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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE HICKMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 12-1-01123-9

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BRIEF OF RESPONDENT

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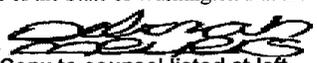
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**TABLE OF CONTENTS**

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. PROCEDURAL HISTORY.....1

    B. FACTS .....7

III. ARGUMENT .....13

    A. THE TRIAL COURT PROPERLY DENIED HICKMAN’S MOTION TO SUPPRESS UNDER *TERRY*, WHERE HICKMAN AND HIS ACCOMPLICE WERE STOPPED DRIVING ON A LIGHTLY USED ROAD AT 2:30 A.M., AFTER POLICE RECEIVED A CONFIRMED REPORT OF SOMEONE TRESPASSING IN THAT SAME AREA AND UNLAWFULLY CUTTING WOOD WITH A CHAINSAW HALF AN HOUR PREVIOUSLY, AND WHERE THE DEPUTY HEARD WOOD BEING CHOPPED WITH AN AX MOMENTS EARLIER.....13

    B. NO UNANIMITY INSTRUCTION WAS REQUIRED WHERE THE CRIME INVOLVED A CONTINUING COURSE OF CONDUCT. ....21

    C. THE FORFEITURE PROVISION IN THE JUDGMENT SHOULD BE STRICKEN.....25

    D. THE STATE AGREES THAT THE COSTS IDENTIFIED IN HICKMAN’S BRIEF SHOULD BE STRICKEN.....26

IV. CONCLUSION.....27

## TABLE OF AUTHORITIES

### CASES

<i>In re Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	23
<i>In State v. Randall</i> , 73 Wn. App. 225, 868 P.2d 207 (1994).....	18
<i>In re Sorenson</i> , 200 Wn. App. 692, 403 P.3d 109 (2017).....	26
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	22, 23
<i>State v. Fiallo–Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	24
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991).....	18
<i>State v. Gooden</i> , 51 Wn. App. 615, 754 P.2d 1000 (1988).....	24
<i>State v. Greathouse</i> , 113 Wn. App. 889, 56 P.3d 569 (2002).....	22
<i>State v. Hadran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	23
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	19
<i>State v. Kennedy</i> , 38 Wn. App. 41, 684 P.2d 1326 (1984).....	17
<i>State v. King</i> , 75 Wn. App. 899, 878 P.2d 466 (1994).....	23
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	22
<i>State v. Love</i> , 80 Wn. App. 357, 908 P.2d 395 (1996).....	23
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	22
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	23
<i>State v. Pressley</i> , 63 Wn. App. 591, 825 P.2d 749 (1992).....	18
<i>State v. Ramirez</i> , ___ Wn.2d ___, 426 P.3d 714 (2018).....	26
<i>State v. Rivera</i> , 198 Wn. App. 128, 392 P.3d 1146 (2017).....	26

<i>State v. Russell</i> , 69 Wn. App. 237, 249, 848 P.2d 743 (1993).....	23
<i>State v. Samsel</i> , 39 Wn. App. 564, 694 P.2d 670 (1985).....	16
<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	25
<i>State v. Taylor</i> , 150 Wn.2d 599, 80 P.3d 605 (2003).....	25
<i>State v. Thierry</i> , 60 Wn. App. 445, 803 P.2d 844 (1991).....	17
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987).....	20
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007).....	25
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	13, 14, 15, 16, 17, 18, 19, 20

## RULES

RAP 3.1.....	25
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly denied Hickman's motion to suppress under *Terry v. Ohio*, where Hickman and his accomplice were stopped driving on a lightly-used road at 2:30 a.m., after police received a confirmed report of someone trespassing in that same area and unlawfully cutting wood with a chainsaw half an hour previously, and where the deputy heard wood being chopped with an ax moments earlier?

2. Whether no unanimity instruction was required where the crime involved a continuing course of conduct?

3. Whether the forfeiture provision in the judgment should be stricken? (concession of error)

4. Whether the costs identified in Hickman's brief should be stricken? (concession of error)

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Michael Wayne Hickman was charged by information filed in Kitsap County Superior Court with first-degree trafficking in stolen property. CP 138.

Before trial, Hickman filed a CrR 3.6 motion to suppress. CP 68. The following facts were adduced at a hearing held on the motion.

On May 21, 2012, Deputy Alan Langguth responded to a 911 call from Beverly McQueary regarding someone stealing wood from their property. RP (11/19) 11-12. It was around 5:00 a.m. RP (11/19) 14. The property was part of a wooded area off Apex Road. RP (11/19) 13. The road led to a private airport, but there was no public entrance to it off of Apex. RP (11/19) 13. There may have been about 60 houses in the area, though that would quite a high estimate. RP (11/19) 13, 24-25. Langguth reported to the area but did not hear or see anything. RP (11/19) 14.

Later that day, Deputy Lee Watson went to the scene and spoke with Gregory McQueary. RP (11/19) 34. McQueary told him that someone had been cutting maples on his property and then cutting the wood into blocks. RP (11/19) 34. McQueary walked him into the woods behind his home to the location where he had found the cut wood. RP (11/19) 35. The property was densely wooded, very wet, and hilly. RP (11/19) 35.

Watson walked around the area and found additional locations where cutting had occurred. RP (11/19) 35-36. The stumps had been covered with moss in an attempt to hide them. RP (11/19) 36. Watson could not say how long it had been since the wood had been cut, but it looked fairly fresh. RP (11/19) 40, 42. There were soda cans and wrappers strewn around each of the cutting locations. RP (11/19) 41. The trash did not appear to have been there long. RP (11/19) 41.

There was an old logging road on the property that was overgrown with Scotch broom. RP (11/19) 36. Some of the Scotch broom had been trampled by a vehicle driving through. RP (11/19) 36. Watson showed McQueary the other locations he had found. RP (11/19) 37. McQueary confirmed that most of the locations were on his property. RP (11/19) 37.

The following morning, Langguth responded to a second complaint from McQueary at around 2:00 a.m. RP (11/19) 14. They were hearing the chainsaw again. RP (11/19) 15. Langguth spoke with her on the phone, and learned that Deputy Watson had been out to speak with her during the day, and had found cut maple trees. RP (11/19) 15.

After talking to McQueary, Langguth parked his car on Apex and waited for a second deputy to search on foot. RP (11/19) 15. While he was waiting, he heard what sounded like an ax chopping wood. RP (11/19) 16. At around 2:30 a.m., a tan truck came down the road. RP (11/19) 15. The truck was coming from the direction of the McQueary property. RP (11/19) 16. He saw no other vehicles on the road. RP (11/19) 17. Langguth stopped the truck. RP (11/19) 17.

As he approached the truck, he saw it was covered with little white flowers, which was consistent with the truck having been in the bush. RP (11/19) 17. As he approached the truck he saw cut wood in the back. RP (11/19) 18.

The truck was occupied by two individuals: Hickman, and Scott Yoder. RP (11/19) 18. He made contact with them but did not arrest them. RP (11/19) 20. They seemed to be cooperative. RP (11/19) 20. They both admitted that they had been in the woods cutting trees. RP (11/19) 21. After speaking to them, he let them go on their way. RP (11/19) 21.

The next morning Watson spoke with McQueary again and learned that the McQuearys had called 911 again the previous night and that two suspects had been contacted and identified. RP (11/19) 37. Watson obtained the information Langguth had gathered and contacted Yoder at his residence on a neighboring property. RP (11/19) 38. Yoder admitted being involved in taking the wood. RP (11/19) 38.

Both Hickman and Yoder testified at the hearing. They both confirmed that Langguth never told them to get out of the truck; that they were not handcuffed or held at gunpoint, arrested or in any way threatened. RP (11/19) 55, 67. At the end of the contact Hickman drove off. RP (11/19) 55. Yoder estimated that Langguth spoke to them for about two minutes. RP (11/19) 66.

At the conclusion of the hearing, the trial court denied the motion to suppress:

These are the facts that were known to him. Someone had been trespassing on the rural property of Mr. and Mrs. McQueary -- or McCleary -- the morning before

and then again approximately a half hour before the stop of Mr. Hickman.

The people trespassing on that property were cutting and stealing wood, which he learned through the report of Deputy Watson. When he approached the area, he did not hear a chain saw, but he did hear an axe being used. This is 2:30 a.m., and I feel like I need to underline that because that is a pivotal point.

The route that Mr. Hickman's truck was traveling was coming from the area that Deputy Langguth heard the axe being used and from the area that the McQuearys had pointed out as the area of trespass.

The defense contests, and I agree, that it is unlikely that the deputy saw sawdust on the Hickman truck from his angle and from the time of day. However, that one contested fact doesn't eliminate the other facts, which were, this was a truck -- a pickup truck coming down the road from an area where there had been an earlier trespass and where the sounds of tree cutting had been occurring not half an hour before.

After stopping the truck, the sawdust wasn't sawdust but was flowers from the brush, and in the back of the truck was cut wood. Those are the facts known and developed during this stop.

The officer's truck -- or the officer's position put him 120 to 150 feet away, and I am finding that Mr. Yoder's estimate of that distance is more credible. It's his property that is involved. The conversation lasted two minutes. The only physical intrusion upon Mr. Hickman's liberty was the shining of the light upon the bed of his pickup truck through the windows of the canopy. That is not a significant physical intrusion. There was no detention, other than the two-minute conversation. There was no arrest. There was no stepping out of the truck. Under these circumstances, this is not an improper stop. And the defense motion to suppress the evidence developed as a result of that stop is denied.

RP (11/19) 80-82. The ruling was memorialized in writing with the court

making the following factual findings:<sup>1</sup>

**I.**

That on May 21<sup>st</sup>, 2012 Deputy Langguth of KCSO was contacted through 911 concerning a complaint from Mrs. McQueary at approximately 5:00 AM that she could hear sounds of tree cutting with a chain saw on her property. Deputy Langguth responded to that area but did not see anything useful.

**II.**

That later on May 21<sup>st</sup>, 2012 Deputy Lee Watson of KCSO explored the McQueary property with Mr. McQueary and came upon several maple trees that had been cut, and tire tracks into the area. The tire tracks indicated that the persons cutting the trees likely gained access to the McQueary property by getting through or around a locked gate on Apex Road behind the McQueary property.

**III.**

That on May 22<sup>nd</sup>, 2012 Mrs. McQueary contacted KCSO around 2:00 AM to complain of more chainsaw work being done on the McQueary property. Deputy Langguth spoke to her and learned about the evidence discovered by Deputy Watson the day before, and that entrance to the property was likely through a gate on Apex Road.

**IV.**

That on May 22<sup>nd</sup>, 2012, at approximately 2:30 AM Deputy Langguth went to Apex Road and parked below the point on the road where the gate was located, to wait for additional KCSO backup. It was very dark. There are a limited number of homes on Apex Road, which dead ends at the Apex runway. Deputy Langguth could also hear the sounds of an axe being used in the wooded area, but not a chainsaw. The deputy was parked at the entrance to a housing development located approximately 120 ft from Mr Yoder's driveway.

**V.**

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<sup>1</sup> Hickman acknowledges that these findings are verities on appeal. Brief of Appellant, at 10.

That within a short period of time Deputy Langguth saw a pickup truck coming down Apex Road, from the direction of the area where the sounds originated. The truck turned on to Mr Yoder's dirt driveway road. The deputy did turn on his headlights but would only have been able to see the truck in the headlights for a very short period of time, mere seconds. As the deputy was by the truck he could see that what he thought might have been saw dust was actually flowers left on the truck as if it had been driving in a wooded or brushy area.

#### **VI.**

That deputy drove behind the truck, and using emergency lights, caused the truck to come to a stop. Upon approaching the truck the deputy could see into the back of the pickup by means of his flashlight and see cut wood in the back of the pickup truck.

#### **VII.**

That the deputy spoke to the occupants, Scott Yoder and the driver, the defendant Michael Hickman for a few short minutes. Neither of these individuals was made to step out of the truck, nor were they handcuffed. They were not threatened in any way. They were asked a few questions about their knowledge of the tree cutting, and after answering the questions were allowed to leave.

CP 141-43.

After trial, a jury found Hickman guilty as charged. CP 172.

### **B. FACTS**

The McQuearys lived on a 7-acre parcel on Anderson Hill Road in Kitsap County. 1RP 114. The property had been his wife's family homestead since 1886. 1RP 115. It was primarily forested with second-growth firs, alders, and maples. 1RP 115. Most were very large. 1RP 120. They had no intention of using the land or timber, their intention was to

“keep it for posterity.” 1RP 115. He never gave anyone permission to come on his property and cut wood. 1RP 122, 135. He did not know either Hickman or Scott Yoder.

The McQueary’s property abutted that of Scott Delhaute to the south. 1RP 116. Delhaute’s land had been logged in the 1970s and the trees were not as large. 1RP 120.

In the early morning hours of May 21, 2012, Greg McQueary’s wife frantically woke him. 1RP 121. There was the sound of chainsaws coming from the woods behind the house. 1RP 121. Ms. McQueary called 911. 1RP 123.

Deputy Alan Langguth responded around 5:00 a.m. 2RP 161. He went to the area of Apex and Anderson Hill Roads. 2RP 160. The area was very wooded. 2RP 160. He did not find anything of direct significance. 2RP 161.

Deputy Lee Watson followed up with the McQuearys during the following day shift. 2RP 193-94. McQueary let him into the woods behind his home. 2RP 194. It was densely wooded with a lot of brush. 2RP 194. They came across some felled maples on McQueary’s property. 1RP 125, 2RP 197. He also observed a Polaris jug for mixing oil and gas, a pop bottle and a Vaughn hammer. 1RP 124, 2RP 197. The Polaris jug was the type used to oil a chain saw during use. 1RP 124, 2RP 197. As he

continued walking he came across additional maple trees that had been cut down. 2RP 198. Someone had piled debris on the stumps in an attempt to hide them. 2RP 198.

Eventually he walked down an old logging road down a steep hill that passed through a dirt quarry. 2RP 199. There were tire tracks through the dirt there. 2RP 199. He followed the tire tracks, which came out at a gate on Apex Road. 2RP 199. The gate was closed and locked. 2RP 200. A truck could have driven around the gate. 2RP 200.

In Watson's experience, maple wood was very valuable, and used for making guitars and furniture. 2RP 201. Wood cut for such purposes was cut differently than firewood. 2RP 201. It cut into blocks so the buyer can see the grain. 2RP 201. The cut wood he came across on McQueary's property was cut into such blocks. 2RP 201.

The following morning, at around 2:00 a.m., Langguth responded to a second 911 from the McQuearys. 2RP 161. On the way, he learned that about Watson's daytime investigation. 2RP 162. Based on that information he proceeded to Apex Road, arriving around 2:30. 2RP 162.

The area was sparsely populated. 2RP 163. There were only a few homes along the road, which terminated at a small private airport. 2RP 163. He parked off the road and observed no traffic. 2RP 163. There was a lot of wooded area between the airport and where he waited. 2RP 189.

Eventually, a truck appeared heading from the direction of the airport. 2RP 163, 188. Shortly before seeing the truck, Langguth heard the sound of an ax chopping wood. 2RP 167.

He began to drive toward the truck, which turned down a little side road. 2RP 164. Langguth he followed it; it appeared to have sawdust on it. 2RP 164. He activated his emergency lights and stopped the truck. 2RP 165. He approached the truck and realized what he thought was sawdust was actually little tiny flowers. 2RP 165. He looked into the back of the truck as he walked up to it and saw cut wood. 2RP 166.

Langguth spoke to the occupants, Michael Hickman and Scott Yoder. 2RP 166. He primarily spoke to the passenger, Yoder. 2RP 167. Hickman was sitting next to Yoder in the truck and could hear the conversation. 2RP 168. Hickman nodded his head in agreement with the things Yoder said. 2RP 169.

Langguth asked Yoder if they were cutting maples and Yoder responded that they were. 2RP 169. Yoder said they had been doing it the previous morning around 5:00 a.m. 2RP 169-70, 183. He said he and Hickman had cut down two trees and had gone back the second night to retrieve them. 2RP 170, 183. They had been in the woods for about a half hour cutting up the trees from the night before. 2RP 184. Hickman asserted that he was just helping Yoder. 2RP 184. Yoder claimed the

property belonged to his boss, Scott Delhaute, who knew he was cutting wood on the property. 2RP 187.

The next day, based on Langguth's report, he contacted several people. He spoke with Scott Delhaute at his home in Seabeck. 2RP 203. Delhaute was a land developer. 2RP 228. On the map in Exhibit 33, Delhaute owned most of the land between his development (marked as D) and the airport and between Anderson Hill and Apex Roads, except for the McQueary parcel (marked as a black box). 2RP 228-29, CP 315.

Delhaute also owned a granite countertop business. 2RP 230. Yoder worked for him as installer for that business. 2RP 230. Yoder rented a home for him on the Apex Road property. 2RP 231. Delhaute gave Yoder permission to harvest firewood on the property, so long as the trees were already down. 2RP 231. He made that condition very clear to Yoder. 2RP 231.

Neither Yoder nor Hickman ever asked for or received permission to cut standing trees. 2RP 232-33. The timber from standing trees was valuable. 2RP 232. Delhaute would not have given them away to anyone. 2RP 232. All the property between Apex Road, Anderson Hill Road, and the airport belonged to either Delhaute or McQueary. 2RP 234. The trees that were cut were very near the property line. Delhaute did not know whether they were on his land or the McQuearys'. 2RP 237. However,

some of the cut trees were definitely on his property. 2RP 239.

After talking to Delhaute, Watson went to see Yoder at his house on Apex Road. 2RP 204. While there, he observed maple wood blocks that appeared to have been processed for sale. (Exh. 16 & 17, CP 284-87) 2RP 205. He placed Yoder under arrest.

Watson then proceeded to Hickman's home. 2RP 206. Hickman spoke to him on this front porch after reading him his *Miranda* rights. 2RP 207-09. Hickman stated that he had been helping Yoder cut maple on Delhaute's property and sell it. 2RP 209.

Harvesting wood required a county permit. 2RP 210. Hickman said he had one from Pierce County. 2RP 210. A Pierce County permit would not be valid in Kitsap County. 2RP 211. Yoder said he had sold some of the wood to a maple company in Elma. 2RP 211.

Watson recovered a chainsaw from McQueary's property when he went back on May 23. 2RP 214. It was in a duffel bag. 2RP 215. Hickman gave him a second chainsaw at his house. 2RP 218. Exhibit 19 depicts the chainsaw and duffel bag found at McQueary's, along with a gas can and a machete. 2RP 219.

### III. ARGUMENT

**A. THE TRIAL COURT PROPERLY DENIED HICKMAN'S MOTION TO SUPPRESS UNDER *TERRY*, WHERE HICKMAN AND HIS ACCOMPLICE WERE STOPPED DRIVING ON A LIGHTLY USED ROAD AT 2:30 A.M., AFTER POLICE RECEIVED A CONFIRMED REPORT OF SOMEONE TRESPASSING IN THAT SAME AREA AND UNLAWFULLY CUTTING WOOD WITH A CHAINSAW HALF AN HOUR PREVIOUSLY, AND WHERE THE DEPUTY HEARD WOOD BEING CHOPPED WITH AN AX MOMENTS EARLIER.**

Hickman argues that Deputy Langguth lacked reasonable suspicion to stop his truck. He is incorrect. The deputy acted properly in briefly detaining Hickman and his accomplice Yoder when he encountered them driving on a deserted road at 2:30 a.m., after receiving a confirmed report of someone trespassing in the same area and unlawfully cutting wood with a chainsaw half an hour previously, and where the deputy heard wood being chopped with an ax moments earlier.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a Cleveland police officer on patrol at 2:30 in the afternoon saw two men alternately walking past, and looking into, a downtown store window, and then after each viewing they would confer. This occurred approximately a dozen times. The officer saw no crime being completed in this activity, but based upon thirty years of police experience he

surmised that it was likely the two men were “casing a job”, and that because of the nature of such a crime they might be armed. *Terry*, 392 U.S. at 6-7. As the two men were walking away from the store the officer approached the men and asked for their names, and when they did not respond, except for mumbling, “Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing”, eventually discovering a firearm. *Terry*, 392 U.S. at 7.

In evaluating this situation the U.S. Supreme Court recognized that “it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” *Terry*, 392 U.S. at 16-17. Nevertheless, the Court went on to approve the police conduct in that case. The Court held that the potential indignities and inconveniences that naturally flow from a police detention are permissible where the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21.

The Court held that these facts, though specific and articulable,

need not be dispositive of criminal activity, or even rise to the level of probable cause. The court further noted that all the circumstances should be considered:

There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner ... It would have poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this neighborhood to have failed to investigate this behavior further.

*Terry*, 392 U.S. at 22-23

It is important to emphasize that while it is important for the officer to reference those “specific and articulable facts,” *Terry*, 392 U.S. at 21-22, which gave rise to his or her suspicions, that the Court must also view with discretion the rational inferences to be drawn from those facts, in light of the officer’s experience. *Terry* was very clear in holding that “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch’, but to the specific reasonable inferences which he is entitled to draw from the facts *in light of his experience.*” *Terry*, 392 U.S.

at 27 (emphasis supplied).

In this case the articulable suspicion of Deputy Langguth was for the crime of theft, not a traffic violation. The specific and articulable facts known to Langguth were extensive:

- (1) Someone had been trespassing on the nearby property of the McQuearys at 5:00 a.m. the morning before, and again within a half hour of the stop at 2:30 a.m.
- (2) The persons trespassing on the McQueary property were cutting and stealing wood, minutes before the deputy saw Hickman's truck.
- (3) The likely route of access to the McQueary property the thieves were using was off of Apex Road.
- (4) Apex Road was in an area where little traffic would be expected, particularly at 2:30 a.m.
- (5) Langguth heard an ax being used nearby just before he saw the defendant's truck appear.
- (6) Hickman's truck came from same direction as the chopping sounds.
- (7) After stopping the truck, Langguth saw flowers that likely came from driving the truck in the woods.
- (8) In the back of the truck was cut wood.<sup>2</sup>

Additionally, the courts accord deference to the judgment and experience of officers in the field. In *State v. Samsel*, 39 Wn. App. 564,

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<sup>2</sup> Although Hickman is correct that these last two facts were not known to Langguth when he initiated the stop, they are relevant to the reasonableness of his continuation of the stop to briefly question Hickman and Yoder.

570-571, 694 P.2d 670 (1985), the Court noted that the officer's experience is a relevant factor:

While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience ... Further, reasonableness is measured not by exactitudes, but by probabilities.

*Samsel*, 39 Wn. App. at 570-571. Similarly, in *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991), law enforcement observed a car in a transit stop area playing music loudly and making no attempt to park. While ordinary citizens might only have seen annoying young people, the officers recognized the hallmarks of a possible drive-by shooting:

Circumstances that might appear innocuous to the average person may appear incriminating to a police officer in light of past experience, and the officer may bring that experience to bear on a situation, as the officers did here.

*Thierry*, 60 Wn. App. at 448; *see also State v. Kennedy*, 38 Wn. App. 41, 46, 684 P.2d 1326 (1984) (“Moreover, the special experience or knowledge of the police officer involved may be taken into account.”).

These cases all highlight the earlier holding in *Terry* that in reviewing the objective facts upon which the officer developed a reasonable suspicion, it is also important for the court to give deference to the experience and training of an officer in interpreting those objective facts:

In reviewing those circumstances, courts may consider such factors as the officer's training and experience, the location of the stop, and the conduct of the person detained.

*State v. Pressley*, 63 Wn. App. 591, 825 P.2d 749 (1992).

Here, Langguth testified without contradiction that he had twelve years of experience as a deputy. RP (11/19) 11. He was also quite familiar with area around Apex Road because it was in his patrol area. RP (11/19) 12.

In the *Terry* itself the Court held that "it is imperative that the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution and belief' that the action taken was reasonable. *Terry*, 392 U.S. at 22. In *State v. Randall*, 73 Wn. App. 225, 228, 868 P.2d 207 (1994), this Court emphasized that "a determination of probable cause requires a more demanding level of suspicion than that required to justify an investigatory Terry stop." See also *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991) ("a police officer can conduct an investigative or Terry stop based on less than probable cause.").

As discussed above, in *Thierry* the specific and articulable facts available to those officers were that they were "working a high crime area, observed behavior consistent with the profile of drive-by shootings." *Thierry*, 60 Wn. App. at 448. It was winter, forty degrees, the windows were rolled down, loud music was playing from the car, and they were

driving through a parking lot without an attempt to park. These facts would not support an arrest or search warrant, but they were sufficient to support a *Terry* stop.

In *Pressley* an officer observed two young females standing next to each other on a downtown Seattle street, “their hands were chest high and the respondent appeared to be pointing to an object in her hand or counting objects in her hand. The other female was intently looking at the objects in the respondent’s hand.” *Pressley*, 63 Wn. App. at 594-594. When the officer approached the suspect said “Oh Shit” and the two individuals separated and walked off. This was sufficient, when combined with the officer’s experience in recognizing drug transactions, to find a reasonable basis for a *Terry* stop. Although it would have been possible to construct a host of alternative, entirely innocent scenarios to explain the behavior observed by the officer in *Pressley*, the ability to imagine an innocent scenario is not the standard applied in a *Terry* stop.

The Supreme Court has thus clarified the standard:

LaFave suggests that the standard is a substantial possibility that criminal conduct has occurred or is about to occur. We believe this to be the preferred definition. It maintains the ability of law enforcement to deter criminal conduct and yet reasonably safeguards ‘private affairs.’ *When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention.*”

*State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (emphasis

supplied). Washington courts have also noted that in determining the proper scope of a *Terry* stop there are factors to be considered in determining when reasonable suspicion is no longer sufficient and probable cause becomes necessary. In *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987), the Court noted that there are “three factors to be considered in determining whether an intrusion on an individual is permissible under *Terry* or must be supported by probable cause : (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect’s liberty; and (3) the length of time the suspect is detained.”

In the present case the purpose of the stop (a suspicion of trespass and theft of wood), warranted brief investigation and did not immediately suggest a dangerous situation warranting a pat down or other more physical detention. The degree of physical intrusion by Deputy Langguth was extremely limited in that the defendant was not moved, handcuffed, patted down or otherwise interfered with beyond being stopped and asked questions. The detention of the defendant in his stopped truck was exceedingly brief. Indeed Yoder testified that the stop lasted only two minutes.

In this case, deputies were investigating a theft of wood being cut from private property in the middle of the night. At 2:30 in the morning, after having just heard an ax chopping wood, Langguth saw a truck

coming down a virtually untraveled dead-end road from the direction where the chopping and theft were occurring. Indeed, Hickman's was the only vehicle to appear that night. Rather than being an unreasonable intrusion, it would probably have been sorry police work indeed for Langguth not to have stopped the truck for a brief conversation with the occupants.

Hickman's argument attempts to parse each of the facts separately. But considered in their totality, they gave rise to a reasonable suspicion. It was suspicious to be driving on a lightly used road at 2:30 a.m., when police have a report of someone trespassing from that same area and unlawfully cutting wood with a chainsaw half an hour previously, and an ax moments earlier. No, these are not unlawful acts, individually, but they are unusual to say the least. These are the actual and cumulative facts upon which the deputy reasonably founded his suspicion of criminal activity. His extremely brief questioning of Hickman and Yoder was good police work, and entirely lawful. The trial court properly denied Hickman's motion to suppress.

**B. NO UNANIMITY INSTRUCTION WAS REQUIRED WHERE THE CRIME INVOLVED A CONTINUING COURSE OF CONDUCT.**

Hickman next claims that he was entitled to a unanimity

instruction. This claim is without merit because such instructions are only required in multiple acts cases. Where, as here the crime involved a continuing course of conduct, no such instruction was required.

“Criminal defendants in Washington have a right to a unanimous jury verdict.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of several acts, any one of which is allegedly sufficient to constitute the crime charged, the jury must unanimously agree on which act constituted the crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure a uniform verdict when the State introduces evidence of multiple acts, the State must elect the act it is relying on for the conviction or the trial court must instruct the jury that it must unanimously agree that the State proved one particular act beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411. The absence of either an election or instruction constitutes a constitutional error because it is possible that all of the jurors did not rely on the same criminal act when convicting the defendant, “resulting in a lack of unanimity on all elements necessary for a conviction.” *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002), *review denied*, 149 Wn.2d 1014 (2003).

Nevertheless, the law distinguishes between a single, continuing offense and “‘several distinct acts’ each of which could be the basis of a criminal charge” for purposes of jury unanimity. *State v. Crane*, 116

Wn.2d 315, 326, 804 P.2d 10 (1991), *overruled on other grounds*, *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) (quoting *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984) (internal quotation marks omitted)). When considering a continuous course of conduct, a jury need not unanimously agree on any particular criminal act or incident so long as it unanimously agrees the course of conduct occurred. *Crane*, 116 Wn.2d at 330. The Court examines a variety of factors “in a commonsense manner” to determine if the State alleges multiple distinct acts or a single course of conduct. *State v. Hadran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). These factors include whether the charges involved different times, places, materials, types of possession (actual or constructive), and whether the defendant engaged in the acts with a single purpose. *Hadran*, 113 Wn.2d at 17; *Love*, 80 Wn. App. at 361; *State v. King*, 75 Wn. App. 899, 903, 878 P.2d 466 (1994).

In determining the need for a unanimity instruction, the Court examines: (1) the proof required by the relevant statute or to convict instruction; (2) what the evidence discloses; and (3) whether the evidence disclose more than one violation. *State v. Russell*, 69 Wn. App. 237, 249, 848 P.2d 743, *review denied*, 122 Wn.2d 1003 (1993).

Here, the to-convict instruction provided:

To convict the defendant of the crime of trafficking in stolen property in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period of May 20<sup>th</sup>, 2012 to May 22<sup>nd</sup>, 2012, the defendant or an accomplice knowingly trafficked in stolen property;

(2) That the defendant acted with knowledge that the property had been stolen; and

(3) That the acts occurred in the State of Washington.

CP 164. Notably absent from these elements is the identity of the victim(s).

The evidence at trial showed that Hickman and Yoder cut maples and took the wood on the dates alleged in the information. It showed that they had the permission of neither the McQuearys or Delhaute to do so. It further showed that Yoder or Hickman had prepared the wood for sale, and had in fact sold some of it to a maple company in Elma.

Evidence that the defendant engaged “in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct.” *State v. Fiallo–Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Thus this Court has held that several acts extending over a time frame of a few days constituted a continuing course of conduct when the acts were in furtherance of the same objective. *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000

(1988) (holding that defendant's actions over the course of 10 days were a continuing course of conduct furthering the objective of making money from prostituting two girls).

The cases on which Hickman relies involved assaults – crimes that necessarily involve discreet acts. Hickman fails to meet his burden of showing that the present case involved multiple acts. *See State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007); *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Instead the evidence conclusively shows that the crime here was a continuing course of conduct. As such no unanimity instruction was necessary.

**C. THE FORFEITURE PROVISION IN THE JUDGMENT SHOULD BE STRICKEN.**

Hickman next claims that the trial court erred by entering a Judgement and Sentence that included a forfeiture provision that does not comport with current law. He is correct.

In conceding the point, the State notes that Hickman makes no assertion that any of his property was improperly forfeited. Only by exalting form over substance is Hughes an “aggrieved party.” RAP 3.1. An aggrieved party is “one whose personal right or pecuniary interests have been affected.” *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). But it has been held that a person need not be aggrieved in order to

prevail on this issue. *See State v. Rivera*, 198 Wn. App. 128, 392 P.3d 1146 (2017).

The state concedes that present authority requires deletion of the present forfeiture provision. This should be done in the manner of a remand to correct a scrivener's error. "Where only corrective changes are made to a judgment and sentence by a trial court on remand, there is nothing to review on appeal." *In re Sorenson*, 200 Wn. App. 692, 699, 403 P.3d 109 (2017). This being a ministerial action that allows for no discretion on the part of the trial court, a new sentencing hearing is not required. *Id.*

**D. THE STATE AGREES THAT THE COSTS IDENTIFIED IN HICKMAN'S BRIEF SHOULD BE STRICKEN.**

Hickman next claims that his discretionary costs must be stricken pursuant to *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714 (2018). The State concedes he is correct.

#### IV. CONCLUSION

For the foregoing reasons, Hickman's conviction and sentence should be affirmed, and the matter remanded to strike the provisions relating to forfeiture and costs as identified in Hickman's brief.

DATED October 26, 2018.

Respectfully submitted,

TINA R. ROBINSON  
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A handwritten signature in black ink, appearing to be 'TR' followed by a long horizontal stroke.

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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