IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC85564**
	)	
MARVIN L. GOFF,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT, DIVISION 4
THE HONORABLE LARRY D. HARMAN, JUDGE

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of stealing, third offense, § 570.040, RSMo 2000, obtained in the Circuit Court of Clay County, for which appellant was sentenced to fifteen years of imprisonment, the sentence to run concurrently with any other sentences he was then serving (Tr. 203, L.F. 29-30). After an opinion by the Court of Appeals, Western District, this Court took transfer of the case. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. Art. V, § 10 (as amended 1976).

STATEMENT OF FACTS

Appellant, Marvin L. Goff, was charged by amended information, as a prior and persistent offender, with stealing, third offense, § 570.040, RSMo 2000 (L.F. 6-7). On April 15, 2002, the cause went to trial before a jury in the Circuit Court of Clay County, the Honorable Larry D. Harman presiding (Tr. 1).

Appellant disputes the sufficiency of the evidence to support his convictions and the denial of his motion to suppress. Viewed in the light most favorable to the verdict, the following evidence was adduced at the suppression hearing and at trial.

In the early morning hours of July 24, 2001, appellant and his co-conspirator, Patrick Trent, drove to the WalMart in Gladstone, Missouri (Tr. 86-87). After 11:00 p.m., the far north and south doors of the WalMart were locked, and only the middle doors remained open (Tr. 85). Instead of parking near the middle doors in a parking space, appellant and Mr. Trent drove past the open doors, past the locked south doors, and parked illegally in the fire lane directly in front of the vending machines, which were located further south than the south doors (Supp.Tr. 9, 12-13, Tr. 85).[1]

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[1] **The fact that their car was parked pointing south shows that they had come from the north (Tr. 86), allowing the reasonable inference that they drove past the**

open doors.

Officer Mitzi Boydston, a Gladstone police officer for more than seventeen years, was on patrol at 2:50 a.m. (Tr. 82-83). She drove into the WalMart parking lot, and saw appellant and Mr. Trent outside of their car, standing by the vending machines (Tr. 87, 102). As the patrol car came nearer, Mr. Trent got into the driver's side of the car, and appellant walked over to the south doors and pulled on them, as if trying to go inside (Tr. 87).

Officer Boydston said, over the police radio, that there was a car and two subjects standing by the WalMart vending machines (Tr. 102). Also over the radio, she called in the license plates of the car while continuing to drive through the lot, and learned that the car was registered at a certain address, and that a person living at that address, who was known to drive that car, had several outstanding warrants (Tr. 88-90). Officer Boydston turned around in the parking lot and drove back to the vending machines, but appellant and Mr. Trent had gone (Tr. 90, 102). Officer Boydston broadcast over the radio that the car was gone, and she and other Gladstone police officers in the area began looking for the car (Tr. 90-91, 102).

Officer Wayne Easley, a Gladstone police officer for seven years, was also on patrol, and had been listening to the radio traffic (Tr. 100-102). He heard Officer Boydston say there were two men and a car by the WalMart vending machines, heard the warrants, and "a moment later" heard Officer Boydston state that the car was gone (Tr. 102). A few minutes later, Officer Easley found the car at the HyVee located directly across the street from the WalMart (Tr. 101-102). It was not parked

in a parking space, but rather was parked directly in front of the three vending machines (Tr. 102-103). Appellant and Mr. Trent were standing by the vending machines (Tr. 104). When Officer Easley drove by in his police car, Mr. Trent got in the driver's side of the car, and appellant walked into the HyVee (Tr. 105-106). Officer Easley turned around and drove by them one more time, and Mr. Trent parked the car in a parking space (Tr. 105, 107). Officer Easley drove out of the parking lot, then came back behind the HyVee, turned off all his lights, and parked where he could see Mr. Trent and the car's headlights, but Mr. Trent could not see him (Tr. 107-108).

As Officer Easley watched Mr. Trent, he saw Mr. Trent get out of the car, open the engine compartment, look around, quickly put a bag inside the engine compartment, and close the hood (Tr. 108-109). Then he got back in the car and waited for appellant to return (Tr. 108).

Appellant returned to the car, having bought only a soda at HyVee (Tr. 131). Appellant and Mr. Trent tried to leave, but Officer Easley pulled behind their car, turned on his lights, and "beeped" his siren so they would know he was behind them and not back into him (Tr. 109). Officer Easley approached the men, and both seemed nervous (Tr. 110). Officer Easley asked them for identification, and Mr. Trent gave his license and appellant told him his name (Tr. 110).

Mr. Trent had an outstanding warrant, so Officer Easley arrested him (Tr. 111). Officer Easley patted-down Mr. Trent and appellant to check for weapons (Tr.

111). Officer Easley felt a large object in appellant's right front pants pocket, thought it might be a weapon, and asked appellant what it was (Supp.Tr. 23, Tr. 112). Appellant said he did not know (Tr. 112). Officer Easley asked appellant if he could take it out, and appellant said "yes, or, sure" (Supp.Tr. 17, Tr. 112).

Officer Easley took it out (Tr. 112). It was a universal key, made to pick the locks of vending machines (Tr. 112-13). He took the key to the vending machines, and saw that one was open about two inches wide (Tr. 113-14). The padlock was missing from the machine, and the machine door looked like it had been pried open (Tr. 113-14, 148). The universal key fit into the lock of the open vending machine (Tr. 113).[2]

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[2] **Officer Easley thought there were two vending machines, and thought the one that was ajar was a Pepsi machine and the other machine was a Mountain Dew machine, but was not certain (Tr. 129). The HyVee store director testified that there were three soda machines, and the only one broken into that night was the 7-Up machine (Tr. 146-47, 157).**

Officer Easley looked inside the car, and saw a large amount of quarters on the floorboard of the front passenger seat, where appellant had been sitting (Tr. 116-17). Officer Easley looked underneath the passenger seat, and found a bag under the front passenger seat containing only quarters, dimes, and one-dollar bills, totaling about $60 of currency (Tr. 117-18, 143). In the engine compartment of the car was a make-up bag containing two more universal keys, and many smaller vending machine keys, with codes written on the keys (Tr. 118-20, 127). In the front passenger compartment was a notebook with a list of codes correlating to the codes on the keys (Tr. 126-27). In the back seat of the car were vice grips, a monkey wrench, screwdrivers, a wire-cutter, and pliers (Tr. 120-21, 133). In the trunk of the car were coin wrappers for rolling quarters and dimes, two more empty bank bags, and a padlock which was the same type of padlock HyVee used to lock the vending machines (Tr. 123-24, 142, 144, 157).

That night, the HyVee employees there that night were unable to determine whether money had been taken out of the soda machine (Tr. 134). So that morning, Gladstone police officers contacted the HyVee store manager, Steve Binseil (Tr. 146, 148). Mr. Binseil checked all three machines, and found that nothing had been taken from two machines, but the machine that had been broken into "had money gone out of it" (Tr. 148, 156). The box which collected the change had been emptied (Tr. 149, 151). Mr. Binseil was not sure how much money had been taken, because although the machines were usually emptied every Monday, they often went two weeks

without emptying the machines (Tr. 155-56).

At the close of the evidence, instructions, and arguments of counsel, the jury found appellant guilty of felony stealing (L.F. 25). At the sentencing hearing on June 5, 2002, the court, having previously found appellant to be a prior and persistent offender for the offense of stealing and a prior and persistent felony offender (Tr. 9), sentenced him to fifteen years of imprisonment, the sentence to run concurrently with any other sentences he was then serving (Tr. 203, L.F. 29-30).

Appellant appealed, and on July 22, 2003, the Court of Appeals, Western District, reversed his conviction, holding that there was no reasonable suspicion to support the stop. State v. Goff, No. WD (Mo.App.W.D. July 22, 2003), slip op. at 8. The state sought transfer. On October 28, 2003, this Court granted the state's motion to transfer the case. This appeal follows.

POINT I

The trial court did not plainly err in not sua sponte excluding evidence seized from appellant's person and car on the ground that the initial stop violated the Fourth Amendment right to be free from unreasonable searches and seizures because appellant failed to prove that there was no reasonable suspicion for the stop in that appellant did not call the dispatcher and the facts known to Officers Mitzi Boydston and Wayne Easley established a reasonable suspicion that appellant and Patrick Trent were engaged in the commission of a crime, stealing from vending machines.

For his first point on appeal, appellant claims that the trial court clearly erred in overruling his motion to suppress evidence seized from his person and the car (App.Sub.Br. 17). Although appellant never raised this claim before or during trial or in his motion for a new trial, on appeal appellant argues that the initial stop of him was not based on reasonable suspicion (App.Sub.Br. 17). Appellant claims that even though case law holds that the information known to all the officers should be considered in determining whether there is reasonable suspicion for the stop, and even though Officers Mitzi Boydston and Wayne Easley were working together in effecting the stop of appellant, only the information known to Officer Easley may be considered in determining whether there was reasonable suspicion to support the stop (App.Sub.Br. 23-27). The Court of Appeals, Western District, agreed with this premise, and reversed appellant's convictions, finding that if the information known to Officer Boydston was ignored, the information known to Officer Easley was not

sufficient to support reasonable suspicion. State v. Goff, No. WD (Mo.App.W.D. July 22, 2003), slip op. at 8. Respondent sought transfer, and this Court granted respondent's request.

1. Facts

At about 2:50 a.m. the morning of July 24, 2001, Officer Boydston, who had been a Gladstone police officer for more than seventeen years, was patrolling the WalMart parking lot (Tr. 82-83). Her attention was drawn to a car because "it was parked some ways away from the closest entrance door and not in an actual parking space where most patrons park" (Supp.Tr. 4, 12). It was facing south, showing that it had come from the north (Tr. 86), and suggesting it had passed the open doors in order to park south of the closed south doors. Further, it was illegally parked in the fire lane, directly in front of the vending machines on the walkway (Supp.Tr. 9, 12-13, Tr. 85). Two men were outside the car, standing by the vending machines (Tr. 87, 102).

Officer Boydston approached from the south in her patrol car, and both men looked at her as she drove by (Tr. 84, 88). When they saw her, one man, later identified as Patrick Trent, got into the driver's seat of the car, and the other man, later identified as appellant, walked up to the south doors and pushed on them, as if trying to go inside (Tr. 87). Officer Boydston announced over the police radio that "there was a vehicle and two subjects by the vending machines" (Tr. 102).

As Officer Boydston drove to the north end of the parking lot, she ran the car's

license plates to see if there were any outstanding warrants (Tr. 88-90). The dispatcher reported that there were outstanding warrants for a person known to drive that car and who lived at the address where the car was registered (Tr. 88-90). Officer Boydston turned around and went back to where appellant and Mr. Trent had been "a moment" before, but they had gone (Tr. 90, 102).

Officer Wayne Easley, a Gladstone police officer for seven years, had been listening to Officer Boydston's radio communications, and began looking for the car (Tr. 100-102). A few minutes later, he found it at the HyVee located directly across the street from the WalMart (Tr. 101-102). What directed his attention to the car was the fact that "there were two males standing outside the vehicle by the vending machines" (Tr. 104). The car was not parked in a parking space, but instead was parked directly in front of the vending machines (Tr. 102-103). When Officer Easley drove by in his patrol car, Mr. Trent got into the driver's seat of the car, and appellant walked to the HyVee doors and went inside (Tr. 105-106). Officer Easley ran the license plate himself to double-check that there were warrants (Tr. 104). Officer Easley turned around, drove past them once more, and exited the parking lot, and Mr. Trent parked the car in a parking space and waited for appellant (Tr. 105, 107).

Officer Easley then drove behind the HyVee, turned off his lights, and parked where Mr. Trent could not see him but where he could see Mr. Trent and the car's headlights (Tr. 107-108). Mr. Trent got out of the car, opened the hood, looked

around, quickly put a bag in the engine compartment, closed the hood , and got back in the driver's seat (Tr. 108-109).

Appellant returned to the car, having bought only a soda at HyVee (Tr. 131). Officer Easley pulled behind the car, turned on his lights, and "beeped" his siren so the men would know he was there and not back into him (Tr. 109).

Officer Easley approached the men and asked for identification (Tr. 110). Both men appeared nervous (Tr. 110). Mr. Trent gave him a driver's license, and appellant told him his name (Tr. 110). Officer Boydston came to the scene while Officer Easley was checking for warrants on the two men (Tr. 93). There were outstanding warrants on Mr. Trent, so Officer Easley arrested him and patted him down for weapons (Tr. 111). Officer Easley asked appellant to exit the car, as he needed to search it incident to the arrest of Mr. Trent and because he need to inventory it before it was towed (Supp.Tr. 8, 11, 19, 26), and to protect Officer Easley's safety, he patted down appellant to check for weapons (Supp.Tr. 23, Tr. 111).

Officer Easley felt something he "thought was a weapon" in appellant's front pants pocket (Supp.Tr. 23). The object was the size of a screwdriver handle (Supp.Tr. 24). He asked appellant what it was, and appellant replied, "I don't know" (Tr. 112). Officer Easley asked if he could retrieve it, and appellant said, "yes, or, sure" (Supp.Tr. 17). The object was a universal pick-lock for a vending machine (Tr. 112-13). Officer Easley went to the vending machines, saw that one had been broken into and was still one or two inches open, and tried the lock in that machine (Supp.Tr. 18,

Tr. 113-14). The key fit (Tr. 113).

Officer Easley looked inside the car and saw "quite a large amount of quarters," more than people usually have in their cars, scattered on the passenger side floorboard where appellant had been sitting (Supp.Tr. 18, Tr. 116-17). Officer Easley asked appellant if he could search the car, and appellant gave his consent (Supp.Tr. 26).[3] He proceeded to search the car, and found a bag under the front passenger seat containing only quarters, dimes, and one-dollar bills, totaling about $60 of currency (Tr. 117-18, 143). In the engine compartment of the car was a make-up bag containing two more universal keys, and many smaller vending machine keys, with codes written on the keys (Tr. 118-20, 127). In the front passenger compartment was a notebook with a list of codes correlating to the codes on the keys (Tr. 126-27). In the back seat of the car were vice grips, a monkey wrench, screwdrivers, a wire-cutter, and pliers (Tr. 120-21, 133). In the trunk of the car were coin wrappers for rolling quarters and dimes, two more empty bank bags, and a padlock which was the same type of padlock HyVee used to lock the vending

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[3] At the suppression hearing, when asked whether appellant consented to the search of the car, Officer Easley said, "I believe so" (Supp.Tr. 25-26). Under further questioning, Officer Easley said it was possible that appellant gave him consent to search the car, but he did not recall, and it was possible he did not give consent (Supp.Tr. 26).

machines, and which was likely the padlock which was missing from that machine (Tr. 123-24, 142, 144, 157).

2. Standard of review

> **Where a claim regarding a motion to suppress is preserved for review, the court: reviews a trial court's ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court's determinations of credibility. The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous. The Court will consider evidence presented at a pre-trial hearing, as well as any additional evidence presented at trial.**

State v. Edwards, 116 S.W.3d 511, 530 (Mo.banc 2003) (citations omitted). The facts and reasonable inferences are viewed in the light most favorable to the trial court's decision, and contrary evidence and inferences are disregarded. State v. Hoyt, 75 S.W.3d 879, 882 (Mo.App.W.D. 2002). The trial court's factual findings and credibility determinations are given deference, and questions of law are reviewed de novo. Id.

However, appellant's point is not preserved for review. Before trial, appellant filed a motion to suppress the evidence seized from his person and the car (L.F. 4-5). The motion did not raise a claim that the initial stop of the car was made without reasonable suspicion (L.F. 4-5, Resp.App. A11-A12). At the hearing on the motion to suppress, appellant's attorney did not raise a claim regarding the initial stop of the car (Supp.Tr. 28-29). At trial, appellant allowed Officer Easley to testify

about finding the universal pick-lock and trying it in the open vending machine, and then objected to the admission of the pick-lock and the rest of the evidence "based on the motion to suppress" (Tr. 115), and did not raise any other grounds. In the motion for new trial, appellant referenced the motion to suppress without raising any other grounds (L.F. 26).

Because at trial appellant never raised the ground he now asserts on appeal, his point is not preserved for review. State v. Mayes, 63 S.W.3d 615, 633 (Mo.banc 2001) ("To preserve an objection to evidence for review, the objection must be specific, and the point raised on appeal must be based upon the same theory"); State v. Barnett, 980 S.W.2d 297, 303 (Mo.banc 1998) (same).

Should this Court be inclined to consider appellant's claim under plain error review, the standard of review is even higher than if the claim were preserved: "the record must show that the error 'so substantially affects the rights of the defendant that a manifest injustice or miscarriage of justice results.'" State v. Galazin, 58 S.W.3d 500, 507 (Mo.banc 2001). "Plain error is error that is evident, obvious and clear." State v. Thurston, 104 S.W.3d 839, 841 (Mo.App.S.D. 2003); State v. Kennedy, 107 S.W.3d 306, 313 (Mo.App.W.D. 2003); State v. Santillan, 1 S.W.3d 572, 578 (Mo.App.E.D. 1999). "Appellant bears the burden of showing that an alleged error rises to the level of plain error." State v. Faulkner, 103 S.W.3d 346, 362 (Mo.App.S.D. 2003); State v. Williams, **18 S.W.3d 461, 464 (Mo.App.E.D. 2000); State v. McKibben, 998 S.W.2d 55, 60 (Mo.App.W.D. 1999).**

3. Law on warrantless stops

The Fourth Amendment protects the right of the people to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. The general rule is that a search performed without a warrant is unreasonable unless the search comes within an exception to the warrant requirement. State v. Rutter, 93 S.W.3d 714, 723 (Mo.banc 2002); State v. Jones, 959 S.W.2d 829, 834 (Mo.App.E.D. 1997); State v. McNaughton, 924 S.W.2d 517, 523 (Mo.App.W.D. 1996).

A. Law on Terry stops

One exception to the warrant requirement is a Terry stop. "An investigative stop is permitted under the Fourth Amendment when a law enforcement officer is able to point to specific and articulable facts which, taken with rational inference from those facts, create a reasonable suspicion that a person has or is about to commit a crime." State v. Rushing, 935 S.W.2d 30, 32 (Mo.banc 1996), *cert. denied* 520 U.S. 1220 (1997); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879-80, 20 L.E.2d 889 (1968). "The officer may also 'briefly stop a moving automobile to investigate, founded upon a reasonable suspicion that the occupants are involved in criminal activity, if the suspicion is supported by specific and articulable facts.'" State v. Monath, 42 S.W.3d 644, 649 (Mo.App.W.D. 2001), *quoting* State v. Franklin, 841 S.W.2d 639, 641 (Mo.banc 1992).

In determining whether the officer had reasonable suspicion for the initial stop of the vehicle, the reviewing court objectively assesses the totality of the

circumstances known to the officer, and ignores the officer's subjective state of mind at the time of the stop. State v. Monath, 42 S.W.3d at 649. "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277, 122 S.Ct. 744, 753, 151 L.Ed.2d 740 (2002).

During such a stop, if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger," the officer may "take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." Terry v. Ohio, 392 U.S. at 24, 27, 88 S.Ct. at 1881, 1883.

B. United States Supreme Court law— Whiteley, Hensley, and Evans

In Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), the United States Supreme Court recognized the strong public interest served by allowing police officers to act on direction of other officers or agencies in finding and arresting individuals suspected of crime, even when the officers do not themselves have probable cause to arrest. The Court stated:

> **We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.**

Whiteley v. Warden, 401 U.S. at 568, 91 S.Ct. at 1037. However, the Court did require the prosecution to show that the officers requesting aid had probable cause to make the arrest, or that the officers making the arrest had gathered enough information to have probable cause themselves. Id., 401 U.S. at 567-68, 91 S.Ct. at 1036-37.

> **Thus Whiteley supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who issued the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance. In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction.**

United States v. Hensley, 469 U.S. 221, 231, 105 S.Ct. 675, 681, 83 L.Ed.2d 604 (1985).

In Hensley, the Court considered a situation where the police briefly stopped an individual at the direction of other officers. In Hensley, police in Ohio interviewed an informant who told them that Hensley had driven the getaway car in

an armed robbery. Id., 469 U.S. at 223, 105 S.Ct. at 677. The Ohio police issued a flyer, which described Hensley, warned that he should be considered armed and dangerous, said that he was wanted for investigation of aggravated robbery which occurred on a certain date, and asked that if police find him, they hold him for the Ohio police department. Id. Police in Kentucky heard the flyer, found Hensley, and stopped him. Id., 469 U.S. at 224, 105 S.Ct. at 678. During the stop they found handguns in his car, and he was convicted in Federal court for possession of those guns. Id., 469 U.S. at 225, 105 S.Ct. at 678.

On appeal, the Court stated:

> **We conclude that, if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information.**

Id., 469 U.S. at 231, 105 S.Ct. at 682. Thus, even though the officers involved in the actual stop did not have reasonable suspicion, they were entitled to rely on the flyer, an objective reading of which would tell an experienced officer that Hensley was at least wanted for questioning and investigation. Id., 469 U.S. at 234, 105 S.Ct. at 683. Because the Ohio police who issued the flyer did have specific facts supporting reasonable suspicion, the stop was permissible, and the evidence uncovered as a result of the stop was admissible. Id.

In Arizona v. Evans, 514 U.S. 1, 4, 115 S.Ct. 1185, 1188, 131 L.Ed.2d 34 (1995), the United States Supreme Court considered a case where the police had arrested a man based on information that there was an outstanding warrant against him, but in fact, the warrant had been quashed seventeen days before the arrest, and only appeared outstanding due to a clerical error. The Court assumed the arrest was illegal, but recognized that the exclusionary rule is a judicial creation not required by the constitution, and its purposes would not be served by requiring the suppression of the fruits of the arrest in that case, where the deterrence value was minimal. Id., 514 U.S. at 10-14, 115 S.Ct. at 1191-93. The Court stated that Whiteley retained relevance in determining whether a violation of the Fourth Amendment had occurred, but also stated that "its precedential value regarding application of the exclusionary rule is dubious," because the Whiteley Court had applied the exclusionary rule without separately considering whether it would have a deterrent effect in that case. Id., 514 U.S. at 13-14, 115 S.Ct. at 1192-93.

Thus, under United States Supreme Court precedent, the individual officer who makes the arrest or stop does not need to have probable cause or reasonable suspicion; rather, in determining whether the action was proper, a reviewing court looks both to what the officers requesting the action and the officers making the arrest knew.

C. Missouri law

In United States v. Stratton, 453 F.2d 36 (8th Cir. 1972), the defendant

admitted that there was probable cause for his arrest, but claimed evidence seized during his arrest should have been suppressed because the arresting officers did not have probable cause. The court found this claim without merit, holding:

> **We think the knowledge of one officer is the knowledge of all and that in the operation of an investigative or police agency the collective knowledge and the available objective facts are the criteria to be used in assessing probable cause. The arresting officer himself need not possess all of the available information.**

Id. at 37. The court cited cases from several different jurisdictions which reached the same conclusion, Id. at 37-38. Then the court examined Whiteley, and said that the case showed that officers are "entitled to rely on the knowledge possessed by other officers in making arrests." Id. at 38.

This has been the law in Missouri ever since. *See* State v. Sanner, 655 S.W.2d 868, 874 (Mo.App.S.D. 1983) ("It is unnecessary that the facts and circumstances comprising probable cause be within the knowledge of the arresting officers at the moment of arrest. Probable cause is to be determined upon the objective facts available for consideration by the agencies or officers participating in the arrest; otherwise each individual officer would have to be fully briefed or informed of all of the essential factors in each case before proceeding to make an arrest upon probable cause."); State v. Young, 701 S.W.2d 490, 494 (Mo.App.E.D. 1985); State v. Adams, 791 S.W.2d 873, 877 (Mo.App.W.D. 1990); State v. Webb, 824 S.W.2d 464, 469-70

(Mo.App.S.D. 1992); State v. Mayweather, 865 S.W.2d 672, 675 (Mo.App.E.D. 1993); State v. Miller, 894 S.W.2d 649, 653 (Mo.banc 1995), *quoting* State v. Franklin, 841 S.W.2d at 644, note 6; State v. Futo, 990 S.W.2d 7, 17 (Mo.App.E.D. 1999); State v. Clayton, 995 S.W.2d 468, 477 (Mo.banc 1999); and State v. Bradshaw, 81 S.W.3d 14, 32 (Mo.App.W.D. 2002).

Thus, it is well-established in Missouri that the officer who arrests or stops the defendant does not have to know enough information to establish probable cause or reasonable suspicion; rather, to be a lawful stop, the state must show that the state possessed enough information to establish probable cause or reasonable suspicion.

Appellant contends that this is not the law, but that the law really is that the other officers or agencies must "*communicate*" enough information "directly with the arresting officer" so that the arresting officer has reasonable suspicion, whether or not all the details are given (App.Sub.Br. 24-26, emphasis in original). But appellant's rule ignores the straightforward language of the cases cited above— the arresting officer does not need to personally have enough information to establish probable cause or reasonable suspicion, so long as the information known to all the officers establishes the standard.

Appellant claims that the law that, "knowledge of one officer is the knowledge of all," United States v. Stratton, 453 F.2d at 36, is too broad, and allows an officer's arrest to be constitutional even if other officers had not yet communicated their

observations to the officers making the stop, or never communicated with those officers at all (App.Sub.Br. 26). But the point of the rule is to allow officers to catch criminals without having to stop and interrogate the other officers or agencies and find out what each person knows. An Amber Alert would do little good if any arresting officer in the country had to first "communicate" with the local detectives in whatever jurisdiction the crime was committed to find out the specifics of the crime before stopping the suspect. The purposes of NCIC (National Crime Information Center), which allows officers to quickly check on computer for outstanding warrants in multiple jurisdictions, would also be frustrated if officers had to "communicate directly" with the detectives who had personal knowledge of the case before taking any action. Appellant's contention ignores the fact that the Constitution is concerned with action taken by the state. Defendants are perfectly comfortable with the idea that what is known to one state actor must be known to all state actors in the context of Brady[4] violations; it is legitimate to apply that same principle where there are exigencies to be considered in tracking down suspects.

4. Officer Easley's stop of appellant did not violate the Fourth Amendment

A. Because appellant did not raise the validity of the initial stop, the state was not required to call the dispatcher to prove the basis of the warrant information

Under State v. Franklin, 841 S.W.2d 639, 644 (Mo.banc 1992), and State v.

[4] **Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).**

Miller, 894 S.W.2d 649, 652 (Mo.banc 1995), where a dispatcher requests that an officer stop a defendant, and an officer stops the defendant based solely on that directive, if the defendant challenges the validity of the stop, the state must not only call the officer who made the stop, but also call the dispatcher or another witness to prove that there was justification for the request of the stop.

The state did not prove the basis for the dispatcher's information about the outstanding warrants. But, as shown above, appellant did not challenge the validity of the initial stop until his appeal. Therefore, the state was not required to put on evidence to prove the validity of the stop at trial.

For example, in State v. Galazin, 58 S.W.3d 500, 501 (Mo.banc 2001), the defendant was convicted of driving while intoxicated. He did not file a motion to suppress, but in the middle of trial, objected to the police officer's testimony about his driving, on the ground that the state failed to prove that the officer had authority to make an arrest in the area in which he encountered appellant. Id. at 502-504. On appeal, he claimed that because the state bears the burden of proof on a motion to suppress, the state should have proved, at trial, that the officer had authority to arrest appellant, by offering into evidence the mutual aid contract conveying this authority. Id. at 504-505.

In denying this claim, this Court stated that one of the reasons for requiring claims of improper searches and seizures to be raised before trial:

is so the basis of the claim of unlawful search or seizure will be known, giving

the state a fair chance to respond and the trial court a fair opportunity to rule on the claim. The rule helps to eliminate the possibility of sandbagging with respect to an issue not relating to guilt or punishment.

Id. at 505. This Court held that where a defendant does not raise the claim regarding the improper search and seizure in a motion to suppress filed before trial, "the accused loses the benefit of the presumption at a hearing on a timely filed motion to suppress that all warrantless searches and seizures are invalid." Id. at 505. Therefore, "the defendant bears the burden of establishing the unlawfulness of the police conduct." Id.

In appellant's case, his motion to suppress claimed: "No probable cause existed for Defendant's arrest or detention;" "The arrest of Defendant and subsequent search of his person and automobile was illegal;" and that the "items were searched for and seized" in violation of the Fourth Amendment and without lawful authority (L.F. 4, Resp.App. A11). Thus, at the hearing on the motion to suppress, the state had the burden to prove probable cause to arrest appellant, and the legality of the search of his car and seizure of the evidence inside. The state did not have the burden of proving every imaginable claim that could possibly have been raised to challenge the stop. Appellant did not challenge the legality of the initial stop, so the state did not have the burden of proving that the initial stop was constitutional.

The case at bar shows the sound policy reasons behind this rule. At the

suppression hearing, Officers Boydston and Easley testified that there were outstanding warrants for a person known to drive appellant's car, and who lived at the address where appellant's car was registered. If appellant had challenged the initial stop, and the only basis for the stop was the outstanding warrants, the state would had to have called the dispatcher or another witness to establish the basis for the warrants and the information that the person drove appellant's car and lived at the place where appellant's car was registered. But where appellant did not challenge the stop, there was no need for the state to waste time and judicial resources in subpoenaing additional, unnecessary witnesses to prove this uncontested, collateral issue. Perhaps appellant knew very well that there was a perfectly sound basis for the dispatcher's information, and chose not to challenge it for that reason. He cannot now be heard to come before this Court, having never challenged the validity of the initial stop below, and criticize the state for not having proved something he never challenged.

Because appellant failed to challenge the constitutionality of the initial stop in a pre-trial motion to suppress, the burden is on appellant to prove that there was no basis for the dispatcher's information. State v. Galazin, 58 S.W.3d at 505. Appellant did not call the dispatcher or adduce any evidence on this issue. Therefore, he has not proven that there was no basis for the dispatcher's information. Accordingly, appellant's point must fail.

B. Even without relying on the dispatcher's information, there was reasonable

suspicion to support the stop

The testimony of Officers Boydston and Easley at the hearing on appellant's motion to suppress and at trial proved that the information known collectively to the officers established reasonable suspicion to support the initial stop. Officer Boydston spotted Mr. Trent and appellant at WalMart, at 2:50 a.m. (Supp.Tr. 8, Tr. 83, 87). Not only were they not parked by the open doors at the center of the building, but they had parked south of the south doors, so that they were only the width of the sidewalk, about ten feet, away from the vending machines there (Tr. 85-88). Further, they were illegally parked in the fire lane (Supp.Tr. 9). When they saw Officer Boydston coming towards them, Mr. Trent got into the driver's side of the car, and appellant pretended to try to enter WalMart (Supp.Tr. 4-5, Tr. 87). But the men left as soon as Officer Boydston passed— only a moment after the dispatcher talked to her, the men were gone (Supp.Tr. 6, Tr. 90, 102); they did not go to the open entrance to do some shopping.

Then they drove across the street to the HyVee, and parked directly in front of those vending machines (Supp.Tr. 6, Tr. 102-103). After several minutes, Officer Easley, who had heard Officer Boydston's report, found the car parked in front of the machines, and both men standing next to the vending machines (Supp.Tr. 6, 14-15, Tr. 102-104). Then appellant and Mr. Trent did the same thing they had done before, which was, upon seeing an officer, Mr. Trent got into the driver's seat, and appellant went to the door of the store (Supp.Tr. 14-15, Tr. 105-106). As soon as Mr. Trent

could not see Officer Easley, Mr. Trent got out of the car, looked around, opened the car hood, put a bag of some sort in the engine compartment, and quickly closed the hood (Supp.Tr. 15, Tr. 108-109). Then Mr. Trent got back in the driver's seat and waited for appellant (Supp.Tr. 15-16, Tr. 109). When appellant came out, carrying only a soda (Tr. 131), the two men tried to leave, but Officer Easley stopped them (Supp.Tr. 16, Tr. 109-110).

Thus, at the time of Officer Easley's stop, the officers knew that appellant and Mr. Trent had broken at least one law, by parking in the fire lane at WalMart, and they were entitled to stop him on those grounds alone. State v. Meza, 941 S.W.2d 779, 780-81 (Mo.App.W.D. 1997) (arrest for traffic violations was legally permitted, subjective reasons of officer for effecting stop were irrelevant); State v. Ramsey, 864 S.W.2d 320, 329 (Mo.banc 1993), *cert. denied* 511 U.S. 1078 (1994) ("So long as police do no more than they are legally permitted to do, the officer's motives in making the arrest are irrelevant."). Appellant argues that the state did not prove that the officers were entitled to enforce the violation of the fire lane (App.Sub.Br. 32-33), but appellant did not object on any grounds to evidence that they were parked in violation of the law; rather, he elicited this evidence, and even asked whether Officer Boydston had issued a citation for the violation (Supp.Tr. 9). Their parking in the fire lane also increases the quantum of proof in favor of reasonable suspicion. *See, e.g.*, State v. McClain, 602 S.W.2d 458, 458 (Mo.App.E.D. 1980).

Further, their behavior at the WalMart and HyVee gave rise to a reasonable

suspicion that they were trying to rob the vending machines at the stores. The men were standing beside one soda machine, and ten minutes later were standing beside another soda machine. If they had legitimately wanted to buy a soda from the machine at three in the morning, they could have done that at the WalMart; there was no need to immediately run over to the HyVee machines.

Both times police first saw the men, both men were standing by the machines, the car parked directly in front of the machine, and as soon as they saw the officers, they immediately executed the same pattern— Mr. Trent got in the car, and appellant headed for the door of the store. If they had legitimately been looking over the sodas, they would not have instantly stopped what they were doing when the officers drove by and performed the identical moves. When Officer Boydston drove by, in the time it took to drive to one end of the parking lot and back appellant and Mr. Trent were gone, showing that they were trying to avoid contact with police. The men did not actually enter the WalMart to shop there, but instead immediately left and went to HyVee, and made only a nominal purchase there.

Mr. Trent quickly hid a bag under the hood of the car after looking around to make sure Officer Easley was gone, demonstrating that he wanted something hidden where officers would not have the opportunity to see it and search it. This gave rise to a reasonable suspicion that appellant and Mr. Trent were engaged the criminal activity of trying to rob the vending machines, and authorized Officer Easley to make an investigatory stop. Therefore, the evidence discovered as a result of that stop was

admissible.

5. The pat-down of appellant was permissible, and, in any event, appellant did not suffer manifest injustice from the admission of the universal pick-lock

Under the totality of the circumstances, Officer Easley was permitted to pat-down appellant for weapons. As shown above, it was 3 a.m., Officer Easley had just witnessed appellant and Mr. Trent apparently trying to rob the vending machines, and had heard Officer Boydston's report that the men had been standing by the WalMart vending machines ten minutes before and had disappeared after they saw her drive by. Also, both men appeared nervous when Officer Easley approached them (Tr. 110). By the time he patted-down appellant, he had found out that appellant's co-conspirator, Mr. Trent, had outstanding warrants, and arrested him on those warrants (Supp.Tr. 16-17), and he was about to search their car incident to that arrest (Supp.Tr. 19, 26). Under these circumstances, a reasonably prudent officer would be warranted in the belief that appellant might be carrying a weapon. Therefore, the pat-down was permissible.

The discovery of the universal key pick-lock was then admissible– the key was large and bulky, about the size of the end of a screwdriver handle, Officer Easley thought it was a weapon, and appellant said "yes, or, sure" when Officer Easley asked if he could retrieve it (Supp.Tr. 17, 23-24).

Appellant argues that Officer Easley could not have been worried about his safety because he, "specifically *denied* that [appellant] made any actions to make

Easley think that he was armed or dangerous" (App.Sub.Br. 34, emphasis in original). The actual testimony on this issue was as follows:

> **Q. Did Mr. Goff make any furtive actions that made you believe he was armed or dangerous?**
>
> **A. No.**

(Supp.Tr. 23). This testimony shows only that appellant did not reach for a weapon before Officer Easley patted him down. The fact that appellant had not yet lunged for a weapon before the pat-down occurred did not destroy Officer Easley's reasonable belief under the totality of the circumstances that he needed to pat-down appellant for his safety.

In any event, the admission of the pick-lock did not cause appellant manifest injustice. Officer Easley arrested Mr. Trent before he patted-down appellant, and lawfully searched the car pursuant to that arrest. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). Therefore, all the evidence in the car was admissible, as was appellant's behavior at the WalMart and HyVee. There is no reasonable probability that the verdict would have been different had one of the universal pick-locks not been admitted. Therefore, appellant's claim has no merit, and must fail.

POINT II

The trial court did not err in denying appellant's motion for a judgment of acquittal because the evidence was sufficient to sustain his conviction of stealing, third offense, in that the evidence showed appellant and his co-conspirator drove up to vending machines in the middle of the night, used their tools and lock picks to break into at least one machine, and took the change from the machine and dumped it into their car.

Appellant's argument that the state failed to establish the corpus delicti of the crime is spurious, because appellant does not challenge the admission of his statements.

For his second point on appeal, appellant claims that the trial court erred in overruling his motion for a judgment of acquittal (App.Sub.Br. 36). Appellant argues that even though the evidence showed that someone had just broken into the vending machine and stolen all the change in it, appellant was caught standing at the machine, a large amount of change was found on the passenger side floorboard of his car, he had a universal vending machine lock pick in his front pants pocket and had in his car various other tools for breaking into vending machines and processing the proceeds, the evidence was insufficient because the HyVee store supervisor did not know how much change had been stolen (App.Sub.Br. 36).

1. Standard of review and law on sufficiency of the evidence

When reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence. All evidence and inferences to the contrary are disregarded. This Court does not weigh the evidence. Appellate review is limited to determining whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.

State v. Crawford, 68 S.W.3d 406, 407-408 (Mo.banc 2002) (citations omitted); State v. Grim, 854 S.W.2d 403, 405 (Mo.banc 1993).

2. The evidence was sufficient

As shown in Respondent's Statement of Facts, the evidence and reasonable inferences showed that appellant and Patrick Trent were engaged in stealing from vending machines, and did, in fact, steal all the change from the vending machine at HyVee. They were first spotted at WalMart, and not only were not parked by the open doors, but had parked south of the south doors, so that they were only the width of the sidewalk, about ten feet, away from the vending machines there (Tr. 85-88). When they saw an officer coming, according to plan, Mr. Trent got into the driver's side of the car, and appellant pretended to be trying to enter the store (Tr. 87). As soon as the officer was far enough away, they immediately left, fleeing so that they would not be caught (Tr. 90, 102).

Then they drove across the street to the HyVee, and parked directly in front of

those vending machines (Tr. 102-103). They used a pick-lock to remove the padlock and threw it in the trunk of their car, appellant used the universal vending machine lock pick to break the second lock, they pulled out the box containing all the change, and then, upon seeing another officer coming, dumped the change onto the floorboard of their car, replaced the box, and closed the machine, though in their haste, they did not completely close it (Tr. 104, 112-17, 142, 148, 157). Then they executed their plan to look innocent, by having Mr. Trent get back into the car and park it, and having appellant go into the store as if he wanted to do some more shopping at 3 a.m. (Tr. 105-106). As soon as the officer was out of sight, Mr. Trent hid the bag of other pick-locks and keys in the engine compartment (Tr. 108-109, 118-20, 127), so that an officer would be less likely to find what was inside if they were stopped. Appellant returned to the car, having made only a nominal purchase, one soda (Tr. 131), an exceptionally odd purchase considering that he had over $60 in quarters, dimes, and one-dollar-bills in the car (Tr. 117-18, 143), and had just been standing next to two soda machines. The two men immediately tried to leave, but were stopped by the officer (Tr. 109-110).

Then, when patted down, appellant absurdly claimed not to know what the large metal object in his front pants pocket was, which turned out to be the universal key vending machine pick-lock (Tr. 112-13). The officer found the vending machine standing ajar and found that appellant's pick-lock fit the door (Tr. 113-14). The HyVee supervisor confirmed that the pad lock in appellant's trunk was the same type

of lock they had used to lock their machines and to replace broken locks, and that the one in his trunk could very well have been the lock from the vending machine (Tr. 124, 142, 148, 157). Appellant had a bag of pick-locks with codes written on them and a notebook with codes corresponding to the keys written in it (Tr. 118-20, 126-27). Further, appellant had an assortment of tools useful for breaking into vending machines easily accessible to him in the back seat of his car, he had a bag of quarters, dimes, and one-dollar bills, totaling about $60, in a bag under his seat, another large amount of quarters on the floorboard under his seat, and he had more empty bank bags and coin rolling papers for quarters and dimes in the trunk of his car (Tr. 116-17, 120-21, 123, 133, 144).

The obvious inference from this evidence was appellant had amassed all the tools he needed to steal from vending machines and to dispose of the gains from those machines, was using those tools that night at 3 a.m., and had successfully stolen the change from one machine before the officer caught him.

The HyVee supervisor unequivocally testified that money was missing from the machine:

> **Q. And what did you find when you checked those machines?**
>
> **A. I found that "Coke" and "Pepsi" had money in it, and "7-Up" had money gone out of it. . . .**
>
> **Q. Now, on the morning of the 24th when you looked in that particular machine, the clasp was broken and the money was completely gone, is**

that right?

A. Out of the "7-Up" machine. There was still some paper currency in the "7-Up" machine. . . .

Q. And your one machine that morning was, in fact, missing all of its coins?

A. It was not missing, if I remember correctly, if was not missing the paper.

Q. But, it was missing the coins?

A. Yes. . . .

Q. All right, now, I believe you testified that nothing had been taken out of the "Pepsi" machine, is that correct?

A. Not that I recall.

Q. But, there was money missing from the "7-Up" machine?

A. Correct.

(Tr. 148-49, 151, 156). He did say that he did not know the exact amount of change that had been lost, because sometimes they only emptied the machine every two weeks instead of every week (Tr. 155-56), but he never changed his testimony that there was money missing from the machine. The state was not required to prove the value of what was stolen in order to convict appellant of stealing, third offense. Section 570.040, RSMo 2000 (Resp.App. A4-A5).

This evidence clearly shows that appellant stole money from the HyVee

vending machine. Therefore, appellant's claim has no merit, and must fail.

Appellant argues that it is possible that when he opened the machine to get all the money and was interrupted by the officer catching him, there was no change in the machine, only bills, so he did not actually steal anything, and the large amount of quarters and dimes scattered on the driver's seat floorboard came from somewhere else (App.Sub.Br. 37-40).[5] Appellant's argument is contradicted by the unequivocal testimony of the HyVee supervisor that money was missing from the vending machine (Tr. 148-49, 151, 156).

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[5] Respondent notes that, even if appellant's sufficiency claim had any merit, which it does not, the remedy would not be discharge, as appellant asserts (App.Sub.Br. 42, 48), but a finding of guilt on the lesser included offense of attempt. State v. Kenney, 973 S.W.2d 536, 546 (Mo.App.W.D. 1998), *overruled in part on other grounds by* State v. Withrow, 8 S.W.3d 75 (Mo.banc 1999); State v. O'Brien, 857 S.W.2d 212, 220 (Mo.banc 1993).

Appellant argues that the supervisor's testimony should not be believed because the state did not establish a foundation for the supervisor's knowledge, for example by having him explain the way in which he determined that money was missing from the machine (App.Sub.Br. 40). However, if appellant had wanted to test the foundation of the supervisor's testimony, he should have done so at trial. It is silly for appellant to claim there was an inadequate foundation for the supervisor's testimony, and to hypothesize that maybe the supervisor did not really know that money was missing, when appellant did not challenge the admission of this testimony at trial. *See* State v. Blue, 875 S.W.2d 632, 633 (Mo.App.E.D. 1994) (refusing to review claim regarding inadequate foundation raised for first time on appeal– foundational deficiencies can frequently be quickly remedied at trial); State v. Myszka, 963 S.W.2d 19, 24 (Mo.App.W.D. 1998); State v. Coomer, 976 S.W.2d 605, 606 (Mo.App.E.D. 1998).

The closest appellant came to challenging the supervisor's testimony was when he asked the supervisor how much money was missing from the machine, and the supervisor answered that he could only speculate (Tr. 156). This does not refute the supervisor's testimony that money was missing, it only shows that he did not know how much money was gone. The value of the property stolen is not an element of the crime of stealing, third offense. Section 570.040, RSMo 2000. The jury was entitled to believe the unequivocal, unrefuted testimony of the supervisor that money was missing from the machine. Therefore, appellant's point must fail.

3. Appellant's attempt to challenge the corpus delicti of the crime is spurious, because appellant does not challenge the admission of his statements

In his brief, apparently because he cannot find any relevant case to support his claim, appellant tries to argue that a case on corpus delicti applies (App.Sub.Br. 39-41). However, this case is spurious.

If there is evidence from which a reasonable juror could find every element of an offense beyond a reasonable doubt, then the evidence is sufficient to uphold the defendant's conviction. State v. Summers, 43 S.W.3d 323, 326-27 (Mo.App.W.D. 2001).

Corpus delicti, on the other hand, does not involve the sufficiency of the evidence. It is a rule which governs the admissibility of extrajudicial statements of the defendant regarding the commission of the crime. *See* State v. McVay, 852 S.W.2d 408, 414 (Mo.App.E.D. 1993). There is a two prong test for establishing corpus delicti: (1) proof, direct or circumstantial, that the specific loss or injury charged occurred, and (2) someone's criminality as the cause of the loss or injury. State v. Ziegler, 719 S.W.2d 951, 954 (Mo.App.S.D. 1986). "If there is evidence of corroborating circumstances which tend to prove the corpus delicti and correspond with circumstances related to the confession, both the circumstances and the confession may be considered in determining whether the corpus delicti is sufficiently proved in a given case." State v. Howard, 738 S.W.2d 500, 504 (Mo.App.E.D. 1987). Thus, if the defendant does not challenge the admission of his statements about the commission of the crime, corpus delicti is irrelevant.

Here, appellant does not challenge the admission of his statements about the

commission of the crime. Therefore, his injection of a case concerning corpus delicti into a discussion of the sufficiency of the evidence is improper, and his argument about the corpus delicti is spurious.

POINT III

The trial court did not abuse its discretion in overruling appellant's motion for a mistrial after appellant elicited evidence from Officer Wayne Easley that, when arrested, appellant was "very polite, he understood the drill, he'd been through it before" because the drastic remedy of mistrial was not required in that the comment was in response to appellant's question, it was isolated, vague and indefinite, the trial court promptly sustained appellant's objection and, after a short break, instructed the jury to disregard the statement, and the statement did not have a decisive role in the determination of guilt.

For his third point on appeal, appellant claims that the trial court abused its discretion in overruling his request for a mistrial after appellant asked Officer Wayne Easley about appellant's demeanor when arrested, and Officer Easley answered that appellant was "very polite, he understood the drill, he'd been through it before" (App.Sub.Br. 43).

1. Facts

During appellant's cross-examination of Officer Easley, appellant asked him whether appellant was cooperative, and Officer Easley said, "Yeah, at the beginning" (Tr. 135). Then the following exchange took place:

> **Q. Did Mr. Goff, what was his demeanor?**
>
> **A. Out there it was very polite, he understood the drill, he'd been through it before. We got back to the station—**

(Tr. 135, Resp.App. A6). At that point appellant objected and asked to approach, and asked for a mistrial (Tr. 135). The jury was excused for "a few minutes" (Tr. 136, Resp.App. A7). The court denied appellant's request for a mistrial, and asked if he would like any other relief (Tr 137, Resp.App. A8). Appellant then requested a cautionary instruction that the jury should "disregard the last statement of the police officer" (Tr. 137-38, Resp.App. A8-A9). The court agreed, and told the officer to listen carefully to the questions, and not volunteer any information beyond what the question asked (Tr. 138, Resp.App. A9). The court then held a recess "for a couple minutes" (Tr. 138, Resp.App. A9). As soon as the jury returned, the court said, "The jury is instructed to disregard the last response of the witness" (Tr. 139, Resp.App. A10).

2. Standard of review

"A court's refusal to declare a mistrial is based on its discretion since the trial court is in the best position to determine the effect of the remark and what measures, if any, might be necessary to cure the effect." State v. Brasher, 867 S.W.2d 565, 569 (Mo.App.W.D. 1993). "Mistrial is a drastic remedy to be used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied." State v. Sanders, 903 S.W.2d 234, 238 (Mo.App.E.D. 1995); State v. Johnson, 968 S.W.2d 123, 134 (Mo.banc 1998), *cert. denied* 525 U.S. 935 (1998).

"A trial court will be found to have abused its discretion when a ruling is:

clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." State v. Brown, 939 S.W.2d 882, 883-84 (Mo.banc 1997). "In most cases in which the prejudicial error is elicited in response to a question by defense counsel, the courts hold that a mistrial is not required because a defendant 'is not entitled to complain about matters brought into the case by his own questions or to take advantage of self-invited error.'" State v. Smith, 934 S.W.2d 318, 320 (Mo.App.W.D. 1996).

> **In analyzing the prejudicial effect of uninvited reference to other crimes evidence, the courts generally examine five factors:**
>
> > **1) whether the statement was, in fact, voluntary and unresponsive [to the prosecutor's questioning if the prosecutor asked the question] . . . 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 at 320-21.

3. The drastic remedy of mistrial was not required

Officer Easley's remark did not necessitate the trial court's using the drastic remedy of mistrial. First, Officer Easley's comment was not made in response to any question by the prosecution, but to appellant's own question about his demeanor (Tr. 135). Appellant argues that any "trained police officer" who is called in the state's case-in-chief should be treated as though the prosecution asked all the questions of the officer (App.Sub.Br. 46), but this argument ignores the fact that police officers are not lawyers, and cannot be held to have the same legal acumen as the attorneys and judges trying and reviewing the case. This argument also makes bad policy sense, because it would allow a defendant who is unhappy with the way the case is going to build error into the case by deliberately asking a state's witness a question calling for a reference to the defendant's other crimes. Appellant elicited Officer Easley's response, and he cannot blame the prosecutor for his own actions.

Second, the statement was singular and isolated, and the prosecution did nothing to magnify it, but instead entirely ignored it.

Third, the comment was vague and indefinite. The comment was made in the context of questioning Officer Easley about appellant's demeanor during the stop

(Tr. 134-35). The comment did not say that appellant had been arrested before, and certainly made no reference to appellant's prior convictions for stealing. At most, the comment showed that appellant had had prior contact with officers in a situation where he had been patted-down. This does not tell the jury whether appellant had been a bystander, a witness, or a suspect. Thus, the comment did not specifically tell the jury that appellant had a propensity to steal.

Fourth, the trial court immediately sustained appellant's objection to the comment, and after a recess lasting just a few minutes, gave the jury an instruction to disregard Officer Easley's statements (Tr. 136-39). Appellant argues that the instruction came too late to do much good (App.Sub.Br. 46-47). But the recess was short, and the instruction came immediately after the jury's return (Tr. 136-39). If any jurors had forgotten what Officer Easley said, they were not reminded by the instruction, and those jurors who remembered what Officer Easley said just minutes before, knew to disregard it.

Fifth, in view of the other evidence and the strength of the state's case, the comment did not have a decisive effect on the jury's verdict. As shown by Respondent's Statement of Facts and Point I, appellant was caught in the act of breaking into the vending machine. His acts before and after the break-in, the myriad of tools and pick-locks he had for breaking into vending machines, the large amount of quarters he had scattered under and around his seat, and the items he had for disposing of the proceeds, all show that he was out that night stealing from

vending machines. He had been at the WalMart vending machines minutes before, he was found standing at the HyVee vending machine, went inside the store as soon as he saw Officer Easley, leaving the door to the vending machine slightly open in his haste, he had the pick-lock for one lock in his pocket and the padlock which had been on the machine in his trunk, all the change from the machine was missing and there was a large amount of change scattered on the floorboard of his car, showing that he had just dumped the change box from the machine out onto the floor of his car so he could be quick, and he claimed not to know what the large metal pick-lock in his front pants pocket was. All this evidence shows that appellant had just finished stealing from the HyVee vending machine. In view of this evidence, Officer Easley's isolated and vague comment did not play a decisive role in the determination of appellant's guilt, and appellant's point must fail.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 11,830 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of _____, 2003, to:

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APPENDIX