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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM WITKOWSKI,

Petitioner.

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Appeal from the Superior Court of Pierce County  
The Honorable Michael Schwartz

No. 15-1-04375-9

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Somebody was stealing power at the house Ms. Berven shared with appellant. This was discovered by the power company, which reported the theft to the Sheriff's Department. The information provided by the power company officials provided the deputies right then and there with ample enough probable cause for a search warrant.

The investigating deputies went to visit the property without a search warrant and obtained consent to enter the property—without *Ferrier* warnings. *Ferrier* warnings were not required in this case because this case was not a “knock and talk” as the term has been used by the Supreme Court—and the Supreme Court has limited *Ferrier* to knock and talk cases.

While they were on the residence's curtilage, by invitation of Ms. Berven, the deputies—accompanied by Ms. Berven—walked up to the power pole where a stolen power meter had previously been affixed and then removed. This walk was also consensual. Ms. Berven had been informed that the officers were there to talk about the theft of power, and walking to the power pole was an obvious and straightforward thing to do. Appellant argues that it was unlawful for the deputies to look at that power pole.

Later, while still in the curtilage, the deputies obtained the consent of appellant, with *Ferrier* warnings, to check the identification numbers on two vehicles and a generator. One of the vehicles (a quad vehicle) came back stolen. This consensual informed search is not challenged on appeal, but it is relevant to the *Ferrier* inquiry.

The deputies subsequently obtained a search warrant for the stolen power meter and its associated fixtures. The information gathered during the visit to appellant's property was included in the warrant application, but probable cause to issue the warrant existed even without that information. The first search warrant was executed three days after the consensual visit to appellant's curtilage.

In executing the first search warrant, the deputies discovered facts which prompted them to seek and obtain a second search warrant. That second search warrant led to the successful prosecution of defendant for firearms charges and controlled substance charges.

The trial court upheld both search warrants. This Court should affirm the trial court.

The second search warrant was signed by the issuing judge several days after that judge authorized the second search warrant. No claim based on this fact was raised in the trial court, so the factual and legal background relating to that claim is very undeveloped. Because the issue was not raised

below, the very relevant telephonic recording of the search warrant authorization is not included in the record below. Nevertheless, appellant seeks to present this claim for the first time on appeal. That attempt should fail pursuant to RAP 2.5(a).

## II. RESTATEMENT OF THE ISSUES

- A. Is undisputed finding of fact 7 supported by substantial evidence?
- B. Are the trial court's "Findings as to Disputed Facts" supported by substantial evidence?
- C. Were *Ferrier* warnings required in this case?
- D. Did the investigating officers obtain consensual entry onto the curtilage of defendant's residence?
- E. Did the investigating officers lawfully observe a power pole in plain view?
- F. Did defendant consent to the search of the identification numbers on two vehicles and a generator?
- G. Did the entry of the officers onto the curtilage of the residence taint the subsequent search warrants?
- H. Is the record below sufficiently developed to evaluate taint?
- I. Has petitioner demonstrated error relating to the signature of the second search warrant in this case?
- J. Has petitioner demonstrated manifest constitutional error relating to the signature of the second search warrant in this case?

### III. STATEMENT OF THE CASE

Pierce County Sheriff's Deputy Martin Zurfluh<sup>1</sup> testified that in October, 2015 he was an investigator tasked with following up investigations originated by patrol deputies. 8/30/16 VRP 9-11. In October, 2015 Deputy Zurfluh was contacted by Detective Torgerson and told that William Witkowski (hereinafter "defendant") and Ms. Berven<sup>2</sup> were stealing power from the Ohop Mutual Light Company, a public utility power provider. 8/30/16 VRP 11. The location of the suspected power theft was 31717 47<sup>th</sup> Avenue East (hereinafter "the Residence"), in Pierce County. 8/30/16 VRP 12.

On October 26, 2015, Deputy Zurfluh contacted Kenneth Klotz, the general manager of the Ohop Mutual Light Company. 8/30/16 VRP 13. Mr. Klotz informed him that the power bill for the Residence was in the name of Ms. Berven. 8/30/16 VRP 14. Mr. Klotz also told him that defendant lived there. 8/30/16 VRP 14.

The General Manager told Deputy Zurfluh that a field technician (James Field) from the power company had gone to the Residence on October 6<sup>th</sup>. 8/30/16 VRP 14. Mr. Field had seen "that the power meter that belonged at that Residence was on the ground at the base of the power

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<sup>1</sup> 8/30/16 VRP 7.

<sup>2</sup> Ms. Berven was also a party to the suppression hearing. Her case was not joined with Mr. Witkowski's case.

pole and there was a stolen meter, or a different meter, in its place. *Id.* Mr. Field took photos of everything, went back to the office, then returned to the Residence. 8/30/16 VRP 15. When Mr. Field returned “[h]e saw that the meter that was on the pole, that was found to be stolen, had been removed and the original one was down below still.” *Id.* The meter down below was the original power meter assigned to the residence. *Id.* The General Manager and Mr. Field were able to determine that the stolen meter that Mr. Field observed on the 6<sup>th</sup> belonged on temporary service a couple of miles away from the Residence. 8/30/16 VRP 17. The stolen meter was identified by serial number. 8/30/16 VRP 17-18.

The General Manager told Deputy Zurfluh that “a little more than \$8,000.00” in “stolen power costs, the meter, service calls, several things that were established in that bill.” 8/30/16 VRP 23-24.

**A. The initial entry onto the Residence curtilage.**

**1. Deputy Zurfluh’s testimony relating to the initial entry onto the property.**

After Deputy Zurfluh learned this information from the General Manager, on October 26<sup>3</sup> he went to the Residence along with Mr. Field and two other deputies. 8/30/16 VRP 18. Deputy Zurfluh testified to his purpose: “Well, to discuss with Mr. Witkowski and Ms. Berven about the

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<sup>3</sup> 8/30/16 VRP 18.

stolen power, and, also, try to locate the stolen power meter.” 8/30/16 VRP 18-19.

Deputy Zurfluh, Mr. Field, and the other deputies parked right in front of the locked gate at the Residence. 8/30/16 VRP 20. Deputy Zurfluh testified about the initial entry:

A. No, nobody jumped the gate. We all walked up to the gate, Ms. Berven was on the back porch of the house. She saw us motioning, yelled, Hi, we need to talk to you. She came out and unlocked the gate.

Q. Did you ask Ms. Berven to unlock the gate, to the best of your recollection, or how did that happen?

A. Well, the gist of the conversation was I needed to talk to them about stolen power. I was there with the power company representative. She, as we were talking, opened the gate for us. She was a little bit upset, but --

Q. Upset how, what do you mean by upset? How was she acting?

A. She was just upset. At one point she just acted very concerned and was upset, maybe almost kind of crying a little bit, a little bit beside herself.

Q. Did you make repeated requests to have her open the gate or did she just do that voluntarily?

A. Voluntarily. Yeah, I didn't order her to open the gate or anything like that. She was being reasonable and opened the gate up, and we all just walked in kind of as we were talking about it.

Q. And you said that the gist of the conversation, you told Ms. Berven you were there to talk about the stolen power?

A. Right.

Q. You were up front with her about why you were at the property?

A. Yes.

Q. Was that before or after she opened the gate and allowed you on the property?

A. Right there at the gate, she was right in front of me. I can't remember if it was before she opened the gate or after she opened the gate. She knew why I was there.

Q. Were you dressed in uniform at the time?

A. Let me think. I was possibly in plain clothes with a tack [sic] vest on at that time.

Q. What about the other deputies?

A. Um, I believe they were in uniform; I'm pretty certain at least one of the two were.

8/30/19 VRP 21-22.

**2. Ms. Berven's testimony relating to the initial entry onto the property.**

Q. What happened -- you asked - you said you asked Deputy Zurfluh what he wants, what was his response?

A. He was there to investigate theft of power.

Q. Then what happened?

A. He told me I needed to open the gate.

Q. Were those his exact words?

A. Yes.

Q. Did he make any -- what did you say?

A. I said, what do you mean open the gate. What do you mean, theft of power. We're running on a generator, we've been running on a generator.

Q. Then what happened?

A. He told me that I needed to open the gate or I was subject to go to jail.

Q. Those were his exact words?

A. Yes.

Q. Then what happened?

A. I opened the gate.

Q. Then did you make any -- you opened the gate, how did you open the gate?

A. Unlocked it with the key, took off the padlock. There's a chain that goes in between the gate, it's got a hole in it like so. The chain goes through the gate, around the pole, and back through, and it's hooked with a padlock.

8/30/16 VRP 143-44.

**3. Trial court's findings relating to the initial entry onto the property.**

Deputy Zurfluh and Ms. Berven were the only two witnesses presented by the parties who provided testimony regarding the entry onto defendant's property. 8/30/16 VRP, 8/31/16 VRP. The two testimonies plainly contradicted each other. The trial court resolved that contradiction in favor of Deputy Zurfluh:

The Court finds Deputy Zurfluh's testimony regarding the initial contact with Ms. Berven at the gate to be credible. The deputies did not attempt to coerce, deceive or otherwise manipulate Ms. Berven's free will.

Findings as to Disputed Facts 1, CP 45. The trial court further concluded:

Ms. Berven not only opened the gate, she unlocked it of her own free will. Nobody, including the deputies, pushed the gate open.

Findings as to Disputed Facts 2. CP 45. 8/31/16 VRP 78-82.

**B. The activities of the deputies and Mr. Field while on the Residence curtilage.**

**1. Testimony of Deputy Zurfluh relating to activity on the Residence curtilage.**

After Ms. Berven opened the gate and allowed the deputies and Mr. Field onto the property, they “all walked over towards the power pole, which is located kind of in the center of the property, she just went with us.” 8/30/16 VRP 22. Defendant came outside the house when Ms. Berven called him. *Id.*

Deputy Zurfluh observed that the power pole had no power meter hooked up on the pole itself. 8/30/16 VRP 24. There was a power meter at the base of the pole (“just lying there”), which Mr. Field identified as belonging to the property. *Id.* That meter was not hooked up to the pole. *Id.* There was a big commercial generator hooked up to the leads coming out of the pole. *Id.* Ms. Berven told Deputy Zurfluh that defendant was an electrician and that he had hooked up the generator to the pole. 8/30/16 VRP 25.

Deputy Zurfluh suspected that stolen vehicles might be on the property. 8/30/16 VRP 28. In a conversation occurring in front of the

house, Deputy Zurfluh asked defendant if he could check the vehicle identification numbers of vehicles he had observed on the property. *Id.* Prior to looking, Deputy Zurfluh advised defendant that he could refuse permission to search, stop the search, or limit the search at any time. 8/30/16 VRP 28-30. Defendant waived his rights and granted Deputy Zurfluh permission to get the VIN numbers. 8/30/16 VRP 59-60. Deputy Zurfluh checked the VIN numbers of the quad vehicle, a truck, and the generator. 8/30/16 VRP 30.

When Deputy Zurfluh checked the serial number on the quad vehicle, he learned that it had been stolen.<sup>4</sup> 8/30/16 VRP 30. The deputies had the quad vehicle impounded. 8/30/16 VRP 31-32.

A search warrant was obtained for the stolen power meter a few days later. 8/30/16 VRP 32. The search warrant was served on October 29, 2015. 8/30/16 VRP 33. In the service of that search warrant more evidence was discovered which led to a second search warrant. 8/30/16 VRP 34-35.

**2. Testimony of Ms. Berven relating to the investigation on the Residence curtilage.**

A. He had me standing on the back side of the cargo trailer. The cargo trailer was parallel to the house. And I was standing right on -- there's like a plastic grid thing where you stand on, and I was standing on that. And it was pouring down rain. I didn't have a jacket on. I asked if I could get a coat. He said, no, you're going to talk to me about this. By this time, the officer had rolled up the thing for the four

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<sup>4</sup> The truck belonged to defendant and the generator's status was undetermined. *Id.*

wheeler and it was visible. He went in there, they didn't even ask if they could go in there, they didn't ask if they could search for a VIN number or serial number or anything. Then

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Q. Slow down a little bit.

A. Okay.

Q. You said it was raining. What was your demeanor?

A. I was upset.

Q. You were -- why were you upset?

A. Because he kept saying if I didn't answer him or tell him whatever, I was going to jail. He said, the power is in your name and you will go to jail for this, this a felony.

Q. Who's he?

A. Officer Zurfluh.

Q. Were you crying?

A. Yes.

Q. When did you start crying?

A. After he told me I was going to jail.

Q. So while you were talking to Detective Zurfluh, you saw this other officer go and peek into this canvas area?

A. Yes, the officer with the glasses on, I don't know his name.

Q. Where was Bill?

A. In the front yard.

Q. Did anybody up to that point ask you, or, as far as you know, anybody else's permission to even approach that canvas covered --

A. No. They asked if they could look in there at one point, and I said, no, that has nothing to do with the power.

Q. When did they do that?

A. Probably, maybe, about ten minutes after being on the property.

8/30/16 VRP 148-50.

**3. Testimony of defendant relating to the investigation on the Residence curtilage.**

Defendant testified that on October 26, 2015 Deputy Zurfluh came up to him aggressively and said, "I cannot wait to get into that shed."<sup>5</sup> 8/31/16 VRP 8. Defendant testified that he was "kept" by deputies on the porch for about fifteen to twenty minutes and could not see what was going on.<sup>6</sup> 8/31/16 VRP 8-9. Defendant testified that he consented only to the search of his truck. 8/31/16 VRP 12. Defendant testified that he saw deputies removing panels "off the truck or off the generator." 8/31/16 VRP 16.

**4. The trial court's resolution of the issues relating to the investigation on the Residence curtilage.**

Relating to the initial investigation on the Residence curtilage, the trial court found Deputy Zurfluh's testimony credible and found the testimony of Ms. Berven and defendant not credible. CP 45.

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<sup>5</sup> Apparently, defendant referred to the shed which was searched three days later pursuant to a warrant. See 8/30/16 VRP 33-35.

<sup>6</sup> Defendant clearly intended to express that he was detained. See also, 8/31/16 VRP 13.

**C. Relevant facts pertaining to trial.**

Two search warrants were issued in this case. The first search warrant related only to the stolen power meter and its associated fixtures. Exhibit 4. The second search warrant supplemented the first search warrant and was based upon information obtained during the execution of the first search warrant. Exhibit 5.

A recitation of the facts presented at trial is unnecessary given that defendant's challenges on appeal relate only to the admissibility of evidence obtained prior to trial. Petitioner was convicted following trial of unlawful possession of a controlled substance with intent to deliver (heroin), unlawful possession of a controlled substance with intent to deliver (methamphetamine), twelve counts of unlawful possession of a firearm in the first degree, one count of unlawful possession of a controlled substance (oxycodone), and seven counts of unlawful possession of a stolen firearm. CP 290-310. Defendant was also convicted of one count of defrauding a public utility in the first degree. CP 311-19.

Respondent agrees with defendant that defendant's conviction for each count depends upon the validity of the first search warrant. Defendant's conviction on the gun and drug charges depends upon the validity of the second search warrant. Respondent agrees with defendant that the validity of the second search warrant depends upon the validity of

the first search warrant. Defendant's only challenge to the second search warrant on appeal is the claim that the second search warrant was the fruit of an invalid first search warrant.

#### IV. ARGUMENT

**A. The findings of fact in this case are supported by substantial evidence, with one qualification.**

"Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." (citation omitted)

*State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313, 315 (1994).

We review a trial court's order on a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Bliss*, 153 Wn.App. 197, 203, 222 P.3d 107 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Credibility determinations are for the trier of fact and are not subject to appellate review. We must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." *State v. Liden*, 138 Wn.App. 110, 117, 156 P.3d 259 (2007) (citation omitted). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003).

*State v. Mashek*, 177 Wn. App. 749, 756, 312 P.3d 774 (2013).

In this case, the trial court's determinations relating to credibility were necessary to resolve contradictory testimony presented in the motion

to suppress. While defendant has assigned error to the trial court's credibility determinations (Disputed Findings of Fact 1, 3, and 5),<sup>7</sup> he has presented no argument to disturb the settled rule that "[c]redibility determinations are for the trier of fact and are not subject to appellate review." *Mashek, supra*.

The first sentence of disputed finding of fact one is an explicit credibility finding. In the second sentence of that finding, (concluding that the deputies "did not attempt to coerce, deceive or otherwise manipulate Ms. Berven's free will")<sup>8</sup> the trial court did nothing more than fairly interpret the testimony of Deputy Zurfluh. See 8/30/19 VRP 20-22. Finding of fact 2 adopts Deputy Zurfluh's testimony about entry through the gate. See 8/30/19 VRP 20-22. Finding of fact three and five are unchallenged credibility findings. CP 45.

In finding of fact four, the trial court concluded that "Ms. Berven's conduct in unlocking and opening the gate and stepping back sent a clear message inviting the deputies and Mr. Field onto the property." CP 45. This finding of fact is an inference readily drawn from Deputy Zurfluh's credible testimony. See 8/30/16 20-22.

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<sup>7</sup> CP 45.

<sup>8</sup> CP 45.

Defendant assigns error to the second sentence of “undisputed” finding of fact 7: “The purpose for going to the property was to speak with Berven and Witkowski about the theft of power and the stolen power meter.” CP 41. This issue was not disputed in the trial court as defense counsel approved the entry of the finds of fact “as to form.” CP 47.

The trial court unambiguously found that the deputies and Mr. Field did not enter onto the Residence curtilage for the purpose of conducting a search. The trial court stated: “The officers expressed a desire to talk about this, not necessarily to search, I don't find this to be analogous to the knock and talk scenario.” 8/31/16 VRP 80. This is reflected in the trial court’s findings: “The deputies were not there to search, but rather to talk with the occupants about the theft of power.” Undisputed Finding of Fact 7 (CP 42); See also Reasons for Admissibility or Inadmissibility 2 (CP 45).

Defendant asserts that the trial court’s findings of fact are “belied” by the record because Deputy Zurfluh testified that he was there to make a search.<sup>9</sup> When asked for his purpose in going out to the property, Deputy Zurfluh testified:

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<sup>9</sup> “The trial court found Zurfluh did not go to the property to conduct a search but instead merely went to speak to Witkowski and Berven. Appendix A at 2, 6. It even made a finding that Zurfluh's testimony that he was not there to conduct a search was credible. Appendix A at 6. The record belies this, however. Zurfluh unequivocally stated and repeatedly affirmed one of his purposes in seeking entry to the premises was to search for evidence of utility theft. VRP 18-19, 44, 48-49, 61.” Appellant’s Brief at 14, fn. 12.

Well, to discuss with Mr. Witkowski and Ms. Berven about the stolen power, and, also, try to locate the stolen power meter.

8/30/16 VRP 18-19. On cross examination by defendant's counsel Deputy

Zurfluh testified:

Q. All of your information going in on that day was from Detective Torgerson, correct?

A. Yes.

Q. And Ken Klotz and James Field, that was all that you had?

Q. And on that basis, it was your intent to go out and search the property, is that correct, for evidence of stolen power and evidence of a stolen quad?

A. And evidence of a stolen power meter.

8/30/16 VRP 44. This exchange came in the context of questioning leading up to a "why didn't you get a warrant" question. 8/30/16 VRP 44-45.

Q. So why didn't you, initially, when you first entered onto the property, there was a locked gate, Ms. Berven's at the gate, why didn't you read her her Ferrier warnings at that point?

A. You know, I think I initially showed up there, like I said, to speak with her about the stolen power, the illegal power connection, and, you know, ask if we can come on the property. She was right there at the gate. I don't remember if it was locked or there was just a chain around it or something, but she met us at the gate. She was upset. Apparently, she had already -- she had known about this power theft, probably from the power company. And I wanted to have a look at this supposed illegal connection and discuss with both of them what was going on.

8/30/16 VRP 48-49. A similar exchange occurred during cross examination by Ms. Berven's counsel:

Q. So, in this case, you knew you were going out to search a residence, correct, or at least try to search a residence without a warrant?

A. My intent was to go there and discuss the stolen power. I mean, we looked around for a stolen power meter because it was gone now.

Q. That's evidence of a crime, correct?

A. Yes.

Q. And it's on somebody's property?

A. Correct.

Q. So you were going to go out -- however you want to paraphrase it -- you were going to go out there to gather evidence of a crime?

A. Yes.

8/30/16 VRP 61.

There is ample evidence in this case to conclude that the deputies entered onto the property to talk with the occupants about the circumstances surrounding the theft of power. There is also ample evidence to conclude that the deputies did not intend to execute a general search of the property at that time, because they never did (until three days later they obtained and executed a search warrant). The absence of intent to conduct a general search appears to be the focus of the trial court's conclusion. See 8/31/16 VRP 80. However, it is plain that Deputy Zurfluh wanted to have a look at

the power pole and the identification number on the quad. 8/30/16 VRP 61 (pole) , 44 (quad). This court should acknowledge those two facts.

**B. The trial court properly concluded that *Ferrier* warnings were not required in this case.**

The investigating officers did not employ the knock and talk procedure to avoid getting a search warrant in this case. They used the knock and talk procedure to talk about the theft of electric power. It is undisputed that the theft of electric power services provided the investigating deputies with a reason to talk with the residents about that theft. The trial court's finding that "[t]he deputies were not there to search, but rather to talk with the occupants about the theft of power,"<sup>10</sup> is borne out by the *search warrant later obtained* in this case,<sup>11</sup> by the fact that an unrestricted consensual search was not sought, and by the fact that that no intrusion into the home itself was requested. CP 40-43, 45-46. Further, in the first search warrant, the State only sought to search for evidence of stolen electrical power—and not for evidence relating to the stolen quad vehicle. Suppression Exhibits 4, 5.

A *Ferrier* warning is not required every time police seek to effect a consensual search. *State v. Williams*, 142 Wn.2d 17, 28, 11 P.3d 714

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<sup>10</sup> "Undisputed" Finding of Fact 7 (CP 42); Reasons for Admissibility or Inadmissibility 2 (CP 45).

<sup>11</sup> 8/30/16 VRP 32-33. The trial court explicitly found Deputy Zurfluh's testimony credible. Finding as to Disputed Facts 3, CP 45.

(2000). *Ferrier* warnings are required only in “situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.” *Id.* *Ferrier* warnings are required only when the knock and talk procedure is employed by law enforcement. *State v. Bustamante–Davila*, 138 Wn.2d 964, 980–81, 983 P.2d 590 (1999). The intent of the officer, and whether the officer's intentions are deceptive, is the focus of this determination. *State v. Overholt*, 147 Wn.App. 92, 96, 193 P.3d 1100 (2008).

In this case, the investigating officers' purpose for entering upon the Residence curtilage was a straightforward attempt to secure information about stolen power. Where entry is sought to question a resident rather than to search the home, *Ferrier* does not require police to inform the owner of the right to refuse consent. *State v. Khounvichai*, 149 Wn.2d 557, 69 P.3d 862 (2003). While there was an ancillary intention to look at the power pole and the quad, if a purpose is to be assigned to the inquiry at Ms. Berven's house, that purpose was talking, not searching.

*Ferrier* is also distinguishable because it involved an intrusion into a dwelling while this case involved an intrusion only upon the curtilage. *Ferrier*, as discussed *supra*, is limited to the knock and talk procedure, and a consensual search of a limited part of the curtilage, like this case, is *not* a knock and talk:

During a knock and talk, officers go to a home without a warrant and ask for the resident's consent to search the premises. When officers conduct a knock and talk, they must give the resident a prescribed set of warnings, informing the resident of his or her constitutional rights.

(citation omitted) *State v. Budd*, 185 Wn.2d 566, 573, 374 P.3d 137, 141 (2016).

[T]he *Ferrier* requirement is limited to situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search and have declined to broaden the rule to apply outside the context of a request to search.”

*State v. Khounvichai*, 149 Wn.2d 557, 563, 69 P.3d 862 (2003).

A *Ferrier* knock and talk search is also an unlimited search:

There is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes. When police obtain consent to search a home pursuant to a “knock and talk they go through private belongings and affairs *without restriction*. Such an intrusion into privacy is not present, however, when the police seek consensual entry to question a resident.

*State v. Khounvichai*, 149 Wn.2d at 564. This case presents a clearly limited search—and therefore not a “knock and talk” at all. The investigating officers in this case sought and obtained permission only to check for identification numbers on two cars and a generator and walked with the property owner to a power pole.

In this case, the trial court also found that Deputy Zurfluh attempted to issue *Ferrier* warnings. Reasons for Admissibility or Inadmissibility 6,

CP 46. The trial court discussed this issue at 8/31/16 VRP 82-83. It appears that the trial court considered Deputy Zurfluh's warnings as an "attempt" because they were belatedly given after Deputy Zurfluh already entered the property. 8/31/16 VRP 83. The trial court plainly found Deputy Zurfluh credible on this issue.<sup>12</sup> 8/31/16 VRP 82. Deputy Zurfluh testified:

Q. And prior to the time that you actually went and looked at the serial numbers and the VIN, did you verbally explain anything to him with regard to your ability to look at the serial numbers and the VIN?

A. I did. I did read him Ferrier warnings, explained to him he had the right to refuse my search, prior to looking, and he was fine with that.

8/30/16 VRP 28.

In this case the search of the vehicles and the generator was still only effected after *Ferrier* warnings were given. *Id.* *Ferrier* warnings are only required where consent is sought to circumvent the requirements of the search warrant process. *State v. Ruem*, 179 Wn.2d 195, 206, 313 P.3d 1156 (2013). In this case, the officers did not intend to circumvent the search warrant process because *Ferrier* warnings were given before searching took place.<sup>13</sup> Respondent acknowledges that these belated *Ferrier* warnings were given before the search of the quad vehicle and the generator and not before the observation of the pole. Nevertheless, this factor is probative as

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<sup>12</sup> The trial court referred to Deputy Zurfluh's "apparent conscientiousness." *Id.*

<sup>13</sup> "Deputy Zurfluh testified that prior

to the question of whether deception was involved in the securing of consent.

Taking all the relevant factors together, and according discretion to the trial court's findings,<sup>14</sup> this Court should conclude that the trial court correctly concluded that *Ferrier* warnings were not required in this case.

**C. The trial court properly concluded that the entry of the deputies and Mr. Field onto the Residence curtilage was a lawful entry with the consent of the owner.**

Ms. Berven unlocked the gate, opened it of her own free will, and stepped back, allowing the deputies to enter. Findings as to Disputed Facts 1, 2, 4, CP 45. Ms. Berven invited the deputies onto her property. *Id.*, Reasons For Admissibility, 3. The trial court's conclusion of consensual entry was supported by ample evidence. See *State v. Bustamante-Davila*, 138 Wn.2d at 981.

**D. The deputies lawfully observed a power pole in plain view.**

After Ms. Berven opened the gate, she, and the deputies she invited<sup>15</sup> in, walked over to the power pole which was located in the center of the property. 8/30/16 VRP 22. Ms. Berven walked with the deputies. *Id.* The

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<sup>14</sup> Respondent is unable to find a case expressing the standard of review for a *Ferrier* challenge. However, after *Ferrier*, *Bustamante-Davila*, *Williams*, and *Khounvichai* (a non-exclusive list), not every *Ferrier* claim is clear-cut. It stands to reason that the trial court should be accorded some discretion, as it is given in evidentiary hearings, when making the call on a *Ferrier* issue. Given that *Ferrier* is a prophylactic rule rather than an inflexible constitutional mandate, the abuse of discretion standard appears to be appropriate.

<sup>15</sup> Reasons for Admissibility or Inadmissibility 3, CP 45.

deputies were accompanied by Ms. Berven the entire time. *Id.* The deputies looked at the power pole. 8/30/16 VRP 24. The trial court properly found that was a plain view observation. Reasons for Admissibility or Inadmissibility 4, CP 46. Implicit in the trial court's plain view conclusion is the conclusion that law enforcement officers observed the electrical pole from a lawful vantage point.<sup>16</sup> In this case, Ms. Berven opened the gate, let the deputies and Mr. Field inside, then walked around the property with them.

The record in this case demonstrates that Ms. Berven placed no scope limitations upon the deputies' entry onto the Residence curtilage. Defendant argues that Ms. Berven imposed a scope limitation, but defendant does not identify that limitation.<sup>17</sup> If defendant cannot articulate a scope limitation in the calm reflection of an appeal, respondent suggests that there was no perceptible limitation placed upon the deputies' as they walked with Ms. Berven on the Residence curtilage.

The pertinent question in this consent inquiry is whether the deputies conduct exceeded their invitation. *State v. Hastings*, 119 Wn.2d 229, 235, 830 P.2d 658, 661 (1992). The facts in this case demonstrate that the

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<sup>16</sup> "The plain view doctrine is necessarily limited to the lawful vantage point of the viewer." *State v. Khounvichai*, 149 Wn.2d at 571.

<sup>17</sup> "Zurfluh exceeded the scope of any consent Berven may have given to enter." Appellant's Brief at 18.

officers did not go anywhere they were not supposed to go because they were escorted by Ms. Berven the entire time. Since the officers were at the Residence curtilage to talk about power theft, the most logical place to talk about power theft was by the power pole. The trial court did not abuse its discretion when it concluded that Deputy Zurfluh's observations of the power pole were plain view observations.

**E. Defendant consented to the search of the identification numbers on the two vehicles and the generator. Alternatively, other than as to the *Ferrier* question, the identification number searches are irrelevant.**

The searches of the quad vehicle and the generator were consensual. See Reasons for Admissibility or Inadmissibility 6, CP 46. On this issue, the trial court expressly found defendant not credible. Findings as to Disputed Facts 5, CP 45.

The consensual search of the identification numbers of the quad vehicle and the generator are relevant to the *Ferrier* inquiry, but are otherwise irrelevant. No stolen property charges stemmed from those items. Second Amended Information, CP 159-169. The quad vehicle is mentioned in the search warrant,<sup>18</sup> but neither the quad nor evidence relating to the quad is sought in the search warrant. *Id.* The first search warrant in this case relates only to the theft of power. *Id.* Information about the quad

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<sup>18</sup> The warrant issued under cause number Cause No. 15-1-51788-2 and admitted at the suppression hearing as Exhibit 4.

contained in that warrant is unnecessary surplusage and can be deleted without any dilution of the probable cause. *Id.* The second search warrant authorized a search only for firearms and controlled substances and was based upon material discovered when the first search warrant was executed.<sup>19</sup> Likewise, information about the identification number search of the quad and the generator are also unnecessary surplusage and do not dilute the probable cause expressed in the second search warrant. *Id.* Search warrants are presumed valid<sup>20</sup> and petitioner presents no argument that the search warrants in this case were in any way diminished by the examination of the quad vehicle and the generator for their identification numbers. Defendant has never attempted to argue that discovery of the quad vehicle's stolen status changed anything. *State v. Moore*, 29 Wn. App. 354, 361, 628 P.2d 522, 526 (1981) (stating that while the State bears the burden of disproving taint, defendant bears the burden of identifying the taint-causing event).

**F. Deputy Zurfluh's plain view examination of the power pole on October 26, 2015 did not taint the subsequent search warrant because the relevant facts presented in the search warrant application were not materially augmented by entry onto the Residence curtilage. Alternatively, remand for a taint hearing is necessary.**

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<sup>19</sup> Search warrant No. 15-1-51787-4. Suppression hearing exhibit 5.

<sup>20</sup> A search warrant is presumed valid. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

The State bears the burden of proving that Deputy Zurfluh's plain view observation of the power pole on October 26, 2015. In this regard, it is helpful what Deputy Zurfluh knew before he looked at the power pole:

1. The power company shut off the power to the Residence in May, 2015 as a result of nonpayment. Exhibit 4, page 1.
2. On October 5, 2015 Mr. Field, a power company engineering coordinator, went to the Residence curtilage in response to a citizen complaint of an illegal power installation. Exhibit 4, page 2. He saw the original power meter lying on the ground and a stolen power meter installed in its place. *Id.* Mr. Field noted that the lock which had secured the power meter had been cut and was lying on the ground next to the transformer box. *Id.* The locking ring and red seal (indicating that the meter had been locked off by the power company) was on the ground with the meter base cover. *Id.* Mr. Field took pictures of the stolen power hook-up. *Id.*
3. Mr. Field left and returned later that day and saw that the stolen power meter had been removed. *Id.*
4. The stolen power meter had been providing power to the residence. *Id.* The stolen meter's id number was

On October 27, 2015 Deputy Zurfluh sought a warrant for the following items:

- Grey Power Meter, 303 964 997
- Temporary Meter Base, grey in color, approximately 12" X 8"
- Lock ring, grey in color with a blue or red seal with the inscription OMLC.

Exhibit 4, page 1. The power meter was the stolen power meter. Exhibit 4, page 2.

Deputy Zurfluh had ample basis for a search warrant prior to entering the Residence curtilage. A disclosed citizen, acting in the ordinary

course of business reported an obvious crime. That information was obtained on October 6, 2015 (Exhibit 4) and the search warrant was served on October 29, 2015. What was observed on the property by Deputy Zurfluh on October 26, 2015 did not make the probable cause materially better because, as Deputy Zurfluh notes in the application for search warrant: "In conclusion, at the time of reporting the stolen power meter has not been located and was last seen and photographed on the property located at 31717 47<sup>th</sup> Ave. E. A search warrant will be required to locate stolen power meter. Exhibit 4, page 4. That statement was just as factually supported before the deputies entered the Residence curtilage on October 26, as it was afterward. There is no possibility that the deputies' entry onto the Residence curtilage tainted the subsequently issued search warrant in this case.

Alternatively, if this Court finds that *Ferrier* warnings were required in this case or that the entry onto the Residence curtilage was otherwise unlawful, this Court should remand the matter back to the trial court so that the issue of taint can be addressed. See e.g., *State v. Griff*, 75 Wn.2d 267, 269, 450 P.2d 486, 487 (1969); *State v. McReynolds*, 104 Wn. App. 560, 565, 17 P.3d 608, 612 (2000); *State v. Rodriguez*, 32 Wn. App. 758, 759, 650 P.2d 225, 226 (1982). If there is an issue of possible taint in this case, that issue should be resolved with a full hearing.

**G. Defendant has failed to demonstrate manifest constitutional error relating to the issuance of the second search warrant.**

Defendant never presented his unsigned search warrant claim to the trial court. See CP 18-39, 8/30/16 VRP, and 8/31/16 VRP. Defendant now frames this issue as a constitutional violation and does not argue that his constitutional claim was presented to the trial court. See Appellant's Brief at 21-25. Because defendant is raising his constitutional claim for the first time on appeal, defendant must demonstrate manifest constitutional error. RAP 2.5(a)(3).

Application of RAP 2.5(a)(3) depends on the answers to two questions: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Defendant argues that non-compliance with CrR 2.3(c) is constitutional error and that the search warrant at issue in this case did not comply with CrR 2.3. Appellant's Brief at 24. Defendant relies nearly completely on the reasoning expressed *State v. Ettenhofer*, 119 Wn. App. 300, 79 P.3d 478, 480 (2003). See Appellant's Brief at 21-25.

**1. The sparse record below precludes a finding of manifest constitutional error.**

CrR 3.2(c) has changed considerably since 2003, when *Ettenhofer* was decided. Since September 1, 2014 CrR 3.2(c) reads:

**(c) Issuance and Contents.** A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. The evidence in support of the warrant must be in the form of affidavits, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant and may be provided to the court by any reliable means. Any sworn testimony must be recorded and made part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court's authorization may be communicated by any reliable means. A record shall be made of any additional evidence on which the court relies. The warrant shall be directed to any peace officer and shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. The warrant shall designate the court to which the warrant shall be returned. The warrant may be served at any time.

(emphasis added) CrR 2.3(c). When *Ettenhofer* was decided, "CrR 2.3(c)'s telephonic provision . . . contemplate[d] only that the sworn testimony establishing the grounds for the warrant may be telephonic." *State v.*

*Ettenhofer*, 119 Wn. App. at 304. The rule now states that “[t]he court’s authorization may be communicated by any reliable means.” CrR 2.3(c).

Had defendant’s claim been presented to the trial court, a factual record could have been developed to inform the trial court and this Court as to how the warrant issuing court’s authorization was communicated to Deputy Zurfluh and how (or if) it was preserved. Those facts matter because “a ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown.” *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830, 835 (2002) (citing *State v. Parker*, 28 Wn.App. 425, 427, 626 P.2d 508 (1981)).<sup>21</sup>

In this case, defendant has not demonstrated manifest constitutional error because the factual record is undeveloped on the important issues of (a) whether a mistake actually took place; and (b) if a mistake did take place, whether the mistake not ministerial in nature. For example, if the issuing court told Deputy Zurfluh “I will sign the warrant,” and that oral

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<sup>21</sup> “Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits.” *Id.* Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. *State v. Temple*, 170 Wn. App. 156, 162, 285 P.3d 149 (2012). See also *Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, cert. denied, 493 U.S. 975, 110 S.Ct. 497, 107 L.Ed.2d 501 (1989); *State v. Montagna*, 35 Conn.Supp. 225, 405 A.2d 93 (1979); *People v. Blake*, 266 Ill.App.3d 232, 203 Ill.Dec. 658, 640 N.E.2d 317 (1994); *State v. Huguenin*, 662 A.2d 708, 710 (R.I. 1995); *Yuma County Attorney v. McGuire*, 109 Ariz. 471, 512 P.2d 14 (Ariz.1973); *State v. Perry*, 720 So. 2d 345, 347 (La. Ct. App. 1998); *Sternberg v. Superior Court*, 41 Cal.App.3d 281, 115 Cal. Rptr. 893 (1974); *United States v. Cruz*, 774 F.3d 1278, 1287–88 (10th Cir. 2014); *United States v. Lyons*, 740 F.3d 702, 724–25 (1st Cir. 2014).

authorization was preserved, then defendant has no claim of error. Or, if the issuing court told Deputy Zurfluh “I will sign the warrant,” and that oral authorization was mistakenly unpreserved (a ministerial error), then defendant has no claim of error.

Defendant explicitly recognizes the factually barren record he presents to this Court:

There is nothing on the face of the document or elsewhere in the record indicating the judge had authorized someone else to affix his signature to the warrant before the search took place.

Appellant’s Brief at 24. There is likely available relevant information, which is not in the record, because defendant did not present his claim to the trial court.<sup>22</sup> Petitioner cannot benefit from this sparse record on appeal. RAP 2.5(a). While the State would have been responsible for the burden of production on this issue had it been raised in the trial court, the burden of production cannot be offloaded onto the State for the first time on appeal. RAP 2.5(a). Defendant has failed to demonstrate manifest constitutional error.

The Court of Appeals’ opinion in *Ettenhofer* relied upon the legal conclusion that the signed warrant must be given to the owner of premises searched or posted at the time the warrant is served. *Ettenhofer*, 119 Wn.2d

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<sup>22</sup> For instance, the recording of the telephone conversation between Deputy Zurfluh and Judge Costello, as well as Judge Costello’s own testimony on the issue.

at 205-06. That is no longer good law. *State v. Ollivier*, 178 Wn.2d 813, 851–52, 312 P.3d 1, 22–23 (2013). Provision of the search warrant before the search begins is not required. *Id.*

The factual unknowns attending defendant’s unsigned search warrant claim are accompanied by legal unknowns. When this Court reviews a claim of manifest constitutional error raised for the first time on appeal, the pertinent question is whether this is a matter the trial court could have recognized and corrected given the record presented.

Manifest error requires a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. To determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

(internal quotes, braces, and citations omitted). *State v. Grott*, 97183-8, 2020 WL 829894, at \*6 (Wash. Feb. 20, 2020).

Given the amendments to CrR 2.3(c) and the overruling of *Ettenhofer* on a very important, perhaps crucial, point, the law regarding the search warrant was anything but clear at the time this case was before the trial court.

Defendant’s “the judge approved the search warrant but only signed it later” claim is presented for the first time on appeal. This is an issue that ought to have been presented to the trial court. As this Court looks at the

record from the trial court's perspective, the factual unknowns and the legal uncertainties combine to create a factually undeveloped issue of first impression. RAP 2.5(a) does not permit such claims to be raised for the first time on appeal.

**H. Alternatively, defendant has failed to demonstrate any prejudice resulting from noncompliance with CrR 2.3(c).**

“Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. The courts' ministerial rules for warrant execution and return do not flow so directly from the Fourth Amendment's proscription upon unreasonable searches that failure to abide by them compels exclusion of evidence obtained in execution of a search warrant.” (internal quotation omitted) *State v. Temple*, 170 Wn. App. 156, 162, 285 P.3d 149 (2012) (quoting *State v. Parker*, 28 Wash.App. 425, 626 P.2d 508 (1981)).

**V. CONCLUSION**

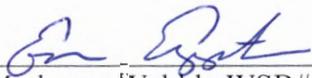
The investigating deputies effected a consensual entry onto the Residence curtilage and observed a power pole in plain view. *Ferrier* warnings were not required in this case. Alternatively, the observation of the power pole did not taint a subsequent search warrant of the premises. Alternatively, the matter should be remanded for the trial court to conduct a taint hearing.

Petitioner's "the judge approved the warrant, but did not sign it" claim, presented for the first time on appeal demonstrates neither manifest constitutional error nor prejudice and should not be considered by this Court. The record, both legal and factual, is too undeveloped for appellate consideration.

The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of March, 2020.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
Mark von Wahlde WSB# 18373 40497  
Deputy Prosecuting Attorney

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3/23/20   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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