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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 34989-6-III

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON

v.

MICHAEL S. PERRY

The Honorable Allen C. Nielson, Judge

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RESPONSE TO OPENING BRIEF

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Matt Arpin, WSBA# 26302  
Special Deputy Prosecuting Attorney  
Stevens County Prosecutor's Office  
215 South Oak Street  
Colville, WA 99114  
(509) 684-7500

**TABLE OF CONTENTS**

- I. STATEMENT OF CASE.....1
  - A. CrR 3.5 Motion Facts.....1
  - B. CrR 3.6 Motion Facts.....4
  - C. Trial Facts.....4
    - 1. Traffic Stop.....4
    - 2. Search Warrants.....7
      - a. Trailer.....8
      - b. Snowmobile.....8
      - c. ABC Mini-Storage Rental Agreement.....9
      - d. Capital One Bank Statement.....9
      - e. Tax Documents.....9
      - f. Drug Paraphernalia.....10
      - g. Idaho License Plates.....10
    - 3. Jonathan Harper's Testimony.....10
      - a. January 19, 2016.....11
      - b. January 30, 2016.....12
    - 4. Jury Verdict.....14
- II. ARGUMENT.....14
  - A. The unchallenged CrR 3.5 findings of fact support the trial court's conclusions of law that Perry's pre *Miranda* statements are admissible.....14
    - 1. Standard of Review for CrR 3.5 Ruling.....14

2.	Warrantless Questioning of Passengers.....	15
3.	Asking Perry if he owned the trailer was within the scope of the original traffic stop and based on a reasonable suspicion Perry was responsible for the observed “ownership” infractions.....	17
4.	<i>Rankin, Larson, O’Cain, Erho, and Allen</i> are distinguishable.....	19
B.	Because the warrant authorizing the search of the trailer was based on probable cause, the warrant was valid and the physical evidence seized during the warrant’s execution was properly admitted at trial.....	22
C.	The State proved every element of the crimes committed by Perry beyond a reasonable doubt.....	27
1.	Sufficiency of Evidence Standard of Review.....	30
2.	Perry “knowingly possessed” the stolen trailer, the stolen snowmobile, and the stolen Idaho license plates.....	31
3.	Bank Statement/Tax Documents.....	34
4.	Drug Paraphernalia.....	35
D.	Using Perry’s statement, “Just my drugs,” to bolster Perry’s credibility was a legitimate trial strategy and not ineffective assistance of counsel.....	36
III.	CONCLUSION.....	43

## TABLE OF AUTHORITIES

### WASHINGTON STATE CASES

<i>State v. Allen</i> , 138 Wn.App. 463, 157 P.3d 893 (Div. 2 2007).....	16, 19, 20
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	16
<i>State v. Boursaw</i> , 94 Wn.App. 629, 976 P.2d 130 (1999).....	38
<i>State v. Boyce</i> , 44 Wn.App. 724, 723 P.2d 28 (Div. 1 1986).....	fn. 9
<i>State v. Clark</i> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	23
<i>State v. Cord</i> , 103 Wn.2d 361, 693 P.2d 81 (1985).....	23
<i>State v. Coss</i> , 87 Wn.App. 891, 943 P.2d 1126 (1997).....	22
<i>State v. Day</i> , 161 Wn.2d 889, 168 P.3d 1265 (2007).....	16
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	15, 16
<i>State v. Erho</i> , 77 Wn.2d 553, 463 P.2d 779 (1970).....	19-21
<i>State v. France</i> , 180 Wn.2d 809, 329 P.3d 864 (2014).....	28
<i>State v. Froehlich</i> , 197 Wn.App. 831, 391 P.3d 559 (Div. 2 2017).....	22
<i>State v. Gaddy</i> , 152 Wn.2d 64, 93 P.3d 872 (2004).....	27
<i>State v. Garcia–Salgado</i> , 170 Wn.2d 176, 240 P.3d 153 (2010).....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	31
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	37, 38
<i>State v. Grogan</i> , 147 Wn.App. 511, 195 P.3d 1017 (Div. 3 2008).....	15
<i>State v. Haack</i> , 88 Wn.App. 423, 958 P.2d 1001 (Div. 1 1997).....	21
<i>State v. Hamilton</i> , 179 Wn.App. 870, 320 P.3d 142 (Div. 2 2014).....	40

<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996), overruled on other grounds by <i>Carey v. Musladin</i> , 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006).....	37
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	28, 30
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	23
<i>State v. Huft</i> , 106 Wn.2d 206, 720 P.2d 838 (1986).....	23, 26
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	26, 27
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	23
<i>State v. Johnson</i> , 55 Wn.2d 594, 349 P.2d 227 (1960).....	41
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	28, 31
<i>State v. Jussila</i> , 197 Wn.App. 908, 392 P.3d 1108 (Div. 3 2017).....	30, 31
<i>State v. Kipp</i> , 179 Wn.2d 718, 728, 317 P.3d 1029 (2014).....	23
<i>State v. Kyllö</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	37
<i>State v. Larson</i> , 93 Wn.2d 638, 611 P.2d 638 (1980).....	20
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	15, 28
<i>State v. Makekau</i> , 194 Wn.App. 407, 378 P.3d 577 (Div. 2 2016).....	29
<i>State v. McKenna</i> , 91 Wn.App. 554, 958 P.2d 1017 (Div. 2 1998).....	38
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	16
<i>State v. Mohamed</i> , 187 Wn.App. 630, 350 P.3d 671 (Div. 1 2015).....	41
<i>State v. Neth</i> , 165 Wn.2d 177, 1986 P.3d 658 (2008).....	22, 23
<i>State v. O’Cain</i> , 108 Wn.App. 542, 31 P.3d 733 (Div. 1 2003).....	19-21
<i>State v. Pierce</i> , 169 Wn.App. 533, 280 P.3d 1158 (Div. 2 2012).....	14
<i>State v. Porter</i> , 186 Wn.2d 85, 375 P.3d 664 (2016).....	28, fn. 10

*State v Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).....16, fn. 5, 19, 20

*State v Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004).....38, 40

*State v Rife*, 133 Wn.2d 140, 943 P.2d 266 (1997).....15

*State v Riley*, 34 Wn.App. 529, 633 P.2d 145 (1983).....26

*State v Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).....31

*State v Satterthwaite*, 186 Wn.App. 359, 344 P.3d 577  
(Div. 2 2015).....29, fn. 10

*State v Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009).....36

*State v Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).....22

**FEDERAL CASES**

*Carey v Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006)....37

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,  
80 L.Ed.2d 674 (1984).....27, 28, 36, 37

*Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)....15, 16, 18

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. XIV.....30

Wash. Const. art. I, § 7.....fn.4

Wash. Const. art. I, § 3..... 30

**WASHINGTON STATE STATUTES**

RCW 9A.56.068.....29

RCW 9A.56.140.....29

RCW9A.56.160.....29

RCW 9A.56.170.....29

RCW 46.04.010.....	fn. 6
RCW 46.04.620.....	fn. 6
RCW 46.04.670.....	fn. 6
RCW 46.16A.030.....	17
RCW 46.16A.200.....	fn. 6
RCW 46.16A.500.....	18
RCW 46.37.010.....	17
RCW 46.37.070.....	17
RCW 46.37.200.....	17
RCW 46.61.021.....	18
RCW 46.63.020.....	fn. 6

**WASHINGTON STATE RULES OF APPELLATE PROCEDURE**

RAP 2.5.....	41
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**WASHINGTON STATE SUPERIOR COURT CRIMINAL RULES**

CrR 3.5.....	1, 14, 15, 18, 41, 42
CrR 3.6.....	4, 23, 24, 26

**I. STATEMENT OF CASE**

**A. CrR 3.5 Motion Facts.**

On May 4, 2016, the trial court held an evidentiary hearing on the State of Washington's CrR 3.5 motion to admit several of appellant Michael Perry's statements at his criminal trial. See CP 13-29; RP 12-51.

On September 20, 2016, the court entered its CrR 3.5 *Findings of Fact, Conclusions of Law and Ruling* (hereafter *CrR 3.5 Ruling*). CP 64-68. In this appeal, Perry challenges only the *CrR 3.5 Ruling's* conclusions of law; Perry does not challenge any of the *CrR 3.5 Ruling's* findings of fact. See Opening Brief at 1.

The live testimony offered at the CrR 3.5 evidentiary hearing that supports the court's unchallenged findings of facts showed:

On January 30, 2016, at approximately 6:00 pm, Chewelah Police Officer David Watts conducted a traffic stop on a Ford Bronco pulling a flatbed trailer with defective brake lights and no license plate. RP 33, 34.

Officer Watts contacted the driver of the Bronco, later identified as Jonathan Harper, advised him why he was stopped, and requested his driver's license, proof of insurance, and vehicle registration. RP 34, 36. Office Watts also asked Harper "if there was a registration for the trailer." RP 35. Harper said he did not have "a registration" for the trailer. RP 35.

Officer Watts testified, “[a]nd so then I asked the driver if the trailer belonged to him, and he told me that no, the trailer did not belong to him, and pointed over at the passenger Mr. Perry and said “The trailer's his.”” RP 35.

Officer Watts then asked Perry, who was sitting in the Bronco's passenger seat but had not yet been identified, if he owned the trailer. RP 35. Perry denied he owned the trailer, but admitted that “all the property on it belonged to him,” and claimed that “a guy that he knew outside Addy owned the trailer as far as he knew.” RP 35. Perry did not provide the name of the “guy that he knew” that owned the trailer. RP 35.

When Officer Watts ran Harper's information through police dispatch, dispatch advised Harper's driver's license was suspended. RP 35, 40. Officer Watts then arrested Harper for driving with a suspended license. RP 36.

Officer Matthew Miller arrived on the scene as a “cover unit” soon after Harper's Bronco was pulled over. RP 19. After learning Harper's driver's license was suspended, but prior to learning the trailer was stolen, Officer Miller asked Perry if he had a driver's license to determine if he could drive the Bronco after Harper was arrested. RP 20, 27. Officer Miller did not ask Perry to identify himself or to produce a driver's license.

Perry told Officer Miller he believed his license was suspended for past-due child support, and declined Officer Miller's offer to confirm its status. RP 28.

About this time, Washington State Patrol Trooper Jesse Dell arrived on the scene. RP 36. Trooper Dell examined the trailer, located the VIN number, and ran it through dispatch. RP 36. Dispatch advised the trailer was reported stolen. RP 36.

Trooper Dell and Officer Miller placed Perry under arrest for possession of the stolen trailer. RP 36. Prior to searching Perry incident to arrest, Officer Watts asked Perry if he had any "weapons or anything illegal on him." RP 36, 39. Officer Watts testified that Perry responded, "Just my meth' in my pocket." RP 39, 43.

After Officer Miller read Perry *Miranda* warnings, Perry declined to be interviewed and was placed in Trooper Dell's patrol vehicle. RP 21. Later, Officer Watts interviewed Perry without first re-reading *Miranda* warnings. RP 37. Perry claimed Harper was pulling the trailer with the covered snowmobile already loaded on top when he arrived at Perry's residence to help him move. RP 38.

Ultimately, the court entered *Findings of Fact, Conclusions of Law and Ruling* admitting the statements made by Perry prior to his original

invocation of *Miranda*, and suppressing the statements Perry made thereafter. CP 64-68.

**B. CrR 3.6 Motion Facts.**

The trial court did not conduct an evidentiary hearing on Perry's CrR 3.6 suppression motion. See RP 65-75; CrR 3.6. Instead, the court reviewed the uncontested facts contained the CrR 3.6 *Supplemental Documents* offered by the State, which include Officer Watts' original and amended *Affidavit for Search Warrant*, as well as the two *Search Warrants* authorized based on contents of each affidavits. CP 69-96.

Ultimately, the court entered *CrR 3.6 Findings of Fact, Conclusions of Law and Ruling* admitting the evidence seized during Perry's arrest and pursuant to the search warrants. CP 101-103.

**C. Trial Facts.**

**1. Traffic Stop.**

On January 30, 2016, just before 7:00 pm, City of Chewelah, Washington, Police Officer David Watts observed a tan Ford Bronco pulling a flat-bed trailer near the intersection of Highway 395 and Cozy Nook Road in Chewelah, Washington. RP 95-96. After observing the trailer had defective brake lights and no license plate, Officer Watts stopped the Bronco. RP 97.

While approaching the Bronco, Officer Watts observed a covered Arctic Cat snowmobile on the back of the trailer, as well as “a lot” of household items, including a couch, mattresses, and boxes strapped under some webbing at the front of the trailer. RP 102.

Officer Watts contacted the driver of the Bronco, later identified as Jonathan Harper. RP 98. Harper gave Officer Watts his Washington State ID card and vehicle registration, but was unable to produce proof of insurance or registration for the trailer. RP 98.

After speaking with Harper, Officer Watts asked the passenger inside the Bronco, later identified as Michael Perry, “if the trailer was his.” RP 99. Perry denied he owned the trailer, and said he borrowed it from a friend in the Addy area. RP 100. Perry admitted he owned “all the stuff on the trailer.” RP 99-100.

Perry claimed “he was not aware of the name of the person” from whom he borrowed the trailer. RP 100. Officer Watts found this “unusual.” RP 100.

Officer Watts returned to his patrol car and ran Harper's ID card and vehicle registration through police dispatch; dispatch advised the Bronco's registration was current, but Harper's driver's license was suspended. RP 101.

In the meantime, Washington State Patrol Trooper Jesse Dell arrived, located the trailer's VIN number, and ran it through dispatch; dispatch advised the trailer was reported stolen. RP 102, 183, 185, 187

Officer Watts testified, "Due to the information that we had about the property being on the trailer, who it belonged to, the passenger, no license plate and other things, determined that there was probable cause to arrest the passenger for possession of that stolen trailer." RP 103.

Perry was arrested for possession of the stolen trailer and searched incident to arrest. RP 104. Prior to the search, Officer Watts asked, "Do you have anything on your person, guns, knives, anything illegal, anything that could hurt me?" RP 104. Perry responded, "Just the drugs in my pocket." RP 104.

Officer Watts searched Perry and found a plastic baggie containing methamphetamine in the upper left chest pocket of Perry's overalls.<sup>1</sup> RP 104, 186.

Stevens County Sheriff's Deputy Mark Coon arrived with a drug sniffing dog and conducted an open-air sniff of the Bronco that resulted in a "positive" alert. RP 105-106. Thereafter, Officer Watts seized the

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<sup>1</sup> At trial, Sheri Jenkins of the Washington State Patrol Crime Lab testified the substance seized from Perry was methamphetamine, which was admitted into evidence as Exhibit 45. RP 199-203; CP 150-154.

Bronco and trailer and had them towed to a secure facility. RP 106.

## **2. Search Warrants.**

The next day, January 31, 2016, Officer Watts secured a warrant to search the Bronco and trailer for evidence of controlled substance violations and possession of stolen property. RP 110, 113; CP 70-82.

While executing the warrant, Office Watts found Karen Dineen's driver's license and MasterCard in the center console of the Bronco. CP 88. Officer Watts called Dineen who advised her wallet was stolen around January 23, 2016, and that unauthorized charges had been attempted before she could cancel her MasterCard (which no other person had permission to possess). CP 88. Based on this new information, Officer Watts added an addendum to his *Affidavit for Search Warrant* and secured a second *Search Warrant* to look for evidence of identity theft. CP 83-96.

When Officer Watts removed the cover from the snowmobile on the trailer, locate its VIN number, and ran the VIN through dispatch; dispatch advised the snowmobile was reported stolen by the registered owner, Donn Brink. RP 112, 205.

Further search of the trailer and the totes and boxes packed thereon revealed the following physical evidence admitted at trial:

1. a receipt from Spalding Auto Parts in Perry's name dated September, 2015, (RP 116, 131);
2. a rental agreement between Perry and ABC Mini-Storage dated August 4, 2015 (RP 116, 132, 133);
3. a Capital One bank statement in the Carol Horlacher's name (RP 116, 123);
4. tax documents in Amanda Jansen's name (RP 116, 120-123);
5. two Idaho license plates, number 3B52148 (RP 125); and
6. drug paraphernalia (a red case containing several needles, plastic baggies, and spoons with residue) (RP 127).

Officer Watts did not locate anything identifying Harper by name or otherwise on the trailer during the search. RP 204.

**a. Trailer.**

Bret Hulquist testified he reported the trailer stolen while employed by Barton-Chrysler in July 2015. RP 165. Only Hulquist and one other Barton employee (not Harper or Perry) had permission to use the trailer. RP 167. Officer Watts valued the stolen trailer at approximately \$1500. RP 142.

**b. Snowmobile.**

Donn Brink testified that on January 18, 2016, his "R&R enclosed snowmobile trailer" was stolen from a hotel parking lot in Spokane. RP 227, 233. Within hours after Brink reported it stolen, the trailer was

located empty and abandoned. RP 227. Brink testified the trailer contained two snowmobiles when it was stolen, including the same Arctic Cat that was recovered off the stolen trailer.<sup>2</sup> RP 226, 229.

**c. ABC Mini-Storage Rental Agreement.**

Sherry Henry, site manager for ABC Mini-Storage in Spokane (hereafter ABC Storage), testified the rental agreement was a standard monthly rental agreement executed between ABC Storage and Michael Perry for storage unit H-23. RP 171. The rental agreement was admitted into evidence at trial as Exhibit 52. CP 150-154.

**d. Capital One Bank Statement.**

Carol Horlacher testified the Capital One bank statement belonged to her, and no other person permission to possess it. RP 161. The bank statement was admitted into evidence at trial as Exhibit 47. CP 150-154.

**e. Tax Documents.**

Amanda Jansen (Amanda Abney at the time of trial (RP 152)), testified the tax documents belonged to her and contained identifying information including her social security number, birth date, income, and bank account number. RP 156. Jansen testified she was expecting to

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<sup>2</sup> Brink also testified several items stolen from his trailer were eventually returned by law enforcement, including two helmets, a pair of snowmobile boots, a jacket, pants, goggles, and a set of duffel bags. Many other items were never recovered. RP 230.

receive the tax documents in the mail from her tax preparer, but had to request another copy when they did not arrive. RP 156. No other person had permission to possess Jansen's tax documents. RP 156. The tax documents were admitted into evidence at trial as Exhibit 46. CP 150-154.

**f. Drug Paraphernalia.**

Officer Watts testified that he recognized the needles, baggies, and spoon with residue contained in the red-zippered case found in a tote on the trailer to be drug paraphernalia. RP 127. Officer Watts testified that illegal drugs are typically cooked in a spoon and then put into needles and injected. RP 127. The drug paraphernalia was admitted into evidence at trial as Exhibit 49. CP 150-154.

**g. Idaho License Plates.**

Officer Watts testified that he ran the Idaho license plates through dispatch; dispatch advised the plates were stolen. RP 125. The license plates were admitted into evidence at trial as Exhibit 48. CP 150-154.

**3. Jonathan Harper's Testimony.**

Harper testified that under a plea agreement related to the events in question, he plead guilty to possession of stolen property, identity theft, and possession of controlled substances, and was sentenced to 120 days in jail and 1 year probation. RP 255-56; 266. In addition to pleading guilty,

the agreement required Harper to testify “truthfully” in Perry's criminal trial. RP 273. The State agreed to dismiss two charged counts and to decline to charge four additional counts. RP 267- 269.

**a. January 19, 2016.**

Harper testified he knew Perry for about three years when he ran into him on January 19, 2016, at the Airway Heights Casino. RP 247, 248, 250. At this time, Harper was homeless and lived in his Bronco. RP 248. Harper agreed to help Perry move, which he had done before, and later that same day followed Perry to ABC Storage to help him “unload a few things out of Perry's truck. RP 248-250.

At trial, security video from ABC Storage recorded on January 19, 2016, was admitted into evidence (Exhibit 53) that showed Harper, Perry, and Perry's girlfriend, enter the ABC Storage facility in separate vehicles before congregating in front of Perry's storage unit, H-23. RP 209-220.

Officer Watts testified a covered snowmobile that “appears identical” to the one recovered is visible in the back of a pickup truck in the video. RP 215. The owner of the snowmobile, Donn Brink, testified the covered snowmobile visible in the video appeared to be his based on it's unique cover and windshield profile. RP 238.

Officer Watts further testified that two cardboard boxes he searched

in February, 2016, while assisting Spokane County Sheriff's Deputies execute a warrant on Perry's storage unit are also visible. RP 208, 216. One box contained a helmet, goggles, and vacuum equipment belonging to Brink. RP 209. A folder from "R&R RV or Trailer" with a receipt from Les Schwab in Brink's name and an Arctic Cat brand snowmobile owner's manual were found in the second box. RP 209.

Harper also testified about the ABC Storage security footage recorded January 19, 2016, and identified himself, his Bronco, Perry, Perry's truck, Perry's girl friend, and her truck. RP 250-255.

**b. January 30, 2016.**

Harper testified that on January 30, 2016, he and Perry met for breakfast at Chewelah Casino before driving separately to a nearby SpoKo gas station. RP 256. Around 1:00 pm, Perry got in the passenger seat of Harper's Bronco and they drove together to Perry's residence up in the mountains outside of Addy. RP 256-257.

At trial, security video from both Chewelah Casino and SpoKo gas station recorded January 30, 2016, was admitted into evidence (Exhibit 54) that confirmed this part of Harper's testimony. RP 107, 108; CP 150-154. In the video, Harper's Bronco is not pulling a trailer. RP 108.

Once at Perry's residence, Perry lent Harper a helmet and "snow

gear,” and the two men rode snowmobiles for about thirty minutes. RP 259, 262. When they were done riding, they shoveled the trailer and loaded the snowmobile and Perry's personal belongings, including “a mattress, and a bunch of boxes and totes. And some bags.” RP 258, 270. Harper neither packed these boxes, nor put any of his own belongings therein. RP 258.

Harper testified he and Perry attached magnetic lights to the trailer and plugged them into the Bronco. RP 259. Harper did not pay attention to whether the trailer displayed a license plate. RP 259.

Harper hooked his Bronco to the flatbed trailer containing the snowmobile and Perry's household items, and he and Perry started driving toward Perry's new residence. Harper had to drive slow because the trailer was swaying back and forth. RP 260. About 20 minutes later, Officer Watts stopped Harper's Bronco. RP 260.

During the traffic stop, Harper admitted his license was suspended, but falsely claimed he placed a magnetic license plate on the back of the trailer “trying to stay out of a ticket.” RP 260, 269. Ultimately, Harper was arrested for driving with a suspended license. RP 260, 263. Harper testified he was unaware the trailer was stolen. RP 260.

#### 4. Jury Verdict.

Ultimately, a jury convicted Perry of possession of a stolen motor vehicle (snowmobile, Count 1), possession of stolen property in the second degree (trailer, Count 2), possession of methamphetamine (Count 3), possession of drug paraphernalia (red case/contents, Count 4), possession of stolen property in the third degree (Idaho license plates, Count 5), and two counts of identity theft in the second degree based on possession of the bank statement and tax paperwork, respectively (Counts 6 and 7). CP 186-199.<sup>3</sup>

## II. ARGUMENT

### A. The unchallenged CrR 3.5 findings of fact support the trial court's conclusions of law that Perry's pre-Miranda statements are admissible.

#### 1. Standard of Review for CrR 3.5 Ruling.

Perry has not assigned error to any findings of fact from the *CrR 3.5 Ruling* entered after an evidentiary hearing on the State's motion seeking to admit Perry's statements at trial. See Opening Brief at 1.

It is well-settled that unchallenged findings of fact entered following a CrR 3.5 motion hearing are treated as verities on appeal. *State v. Pierce*, 169 Wn.App. 533, 544, (Div. 2 2012) citing *State v.*

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<sup>3</sup> The court dismissed two additional counts of identity theft at the close of evidence. RP 284-285.

*Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

However, Perry has assigned error to conclusion of law numbers 2, 3, and 4 from the *CrR 3.5 Ruling*. See Opening Brief at 1; CP 64-68.

Whether a trial court derived proper conclusions of law from its findings of fact is reviewed de novo. *Id.*, citing *State v. Grogan*, 147 Wn.App. 511, 516, 195 P.3d 1017 (Div. 3 2008).

## **2. Warrantless Questioning of Passengers.**

Warrantless search and seizures are presumptively unconstitutional under article 1, section 7 of the Washington State Constitution.<sup>4</sup> *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010); *State v. Duncan*, 146 Wn.2d 166, 173–74, 43 P.3d 513 (2002).

There are, however, a few “jealously and carefully drawn exceptions” to the warrant requirement, including searches and/or seizures based on consent or exigent circumstances, “searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops.” *Duncan*, 146 Wn.2d at 173–74, citing *State v. Rife*, 133 Wn.2d 140, 150–51, 943 P.2d 266 (1997).

A *Terry* investigative stop authorizes a police officer to briefly detain a person for questioning without probable cause to arrest if they

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<sup>4</sup> “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash Const. Art. I, sect. 7

have a reasonable, articulable suspicion, “based on specific, objective facts,” that the person detained is engaged in criminal activity or a traffic violation. *State v Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007); *Duncan*, 146 Wash.2d at 172–74, citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

While all investigatory / traffic infraction stops constitute a seizure of the driver, “[a]n automobile *passenger* is not seized when a police officer merely stops the vehicle in which the passenger is riding.” *State v Rankin*, 151 Wn.2d 689, 691-692, 92 P.3d 202 (2004) (emphasis added), citing *State v Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722 (1999); *State v Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). And, law enforcement may constitutionally request information from a passenger for investigatory purposes if the inquiry is either (1) within the scope of the original traffic stop, or (2) the officer conducting the traffic stop acquires (or otherwise already possesses) a lawful, reasonable suspicion that the *passenger* is engaged in criminal activity or committing a traffic infraction.<sup>5</sup> *State v Allen*, 138 Wn.App. 463, 471, 157 P.3d 893 (Div 2 2007) (emphasis added); *Rankin*, 151 Wn.2d at 695-696.

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<sup>5</sup> Other reasons that might justify an officer's request for identification are “the need to obtain witnesses to an infraction . . . or the need to determine if anyone in the vehicle has a valid license to remove the vehicle from the premises.” *Rankin*, 151 Wn.2d at 705-706 (concurring opinion). Here, Perry witnessed Harper's traffic infractions, and was asked not for ID but only if he had a valid license to remove the Bronco. RP 20, 27.

Here, asking the passenger Perry if he owned the trailer was within the scope of the original traffic stop. Moreover, Officer Watts either had or acquired a reasonable, articulable suspicion, that Perry was responsible for the observed traffic infractions as the owner of the trailer.

**3. Asking Perry if he owned the trailer was within the scope of the original traffic stop and based on a reasonable suspicion Perry was responsible for the observed “ownership” infractions.**

Because a trailer's *owner* is primarily liable for observed defective equipment and license plate display infractions regardless of whether the owner is also the trailer's operator, Officer Watts' questions to Perry about the trailer's ownership were within the scope of the original traffic stop.<sup>6</sup>

The failure to display a visible license plate on the rear of a trailer being moved on a public roadway is a traffic infraction.<sup>7</sup> RCW 46.16A.030(2). Moving a trailer with defective brake lights on a public roadway is also a traffic infraction. RCW 46.37.010(1)(b); RCW 46.37.070; RCW 46.37.200.

<sup>6</sup> For purposes of Title 46, the term “vehicle” includes trailers. See RCW 46.04.670 (“Vehicle” includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway...”); RCW 46.04.620 (“Trailer” includes every *vehicle* without motive power designed for being drawn by or used in conjunction with a motor vehicle...”) (emphasis added); RCW 46.04.010 (“The terms used in Title 46 have the meaning given to them in Title 46, Chapter 4, except where otherwise defined.”).

<sup>7</sup> RCW 46.16A.200(7)(d) (“It is unlawful to...[o]perate a vehicle unless a valid license plate or plates are attached as required under this section.”); RCW 46.63.020 (The failure to perform any act required by Title 46 is a traffic infraction except for those exceptions listed RCW 46.63.020).

Importantly, *both the owner and operator* of the trailer are independently responsible for these infractions, with the *owner* being primarily responsible. RCW 46.16A.500. If a trailer's owner is not present when law enforcement stops the vehicle pulling the trailer, the operator is specifically authorized to accept a citation and promise to appeal *on behalf of the owner. Id.*

When Officer Watts observed the trailer being towed on a public roadway with defective brake lights and no license plate, he acquired a reasonable, articulable suspicion (under *Terry*) that traffic infractions were being committed in his presence. However, unlike most traffic infractions that place primarily responsibility on the driver of a vehicle, it was impossible for Officer Watts to identify the person primarily responsible for the observed infractions without first determining who owned the trailer. In fact, Officer Watts had a specific statutory duty to determine who owned the trailer before issuing any citation. See RCW 46.61.021.

During the course of the otherwise unchallenged traffic stop, Harper “reported that the trailer” belonged to Perry. CP 64-68 (*CrR 3.5 Ruling*, FOF 3). Officer Watts then asked Perry if he owned the trailer. CP 64-68 (*CrR 3.5 Ruling*, FOF 4). Perry said the “stuff (on the trailer) was his, but the trailer was a friend's from the Addy area.” *Id.* Perry said

he did not know the friend/owner's name. *Id.*

Here, Officer Watts observed “ownership infractions” being committed in his presence, and his questions about who owned the trailer were within the scope of original traffic stop.<sup>8</sup> Arguably, under these circumstances, Officer Watts had a reasonable, articulable suspicion that *any* adult in the Bronco might be responsible for the observed traffic infractions as the trailer's owner.

In any event, once Harper accused Perry of owning the trailer, Officer Watts' acquired an independent reasonable suspicion that Perry owned the trailer. And, because Officer Watts' follow-up questions to Perry were limited in scope to the unresolved ownership issue, the questions cannot fairly be characterized as part of some other suspicion or fishing expedition unrelated to the observed infractions.

In short, Officer Watts' questions about the trailer's ownership were constitutionally permissible under the authorities cited above.

**4. *Rankin, Larson, O'Cain, Erho, and Allen are distinguishable.***

The cases Perry primarily relies on are distinguishable as to both the facts and legal issues presented. See Opening Brief at 15-30.

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<sup>8</sup> Officer Watts testified, “[S]ince there is no license plate on the trailer to run at the time, you try to figure out who owns the trailer . . . specifically, who it's registered to, who owns it...” RP 98

In *Rankin*, police officers asked a passenger for identification after observing the driver commit a traffic infraction by rolling over a marked stop line. *Rankin*, 151 Wn.2d at 692. Similarly, in *Larson*, officers asked a passenger for identification after stopping the driver of a vehicle observed committing a parking violation. *State v. Larson*, 93 Wn.2d 638, 640, 611 P.2d 638 (1980). In *Allen*, a passenger was questioned about a no-contact order unrelated to the reasons justifying the traffic stop. *Allen*, 138 Wn.App. 463.

In each of these cases, the driver was the only possible person responsible for the observed traffic infractions, and the identification or other information requested by law enforcement was outside the scope of the original traffic stop. Moreover, no independent grounds existed to justify a reasonable suspicion that the questioned passenger committed a crime or traffic infraction in the presence of law enforcement.

Here, in contrast, both Harper and the trailer's owner were responsible for the observed "ownership infractions," Officer Watts' questions related solely to resolving the ownership issue, and Officer Watts independently possessed and/or acquired a reasonable, articulable suspicion that Perry owned the trailer.

*O'Cain* and *Erho* are distinguishable for different reasons. *O'Cain*

held the State must prove a police dispatch report was based on a sufficient factual foundation to support a warrantless seizure based *solely* on the dispatch report. *State v. O'Cain*, 108 Wn.App. 542, 31 P.3d 733 (Div. 1 2003). *Erho* held that where a defendant disputes he was given *Miranda* warnings, the State must call the other officers present during the interrogation to corroborate the rights were given because of the heavy burden on the State to demonstrate a valid waiver of rights. *State v. Haack*, 88 Wn.App. 423, 433, 958 P.2d 1001 (Div. 1 1997), citing *State v. Erho*, 77 Wn.2d 553, 463 P.2d 779 (1970). Here, in contrast, the seizure at issue was based on traffic infractions committed in the presence of law enforcement, and there was no dispute over *Miranda* warnings.

Finally, Perry mistakenly alleges that Officer *Watts* asked Perry if he had a driver's license *prior to asking questions about who owned the trailer*. See Opening Brief at 20, 21, 28. (emphasis added). In fact, Officer *Miller* asked Perry if he had a driver's license after learning Harper's license was suspended but before law enforcement learned the trailer was stolen. RP 20, 27-28.

Moreover, asking Perry if he had a valid driver's license was permissible under the community care-taking exception to the warrant requirement; Officer Miller never asked Perry to identify himself or to

produce a driver's license, but was simply trying to decide what to do with the Bronco considering Harper's DWLS status. See *State v. Froehlich*, 197 Wn.App. 831, 838, 391 P.3d 559 (Div. 2 2017), citing *State v. Coss*, 87 Wn.App. 891, 899, 943 P.2d 1126 (1997) (“[A]n officer may impound a vehicle only if there are no reasonable alternatives . . . (which) “may include obtaining a name from the driver of someone in the vicinity who could move the vehicle.”).

**B. Because the warrant authorizing the search of the trailer was based on probable cause, the warrant was valid and the physical evidence seized during the warrant's execution was properly admitted at trial.**

Perry argues the evidence seized from the trailer pursuant to a search warrants secured after Perry's arrest should have been suppressed because the warrant was invalid. See Opening Brief at 31. In fact, the warrants authorizing the search of the trailer and Bronco were supported by probable cause to believe Perry was involved in the specified crimes.

“A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched.” *State v. Neth*, 165 Wn.2d 177, 182, 1986 P.3d 658 (2008) citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

“Probable cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity.” *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986), citing *State v. Cord*, 103 Wn.2d 361, 365, 693 P.2d 81 (1985).

Washington appellate courts review the issuance of a search warrant for abuse of discretion, and give great deference to the judge that issued the warrant. *Neth*, 165 Wn.2d at 182. Review is limited to the four corners of the documents supporting probable cause, which are “evaluated in a common sense manner, rather than hypertechnically, with any doubts resolved in favor of the warrant.” *Id.*; *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). Where facts are undisputed, review is de novo. *State v. Kipp*, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014), citing *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996); compare *State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). (Rejecting a line of cases holding the constitutional rights involved in a suppression motion require appellate courts to independently evaluate the evidence in *all* cases, including those with disputed facts).

Here, the court did not conduct any evidentiary hearing on Perry's CrR 3.6 motion to suppress before concluding the search warrants at issue

were supported by probable cause. See RP 65-75; CP 101-103; CrR 3.6. Instead, the court reviewed the uncontested facts contained the CrR 3.6 *Supplemental Documents*, which include Officer Watts' original and amended *Affidavit for Search Warrant*, and the two *Search Warrants* authorized based on contents of each of the affidavits. CP 69-96.

The uncontested facts contained in Officer Watt's *Affidavit(s) for Search Warrant(s)* that lead the court to conclude Perry was probably involved in crimes involving possession stolen property, possession of controlled substances, possession of drug paraphernalia, and identity theft include: 1. Harper claimed in Perry's presence that Perry owned the trailer and the property packed on it. 2. Perry admitted he owned the property on the trailer. 3. Perry denied he owned the trailer, and claimed he had borrowed it from an unnamed friend. 4. Harper and Perry both stated they were moving Perry and his belongings to Perry's new residence at the time of the traffic stop. 5. The trailer was reported stolen. 6. In Officer Watts' experience, property located on or within a stolen vehicle/trailer is often found to be stolen. 7. Methamphetamine was discovered in Perry's pocket during a search incident to Perry's arrest for possession of the stolen trailer. 8. An open air exterior canine sniff of Harper's Bronco resulted in a positive alert for narcotics pinpointed as emitting from the passenger

floor area where Perry was seated.<sup>9</sup> 9. Officer Watts observed a digital scale on the center console of the Bronco. 10. Perry has 28 prior arrests for crimes including possession of stolen motor vehicle, possession of stolen property, trafficking in stolen property, first degree theft, second degree burglary, and identity theft. 11. Perry has 13 felony convictions in Washington for crimes including possession of a stolen motor vehicle, five Burglary 2<sup>nd</sup> convictions, a VUSCA conviction, and a Theft 2<sup>nd</sup> conviction. 12. Harper stated “as far as he knew,” Perry owned the snowmobile. 13. Harper said the trailer and snowmobile were already at Perry's residence when he arrived there to help Perry move. 14. Harper stated Perry had “a few things” inside the Bronco. 15. While executing the first search warrant, Office Watts found Karen Dineen's stolen driver's license and MasterCard that no person had permission to possess. CP 69-78, 88.

Based on these undisputed facts, a reasonable person could conclude that Perry was likely involved in crimes related to possession of stolen property, possession of controlled substances and/or paraphernalia, and identity theft. Thus, the *Search Warrant(s)* at issue were based on probable cause, and the evidence seized under those warrants properly

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9 Where a canine “sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred.” *State v. Boyce*, 44 Wn.App. 724, 730, 723 P.2d 28 (Div. 1 1986).

admitted at Perry's trial. The trial court did not abuse its discretion.

Perry claims the trial court's probable cause determination erroneously applied the "totality of circumstances test" to citizen informants rejected in *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). See Opening Brief at 31. This claim is based on the court's citation to *Huft* and use of the introductory phrase, "*Taken as a whole*," to preface its conclusion that search warrant at issue was "legally sufficient." CP 102. This introductory phrase, however, is consistent with the well-established principle that a judge issuing a warrant must consider "all the facts and circumstances sworn to by the person seeking the warrant." *State v. Riley*, 34 Wn.App. 529, 531, 633 P.2d 145 (1983).

Here, the uncontested facts and circumstances sworn to by Officer Watts' are contained in the *3.6 Supplemental Documents*. While only portions of the facts contained in those documents are highlighted above, the court properly considered them all.

Notwithstanding the cite to *Huft*, Harper was not a citizen informant, and application of Aguilar-Spinelli principles was unnecessary. See Opening Brief at 31-35. Asking Perry if he owned the trailer was simply within the scope of the traffic stop. And, in any event, appellate courts review conclusions of law justifying the issuance of a search

warrant de novo. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

Even if Harper is considered to be a citizen informant, “probable cause may still be established by independent police investigation.” *Jackson*, 102 Wn.2d at 438. Here, the independent police investigation outlined above independently establishes the probable cause necessary to support the warrant.

Because the uncontested facts from Officer Watts' *Affidavit(s) for Search Warrant(s)* would lead a reasonable person to conclude Perry was involved in the crimes of possession of stolen property, possession of controlled substances and paraphernalia, and identity theft, the search warrants were supported by probable cause, and the physical evidence seized during their execution properly admitted at trial.

**C. The State proved every element of the crimes committed by Perry beyond a reasonable doubt.**

Perry challenges the sufficiency of the evidence supporting his convictions for Possession of a Stolen Motor Vehicle (Count 1), Second Degree Possession of Stolen Property (Count 2), Possession of Drug Paraphernalia (Count 4), Third Degree Possession of Stolen Property (Count 5), and Identity Theft (Counts 6 and 7). See Opening Brief at 35–50. Perry does not challenge the sufficiency of the evidence supporting

his conviction for Possession of Methamphetamine (Count 3).

As to Counts 1, 2 and 5, Perry alleges the “to convict” jury instructions included additional, non-essential elements the State was required to prove under the law of the case doctrine articulated in *Hickman*. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998); see also *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017) (holding *Hickman* remains good law). More specifically, Perry alleges that using the statutory definition of the term “possess” in the “to convict” instructions instead of the word “possess” or “possesses” added the non-essential elements, “to withhold or appropriate,” to these counts.

However, contrary to Perry's assertion, the definitional components of an element of an offense are not themselves elements of the offense. *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016) (definition not element of offense); *State v. France*, 180 Wn.2d 809, 818–20, 329 P.3d 864 (2014) (Washington Courts “have already rejected the notion that multiple definitions of statutory terms necessarily create either new elements or alternative means of committing a crime.”); *Lorenz*, 152 Wn.2d 22 (definition not an element of offense).

Under Count 1, “[a] person is guilty of *possession of a stolen vehicle* if he or she possess [possesses] a stolen motor vehicle.” RCW

9A.56.068(1) (emphasis added). Under Count 2, “[a] person is guilty of *possessing stolen property* in the second degree if . . . he or she possess stolen property . . . which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value.” RCW 9A.56.160 (emphasis added). And, under Count 5, “[a] person is guilty of *possessing stolen property* in the third degree if he or she possesses . . . stolen property which does not exceed seven hundred fifty dollars in value.” RCW 9A.56.170 (emphasis added).

““*Possessing stolen property*” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner.” RCW 9A.56.140 (emphasis added). This definition applies to both the possession of stolen property and possession of stolen motor vehicle statutes. *State v. Makekau*, 194 Wn.App. 407, 378 P.3d 577 (Div. 2 2016), citing *State v. Satterthwaite*, 186 Wn.App. 359, 364, 344 P.3d 577 (Div. 2 2015) (RCW 9A.56.068 “implicitly incorporates RCW 9A.56.140(1)’s terms because the terms apply to other possession of stolen property offenses in the same chapter.”).<sup>10</sup>

Here, the use of the term “possess” and its definition in the “to

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<sup>10</sup> See also *Porter*, 186 Wn.2d 85 (reversing *Satterthwaite*, 186 Wn.App 359, on other grounds).

convict” instructions did not create any “additional” essential or non-essential elements.

The cases Perry relies on, *Hickman* and *Jussila*, are distinguishable. In *Hickman*, “venue” was determined to be an additional element and opposed to the definition of an essential element. *Hickman*, 135 Wn.2d at 105. Similarly, in *Jussila*, including serial numbers from stolen firearms in the “to convict” instruction did not define any other element of a crime and was thus considered an additional (non-essential) element. *State v. Jussila*, 197 Wn.App. 908, 392 P.3d 1108 (Div. 3 2017).

Here, in contrast, the evidence presented at trial establishing that Perry “possessed” the stolen trailer and property also establishes that he “withheld or appropriated” the stolen trailer and property since the latter phrase merely defines the former term. Using the definition of “possess” instead of the word “possess” simply does not require the State to prove anything in addition to the essential elements of the crimes at issue.

#### **1. Sufficiency of Evidence Standard of Review.**

Due Process requires the State to prove every element of a crime beyond a reasonable doubt. *Johnson*, 188 Wn.2d. at 742 citing U.S. Const. Amend. XIV; Wash. Const. Art. I, sec. 3.

Evidence supporting a conviction is sufficient if “a rational trier of

fact could find each element of the crime beyond a reasonable doubt.” *Jussila*, 197 Wn.App. at 920, citing *State v Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “Both direct and indirect evidence may support the jury's verdict.” *Jussila*, 197 Wn.App. at 920 (citations omitted). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. . . A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Johnson*, 188 Wn.2d at 751, citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Perry specifically alleges the State failed to prove he “knowingly possessed” the stolen property identified in Counts 1, 2, and 5. Assignments of Error 10 & 11. Since the use of the defining phrase, “withheld or appropriated,” in the “to convict” instructions merely defines the term “possess,” the same evidence that permits a rational trier of fact to find Perry “knowingly possessed” stolen property also establishes Perry “withheld or appropriated” stolen property.

**2. Perry “knowingly possessed” the stolen trailer, the stolen snowmobile, and the stolen Idaho license plates.**

To convict Perry of Possessing Stolen Property in the Second Degree (Count 2), the State had to prove that Perry “knowingly possessed”

the stolen trailer. CP 115. To convict Perry of Possessing a Stolen Motor Vehicle (Count 1), the State had to prove Perry “knowingly possessed” the stolen Arctic Cat snowmobile. CP 114. To convict Perry of Possessing Stolen Property in the Third Degree (Count 5), the State had to prove Perry “knowingly possess(ed)” stolen Idaho license plates. CP 118.

The jury was instructed that a “person knows or acts *knowingly* . . . or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result.” CP 122. The jury was further instructed that “[p]ossession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.” CP 129.

Here, the evidence admitted at trial (and the reasonable inferences from that evidence) was sufficient to permit a rational trier of fact to find Perry “knowingly possessed” the stolen trailer, the stolen snowmobile, and literally all of the other property contained on the trailer.

Harper told Officer Watts Perry owned the trailer. Perry denied owning the trailer, but suspiciously claimed he borrowed it from a friend

he could not name. Perry admitted the trailer contained Perry's property.

Harper testified the trailer was already located at Perry's residence when Harper arrived in his Bronco on January 30, 2016, to help Perry move to a new residence. Security video from a gas station recorded on the morning of January 30, 2016, showed Harper in his Bronco following Perry in his girlfriend's truck into the gas station. Harper's Bronco is not pulling the trailer in the video.

Harper neither packed any of Perry's boxes or totes, nor put any of his own property in the totes. Harper and Perry loaded the snowmobile onto the trailer at Perry's residence. The trailer and the snowmobile were reported stolen by the registered owners.

A receipt in Perry's name and a rental agreement between Perry and ABC Storage (for unit H 23) were found in a tote on the trailer. Stolen Idaho license plates, a stolen Capital One bank statement belonging to Carol Horlacher, stolen tax documents belonging to Amanda Jansen, and a red-zippered case containing needles, plastic baggies, and spoons, including one spoon with drug residue in it, typically used to store, prepare and ingest methamphetamine, were also found on the trailer.

ABC Storage security footage from January 19, 2016, showed Perry outside his storage unit (H-23) with the same stolen Arctic Cat

snowmobile owned by Donn Brink recovered off the trailer in the back of a pickup. Harper is also present in the video. Two cardboard boxes later found in Perry's storage unit and searched by law enforcement in February, 2016, are also seen in the pickup in the security video. One box contained Donn Brink's stolen snow gear, and the other box contained a receipt in Brink's name and an Arctic Cat snowmobile owner's manual.

This evidence, and all the reasonable inferences therefrom, were more than sufficient to permit the jury to find beyond a reasonable doubt that Perry had actual or constructive possession of the trailer, the snowmobile, and the license plates, and also that Perry knew these items were stolen.

### **3. Bank Statement/Tax Documents.**

With respect to identity theft (Count 6 and Count 7), Perry claims only that the State failed to prove he “intended to commit a crime.” Assignments of Error 12. However, Perry did not have either Carol Horlacher's permission to possess her Capital One MasterCard statement, or Amanda Jansen's permission to possess her tax documents. Neither Horlacher nor Jansen knew Perry. The MasterCard statement and tax documents were found organized in a folder in a plastic tote on the trailer which was packed by Perry before being loaded on the trailer.

The logical inference from this evidence is that Perry possessed these documents with the intent to use them to commit a crime. There is simply no other legitimate reason for a person to not merely possess such documents belonging to complete strangers, but also to treat them importantly enough to protect and organize them in a folder, and to move them with you to a new residence.

#### **4. Drug Paraphernalia.**

Perry alleges the State failed to prove he “possessed” drug paraphernalia as charged in Count 4. However, the “to convict” instruction for this crime required the State to prove Perry “*used* drug paraphernalia to process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, inhale, or otherwise introduce into the human body a controlled substance, methamphetamine.” CP 117. The jury was instructed that ““Drug Paraphernalia” includes, but is not limited to: kits used, intended for use, or designed for use in . . . preparing controlled substances . . . containers used, intended for use, or designed for use in packaging small quantities of controlled substances . . . containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances. . . hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally

injecting controlled substances into the human body.” CP 131.

The evidence outlined above shows Perry “knowingly possessed” the contents of the trailer, which includes the red-zippered case that contained needles, baggies, and spoons (one with residue) that Officer Watts testified he recognized to be drug paraphernalia used to ingest methamphetamine. Officer Watts testified that methamphetamine is typically cooked in a spoon and then put into needles and injected. Perry had 10.9 grams of methamphetamine in a plastic bag found in his pocket during a search incident to arrest.

Clearly, it was reasonable for the jury to find beyond a reasonable doubt that the red-zippered case and contents was a both “kit” used to prepare methamphetamine for injection, and a “container” used to store or conceal methamphetamine.

**D. Using Perry's statement, “Just my drugs,” to bolster Perry's credibility was a legitimate trial strategy and not ineffective assistance of counsel.**

Ineffective assistance of counsel claims are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on an ineffective assistance claim, Perry must show (1) deficient performance by defense counsel, and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984); *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). The failure to show either element of the test defeats the claim and ends the reviewing court's inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996), overruled on other grounds by *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006).

Representation is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Washington courts “give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel's performance was reasonable.” *State v. Hamilton*, 179 Wn.App. 870, 879, 320 P.3d 142 (Div. 2 2014), citing *Grier*, 171 Wn.2d at 33. “When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Id.* (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

Conversely, “the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel's

performance.”” *Id.* (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, Perry contends defense counsel was ineffective for failing to move to suppress Perry's, “Just my drugs,” statement made when asked if he possessed anything dangerous before being searched incident to arrest. See Opening Brief at 50.

However, using that statement to bolster Perry's credibility was a legitimate trial strategy and not ineffective assistance of counsel. Moreover, because the methamphetamine found on Perry during the search incident to arrest was admitted at trial, Perry cannot establish prejudice even if counsel's performance is deemed deficient.

A search incident to a lawful arrest is a recognized exception to the warrant requirement. *State v. Boursaw*, 94 Wn.App. 629, 632, 976 P.2d 130 (1999). The exception allows an officer to search an arrestee for weapons or “evidence that might be on the person of the arrestee.” *State v. McKenna*, 91 Wn.App. 554, 560–61, 958 P.2d 1017 (Div. 2 1998).

It is undisputed that Perry was under arrest for possession of stolen property when Officer Watts searched him. Thus, the seizure of Perry's methamphetamine was lawful under the search incident to arrest exception to the warrant requirement. Even without the Perry's statement, the State's

admissible evidence proved Perry possessed methamphetamine. Thus, Perry's ineffective assistance of counsel claim fails based on his inability to show prejudice.

Moreover, Perry cannot show deficient performance by counsel because using Perry's statement (and not seeking its suppression) was a legitimate trial strategy to bolster Perry's credibility.

While Perry did not testify at trial, several statements made before he was arrested were admitted, including his statement disclaiming ownership of the trailer. If defense counsel could show the jury Perry was honest, the jury might believe Perry's denial about owning the trailer.

Defense counsel's cross examination of Officer Watts about the methamphetamine found on Perry reveals this strategy in play:

Q. This (the confiscated plastic baggie with methamphetamine) is what my client told you you would find on his person when you asked him the question about – dangerous items, and – at the scene. Is that right?

A. That is correct.

Q. So he told you that's what you would find and that's what you found?

A. That is correct.

RP 119. Defense counsel's closing argument similarly reveals his strategy to bolster Perry's credibility; “we did acknowledge in opening statements

and we continue to acknowledge it now that we've had the expert testify, this was meth' – methamphetamine in his – in his pocket that day. He identified to police as his drugs, and he just turned it over to them.” RP 338.

In short, it was a reasonable strategy for defense counsel to use Perry's statement, “Just my drugs,” to bolster Perry's credibility with the jury, especially when the statement did not affect the admissibility of the methamphetamine.

Perry's reliance on *Hamilton* is misplaced since that case concerned a search and seizure conducted *before* the defendant was arrested, and not a search and seizure conducted incident to a lawful arrest. *State v. Hamilton*, 179 Wn.App. 870, 320 P.3d 142 (Div. 2 2014). Perry's reliance on *Reichenbach* is similarly misplaced for the same reason. See *State v. Reichenbach*, 153 Wn.2d. 126, 101 P.3d 80 (2004).

Because defense counsel employed a legitimate trial strategy to bolster Perry's credibility through the admission of his honest statement about possessing drugs, defense counsel was not deficient for failing to move to suppress the statement. Moreover, even if such a strategy was unreasonable, Perry cannot show prejudice when the admissibility of the methamphetamine was not dependent on Perry's statement.

**E. Statement of Additional Grounds for Review: Perry cannot show actual prejudice resulting from the appearance of two different judges in his case.**

In his *Statement of Additional Grounds for Review*, Perry argues his due process rights were violated because two different judges appeared in his case. See *Statement of Additional Ground for Review*.

Because Perry did not object to the appearance of a second judge after another judge already heard the State's CrR 3.5 motion, this claimed error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a); *State v. Mohamed*, 187 Wn.App. 630, 648-649, 350 P.3d 671 (Div. 1 2015) (citations omitted).

In order to show a “manifest error” under RAP 2.5(a)(3), actual prejudice arising from the claimed error must be demonstrated. *Mohamed*, 187 Wn.App. at 649. “To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. The focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.* (internal quotation marks and citations omitted); see also *State v. Johnson*, 55 Wn.2d 594, 349 P.2d 227 (1960) (“[A] defendant may by failing to object to the substitution of a judge during the trial (after evidence has been received) waive his right to

allege error if no prejudice is shown.”).

Here, Perry does not allege or identify *any* practical consequences resulting from the appearance of two different judges in his case.

After conducting an evidentiary hearing, Judge Monasmith entered detailed CrR 3.5 *Findings of Fact, Conclusions of Law and Ruling*. CP 64-68. Under that *CrR 3.5 Ruling*, Perry's pre-*Miranda* statements were deemed admissible, and Perry's post-*Miranda* statements were suppressed. CP 64-68. The *CrR 3.5 Ruling* was honored and implemented by Judge Nielson. Perry did not object on the record to Judge Nielson's appearance. Furthermore, Perry has not challenged the *CrR 3.5 Ruling's* findings of fact, and the conclusions of law will be reviewed de novo.

Because the *CrR 3.5 Ruling's* conclusions of law are supported by the unchallenged findings of fact as argued in section II, A., Perry cannot make a plausible showing that the appearance of two different judges had any practical and identifiable consequences in the trial of the case. Because he cannot show “manifest error,” his *Statement of Additional Grounds for Review* is without merit, regardless of whether the alleged error is properly characterized as constitutional under the circumstances.

### III. CONCLUSION

Based on the foregoing, the State asks this court to deny Perry's direct appeal and to affirm the judgment and sentence of the Stevens County Superior Court.

Respectfully submitted September 20, 2017.



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Matt Arpin, WSBA #26302  
Special Deputy Prosecuting Attorney  
Stevens County, Washington  
215 South Oak Street  
Colville, WA 99114  
(509) 684-7500

**CERTIFICATE OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington that, on September 20, 2017, I mailed (postage prepaid) a true and correct copy of this *RESPONSE TO OPENING BRIEF* to:

Lise Ellner, Attorney at Law  
P.O. Box 2711  
Vashon, WA 98070

Michael S. Perry, #777623  
Airway Heights Correction Center  
P.O. Box 2049  
Airway Heights, WA 99001

Signed at Spokane, Washington, on September 20, 2017.



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Matt Arpin, WSBA #26302  
Special Deputy Prosecuting Attorney