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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ANDREW GLASER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-01299-18

BRIEF OF RESPONDENT

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SERVICE	<p>Kevin Hochhalter Po Box 55 Adna, Wa 98522 Email: kevin@olympicappeals.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED August 24, 2020, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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TABLE OF CONTENTS

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

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

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT10

 A. GLASER’S CONTENTION THAT THE MAGISTRATE WAS PRESENTED WITH INSUFFICIENT EVIDENCE OF THE QUALIFICATIONS OF DETECTIVE GRANT, WHO OPINED THAT GLASER’S FINGERPRINTS WERE FOUND AT THE MURDER SCENE MUST FAIL BECAUSE THERE WAS SUFFICIENT EVIDENCE OF GRANT’S QUALIFICATIONS AND BECAUSE EVEN IF THERE WEREN’T, PROBABLE CAUSE WOULD STILL HAVE EXISTED BECAUSE THE FINGERPRINTS WERE NOT THE ONLY EVIDENCE OF GLASER’S PRESENCE AT THE TIME OF THE MURDER.....10

 1. Standard of Review.....11

 2. The application contained sufficient information regarding the qualifications of Detective Grant.13

 3. Even absent the fingerprint evidence, there would be sufficient probable cause to issue warrants for the truck and the house.16

 B. DETECTIVE PEFFER’S FAILURE TO FULLY COMPLY WITH CRR 2.3(D) WHEN HE COMPLETED THE WARRANT INVENTORY DID NOT REQUIRE SUPPRESSION BECAUSE GLASER FAILED TO SHOW PREJUDICE.....19

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

CASES

<i>Cady v. Dombrowski</i> , 413 U.S. 433, 93 S. Ct 2523, 37 L. Ed. 2d 706 (1973).....	26
<i>In re Yim</i> , 139 Wn.2d 581, 989 P.2d 512 (1999).....	12
<i>Murray v. United States</i> , 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).....	12, 13
<i>People v. Fernandez</i> , 61 A.D. 3d 891, 878 N.Y.S.2d 92 (2009).....	26
<i>People v. Jenkins</i> , 71 Misc. 2d 938, 337 N.Y.S.2d 653 (1972).....	26
<i>State v. Betancourth</i> , 190 Wn.2d 357, 413 P.3d 566 (2018).....	12, 13
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	21, 22, 23
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	13
<i>State v. Curry</i> , 103 Idaho 332, 647 P.2d 788 (1982).....	27
<i>State v. Garcia</i> , 63 Wn. App. 868, 824 P.2d 1220 (1992).....	11
<i>State v. Givens</i> , 14 Ohio App. 3d 2, 469 N.E. 2d 1332 (1983).....	27
<i>State v. Hunt</i> , 454 S.W.2d 555 (Mo. 1970).....	26
<i>State v. Kalakosky</i> , 121 Wn.2d 525, 852 P.2d 1064 (1993).....	19
<i>State v. Kennedy</i> , 72 Wn. App. 244, 864 P.2d 410 (1993).....	11
<i>State v. Kern</i> , 81 Wn. App. 308, 914 P.2d 114 (1996).....	21
<i>State v. Linder</i> , 190 Wn. App. 638, 360 P.3d 906 (2015).....	20
<i>State v. Olson</i> , 74 Wn. App. 126, 872 P.2d 64 (1994).....	14, 15, 16
<i>State v. Parker</i> , 28 Wn. App. 425, 626 P.2d 508 (1981).....	24
<i>State v. Pleasant</i> , 11 Wn. App. 2d 1001, 2019 WL 5448900 (2019).....	23

<i>State v. Scherf</i> , 192 Wn.2d 350, 429 P.3d 776 (2018).....	19
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	12, 16
<i>State v. Smith</i> , 15 Wn. App. 716, 552 P.2d 1059 (1976).....	27
<i>State v. Solberg</i> , 66 Wn. App. 66, 831 P.2d 754 (1992).....	11
<i>State v. Temple</i> , 170 Wn. App 156, 285 P.3d 149 (2012).....	23, 24
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	19
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	12
<i>State v. Whitford</i> , 7 Wn. App. 2d 1042, 2019 WL 480465 (2019).....	23
<i>State v. Wraspir</i> , 20 Wn. App. 626, 581 P.2d 182 (1978).....	28
<i>United States v. Gantt</i> , 194 F.3d 987 (1999).....	24
<i>United States v. Johnson</i> , 660 F2d. 749 (9th Cir., 1981)	25
<i>United States v. W.R. Grace</i> , 526 F.3d 499 (9th Cir. 2008)	24
<i>United States v. Williamson</i> , 439 F.3d 1125 (9th 2006).....	28

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Glaser's contention that the magistrate was presented with insufficient evidence of the qualifications of Detective Grant, who opined that Glaser's fingerprints were found at the murder scene, must fail because there was sufficient evidence of Grant's qualifications and because even if there weren't, probable cause would still have existed because the fingerprints were not the only evidence of Glaser's presence at the time of the murder?

2. Whether Detective Peffer's failure to fully comply with CrR 2.3(d) when he completed the warrant inventory did not require suppression because Glaser failed to show prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brian Andrew Glaser was charged by information filed in Kitsap County Superior Court with first-degree murder. CP 327.

Before trial, the parties litigated numerous suppression issues. Glaser was successful in suppressing multiple items of evidence, and most of his statements to the police. CP 629. Pertinent to the present appeal, the court denied his motion to suppress the fruit of the search, pursuant to a warrant, of Glaser's home.

Specifically, the court found, after excising references to Glaser's statements, and to two witnesses it deemed insufficiently identified, that there was still sufficient basis for a finding of probable cause to search. CP 635. The court also rejected the contention that Glaser was prejudiced due to errors made during the completion of the inventory of the search. CP 636.

Following a jury trial, Glaser was found guilty as charged. CP 606-07. The court imposed a standard-range sentence. CP 611-12.

B. FACTS

Sheila Duckworth was the widow of Donald Duckworth. 1RP 49. Her husband and his brother Ron¹ had a well drilling business. 1RP 50. She worked as the secretary for Duckworth Pump and Well Drilling. 1RP 50.

On August 29, 2018, the day began like normal. 1RP 51. Don was finishing a well and was going to call when he was done. 1RP 52. She was expecting the call sometime in the afternoon but it never came. 1RP 52.

Around 7:00 p.m. Sheila called Don's cell but it went to voice mail. 1RP 53. She made a few more calls but he still did not answer. 1RP 53. Eventually she went to the drill site. 1RP 53. When she arrived, she thought there was a party because there were so many cars there. 1RP 54. Then she saw the flashing lights and ran to where the ambulance was. 1RP 54. An

¹ To avoid confusion, a number of individuals will be referred to by first names. All references to "Glaser" refer to the appellant. No disrespect is intended.

officer eventually informed her that Don was dead. 1RP 54.

The police asked her if there was anyone who would want to harm Don. 1RP 54. Brian Glaser was the only one she could think of because of an incident that has occurred a few weeks earlier. 1RP 55. Glaser had been injured on the job in February 2018. 1RP 56, 58. He returned to work but then just stopped coming in sometime after that. 1RP 59. He did not give notice or formally quit. 1RP 59.

Alex Madayag had hired Duckworth drill a new well. 1RP 93. Toribio "Pinky" Madayag was Alex's brother. 1RP 71. He arrived home around 1:30 the day of the murder. 1RP 72. On the way, he drove by his brother's house, which was next door. 1RP 71, 74. The drilling rig was running and he assumed Don was working on the well. 1RP 72. There was another truck parked there as well. 1RP 74.

Eugenia Vansickle, the sister of Alex and Pinky, went to the home of her sister, Anita Marquez, who lived adjacent to Alex and Pinky. 1RP 104. She stopped at Alex's house on the way to pick up some books around noon. 1RP 105. She left Marquez's house around 1:50. 1RP 105.

As she passed the drilling rig, she saw three men standing talking. 1RP 105-06. Also, there was a truck parked in Alex's driveway. 1RP 105. There was a boom mounted in the back of the truck. 1RP 107. It was a small pickup. 1RP 107. It was the truck subsequently identified as Glaser's. 1RP

109-10.

Robert Wenzlaff was a machinist who occasionally worked on Don's equipment. 2RP 205. On the day of the murder he had just repaired the well-drilling machine, and went with Don to the job site to make sure it was working properly. 2RP 206. They went to the Madayag property around 10:00 a.m. 2RP 206-07. Wenzlaff took a video of the machine working about 45 minutes later. 2RP 208-09.

As Don finished what he was doing and shut the machine down, and they were startled by Glaser, who was standing near the front of the truck, about 40 feet away. 2RP 211-12. He commented on their discussion. 2RP 212. He had been listening to them talk, but they did not realize he was there. 2RP 212. Glaser's truck was parked up on the driveway. 2RP 212.

Glaser did not appear upset initially. 2RP 213. Then Glaser and Don started talking about Glaser's job-related injury. 2RP 213. Wenzlaff felt uncomfortable because he felt like it was none of his business. 2RP 213. The undertone of the conversation also made him feel uncomfortable in a way he could not put his finger on. 2RP 213. He made his excuses and left. 2RP 219. It was around 1:50 p.m. when he left. 2RP 230.

Amy Wainio, who lived across the street from Alex, noticed that the well driller was running at 3:00 in the afternoon on the day of the murder. 6RP 917, 919. Then it stopped and she heard gunshots. 6RP 919-20. She

lived too far to hear shots from the gun club nearby. 6RP 920. The shots she heard came from across the street. 6RP 920. She heard the shots at 3:11 or 3:15. 6RP 922, 924.

Glaser's mother reported that he came home around 3:20 that afternoon. 5RP 738-39, 749.

Alex's wife, Nicole Hebner, got home from work between 4:05 and 4:15. 1RP 86. She did not see any strange vehicles. 1RP 87. Alex got home between 4:45 and 5:00. 1RP 87.

When Alex got home, he headed to the drilling site for a progress report. 1RP 95. He did not hear the rig running. 1RP 96. As he approached, he saw Don laying on the ground. 1RP 97. Don did not respond when Alex called his name. 1RP 97.

Alex came running into the house saying "Don's down." 1RP 88. Hebner told him to call 911, which he did. 1RP 88. She had CPR training so she checked for a pulse, but Don was already cold. 1RP 88.

When the police arrived, Don was lying on his back near the rear of the well-drilling truck. 1RP 127. There were a lot of shoe prints in the dirt that had been put out by the drilling rig. 1RP 127. He appeared to have several gunshot wounds to the torso. 1RP 127.

When they rolled Don's body over, they saw several projectiles.

1RP 132. Some were attached to his clothes and others were in the dirt beneath him. 1RP 132-33.

They knew a vehicle had been seen in the vicinity: a smaller pickup truck with a yellow-orange boom, possibly an engine hoist, in the bed. 1RP 137-38. He subsequently saw Glaser's truck, which had a yellow-orange boom in the back. 1RP 138. They found it by running the plate. 1RP 138.

The autopsy revealed that Don was shot 17 times. 7RP 1092. None of the wounds had gunpowder on them indicating the gun was at least 18 to 24 inches away. 7RP 1095.

Glaser lived with his parents on Eagle Harbor Drive, which was a six minute drive at the speed limit from the murder scene. 1RP 141, 3RP 480. A warrant was obtained to search the house. 1RP 140. Birkenfeld assisted in the search on August 30, and collected a backpack. 1RP 141. In the backpack were various items, including a firearm. 1RP 141. The backpack was behind a recliner a few feet from the front door. 1RP 141. The gun looked like a Glock, but Birkenfeld did not remove it from the pack. 1RP 142. He left it in the pack so it could be processed in a more sterile environment, which was done at the Bainbridge Island Police Department.. 1RP 143. There was also a box of 9mm full metal jacket ammunition in the pack. 1RP 144-45. The gun had a tactical flashlight and a silencer. 1RP 144.

Other detectives at the search were Bremerton Detective Garland, and Bainbridge Detectives Ledbetter and Peffer. 1RP 156. Garland was there when Birkenfeld found the backpack and they brought it to Peffer's attention. 1RP 156. After Peffer photographed it, Birkenfeld took it to the station. 1RP 157. Garland was with him. 1RP 158. Once there he handed it over to Detectives Bowman and Ayers. 1RP 159.

Bowman received the backpack from Birkenfeld; he and Ayers processed the evidence. 5RP 799, 826. They photographed and packaged it and placed it in the evidence locker. 5RP 799. IN it were a box of full metal jacket 9mm Luger ammunition, a 9mm Glock 17 handgun with a rail light and a suppressor mounted on the muzzle. 5RP 801-03. The Glock had a dummy round in the chamber. 5RP 803. There were 17 RTAC 9mm rounds in the magazine. 5RP 804.

A Glock 17 would eject its shell casings after they are fired, usually to the right, assuming no obstructions. 1RP 164. No shell casings were recovered at the scene. 1RP 165. They did a hands-and-knees search of the wood surrounding the murder scene and found nothing. 2RP 187.

A swab for DNA of the silencer included Glaser and excluded Don. 7RP 1120. The same was true for the grip of the gun and the magazine. 7RP 1120-21.

Forensic analysis of the fired bullets showed that they had marks on

them that were similar to those caused by the suppressor on test-fired bullets. 7RP 1185-86. An examination of the fired casing found in Glaser's truck showed that it was fired from the Glock. 7RP 1209.

The day after the murder, Glaser was detained at the Bainbridge Island Marina. 2RP 262. While they were waiting for detectives to come and interview Glaser, Glaser commented on Keeler's gun, which was a Sig, and asked him how he liked it and that sort of thing. 2RP 264. Keeler left once the detectives arrived. 2RP 264.

The dirt around the drilling was grayish and different from that elsewhere on property, presumably from drilling activity. 2RP 292. A search of Glaser's truck revealed similar dirt on the floor of the truck. 2RP 306.

There was possible gunshot residue on the steering wheel and gear shift. 2RP 306. Forensic analysis showed the samples from Glaser's steering wheel and gearshift tested positive for gunshot residue. 4RP 608. They were the largest populations of residue the scientist had ever worked on. 4RP 615.

Don's son, Derrick, detailed an incident that occurred about a week before the murder; Don had picked Derrick up at the Bainbridge ferry terminal. 4RP 650. Driving through town, they stopped at a four-way stop sign and saw Glaser, who was driving the Nissan truck in the opposite direction. 4RP 650. Don and Derrick waved to him. 4RP 651. Glaser did

not wave back; he just turned onto the road in front of them. 4RP 651. Seconds later they saw Glaser coming fast back toward them and then passing them. 4RP 651. He looked at them with an angry, “stoic” or “stone-cold” expression on his face as he went by. 4RP 652, 663.

Former Duckworth Drilling employee Glenn Prindle also described the relationship between Glaser and Don. 5RP 843. Glaser complained about Don calling him a snowflake. 5RP 846. He also said some of Don’s comments “were way over the line.” 5RP 846. Glaser also alleged that Don had come over to his house and looked through his things when he was not home. 5RP 848. Toward the end of his employment, Glaser told Prindle that he loved working with him, but hated working with Don. 5RP 850. Prindle saw Glaser at Home Depot a few weeks after he stopped coming into work. 5RP 854. Prindle suggested Glaser should let Don know what was going on. 5RP 854. Glaser did not respond, he just gave an angry “hate-filled look” and looked down without saying a word. 5RP 854.

A review of the L&I complaint showed that Glaser blamed Don for his injury:

Don, the drill rig operator, put excessive force on a tool despite my recommendation. It was not designed for that load. When I asked what was the point of pulling the well casing with the sand line instead of the hydraulic top drive that was designed for that duty, he continued dead pulling on the well casing.

I pointed out that the tool was pulling apart. He said,

“Oh, well,” and continued. I was ten feet from the back of the drill rig. A four-inch piece of one-inch water pipe hit me on the head -- it says form, but probably from -- 20 feet up.

8RP 1265.

III. ARGUMENT

A. GLASER’S CONTENTION THAT THE MAGISTRATE WAS PRESENTED WITH INSUFFICIENT EVIDENCE OF THE QUALIFICATIONS OF DETECTIVE GRANT, WHO OPINED THAT GLASER’S FINGERPRINTS WERE FOUND AT THE MURDER SCENE MUST FAIL BECAUSE THERE WAS SUFFICIENT EVIDENCE OF GRANT’S QUALIFICATIONS AND BECAUSE EVEN IF THERE WEREN’T, PROBABLE CAUSE WOULD STILL HAVE EXISTED BECAUSE THE FINGERPRINTS WERE NOT THE ONLY EVIDENCE OF GLASER’S PRESENCE AT THE TIME OF THE MURDER.

Glaser argues that the search warrants for his truck and home were invalid once illegally obtained evidence was stricken from the applications. He bases this argument on the contention that the magistrate was presented with insufficient evidence of the qualifications of Detective Grant, who opined that Glaser’s fingerprints were found at the murder scene. This claim must fail both because there was sufficient evidence of Grant’s qualifications and because even if there weren’t probable cause would still have existed because the fingerprints were not the only evidence of Glaser’s presence at the time of the murder.

1. Standard of Review

This court reviews the validity of a search warrant under the abuse of discretion standard. *State v. Kennedy*, 72 Wn. App. 244, 248, 864 P.2d 410 (1993). Great deference is given to the magistrate's determination of probable cause, and all doubts are resolved in favor of the validity of the warrant. *Kennedy*, 72 Wn. App. at 248; *State v. Solberg*, 66 Wn. App. 66, 79, 831 P.2d 754 (1992), *reversed in part on other grounds*, 122 Wn.2d 688 (1993). The magistrate may draw commonsense inferences from the facts stated in the affidavit supporting the application for a search warrant, and the affidavit should not be examined in a hypertechnical manner. *Kennedy*, 72 Wn. App. at 248; *State v. Garcia*, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992).

A search warrant affidavit establishes probable cause if a reasonable person would understand from the facts contained in the affidavit that a crime has been or is being committed and that evidence of the crime can be found at the place to be searched. *In re Yim*, 139 Wn.2d 581, 594, 989 P.2d 512 (1999); *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). The reviewing magistrate is entitled to draw commonsense inferences from the stated facts. *State v. Cherry*, 61 Wn. App. 301, 304, 810 P.2d 940, *review denied*, 117 Wn.2d 1018 (1991). Further, it is only the probability of criminal activity and not a prima facie showing of it which governs the

standard of probable cause. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

Additionally, as Glaser notes, the independent source doctrine recognizes that probable cause may exist for a warrant based on legally obtained evidence when the tainted evidence is suppressed. *State v. Betancourth*, 190 Wn.2d 357, 365, 413 P.3d 566 (2018). In applying the independent source doctrine, the determinative question is whether the challenged evidence was discovered through a source independent from the initial illegality. *Betancourth*, 190 Wn.2d at 365 (citing *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)). To determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant. *Id.* If the illegality in no way contributed to the issuance of the warrant and police would have sought the warrant even absent the initial illegality, then the evidence is admissible through the lawful warrant under the independent source doctrine. *Id.* The appropriate remedy where a warrant application contains illegally obtained information is to strike all references to the initial illegality from the warrant affidavit when assessing whether probable cause existed to issue the original warrant. *Betancourth*, 190 Wn.2d at 369 (citing *State v. Coates*, 107 Wn.2d

882, 887, 735 P.2d 64 (1987) (“a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information”).

Here, the trial court suppressed Glaser’s statement to the police. Glaser argues that when the information obtained from that statement, along with other information from sources that the trial court found were insufficiently reliable under *Aguilar-Spinelli*, is excised from the warrant applications, there is insufficient basis for the magistrate to have found probable cause. Thus, he argues, the warrant fails the first question presented under *Betancourth*.²

2. *The application contained sufficient information regarding the qualifications of Detective Grant.*

Glaser first argues that after the striking of the improper elements, the application lacked probable cause because there was insufficient evidence of the qualifications of Detective Grant, who did the analysis concluding that Glaser’s fingerprints were on the truck at the murder scene. Glaser would read the warrant application in an overly restrictive manner, and contrary to the established standard of review.

Glaser relies primarily on the holding in *State v. Olson*, 74 Wn. App.

² Glaser concedes that the trial court’s conclusion as to the second question (whether the police would have sought the warrant absent the illegally-obtained information) is supported by sufficient evidence. Brief of Appellant at 9.

126, 872 P.2d 64 (1994), *aff'd*, 126 Wn.2d 315 (1995). In *Olson*, a warrant was issued based on the officer's affidavit that he smelled marijuana at the defendant's home. The trial court accepted the defendant's argument that the search warrant lacked probable cause because there was insufficient evidence that the officer was qualified to recognize the smell of marijuana and suppressed the evidence. *Olson*, 74 Wn. App. at 129. On appeal, this Court reversed because the trial court failed to apply a "common sense" reading of the warrant application. *Olson*, 74 Wn. App. at 131.

In *Olson*, "the affidavit did not explicitly state that [the detective] was trained to recognize the odor of growing or burning marijuana." *Olson*, 74 Wn. App. at 130. Nevertheless it did state that he had graduated from the Basic Drug Enforcement Administration (DEA) course for controlled substances, had attended one controlled substance investigation seminar, and graduated from a 36 hour patrol officer course in controlled substances investigation. *Olson*, 74 Wn. App. at 131. The officer additionally participated in a number of investigations where he had handled marijuana. *Id.*

This Court found this recitation was more than sufficient to support probable cause:

Any other construction of the language would be strained, hypertechnical, and contrary to common sense. The affidavit does not contain a conclusory statement of personal belief. It enumerates why [the detective] could identify marijuana

by smell: he had been trained to identify controlled substances, had experience investigating controlled substances crimes, and had personally participated in marijuana manufacturing cases. We find no requirement that the officer be explicitly trained to identify the smell of marijuana; [the detectives]'s experience was sufficient.

Olson, 74 Wn. App. at 131.

Here, Judge Houser knew that Grant's qualifications included attending the scientific basic fingerprints course, 24 hours at the Biometric Technology Center of the FBI, 40 hours at the Michigan State forensic lab, and FBI advanced crime scene photography training. CP 265. Further, the judge heard that using this training Detective Grant had compared the loops and ridges of the fingerprints recovered at the homicide scene to Brain Glaser's known fingerprints and found that they matched. *Id.* Sufficient information and facts were set forth for the court to conclude that Detective Grant was qualified to make his conclusion regarding the fingerprint match.

Glaser would read the application in a way that would "be strained, hypertechnical, and contrary to common sense." *Olson*, 74 Wn. App. at 131. He latches on to the references in *Olson* to the detective's experience, arguing that evidence of Grant's qualifications was insufficient because it did not detail his experience. But in *Olsen* the Court was responding to a contention that there was no evidence the detective had been trained to detect the odor of marijuana. Here, on the other hand there were specific statements that Grant had taken training in basic scientific fingerprinting

and had attended 24 hours of biometric training as well. There was further a brief description of the methodology (comparing ridges and loops) used by Grant.

The trial court properly found that the statement of Grant's qualifications was adequate. As required by *Olson* and the precedent on which it relied, the application reflected "more than a 'mere personal belief'" in the identification. *Olson*, 74 Wn. App. at 130 (*quoting State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)). This contention should be rejected.

3. *Even absent the fingerprint evidence, there would be sufficient probable cause to issue warrants for the truck and the house.*

Excluding the fingerprint evidence and the other matters excluded by the trial court, the application for the warrant to search the truck included the following information:

- Don's wife Sheila attempted to call him at 8:00 p.m., but received no answer. CP 262-63.
- The application specifically included by reference the information presented in the earlier warrant applications. CP 266. The previous applications to search the Duckworth trucks and Don's phone indicated that Don's body had been discovered around 5:00 p.m. CP 248, 254.

- Don and Glaser, a former employee, had recently had a falling out about an L&I claim Glaser had made. CP 263.
- After the claim was accepted by L&I, Glaser walked off the job and told Don he did not want to work for him anymore. The relationship became volatile after that. CP 263.
- Don's son Derrick became concerned by Glaser's behavior and felt he was "aggressive," "a loud mouth," and "a quack," and felt he was crazy. CP 263.
- Glaser was associated with a Nissan pickup, plate number C887218. CP 263.
- Police observed the Nissan pickup with a distinctive lift or crane in the back at Glaser's home. CP 263.
- Neighbor Eugenia Vansickle observed a pickup with a lift in the back at the murder site around 1:30 p.m. CP 264.
- Vansickle saw three men talking at the site. CP 264.

The search warrant for the house also incorporated all the content of the three previous warrants, which had been issued by the same judge. CP 276-77. In addition to the facts previously discussed, the additional facts were presented:

- Glaser's mother, Diane, stated that although she was not aware that

he had left, Glaser returned the day of the murder at 3:26 p.m., a time she was able to verify based on a phone call with a friend. CP 278.

- Diane also described the numerous firearms they had in the home. CP 278.
- Diane described the clothing Glaser was wearing and stated that it was still in the house. CP 278.
- Glaser's father, Alan, also confirmed the presence of the guns in the home and described Glaser's access to them. CP 278.
- The search of Glaser's truck revealed mud on the floor like that at the scene. CP 279.

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In addition, probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. *State v. Scherf*, 192 Wn.2d 350, 363, 429 P.3d 776 (2018). All doubts are resolved in favor of upholding the warrant. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993).

Here, the warrant applications showed that Don had been shot and killed sometime between 1:30 and 5:00 p.m. on August 29. The warrants described a history of bad blood between Glaser and Don, and that Glaser had been acting aggressive and crazy. Glaser's unique truck was seen at the site of the murder during that time period. Glaser's mother showed that Glaser had arrived home around 3:25 that day, and described the numerous firearms they had in the residence, and that the clothes he was wearing when he came home were still in the home. Even absent the fingerprint evidence there was sufficient evidence in the warrant applications to place Glaser at the scene of the crime, which was all the fingerprint evidence did. This claim should be rejected.

B. DETECTIVE PEFFER'S FAILURE TO FULLY COMPLY WITH CRR 2.3(D) WHEN HE COMPLETED THE WARRANT INVENTORY DID NOT REQUIRE SUPPRESSION BECAUSE GLASER FAILED TO SHOW PREJUDICE.

Glaser next claims that errors in the completion of the inventory for the search of his home require the suppression of the evidence obtained pursuant to the search warrant. This claim is without merit because Glaser fails to establish prejudice.

This Court reviews the trial court's findings of fact in ruling on a motion to suppress under the substantial evidence standard and reviews

conclusions of law de novo. *State v. Linder*, 190 Wn. App. 638, 643, 360 P.3d 906 (2015). CrR 2.3(d) provides:

The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

The trial court found that Detective Peffer failed to comply with the requirement that the inventory be prepared in the presence of a third person and that there were errors in the omission of items from the inventory. It nevertheless declined to find that Glaser had shown prejudice. CP 636.

“[U]nless constitutional considerations are in play, the rules for execution and return of a search warrant are basically ministerial in nature.” *State v. Kern*, 81 Wn. App. 308, 311, 914 P.2d 114 (1996). Generally, unless a defendant can show prejudice, procedural noncompliance with these rules does not invalidate a warrant or otherwise require suppression of evidence. *Kern*, 81 Wn. App 308.

Glaser relies primarily on *Linder*. There, the defendant obtained suppression at trial where the search and inventory were undertaken entirely

by an officer acting alone, “with literally no one else around.” *Linder*, 190 Wn. App. at 652. The Court of Appeals affirmed.

In *Linder*, the Court looked to the Washington Supreme Court’s decision in *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982), which detailed the objectives of the exclusionary rule:

[T]he exclusionary rule should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.”

Bonds weighed those objectives against the substantial costs of exclusion in that case, and concluded exclusion was not merited due to the minimal benefit that would be obtained by excluding the evidence. *Bonds*, 98 Wn.2d at 14. Despite the holding in *Bonds*, the Court in *Linder* upheld the lower court’s finding that “[a]bsent suppression, there [was] no adequate remedy for a violation of CrR 2.3(d).” *Linder*, 190 Wn. App. at 645.

Linder distinguished several other cases that found no prejudice:

[A]most all of the searches were conducted in a manner that satisfied the purpose, if not the letter, of the procedure required by the rule. In many cases, the violations could be cured after the fact. As a result, no prejudice to a right of the defendant was demonstrated.”

Linder, 190 Wn. App. at 651. In *Linder*, however, both the discovery of the contraband and his inventory took place while he was completely alone.

The Court concluded this was prejudicial because it was impossible to challenging the seizure without pitting the officer's credibility against the defendant's. The court therefore decided suppression was the only remedy under the particular facts it was presented.³

Linder should be read narrowly and limited to its particular facts. Here, at no point did Detective Peffer act alone with respect to executing the warrant, collecting evidence, or filling out the associated paperwork prior to filing it with the clerk of the court. The only cases to discuss *Linder* have distinguished it.⁴

Like *Linder*, *Whitford* was decided by Division III of this Court. The Court described its holding in *Linder* thusly:

We observed that, absent suppression, *Linder* had no adequate remedy for someone's *tampering* with the evidence since no one else could confirm the contents of the box on seizure.

Whitford, 2019 WL 480465 at *6 (emphasis added). The Court concluded that regardless of whether the rule had been violated, the defendant failed to show prejudice. *Id.*, at *7.

³ A key to the decision in *Linder* was the lower court's findings regarding the credibility of the officer. It seems that more was afoot if one reads between the lines as to the dynamics between an officer whose credibility the court was so willing to call into question, and the State, which declined to challenge on appeal the modified findings of fact regarding that credibility.

⁴ *State v. Whitford*, 7 Wn. App. 2d 1042, 2019 WL 480465 (2019); also *State v. Pleasant*, 11 Wn. App. 2d 1001, 2019 WL 5448900 (2019) (rejecting the notion *Linder* required that witnesses to the inventory must sign it). Both are unpublished. See GR 14.1(a).

The *Whitford* decision also discussed another case that was briefly mentioned in *Linder*. In *State v. Temple*, 170 Wn. App 156, 285 P.3d 149 (2012), the defendant argued that the police violated warrant procedures by failing to file the inventory along with the return, by failing to provide a copy of the warrant or receipt to the defendant, and by failing to make the inventory in the presence of another person while falsely stating that it was. *Temple*, 170 Wn. App at 161. In that case, the defendant conceded that any one of those errors, standing alone, was insufficient to invalidate the warrant. Instead, he argued the cumulative effect of the violations rose to a constitutional violation. *Id.* The court dismissed that claim summarily and reiterated that “absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits.” *Temple*, 170 Wn. App. at 152. This is because the 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.” *Temple*, 170 Wn. App. at 153 (*citing* 2 Wayne R. LaFare, *Search and Seizures*. 4.12, at 717 (3d ed 1996)).

Thus, unless the defendant can demonstrate prejudice resulting from a failure to strictly comply with the rule, the validity of the warrant must be upheld. *State v. Parker*, 28 Wn. App 425, 427, 626 P.2d 508 (1981). In

United States v. Gantt, 194 F.3d 987, 1005 (1999), *overruled on other grounds*, *United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008), the court noted that not all violations of the rule demand suppression of the seized evidence. *Gantt* held that violations require suppression only if law enforcement deliberately disregarded the rule (as was shown in *Gantt*), or if the defendant was prejudiced. *Id.*

Prejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent the error. *United States v. Johnson*, 660 F.2d. 749, 753 (9th Cir., 1981). There is no merit in a claim that this search would not have occurred or would have been less intrusive had the inventory been filled out precisely accurately.

Washington courts have not squarely addressed what the appropriate remedy is, if any, for errors on the inventory form itself. The State could find no Washington case with the same facts as the case before the Court at hand.

Kern arguably comes close because unlike most of the other cases discussed in *Linder*, where the issue concerned the process or a procedural matter, *Kern* challenged the substance of the inventory form itself as being improper. There, a search warrant was submitted to a bank for records. The officer filed the inventory listing the items he believed would be seized, before the records were actually delivered by the bank into police custody

The court found CrR 2.3(d) had been violated, but relied upon the overwhelming weight of authority in the state that has held suppression of evidence for a violation of the return requirements is only appropriate if the defendant demonstrates prejudice. *Id.*

Although there is no direct decision within Washington on this particular issue, in similar circumstances other jurisdictions have long rejected suppression without a showing of prejudice. In *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct 2523, 37 L. Ed. 2d 706 (1973), the United States Supreme Court addressed the failure to list in the inventory certain items seized pursuant to the execution of the search warrant by focusing on the fact that the items were constitutionally seized. The court then found it insignificant that they were not listed in the return of the warrant. *Dombrowski*, 413 U.S. at 449.

The Supreme Court of Missouri has held that the complete failure of officers to file the return and inventory as required under their court rule was not grounds to quash the warrant or suppress the evidence where the warrant was supported by probable cause, the defendant could show no prejudice by its absence, and the trial court ordered that the return and inventory be filed within ten days of the decision. *State v. Hunt*, 454 S.W.2d 555, 559-60 (Mo. 1970) (also collecting cases).

In New York, The Supreme Court, Appellate Division focused on

the validity of the underlying search warrant that was supported by probable cause in deciding that noncompliance with the rules governing return and inventory does not undermine the warrant itself. *People v. Fernandez*, 61 A.D. 3d 891, 878 N.Y.S.2d 92 (2009); accord *People v. Jenkins*, 71 Misc. 2d 938, 939, 337 N.Y.S.2d 653 (1972) (“while scrupulous observance of legal requirements with respect to search warrants is required, a less than punctilious compliance should not operate to void a valid search where the derelictions occur after the execution of the warrant and are ministerial in nature.”).

The Ohio Court of Appeals has held that the failure to include all of the items seized in the inventory form did not require suppression where the police officer(s) executing the search warrant testified that items presented in court were, in fact, items seized at defendant’s home. *State v. Givens*, 14 Ohio App. 3d 2, 469 N.E. 2d 1332 (1983).

Closer to home, the Court of Appeals of Idaho has held that the failure of the inventory to list a specific item, a sledgehammer, that had been seized during the search warrant execution of the defendant’s home did not require suppression of the evidence at trial. *State v. Curry*, 103 Idaho 332, 647 P.2d 788 (1982). That court looked to the “persuasive line of authority, representing by the holding of the Washington Court of Appeals” in insisting that the defendant must show prejudice before a ministerial error

will require suppression of otherwise validly seized evidence. *Curry*, 103 Idaho at 337 (citing *State v. Smith*, 15 Wn. App. 716, 552 P.2d 1059 (1976)). The court pointed out that the defendant had notice “as early as the date of the preliminary hearing” of the prosecution’s possession of the sledgehammer, and concluded no prejudice could be claimed in that circumstance. *Curry*, 103 Idaho at 337.

Finally, looking to the Ninth Circuit, that court upheld an Oregon district court decision to allow evidence and delineated the only three circumstances under which evidence obtained in violation of the rules regarding execution of search warrants is subject to suppression:

(1) if the violation rises to a constitutional magnitude; (2) if the defendant was prejudiced, in the sense that the search would not have occurred or would not have been so abrasive if law enforcement had followed the rule; or (3) officers acted in deliberate and intentional disregard of a provision of the rule.

United States v. Williamson, 439 F.3d 1125 (9th 2006).

The overwhelming majority of cases around the nation thus hold true to the proposition that a valid search warrant that is supported by probable cause is not susceptible to attacks based on ministerial, grammatical, or technical errors under the court rules governing their execution.

Glaser cites to *State v. Wraspir*, 20 Wn. App. 626, 629, 581 P.2d

182 (1978) for the proposition that the purpose of the rule is “to safeguard, if possible, against errors, willful or inadvertent, by one officer acting alone.” Nevertheless, the Court in *Wraspir* recognized that to obtain relief a defendant must show prejudice. *Wraspir*, 20 Wn. App. at 630.

Here, as below, Glaser fails to show prejudice. He argues that he was forced into a “swearing contest” with the officers. But this is simply not the case as in *Linder* where a single officer handled both the search and inventory of a small tin containing drugs.

Here, on the other hand, the search involved numerous detectives who both testified about the search and documented it photographically. Moreover, the State conceded the mistakes at trial, and it was the subject of extensive cross-examination, as Glaser points out. Brief of Appellant at 22. This was not a “swearing contest.” Rather, Glaser was able to impeach the circumstances surrounding the gathering of the evidence through the testimony of the detectives themselves. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Glaser’s conviction and sentence should be affirmed.

DATED August 24, 2020.

Respectfully submitted,

CHAD M. ENRIGHT

Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'RS' followed by a long horizontal stroke.

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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