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State of Washington  
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NO. 51539-3-II

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

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STATE OF WASHINGTON, Appellant

v.

COREY DEAN HARRIS, Respondent

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01492-3

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BRIEF OF APPELLANT

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## ASSIGNMENTS OF ERROR<sup>1</sup>

- I. **The trial court erred when it concluded the qualifying information in the search warrant affidavit did not establish probable cause to search Harris’s leased, shop building for evidence of a crime.**
- II. **The trial court erred when it concluded that Dep. Fields failed to comply with RCW 10.31.040 (the knock and announce rule) when he entered Harris’s unoccupied, shop building without strictly complying with the knock and announce rule.**
- III. **The trial court erred when it entered an order suppressing the evidence seized in Harris’s leased, shop building.**
- IV. **The trial court erred when it entered an order dismissing the State’s case.**

## ISSUES PRESENTED

- I. **The Trial Court erred when it concluded that the Search warrant affidavit failed to establish probable cause after excising Dep. Field’s observations from inside Harris’s building because the GPS information contained in the affidavit, combined with the other information provided, established probable cause to believe there was evidence of a crime in Harris’s building.**

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<sup>1</sup> The State does not assign error to the trial court’s Findings of Fact because when reviewing a search warrant affidavit for probable cause the trial court “does not resolve factual conflicts but . . . simply determines as a matter of law whether probable cause has been established.” *State v. Estorga*, 60 Wn.App. 298, 304 n.3, 80 P.2d 813 (1991); *State v. O’Neil*, 74 Wn.App. 820, 823, 879 P.2d 950 (1994) (overruled on other grounds by *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999)). As a result, any factual findings “are superfluous.” *Id.*; *State v. Perez*, 92 Wn.App. 1, 4 n.3, 963 P.2d 881 (1998) (citations omitted). Similarly, “RAP 10.3(g) does not require a party to assign error to a conclusion of law.” *State v. Alvarez*, 74 Wn.App. 250, 255, 872 P.3d 1123 (1994); RAP 10.3(g).

**II. The trial court erred when it concluded that the entry into Harris's leased building pursuant to the search warrant was "unlawful[] because Deputy Fields did not comply with RCW 10.31.040" since compliance was not required under longstanding case law.**

#### STATEMENT OF THE CASE

Cory Dean Harris was charged by information with five counts of Possession of Stolen Property in the First Degree occurring between March 20, 2017 and March 22, 2017. CP 1-2. The information alleged that Harris was in possession of a stolen Caterpillar 259D track loader, a stolen Takeuchi TB260 excavator, a stolen 2015 Olympia tilt trailer, a stolen 2011 Great Northern 18' total tilt trailer, and a stolen 2011 Great Northern 20' 14k tilt trailer. CP 1-2. All of these farm or construction vehicles were found in an outbuilding<sup>2</sup> that Harris leased in rural Battleground. CP 5-7.

The investigation into Harris and his leased building began when Redmond Oregon Police Officer Michael Maloney contacted Clark County Sheriff Deputy Jeremiah Fields and reported getting a GPS location of a stolen Caterpillar 259D track loader in the area of 18288 NE 72nd Avenue, Battleground, Washington. CP 5, 13. Upon Dep. Fields initial check of the reported area, he was unable to find a residence address

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<sup>2</sup> The relevant building is also referred to, interchangeably, as a "shop building." CP 104-111.

associated with 18288 NE 72nd Avenue or see the stolen Caterpillar outside of any property. CP 5, 14.

The next day, Dep. Fields returned to the area and had contact via telephone with Mark Rickabaugh the owner of the stolen Caterpillar. CP 5, 14. Rickabaugh provided Dep. Fields with “pictures and GPS locations of where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding.” CP 5, 14. Dep. Fields was able to match the pictures to Google Maps and found the residence address associated with the outbuilding to be 18110 NE 72nd Avenue. CP 5, 14. Rickabaugh told Dep. Fields that the value of the stolen Caterpillar was \$46,000. CP 5, 14.

Dep. Fields proceeded to the residence located at 18110 NE 72nd Avenue. CP 5, 14. There, he spoke with a female resident who had been living in the home for three years. CP 14. She put Dep. Fields on the phone with the property owner (of the residence and the outbuilding), Daniel Tucker. CP 5, 14. Tucker told Dep. Fields that he rents the outbuilding to Corey Harris and has for the last six to eight years. CP 5, 14. Tucker indicated that he shared storage space in the building with Harris, kept property such as snowmobiles and ATVs in the building, and stated to Dep. Fields that he knew that Harris had a tractor in the building, but that he did not know the type. CP 5, 14.

Tucker told Dep. Fields that he (Tucker) did not need permission to access the outbuilding and provided Dep. Fields with the access code to the key box located on the door of the outbuilding as well as permission to enter the building. CP 5, 14. Dep. Fields retrieved the key from the key box and then knocked on the door and “announced ‘Sheriff’s Office’” before entering the building. CP 5, 14. Dep. Fields immediately noticed Rickabaugh’s stolen Caterpillar. CP 5, 14. Dep. Fields did not find the serial number on the Caterpillar but instead found a sticky residue left where the serial number plate should have been. CP 5, 14.

Next, Dep. Fields exited the outbuilding and applied for a search warrant. CP 5, 14. Dep. Fields returned to the outbuilding, executed the search warrant, and found the stolen vehicles listed in the information. CP 5-7, 21-24.

After the State charged Harris, Harris filed a motion to suppress arguing numerous bases for the suppression of the evidence found in his leased outbuilding and a rebuttal to the State’s response brief, which included additional arguments as to why Dep. Fields’s initial entry into the building was unlawful. CP 8-9, 25-48, 78-98. Following a CrR 3.6 hearing, which included testimony from Dep. Fields and Harris, the trial court concluded that Tucker did not have the authority to consent to search of the outbuilding that he leased to Harris, i.e., Tucker did not have

“common authority” over the building. *See* RP; CP 109-110 (Conclusions of Law #1-#9). Consequently, the trial court held that Dep. Fields’s observations of the stolen Caterpillar in Harris’s leased building were unlawfully obtained and must be excised from the search warrant affidavit. CP 110 (Conclusion of Law #13). Based on the record below, and for the purposes of this appeal, the State does not challenge these conclusions.

The trial court did, however, make other conclusions, which the State does seek to challenge on appeal. Namely, that without Dep. Fields’s “unlawful observations, there was no probable cause for the search warrant,” that “[a]fter the Court excises the observations of Deputy Fields after entering the building from the affidavit, the State fails to establish Probable Cause for the issuance of the warrant,” and that “the subsequent entry under the search warrant [was] . . . unlawful because Deputy Fields did not comply with RCW 10.31.040,” the knock and announce rule. CP 110 (Conclusions of Law #12, #14, #19). Because of the aforementioned conclusions the trial court suppressed all of the State’s evidence and dismissed the State’s case. CP 111.<sup>3</sup> This timely appeal follows. CP 114.

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<sup>3</sup> Worth noting is that because the trial court suppressed the evidence on Harris’s consent and initial unlawful entry theory it did not end up addressing the other bases for suppression that Harris raised. The State acknowledges that even if this Court reverses the trial court that Harris may continue to pursue those other bases for suppression.

## ARGUMENT

- I. **The Trial Court erred when it concluded that the Search warrant affidavit failed to establish probable cause after excising Dep. Field’s observations from inside Harris’s building because the GPS information contained in the affidavit, combined with the other information provided, established probable cause to believe there was evidence of a crime in Harris’s building.**

Under both the Constitution of the United States and Washington’s Constitution, a search warrant may issue only upon a determination of probable cause.<sup>4</sup> *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference” that that evidence of the crime can be found at the place to be searched. *Id.*

Furthermore, “it is axiomatic that the probable cause needed to support a warrant must be judged solely on facts presented to the issuing magistrate.” *State v. Goble*, 88 Wn.App. 503, 508, 945 P.2d 263 (1997) (citing cases); *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) (noting that the probable cause determination, on review or otherwise is based “*only* [on] the information that was brought to the

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<sup>4</sup>“In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Brinegar v. U.S.*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949).

attention of the issuing judge or magistrate at the time the warrant was requested”) (emphasis in original) (citations omitted). Thus, when evaluating whether probable cause supports a search warrant “the focus is on what was known at the time the warrant issues, *not* what was learned afterward.” *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007) (emphasis added) (citation omitted).

When examining an affidavit for probable cause judges “may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant’s control.” *State v. Dunn*, 186 Wn.App. 889, 897, 348 P.3d 791 (2015) (quoting *State v. Gebaroff*, 87 Wn.App. 11, 16, 939 P.2d 706 (1997)). Thus, for example:

because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar, or robber. It is commonly said that in such circumstances account may be taken of the ‘type of crime, the nature of the missing items, the extent of the suspect’s opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property.’ It is most relevant, therefore, that the objects are ‘the sort of materials that one would expect to be hidden at [the offender’s] place of residence, both because of their value and bulk,’ and also that the offender ‘had ample opportunity to make a trip home to hide’ the stolen property before his apprehension.

*Dunn*, 186 Wn.App. at 898 (quoting *State v. McReynolds*, 104 Wn.App. 560, 569-570, 17 P.3d 608 (2000)) (alteration in original) (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 381-84 (3d ed.1996)). Accordingly, when the stolen property at issue is a truck, an ATV, or other similarly bulky item, a fair and reasonable inference—for the purposes of establishing probable cause—is that the stolen property is likely to found at a suspect’s home, garage, barn, or other storage building under his or her control. *Id.* at 897-99 (noting that the stolen items “were bulky and, therefore, likely to be hidden inside a building”).

Probable cause itself “may be based on hearsay, a confidential informant’s tip, and other unscrutinized evidence that would be inadmissible at trial.” *Chenoweth*, 160 Wn.2d at 475 (citing *State v. Huft*, 106 Wn.2d 206, 209-210, 720 P.2d 838 (1986));<sup>5</sup> *Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). That these types of evidence can establish probable cause is unsurprising since “the concept of probable cause . . . requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found.” *Id.* (citation omitted). Accordingly, a “tolerance for factual inaccuracy is inherent to the concept of probable cause.” *Id.*

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<sup>5</sup> In fact, probable case, as established by a search warrant affidavit, “may be based in whole . . . upon hearsay.” *Id.* at 465.

A. STANDARD OF REVIEW

Reviewing courts are to examine affidavits in support of a search warrant in “a commonsense, not a hypertechnical manner.” *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citations omitted). Moreover, “[d]oubts concerning the existence of probable cause are generally resolved in favor” of the validity of the search warrant. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002); *Chenoweth*, 160 Wn.2d at 477. Courts should also refrain from shifting the focus from whether a “magistrate could reasonably find probable cause based on facts known at the time to whether the police conducted a reasonably thorough investigation before applying for a search warrant.” *Chenoweth*, 160 Wn.2d at 476-77. And while typically a magistrate’s decision to issue a search warrant is reviewed for abuse of discretion, when an affidavit supporting a search warrant contains information that was illegally obtained the determination of whether the remaining information “amounts to probable cause is legal question that is reviewed de novo.” *Ollivier*, 178 Wn.2d at 847-48 (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010)); *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (holding that a reviewing court “must view the warrant without the illegally gathered information to determine if the remaining

facts present probable cause to support the search warrant”) (citation omitted).

B. INDEPENDENT SOURCE DOCTRINE

Under the independent source doctrine, evidence tainted by “unlawful police action is not subject to exclusion ‘provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.’” *State v. Bentancourth*, 190 Wn.2d 357, 364-65, 413 P.3d 566 (2018) (quoting *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005)). “The independent source doctrine recognizes that probable cause may exist for a warrant based on legally obtained evidence when the tainted evidence is suppressed.” *Id.* at 365. Therefore, reviewing courts are to uphold a search warrant unless the illegally obtained information in the search warrant affidavit was “*necessary* to the finding of probable cause.” *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992) (emphasis in original) (citations omitted); *State v. Coates*, 107 Wn.2d 882, 887-89, 735 P.2d 64 (1987). The independent source doctrine ensures that the State neither benefits from its unlawful conduct nor is it placed in a worse position than it otherwise would have occupied. *Gaines*, 154 Wn.2d at 720; *Bentancourth*, 190 Wn.2d at 365, 371-72.

Our Supreme Court recently described the independent source doctrine in *Bentancourth*:

In its classic form, the independent source doctrine applies when the State procures the challenged evidence pursuant to a valid warrant, untainted by prior illegality. In the first type of independent source scenario, police conduct an initial unwarranted search of a constitutionally protected area, during which they discover but do not seize incriminating items. Police later obtain a search warrant for the area and seize the evidence during the warranted search.

For example, in *Gaines*, the police performed an illegal warrantless search of the trunk of the defendant's car, during which officers saw what appeared to be the barrel of an assault rifle and numerous rounds of ammunition. Rather than seizing the items, officers immediately closed the trunk without disturbing the contents. The following day, the police sought a search warrant for the defendant's trunk, which included a single reference to the officer's observation of the weapon, as well as other evidence to establish probable cause. After obtaining the warrant and searching the vehicle, the police recovered the rifle and ammunition from the trunk of the defendant's car. We concluded that this conduct violated article I, section 7 and that the appropriate remedy was to strike all references to the initial illegal search from the warrant affidavit when assessing whether probable cause existed to issue the original warrant; we held that the evidence was ultimately seized pursuant to a lawful warrant.

190 Wn.2d at 368-69 (internal citations omitted). Additionally, to determine whether a search warrant is truly an independent source for the discovery of the challenged evidence a court must determine whether the "police would have sought the warrant even absent the initial illegality." *Id.* at 365. Oftentimes this determination must be made by the trial court

following remand. *State v. Spring*, 128 Wn.App. 398, 405, 115 P.3d 1052 (2005) (citations omitted); *State v. Miles*, 159 Wn.App. 282, 296-98, 244 P.3d 1030 (2011); *but see Gaines*, 154 Wn.2d at 721-22.

Here, because the qualifying information in the search warrant affidavit established probable cause the trial court erred when it invalidated the search warrant and suppressed the seized evidence after finding that Dep. Fields's initial entry into Harris's leased outbuilding, and the resulting discovery of the stolen Caterpillar, was unlawful. The following information contained in the search warrant affidavit is the only information that must be excised:

As I entered the man door I immediately noticed a yellow Caterpillar matching the description and the picture I was provided by Officer Maloney. I was unable to locate a serial number but did find where a serial number may have been but had been removed. There was sticky residue left where the serial number plate should be.

CP 14. Notably, immediately after the preceding section, Dep. Fields's affidavit states that "[b]ased on the *GPS location provided* by the victim and the matching Caterpillar with removed VIN number located in the out building, I believe there is probable cause to search the building for the items requested above and to recover the stolen Track Loader." CP 14-15 (emphasis added).

The GPS location information provided in the affidavit follows:

In this official capacity, I have been working with Redmond (Oregon) Police Officer Michael Maloney to recover a stolen Caterpillar [sic] 2590 Track Loader. I believe the stolen Caterpillar 259D with serial number FTL 1235 is located in the out building located on the property of 18110 NE 72nd Avenue, Battle Ground, Washington.

I was contacted on 03/20/2017 by Officer Maloney<sup>6</sup> and he stated they had a Caterpillar 259D stolen Friday night. He said the Caterpillar is equipped with a GPS tracking system and it might be in the area of 18228 NE 72nd Avenue. I checked the area and was unable to locate it and could not find an address matching and did not see the Caterpillar outside any property.

On 03/21/2017 I was again dispatched to 18228 NE 72nd Avenue. I contacted Mark Rickabaugh<sup>7</sup> via telephone who is the owner of the stolen Caterpillar. He provided me with pictures and GPS locations of where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding. I was able to match the photos to Google Maps and found the address to be 18110 NE 72nd Avenue. Mark said the value of the Track Loader is \$46,000.00.

CP 13-14.

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<sup>6</sup> When the “commonsense inference to be drawn is that the person providing information is a police officer” his or her observations “are considered a reliable basis for the issuance of warrants.” *State v. Matlock*, 27 Wn.App. 152, 155, 616 P.2d 684 (1980) (rejecting among other arguments that the affidavit in question did “not sufficiently identify Officer Richart so as to establish his reliability”); *U.S. v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *State v. Laursen*, 14 Wn.App. 692, 695, 544 P.2d 127 (1975).

<sup>7</sup> Similarly, when an identified citizen informant or victim provides information to police that is utilized in a search warrant affidavit the reliability showing is relaxed. *State v. Northness*, 20 Wn.App. 551, 555-58, 582 P.2d 546 (1978); *State v. Lair*, 95 Wn.2d 706, 710-13, 630 P.2d 427 (1981) (holding that “even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth”).

GPS technology, at this point, is not new and its accuracy and reliability is well-established. *U.S. v. Brooks*, 715 F.3d 1069, 1077-78 (8th Cir. 2013) (holding that the district court did not abuse its discretion when it “took judicial notice of the accuracy and reliability of GPS technology” and remarking that “[c]ourts routinely rely on GPS technology to supervise individuals . . . and . . . have generally assumed the technology’s accuracy” in the context of the Fourth Amendment); *People v. Campbell*, - -- Colo.App. ----, 2018 WL 549494 (holding that “GPS technology is prevalent in modern society and widely regarded as reliable”); *United States v. Jones*, 565 U.S. 400, 414-16, 132 S.Ct. 945, 955, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring) (discussing GPS monitoring); see *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F.Supp.2d 526, 533, 540-41 (D. Md. 2011); see also James Beck et al., *The Use of Global Position System (GPS) and Cell Tower Evidence to Establish a Person’s Location*, 49 No. 1 Crim. L. Bull. art. 7 (Winter 2013) (stating that “[t]he relatively unchallenged science behind GPS and the extensive, successful reliance on the technology during the past 30 years justify its admissibility in court”). In fact, courts, including ours, have addressed GPS technology for well over a decade. *State v. Jackson*, 150 Wn.2d 251, 260-65, 76 P.3d 217 (2003); See also *U.S. v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002).

The GPS location information contained in Dep. Fields's affidavit constitutes "sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity w[ould] be found" in Harris's leased outbuilding because of the well-established accuracy and reliability of GPS technology itself, the accuracy of the GPS information actually provided, and the ability of Dep. Fields, while basically on-scene, to match the "the pictures and GPS locations of where the [stolen] Caterpillar had been" provided by the victim to Google Maps and the residence address at which Harris's leased outbuilding was located. *Chenoweth*, 160 Wn.2d at 475; CP 13-14. More specifically, the victim reported that "the last update he received *showed* the Caterpillar in and near an outbuilding" and Dep. Fields was able use this information combined with the GPS information, provided pictures, and Google Maps to locate the "match[ed]" residence address with an outbuilding. CP 12, 14.

That the GPS tracking system installed in the stolen Caterpillar conveyed that the Caterpillar "might be in the *area* of 18228 NE 72nd Avenue" rather than at the residence address of "18110 NE 72nd Avenue" is of no matter since the residence address of 18110 NE 72nd Avenue *is* in

the area of 18228 NE 72nd Avenue<sup>8</sup> and there is no residence at 18228 NE 72nd Avenue. CP 13-14 (emphasis added). Furthermore, Dep. Shields followed up on the original GPS information with the additional information provided by the victim to locate the residence address of 18110 NE 72nd Avenue and Harris's leased outbuilding while *in the area* of 18228 NE 72nd Avenue. CP 13-14. When the above is combined with the fact that courts "may draw reasonable inferences about where evidence is likely to be kept," that bulky, valuable stolen property like a Caterpillar is likely to be found hidden in a home, garage, barn, or other storage building, and that the property owner reported knowing that Harris had a "tractor"<sup>9</sup> in the leased outbuilding, the qualifying information in the affidavit established probable cause to believe that evidence of the stolen Caterpillar would be found in Harris's leased building. *Dunn*, 186 Wn.App. at 897-99; CP 14.

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<sup>8</sup> Compare <https://goo.gl/maps/A2srqwnjPTr> (18228 NE 72nd Ave) with <https://goo.gl/maps/XpiFy4gfAjo> (18110 NE 72nd Ave); *State v. Nichols*, 161 Wn.2d 1, 5 n.1, 162 P.3d 1122 (2007) (noting that "[c]ourts routinely take judicial notice of maps") (citations omitted); ER 201 (the rule permits judicial notice of a fact "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); see also *Concerned Friends of Ferry County v. Ferry County*, 191 Wn.App. 803, 825, 365 P.3d 207 (2015); CP 65.

<sup>9</sup> A tractor is not a track loader, the Caterpillar vehicle that was stolen and Harris possessed. While tractors can come in many variations, some of which look similar to a track loader, the distinguishing feature between the two is that the tractor has tires while the track loader utilizes a continuous track on each side to move. Regardless, at a minimum, the observation of a tractor in Harris's leased building was relevant to show that Harris uses or used the building, in part, to store farm or construction vehicles or that such vehicles could be stored within.

As a result, the evidence seized was not done so unlawfully since it was “ultimately . . . obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.” *Bentancourth*, 190 Wn.2d at 364-65 (internal quotation omitted). That is, the independent source doctrine applies since probable cause still exists for the warrant when “the tainted evidence is suppressed;” here, the observation of the stolen Caterpillar in Harris’s leased building. *Id.* at 365.<sup>10</sup> Moreover, this result comports with the rationale for the independent source doctrine because the State neither benefits from its unlawful conduct nor is it placed in a worse position than it otherwise would have occupied. *Gaines*, 154 Wn.2d at 720; *Bentancourth*, 190 Wn.2d at 365, 371-72. To the extent that this Court cannot determine whether the police would have obtained the stolen property in Harris’s leased building “through the course of predictable police procedures,” then it may be necessary to remand to the trial court to ensure that the police would have sought the warrant in the absence of the unlawfully obtained observation. *Gaines*, 154 Wn.2d at 721; *Spring*, 128

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<sup>10</sup> Though the State did not use the term “independent source” below, the parties argued about whether the affidavit established probable cause after severing or excising the unlawfully obtained evidence from the warrant and the trial court specifically ruled on this point. RP 116-134, 159; CP 110 (Conclusion of Law #14, #19) (“After the Court excises the observations of Deputy Fields after entering the building from the affidavit, the State fails to establish Probable Cause for the issuance of the warrant.”). Consequently, the issue is properly before this Court. Furthermore, there was no concession below that the search warrant would be invalidated if Dep. Fields’s observation of the tractor was found unlawful. RP 6-9, 31-32 (State: “we’d agree . . . that if you found against us on the *validity of the warrant*, then further testimony on plain view would not matter either”) (emphasis added).

Wn.App. at 405-06. Notwithstanding that inquiry, this Court should reverse the trial court's rulings, the order of suppression, and the order of dismissal, and reinstate the case against Harris.

**II. The trial court erred when it concluded that the entry into Harris's leased building pursuant to the search warrant was "unlawful[] because Deputy Fields did not comply with RCW 10.31.040" since compliance was not required under longstanding case law.<sup>11</sup>**

The "knock and announce" rule is codified at RCW 10.31.040 and has constitutional underpinnings. *Wilson v. Arkansas*, 514 U.S. 927, 934, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). The rule requires that police, prior to entry, knock, announce their identity and purpose, and "wait a reasonable period to give occupants opportunity to voluntarily admit them before entering premises without permission." *State v. Cardenas*, 146 Wn.2d 400, 411, 47 P.3d 127 (2002); *State v. Campbell*, 15 Wn.App. 98, 101-02, 547 P.2d 295 (1976); RCW 10.31.040.<sup>12</sup> "The purposes of the knock and announce rule are to (1) reduce the potential for violence, to both occupants and police, arising from an unannounced

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<sup>11</sup> CP 110 (Conclusion of Law #12).

<sup>12</sup> The statute provides that "[t]o make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other enclosure, if, after notice of his or her office and purpose, he or she be refused admittance." Despite specifically referring to an entry to "make an arrest" the rule also applies when the police execute search warrants. *State v. Shelly*, 58 Wn.App. 908, 910, 795 P.2d 187 (1990) (citing *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984)).

entry; (2) prevent unnecessary property damage; and (3) protect an occupant's right to privacy." *Shelly*, 58 Wn.App. at 910 (citing *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256 (1980)).

Nonetheless, compliance with the knock and announce rule is subject to exceptions. *Cardenas*, 146 Wn.2d at 411; *Campbell*, 15 Wn.App. at 101. One well-established and longstanding exception is where police compliance with the rule would be "futile" or a "useless gesture." *Hudson v. Michigan*, 547 U.S. 586, 589-90, 126 S.Ct. 2159, 165 L.Ed.2d. 56 (2006) (citing *Richards* 520 U.S. at 394); *Campbell*, 15 Wn.App. at 101; *Shelly*, 58 Wn.App. at 911 (citing *Coyle*, 95 Wn.2d at 11). The "futile gesture" or "useless gesture" exception applies in situations such as when nobody is present inside the building at which the police seek entry. *Campbell*, 15 Wn.App. at 101-02; *U.S. v. Barnes*, 195 F.3d 1027, 1028-29 (8th Cir.1999); *U.S. v. McGee*, 280 F.3d 803, 806-07 (7th Cir. 2002); *Payne v. U.S.*, 508 F.2d 1391, 1393-94 (5th Cir. 1975); *Hart v. Superior Court*, 21 Cal.App.3d 496, 500-04 (1971); *Wilson*, 514 U.S. at 935 (quoting *Pugh v. Griffith*<sup>13</sup> for the proposition that "the necessity of a demand . . . is obviated, because there was nobody on whom a demand could be made"). The Supreme Court has "require[d] only that police 'have a reasonable suspicion . . . under the particular circumstances'

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<sup>13</sup> 7 Ad. & E. 827, 840-841, 112 Eng.Rep. 681, 686 (K.B.1838)

that one of the[] grounds for failing to knock and announce exists, and we have acknowledged that “[t]his showing is not high.” *Hudson v. Michigan*, 547 U.S. at 590 (quoting *Richards* 520 U.S. at 394); *Cardenas*, 146 Wn.2d at 411.

Here, the record below is sufficient, albeit unsatisfactory. The CrR 3.6 hearing and its attendant testimony was focused on Dep. Fields’s initial entry into Harris’s leased building and whether that entry was the product of lawful consent. *See* RP. The State informed the trial court that it had additional police witnesses who were present to testify to the “knock-and-announce” issue during the service of the search warrant. RP 7, 31-32. Because of the focus of the hearing, however, those witnesses were not called, and while questions were asked about Dep. Fields knocking and announcing before the first entry, only a single question was asked about the knock and announce procedure he employed when taking part in the execution of the search warrant.<sup>14</sup> RP 7, 25-26, 31-32, 52.<sup>15</sup>

Nonetheless, the evidence was sufficient to establish that compliance with the knock and announce rule would have been “futile” or a “useless gesture” since Harris’s leased building was unoccupied at the time of Dep.

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<sup>14</sup> Defense: “By the way, on this knock-and-announce, maybe it’s jumping ahead a little, but you said the same thing when the entry was made with the search warrant, correct?” [Dep. Fields:] “Yes.” RP 52.

<sup>15</sup> Dep. Fields actually did knock on the door and announce “Sheriff’s Office,” but that State did not present evidence as to how long Dep. Fields waited before entry or whether he announced “his purpose.” RP 25-26, 45, 52.

Fields's entry pursuant to the search warrant. RP 25-31; CP 106 (Finding of Fact #24) ("Deputy Fields did not see or hear anyone in the building."); CP 107 (Finding of Fact #27) (after Dep. Fields left the shop "the location as secured."). Consequently, Dep. Fields was not required to comply with RCW 10.31.040 prior to entering Harris's outbuilding for the purposes of executing the search warrant. *Wilson*, 514 U.S. at 934; *Campbell*, 15 Wn.App. at 101-02. Accordingly, the trial court erred when it concluded that Dep. Fields's entry into Harris's outbuilding with a search warrant was "unlawful because Deputy Fields did not comply with RCW 10.31.040." CP 110 (Conclusion of Law #12). This Court, therefore, should reverse the trial, its order suppressing the evidence discovered, and its order dismissing the case.

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**CONCLUSION**

For the reasons argued above, the trial court's order suppressing the evidence seized and order dismissing the State's case should both be reversed and the case reinstated.

DATED this 14<sup>th</sup> day of August, 2018.

Respectfully submitted:

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