

NO. 35156-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TITUS DION PETERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 03-1-01526-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

07 MAR 20 11:51
COURT OF APPEALS
STATE OF WASHINGTON
BY [Signature]

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

 1. Did the court properly conclude that Officer Smalls and Officer Viehmann had probable cause to arrest defendant after fellow officers observed defendant appear to sell cocaine in an open-air drug market? 1

 2. Did RCW 10.31.100 authorize Officers Smalls and Viehmann to arrest defendant when Officers Smalls's and Viehmann's fellow officers had probable cause to believe they had witnessed defendant commit a gross misdemeanor?..... 1

B. STATEMENT OF THE CASE.1

 1. Procedure.....1

 2. Facts as Presented at the CrR 3.5/3.6 Hearing3

C. ARGUMENT.....9

 1. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT OFFICER SMALLS AND OFFICER VIEHMANN HAD PROBABLE CAUSE TO ARREST DEFENDANT AFTER FELLOW OFFICERS OBSERVED DEFENDANT APPEAR TO SELL COCAINE IN AN OPEN-AIR DRUG MARKET.....9

 2. OFFICERS MAY ARREST A PERSON WHEN FELLOW OFFICERS IN A UNIT OBSERVE THE PERSON SELLING CRACK COCAINE.....24

D. CONCLUSION.33

Table of Authorities

Federal Cases

<u>Henry v. United States</u> , 361 U.S. 98, 103, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).....	21
<u>Ornelas v. United States</u> , 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).....	20
<u>Rios v. United States</u> , 364 U.S. 253, 261-62, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960).....	21

State Cases

<u>Staats v. Brown</u> , 139 Wn.2d 757, 791, 991 P.2d 615 (2000)	16, 17
<u>State v. Acrey</u> , 148 Wn.2d 738, 745, 64 P.3d 594 (2002).....	10, 22
<u>State v. Alvarado</u> , 56 Wn. App. 454, 456, 783 P.2d 1106 (1989)	16, 30, 31
<u>State v. Bryant</u> , 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999)	29
<u>State v. Cole</u> , 122 Wn. App. 319, 323, 93 P.3d 209 (2004)	9-10
<u>State v. Conner</u> , 58 Wn. App. 90, 98, 791 P.2d 261, <u>review denied</u> , 115 Wn.2d 1020, 802 P.2d 126 (1990).....	20
<u>State v. Craig</u> , 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002)	16
<u>State v. Fore</u> , 56 Wn. App. 339, 343, 783 P.2d 626 (1989), <u>review denied</u> , 114 Wn.2d 1011 (1990).....	21
<u>State v. Fricks</u> , 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).....	21
<u>State v. Gaddy</u> , 152 Wn.2d 64, 70, 93 P.3d 872 (2004).....	19, 20
<u>State v. Graham</u> , 130 Wn.2d 711, 724, 927 P.2d 227 (1996).....	20
<u>State v. Knighten</u> , 109 Wn.2d 896, 903, 748 P.2d 1118 (1988).....	20

<u>State v. Lund</u> , 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993), <u>review denied</u> , 123 Wn.2d 1023 (1994)	19
<u>State v. Maesse</u> , 29 Wn. App. 642, 647, 629 P.2d 1349 (1981).....	16
<u>State v. Mance</u> , 82 Wn. App. 539, 542, 918 P.2d 527 (1996).....	17, 20, 21
<u>State v. Mendez</u> , 137 Wn.2d 208, 214, 970 P.2d 722 (1999).....	10
<u>State v. Norlin</u> , 134 Wn.2d 570, 582, 951 P.2d 1131 (1998), <u>review denied</u> , 140 Wn.2d 1026, 10 P.3d 406 (2000).....	29
<u>State v. Scott</u> , 93 Wn.2d 7, 10, 604 P.2d 943 (1980)	20
<u>State v. Terrovona</u> , 105 Wn.2d 632, 643, 716 P.2d 295 (1986).....	19, 20
<u>State v. Vasquez</u> , 109 Wn. App. 310, 318, 34 P.3d 1255 (2001).....	10
<u>State v. Woods</u> , 117 Wn. App. 278, 279, 70 P.3d 976 (2003)	29
<u>Torrey v. City of Tukwila</u> , 76 Wn. App. 32, 39, 882 P.2d 799 (1994)	17, 24, 25, 26

Statutes

42 U.S.C. §1983	26
RCW 10.31.100	1, 16, 17, 24, 25, 26, 27, 28, 29, 32
RCW 69.41	21
RCW 69.50	21
RCW 69.50.206(b)(4).....	21, 29
RCW 69.50.206(b)(5).....	21, 29
RCW 69.50.401	29
RCW 69.50.401(1)	21
RCW 69.52	21
Tacoma Municipal Code 8.72.010	27

Tacoma Municipal Code 8.72.010(A).....10, 21, 22
Tacoma Municipal Code 8.72.04016, 27
Tukwila Municipal Code, chapter 5.5626

Rules and Regulations

CrR 3.5.....2, 3, 8, 9, 11, 12, 14, 16, 29
CrR 3.6.....2, 3, 8, 9, 11, 12, 14, 16, 29

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly conclude that Officer Smalls and Officer Viehmann had probable cause to arrest defendant after fellow officers observed defendant appear to sell cocaine in an open-air drug market?
2. Did RCW 10.31.100 authorize Officers Smalls and Viehmann to arrest defendant when Officers Smalls's and Viehmann's fellow officers had probable cause to believe they had witnessed defendant commit a gross misdemeanor?

B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2003, the Pierce County Prosecutor's Office filed an information charging TITUS DION PETERSON, hereinafter, "defendant," with one count of unlawful possession of a controlled substance with intent to deliver and one count of resisting arrest. CP 1-3. On February 1, 2006, the State amended this information to allege that, while unlawfully possessing a controlled substance with intent to deliver, defendant was within 1,000 feet of a school bus route stop and was on community placement. CP 4-6.

a. CrR 3.5/3.6 Hearing

Before trial, the court held a CrR 3.5/3.6 hearing to determine the admissibility of statements that defendant made to Officers Kenneth Viehmann and Zachary Smalls, of thirty pieces of crack cocaine that the officers found on defendant's person, and of \$75 that the officers found on defendant's person. RP (2) 18-RP(3)150.¹ During this hearing, the State called Sgt. Ronald Bieker, Sgt. Richard Caron, Officer Zachary Smalls, Officer Kenneth Viehmann, and Officer Larry Bornander. RP(2) 20-RP(3) 116. Defendant testified on his own behalf at the hearing. RP(3) 117-125. The court found that defendant's statements and the evidence found on him at the time of arrest were admissible. RP 129-30, 150; CP 92-106. In reaching these conclusions, the court also concluded that Officers Smalls and Viehmann had probable cause to arrest defendant. RP(3) 150; CP 92-106 (RAE² I).

¹ The Verbatim Report of Proceedings for this appeal is contained in 13 volumes, each of which begins with page one. Eleven of the volumes are numbered. Citations to these numbered volumes will appear as "RP([volume number])" followed by the page number (e.g., "RP(1) 1" refers to volume one, page one). Neither the volume containing the morning session of the proceedings of April 18, 2006, nor the volume containing the hearing on findings of fact on July 17, 2006, are numbered. Citations to these unnumbered volumes will appear as "RP([date])" followed by the page number (e.g., "RP(4/18/06) 1" refers to page one of the volume containing the proceedings of April 18, 2006).

² The trial court's Findings and Conclusions on Admissibility of Evidence have two sections: one entitled "The Undisputed Facts" and one entitled "Reasons for Admissibility of the Evidence." CP 92-106. References to the enumerated "Undisputed Facts" in this brief will be labeled "UF" followed by the fact number (e.g., "UF 1" refers to the first undisputed fact). References to the enumerated "Reasons for Admissibility of the Evidence" in this brief will be labeled "RAE" followed by the enumerated reason (e.g., "RAE 1" refers to the first reason for the admissibility of the evidence).

b. Trial on the Merits

The matter proceeded to a bench trial on April 17, 2006. RP(4) 4. The trial court found defendant guilty of both charges of the Amended Information. RP(6) 4. The court sentenced defendant to 111 months confinement to be served consecutively to a robbery conviction from King County. RP(10) 12; CP 41-54. The trial court also ordered defendant to pay monetary penalties. RP(10) 12; CP 41-54. The court ordered the Department of Corrections to calculate the credit defendant would receive for time served. CP 41-54. From this sentence, defendant has filed a timely notice of appeal. CP 107-121.

2. Facts as Presented at the CrR 3.5/3.6 Hearing³

On April 1, 2003, Sgt. Caron, Officer Bornander, Sgt. Bieker, Officer Smalls, and Officer Viehmann participated in a “narcotics emphasis looking for street-level dealings” at the intersection of 13th Street and Tacoma Avenue South in Tacoma, Washington. RP(2) 27-28, 68-69; RP(3) 48-50, 72-73, 89. This area is well-known as an open-air drug market. RP(2) 66-67, 70; RP(3) 42, 47, 90; CP 92-106 (UF III, XXIX). Sgt. Caron supervised the operation and participated in the narcotics emphasis as part of a stationary surveillance unit with Officer Bornander. RP(3) 48-50. Sgt. Caron and Officer Bornander used

³ Defendant only challenges the court’s findings from the CrR 3.5/3.6 hearing. The facts presented at trial are not relevant to this appeal and do not appear here.

binoculars to observe the intersection of 13th Street and Tacoma Avenue South from a nearby building overlooking the area. RP(3) 49-50, 90-91, 95. Sgt. Bieker acted as a mobile surveillance unit; he wore plain clothes and drove an unmarked vehicle to different locations in the area in hopes of witnessing drug activity. RP(2) 27-28; RP(3) 50. Officers Smalls and Viehmann were on the arrest team. RP(2) 68-69; RP(3) 49-50, 72-73. They drove a marked police vehicle, wore police uniforms, and waited outside the area until Sgt. Caron ordered them to enter the area and arrest someone that the unit had probable cause to believe was participating in drug activity. RP(2) 68-69; RP(3) 49-50; 72-73. During the operation, all the officers were in constant radio communication about their observations. RP(3) 11, 58, 91; CP 92-106 (UF IV).

Sgt. Bieker was parked in an alley that day when a black female in a yellow jacket entered the alley and approached a white male. RP CP 92-106 (UF VII and VIII). Sgt. Bieker was fifteen to twenty feet away from the man and saw that the man was holding a twenty dollar bill in the fingertips of his cupped hand. CP 92-106 (UF VII and VIII). When the black female approached the white male, she took the twenty dollar bill from his fingers and dropped a white substance into his hand. RP(2) 30-33. Sgt. Bieker has seen crack cocaine on numerous occasions, and he concluded that the white substance was crack cocaine. RP(2) 22-24, 30-33. He reported this transaction to Sgt. Caron via radio. CP 92-106 (UF XXI).

The black female then left the alley. RP(2) 33. A short time later, Sgt. Caron, Officer Bornander, and Sgt. Bieker saw the black female in the yellow jacket meet defendant on the street and walk with him to an alcove on Tacoma Avenue South. RP(2) 40-41; RP(3) 52, 56, 92, 94. Defendant faced into the alcove with his back to the street, pulled up his shirt, and began to fumble for something in his pants. RP(2) 40-41; RP(3) 56, 94. The female stood to his left with her back to the alcove and appeared to watch the street while defendant fumbled with his clothing. RP(3) 52-53, 92; CP 92-106 (UF XIII, XIV, XVIII). After adjusting his pants, defendant turned his head toward the female, and she cupped her right hand upward behind her back. RP(3) 53-55 93-94; CP 92-106 (UF XIII, XIV, XVIII). Defendant then placed something in her hand, and she put the hand in her jacket pocket. RP(3) 13, 56, 94; CP 92-106 (UF XIII, XIV).

The black female in the yellow jacket left the alcove and walked away. RP(3) 56, 94. Defendant seemed to put something into his pants, readjusted his clothing, and left the alcove. RP(3) 56, 94. As defendant approached the intersection of 13th Street and Tacoma Avenue South, a dense group of people formed around him. RP(3) 97-99. In Officer Bornander's experience, this gathering was consistent with situations in which one drug dealer sells to a group of people. RP(3) 97-99. He testified that a group of people buying drugs will flock to the seller as if

the seller were “the school kid with a bag of candy on the playground.”
RP(3) 96.

While defendant was among this group of people, Officer Bornander and Sgt. Caron saw the black female in the yellow jacket contact three people. RP(3) 60, 99-100; CP 92-106 (UF XXII). First, she contacted a white male and walked shoulder-to-shoulder with him for a while. RP(3) 99-100; CP 92-106 (UF XXII). From their head and hand movements, Officer Bornander concluded that they were exchanging something between them. RP(3) 99-100; CP 92-106 (UF XXII). After this exchange, the black female in the yellow jacket went directly to defendant and appeared to hand him something. RP(3) 101; CP 92-106 (UF XXII, XXIII). Next, the black female in the yellow jacket contacted a white female and brought the white female directly to defendant. RP(3) 60, 103-105; CP 92-106 (UF XXII, XXIV). After this short contact, the white female left the area. RP(3) 107. Finally, the black female in the yellow jacket contacted a white male. RP(3) 60; CP 92-106 (UF XXII). She brought the white male directly to defendant, who had a short contact with the white male. RP(3) 61-62.

Sgt. Caron felt that these exchanges were consistent with the short, clandestine transactions of drug middling. RP(3) 61-62. Drug middling occurs when one person who has a high quantity of drugs on his person (the dealer) enlists the help of another person (the middler) in selling the drugs. RP(3) 43-47; CP 92-106 (UF XVI). The middler takes a small

quantity of drugs from the dealer and sells them to someone on the street. RP(3) 43-47; CP 92-106 (UF XVI). The middler then returns to the dealer, gives the dealer the money, and obtains another small quantity of drugs to sell on the street. RP(3) 43-47; CP 92-106 (UF XVI). When the middler returns to the dealer to exchange cash and drugs, the exchange is usually covert. RP(3) 57, 95.

After his own observations and those of Officer Bornander, Sgt. Caron felt that he had probable cause to arrest defendant for loitering for the purposes of drug activity. RP(3) 65; CP 92-106 (UF XXIV, XXVI). When defendant went into a corner store at the intersection of 13th Street and Tacoma Avenue South, Sgt. Caron called Officers Smalls and Viehmann on the radio and ordered them to arrest defendant. RP(3) 65. Sgt. Caron described defendant as a black man, wearing a red plaid shirt, blue jeans, and a hood or hat. RP(3) 13, 52, 65, 74, 91. He told the officers that defendant had entered a store on the corner of the intersection of 13th Street and Tacoma Avenue South. RP(3) 65.

Officers Smalls and Viehmann went to the corner store, and Sgt. Caron watched the officers enter the store from his surveillance position. RP(3) 13-14, 65, 74, 107; CP 92-106 (UF XXVIII). When Officers Smalls and Viehmann entered the store, they saw defendant look around the store as if trying to find another exit. RP(3) 15. Officer Smalls arrested and handcuffed defendant and performed a standard pat-down search of defendant's person. RP(3) 15-16. During this search, Officer

Smalls found a plastic bag with thirty pieces of crack cocaine in the waistband of defendant's pants. RP(3) 16, 17, 76; CP 92-106 (UF XXXI). The Officers then advised defendant that he was under arrest and informed defendant of his Miranda rights. RP(3) 77. Sgt. Caron watched from his surveillance position as the Officers led defendant out of the store. RP(3) 66, 77, 107-108; CP 92-106 (UF XXXV). Sgt. Caron confirmed that the officers had arrested the same person he had seen in the alcove with the black female with the yellow jacket. RP(3) 66, 77, 107-108; CP 92-106 (UF XXXV).

Officers Smalls and Viehmann took defendant to the Pierce County Jail. RP(3) 77. When the officers took defendant out of the vehicle at the jail, defendant broke away from the officers and ran toward the County-City Building. RP(3) 77-78. He tripped and fell near the entrance to the County-City Building, and Officers Smalls and Viehmann apprehended him again. RP(3) 78.

During this the CrR 3.5/3.6 hearing, defendant testified that he was in the corner store on April 1, 2003, and claimed he did not receive his Miranda warnings until he arrived at the Pierce County Jail. RP(3) 120-125. Defendant did not call any witnesses at the CrR 3.5/3.6 hearing. Defendant did not call any witnesses or testify at the trial on the merits.

C. ARGUMENT.

1. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT OFFICER SMALLS AND OFFICER VIEHMANN HAD PROBABLE CAUSE TO ARREST DEFENDANT AFTER FELLOW OFFICERS OBSERVED DEFENDANT APPEAR TO SELL COCAINE IN AN OPEN-AIR DRUG MARKET.

This appeal is confined to the court's finding under the CrR 3.5/3.6 motion that Officers Smalls and Viehmann had probable cause to arrest defendant on April 1, 2003. Defendant only assigns error to the "Findings and Conclusions on Admissibility of Evidence CrR 3.5/3.6." Br. of Appellant at 1-2; see CP 92-106. He does not assign error to either the "Findings of Fact and Conclusions of Law Admissibility of Statement CrR 3.5" or the "Findings of Fact and Conclusions of Law re: Bench Trial." Br. of Appellant at 1-2; see CP 60-91. Moreover, defendant's Statement of Facts is supported only by citations to the record of the CrR 3.5/3.6 hearing. Br. of Appellant at 5-12.

At the close of the CrR 3.5/3.6 hearing, the court properly found that the police officers had probable cause to arrest defendant. A defendant may move to suppress physical evidence before trial. CrR 3.5/3.6. This Court reviews a trial court's denial of a CrR 3.5/3.6 suppression motion to determine (1) whether substantial evidence supports the trial court's challenged findings of fact and, (2) whether the findings support the trial court's conclusions of law. State v. Cole, 122 Wn. App.

319, 323, 93 P.3d 209 (2004); see also State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001) (the question of whether probable cause exists is a mixed question of law and fact). There is substantial evidence to support a finding of fact if there is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). After determining whether substantial evidence supports the trial court's findings of fact, this Court reviews de novo whether there was probable cause to arrest. Cole, 122 Wn. App. at 323 (citing State v. Mendez, 137 Wn.2d at 214).

a. The trial court's findings of undisputed fact were supported by substantial evidence.

An appellate court only reviews those facts to which error has been assigned. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2002). Facts to which a defendant has not assigned error are verities on appeal. Id. Defendant does not assign error to Facts I-IV, VI-VIII, XI-XVIII, XXI-XXVI, or XXVIII-XXXVI. He also does not assign error to Reason for Admissibility of the Evidence I, which reads, "At the time of the defendant's arrest, the officers had probable cause to arrest defendant for the crime of Loitering for Purposes of Drug Activity (LPDA), a violation of Tacoma Municipal code 8.72.010(A)." CP 92-106. These facts and conclusions are thus verities on appeal. See Acrey, 148 Wn.2d at 745.

Defendant assigns error to the trial court's Facts on Admissibility of Evidence CrR 3.5/3.6 numbers V, IX, X, XIX, XX, and XXVII. Br. of Appellant at 1-2. These findings are supported by substantial evidence from the CrR 3.5/3.6 hearing because there is sufficient evidence to persuade a fair-minded, rational person of the truth of each fact.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact V. Fact V reads, "Sgt. Bieker was in plain clothes and in an unmarked patrol car equipped with tinted windows during the investigation." CP 92-106 (UF V). Sgt. Bieker testified that on April 1, 2003, he was in a tinted, unmarked vehicle wearing plain clothes. RP(2) 27-28. He testified that he was participating in a "street-level narcotics emphasis looking for street-level dealings on the corners in that area." RP(2) 27. Sgt. Caron testified that Officer Bieker was one of the roving, street-level surveillance units during the operation. RP(3) 50.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact IX. Fact IX reads,

After he witnessed the Black female in the yellow jacket exchange "crack" cocaine for money, Sgt. Bieker contacted the other officers participating in the investigation by radio. Bieker informed the other officers of his observations of the street sale of crack and provided a description of the black female in the yellow jacket.

CP 92-106 (UF IX). Sgt. Bieker testified that he saw the black female in the yellow jacket approach a man in an alley and take a twenty dollar bill from his fingers while dropping a “rock [of what] appeared to be crack cocaine” into the man’s hand. RP(2) 30-32. He was fifteen to twenty feet from the female when she did this. RP(2) 30. Sgt. Bieker reported this information to the other officers of the operation via radio. RP(2) 33. Sgt. Caron and Officer Bornander both heard Sgt. Bieker report that he saw this exchange. RP(3) 59-60, 91.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact X. Fact X reads, “Sgt. Bieker then observed the black female in the yellow jacket make contact with several other persons, but he was unable to discern the nature of those contacts.” CP 92-106 (UF X). Sgt. Bieker testified that he saw the black female in the yellow jacket make “several more contacts” contact with other individuals after she sold crack cocaine to the man in the alley. RP(2) 34. He could not see precisely what these people were doing when they contacted the black female in the yellow jacket. RP(2) 34.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact XIX. Fact XIX reads,

[After the contact in the alcove,] the Black female in the yellow jacket walked away from the defendant and back down to Tacoma Avenue. Caron then observed as the

defendant remained in the doorway. The officers watched as the defendant tucked his shirt back into his waistband hooked his pants back up. Based upon their professional experience and observations, Officer Bornander, Sgt. Caron and Sgt. Bieker each formed the opinion that they had witnessed the defendant engage in a drug transaction with the Black female in the yellow jacket in the alcove.

CP 92-106 (UF XIX). Sgt. Caron and Officer Bornander testified that, after defendant contacted the black female in the yellow jacket in the alcove, the female left the alcove and walked down Tacoma Avenue. RP(3) 56, 94. They then saw defendant stuff something in his pants, fasten his pants, and walk away from the alcove. RP(3) 56, 94. They also testified that clandestine exchanges like the one that occurred in the alcove are consistent with an exchange of drugs between a “middler” and a dealer. RP(3) 57, 95. Based on these observations and their experience with middling, Sgt. Caron and Officer Bornander believed that the female and defendant were engaged in a drug activity. RP(3) 57, 62, 95.

Sgt. Bieker watched the incident in the alcove and testified that it appeared that defendant and the black female in the yellow jacket were “exchanging items in a fashion similar to that of a drug transaction.” RP(2) 40, 41. He also testified that he believed that the female in the yellow jacket was “middling [drug] deals” for defendant. RP(2) 41. Sgt. Caron felt that based on his own observations and those of Officer Bornander and Sgt. Bieker, there was probable cause to arrest defendant. RP(3) 12, 65, 73.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact XX. Fact XX reads,

The defendant put his hood up and walked west up the hill on 13th Avenue where he was approached by five to seven other people. Once a person engages in a drug transaction on the street it is common for others in the area to then approach that person in the hope of getting some drugs. After the defendant engaged in the drug transaction in the alcove, Officer Bornander observed that the defendant became the center of attention amongst the five to seven others that joined him.

CP 92-160 (UF XX). Officer Bornander testified that he saw defendant leave the alcove and that, shortly thereafter, defendant was surrounded by a dense group of several people. RP(3) 97-99. He said that this is typical behavior during a drug transaction because many buyers want to contact the dealer in order to purchase narcotics. RP(3) 97-99.

There was sufficient evidence at the CrR 3.5/3.6 hearing to persuade a fair-minded, rational person of the truth of Undisputed Fact XXVII. Fact XXVII reads,

Sgt. Caron contacted Officers Viehmann and Smalls by radio [after Sgt. Caron formed the opinion that the defendant and the black female in the yellow jacket were loitering for the purpose of drug activity] and directed them to arrest the defendant for Loitering for the Purpose of Drug Activity. When Caron spoke to Viehmann, he advised that he and Bornander had witnessed the defendant participate in a drug transaction that involved the defendant participating in a hand to hand transfer with a Black female. Caron advised Viehmann that the defendant was a Black male in a red plaid shirt with a hood and that he was in a store on the

corner of 13th and Tacoma Avenue South. Viehmann and Smalls were in uniform and in a marked patrol car parked out of the area at the time that they received the directive from Sgt. Caron.

CP 92-106 (UF XXVII). All the officers of the unit, including Officers Small and Viehmann, were in constant radio and Nextel communication throughout the operation. RP(3) 11, 58, 91; CP 92-106 (UF IV). Sgt. Caron testified that when he had probable cause to arrest defendant for loitering for the purpose of drug activity, he radioed Officers Smalls and Viehmann and told them to arrest defendant. RP(3) 65. Officers Smalls and Viehmann confirmed that they received a radio communication from Sgt. Caron to arrest defendant. RP(3) 13, 73. They both testified that Sgt. Caron described defendant as “a black male, 20, wearing a red-colored plaid shirt, blue jeans and a dark knit hat” or hood. RP(3) 13, 52, 74, 91. Sgt. Caron told them he had gone into a store on the southwest corner of 13th and Tacoma Avenue South. RP(3) 13-14, 65, 74, 107. Officer Viehmann testified that Sgt. Caron said defendant had been involved in a “furtive transaction in an alcove in the area.” RP(3) 13. Both officers said they were in police uniforms in a marked patrol car when they received these radio communications. RP(2) 68-69; RP(3)50, 72-73.

The State presented substantial evidence to support each of the undisputed facts to which defendant assigns error. Moreover, defendant provided no evidence to contradict any of these facts. RP(3) 117-125.

Thus, the undisputed facts were supported by substantial evidence at the CrR 3.5/3.6 hearing.

- b. The findings support the conclusion that Officers Viehmann and Smalls had probable cause to arrest defendant.

Defendant's CrR 3.5/3.6 motion at the trial level was based on the argument that that Officers Smalls and Viehmann did not have probable cause to arrest defendant in the corner store. An officer may conduct a search of the arrestee's person if the search is incident to a valid arrest. State v. Craig, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002). An officer may arrest a person without a warrant "for committing a ... gross misdemeanor only when the offense is committed in the presence of the officer." RCW 10.31.100. Defendant in this case was arrested for loitering for purposes of drug activity, a gross misdemeanor under Tacoma Municipal Code. Tacoma Municipal Code 8.72.040.

When police officers act together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to arrest a particular suspect. Staats v. Brown, 139 Wn.2d 757, 791, 991 P.2d 615 (2000); State v. Alvarado, 56 Wn. App. 454, 456, 783 P.2d 1106 (1989); State v. Maesse, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981). An arresting officer who does not personally possess sufficient information to constitute probable cause may still make a warrantless arrest by relying on what other officers

or police agencies know or by acting upon the direction or as a result of a communication from a fellow officer. Brown, 139 Wn.2d at 791; State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996). This is commonly referred to as the “fellow officer” rule. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996). For purposes of RCW 10.31.100, the fellow officer rule allows an officer to arrest someone when there is cumulative knowledge that provides probable cause that the arrestee has committed a gross misdemeanor. Torrey v. City of Tukwila, 76 Wn. App. 32, 39, 882 P.2d 799 (1994).

Thus, defendant’s arrest was valid if (1) Officers Smalls and Viehmann were working with other officers as a unit, and (2) the other officers had probable cause to believe that defendant had committed the crime of loitering for purposes of drug activity in their presence.

i. Officers Smalls and Viehmann were working with many officers as a single unit.

Officers Smalls and Viehmann were working with many police officers as a unit when they arrested defendant. Sgt. Caron supervised the operation that was designed to detect open-air drug activity near the corner of 13th and Tacoma Ave. South. RP(3) 48-49. Sgt. Caron and Officer Bornander maintained a stationary observation position from a nearby building and watched defendant and the black woman in the yellow jacket. RP(3) 49-50, 89-91, 95. These two officers used binoculars to watch the

area closely. RP(3) 50, 89. Sgt. Bieker acted as an undercover mobile surveillance unit, watching alleyways and other areas that Sgt. Caron and Officer Bornander could not otherwise see. RP(2) 27-28; RP(3) 50. Officers Viehmann and Smalls comprised the uniformed arrest team. RP(2) 67-69; RP(3) 49-50, 72-73. They were wearing police uniforms and driving a marked patrol vehicle outside the area until Sgt. Caron ordered them to make an arrest. RP(2) 68-69; RP(3) 50, 65, 72-73. The arrest team knew that Sgt. Caron and Officer Bornander were watching the area of 13th and Tacoma from a concealed observation post. RP(2) 69. Throughout the operation, all the officers were in constant radio communication. RP(2) 33, 68-69; RP(3) 11, 13-14, 50, 58-60, 65, 72-74, 91, 107; CP 92-106 (UF IV).

Defendant's arrest demonstrated that the officers were working as a single unit to identify and arrest one man. The officers saw a man engage in a transaction with a black female in a yellow jacket in an alcove. RP(3) 12-13, 52-56, 73, 92-94; CP 92-106 (UF XIII, XIV, XVIII). They gave similar descriptions of that person: he was a black male wearing a red-colored plaid shirt, blue jeans, and a hood or cap. RP(3) 13, 52, 74, 91. After Sgt. Caron concluded that the officers had probable cause to arrest, he described defendant to Officers Smalls and Viehmann for loitering for the purpose of drugs activity. RP(3) 13, 15, 74; CP 92-106 (UF XXXI). Sgt. Caron watched defendant enter a store, relayed that information to Officers Smalls and Viehmann, and watched the officers

enter the store to which he had directed them. RP(3) 13-14, 65, 107; CP 92-106 (UF XXVIII). In the store, Officers Smalls and Viehmann arrested a man that matched the description that Sgt. Caron had given them. RP(3) 14, 74. Sgt. Caron watched the officers escort defendant out of the store in handcuffs and noted that defendant was the same person he had seen in the alcove. RP(3) 66, 77, 107-108; CP 92-106 (UF XXXV).

ii. Officers Smalls and Viehmann and their fellow officers had probable cause to believe that defendant had committed the crime of loitering for purposes of drug activity in the presence of officers in the unit.

Probable cause to arrest exists where “the facts and circumstances within the arresting officer’s knowledge ... of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” State v. Lund, 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993), review denied, 123 Wn.2d 1023 (1994); State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (citing State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

At the time of arrest, the arresting officer need not have evidence to prove each element of the crime beyond a reasonable doubt; the officer is required only to have knowledge of facts sufficient to cause a reasonable person to believe that an offense had been committed. Gaddy,

152 Wn.2d at 70 (citing State v. Knighten, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988)). It does require more than “a bare suspicion of criminal activity.” Terrovona, 105 Wn.2d at 643; see also State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996); State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261, review denied, 115 Wn.2d 1020, 802 P.2d 126 (1990). The standard for probable cause is lower than “by a preponderance of the evidence” and lower than that needed to send a case to the jury. Ornelas v. United States, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). The standard of reasonableness to be applied in narcotics cases takes into consideration the special experience and expertise of the arresting officer. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

The existence of probable cause is determined by an objectively reasonable standard that is to be applied in light of everyday experience rather than strict legal formulae. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (citing State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996)); State v. Scott, 93 Wn.2d 7, 10, 604 P.2d 943 (1980); Ornelas, 517 U.S. at 695. An arresting officer’s special experience must be given consideration in determining whether it was reasonable for the officer to believe that the defendant had probably committed a crime. Scott, 93 Wn.2d at 10. The arresting officer is entitled to view the facts before him through the lens of his or her police experience and expertise. Ornelas, 517 U.S. at 699. Probable cause is determined by the facts and

circumstances ““within the officer’s knowledge at the time of the arrest.”” State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990) (quoting State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)). Probable cause cannot be supported by information police gain following an arrest. See Rios v. United States, 364 U.S. 253, 261-62, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Henry v. United States, 361 U.S. 98, 103, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959). State v. Mance, 82 Wn. App. 539, 541-42, 918 P.2d 527 (1996).

A person is guilty of loitering for purposes of drug activity if he “loiter[s] in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the intent to engage in drug-related activity contrary to any of the provisions of Chapters 69.41, 69.50, or 69.52 RCW.” Tacoma Municipal Code 8.72.010(A). RCW 69.50.401(1) reads, “[e]xcept as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). Cocaine is a controlled substance. RCW 69.50.206(b)(4) and (b)(5).

The police officers involved in this operation had probable cause to believe that defendant committed loitering for the purpose of drug activity in the presence of the officers in the unit. Defendant fails to assign error to Reason for Admissibility of the Evidence I, which expresses the trial court’s finding that “[a]t the time of the defendant’s arrest, the officers had

probable cause to arrest the defendant for the crime of Loitering for the Purposes of Drug Activity (LPDA), a violation of Tacoma Municipal code 8.72.010(A).” CP 92-106 (RAE I). Because defendant failed to assign error to this conclusion, it is a verity on appeal that the Officers Smalls and Viehmann had probable cause to arrest defendant in this case. See Acrey, 148 Wn.2d at 745.

Even if defendant had assigned error to Reason for Admissibility of the Evidence I, the court still correctly concluded that Officers Smalls and Viehmann had probable cause to arrest defendant. On April 1, 2003, Sgt. Bieker saw a black female in a yellow jacket conduct a drug transaction in an alley in an area known for its drug activity, and he reported this transaction to Sgt. Caron, Officer Bornander, Sgt. Bieker, Officer Smalls, and Officer Viehmann. RP(2) 66-67, 70; RP(3) 42, 47, 59-60, 90-91; CP 92-106 (UF III, VII, VIII, XXI, XXIX). After this transaction, Sgt. Caron, Officer Bornander, and Sgt. Bieker saw the black female have a secretive exchange with defendant in a nearby alcove. RP(3) 13, 52-56, 92-94; CP 92-106 (UF XIII, XIV, XVIII). After leaving the alcove, defendant engaged in activity consistent with selling drugs to a large group of people. RP(3) 97-99. Meanwhile, the officers observed the black female conduct three short, clandestine exchanges with three other people that were consistent with selling drugs. RP(3) 60, 98-100, 103-105; CP 92-106 (UF XXII, XXIV). Either after or during each of these exchanges, the black female in the yellow jacket returned to defendant and

made a short contact with him. RP(3) 61-63, 101; CP 92-106 (UF XXII, XXIII). The officers who observed defendant were familiar with drug “middling,” a way of selling drugs on the street. RP(3) 43-47, 57, 95; CP 92-106 (UF XVI). After observing defendant engage in these exchanges with the black female and others, the officers believed that defendant was selling drugs. RP(3) 61-62, 95.

Officers Smalls and Viehmann thus had probable cause to arrest defendant for loitering for the purposes of drug activity. The facts and circumstances within their knowledge suggested that defendant was engaged in selling drugs with the help of a middler. These facts and circumstances were observed by several officers with experience in identifying drugs and drug activity. The observing officers reported many transactions to each other in which either the defendant or his apparent middler was selling drugs to people on the street. Based on the information within their knowledge, the number of transactions officers observed, and the experience of all the officers involved in the narcotics emphasis, Officers Smalls and Viehmann had reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that defendant was loitering in the area to sell crack cocaine. Thus, the arresting officers had probable cause to arrest defendant for the crime of loitering for the purposes of drug activity.

The trial court correctly concluded that the Officers Smalls and Viehmann were authorized to arrest defendant because the facts on which

it relied were supported by substantial evidence and because the arresting officers had probable cause to believe that their fellow officers observed defendant loitering for purposes of drug activity.

2. OFFICERS MAY ARREST A PERSON WHEN FELLOW OFFICERS IN A UNIT OBSERVE THE PERSON SELLING CRACK COCAINE.

Defendant argues that the fellow officer rule does not apply to cases in which a person is arrested for committing a felony. Br. of appellant at 12-18. RCW 10.31.100 authorized the arrest in this case. Even if RCW 10.31.100 did not authorize the arrest in this case, such an error was harmless.

a. The fellow officer rule applies to misdemeanors as well as felonies.

“A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.” RCW 10.31.100. Washington courts have applied the fellow officer rule, holding that it is lawful for an officer to conduct a warrantless arrest for a misdemeanor or gross misdemeanor when the arresting officer was not the officer who observed a misdemeanor being committed in his presence. Torrey v. City of Tukwila, 76 Wn. App. 32, 39, 882 P.2d 799 (1994). All that the court requires is that the officers act as a unit. Id.

As noted above, all the officers who participated in the narcotics emphasis on April 1, 2003, including Officers Smalls and Viehmann, were acting as a unit when defendant was arrested. While working as a unit with officer Smalls and Viehmann, Sgt. Caron, Officer Bornander, and Sgt. Bieker observed defendant conduct several transactions consistent with selling drugs. RP(2) 40-41; RP(3) 13, 52-56, 60-62, 92-94, 96-101, 103-105, 107; CP 92-106 (UF XIII, XIV, XVIII, XXII-XXIV). Defendant made these transactions in the presence of the observing officers, who were either in a van at street level observing his actions or in a nearby building observing his actions. RP(2) 27-28, 68-69; RP(3) 49-50, 72-73, 90-91, 95. During the operation, all the officers were in constant radio communication about their observations. RP(3) 11, 58, 91; CP 92-106 (UF IV). At the time defendant made these transactions, he was loitering in the area of 13th Street and Tacoma Avenue South. RP(2) 27-28, 68-69; RP(3) 48-50, 72-73, 89. Thus, Sgt. Caron, Officer Bornander, and Sgt. Bieker had probable cause to believe that defendant had committed a gross misdemeanor in their presence: loitering for the purpose of drug activity. Officers Smalls and Viehmann, who were working in a unit with the observing officers, were authorized to arrest defendant under RCW 10.31.100.

The Washington Court of Appeals has already held that the fellow officer rule permits the kind of arrest that occurred here. In Torrey v. Tukwila, 76 Wn. App. 32, three adult dancers sued the City of Tukwila

under 42 U.S.C. §1983, claiming that RCW 10.31.100 did not authorize their warrantless gross misdemeanor arrests. Id. at 37-39.⁴ On April 3, 1992, the Tukwila Police formed a police unit comprised of several undercover officers and one arresting officer to catch adult dancers at a local club who violated Tukwila Municipal Code (“TMC”) chapter 5.56, which regulated the conduct of adult entertainers. Id. at 34-35. The undercover officers entered the club, watched the dancers, and obtained probable cause that the actions they were observing constituted gross misdemeanors under TMC chapter 5.56. Id. at 35, 37. The arresting officer then entered the club, spoke to the undercover officers, and arrested dancers that the undercover officers said had committed gross misdemeanors under TMC. Id. at 35, 37. The court held that, in accordance with the fellow officer rule, RCW 10.31.100 authorized the arresting officer to arrest the dancers that the undercover officers in the unit had witnessed commit gross misdemeanors. Id. at 39.

This case is identical to Torrey. Here, Sgt. Caron formed a police unit comprised of officers in surveillance and arrest units in order to perform a street-level narcotics emphasis at the intersection of 13th Street and Tacoma Avenue South. RP(2) 27-28, 68-69; RP(3) 48-50, 72-73, 89. The surveillance units entered the area, watched defendant and his

⁴ The version of RCW 10.31.100 in Torrey was identical in relevant part to the current version of RCW 10.31.100. Torrey, 76 Wn. App at 37-39.

apparent middler, and obtained probable cause that defendant was loitering for the purposes of drug activity in violation of Tacoma Municipal Code 8.72.010. RP(2) 40-41; RP(3) 13, 52-56, 60-62, 65, 92-94, 96-101, 103-105, 107; CP 92-106 (UF XIII, XIV, XVIII, XXII-XXIV, XXVI). Sgt. Caron then spoke to Officers Smalls and Viehmann of the arrest unit, who entered the area and arrested defendant for committing a gross misdemeanor under Tacoma Municipal Code 8.72.010 and 040. RP(3) 13-17, 65-66, 74, 76-77, 107-108; CP 92-106 (UF XXIV, XXVI, XXVIII, XXXV). Thus, under the fellow officer rule, Officers Smalls's and Viehmann's arrest of defendant was valid because the surveillance officers in their unit had witnessed defendant commit a gross misdemeanor.

Defendant's reading of RCW 10.31.100 does not provide any more protection to arrestees. Under defendant's reading of RCW 10.31.100, undercover officers would have to conduct gross misdemeanor arrests without the help of uniformed officers. Such a practice would not protect the arrestee; the officer will still perform the arrest because the officer has witnessed the crime. Defendant's interpretation of RCW 10.31.100 only protects someone nearby who is preparing to commit a crime and is now alerted to the presence of undercover officers in the area.

Defendant's interpretation would moreover make undercover operations more hazardous and less effective. Sgt. Caron testified that there are two reasons that uniformed officers perform arrests after

undercover officers observe the crimes: (1) “it is safer to have a uniform officer make the contact” with the defendant, and (2) uniformed officers “keep[] the undercover officers insulated so nobody immediately knows that the plain clothes are in the area doing a contact.” RP(3) 48-49. If an undercover officer is forced to perform the arrest, then it is possible that the arrestee will not realize that the person arresting him is authorized to perform that arrest. In such a case, the arrestee may justifiably attack the officer or otherwise endanger him. Passersby would not be encouraged to help the officer because they would not know that the officer was performing his duties. In fact, they may think the officer is an aggressor and be encouraged to intervene and attack the officer in a misguided attempt to protect the arrestee. Furthermore, once an undercover officer conducts an arrest, any observer would then know that the officer was an officer. People who may have been planning to commit other crimes would then be notified that a police officer was in the area. The officer could never again work in that area in an undercover capacity, and anyone who wanted to commit a crime would simply leave the area and find a place where he or she could conduct illegal activity unobserved.

The Washington Court of Appeals has held that RCW 10.31.100 does not preclude the use of the fellow officer rule to establish probable cause to conduct a warrantless gross misdemeanor arrest. An officer may rely on the observations of other officers with whom he is acting as a unit in order to establish probable cause to arrest a person for committing a

gross misdemeanor. A contrary rule would not provide any more protection to arrestees, but it would threaten officer safety and severely undermine the effectiveness of undercover police operations.

- b. Alternatively, this Court may affirm the trial court's suppression ruling where there is probable cause to believe defendant committed unlawful delivery of a controlled substance.

This Court can affirm the trial court's decision to deny the CrR 3.5/3.6 motion on any ground supported by the record, even if the trial court made an erroneous legal conclusion. State v. Woods, 117 Wn. App. 278, 279, 70 P.3d 976 (2003); State v. Bryant, 97 Wn. App. 479, 490-91, 983 P.2d 1181 (1999) (citing State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998), review denied, 140 Wn.2d 1026, 10 P.3d 406 (2000)).

An officer may arrest a person without a warrant if the officer has “probable cause to believe that a person has committed or is committing a felony.” RCW 10.31.100. It is a felony for any person to “manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401. Cocaine is a controlled substance. RCW 69.50.206(b)(4) and (b)(5).

Even if this Court finds that Officers Smalls and Viehmann could not arrest defendant for loitering for purposes of drug activity, it can affirm because Officer Smalls and Viehmann had probable cause to

believe defendant had committed the felony of unlawful delivery of a controlled substance. As argued above, Officers Smalls and Viehmann were working with Sgt. Caron, Sgt. Bieker, and Officer Bornander as a unit. As a unit, they witnessed defendant's actions, which gave them probable cause to believe that defendant was selling crack cocaine in a public place. RP(2) 40-41; RP(3) 13, 52-56, 60-62, 92-94, 96-101, 103-105, 107; CP 92-106 (UF XIII, XIV, XVIII, XXII-XXIV). Their conclusion that defendant was loitering for the purposes of drug activity was based on their conclusion that defendant was possessing and selling crack cocaine. RP(3) 43-4, 57, 957; CP 92-106 (UF XVI).

In State v. Alvarado, 56 Wn. App. 454, 783 P.2d 1106 (1989), the fellow officer rule authorized an arrest team to arrest a man for selling cocaine even when the arresting officers did not witness the sale and the arresting officers were unidentified. Officer Trebesh and Officer Miller set up two separate observation posts of one area in Seattle where Alvarado engaged in the sale of a "bindle" of cocaine outside a storefront. Id. at 455. Officer Trebesh observed these transactions from a nearby storefront window observing through the curtains; Officer Miller used binoculars to observe from a further distance. Id. at 455. Both officers radioed to an arrest team that they had witnessed these transactions, and both units provided a description of Alvarado. Id. at 455. The arrest team arrived immediately after this radio communication and Miller watched them arrest Alvarado. Id. at 455, 457. Although the officers could not

testify as to the identity of the arresting officer in this case, the court held that the fellow officer rule gave the arresting officer probable cause to arrest Alvarado. Id. at 457.

The fellow officer rule authorized the arrest in this case as well. Sgt. Caron, Officer Bornander, and Sgt. Bieker set up two separate observation posts in one area in Tacoma where defendant engaged in the sale of “crack” cocaine. RP(2) 66-67, 70; RP(3) 13, 42-47, 52-57, 59-63, 90-95, 97-99, 101; CP 92-106 (UF III, VII, VIII, XIII, XIV, XVI, XVIII, XXI-XXIII, XXIX). Sgt. Bieker observed these transactions from street level; Sgt. Caron and Officer Bornander used binoculars to observe from a further distance. RP(2) 27-28, 68-69; RP(3) 49-50, 72-73, 90-91, 95. Sgt. Caron radioed to an arrest team that they had witnessed these transactions; Sgt. Bieker and Sgt. Caron both provided a description of defendant. RP(3) 11, 13, 52, 58, 74, 91; CP 92-106 (UF IV). Officers Smalls and Viehmann arrived immediately after this radio communication and Sgt. Caron watched them follow defendant into a store and then lead him away in handcuffs. RP(3) 13-14, 65-66, 74, 77, 107-108; CP 92-106 (UF XXVIII, XXXV). Just as the arresting officers in Alvarado had probable cause to arrest Alvarado, Officers Smalls and Viehmann likewise had probable cause to arrest defendant because their fellow officers observed defendant selling crack cocaine on the street.

Possessing crack cocaine and distributing crack cocaine are both felonies; because their fellow officers had probable cause to believe

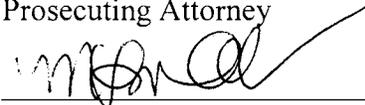
defendant was committing these felonies, Officers Smalls and Viehmann could arrest defendant. RCW 10.31.100 does not prohibit an officer from arresting a person if the officer has probable cause to believe that the person committed a felony. Thus, even if the arresting officers needed to witness a gross misdemeanor in order to arrest defendant of that gross misdemeanor, they could arrest defendant in this case because they also had probable cause to believe that defendant had committed a felony. The fact that they were not present when he distributed and possessed crack cocaine is harmless because Officers Smalls and Viehmann could arrest defendant for committing a felony whether or not they witnessed him commit the felony.

D. CONCLUSION.

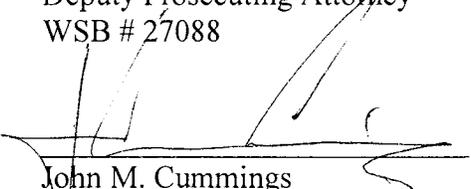
For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: MARCH 27, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088



John M. Cummings
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/29/07 Johnson
Date Signature

FILED
COURT OF APPEALS
DIVISION II
07 MAR 30 PM 1:51
STATE OF WASHINGTON
BY [Signature]