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Division II  
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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REPLY BRIEF OF APPELLANT

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## ARGUMENTS IN REPLY

**I. The State preserved its independent source argument by making the argument in the trial court and preserved its knock and announce violation argument by objecting to the entry of Conclusion of Law No. 12 where the lawfulness of the second entry into shop building was outside the scope of the hearings and the parties' arguments.**

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

In order to preserve an “error for consideration on appeal, the general rule is that the alleged error must be called to the trial court’s attention at a time that will afford the court an opportunity to correct it.” *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979) (citation omitted); *State v. Bird*, 136 Wn.App. 127, 133-34, 148 P.3d 1058 (2006). To call an error to the trial court’s attention a party need only make the essential argument below; it need not intone magic words. *State v. Wilson*, 108 Wn.App. 774, 778, 31 P.3d 43 (2001); *Greenfield v. Western Heritage Ins. Co.*, 154 Wn.App. 795, 801, 226 P.3d 199 (2010); *State v. Allred*, 4 Wn.App.2d 1040, 2018 WL 3360852, 3 (2018).<sup>1</sup> “This rule exists to give the trial court an opportunity to correct the error and to give the opposing

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<sup>1</sup> *Allred* is an unpublished opinion of this Court. Pursuant to GR 14.1 the opinion “may be accorded such persuasive value as the court deems appropriate.”

party an opportunity to respond.” *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015) (citation omitted).

An appellate court, on the other hand, may refuse to review a claim of error when that error was not raised in the trial court. *Id.* at 832 (citing RAP 2.5(a)). And while appellate courts do “normally decline to review issues raised for the first time on appeal, . . . RAP 2.5(a) grants appellate court discretion to accept review of claimed errors not appealed as a matter of right.” *Id.* at 834-35 (internal citation omitted).

Furthermore, when suppression issues are being litigated on appeal, appellate courts “review a trial court’s ruling on a motion to suppress evidence to determine (1) whether substantial evidence supports the trial court’s factual findings, and (2) whether the factual findings support the trial court’s conclusions of law.” *State v. Quezadas-Gomez*, 165 Wn.App. 593, 600, 267 P.3d 1036 (2011) (citation omitted). Any unchallenged findings of fact are verities on appeal and a trial court’s conclusions of law are reviewed de novo. *Id.* (citations omitted).

#### B. INDEPENDENT SOURCE DOCTRINE

Under the independent source doctrine, when information that was unlawfully obtained is included in a search warrant affidavit “the appropriate remedy [i]s to strike all references to the initial illegal search from the warrant affidavit” and then “assess[] whether probable cause

exist[s] to issue the original warrant. . . .” *State v. Betancourth*, 190 Wn.2d 357, 368-69, 413 P.3d 566 (2018). Here, the State noted that, despite the trial court’s ruling that Dep. Fields’ initial entry into the shop building was unlawful that “there was other information that before we ever get to that point, *independently*, was the basis for probable cause to get a search warrant. . . .” RP 118 (emphasis added).<sup>2</sup> Though the State often used the term “severability” rather than saying “independent source,” the analysis and arguments the State presented are indistinguishable from the independent source doctrine, e.g., “[a]nd the State believes that even with your excising out what you’ve excluded, that the warrant would still be valid.” RP 117.

After raising the issue, both parties argued the merits of whether probable cause remained after the unlawfully obtained information was excised from Dep. Fields’ search warrant affidavit and the trial court made a ruling on the merits—“[i]f we exclude everything out from the time that he [(Dep. Fields)] opened that door, what is left is not enough that I think there would have been probable cause for a warrant.” RP 116-134; CP 110 (Conclusions of Law No. 13-14). Thus, the State raised the independent source doctrine argument in the trial court and the opposing party was

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<sup>2</sup> At the CrR 3.6 hearing the trial court ruled that the first entry was unlawful and the search warrant was invalid. RP 107-112. At that hearing, however, the trial court failed to analyze whether probable cause remained after excising the unlawfully obtained evidence. RP 107-112. Thus, the State raised the issue at the next hearing.

given an opportunity to, and did, respond to the argument. As a result, the State preserved the independent source doctrine argument for this Court's review.

Harris' claim that "[t]he argument that the affidavit for search warrant was sufficient to establish probable cause, even after excision of the illegal portion was not briefed at the Trial Court, was not raised or argued at the suppression hearing, and was waived" is without merit. Brief of Respondent at 3. First, Harris relies on an unsupported and artificial distinction between "the suppression hearing" and the hearing to enter findings to support his claim that arguments not raised at "the suppression hearing" are waived. Br. of Resp. at 6-7.<sup>3</sup> Notably, Harris does not provide any legal authority for the proposition that legal arguments made on the merits, by both parties, and ruled on by the trial court are waived unless made at a specifically titled hearing, that all search and seizure arguments must be made at a designated suppression hearing or they are waived, or that briefing must be filed to preserve an argument. Br. of Resp. at 3-7. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574

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<sup>3</sup> "Appellant, on appeal, suggests that the issue of severability was raised below, by citing to the Report of Proceedings at page 116, however this was not at the suppression hearing on January 12, 2018; it was only after the court had ruled and was entering Findings and Conclusions on January 30, 18 days later." Br. of Resp. at 7 (emphasis in original).

P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Moreover, an appellate court need not consider arguments unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). But, in fact, Harris does not even argue that there is a substantive legal difference between the hearings relative to the waiver determination; rather, his claim of waiver is simply *ipse dixit*. Accordingly, this Court should conclude that the independent source doctrine argument was preserved and review the argument on the merits.

#### C. KNOCK AND ANNOUNCE RULE

The knock and announce rule requires that police, prior to entry into a home, 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); RCW 10.31.040. The police, however, need not comply with the rule where compliance 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) (citation omitted); *State v. Campbell*, 15 Wn.App. 98, 101, 547 P.2d 295 (1976).

Here, the State did not make an argument below applying the “futile” or “useless gesture” doctrine to the second entry into the shop

building in service of the search warrant. *See* RP. But said argument was not required to be made since the lawfulness of the second entry was outside the scope of the issues actually litigated at the hearings and because the main issues resolved at the hearings—the authority of Tucker to consent to entry into the shop building and the validity of the search warrant—were determinative, i.e., if the search warrant was not supported by probable cause there was no legal reason to litigate the lawfulness of the second entry.

At the outset, the State announced that it had two witnesses present and available to testify about the second entry into Harris’ shop building and the knock and announce rule. RP 7. But as the State noted, whether the witnesses would be called “depend[ed] on [the trial court’s] rulings because they would only be witnesses where we get to knock-and-announce forward.” RP 7.<sup>4</sup> This comment was in response to the Court’s view of how to approach the hearing. RP 5-6. The position of Harris and the trial court was that if the authority to consent issue<sup>5</sup> was decided in Harris’ favor then the search warrant would be invalidated, the evidence

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<sup>4</sup> These two witnesses were not present for the first entry into Harris’ leased shop building. RP 21, 24, 26, 30.

<sup>5</sup> As a reminder, in the trial court the State argued that Tucker, the owner of the building that Harris leased space from, provided Dep. Fields with lawful consent to enter. Harris first entered pursuant to that consent and observed the stolen track loader.

suppressed, and the rest of the suppression arguments would become moot. RP 5-6. The following exchange exemplifies this position:

[HARRIS]: You Honor, our position is that if you decide this consent issue –

...

THE COURT: That takes care of it. I agree with you. Because if I find that – and you should read nothing into this, but I do agree with that statement.

If I find the *first entry* was not valid, the information of finding the track loader in there would never have been had. You have to take that out. You could have never gotten the warrant.

[HARRIS]: Right.

RP 6.<sup>6</sup> Harris’ opinion appears to remain the same as he remarks in his brief that “[n]umerous other issues were not addressed because the Trial Court correctly determined that the issue of the validity of the consent to enter was dispositive. . . .” Br. of Resp. at 4 (internal citations omitted); *see also* Br. or Resp. at 23 (“The knock and announce issue has no significance if the Appellate Court determines that the search warrant was invalid.”)

A thorough review of the suppression hearing shows that the focus by all parties was on the authority to consent issue with some argument on the knock and announce rule as it pertained to the first entry. RP 31-45,

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<sup>6</sup> Harris then also noted that the knock and announce rule was an issue as well, but that it “comes . . . before the entry.” RP 6-7.

92-112. After the State finished the direct examination of Dep. Fields, focusing on those issues, the trial court remarked to Harris that:

I think he's [(the State)] taken the lead that that I came out and announced and we all kind of agreed on this first initial entry. Should I rule in your favor on your motion . . . the rest of the case is kind of moot on the matter, so I think he's feeling he's addressed that initial entry search. . ."

RP 32. The State agreed, but noted other issues, including "knock-and-talk [and] the validity of the warrant" could still remain. RP 32.

It was at this point that Harris sought dismissal "based on failure to comply with the knock-and-announce" statute during the first entry. RP 32-33. Harris and the trial court then went back and forth discussing the interplay of Tucker's authority to consent and the knock and announce rule. RP 33-39. The State joined that discussion before the trial court decided, without ruling on any of the legal issues, that additional evidence should be taken. RP 39-45.

Following the completed cross examination<sup>7</sup> of Dep. Fields, the State said that it didn't have any additional questions for him "on *this* issue." RP 58 (emphasis added). The trial court then stated "[a]s we take additional testimony on *this* issue we're excluding witnesses" and asked Harris if he was "calling any witnesses just for *this* issue." RP 58

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<sup>7</sup> During this cross examination Harris asked Dep. Fields his one substantive question about the second entry: HARRIS: "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 (emphasis added).

(emphasis added). Harris confirmed he was. RP 58. Next, the court confirmed the scope of the hearing:

THE COURT: So at this point, for that initial entry, the State has put all their witnesses on?

[STATE]: For that issue, that's all of our witnesses

...

[HARRIS]: Okay. So no further witnesses on the issue of consent; is that what I'm hearing?

THE COURT: That's what they are saying. . . .

RP 59.

Harris then testified and at the end of his initial direct examination his counsel noted “[t]hat’s what I have for right now, Your Honor, on this issue of authority to consent.” RP 79. After additional cross and direct examinations, Harris’ testimony was complete and the parties moved to argument. RP 91-92. The parties only provided argument on the authority to consent issue; neither mentioned the knock and announce rule or the second entry into Harris’ leased shop building. RP 92-107. The trial court, accordingly, only ruled on that issue and concluded that Tucker did not have actual authority to consent to Dep. Fields’ entry into Harris’ leased shop building. RP 107-112.

Unsurprisingly, since the trial court had already ruled that the initial entry into the home was unlawful and determinative of the validity of the search warrant it did not make alternative and unnecessary legal

conclusions regarding the knock and announce rule as it pertained to the initial entry. RP 107-112.<sup>8</sup> More significantly, the trial court did not rule on the lawfulness of the second entry into the shop building. RP 107-112. This makes sense since the court did not take evidence (the State's declared witnesses) regarding the lawfulness of the second entry or hear argument on that issue.

Furthermore, when the parties reconvened for the entry of findings and argued about "severability" (the independent source doctrine) no legal discussion was had regarding the knock and announce rule or the second entry into the shop building save for the State's objections to two findings of fact relevant to the useless gesture doctrine<sup>9</sup> and to the specific conclusion of law that Dep. Fields' entries were unlawful because he did not comply with RCW 10.31.040. RP 140-41, 143, 151; CP 106-07, 110. As a result, despite (1) not hearing argument from the parties on the issue; (2) not hearing from the State's designated and available witnesses on the issue; and (3) not making an oral ruling on the issue, the trial court entered Harris' proposed conclusion of law, over the State's objection, that the

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<sup>8</sup> Harris acknowledges that the same situation applies on appeal by stating "[t]he knock and announce issue has no significance if the Appellate Court determines that the search warrant was invalid." Br. of Resp. at 23.

<sup>9</sup> To Finding of Fact No. 24 the State requested that the language "Deputy Fields did not see or hear anyone in the building" be added and that language was added. RP 140-41; CP 106. To Finding of Fact No. 27 the State requested that the language "the location [(the shop building)] was secured" be added and that language was added. RP 143; CP 107.

second entry was unlawful for a failure to comply with the knock and announce rule. Given the procedural posture and substantive legal issues actually raised and argued, the State cannot have been said to have waived any argument as it pertains to the second entry into the shop building.

Furthermore, the trial court's Conclusion of Law No. 12, which states, in part, that the "subsequent entry under the search warrant w[as] . . . unlawful[] because Deputy Fields did not comply with RCW 10.31.040" is unsupported by the evidence at the hearings and the trial court's findings of facts, which are verities on appeal, because said evidence and findings plainly establish that the "useless gesture" doctrine applies and, thus, that compliance with RCW 10.31.040 was not required. CP 110. The State preserved its ability to challenge Conclusion of Law No. 12 by objecting to its entry. RP 151. And at a minimum, this Court, if it does not address the substance of the "useless gesture" doctrine, should allow the State to present the argument to the trial court upon remand.

In the alternative, if RAP 2.5 applies, RAP 2.5(a)(2) provides that a "party may raise the following claimed errors for the first time in the appellate court: . . . failure to establish facts upon which relief can be granted." Here, there was a failure to establish facts regarding the second entry upon which relief—the suppression of the evidence—can be granted. Moreover, under RAP 2.5(a) a court may exercise its discretion to review

claims of error even if the error does not fall within the listed exceptions. *See e.g., State v. Shabeeb*, 194 Wn.App. 1032, 2016 WL 3264421 (2016) (Deciding to exercise “discretion under RAP 2.5(a) to address” an unpreserved argument).<sup>10</sup>

**II. The search warrant affidavit established probable cause even after the unlawful evidence was excised because it was based on reliable and corroborated GPS information.**

A. STANDARD OF REVIEW

As Harris acknowledges, 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 a legal question that is reviewed de novo.” *State v. Ollivier*, 178 Wn.2d 813, 847-48, 312 P.3d 1 (2013) (citation omitted); Br. of Resp. at 8. Nonetheless, Harris proposes a new standard of review in which “[t]he burden of proof should fall upon the State, and the standard of proof should be to require the State to demonstrate that no reasonable judge would decline to issue the warrant.” Br. of Resp. at 8 (emphasis in original). Harris then applies this proposed standard to argue that the “Trial Court judge acted well within his discretion” when it concluded

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<sup>10</sup> *Shabeeb* is an unpublished opinion of this Court. Pursuant to GR 14.1 the opinion “may be accorded such persuasive value as the court deems appropriate.”

that excised affidavit did not establish probable cause. Br. of Resp. at 8, 13.

This Court should decline Harris' invitation to apply a new standard of review. First, Harris fails to cite any legal authority to support his proposal. Second, our Supreme Court has declared the standard of review that must be applied on appeal and that determination is binding on this court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). That standard of review, when determining whether an independent source established probable cause, is de novo. *Ollivier*, 178 Wn.2d at 847-48. Furthermore, a de novo review of probable cause still involves taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences rather than performing a hyper technical parsing. *State v. Maddox*, 152 Wn.2d 499, 509-510, 98 P.3d 1199 (2004); *see e.g. State v. Phillip*, 195 Wn.App. 1051, 2016 WL 4507473 (2016).<sup>11</sup>

#### B. RELIABILITY

Harris' primary claim is that the search warrant affidavit—minus the excised information—did not establish probable cause because it was based upon unreliable information. In fact, Harris appears to claim that information provided by Redmond, Oregon Police Officer Michael Maloney, the victim, Mark Rickabaugh, and the GPS location information

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<sup>11</sup> *Phillip* is an unpublished opinion. Pursuant to GR 14.1 the opinion “may be accorded such persuasive value as the court deems appropriate.”

should all be deemed unreliable. Br. of Resp. at 9-13. These claims do not withstand serious scrutiny.

1) Identified informants

First, “[c]itizen [or identified] informants are deemed *presumptively* reliable.” *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004) (emphasis added) (citation omitted). Courts grant citizen or identified informants this presumption because there “is less risk of information being a rumor or irresponsible conjecture” and the “informant’s report is less likely to be marred by self-interest.” *Id.* Because the presumption of reliability obtains when the citizen informant makes a report it is the party contesting the information that must overcome the presumption. *Id.* at 74; *see also* Brief of Appellant at 13, n. 6-7.

Harris’ claim that Ofc. Maloney and Rickabaugh cannot be considered reliable fails because he applies the wrong legal standard in contesting their reliability by suggesting the State was obliged to show a “track record of reliability” or “established prior reliability” in order to rely on their information. Br. of Resp. at 9-11. A track record, or other historical basis for reliability, is only required when informant is anonymous or confidential. *Gaddy*, 152 Wn.2d at 73-74; *State v. Matlock*, 27 Wn.App. 152, 155, 616 P.2d 684 (1980) (holding that a police officer’s

observations “are considered a *reliable* basis for the issuance of warrants) (emphasis added); *see also State v. Lair*, 95 Wn.2d 706, 710-13, 630 P.2d 427 (1981). Nevertheless, Harris’ criticisms do not overcome Ofc. Maloney’s and Rickabaugh’s presumption of reliability.

A commonsense reading of the affidavit provides that Rickabaugh contacted the Redmond, Oregon police after noticing that his Caterpillar 259 track loader equipped with GPS tracking had been stolen. CP 13-14. Ofc. Maloney was assigned to the case and based on the GPS information provided he contacted Clark County, Washington and provided information about the stolen track loader to include that the track loader “might be in the *area* of 18228 NE 72<sup>nd</sup> Avenue.” CP 13-14 (emphasis added). After Dep. Fields was unable to initially locate the track loader, he directly contacted Rickabaugh who was able to provide Dep. Fields with “pictures and GPS locations of where the Caterpillar had been” and told Dep. Fields that “the last update he received showed the Caterpillar in and near an outbuilding.” CP 14. Dep. Fields utilized this information to identify Tucker’s nearby address which contained an outbuilding and continued his investigation. CP 14.

Based on the above, there is no basis by which to overcome the presumption that Ofc. Maloney and Rickabaugh were truthfully relaying information upon which Dep. Fields could rely. There is also no basis to

believe that an officer investigating a crime and a victim hoping to retrieve his stolen property valued at \$46,000 were trading in “rumor or irresponsible conjecture.” CP 14; *Gaddy*, 152 Wn.2d at 73-74.

## 2) GPS

Thus, Harris’ argument that Ofc. Maloney and Rickabaugh are unreliable must be inextricably linked to his untenable claim that the GPS device should be considered unreliable and that it provided “false, inaccurate information.” Br. of Resp. at 10. For example, Harris complains that there is “[n]o information in the affidavit as to the brand, model, age, effective range, condition, or currency of software of [the GPS] device.” Br. of Resp. at 11. But Harris does not explain how this information would assist the magistrate. For instance, if the magistrate was told the GPS device was a two year old Skid Steer Solutions NT-GP51 in fair condition on software version 2.01, would he or she be able to determine the reliability of the device? What if, instead, it was a Tracker Systems GV300VC?

Furthermore, Harris again fails to provide any legal authority for the proposition that this type of device information is necessary for determining the reliability of a device or assessing the relevant technology’s ability to assist in a probable cause determination. Br. of Resp. at 11, 13. “Where no authorities are cited in support of a

proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *Young*, 89 Wn.2d at 625 (citation omitted). And in analogous situations, even those where the technology is less accurate and inadmissible at trial, our courts have never required device or instrument specific information in order for that device’s result or instrument’s measurement to be used to establish probable cause. *State v. Cherry*, 161 Wn.App. 301, 304-06, 810 P.2d 940 (1991); *State v. Clark*, 143 Wn.2d 731, 749-750, 24 P.3d 1006 (2001); *Clement v. Dep’t of Licensing*, 109 Wn.App. 371, 375-76, 35 P.3d 1171 (2001) *State v. Portrey*, 6 Wn.App. 380, 385, 492 P.2d 1050 (1972).

Thus, for instance, the State could not find any authority for the proposition that in order for a drug field test to support a probable cause determination for possession of drugs that an affidavit must or should contain the “brand, model, [or] age” of the test kit. The same can be said for other tests or measurements to include DNA tests, laboratory drug tests, blood toxicology tests, speed measuring devices, tool mark examination, and even polygraph examinations. *Clark*, 143 Wn.2d at 749-750; *Clement*, 109 Wn.App. at 375-76. This is because the foundation that needs to be established for the admission of evidence in front of a fact-finder, where information about the device and the operator may prove necessary, differs from that required to establish probable cause. *State v.*

*Huff*, 106 Wn.2d 206, 209-210, 720 P.2d 838 (1986); *Brinegar v. United States*, 338 U.S. 160, 172-173, 69 S.Ct. 1302, 1309, 93 L.Ed. 1879 (1949) (noting the different standard for evidence providing probable cause and evidence admissible to prove guilt).

For example, in *Clement*, the defendant argued that in order to prove the lawfulness of a traffic stop for speeding the Department of Licensing was required to “produce foundational evidence to support the radar reading.” 109 Wn.App. at 376. But *Clement* rejected this argument, noting that the Department need not “go beyond proving that there was probable cause to believe the motorist violated the traffic code.” *Id.* Similarly, here, the State utilized the GPS information to establish probable cause and nothing more. Because GPS technology is not new and its accuracy and reliability is well-established—even more so than drug field tests and polygraph examinations—the GPS information obtained in this case is presumed, and was proved, reliable, and can form the basis of establishing probable cause notwithstanding the absence of information regarding the actual device. *See* Br. of App. at 14 (citing authority for proposition that GPS technology is reliable).

Next, as it pertains to the reliability of GPS information provided by Ofc. Maloney and Rickabaugh to Dep. Fields, the information was accurate and reliable. Harris argues the GPS information provided by Ofc.

Maloney was “false and inaccurate” and included an address that “did not even exist.” Br. of Resp. at 10, 13 (emphasis in original). A fair reading of the affidavit shows that this argument is itself factually inaccurate.

The affidavit indicated that the stolen Caterpillar “might be in the *area* of 18228 NE 72nd Avenue.” CP 13-14 (emphasis added). The residence address of 18110 NE 72nd Avenue *is* in the area of 18228 NE 72nd Avenue.<sup>12</sup> In fact, the distance between the two addresses is approximately 282 feet. <https://goo.gl/maps/Fs4Jp9fTMxq> (last accessed on November 28, 2018). Moreover, Harris does not explain how he has come to the conclusion that 18228 NE 72nd Avenue does not exist as an address; the absence of a residence at that location does not make his claim true. And, furthermore, Dep. Fields, was able to match “the pictures and GPS locations of where the [stolen] Caterpillar had been” provided by Rickabaugh to Google Maps and the residence address at which Harris’ leased outbuilding was located. CP 13-14. By matching the on scene information with that provided by Rickabaugh, Dep. Fields corroborated the reliability of the GPS. Accordingly, Harris’ challenge to the reliability of the GPS information fails.

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<sup>12</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.

When all of the above is combined with the fact that bulky, valuable stolen property like a Caterpillar is likely to be found hidden in a garage, barn, or other storage building, and that the property owner reported knowing that Harris had a “tractor” 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’ leased building. *State v. Dunn*, 186 Wn.App.889, 348 P.3d 791 (2015); CP 14.

**III. Because the trial court found that the qualifying information did not establish probable cause there was no reason to reach the second prong of the independent source inquiry.**

To determine whether a search warrant is truly an independent source for the discovery of the challenged evidence a court must also determine whether the “police would have sought the warrant even absent the initial illegality.” *Betancourth*, 190 Wn.2d 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).

Harris argues that “[t]his factual issue could have been, and would have been resolved if the issue had been raised in the suppression hearing, but it was not” and that, as a result, remand for a hearing in the trial court

is inappropriate. Br. of Resp. at 15-16. This argument is belied by the record in which numerous issues related to the potential suppression of the evidence were not litigated because the trial court *and* Harris believed the authority to consent issue was dispositive.<sup>13</sup> RP 6-7, 58-59, 79. Similarly, there was no reason for the trial court to take evidence or hear argument as to whether the “police would have sought the warrant even absent the initial illegality” when it had already determined that the qualifying information in the search warrant affidavit did not establish probable cause. *Betancourth*, 190 Wn.2d at 365.

And contrary to Harris’ claim that “the deputy’s [(Dep. Fields)] subjective intent” is determinative of the question; Dep. Fields, a patrol deputy of only nine months at the time, was working with other officers on this case, including a detective and a sergeant. RP 7, 30. It stands to reason, whatever Dep. Fields’ personal beliefs, that whether the “*police* would have sought the warrant” would not be entirely up to him. *Betancourth*, 190 Wn.2d at 365 (emphasis added). Consequently, if this Court finds that the qualifying information in the affidavit established probable cause then it should remand for the trial court to determine if the

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<sup>13</sup> Harris has otherwise already acknowledged that “[n]umerous other issues were not addressed because the Trial Court correctly determined that the issue of the validity of the consent to enter was dispositive. . . .” Br. of Resp. at 4 (internal citations omitted)

warrant would have been sought absent the initial entry into the outbuilding.

**IV. Because Dep. Fields reasonably believed that the shop building was unoccupied when he returned with the search warrant he was not required to comply with the knock and announce statute since to do so would be a useless gesture or futile act.**

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) (citation omitted); *Campbell*, 15 Wn.App. at 101; *State v. Shelly*, 58 Wn.App. 908, 911, 795 P.2d 187 (1990) (citation omitted)). 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). The Supreme Court has “require[d] only that police ‘have a reasonable suspicion . . . under the particular circumstances’ that one of the[] grounds for failing to knock and announce exists, and we have acknowledged that ‘[t]his showing is not high.’” *Hudson*, 547 U.S. at 590 (quoting *Richards v.*

*Wisconsin*, 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997));  
*Campbell*, 15 Wn.App. at 102 (noting that it was “*reasonable* to believe  
that the lessee of the apartment was not present”) (emphasis added);  
*Cardenas*, 146 Wn.2d at 412 (noting that the officers “*reasonably* believed  
that the suspects were armed) (emphasis added).

Harris claims that the State’s useless gesture argument fails  
because “nothing in the record . . . indicate[s] that Deputy Fields knew . . .  
that the building was unoccupied” or that “Deputy Fields was ‘virtually  
certain’ that compliance with the statute would be a useless act” Br. of  
Resp. at 24-25, 29 (citing *State v. Coyle*, 95 Wn.2d 1, 11, 621 P.2d 1256  
(1980)). But the State was not required to prove that Dep. Fields “knew”  
or was “virtually certain” the building was unoccupied—neither is the  
correct standard. Harris cites to *State v. Schimpf*, 82 Wn.App. 61, 914 P.2d  
1206 (1996), but a brief review of that case shows that it does not stand for  
the proposition that the State must prove “knowledge” for an exception of  
the knock and announce rule to apply. *Coyle*, the other case upon which  
Harris relies, does state that noncompliance with the rule may only be  
excused when the police are “virtually certain” one of the exceptions  
applies. 95 Wn.2d at 11. But that holding doesn’t survive later opinions of  
the United States Supreme Court or of ours. *Richards*, 520 U.S. at 394;  
*Hudson*, 547 U.S. at 590; *Cardenas*, 146 Wn.2d at 411-12. In fact, our

Supreme Court in *Cardenas*, decided after *Coyle*, specifically cites the United Supreme Court in *Richards* for the proposition that “strict compliance with the knock and announce rule is required unless the State can demonstrate that the police had ‘*a reasonable suspicion* that knocking and announcing their presence, under the particular circumstances, would be dangerous or *futile*. . . .’” *Cardenas*, 146 Wn.2d at 411 (emphasis added) (quoting *Richards*, 520 U.S. at 394).

Nonetheless, the record and the unchallenged findings of fact, which are verities on appeal, establish that *prior* to Dep. Fields’ second entry that he would have been “virtually certain,” or at a minimum reasonably believe that the shop building was unoccupied.<sup>14</sup> Upon Dep. Fields’ first entry he noticed from the doorway that the shop building was “a big, open area” without partitions or cages. RP 26, 78-79. While inside the shop building Dep. Fields moved to the track loader and made a phone call to the dealership. RP 26-29. He was inside for three to five minutes. RP 29. While inside, there was no indication any other person was inside the building. *See* RP; CP 118 (Finding of Fact No. 24 – “Deputy Fields did not see or hear anyone in the building.”). After exiting, for the purpose of obtaining a search warrant, the shop building was locked and another deputy maintained security on the building until the service of the search

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<sup>14</sup> Harris testified that he only went to the shop building about once a month. RP 79-80. The nature of the structure suggests that it was less likely to be occupied than a residence.

warrant. RP 30; CP 119 (Findings of Fact No. 27, 30). Based on these facts it is fair to say that Dep. Fields had a reasonable suspicion that no person was in the shop building at the time he executed the search warrant. Consequently, Dep. Fields was excused from complying with the knock and announce rule since to comply would be a “useless gesture.”

### CONCLUSION

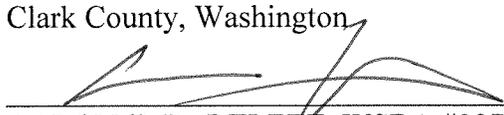
This court should reverse the trial court’s order suppressing the evidence and dismissing the case against Harris.

DATED this 30<sup>th</sup> day of November, 2018.

Respectfully submitted:

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