IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 85564**
	)	
MARVIN L. GOFF,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, DIVISION IV
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

KENT DENZEL, MOBar #46030
Assistant Public Defender
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855
FAX: (573) 875-2594

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JURISDICTIONAL STATEMENT

Marvin Goff appeals his conviction following a jury trial in the Circuit Court of Clay County, Missouri, for stealing, third offense, § 570.040.[1] The Honorable Larry D. Harman sentenced Mr. Goff, as a prior and persistent offender, to fifteen years imprisonment. After the Missouri Court of Appeals, Western District, issued its opinion in WD 61497, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo 2000, unless otherwise stated.

STATEMENT OF FACTS

Gladstone police officer Mitzi Boydston saw a car stopped near some vending machines outside a Wal-Mart around 3:00 a.m. on July 24, 2001 (Tr. 82-83, 86).[2] Although the store was open 24 hours, the doors nearest the car were locked after 11:00 p.m. (Tr. 84-85). There are three sets of doors: north, center, and south; only the middle doors are unlocked after 11:00 p.m. (Tr. 85).

As Boydston drove by, she saw a man, later identified as Patrick Trent (Tr. 95, 111), get into the driver's seat (Tr. 87).[3] Another man, Marvin Goff, was pulling at the south doors that were locked at that hour (Tr. 87). Both men glanced up at Boydston as she passed by (Tr. 88).[4]

Boydston called in a license check on the car, then drove on towards the other end of the store (Tr. 88-90). The dispatcher went beyond what Boydston requested and reported back to her that a person living at the address where the car was registered, and known to drive the car, had several outstanding warrants (Tr. 90). In

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[2] The Record on Appeal consists of the legal file (L.F.), the trial transcript (Tr.), and the transcript of the hearing on the motion to suppress (Hr.Tr.).

[3] At the suppression hearing, Boydston said one man was in the car and the other was outside (Hr.Tr. 4-5).

[4] Boydston did not testify, as the State asserted in its transfer application, that the men got in the car when they saw her approaching (Trans.App. 2), nor did she see Mr. Goff get in the car (Tr. 87-88).

the suppression hearing, Boydston phrased it, "The license check came back after the dispatcher checked with outstanding warrants for a person that came back to the address that the car was registered to." (Hr.Tr. 5). The warrants were not for the car's occupants (Hr.Tr. 9). Mr. Goff owned the car; he did not have any outstanding warrants (Hr.Tr. 9-10, 21). The car was gone when Boydston went back to where she had seen it (Tr. 90).

Boydston and other officers who had heard the radio traffic looked for the car (Tr. 90-91). About ten minutes later, Gladstone officer Wayne Easley saw it in a Hy-Vee lot across the street from the Wal-Mart (Tr. 91-92, 102). Hy-Vee is also open 24 hours a day (Tr. 94). The car was at the curb next to some vending machines outside an entrance into the store (Tr. 103).

Easley saw Trent and Mr. Goff standing at the vending machines (Tr. 104-05, 111). It looked like Mr. Goff went in the store, while Trent got in the car and parked it in a space in front of the store (Tr. 105-06). Easley drove past the car three times, then drove around behind the store and parked where he could see Trent in the car but did not believe that Trent could see him (Tr. 104-05, 107).[5] Trent looked around, then got out and opened the hood (Hr.Tr. 15; Tr. 107). It looked to Easley like he put an object in the engine compartment, closed the hood quickly, then got back in the

[5] In the suppression hearing, Easley said he was positioned southeast of the south-facing car; he did not know whether anyone in the car could see him (Hr.Tr. 22).

driver's seat (Tr. 107). Easley could not tell what the object was, though it looked like a bag of some kind (Tr. 109).

Easley waited for Mr. Goff to return to the car (Tr. 107). When he came out of the store -- with a soda and possibly a sandwich -- and got in the passenger seat, Easley pulled behind the men's car and turned on his lights and siren (Tr. 109, 131).[6] After asking for both men's identification, Easley arrested Trent on an outstanding warrant (Tr. 110). Easley did not recall whether Mr. Goff produced a license, but he did identify himself (Tr. 110-11).

Easley asked Mr. Goff to get out, then patted him down, for "safety reasons" (Tr. 111). Mr. Goff did not make any furtive movements that made him believe he was armed or dangerous (Hr.Tr. 23). He felt a "large object" in Mr. Goff's pants pocket and asked him what it was (Tr. 112). Mr. Goff replied, "I don't know" and Easley asked if he could retrieve it (Tr. 112). He said Mr. Goff "complied" (Tr. 112). When asked if he felt anything that he thought was a weapon, Easley answered, "Yes . . . [t]he object in the front right pocket. I didn't know what it was. It was just kind of large and bulky, and he didn't know what it was." (Hr.Tr. 23). Easley later learned the object was a "universal key" for vending machines (Tr. 112-13).

Easley went over to the Pepsi machine outside Hy-Vee and put the key in the lock (Tr. 113). It fit, but he did not recall whether he tried to turn it or not (Tr. 113).

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[6] Easley remembered at the time of the suppression hearing that he was out of sight of the men when Mr. Goff returned to the car -- he said Mr. Goff "apparently" returned

The machine was not closed all the way; it had been pried open one to two inches (Tr. 113-14). There is usually a metal "clasp" [7] by which a padlock secures the door to the body of the machine, but the officer believed there was no padlock on the Pepsi machine (Tr. 114). Easley did not see any money or soda cans or bottles near the machines (Tr. 134). He did not know whether anything was missing from the machines (Tr. 134). Easley did not remember finding any coins or small bills on Mr. Goff (Tr. 140).

When the State offered the "universal key" into evidence, Mr. Goff objected on the basis of his pretrial motion to suppress and requested a continuing objection as to all exhibits (Tr. 115-16). The court overruled the objection (Tr. 116). Easley arrested Mr. Goff at this point (Tr. 116). He looked in the car and could see "a large amount of quarters kinda sprawled across the . . . inside of the vehicle." (Tr. 116; Hr.Tr. 21). The quarters were in the front floorboard, mainly on the passenger side (Tr. 116-17).

Officer Easley searched the car "incident to arrest" (Tr. 117). Under the passenger seat he found a bag containing approximately $60.00, including "a whole lot of one dollar bills" and "a whole lot of quarters" (Tr. 117-18). He looked under the hood and found a bag that contained two more tools similar to the one he found in Mr. Goff's pocket, and "a whole bunch of loose keys." (Tr. 118-19). Easley agreed that they were "vending machine type keys" (Tr. 119-20). He found wire cutters,

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because both men were there after Easley drove around the store (Hr.Tr. 16).

[7] Presumably, Easley said or intended to say a "hasp" -- a device used with a padlock.

pliers, screwdrivers, and vice [sic] grips in the back seat (Tr. 120-21). There were money bags and coin rolling papers in the trunk (Tr. 123-24). Easley also found a notebook in the car with numbers that "possibly looked like some of the number that were on the keys." (Tr. 125-27). He did not investigate the numbers at all (Tr. 126).

The employees of Hy-Vee could not determine that night if there had been a loss (Tr. 114). Store manager Steven Binseil examined the three vending machines outside the store -- Coke, Pepsi, and 7-Up -- the next morning (Tr. 148). He explained that at the time, Hy-Vee had control of and would fill and collect the money from the vending machines (Tr. 147-48, 153-54). Each machine had two locks; a padlock on a "clasp," and a key lock on the front of the machine (Tr. 147). The customer service employee would obtain the keys -- a separate one for each machine -- from Binseil or the assistant manager each Monday morning and empty the money (Tr. 147, 154).[8] The store's keys did not look like the "universal key" device that officer Easley took from Mr. Goff's pocket (Tr. 147).

When Binseil checked, the Coke and Pepsi machines had money in them, but the 7-Up machine "had money gone out of it." (Tr. 148). It had dollar bills in it but no coins (Tr. 149, 151). The coins and bills were stored in different areas in the machine (Tr. 149). He could only speculate as to how much money was missing (Tr. 156). The three machines together would have approximately $150 to $200 removed per week (Tr. 150-51). When he was asked if the lock on the Pepsi machine was

[8] This stop occurred in the early morning hours of a Tuesday -- July 24, 2001 (Tr.

broken, Binseil said that for two to three months the machine had been broken into almost every week (Tr. 148). He also said that the lock on the 7-Up machine was broken, but he did not recall if the padlock was gone or broken or if the "clasp" was broken (Tr. 148, 152).

During voir dire, the venire panel was asked if any member had been the victim of a crime (Tr. 33). Panelist Lowe said he was a retired police officer and described the physical assaults he had suffered over the years (Tr. 40-41). He was asked if anything about his experience would cause him to be less than fair and impartial if selected and he answered, "I can honestly say that I've never arrested an innocent person. I don't know of any cop who ever did." (Tr. 42). Mr. Goff's motion to strike the panel and declare a mistrial was denied (Tr. 43).

At trial, Officer Easley was asked on cross examination about Mr. Goff's demeanor at the scene, and he answered, "out there it was very polite, he understood the drill, he'd been through it before. We got back to the station --" (Tr. 135).[9] Defense counsel approached the bench and moved for a mistrial, because he had not asked for this information, which constituted a reference to collateral crimes (Tr. 135). The prosecutor objected, arguing that defense counsel "kinda opened the door." (Tr. 136). She agreed that a cautionary instruction would be acceptable (Tr. 136).

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83).

[9] Easley had been asked a similar question at the preliminary hearing, "Was he nervous or calm, intoxicated, any of those?" He answered, "I don't believe so."

The court denied the mistrial and asked if Mr. Goff wanted some other form of relief (Tr. 137). Counsel said that the comment was particularly problematic because of the comments of venire panelist Lowe in voir dire (Tr. 137). Counsel understood that the court was denying the motion and asked for a cautionary instruction (Tr. 137-38). Following the afternoon recess, the court informed the jury that it was "to disregard the last response of the witness." (Tr. 138-39).

The jury found Mr. Goff guilty and on June 5, 2002, the court sentenced him, as a prior and persistent offender, to fifteen years imprisonment (L.F. 25, 29). Notice of appeal was filed June 7, 2002 (L.F. 31). After the Western District of the Missouri Court of Appeals reversed and remanded, finding that the initial stop was invalid and that Mr. Goff's motion to suppress should have been granted, this Court sustained the State's transfer application and transferred this appeal to this Court.

(Hr.Tr. 25).

POINTS RELIED ON

I.

The trial court clearly erred in overruling Mr. Goff's motion to suppress the evidence seized from him and his car, and in admitting over his objection at trial the money, keys, tools, and notebook that were seized, because these rulings violated Mr. Goff's rights to be free from unreasonable search and seizure and to due process of law, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution, in that the evidence was the fruits of an illegal stop and search because: 1) the police officers did not have reasonable suspicion of criminal activity on which to base a stop of Mr. Goff's car; all the officers knew was that Mr. Goff tried to enter an open business through a door that was locked at that particular hour, and was later seen next to vending machines at another open business; 2) a computer check revealed no warrants for Mr. Goff or his car, and the police could not rely on a report that a person with outstanding warrants who lived at the same address "was known to drive the car" because the State did not prove the basis of the dispatcher's knowledge, and even if it had this would not establish reasonable suspicion that the person with outstanding warrants was in the car at the time; and 3) the officers did not believe that Mr. Goff was armed or dangerous before patting him down and they therefore had no valid basis to do so.

State v. Miller, 894 S.W.2d 649 (Mo. banc 1995);

State v. Franklin, 841 S.W.2d 639 (Mo. banc 1992);

Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985);

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

U.S. Const., Amends IV and XIV;

Mo. Const., Art. I, Secs. 10 and 15; and

§ 542.296.

II.

The trial court erred in overruling Mr. Goff's motion for judgment of acquittal at the close of the evidence, and in accepting the jury's verdict and in sentencing him for stealing, because the State failed to produce sufficient evidence to permit a rational trier of fact to reach a subjective state of *near certitude* that the alleged victim had suffered a loss, and the rulings therefore violated Mr. Goff's right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was no evidence that any money had been taken from the vending machine, because the machine was emptied less than 24 hours before Mr. Goff was arrested, there were still dollar bills in the machine, and there was no accounting as to when the machine was last filled or how many sodas were bought from it between that time and Mr. Goff's arrest. This was not sufficient evidence to prove beyond a reasonable doubt that a theft had occurred.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);

State v. Grim, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993);

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

State v. Duvall, 787 S.W.2d 798 (Mo.App. E.D. 1990);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§§ 570.030 and 570.040.

III.

The trial abused its discretion in denying Mr. Goff's request for a mistrial when Officer Easley testified that Mr. Goff "understood the drill, he'd been through it before" because this violated Mr. Goff's rights to due process of law, a fair trial before a fair and impartial jury, and to be tried only for the offenses charged, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the officer's comment clearly told the jury that Mr. Goff had prior convictions, and this could not be cured by an admonition to disregard the testimony, especially where that admonition came after a recess and had little impact in comparison to the prejudicial effect of the comment itself.

State v. Smith, 934 S.W.2d 318 (Mo.App. W.D. 1996);

State v. Riggins, 987 S.W.2d 457 (Mo.App. W.D. 1999);

State v. Johnson, 901 S.W.2d 60 (Mo. banc 1995);

State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10, 17, and 18(a).

ARGUMENT

I.

The trial court clearly erred in overruling Mr. Goff's motion to suppress the evidence seized from him and his car, and in admitting over his objection at trial the money, keys, tools, and notebook that were seized, because these rulings violated Mr. Goff's rights to be free from unreasonable search and seizure and to due process of law, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 15 of the Missouri Constitution, in that the evidence was the fruits of an illegal stop and search because: 1) the police officers did not have reasonable suspicion of criminal activity on which to base a stop of Mr. Goff's car; all the officers knew was that Mr. Goff tried to enter an open business through a door that was locked at that particular hour, and was later seen next to vending machines at another open business; 2) a computer check revealed no warrants for Mr. Goff or his car, and the police could not rely on a report that a person with outstanding warrants who lived at the same address "was known to drive the car" because the State did not prove the basis of the dispatcher's knowledge, and even if it had this would not establish reasonable suspicion that the person with outstanding warrants was in the car at the time; and 3) the officers did not believe that Mr. Goff was armed or dangerous before patting him down and they therefore had no valid basis to do so.

The vague mention of a warrant did not justify this stop. The officers did not have reasonable suspicion on which to justify a stop. And Officer Easley did not have a reasonable and articulable suspicion that Mr. Goff was armed before patting him down. For all these reasons, all evidence seized from the point of the stop must be suppressed.

I. *Background*

At neither the suppression hearing nor the trial did either officer -- Boydston, who initiated the chain of events, or Easley, who conducted the stop at issue -- testify to having any suspicion whatsoever about Trent's and Mr. Goff's activities. It was not a subject with which the State was concerned, despite the rule that the State bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. ***State v. Franklin***, 841 S.W.2d 639, 644 (Mo. banc 1992); § 542.296.6.

II. *The Underlying Facts*

Mr. Goff does not claim that there was no testimony about the men's activities. Officer Boydston testified that she saw them stopped near some vending machines outside Wal-Mart around 3:00 a.m. (Tr. 83, 86). Mr. Goff tried to enter a store that was open for business, though he chose the wrong doors (Tr. 87).[10] And depending on whether one refers to Boydston's hearing or trial testimony, Mr. Trent was either

[10] There was no evidence whether there were any signs directing customers to use the unlocked center doors.

in the car or just getting in as she passed (Hr.Tr. 4-5; Tr. 87). She did not see either man near the vending machines (Hr.Tr. 5).[11]

Officer Easley took up the search when he heard Boydston's radio communications about a warrant, and found the men and their car at another open business, the Hy-Vee across the street from Wal-Mart (Tr. 91-92, 102). At Hy-Vee the men were standing by the machines; Easley could see this as he drove by them three times before "setting up" to watch (Tr. 104-05, 107, 111). Easley saw Trent park the car while Mr. Goff went in the store (Tr. 105-06). It was at this point that Trent looked around, then got out and put something under the hood; Easley could not tell what it was (Hr.Tr. 15; Tr. 107, 109).

So there was some evidence about the men and what they were doing.

III. *The Proceedings Below*

But because this evidence of what the officers saw -- even assuming that Boydston's observations were relevant -- was so minimal, the prosecutor did not address suspicion at the hearing; the focus was on the allegedly outstanding warrants for some unidentified person living at Mr. Goff's address and possibly, at some unstated time, driving Mr. Goff's car: Boydston said that, "The license check came back after the dispatcher checked with outstanding warrants for a person that came back to the address that the car was registered to." (Hr.Tr. 5). She did not even say

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[11] Easley testified that Boydston said over the radio that there was a car and "two subjects by the vending machines" at Wal-Mart (Tr. 102).

that she called in for the license check because she was suspicious about a possible crime. And Easley was asked about having heard Boydston's radio traffic about the warrants and conducted the stop -- he spoke no more about suspicion about a possible crime than did Boydston (Hr.Tr. 14-16).

Because the State advanced only the one theory in the motion court, Mr. Goff concentrated on that issue in his brief in the Court of Appeals, briefly addressing the issue of reasonable suspicion aside from those warrants (which were never produced in court and the person who was the subject of them was never named), arguing that the two men's activities -- merely standing by vending machines outside an open business -- did not provide the requisite suspicion to stop them.

Mr. Goff's primary argument went to the issue of the allegedly outstanding warrants. He argued that this Court's decisions in ***Franklin***, 841 S.W.2d at 644-45, and ***State v. Miller***, 894 S.W.2d 649, 651-52 (Mo. banc 1995), required the State to produce evidence of the source of the dispatcher's information about the unknown person having some connection to Mr. Goff's car. *Also see*, ***State v. Kinkead***, 983 S.W.2d 518, 519 (Mo. banc 1998) (where an officer relied on a dispatcher for information that a suspect had a suspended license, the State was required to show that the dispatcher had probable cause to arrest; because it failed to produce evidence as to the source of the dispatcher's knowledge, it did not carry its burden).

Here, there was no evidence who the person was with the outstanding warrant -- it was not Trent or Mr. Goff (Hr.Tr. 9) -- and there was no evidence how it was "known" that he person lived at Mr. Goff's address and drove his car. Without such

evidence, under ***Franklin***, ***Miller***, and ***Kinkead***, the State failed to meet its burden. Perhaps because of the obvious strength of this argument, or for whatever other reason, it is clear that between the trial and the appeal, the State changed its theory as to how this stop was allegedly justified.

In fact, everything changed when the case got to the Court of Appeals. In its brief in that Court, the State barely mentioned the warrants -- there was a brief reference in the statement of facts, and in the beginning of its argument the State noted Mr. Goff's argument that the warrants were not a sufficient reason for the stop. But the State's Point Relied On did not justify the stop by reference to the warrants, and the only other mention was an attempt to refute Mr. Goff's argument based on ***Franklin*** and ***Miller*** that the testimony about warrants could not justify the stop because the State did not prove how the dispatcher learned the information about some unidentified person living at Mr. Goff's address and possibly driving Mr. Goff's car, at some unstated time.

Therefore, Mr. Goff will address the theory the State now presents: that Easley had reasonable suspicion for the stop based on the actions of Trent and Mr. Goff at the two locations.

IV. *The Applicable Law and the Standard of Review*

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause. . . ." United States Constitution; Amendment IV; *also see*, Mo. Const. Art. I, Sec. 15. Generally, a search or seizure is

allowed only if the police have probable cause to believe the person has committed or is committing a crime. ***Beck v. Ohio***, 379 U.S. 89, 91, 85 S.Ct. 223, 224, 13 L.Ed.2d 142 (1964).

The Fourth Amendment also allows a so-called ***Terry***[12] stop, which is a minimally intrusive form of seizure or "semi-arrest" that is lawful if the police officer has a reasonable suspicion supported by articulable facts that those stopped are engaged in criminal activity. ***Miller***, 894 S.W.2d at 651. The police are allowed to conduct ***Terry*** stops of moving vehicles upon a reasonable suspicion that the occupants are involved in criminal activity. ***United States v. Brignoni-Ponce***, 422 U.S. 873, 882, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975).

Mr. Goff was aggrieved by the illegal seizure of his car, his person, and the property taken from his car, and filed a motion to suppress the seized evidence (L.F. 4-5). As stated above, the State bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. ***Franklin***, 841 S.W.2d at 644; § 542.296.6. Appellate review of a motion to suppress is limited to a determination of the sufficiency of the evidence to sustain the trial court's finding. ***State v. Wise***, 879 S.W.2d 494, 503 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093 (1995). An appellate court will reverse the trial court's ruling only if that ruling is clearly erroneous. ***State v. Trenter***, 85 S.W.3d 662, 668 (Mo.App. W.D. 2002). The ruling is clearly erroneous if this Court is left with a definite and firm impression that a mistake has been made. *Id*.

"In reviewing the trial court's ruling on a motion to suppress, the facts and any reasonable inferences arising therefrom are to be viewed in a light most favorable to the ruling of the trial court." ***State v. Carter***, 955 S.W.2d 548, 560 (Mo. banc 1997). "As in all matters, a reviewing court gives deference to the trial court's factual findings and credibility determination, but reviews questions of law *de novo*." ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc), *cert. denied*, 524 U.S. 961 (1998). Whether reasonable articulable suspicion exists to justify a seizure is a mixed question of fact and law, but the ultimate conclusion as to whether a reasonable articulable suspicion exists is subject to *de novo* review. ***United States v. Green***, 52 F.3d 194, 197 (8th Cir. 1995).

V. *Easley Could Not Rely On Observations That Were Not Communicated To Him*

Contrary to the State's assertions in its transfer application (Trans.App. 5-6), the "fellow officer" rule does not validate this warrantless, suspicionless stop. In its application to transfer this appeal to this Court, the State cited and then ignored this Court's decision in ***Miller***, in which this Court said that "[w]hen a law enforcement officer effectuates a ***Terry*** stop, he need not have personally observed facts amounting to reasonable suspicion provided he acted on *information provided by* another officer who is shown to have had reasonable suspicion to make the stop." *Id*., at 652; *citing*, ***United States v. Hensley***, 469 U.S. 221, 105 S. Ct. 675, 83 L.Ed.2d 604 (1985) (emphasis added).

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

But Boydston provided no information that would establish any suspicion whatsoever, let alone reasonable suspicion. This is why the cases the State cited in its application to transfer (Trans.App. 5), have no application to the facts of this case. The State first cites ***State v. Futo***, 990 S.W.2d 7, 11-12 (Mo.App. E.D. 1999) for the proposition that, "[t]he arresting officer does not need to personally possess all of the information upon which the arrest is based; the knowledge of other involved officers and agencies is imputed to the arresting officer." *Id*., at 17. But in ***Futo***, the Eastern District pointed out that, "after having *communicated* by phone with St. Louis law enforcement authorities, members of the Riverside County, California Sheriff's Department" took the defendant into custody and ultimately arrested him. *Id*., at 11 (emphasis added). Thus, the State's premise is flawed. ***Futo*** does not apply where the initiating officer does not *communicate* with the arresting officer. If the case purported to address that issue, it would be contrary to ***Franklin***, ***Miller*** and ***Kinkead***.

Similarly, in ***State v. Bradshaw***, 81 S.W.3d 14 (Mo.App. W.D. 2002), the issue was not the fellow officer rule, but the reliability of an accomplice's information; as in ***Futo***, the officer with information *communicated* directly with the arresting officer. *Id*., at 31-32. And in ***State v. Clayton***, 995 S.W.2d 468 (Mo. banc 1999), this Court quoted ***State v. Mayweather***, 865 S.W.2d 672, 675 (Mo.App. E.D. 1993), for the proposition that, "[f]urthermore, probable cause is determined by the collective knowledge and the facts available to all of the officers participating in the arrest; the arresting officer does not need to possess all of the available information." 995 S.W.2d at 477. But again, in ***Clayton***, there were several *communications* linking

Clayton with the crime. The arresting officer was fully apprised of the other events. *Id*.

The same is true of the other cases cited by the State. In ***State v. Webb***, 824 S.W.2d 464 (Mo.App. S.D. 1992), the issue was the validity of a search warrant, and the Court held that "the 'basis of knowledge' of facts set forth in the search warrant application came from firsthand observations and conversations heard by the officers involved." *Id*., at 469. It was not necessary for the officer applying for the warrant to observe all of the facts, personally; they were *communicated* to him. *Id*. And in ***State v. Adams***, 791 S.W.2d 873 (Mo.App. W.D. 1990), there was no apparent issue involving a *communication* between officers. The Court first determined that an arrest warrant was invalid because it was based solely on the prosecutor's statement that contained no facts. *Id*., at 877. The Court went on to find a valid warrantless arrest on probable cause, because the "Sheriff's Office investigated the report and indeed found marijuana growing on the premises" and it was the Sheriff and a deputy who arrested the defendant. *Id*. Again, therefore, there was *communication* (or even identity) between the officer(s) with probable cause and the officer(s) making the arrest.

For all of these reasons, the basis on which the State obtained its transfer of this appeal is tainted. It claimed that the Court of Appeals failed to follow the applicable law on the fellow officer rule, but the State's confusion is over the nature of the required communication between an officer with reasonable suspicion and the detaining officer. The officer with knowledge need not impart every detail to the

detaining officer. But she must inform the other officer that she has grounds to detain; otherwise, that officer cannot claim to have based his actions thereon. And, of course, the initiating officer must testify as to those grounds. ***Miller***.

On the State's theory, if an officer had been called at the suppression hearing and claimed to have seen Mr. Goff breaking into some other vending machine -- or committing any other crime -- earlier that evening, this would have provided Easley with reasonable suspicion for the stop, *even if that hypothetical officer had remained silent about his observations and neither Easley nor Boydston were aware of the incident*. The fellow officer rule is not so broad as to encompass such unknown outside information.

This Court noted in ***Miller*** that in ***Hensley***, *supra*, the United States Supreme Court "created a three-part test that requires the following: (1) that the *communication* objectively supported the action taken by the officer; (2) that the *communication* was issued on the basis of a reasonable suspicion that the occupant of the vehicle had been involved in a crime; and (3) that the stop that in fact occurred was no more intrusive than would have been permitted the officer that originally *communicated* the information." 894 S.W.2d at 652, *citing*, ***Hensley***, 469 U.S. at 232-33, 105 S.Ct. at 682 (emphasis added). Again, in this case, there was no *communication*.

In ***Whiteley v. Warden***, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), the United States Supreme Court held that the Fourth Amendment was violated when police officers arrested Whiteley and recovered inculpatory evidence based upon a radio report that two suspects had been involved in two robberies. *Id*., 401 U.S. at

568-69, 91 S.Ct. at 1037-38. The Court noted that the "police were entitled to act on the strength of the radio bulletin," but said that there was a Fourth Amendment violation because the initial complaint, upon which the arrest warrant and subsequent radio bulletin were based, was insufficient to support an independent judicial assessment of probable cause. *Id*. The Court concluded that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id*.

Although in ***Arizona v. Evans***, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), the Court said that ***Whiteley*** was no longer the final answer for deciding whether to apply the exclusionary rule in every case where there has been a Fourth Amendment violation, it specifically found that ***Whiteley***, "clearly retains relevance in determining whether police officers have violated the Fourth Amendment," ***Evans***, 514 U.S. at 13, 115 S.Ct. at 1192. Officer Easley violated the Fourth Amendment by stopping, detaining, searching, and arresting Mr. Goff when he had no information on which to base his actions other than the disavowed warrant theory and his own limited observations, addressed *infra*. The Court of Appeals was correct to rule that what Boydston saw but did not communicate should play no role in the consideration of this issue.

VI. *Officer Easley Did Not Have Reasonable Suspicion of Criminal Activity*

A. *Easley's Observations*

It is a well-worn principle of law that the successes of a search cannot be used to justify its legality. ***Miller***, 894 S.W.2d at 653. Thus, the evidence seized from Mr.

Goff and the car, and the outstanding warrant for Patrick Trent cannot play any part in this analysis. The stop has to be based on reasonable suspicion from the men's actions, and there was none shown.

All Officer Easley knew before he pulled into the Hy-Vee lot was that Boydston, a fellow officer, saw a car and two "subjects by the vending machines" at Wal-Mart,[13] that she checked for warrants on Mr. Goff's car, and found none on him or his car (Hr.Tr. 14). Easley saw the car in the Hy-Vee lot, and saw Trent and Mr. Goff standing by the vending machines (Hr.Tr. 14; Tr. 105). He did not testify that he saw them do anything illegal or even suspicious; he specifically mentioned that the only "suspicious" thing he recalled seeing Trent do was to put something under the car's hood (Tr. 131-32).

It is important to note, again, that both stores were open for business, despite the late hour (Tr. 84, 94). The vending machines where Easley saw the men were next to an open entrance to the store (Tr. 103-04). Thus, at least until Trent parked the car, then put something under the hood, there was nothing secretive about the men's activities, and Easley mentioned nothing about those activities that he thought was suspicious. As the Court of Appeals held, that leaves only Trent's actions in the engine area as suspicious.

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[13] It is extremely doubtful that Easley actually heard Boydston say anything more than that they were parked by the vending machines, because she specifically denied seeing either man approach the machines (Hr.Tr. 5).

But those actions did not rise to the level of reasonable suspicion to stop the vehicle. Officer Easley did not see evidence of a past crime or a crime in progress. He did not see the object Trent left under the hood (Tr. 109), so he could not suspect at the time of the stop that it was evidence of a crime. Most importantly, Easley never testified that Trent's actions, or any of his knowledge, raised his suspicions.

B. *Applicable Law*

Reasonable suspicion must be based upon a specific, articulable set of facts indicating that criminal activity is afoot. ***United States v. Sokolow***, 490 U.S. 1, 7, 109 S.Ct. 1581, 1584, 104 L.Ed.2d 1 (1989). The law enforcement authorities must be able to articulate more than just an "inchoate and unparticularized suspicion or 'hunch.'" *Id*. (*quoting*, ***Terry***, 392 U.S. at 30, 88 S.Ct. at 1884-85). Whether a Fourth Amendment violation has occurred "'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time', and not on the officer's actual state of mind at the time the challenged action was taken." ***Maryland v. Macon***, 472 U.S. 463, 471, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985); ***State v. Patterson***, 624 S.W.2d 11, 14 (Mo. 1981).

C. *Analysis*

Officer Boydston obviously had a hunch, because she did the check on Mr. Goff's license. But not only did she not articulate anything more than this hunch, she did not, nor did Officer Easley, articulate any suspicions based on what they observed.

Easley also had only a generalized suspicion of criminal activity. He testified that he sat while Mr. Goff was in Hy-Vee because he, "was waiting for the defendant,

Mr. Goff, to return to the vehicle so [he] could conduct what we call a car check." (Tr. 107). In other words, Easley wanted to see whether his hunch would pan out. If he had thought otherwise -- if he had thought he had reasonable suspicion to detain them -- he would have conducted the stop as soon as he saw the men by the vending machines.

This case boils down to two men being where they had every right to be -- the parking lots of two establishments that were open for business -- and the officers articulating absolutely nothing that raised reasonable suspicions of criminal activity.

As already discussed, the nebulous warrants for an unidentified person at Mr. Goff's address do not provide reasonable suspicion for this stop. Mr. Goff has shown how this Court's holdings in ***Franklin***, ***Miller***, and ***Kinkead***, are violated by using this evidence, and there was nothing presented by the State to link these warrants to Mr. Goff or the car at the time of the stop. Had this been a specific warrant for Mr. Goff, he would not be arguing that the State would have to provide other evidence or produce the dispatcher. But that was not the case.

VII. ***The Events at Wal-Mart Do Not Add Reasonable Suspicion***

Even if this Court should find, despite the foregoing, that Officer Boydston's observations at Wal-Mart can be considered as part of the totality of the circumstances in determining whether there was reasonable suspicion, that totality is still lacking. Boydston did not see Mr. Trent or Mr. Goff tamper with a vending machine at Wal-Mart; indeed, she did not even seen either man approach the machines (Hr.Tr. 5). No one saw either man take anything from a machine at either

store. No one saw either do anything that indicated that criminal activity was afoot. There is no evidentiary support for the State's assertion that Mr. Goff "pretended to try to enter Wal-Mart" (Trans.App. 2). Boydston said his action led her to believe "he was maybe trying to enter the business." (Hr.Tr. 9).

All Boydston saw was that Mr. Goff's car was at the curb near a vending machine at Wal-Mart, while he tried to go in the store, when it was open for business, although that particular door was locked (Hr.Tr. 4-5, 9). A few minutes later, he was seen near a vending machine at Hy-Vee, then walked into that -- also open -- business (Hr.Tr. 14; Tr. 94). While he was inside, the man in the driver's seat raised the hood, appeared to place something under it, then quickly closed it (Hr.Tr. 15). Nothing else happened before Mr. Goff's car was stopped from backing out of a parking space by a police car with lights blazing and siren blaring (Hr.Tr. 16). The officers had no idea whether anything was taken from any vending machine (Tr. 134). Therefore, even adding the actions at Wal-Mart -- trying to enter an open store -- to those at Hy-Vee does not amount to "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" ***Sokolow***.

The State's argument that Trent and Mr. Goff "fled" when the officer saw them (Trans.App. 2), is specious. Nothing in the record justifies such a claim. All the officer testified to was that when she turned around in the Wal-Mart parking lot after receiving the information about the warrant, Mr. Goff's car was gone (Hr.Tr. 6). As noted above, "the facts and any *reasonable* inferences arising therefrom are to be viewed in a light most favorable to the ruling of the trial court." ***Carter***, 955 S.W.2d at

560 (emphasis added). This was not evidence of, and does not support a reasonable inference of, flight.

A corollary principle should also apply, as is the case in considering the sufficiency of the evidence, that this Court may not "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001). Flight is not a valid issue here, especially where Easley testified that he drove past the men at Hy-Vee as many as three times before Mr. Goff went in the store (Tr. 104-05, 107). Had they wanted to flee they could have done so between passes, as they could have done when they left Wal-Mart, rather than drive to a business across the street. It is speculative rather than reasonable to infer flight, rather than that they simply thought Wal-Mart was closed because of the locked doors, or that the vending machine -- either at Wal-Mart or Hy-Vee -- did not carry the brand of soda that Mr. Goff ultimately bought inside the store (Tr. 131).

The final item of evidence on which the State bases its claim of reasonable suspicion is that the car was "illegally parked in the fire lane" when Boydston saw it at Wal-Mart (Trans.App. 2). But the State did not rely on this fact below as part of its justification for the stop; this came out in cross-examination and it made no argument at the suppression hearing (Hr.Tr. 9, 28-29). More importantly, there was no evidence that Boydston broadcast this fact, just as she did not broadcast any of her observations. Thus, Easley could not rely on this to justify the stop, because he did not know about it.

Further, the State presented no evidence that it was entitled to enforce any parking regulation on Wal-Mart's private property. *See*, ***Doolin v. Swain***, 524 S.W.2d 877, 880 (Mo. banc 1975) ("the rules of the road apply only to public highways and private ways which are used as highways"). In addition, the State failed to prove at the hearing that there was an ordinance prohibiting such parking. This is not self-proving, because ordinances cannot be judicially noticed. ***State v. Furne***, 642 S.W.2d 614, 616 (Mo. banc 1982). Thus, there was no showing of any violation of law on which the officers could rely as forming reasonable suspicion of criminal activity.

VIII. ***The Warrant for an Unnamed Person Who Was Not in the Car Did Not Provide Grounds for a Stop***

As noted, the State's apparent theory below was that the warrant justified the stop. Mr. Goff refers to this theory as "apparent" because the State made no argument either at the suppression hearing or at trial when Mr. Goff objected to the admission of the seized items (Hr.Tr. 28-29; Tr. 115-16). Because the State has apparently abandoned this theory, Mr. Goff will not address it beyond what he included above in section III of this argument entitled "The Proceedings Below." If the State revives that argument in this Court, Mr. Goff will address it in his reply brief.

IX ***There Was No Cause Shown to do a Pat-Down Search***

Even if this Court were to disagree with the Western District as to the absence of reasonable suspicion, Mr. Goff's conviction must still be reversed, even assuming a valid ***Terry*** stop. This is because, as the United State Supreme Court summarized, "[i]n ***Terry v. Ohio***, we upheld the validity of a protective search for weapons in the

absence of probable cause to arrest because it is unreasonable to deny a police officer the right 'to neutralize the threat of physical harm,' when he possesses an articulable suspicion that an individual is armed and dangerous." ***Michigan v. Long***, 463 U.S. 1032, 1034, 103 S.Ct. 3469, 3473, 77 L.Ed.2d 1201 (1983); *citing* ***Terry***, 392 U.S. at 24, 88 S.Ct. at 1881 (internal citations omitted); *also see* ***State v. McFall***, 991 S.W.2d 671, 674 (Mo.App. W.D. 1999). Thus, there still must be a reasonable, articulable suspicion that the person is armed before the police may conduct a pat-down. Here, officer Easley said that that he patted down Mr. Goff for his "safety," but specifically *denied* that Mr. Goff made any actions to make Easley think that he was armed or dangerous (Hr.Tr. 23).

This was a pat-down search based on no suspicion whatsoever, and cannot be approved by this Court. And without the pat-down, none of the other evidence would have been discovered, because the car was not searched until Officer Easley associated the object in Mr. Goff's pocket with the vending machines (Hr.Tr. 17-18).

X. *All Evidence Seized Should Have Been Excluded*

Under the "fruit of the poisonous tree" doctrine, evidence obtained as a direct result of an illegal search must be suppressed. ***Miller***, 894 S.W.2d at 656-657; ***Wong Sun v. United States***, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

> In determining whether the exclusionary rule should apply to render evidence inadmissible as 'fruit of the poisonous tree,' the question is 'whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of the

> illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Id., 371 U.S. at 488, 83 S.Ct. at 417. Had the officers not violated the Fourth Amendment by stopping Mr. Goff and Mr. Trent for merely being at two stores that were open for business, they never would have discovered the warrant for Mr. Trent, the "universal key" in Mr. Goff's pocket, or any of the items the officers seized from the car.

Marvin Goff's right to be secure in his person from overzealous law enforcement was violated by his seizure and subsequent search without reasonable suspicion that a crime had been or was about to be committed. This Court must reverse his conviction and remand for a new trial without any of the evidence obtained from the point of the illegal stop.

II.

The trial court erred in overruling Mr. Goff's motion for judgment of acquittal at the close of the evidence, and in accepting the jury's verdict and in sentencing him for stealing, because the State failed to produce sufficient evidence to permit a rational trier of fact to reach a subjective state of *near certitude* that the alleged victim had suffered a loss, and the rulings therefore violated Mr. Goff's right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was no evidence that any money had been taken from the vending machine, because the machine was emptied less than 24 hours before Mr. Goff was arrested, there were still dollar bills in the machine, and there was no accounting as to when the machine was last filled or how many sodas were bought from it between that time and Mr. Goff's arrest. This was not sufficient evidence to prove beyond a reasonable doubt that a theft had occurred.

Hy-Vee store manager Steven Binseil was asked if he knew how much money was taken from the 7-Up vending machine outside his store; he answered, "I could only speculate." (Tr. 156). In fact, Mr. Binseil could only speculate whether *any* money was taken.

Before the State can deprive Mr. Goff of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). *Also*

see, ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of *near certitude* of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). (emphasis added). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.*, 443 U.S. at 318, 99 S.Ct. at 2788-2789.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. But this Court must ensure that the jury did *not* decide the facts "based on sheer speculation." *Id*. at 414. While inferences are to be taken in the light most favorable to the verdict, *id*., neither the jury nor this Court may "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Mr. Goff notes that, although Officer Easley testified that it was the Pepsi machine that appeared to have been tampered with that night (Tr. 113), Mr. Binseil said the Pepsi machine had money; it was the 7-Up machine that had no coins (Tr. 148-49, 151). And although Binseil testified that money was "gone out of " the machine, he clarified this and said there were dollar bills in it, just no coins (Tr. 148-49, 151). Therefore, the State failed to show that, *if* there was a theft, that it occurred

near the time Mr. Goff was present -- Mr. Binseil said that for a period of two or three months, the Pepsi machine had been broken into almost every week (Tr. 148). But, as will be shown, the State did not prove a theft at all.

The State's evidence falls far short of anything other than speculation that there was any money missing from the 7-Up machine, the machine on which the State's evidence focused. Mr. Binseil said that the three vending machines together would have approximately $150 to $200 removed per week (Tr. 150-51). There was no evidence of how many sodas had been sold since the machine was last emptied of money, less than 24 hours before.[14] Therefore, the State could not show how much money *should* have been in the machine. And it did not show how much money was *actually* left in the machine in the form of dollar bills.

Binseil first said that the price of soda in the machine was $1.00, then amended this to $0.75 to $1.00 when the prosecutor questioned her witness' answer, adding that it depended on whether the soda was in a can or bottle (Tr. 146).[15] Therefore, for all the State *proved*, to a *near certitude*, all sales since Monday morning could have been in bills, and no coins had been deposited. After all, $150 to $200 per week for the three machines (Tr. 150-51), means that each machine averaged only $50 to,

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[14] The money was emptied every Monday morning (Tr. 147, 154), and July 24, 2001, was a Tuesday, so 3:00 a.m. was less than 24 hours since the last emptying.

[15] There was no evidence whether the 7-Up machine held cans or bottles, or both.

generously, $70 per week, or about $7 to $10 per day.[16] The jury could only speculate whether any of the sales in the less than 24 hours since Monday morning were in coins, and thus could only speculate that any money was taken from the machine. The dollar bills that remained in the machine could well have been all that was *supposed* to be there. Such speculation does not establish that there was a loss.

"*Corpus delicti* is the foundation of a crime, and it entails proof of a loss or injury brought about by criminal agency." ***State v. Edgar***, 2 S.W.3d 896, 898 (Mo.App. W.D. 1999). The crime of stealing, third offense, under § 570.040, first requires proof of stealing under § 570.030. Under that section, the *corpus delicti* of stealing is that Mr. Goff "appropriate[d] property . . . of another. . . ." § 570.030.1; *also see*, ***State v. Brooks***, 861 S.W.2d 353, 355 (Mo.App. S.D. 1993) ("The corpus delicti was not proved by legal evidence sufficient to show that stealing had actually been committed by someone. The evidence was insufficient to support the conviction."). This in turn means that the State had to prove that some of Hy-Vee's property was missing. But it failed to prove such a loss.

The State *could* have shown how many sodas the machine held and how many had been sold since it was last filled. Such an accounting would have established how much money *should* have been in the machine. But without such an accounting, and evidence of how much *was* there, there was no proof of a loss. There was only what *could* have been, not what *was*. There *could* have been coins, but there was no proof

[16] Arguably, the 7-Up machine would have lesser sales than Coke or Pepsi.

that there *should* have been. There was no proof that there was a crime committed, let alone a crime committed by Mr. Goff.

By an accounting, the State might have been able to prove what can only be speculated about on this evidence: was anything missing from the machine? That question cannot be answered without proof of what merchandise was put into the machine, what was sold, and was left after Mr. Goff allegedly stole money. The State did not offer evidence on any of the three subjects, and this Court may not supply it. ***Whalen***. The State proved only that there were no coins in the machine and there were coins in Mr. Goff's car. That is not proof that coins were missing from the 7-Up machine, that the coins in the car came from that machine, or that Mr. Goff took them.

It is not enough for the State to speculate as to the source of the quarters in the car. It was required to prove first that there was a crime -- that someone took money from Hy-Vee's vending machine. In ***State v. Duvall***, 787 S.W.2d 798 (Mo.App. E.D. 1990), the Court of Appeals faced a similar issue. Duvall was seen "inside" a vending machine, and upon being spotted, slammed the door shut. He had $10.60 in coins on his person when he was arrested, and his wife who accompanied him had $19.75 and several vending machine keys. The Court noted that Duvall was then allowed to buy a soda from the machine, using two quarters to do so *Id*., at 799-800. Duvall challenged the sufficiency of the *corpus delicti* -- he alleged there was no proof that the crime of stealing had occurred. *Id*., at 800. The Court observed:

> Richard Paradise, the employee . . . charged with responsibility for the vending machine, testified to finding between $35 and $55 worth of

> coins in the machine every two weeks. He had emptied the coin box a week or more before May 7. After appellant's arrest the coin box was found to contain only two quarters, coins the police had observed appellant put in the machine. Mr. Paradise also testified [that] the number of cans of soda remaining in the machine did not correspond with the money in the coin box. The fact he was unable to testify that any specific sum was missing is not fatal in this case as the value of the property taken is irrelevant to a charge of stealing, third offense. [citation omitted] There is sufficient evidence to support a finding that some money was taken without the owner's consent.

Id.

This is exactly Mr. Goff's point. In ***Duvall***, where the State could not show that the coins in the defendant's possession came from the vending machine in question, it produced evidence that the number of cans and the money in the machine did not correspond. Nothing of the sort was done here. The jury could only speculate whether any money was taken from the machine. *If* the State had produced evidence that money, in fact, was missing from the machine, Mr. Goff would not be arguing to this Court that there was insufficient proof of his guilt. In that case, Mr. Goff's presence and actions, and the items in the car, would be sufficient proof that he took that money, or aided his companion to do so. But that is only the case the State *wishes* it had presented. It is not the case before this Court.

Was money taken from the 7-Up machine? No one knows. When Binseil was asked if he knew how much money was taken from the 7-Up machine he answered, "I could only speculate." (Tr. 156). He had no idea how much it should have had. Had the State presented *some* evidence, as it did in ***Duvall***, as to how much money one would have expected to find in the vending machine, it may have met its burden. It did not.

The State failed to prove beyond a reasonable doubt that there was a theft, and this Court must reverse Mr. Goff's conviction and order him discharged.

III.

The trial abused its discretion in denying Mr. Goff's request for a mistrial when Officer Easley testified that Mr. Goff "understood the drill, he'd been through it before" because this violated Mr. Goff's rights to due process of law, a fair trial before a fair and impartial jury, and to be tried only for the offenses charged, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 17, and 18(a) of the Missouri Constitution, in that the officer's comment clearly told the jury that Mr. Goff had prior convictions, and this could not be cured by an admonition to disregard the testimony, especially where that admonition came after a recess and had little impact in comparison to the prejudicial effect of the comment itself.

During voir dire, the venire panel was asked if any member had been the victim of a crime (Tr. 33). Panelist Lowe said he was a retired police officer and described the physical assaults he had suffered over the years (Tr. 40-41). He was asked if anything about his experience would cause him to be less than fair and impartial if selected and he answered, "I can honestly say that I've never arrested an innocent person. I don't know of any cop who ever did." (Tr. 42). Mr. Goff's motion to strike the panel and declare a mistrial was denied (Tr. 43).

At trial, Officer Easley was asked on cross examination about Mr. Goff's demeanor at the scene, and he answered, "out there it was very polite, he understood

the drill, he'd been through it before. We got back to the station --" (Tr. 135).[17] Defense counsel approached the bench and moved for a mistrial, because he had not asked for this information, which constituted a reference to collateral crimes (Tr. 135). The prosecutor objected, arguing that defense counsel "kinda opened the door." (Tr. 136). She agreed that a cautionary instruction would be acceptable (Tr. 136).

The court denied the mistrial and asked if Mr. Goff wanted some other form of relief (Tr. 137). Counsel said that the comment was particularly problematic because of the comments of venire panelist Lowe in voir dire (Tr. 137). Counsel understood that the court was denying the motion and asked for a cautionary instruction (Tr. 137-38). Following the afternoon recess, the court informed the jury that it was "to disregard the last response of the witness." (Tr. 138-39).

"Generally speaking, the bad character of an accused is not suitable for inquiry unless he tenders an issue involving his character." ***State v. Oates***, 12 S.W.3d 307, 313 (Mo. banc 2000). Evidence of other crimes is generally inadmissible to show that a defendant is a person of bad character, or has a propensity to commit crimes. ***State v. Conley***, 873 S.W.2d 233, 236 (Mo. banc 1994). The admission of other crimes evidence not properly related to the cause on trial violates the defendant's right under the Missouri Constitution, Article I, §§ 17 and 18(a), to be tried for the offense with

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[17] Easley had been asked a similar question at the preliminary hearing, "Was he nervous or calm, intoxicated, any of those?" He answered, "I don't believe so." (Hr.Tr. 25).

which he is charged by the information. ***State v. Burns***, 978 S.W.2d 759, 760 (Mo. banc 1998).

A mistrial is a drastic remedy, which should be granted only in extraordinary circumstances, where the prejudice cannot be removed any other way. ***State v. Johnson***, 901 S.W.2d 60, 62 (Mo. banc 1995). The decision whether to grant a mistrial is left primarily to the trial court, which is in the best position to determine whether the complained-of incident had any prejudicial effect on the jury. *Id*. Refusal to grant a mistrial will be overturned only if the trial court abused its discretion. *Id*. Where the issue arises due to the introduction of evidence of other uncharged crimes, unless the testimony objected to consists of clear evidence of another crime, there is no trial court abuse of discretion in denying a mistrial. ***State v. Simmons***, 955 S.W.2d 729, 737 (Mo. banc 1997). This was such clear evidence.

In analyzing the prejudicial effect of uninvited reference to other crimes evidence, courts generally examine five factors: 1) whether the statement was, in fact, voluntary and unresponsive or whether the prosecution deliberately attempted to elicit the comments; 2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution; 3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused; 4) whether the court promptly sustained defense counsel's objection to the statement and instructed the jury to disregard the volunteered statement; and 5) whether in view of the other evidence presented and the strength of the state's case, it

appeared that the comment played a decisive role in the determination of guilt. ***State v. Smith***, 934 S.W.2d 318, 320-21 (Mo.App. W.D. 1996).

Reviewing these factors in this case reveals: 1) Although the officer volunteered the response, it is important to note that he was not only a State's witness, but a trained police officer, with at least seven years experience (Tr. 100), who should be held to a higher standard, and should know that this was inadmissible evidence. Because of the close relationship between police officers and prosecutors, this factor should weigh in Mr. Goff's favor.

2) Mr. Goff concedes that the second factor favors the State, although the venire panelist's remark in voir dire ("I've never arrested an innocent person. I don't know of any cop who ever did" (Tr. 42)), makes this comment somewhat less isolated.

3) The third factor again favors Mr. Goff. This was a specific statement to the jury that Mr. Goof "understood the drill" and had "been through it before" (Tr. 135). This is a clear reference to a prior record, and even though it doesn't mention any specific crime, it nonetheless told the jury that he was a person likely to be guilty of this offense, especially after Mr. Lowe told them that he never knew a police officer to arrest an innocent person.

4) Mr. Goff also concedes that the fourth factor favors the State in this analysis. Even though the prosecutor argued that defense counsel "kinda opened the door" (Tr. 136), the court did advise the jury to disregard the officer's comment (Tr. 139). But because this instruction did not come until after an argument on the motion

out of the jury's presence (Tr. 135-38), and after an afternoon recess (Tr. 138-39), some of the impact of the instruction was lessened, so this factor does not weigh too heavily in the State's favor.

5) As the Court of Appeals said in ***State v. Riggins***, 987 S.W.2d 457, 462 (Mo.App. W.D. 1999), perhaps the most important factor is the strength of the State's case. Here, as set out in detail in Point II, the State did not even present sufficient evidence to sustain the conviction. This factor weighs heavily in Mr. Goff's favor.

In ***Smith***, *supra*, the Court said that "[b]ecause the comment about a prior arrest was made without any fault on the part of the prosecutor or evidence of bad faith on the part of the witness, it was responsive to the question, it was not emphasized and there was substantial other evidence of guilt, we find the trial judge did not abuse his discretion in denying the motion for mistrial." 934 S.W.2d at 319. Here, the witness' bad faith is evident, the answer was not responsive to a simple question about demeanor, and there was no substantial evidence of guilt. The court in this case abused its discretion in denying Mr. Goff's request.

The officer's injection of this improper evidence prejudiced Mr. Goff by allowing the jury to consider on the issue of guilt the fact that he had a record of prior offenses. The prejudice from this improper comment could not removed by a mere instruction to disregard, and this Court must grant a new trial to cure this prejudice and effectuate Mr. Goff's right to a fair trial.

CONCLUSION

For the reasons set forth in Point I, appellant Marvin Goff respectfully requests that this Court reverse his conviction and remand for a new trial, at which the State may not present evidence seized from Mr. Goff or his car. For the reasons set forth in Point II, Mr. Goff respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom. For the reasons set forth in Point III, Mr. Goff respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

Kent Denzel, MOBar #46030
Assistant Public Defender
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855
FAX: (573) 875-2594

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 11,951 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in November, 2003. According to that program, these disks are virus-free.

On the _____ day of November, 2003, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

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Kent Denzel

APPENDIX

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