collided with the car. Officer Quiles got out of his car, and contacted Thorne and asked him if he had seen any suspicious vehicles. Quiles testified that Mr. Thorne was sweating profusely, and was wearing a jacket and gloves. Officer Quiles asked Mr. Thorne for identification. The initial detention and request for identification was an unlawful seizure; the subsequent search of Thorne was similarly unlawful.

From an objective viewpoint, Mr. Thorne was not free to leave. He was

on foot; the officer had a car. It is manifestly unreasonable to believe that Mr. Thorne would have been permitted to simply walk away. The officer stated during the suppression hearing that Mr. Thorne would have been free to leave even during the time that that he was performing the warrant check. The officer's testimony regarding this issued flies in the face of common sense and strains credulity. The assertion that he would have been free to leave does not pass the blush test; common sense dictates that an officer in the field would not acquiesce to having a subject walk away after contacting him; Officer Quiles' testimony that he was free to leave notwithstanding.

c. The officer's seizure of Thorne was not based on a reasonable or articulable suspicion of wrongdoing.

Evaluation of a Terry stop is four step process: a reviewing court must determine whether (1) the officer's stop was justified, (2) whether the defendant was "seized," (3) whether the delay (duration) of the stop was excessive; and (4) whether the frisk was "too intrusive".

Because there was a seizure in this case, this Court must determine if the seizure was valid.

As noted *supra*, a brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime.

United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). In evaluating the reasonableness of an investigative stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained. *Glover*, 116 Wn.2d at 514 (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). Other factors that may be considered in determining whether a stop was reasonable include "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

The officer must point to specific and articulable facts which, coupled with rational inferences, create an objectively reasonable belief or well founded suspicion that the person is a safety risk. *Terry*, 392 U.S. at 24-25, 88 S. Ct. 1868; *State v. Collins*, 121 Wn.2d 168, 173-74, 847 P.2d 919 (1993); *State v. L.K.*, 95 Wn. App. 686, 695, 977 P.2d 39 (1999); *State v. Richardson*, 64 Wn. App. 693, 697, 825 P.2d 754 (1992). The court may consider the totality of the circumstances surrounding the stop, including the officer's training and experience, the location of the suspect-officer contact, the time of day, the suspect's conduct and response to the officer, and any other circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *L.K.*, 95 Wn. App.

at 695-96.

An investigative stop must be based on an *articulable suspicion* of criminal activity, i.e., the totality of the circumstances must give rise to a substantial possibility that criminal activity has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). A seizure is unreasonable if an officer is unable to articulate specific, objective facts upon which a reasonable suspicion that the person stopped was engaged in criminal activity. *Stroud*, 30 Wn. App. at 399.

Here, Officer Quiles failed to articulate an “objective rationale” or “independent cause” to investigate Thorne. There was no evidence Thorne posed a safety concern nor was there any other reason that would justify investigating Thorne. Thorne was not in a vehicle, nor was the red 4-Runner that was reported as a suspicious vehicle linked to Thorne. Instead, Thorne was merely walking down the sidewalk when he was contacted and questioned by Quiles.

Courts have held that when persons who are already suspected to some degree are watched by the police, turn to conceal something, hide themselves, change direction, or walk off at a fast pace, may justify an investigatory stop. 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.4, 177-78 (3rd ed. 1996). Here, Thorne testified that *he* walked to the police vehicle

as it went through the alley. He was not acting furtively; he made no attempt to hide. The seizure was improper.

d. Once the officer confirmed Thorne was not involved in criminal activity, he should not have been frisked or further detained.

Following the stop, Thorne was patted down. At that time, Officer Quiles discovered the change, vise grips, and screwdriver. Mr. Thorne argues that the officer did not have a reasonable, articulable suspicion of criminal activity to support the initial stop and that the officer's activity beyond that point, including questioning Thorne and performing the initial frisk search, was unlawful.

Assuming *arguendo* that the initial stop was legitimate, a reasonable safety concern must exist to justify a protective frisk for weapons. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993), citing *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The stop and frisk intrusion is limited only to a pat-down for weapons which arises when the officer does not receive satisfactory answers to dispel his initial fears for personal safety. It is an intrusion that only lets the officer seize objects that feel like a weapon; not a cigarette pack or match box or wallet or anything else that does not feel hard like a gun, knife, or other weapon that is hard, heavy, and bulky. A limited search for weapons on a person detained for questioning is

not justified unless the police officer has a reasonable and articulable suspicion that the person is involved in criminal activity and that the person is armed and dangerous. *State v. Sistrunk*, 57 Wn. App. 210, 787 P.2d 937 (1990).

When conducting an investigatory stop, a police officer may not search the person for weapons absent a reasonable suspicion that the person is armed and dangerous. *State v. Blair*, 65 Wn. App. 64, 827 P.2d 356 (1992). In *Blair*, the officer had previously warned the defendant not to return to apartment complex. *Id.* at 66. Upon seeing the defendant on the apartment complex grounds, the officer stopped defendant, placed him under arrest and searched him. Division 1 held there was no basis to justify investigatory stop and no basis for weapons search. *Id.* at 71.

e. All evidence obtained as a result of the initial stop and detention must be suppressed.

Because Officer Quiles did not have the authority to make an arrest, a search incident to arrest cannot be justified under these circumstances. The basis for the stop was unlawful, and therefore the subsequent search and evidence discovered during that search are inadmissible as fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), and *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980)).

Where the initial stop was unlawful, the evidence obtained in the course of any subsequent search must be excluded as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Because the stop, questioning, and request for identification were unlawful, the tools and change should have been suppressed.

In addition, any of Thorne’s statements obtained during the detention should also be suppressed. Under the “fruit of the poisonous tree” doctrine, a confession obtained following an illegal arrest is admissible only if obtained “by means sufficiently distinguishable to be purged of the primary taint” and not through “exploitation of that illegality.” *Wong Sun v. United States*, 371 U.S. at 471; *State v. Ryland*, 65 Wn. App. 806, 829 P.2d 806 (1992).

2. **THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF THE KING COUNTY INCIDENT AND PENDING PUYALLUP BURGLARY CHARGE AS EVIDENCE OF “OTHER CRIMES AND WRONGS” UNDER EVIDENCE RULE 404(b) TO ESTABLISH “IDENTITY”**

The State charged Thorne with three counts of second degree burglary. At the ceramic store, the lock was removed from the door. At the gift boutique, the door lock was removed. The dead bolt was removed from the door at the restaurant.

The prosecution sought to introduce two prior incidents involving

suspected burglary involving locks and businesses. The trial court judge granted the motion on the issue of identity. This was prejudicial error.

ER 404(b) provides:

Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against its prejudicial effect, *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995), on the record. *State v. Powell*, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The State brought a motion to introduce testimony of an arrest in Puyallup for an alleged burglary and a recent one near Kirkland where the Appellant was found out near a business with tools, and a partially broken lock pursuant to Evidence Rule 404(b).

Here, the State asserted that the manner in which entry was gained in the Puyallup matter, and the removal of the outer ring of a ring of a door lock in the Kirkland case, as well as the use of vise grips in those cases, are indicative of a distinctive *modus operandi*, therefore tending to prove the identity of the perpetrator of the three current offenses.

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), our Supreme Court held that when the issue is identity, “the degree of similarity must be at the highest level and must be unique because the crimes must have been committed in a manner to serve as an identifiable signature.” *Id.*, 150 Wn.2d at 17. In the case at bar, the State introduced evidence that Thorne was charged with burglary in which he was found with the gloves, vise grips, a flash light, a screw driver, and a pry tool. Despite the State’s contention, these items are not unique. Moreover the State cannot prove that the items were used in a unique manner. Instead, the State essentially relied on anecdotal evidence from the witnesses, who proclaimed the use of vise grips was usual. This does not rise to the level of “unique” use of the tools. In *State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002), the Supreme Court held that when evidence of other bad acts is introduced to show identity via *modus operandi*, the evidence is relevant to prove the current charge or charges “only if the method implied in the commission of both crimes is “so unique” that proof that

an accused committed one for the crimes creates a high probability that he also committed the other crimes with which he is charged.” *Thang*, 145 Wn.2d at 643, (citing *State v. Russell*, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994) and *State v. Hernandez*, 58 Wn. App. 793, 794 P.2d 1327 (1990)). The *Thang* Court noted that “this court has held that the ‘device used must be so unusual and distinctive as to be like a signature.’” *Thang*, 145 Wn.2d at 644.

In the present case, the alleged incidents were committed a significant distance from the Tumwater offenses. Moreover, there was no showing that the tools cited in the Puyallup and Kirkland cases were used in a manner “so unique” that there is a high probability that he committed the other crimes.

Last, the prejudicial effect of the testimony outweighed its probative value under ER 403. The admission of evidence of other acts by a person, whether criminal or not, to prove that the person acted in conformity with such other acts has long been repugnant to our law. *Michaelson v. United States*, 335 U.S. 469 (1948); see also *State v. DeGaston*, 1 Wn.2d 93, 95 P.2d 410 (1939). Such evidence, however, may be admissible for other limited purposes. ER 404(b). ER 404(b) evidence of their misconduct poses serious probative dangers. The Appellant submits that there is insufficient evidence to show that the offenses were committed with a particular signature or

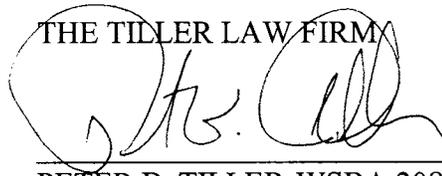
modus operandi to overcome the highly prejudicial effect of the testimony.

E. CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his convictions and suppress the evidence obtained as a result of the detention and resulting search. The Appellant also submits that the trial court erred in admitting evidence of prior bad acts under ER 404(b), and because the error was not harmless, this Court must reverse Thorne's convictions and remand the matter for new trial.

DATED: April 27, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Milo Shawn Thorne

A

1 through the alley. The defendant was moving so rapidly that as the car neared the intersection of
2 the sidewalk and alleyway the defendant nearly contacted the car

3 1.3 Officer Quiles stopped his car, got out, and contacted the defendant. Dispatch logs indicate that
4 Officer Quiles radioed "out with one in front of the liquor store" at 4 17:34 a m

5 1.4 Officer Quiles asked Thorne if he had seen anyone in the vicinity sitting in a vehicle. The
6 defendant replied in the negative, and said he had just come from a friend's house nearby at "the
7 7-11."

8 1.5 During his initial contact with Thorne, Officer Quiles noted that he was sweating profusely – as
9 if he had "come a long way", was "extremely nervous", was wearing a denim jacket (Quiles,
10 on the other hand, was in a short-sleeved uniform), and was wearing dark brown gardening
11 gloves.

12 1.6 The colloquy between the officer and the defendant continued by Officer Quiles' asking Thorne
13 the name of his friend, and was told "Rick Pashell;" but Thorne said he did not know his friend's
14 address – only that he (the friend) lived in an apartment located behind the 7-11 Officer Quiles
15 is familiar with the area and knew that there were no apartments located behind the 7-11 (a block
16 away from the instant location) Thorne further stated that he was headed to Safeway (a short
17 distance away, and open at that hour)

18 1.7 Officer Quiles asked Thorne if he had any identification At the hearing, Officer Quiles
19 explained that he nearly always asks people for their name or identification, regardless of the
20 nature of the contact Thorne produced an identification card for Officer Quiles, who wrote
21 down the name and date of birth, and returned the I D. card to Thorne.

22 1.8 Officer Quiles asked Thorne if he "minded" if he (the officer) "ran him for warrants " Thorne –
23 Officer Quiles said – replied "no." This records check revealed that a warrant for Negligent
24 Driving in the First Degree from Thurston County was outstanding. Officer Quiles asked that his
25 warrant be confirmed, and "a few minutes later," the warrant was "confirmed " The radio log
26 indicates confirmation at 4.26 15 a m

1.9 Search of the defendant incident to arrest revealed the presence of a small flashlight, vice grips, a
flat-head screwdriver, and "two pockets full of quarters and dimes." Thorne said that he had won
the money playing pool in Everett.

1 1.10 Until he learned of the outstanding warrant, Officer Quiles did not believe that he had sufficient
2 grounds to detain the defendant. He testified that until he learned of the warrant that the
3 defendant was free to walk away and go about his business. Although he had some "suspicions",
4 Officer Quiles stated that he did not believe that he had sufficient grounds for a "Terry stop", and
5 that Thorne was free to go (until the warrant was revealed)

6 **II. DISPUTED FACTS: Whether the defendant was "seized" by the officer.**

7 2.1 The defendant testified that he had revealed to Officer Quiles that he was aware of an outstanding
8 warrant (for his arrest) prior to the officer checking with dispatch.

9 2.2 The defendant further testified that he was commanded – (told to stand in a particular position by
10 the officer)- to remain at the scene.

11 **III. CONCLUSIONS AS TO THE DISPUTED FACTS**

12 The officer's testimony is credible – and more credible than that of the defendant The defendant
13 was not ordered to remain anywhere, and until the warrant information was relayed to the officer, the
14 defendant was not "seized "

15 3.1 The contact of the defendant by Officer Quiles initially was inadvertent and one of information-
16 gathering by the officer of a citizen (the defendant) who appeared to be a potential witness

17 3.2 Officer Quiles took no action, verbally or otherwise, to restrain or detain the defendant in any
18 way The defendant was free to walk away at all times until the warrant was discovered The
19 duration of the initial contact to the discovery of the warrant was quite brief

20 3.3 Officer Quiles engaged in no behavior that had coercive elements of constitutional implications
21 The request for identification by the officer was in a manner and in a context that implicated no
22 privacy rights of the defendant. Given the totality of the circumstances the defendant was free to
23 leave and a reasonable person would have felt free to go (until the warrant was discovered).

24 Given all of the foregoing, it is hereby:

25 **ORDERED**, that the motion to suppress is denied, and it is further
26

EDWARD G. HOLM
Thurston County Prosecuting Attorney
3000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3158

1 ORDERED, that evidence revealed, discovered or seized pursuant to the arrest of the defendant
2 on July 6, 2004 is admissible at the trial of this cause

3 Done in Open Court the 25 day of August, 2005

4
5
6 
HONORABLE WM THOMAS MCPHEE

7 Presented by:

Copy received, Approved as to form only

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10 DAVID H BRUNEAU, #6830
Senior Deputy Prosecuting Attorney

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NORMAN D PARTINGTON, JR., #17799
Attorney for Defendant

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MILO SHAWN THORNE,

Appellant.

COURT OF APPEALS
NO. 33930-7-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division Two, and copies were mailed to Milo S. Thorne, Appellant; and James C. Powers, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 27, 2006, at the Centralia, Washington post office addressed as follows:

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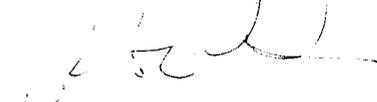
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