

NO. 35080-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON CLOUD,

Appellant.

07 JUN 31 PM 3:26
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00373-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 31, 2007, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Cloud's motion to suppress when: (1) there were multiple justifications for the deputy's initial action of instructing Cloud to stop his vehicle as he approached the deputy at the scene, (2) the brief detention of Cloud was reasonable; (3) Cloud consented to the search of the car; and, (4) the seizure of the ski mask and flashlight found during the search was justified as the officer immediately recognized these items as evidence of a crime?

2. Whether the trial court abused its discretion in admitting evidence of the prior burglary when the evidence was admissible as common scheme or plan evidence (as well as evidence of knowledge, opportunity, motive, and modus operandi) when the evidence showed that cloud had previously burglarized the same store at the same time of night and had used the identical roof vent to enter the store each time despite the fact that there were numerous other roof vents above the store?

3. Whether Cloud's claim of ineffective assistance of counsel must fail because defense counsel's trial conduct can be characterized as legitimate trial strategy?

4. Whether Cloud's claim that the arrest warrant was not supported by probable cause must fail when Cloud did not raise this issue

below and has failed to show prejudice, and when the warrant was supported by probable cause?

5. Whether Cloud's arguments regarding the sufficiency of the evidence must fail because, when viewed in a light most favorable to the State, the evidence at trial permitted a rational jury to find Cloud guilty of burglary in the second degree and unlawful possession of a firearm in the first degree beyond a reasonable doubt?

6. Whether Cloud's claims regarding cumulative error must fail when Cloud has failed to show any error below?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Aaron Cloud was charged by fourth amended information filed in Kitsap County Superior Court with one count of burglary in the second degree (as a principal or an accomplice) and one count of unlawful possession of a firearm in the first degree. CP 144. Both counts also included a special allegation of rapid recidivism. CP 144. Following a jury trial, Cloud was convicted as charged, and the trial court imposed a standard range sentence. CP 181-83, 223. This appeal followed.

B. FACTS

In November of 2005, Cloud was in custody at the Kitsap County jail in connection with two prior burglaries. RP 8-9. As a part of his plea

agreement on these prior burglaries, Cloud agreed to give an interview to law enforcement and to provide information regarding a number of other unsolved "rooftop" burglaries in which Cloud was the suspect. RP 10. In November, Cloud met with Detective Birkenfeld from the Kitsap County Sheriff's Office and admitted that he had committed numerous other burglaries, including a September burglary of a convenience store named "Handy Andy's." RP 12, 14. Cloud further admitted that he had entered the Handy Andy's store in September through a roof vent. RP 12.

On February 2, 2006, nine days after Cloud was released from jail after serving his sentence for the two previous burglaries, Handy Andy's was burglarized again. RP 14 305-07, CP 148. Surveillance video from inside the store showed two burglars in the store, one of whom was wearing a tan "Carhardt" ski mask and was carrying a flashlight. RP 15-17. Although there were a number vents on the roof, it was determined that the point of entry in the February burglary was through the exact same roof vent used by Cloud in the September burglary, despite the fact that the vent had been repaired after the initial burglary. RP 14-15. Detective Birkenfeld investigated the February burglary, and several weeks later observed a Cloud in a car with a tan Carhardt ski mask and a flashlight, which Birkenfeld seized after Cloud consented to a search of his car. RP 21-24, 34-36. A few days later, Cloud was arrested pursuant to an arrest warrant, and a search warrant was obtained

authorizing a further search of Cloud's car. RP 243-44, CP 15-16. During the subsequent search, Detectives found a shotgun in the trunk of Cloud's car as well as additional items of clothing matching those seen on the surveillance video. RP 254, 261.

The 3.6 hearing

Prior to trial, Cloud moved to suppress all the seized items. CP 25. At the 3.6 hearing, Detective Birkenfeld testified regarding the admissions that Cloud had made in the November interview, including Cloud's admission that that had committed the September burglary of Handy Andy's in the late night or early morning hours, and had gained access by peeling back a roof vent to gain entry into the business, opened a cash register, and had then left out the rear door of the business. RP 12, 14. Detective Birkenfeld also stated that he investigated the second burglary, which occurred on February 2 in the early morning hours (roughly between 3:00 and 4:30 am). RP 14. The same entry point that had been used in the September burglary was used again, despite the fact that the roof vent had been patched or repaired after the first burglary. RP 14-15. In addition, during the February burglary two suspects entered through the roof access, opened a cash register, took some cigarettes, and exited through the same rear door as used in the prior burglary. RP 15.

Detective Birkenfeld also testified that he obtained a copy of the video of the February burglary that was recorded by the store's video surveillance system. RP 15. Initially, Detective Birkenfeld was only able to video portions of the video, but he was able to see that one of the burglars was wearing a "tan or brown-colored Carhardt-style ski mask" and was carrying a 5 to 8 inch flashlight that appeared to be blue and had a medium sized cone. RP 15-17. Detective Birkenfeld was able to take still pictures of the video using his digital camera, and believed that the ski mask was in fact a "Carhardt" ski mask based upon his own familiarity with this type of ski mask. RP 31. He further explained that "Carhardt" brand items typically have a square logo with a "C" on it somewhere on the exterior of the clothing item. RP 52. Finally, Detective Birkenfeld stated that his initial viewing of the store surveillance took place prior to his contact with Cloud on March 2. RP 15.

On March 2, Detective Birkenfeld and a number of other officers went to a residence at 1699 Church Road to contact the occupants regarding a number of narcotic related complaints. RP 17-18. Detective Birkenfeld stated that contact was initially a "knock-and-talk" type of contact, but that later during the contact the officers applied for a search warrant. RP 18. He also noted that several people lived at the Church Road address, including Eileen White, who is Cloud's mother. RP 18.

Approximately five to ten minutes before his arrival at the Church Road address, Detective Birkenfeld became aware that another deputy had contacted Cloud. RP 19. Detective Birkenfeld stated that a cell phone caller had reported seeing a male subject pointing a shotgun at people, and that Deputy Eberhard had responded and identified the person of interest as Cloud based on a description of the person and the car involved. RP 19-20. Detective Birkenfeld was aware that the car involved was Cloud's gold, four-door Honda. RP 20. Detective Birkenfeld also understood that Cloud had briefly spoken with Deputy Eberhard who asked for consent to search the trunk of the car, but Cloud refused. RP 34. Cloud then left the area, stating he needed to drop off (or go see) his girlfriend. RP 20, 34.

Detective Birkenfeld stated that once he arrived at the Church Road residence he was aware of a possible safety risk, as Cloud's mother lived at the residence, and that if Cloud appeared it would be a concern. RP 20-21. Detective Birkenfeld's duty at the Church Road address was to serve as a "perimeter" person, and he stayed back towards the driveway entrance to the property. RP 18-19. As the other officers were talking with the people there, Detective Birkenfeld saw Cloud drive into the driveway in his vehicle. RP 21.

As Cloud drove into the driveway, his window was partially down and Cloud was smoking a cigarette. RP 21. Detective Birkenfeld was unable

to recall whether Cloud turned off the vehicle on his own accord or if he had asked Cloud to turn off the car, but acknowledged that either scenario was possible. RP 21, 34-35. As Detective Birkenfeld went to speak with him, Cloud rolled down the window and as he did so he placed his hand underneath the front seat and appeared to be moving a ski mask and flashlight under the seat. RP 5 21-22, 34-35. Detective Birkenfeld explained further that this was a “fluid type of motion, and stated,

[A]s I’m walking to the vehicle, Aaron in placing his hands underneath the seat. I can see at that point what looks like it’s appearing to be stocking-net type of ski mask going under the seat, at the same time being concerned with Mr. Cloud’s hands.

RP 35. Detective Birkenfeld then asked Cloud to step out of the car. RP 22, 35. Detective Birkenfeld explained that there were several reasons for this. First, Detective Birkenfeld explained that he didn’t know if there were guns in the car, didn’t know how thoroughly Deputy Eberhard was able to speak with Cloud, and didn’t know what else might be under the seat. RP 22. Detective Birkenfeld explained that he had officer safety concerns because,

I didn’t know what was in the car. Mr. Cloud has a felony conviction. He had already placed his hands under the seat and maybe 10 to 15 minutes prior, he was identified as a person possibly waiving a shotgun around, less than a couple of miles down the road.

RP 22. Detective Birkenfeld also stated he thought Cloud could have been

reaching for a weapon when he was reaching under the seat, and specifically stated that this was one of the reasons that he detained Cloud. RP 22-23.

Detective Birkenfeld also stated that he detained Cloud based upon the ski mask and flashlight, and that he explained to Cloud about the recent burglary and how the ski mask and flashlight matched the items used in the burglary. RP 22. After advising Cloud of his Miranda rights, Detective Birkenfeld talked to Cloud about how the items matched those used in the burglary and how the time frame of the burglary, as well as the entry and exit points, were the same as in the previous burglary to which Cloud had admitted. RP 23. Cloud himself admitted that it “looked bad,” but said it “wasn’t him.” RP 23. Cloud was also informed that the officers were at the Church Road address because they were applying for a search warrant. RP 51.

Detective Birkenfeld then asked Cloud for permission to search the car and advised him that he could ask him to stop at any time, and Cloud consented. RP 23, 36. Deputy Birkenfeld also made sure that another deputy was present to witness the consent, and Cloud admitted that he had consented to the search during his brief testimony at the 3.6 hearing. RP 36, 78-79. Detective Birkenfeld then collected the ski mask and flashlight from under the seat. RP 24. The ski mask was consistent with the ski mask that Deputy Birkenfeld had observed on the video from the burglary, as it was the same

exact color, had the same exact type of facial opening, and had a square “Carhardt” marking of the same size and fashion as the one in the video. RP 25. Given these factors, Detective Birkenfeld seized these items, but he also explained that Cloud consented to his taking of these items. RP 24-26.

Cloud told Detective Birkenfeld that he was staying in Everett with a girlfriend, and that she had just had a baby. RP 54. After ensuring that the officers had a current phone number for Cloud, Detective Birkenfeld subsequently released Cloud rather than arresting him. RP 27, 54. At the hearing, Detective Birkenfeld explained that he released Cloud because, as a detective, he had “more time on his side,” and that he wasn’t worried about being able to locate Cloud later, as he knew Cloud, had communication with him in the past, knew that he that he frequented Kitsap County, and was confident that Cloud would contact him or show up if he got a message to Cloud that he needed to talk to him further. RP 27. In addition, Detective Birkenfeld wanted to talk to people that Cloud may have talked to and “research all different avenues of this burglary investigation before arresting him.” RP 27.

The trial court’s 3.6 ruling.

The trial court ruled that the Detective Birkenfeld’s actions were lawful and reasonable as he was authorized to stop Cloud’s car both to secure

the scene and because of legitimate officer safety concerns. The trial court further found that the ski mask and flashlight were lawfully seized and that the Detective had reasonably concluded that the items were evidence of a crime. CP 218.

The State's proposed ER 404(b) evidence.

A second pretrial hearing was held regarding the State's proposed admission of ER 404(b) evidence. The State sought to introduce evidence that Cloud had committed at least seven prior burglaries (including the September Handy Andy's burglary) where he had entered commercial buildings after obtaining access through the roofs of the various buildings (usually through vents or air ducts). CP 38-40.

The State argued that these prior burglaries were admissible as common scheme or plan evidence because they were so similar to the charged offense that they were naturally explained by the existence of a plan or design. CP 44. The State also noted that there were often "overlapping justifications" for the admissibility of 404(b) evidence and argued that the evidence of the prior Handy Andy's burglary was admissible as evidence of Cloud's knowledge, and was circumstantial evidence of the crime itself. RP 102.

The State also argued that the evidence was admissible as evidence of motive because the prior burglaries occurred in rapid succession and involved actual thefts of little to no property; indicating that the burglaries were not committed solely for monetary gain, but were likely committed for the adrenaline rush or thrill that Cloud received from his burglaries. RP 104. The State further argued that this motive evidence was important as it explained for the jury why Cloud would burglarize Handy Andy's a second time despite the fact that he had obtained little in the way of money or property in the first burglary. RP 104.

Finally, the State argued that the prior burglaries qualified under the modus operandi exception to ER (404(b)), noting that the prior burglaries occurred over a very short period of time, occurred at the same time of day, and were committed under very similar circumstances. RP 112. In particular, the State had pointed out that the burglaries were of commercial buildings and did not involve the taking of any large items; rather, little to nothing was actually taken. RP 104, 112. In addition, Cloud entered the business through the roof and usually left through a back door. RP 105. The State also argued that the reasons for admitting the evidence regarding the prior Handy Andy's burglary were particularly strong since the evidence showed that Cloud has burglarized this exact business before and had entered through the exact same roof vent. RP 102.

The trial court's ER 404(b) ruling.

The trial court ultimately ruled that the September burglary of the Handy Andy's store was relevant and was offered to show knowledge and a common scheme or plan as well as to rebut a claim of accident or mistake, and the court entered written findings fact and conclusions of law to this effect. CP 221. The court also found that the probative value of the evidence regarding the September burglary substantially outweighed the danger of undue or unfair prejudice. CP 221-22.

With respect to the other burglaries, however, the court held that, although the State had shown that the acts occurred by a preponderance of the evidence, the evidence was inadmissible because the danger of undue prejudice substantially outweighed the probative value of the evidence. CP 220-22.

Stipulation regarding prior offenses.

Prior to trial, the court and the parties also discussed a stipulation regarding the fact that Cloud had previously been convicted of Residential Burglary and Burglary in the Second Degree. RP 175-78. Evidence regarding these convictions for serious offenses was relevant to the charge of unlawful possession of a firearm in the first degree. CP 152. The State inquired on the record whether Cloud wished to enter an "Old Chief"

stipulation which would only indicate that Cloud had been convicted of a “serious offense,” or whether Cloud would rather stipulate that he was convicted of residential burglary and burglary in the second degree or potentially enter no stipulation at all. RP 175-178. The State acknowledged that if Cloud was requesting and Old Chief stipulation then the court would be required to give it, but as the defense had not asked specifically for such a stipulation, the State asked the court to make a record in this regard. RP 175-78. The court then gave Cloud until the following morning to decide how he wished to proceed on this issue. RP 178.

The following morning the parties presented a signed stipulation stating that the jury would be informed that Cloud had previously been convicted of residential burglary and burglary in the second degree. RP 183, CP 151. Cloud and his attorney signed the stipulation and acknowledge that they had reviewed the stipulation and the defendant acknowledged that he was signing the stipulation freely and voluntarily. CP 152-53.

The evidence presented at trial.

At trial, Seung Joo testified that he owned Handy Andy’s and that the store had been burglarized in September and then again in February. RP 189, 193. Mr. Joo testified that in September the burglary occurred around 4:00 to 5:00 in the morning, and the burglar entered through a roof vent and then fell

through the ceiling into the store. RP 190-92. Deputy Schon Montague responded to the store and used inspected the roof and found that there were approximately nine to twelve roof vents over the Handy Andy's store. RP 207-10. One of the roof vents had been ripped off, exposing a hole that was the only access point into the store that the deputy was able to find. RP 209. After the burglar had entered the store, an alarm sounded and it appeared that the burglar left without taking anything. RP 191. After the burglary, the roof vent was fixed. RP 192-93.

Mr. Joo also testified that on February 2, 2006, the store was burglarized again around 4:45 in the morning. RP 193. Entry was made through the same roof vent in both burglaries. RP 202. Deputy Montague again responded to the scene and again inspected the roof. RP 209-10. He found that "the exact same vent that was opened before was open again," exposing the same hole in the roof. RP 210-11.

The February burglary was captured by the store's video surveillance system, and Mr. Joo gave a copy of the tape to the police. RP 194. The tape was authenticated by Mr. Joo and was played for the jury. RP 196, 199. The only items taken appeared to be some cigarettes. RP 194. Deputy Birkenfeld testified that he later viewed portions of the surveillance tape, and explained what he observed, as well as his later contacts with Cloud at the residence on Church Road. RP 217-19. The ski mask and flashlight that Detective

Birkenfeld seized from Cloud's car were entered into evidence. RP 223.

At Cloud's request, Detective Birkenfeld went through the video surveillance with the jury and pointed out specific portions of the tape that showed a ski mask and flashlight matching the one's Detective Birkenfeld recovered from Cloud's car, and noted that the ski mask was the same color, had the same eye opening and mouth opening, and had the same "Carhardt" tag. RP 235-38.

An arrest warrant was obtained, and on March 7th Deputy Shannon arrested Cloud who was driving his gold Honda. RP 243-44. The Honda was then impounded and taken to a secure lot. RP 246. Deputy Birkenfeld met with Cloud after his arrest, and Cloud stated that he had owned the ski mask for approximately a year. RP 249-50.

Deputy Birkenfeld then went to the impound lot and searched Cloud's car. RP 252-53. Deputy Birkenfeld seized a number of items including a pair of shoes, a sweatshirt and pants, a blue backpack, Camel cigarette packs, some pry tools and a shotgun. RP 254, 261. The shotgun was tested and was found to be operational and capable of firing a projectile. RP 267. Deputy Birkenfeld went back and spoke with Cloud again and confronted him concerning the items he had found in the car. RP 270. Cloud became emotional and started crying, and asked "how much time" he was looking at.

RP 270-71.

Again at Cloud's request, Detective Birkenfeld went through the video surveillance with the jury and pointed out specific portions of the tape that showed the burglar wearing pants and a sweatshirt matching the ones found in Cloud's car. RP 279-82. Detective Birkenfeld also pointed out for the jury those portions of the tape that showed the burglar wearing shoes matching the pair found in Cloud's car, noting that the shoes' characteristics (in terms of coloring, construction and markings) were the same. RP 283-85, 292-93. Detective Birkenfeld also explained that based on the video as well as his personal knowledge of the store, it appeared that the burglar had taken Camel and Marlboro brand cigarettes. RP 288. In addition, the tape showed the burglar using a blue backpack consistent with the one found in Cloud's car. RP 291-92.

Detective Birkenfeld also testified regarding the ER 404(b) evidence and stated that he had met with Cloud on November 30th, and that Cloud had admitted that he had committed the September burglary of Handy Andy's by entering the store through a roof vent. RP 228-29.

Finally, for purposes of the rapid recidivism allegation, Cloud stipulated that he was released from incarceration on January 24, 2006, and the trial court read this stipulation, as well as the stipulation regarding the

prior burglary convictions, to the jury. RP 305-07, CP 148.

III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ERR IN DENYING CLOUD'S MOTION TO SUPPRESS BECAUSE: (1) THERE WERE MULTIPLE JUSTIFICATIONS FOR THE DEPUTY'S INITIAL ACTION OF INSTRUCTING CLOUD TO STOP HIS VEHICLE AS HE APPROACHED THE DEPUTY AT THE SCENE, (2) THE BRIEF DETENTION OF CLOUD WAS REASONABLE; (3) CLOUD CONSENTED TO THE SEARCH OF THE CAR; AND, (4) THE SEIZURE OF THE SKI MASK AND FLASHLIGHT FOUND DURING THE SEARCH WAS JUSTIFIED AS THE OFFICER IMMEDIATELY RECOGNIZED THESE ITEMS AS EVIDENCE OF A CRIME.**

Cloud argues that the trial court erred in denying his motion to suppress, arguing that there was no basis for: (1) the stop; (2) the brief detention; (3) the search of Cloud's vehicle; or, (4) the subsequent seizure of the ski mask and flashlight from the vehicle. These claims are without merit because: (1) there were multiple justifications for the deputy's initial action of instructing Cloud to stop his vehicle as he approached the deputy at the scene, (2) the brief detention of Cloud was reasonable; (3) Cloud consented to the search of the car; and, (4) the seizure of the ski mask and flashlight found during the search was justified as the officer immediately recognized these items as evidence of a crime.

When reviewing the denial of a suppression motion, a reviewing court must first determine whether substantial evidence supports the findings of fact and then determines whether the findings support the conclusions of law. *State v. Crane*, 105 Wn. App. 301, 305-06, 19 P.3d 100 (2001), *citing*, *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Whether a seizure occurred is a mixed question of law and fact, and a reviewing court is to give the trial court's factual findings great deference but ultimately must decide as a question of law whether those facts constitute a seizure and the review of this question is de novo. *Crane*, 105 Wn.App at 306, *citing*, *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). Substantial evidence is evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Crane*, 105 Wn.App at 306, *citing*, *Hill*, 123 Wn.2d at 644. It is the trial court's role to resolve issues of credibility, weigh evidence, and resolve differing accounts of the circumstances surrounding the encounter and the reviewing court gives deference to these determinations. *Crane*, 105 Wn.App at 306, *citing*, *State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999); *Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 421, 854 P.2d 1087 (1993).

The Fourth Amendment secures “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures.” U.S. Const. Amend. IV. Its “key principle,” or “ultimate standard,” is one of “reasonableness.” *See, State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998), *citing Michigan v. Summers*, 452 U.S. 692, 699-700, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) (“ultimate standard of reasonableness”); *Dunaway v. New York*, 442 U.S. 200, 219, 99 S. Ct. 2248, 2260, 60 L. Ed. 2d 824 (1979) (“key principle ... is reasonableness”).

1. ***Detective Birkenfeld acted reasonably in telling Cloud to stop his car when Cloud drove into the driveway of Cloud’s mother’s house because Detective Birkenfeld needed to control the scene where the officers were conducting their business and because Detective Birkenfeld had reasonable officer safety concerns.***

Washington courts, as well as the United States Supreme Court, have held in a variety of contexts that officers have the right to control a scene and prohibit civilians from entering certain locations where the officers are conducting police business. For instance, under Washington law an officer may briefly detain a person during the course of a consent search of a residence, in order to maintain control of the situation and insure officer safety. *State v. King*, 89 Wn. App. 612, 616, 949 P.2d 856 (1998).

The United States Supreme Court has also held that police may prevent people from entering a scene while they are in the process of obtaining a warrant. *See, Illinois v. McArthur*, 531 U.S. 326, 328, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001)(officers acted reasonably, and thus, no Fourth

Amendment violation, when they prohibited him from entering a home for about two hours while they obtained a search warrant); *Segura v. United States*, 468 U.S. 796, 814, 824, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)(where both the majority and minority agreed that the police could have lawfully sealed an apartment from the outside and restricted entry into the apartment while waiting for a warrant). In various other circumstances, the United States Supreme Court has upheld temporary restraints where needed to preserve evidence until police could obtain a warrant. *Illinois v. McArthur*, 531 U.S. at 334, 121 S. Ct. at 951, citing, e.g., *United States v. Place*, 462 U.S. 696, 706, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110 (1983) (reasonable suspicion justifies brief detention of luggage pending further investigation); *United States v. Van Leeuwen*, 397 U.S. 249, 253, 90 S.Ct. 1029, 1031, 25 L.Ed.2d 282, 284 (1970) (reasonable suspicion justifies detaining package delivered for mailing).

Similarly, while executing a search warrant, police officers are justified in ascertaining whether any individual arriving on the scene may interfere with the search and in determining what business, if any, the individual has on the scene. *State v. Galloway*, 14 Wn. App. 200, 201, 540 P.2d 444, review denied, 86 Wn.2d 1006 (1975); *State v. Howard*, 7 Wn. App. 668, 502 P.2d 1043 (1972); *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999). When the police have not yet obtained a warrant,

however, police can not question individuals who approach the scene. *State v. Crane*, 105 Wn. App. 301, 307, 19 P.3d 100 (2001).

Although the court in *State v. Crane* held that the officers were not authorized to detain and question anyone that arrived on the scene while officers were obtaining a warrant, the court made it clear that the officers would have been justified in stopping and preventing people from entering the scene. In *Crane*, an officer was in his parked car monitoring a house while other officers applied for a search warrant for the home. *Crane*, 105 Wn. App. at 304. The officer then saw a car with three occupants pull into the driveway of the residence, and the officer pulled his patrol vehicle into the driveway behind the car as the three men (one of whom was Crane) started to approach the residence. *Crane*, 105 Wn. App. at 304. The officer told the men to stop, and they did so and walked toward the officer. *Crane*, 105 Wn. App. at 304. At that point, a woman came out of the residence, and the officer told her to stay inside because the police were not allowing people to come in or out of the residence because they were in the process of obtaining a warrant. *Crane*, 105 Wn. App. at 304. The officer, however, went further, and began to question Crane about his activities and asked him for identification, which he provided. *Crane*, 105 Wn. App. at 304. The officer then held Crane's ID and used his radio to call for a warrants check on Crane, and Crane testified that he did not feel free to leave at this point. *Crane*, 105

Wn. App. at 304-05. The officer learned that Crane had an arrest warrant and, therefore, he arrested Crane and drugs were subsequently found. *Crane*, 105 Wn. App. at 305.

On appeal, Crane argued that his contact with the officer amounted to an illegal seizure in violation of both the Washington and United States Constitutions. *Crane*, 105 Wn. App. at 305. In addition, Crane argued that he was seized when: (1) the officer told him to stop as he approached the residence; (2) when the officer asked for identification; and, (3) when the officer ran the warrants check. *Crane*, 105 Wn. App. at 308-09. The State, however, argued that there was no seizure until the officer actually arrested Crane. *Crane*, 105 Wn. App. at 309. The court held that,

When Officer Green initiated the contact by pulling in behind Stopsen's car and asking Crane to stop as Crane approached the residence, this limited stop was not yet a seizure. From Green's conversation with the woman who came outside, Crane probably was aware that Green was monitoring the house and was not allowing anyone to enter. But when Green requested identification from Crane and called in the warrants check over his portable radio within Crane's hearing, the situation changed.

Crane, 105 Wn. App. at 310. Having found that Crane was seized, the court next turned to the question of whether the seizure was justified. Crane argued that "his entering an area that the police had under surveillance while they awaited a search warrant" did not justify the seizure, while the State argued

that the officer had a duty to maintain the status quo until the warrant was issued. *Crane*, 105 Wn. App. at 311. The court noted that Crane had complied with the officer's requests, had stopped when he was told to, and had not acted suspiciously in any way until after the arrest. *Crane*, 105 Wn. App. at 312. In addition, the court noted that the State had not proposed any reason to suspect that Crane posed or appeared to pose any threat to the officer. *Crane*, 105 Wn. App. at 312. The court thus concluded that the officer "could have secured the residence simply by telling Crane to leave." *Crane*, 105 Wn. App. at 312. The court thus ultimately held that there was a Fourth Amendment violation because there was no articulable suspicion that Crane was involved with a crime "or that Crane was a threat to anyone's safety." *Crane*, 105 Wn. App. at 313. The dissent had argued, "there should be no qualitative difference between a search warrant being obtained and a search warrant having already been issued." *Crane*, 105 Wn. App. at 313(dissent of J. Hunt), citing *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 949, 148 L. Ed. 2d 838 (2001)(finding no Fourth Amendment violation where officers securing a house while awaiting issuance of a search warrant prevented a resident from entering unaccompanied for two hours-a relatively minor intrusion on personal privacy when balanced against reasonable law enforcement concerns).

The majority in *Crane*, however, disagreed with the dissent and stated,

Nor are we persuaded by the dissent's policy argument regarding the authority of police to ask a visitor to leave after the issuance of a search warrant. The dissent contends the same rule should apply during the pendency of a search warrant. Although we do not disagree with this proposition, we see an important distinction between asking a person to leave the scene and seizing a person who comes to the scene during the pendency of a search warrant.

Crane, 105 Wn. App. at 313. The decision in *Crane*, therefore, turned on the fact that the officer did not merely stop Crane and informing him that he was not allowed to go to the residence; rather, the officer seized Crane by taking his identification and running the warrants check. The majority, however, agreed with the dissent that the police may control a scene and even require visitors to leave or keep them from entering the scene while the officers apply for a search warrant. *Crane*, 105 Wn. App. at 313.

Thus, under the Washington cases (including *Crane*) and the United State Supreme Court decision cited above, the police may stop and prevent a person from entering a scene while the officers are applying for a warrant. While the officers may not be able to further detain the person and question him or seize his identification, the cases all agree that the officers may, nonetheless, take the actions necessary to prevent the person from entering a scene while they are in the process of obtaining a warrant.

Cloud argues on appeal that the evidence below was that at the time Cloud was contacted by Deputy Birkenfeld, the officers had not actually obtained a search warrant for the property, but were in the process of applying for a warrant. While the State acknowledges that the actual testimony was that the officers were in the process of obtaining a warrant, this fact does not change the analysis because Detective Birkenfeld was still authorized to stop Cloud from entering the scene and was allowed to ask him to leave. Before Deputy Birkenfeld even had a chance to do so, however, Cloud made furtive movements and reached under the seat of his car, further aggravating the legitimate officer safety concerns that were already present, as outlined below. RP 22-23.

The Washington Supreme Court has held that a police officer may seize a person briefly (and also frisk the person for weapons) when the officer can point to “specific and articulable facts which creates an objectively reasonable belief that a suspect is armed and presently dangerous.” *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d (1993), citing *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 1879-1882, 20 L. Ed. 2d 889, (1968); *State v. Glossbrener*, 146 Wn.2d 670, 680, 49 P.3d 128 (2002).

In the present cast, Detective Birkenfeld had legitimate concerns for his safety and the safety of the other officers on the scene for several reasons. First, Detective Birkenfeld had a legitimate officer safety concern given the

earlier report involving Cloud and a shotgun. This concern was further legitimized by the fact that Cloud had arrived at his mother's residence and found a number of officers and might have been upset by this discovery.

Detective Birkenfeld's initial actions in stopping Cloud from entering the scene, therefore, were justified because the officers had the right to control the scene and because Detective Birkenfeld had legitimate concerns for officer safety given his knowledge that Cloud had recently been reported to have been involved with a shotgun down the road.

As outlined below, additional officer safety concerns were raised when Cloud made furtive movements as Detective Birkenfeld approached the car and before the Detective was even able to have any conversation with Cloud about what was going on at the scene. For all of these reasons, the trial court did not abuse its discretion in concluding that Detective Birkenfeld acted reasonably in stopping Cloud momentarily in order to secure the scene and that this action was further justified by the presence of legitimate officer safety concerns.

2. *Detective Birkenfeld acted reasonably in briefly detaining Cloud due to legitimate officer safety concerns.*

When an individual approaches an officer and behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures. *City of Seattle v. Hall*, 60

Wn. App. 645, 651, 806 P.2d 1246 (1991). Furthermore, furtive movements by a driver (including reaching under the driver's seat) have been held to be sufficient to raise reasonable concerns for officer safety. See, *State v. Kennedy*, 107 Wn.2d 1, 3-4, 13, 726 P.2d 445 (1986)(Upholding a search under the front seat of a vehicle after the officer approached the car, instructed Kennedy to get out, and then searched the area by reaching under the front seat, after the officer had observed Kennedy lean forward as if to put something under the seat prior to the officer's approaching the car). In addition, "a *Terry* stop and frisk may extend into the car if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle." *Glossbrener*, 146 Wn.2d at 680, citing *State v. Terrazas*, 71 Wn. App. 873, 879, 863 P.2d 75 (1993).

In the present case, Detective Birkenfeld saw Cloud reaching under the driver's seat as Detective Birkenfeld approached the car, creating additional officer safety concerns. RP 21-22, 34-35. Detective Birkenfeld explained that the events happened quickly, and that

[A]s I'm walking to the vehicle, Aaron in placing his hands underneath the seat. I can see at that point what looks like it's appearing to be stocking-net type of ski mask going under the seat, at the same time being concerned with Mr. Cloud's hands.

RP 35. Detective Birkenfeld then asked Cloud to step out of the car, and explained that there were several reasons for this. RP 22, 35. First, Detective Birkenfeld explained that he didn't know if there were guns in the car, didn't know how thoroughly Deputy Eberhard was able to speak with Cloud, and didn't know what else might be under the seat. RP 22. Detective Birkenfeld explained that he had officer safety concerns because,

I didn't know what was in the car. Mr. Cloud has a felony conviction. He had already placed his hands under the seat and maybe 10 to 15 minutes prior, he was identified as a person possibly waiving a shotgun around, less than a couple of miles down the road.

RP 22. Detective Birkenfeld also stated he Cloud have been reaching for a weapon when he was reaching under the seat, and specifically stated that this was one of the reasons that he detained Cloud. RP 22-23.

Given all of Detective Birkenfeld's testimony, there were specific and articulable facts that created an objectively reasonable belief that Cloud was armed and presently dangerous. The trial court, therefore, did not abuse its discretion in concluding that the detention was justified due to officer safety concerns. Furthermore, as "a *Terry* stop and frisk may extend into the car if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle," Detective Birkenfeld, therefore, acted reasonably in briefly detaining Cloud and having him get out of the vehicle.

Glossbrener, 146 Wn.2d at 680.

3. *Detective Birkenfeld's search of the car was reasonable because Cloud consented to the search.*

When voluntarily given, consent supplants both probable cause and the need for a warrant. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (consent is an exception to the warrant requirement); *State v. Mathe*, 35 Wn. App. 572, 576, 668 P.2d 599 (1983).

Although Detective Birkenfeld would have been permitted to search the area under the seat where he had observed Cloud making furtive movements, Detective Birkenfeld took the extra step of obtaining Cloud's consent before searching the car. Given the legitimate officer safety concerns, as well as Cloud's consent, the search did not violate the Fourth Amendment.

4. *The seizure of the ski mask and flashlight was justified because Detective Birkenfeld immediately recognized the items as evidence of a crime.*

The 'plain view' exception requires that "the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime." *State v. O'Neill*, 148 Wn.2d 564, 583, 62 P.3d 489 (2003). In order to satisfy the immediate recognition element, the officer must have probable cause to believe that the object is incriminating evidence.

State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994). Thus, officers need not be certain or have “certain knowledge” that the object is evidence. *State v. Gonzales*, 46 Wn. App. 388, 400, 731 P.2d 1101 (1986), *see also Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (an officer need only have probable cause to believe the object in plain view was incriminating evidence). Rather, “Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them.” *State v. Lair*, 95 Wn.2d 706, 716, 630 P.2d 427 (1981), *State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

An officer's knowledge and experience is relevant to determining whether an object is legally seized under the plain view exception. *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S. Ct. 2737, 2749, 49 L. Ed. 2d 627, 644 (1976), *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445, 452 (1986).

In the present case, Detective Birkenfeld knew that Cloud had previously burglarized Handy Andy’s in September, as Cloud had admitted this fact to Detective Birkenfeld in the November interview. RP 12, 14. In addition, Detective Birkenfeld knew that the store had been burglarized again on February 2, and that the same entry point that was used in the September burglary was used again. RP 14-15. Detective Birkenfeld also was able to briefly view portions of the video of the February burglary prior to his contact

with Cloud, and saw that one of the burglars was wearing a “tan or brown colored Carhardt-style ski mask” and was carrying a 5 to 8 inch flashlight. RP 15-17. Finally, Detective Birkenfeld stated that ski mask found in Cloud’s car was consistent with the ski mask that he had observed on the video from the burglary, as it was the same color, had the same exact type of facial opening, and had a square “Carhardt” marking of the same size and fashion as the one in the video. RP 25. Detective Birkenfeld stated that he seized the ski mask and flashlight based on all of these observations. RP 24-26.

Although Cloud argues that any person who possessed a ski mask and a flashlight could not reasonable be considered a suspect in the burglary, his argument fails to note that Cloud was not “any person.” App.’s Br. at 17. Rather, other factors were involved. Most importantly, Cloud had admitting committing the first burglary, and in the second burglary the suspect used the exact same entry point despite the fact that there were numerous roof vents over the store. Although a ski mask and a flashlight may be innocuous when viewed in a vacuum, when viewed in their proper context, the items were extremely incriminating and were strong evidence that Cloud had committed the second burglary either as a principal or as an accomplice.

Given all of the facts known to him, Detective Birkenfeld reasonable concluded that the items were incriminating evidence concerning the

burglary. The trial court, therefore, did not err in concluding that Detective Birkenfeld lawfully seized the ski mask after he “immediately and reasonably concluded that the items were evidence of a crime.” CP 218.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE PRIOR BURGLARY BECAUSE THE EVIDENCE WAS ADMISSIBLE AS COMMON SCHEME OR PLAN EVIDENCE (AS WELL AS EVIDENCE OF KNOWLEDGE, OPPORTUNITY, MOTIVE, AND MODUS OPERANDI) BECAUSE IT SHOWED THAT CLOUD HAD PREVIOUSLY BURGLARIZED THE SAME STORE AT THE SAME TIME OF NIGHT AND HAD USED THE IDENTICAL ROOF VENT TO ENTER THE STORE EACH TIME DESPITE THE FACT THAT THERE WERE NUMEROUS OTHER ROOF VENTS ABOVE THE STORE.

Cloud next claims that the trial court erred in admitting evidence that Cloud admitted that he had committed the September burglary of Handy Andy's. App.'s Br. at 18. This claim is without merit because the evidence was properly admitted under the common scheme or plan exception to ER 404(b), as well as under numerous other ER 404(b) exceptions including knowledge, opportunity, motive, modus operandi and the exception for evidence that is circumstantial evidence of the charged crime.

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under

ER 404(b), evidence of prior bad acts is inadmissible to prove character in order to show conformity with them. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). But such evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

In order to admit evidence of previous bad acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for admitting the evidence, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

Evidence of prior bad acts may be admitted to prove a common scheme or plan. *Lough*, 125 Wn.2d at 852, 889 P.2d 487. In *Lough*, our Supreme Court noted that the common scheme or plan exception to ER 404(b) arises “where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan” or “when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” *Lough*, 125 Wn.2d at 855. Furthermore, other acts are admissible to prove a crime if there is “such occurrence of common features that the

various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” *Lough*, 125 Wn.2d at 860.

Similarly, when a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. *Lough*, 125 Wn.2d at 860. To establish common design or plan for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations. *Lough*, 125 Wn.2d at 860.

In the present case, the evidence of the September burglary showed an occurrence of common features that was naturally explained by a general plan. First, in both cases the burglary occurred at the exact same store at roughly the same time of night. Second, in both cases the exact same roof vent was used despite the existence of numerous other roof vents above the store. Third, in both cases no large items were taken from the store. Finally, in both cases Cloud left the store through a rear door. The factors were not merely similar, but they were essentially identical and were naturally

explained by a common scheme or plan.

In addition, although the trial court ultimately determined that Cloud's numerous other prior burglaries were inadmissible because of the danger of undue prejudice, the trial court could still properly consider those burglaries when determining whether the September Handy Andy's burglary. Thus, the court could still consider whether these other burglaries were additional manifestations of the alleged plan and whether these additional occurrences "increased the likelihood that there was, indeed a common scheme, plan or design in operation here." See, *State v. Lough*, 70 Wn. App. 302, 324, 853 P.2d 920 (1993)(Noting that although the jury was not allowed to hear the 404(b) evidence relating to the defendant's attempts to drug two particular victims, the trial judge could properly consider whether these "recent manifestations of the alleged plan increased the likelihood that there was, indeed a common scheme, plan or design in operation here" with respect to additional 404(b) evidence regarding five other victims), citing ER 104; and 29 Am.Jur.2d, Evidence § 326, at 377.

Finally, ER 404(b) exceptions often overlap, and any number of the recognized 404(b) exceptions apply to the facts of the present case. For instance, the prior burglary of the same store using the same entry point and exit point (and the information Cloud necessarily gained in committing the first burglary) was relevant to demonstrate the defendant's knowledge,

opportunity, motive, and preparation, as well as absence of mistake or accident, and was also relevant as circumstantial evidence of the charged crime. See ER 404(b) (specifically listing knowledge, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) (regarding the admission of ER 404(b) evidence that was circumstantial evidence of the crime and explained how the defendant had acquired certain knowledge).

In addition, as the State argued below, the evidence was also admissible as modus operandi evidence. RP 112. Washington courts have explained that evidence of other crimes evidence is admissible through the modus operandi exception when “the method employed in committing the act must be so unique that mere proof that an accused acted in a certain way at a certain time creates a high probability that he also committed the act charged.” *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). Even if the features of the crime are not individually unique, appearance of several features in the cases, especially when combined with a lack of dissimilarities, can create sufficient inference that they are not coincidental. *State v. Vy Thang*, 145 Wn.2d 630, 644, 41 P.3d 1159 (2002). The required level of uniqueness has been met in circumstances where three female victims were violently murdered, sexually assaulted and posed with props in a small geographic area and over a short period of time. *State v. Russell*, 125 Wn.2d

24, 68, 882 P .2d 747 (1994). Similarly, the existence of pipe wrench burglaries, brown Camaros, ground floor entries, morning break-ins of multi-apartment complexes in a certain geographic area had striking similarities sufficient to be signature-like. *State v. Jenkins*, 53 Wn.App. 228, 237, 882 P .2d 747 (1994). Such similarity was also found in crimes where the victims were approached by a man offering to sell video equipment at reduced prices, where the man directed them to drive to a certain location, took cash but did not return with the merchandise and later contacted the victims. *Thang*, 145 Wn.2d at 644 (citing *State v. Brown*, 111 Wn.2d 124, 128, 761 P.2d 588 (1988)).

In the present case, the evidence showed that Cloud had recently burglarized the same store, at the same time of night, using the exact same roof vent (despite the presence the fact that there were nine to twelve roof vents to choose from), and that the in both instances Cloud exited the store through the same rear door. The single fact that the burglar in both Handy Andy's burglaries picked the exact same roof vent showed that the method of entry employed in both burglaries was not only unique, but it also established that the fact Cloud had entered through the same roof vent in September created a high probability that he also committed the act charged. *Coe*, 101 Wn.2d at 777. In addition, factors such as the time of day, the lack of any theft of large items, and the exit through the same rear door created the

unmistakable inference that these factors were not coincidental. The evidence, therefore, was also admissible under the modus operandi exception.

For all of these reasons, the trial court did not abuse its discretion in admitting evidence of the prior burglary.

C. CLOUD’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE DEFENSE COUNSEL’S TRIAL CONDUCT CAN BE CHARACTERIZED AS LEGITIMATE TRIAL STRATEGY.

Cloud next claims that his trial counsel was ineffective for failing to request an *Old Chief* stipulation. This claim is without merit because Cloud has failed to overcome the strong presumption that trial counsel was effective and has failed to show that counsel’s actions could not have been a legitimate trial strategy.

To establish that counsel was ineffective, Cloud must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient

performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

An error is harmless when, in light of all the evidence presented at trial, it was unlikely to have affected the jury's verdict because the State's case was believable and its evidence corroborated. *State v. Stockton*, 91 Wn. App. 35, 43, 955 P.2d 805 (1998) *citing* *State v. Millante*, 80 Wn. App. 237, 246, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996); *State v. Padilla*, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

In the present case, Cloud's argument concerns the fact that Cloud stipulated that he had previously been convicted of residential burglary and burglary in the second degree rather than seeking an *Old Chief* stipulation stating that he had previously been convicted of a "serious offense." While it is true that allowing the jury to hear that there had been a previous burglary conviction was prejudicial, this fact must be viewed in its proper context. It is critical to note that the trial court had ruled that Cloud's admission to one prior burglary was admissible at trial. The jury, therefore, was going to hear that Cloud had at least some previous involvement with burglaries. The harm in stipulating to the fact that there had been two prior burglary convictions, therefore, was minimal. In addition, trial counsel may have legitimately thought that if the jury were to hear a stipulation stating that Cloud had previously been convicted of a "serious offense," the jury might speculate that Cloud had previously been convicted of some more egregious offense like a violent crime, a sex offense, or even murder. Trial counsel, therefore, likely reasonably concluded that the jury hearing that Cloud had two burglary convictions was potentially much less harmful than the jury hearing that Cloud had committed one prior burglary of the same store and that he also had a prior conviction for an unnamed "serious offense."

Because defense counsel's trial conduct can be characterized as legitimate trial strategy, it cannot serve as a basis for a claim that the

defendant did not receive effective assistance of counsel, and Cloud's argument to the contrary must fail.

D. CLOUD'S CLAIM THAT THE ARREST WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE MUST FAIL BECAUSE CLOUD DID NOT RAISE THIS ISSUE BELOW AND HAS FAILED TO SHOW PREJUDICE, AND BECAUSE THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

Cloud next claims that the arrest warrant was improperly issued because there was not probable cause to believe that Cloud had committed a crime. App.'s Br. at 23. This claim is without merit because the motion for an arrest warrant provided probable cause and because Cloud never challenged the arrest warrant below and has not shown, or even alleged, any prejudice.

Generally issues raised for the first time on appeal are not subject to review. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception to the general rule exists for claims of manifest error affecting a constitutional right. *McFarland*, 127 Wn.2d at 333. In such a case, the defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. *McFarland*, 127 Wn.2d at 333. If the facts necessary to

adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333, citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Even if this court were to assume that the arrest warrant was not supported by probable cause and were to conclude that this was an alleged error of constitutional magnitude, Cloud has still failed to show prejudice. Because the sufficiency of the motion for an arrest warrant was not discussed or examined below, this court has no determination by the trial court to review. *McFarland*, 127 Wn.2d at 333-34, 899 P.2d 1251. In addition, this court has no indication whether the trial court would have granted a motion to suppress on this basis. As a result, Ms. Cloud cannot show actual prejudice, the error is not manifest, and this issue is not reviewable on appeal. *McFarland*, 127 Wn.2d at 334.

In addition, even if this court were to review the arrest warrant, the motion for a warrant of arrest established probable cause. Although there was no testimony or argument below regarding the warrant (as the arrest warrant was not challenged below) the motion for warrant of arrest and the attached certification for determination of probable cause established probable cause on their face. First, the certification for determination of probable cause outlines the facts of the February burglary and states that the surveillance tape showed a burglar (with what appeared to be the same

physical build as Cloud) wearing a tan "Carhardt" ski mask and using a flashlight. CP 9. In addition, deputies found that entry was made through a roof vent. CP 9-10. Second, the certification explained how Detective Birkenfeld recovered a Carhardt ski mask and a flashlight from Cloud's car. CP 10. Third, the certification stated that Cloud had admitted that he had previously burglarized the same store in September, and that the same roof vent was used to access the store in both burglaries. RP 10-11. Finally, the certification stated that, when confronted with the physical evidence, Cloud admitted that it "looked bad." CP 10.

Given all of these facts, the motion for warrant of arrest and the attached certification for determination of probable cause was sufficient to establish probable cause, and the warrant of arrest, therefore, was properly issued.

E. CLOUD'S ARGUMENTS REGARDING THE SUFFICIENCY OF THE EVIDENCE MUST FAIL BECAUSE, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE AT TRIAL PERMITTED A RATIONAL JURY TO FIND CLOUD GUILTY OF BURGLARY IN THE SECOND DEGREE AND UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT.

Cloud next claims that there was insufficient evidence to convict him of burglary in the second degree or unlawful possession of a firearm in the

first degree. Cloud's claims in this regard primarily rely on the premise that the trial court erred in denying his motion to suppress. These claims are without merit because, as discussed above, the trial court did not err in denying the motion to suppress, and there was sufficient evidence to support both convictions below.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The evidence regarding the burglary charge, as has been discussed repeatedly, showed that Cloud possessed a ski mask, shoes, flashlight, backpack and other items of clothing that matched the items worn by the burglar in the February burglary. In addition, Cloud had previously burglarized the same store using the exact same roof vent to gain access to the store. These facts, when viewed in a light most favorable to the State, permitted a rational jury to find Cloud guilty of burglary in the second degree beyond a reasonable doubt.

Similarly, it was uncontested that Cloud had previous convictions for serious offenses and that a shotgun was found in the trunk of his car and that he was driving the car at the time of his arrest. Again, these facts, when viewed in a light most favorable to the State, permitted a rational jury to find Cloud guilty of unlawful possession of a firearm in the first degree beyond a reasonable doubt.

For all of these reasons, Cloud's arguments regarding the sufficiency of the evidence must fail.

F. CLOUD'S CLAIMS REGARDING CUMULATIVE ERROR MUST FAIL BECAUSE CLOUD HAS FAILED TO SHOW ANY ERROR BELOW.

Cloud next claims that cumulative error denied him a fair trial.

App.'s Br. at 26. This claim is without merit because Cloud has failed to show any error.

Cloud next claims that the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Examples include a cases in which there were five evidentiary errors along with discovery violations; *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), in which there were three instructional errors and improper remarks by the prosecutor during voir dire; *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), in which a witness impermissibly suggested the victim's story was consistent and truthful, the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing; *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), and in which the court severely rebuked the defendant's attorney in the presence of the jury, the court refused to allow the testimony of the defendant's wife, and the jury was permitted to listen to a tape recording of a lineup in the absence of court and counsel. *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

Here, Cloud has not established any error at all, and certainly even if he has, none of it combined is of the magnitude appearing in the cited cases. *Greiff*, 141 Wn.2d at 929. For these reasons, Cloud's claim of cumulative error must fail.

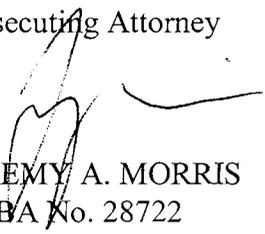
IV. CONCLUSION

For the foregoing reasons, Cloud's conviction and sentence should be affirmed.

DATED May 31, 2007.

Respectfully submitted,

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