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COURT OF APPEALS
DIVISION II

No. 41850-9-II

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THE COURT OF APPEALS FOR THE STATE OF
DIVISION II

STATE OF WASHINGTON
WASHINGTON
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

DANITA K. OSTER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By:



SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

*11/5/11
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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

STATEMENT OF THE CASE 1

ARGUMENT 6

A. THE POLICE’S INITIAL CONTACT WITH OSTER DID NOT IMPERMISSIBLY INTRUDE UPON HER PRIVATE AFFAIRS BECAUSE OSTER WAS NOT SEIZED UNTIL SHE OBSTRUCTED THE OFFICER’S INVESTIGATION 6

 1. The Officer’s Initial Contact With Oster Was A Social Contact 7

 2. The Contact Transformed Into A *Terry* Stop When Oster Attempted To Walk Away With The Purse 12

B. OSTER WAS LAWFULLY ARRESTED FOR OBSTRUCTING A LAW ENFORCEMENT OFFICER. 14

C. THE STATE CONCEDES THAT UNLAWFUL POSSESSION OF DRUG PARRAPHERNALIA IS NOT A CRIME 16

D. SOME OF THE TRIAL COURT’S FINDINGS OF FACT FROM THE SUPPRESSION HEARING DO NOT REFLECT THE TESTIMONY GIVEN AT THE CrR 3.6 HEARING 17

E. OSTER’S DUE PROCESS RIGHT WAS NOT VIOLATED BY THE DELAYED ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE CrR 3.6 HEARING ... 23

F. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT 24

CONCLUSION 27

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	7, 12
<i>State v. Bailey</i> , 154 Wn. App. 295, 224 P.3d 852 (2010)	7, 8
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	6
<i>State v. Gonzales</i> , 90 Wn. App. 852, 954 P.2d 360 (1998), <i>review denied</i> , 136 Wn.2d 1024 (1998).....	23
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	25
<i>State v. Harell</i> , 83 Wn. App. 393, 923 P.2d 698 (1996).....	17
<i>State v. Harrington</i> , 167 Wn.2d 656, 222 P.3d 92 (2009).....	8
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	25
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010).....	24
<i>State v. Jackson</i> , 150 Wn. App. 877, 209 P.2d 553 (2009).....	25
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	12
<i>State v. Kwan Fai Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	25
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	7, 11, 12, 13, 23
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004)	7
<i>State v. Williams</i> , 171 Wn.2d 474, 251 P.3d 877 (2011)	14, 15
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	7

Federal Cases

Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 357 (1979)..... 12

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)..... 12, 14

United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)..... 6

Washington Statutes

RCW 9A.76.020 14

RCW 9A.76.020(1)..... 14

RCW 69.50.412..... 16

Constitutional Provisions

Washington State Constitution, Article 1, section 7 6, 7

U.S. Constitution, Fourth Amendment..... 12

U.S. Constitution, Fourteenth Amendment..... 23

Other Rules or Authorities

CrR 3.6 (b)..... 23

ER 1101(c)(3)..... 22

I. ISSUES

- A. Did the officers violate Oster's constitutional rights under the Fourth Amendment of the United States Constitution and Article One, Section Seven of the Washington State Constitution by impermissibly seizing her and thereby illegally intruding on her private affairs?
- B. Did the officers lawfully arrest Oster for Obstructing a Law Enforcement Officer?
- C. The State concedes that Possession of Drug Paraphernalia is not a crime and therefore not an arrestable offense.
- D. Did the trial court enter erroneous findings of fact?
- E. Was Oster's due process right violated by the trial court's delay in the entry of findings of fact and conclusions of law from the CrR 3.6 hearing?
- F. Did the deputy prosecutor commit misconduct?

II. STATEMENT OF THE CASE

The State filed an information, on September 9, 2010, charging Danita Kay Oster¹ with one count of Possession of Methamphetamine, occurring on or about September 8, 2010. CP 1-2. There was a CrR 3.6 suppression hearing held on December 8, 2010. RP3 3-25. The State and Oster filed memorandums in support of their positions. CP 5-15. The State was represented by deputy prosecutor Brad Meagher. RP 3. At the CrR 3.6 hearing the State called one witness, Chehalis Police Officer Monte

¹ Hereafter, Oster.

Henderson. RP 3. Officer Henderson's testimony at the 3.6 hearing will be discussed at length in a later portion of the State's response and the State will supplement the facts at that time. The trial court denied Oster's motion to suppress the evidence and gave an oral ruling. RP 19-20. At the conclusion of the CrR 3.6 hearing the State and Oster set a trial date February 14, 2011. RP 21. The State requested to set a date for the presentation of findings. RP 21. Oster's trial counsel noted that he knew he would have objections to certain findings but did not think the presentation would take very long. RP 22. The trial court suggested doing the findings the morning of trial, which Oster's trial counsel agreed to do. RP 22.

The morning of trial the State, now represented by deputy prosecutor Halstead, presented the findings and conclusions from the CrR 3.6 hearing. RP 27. Oster's trial counsel put his objections on the record. RP 29-32. The trial court did question when the suppression hearing took place and why it took so long to enter the findings, apparently forgetting it was the trial court who suggested entering the findings the morning of trial. RP 29. The trial court entered the findings and conclusion from the suppression hearing. RP 34.

Officer Monte Henderson testified that through dispatch he received a complaint of a female acting in a bizarre manner in the area of the 200 block of southwest (SW) Second Street. RP 38. Officer Henderson and Officer Renshaw responded to the area, which is within the Chehalis city limits. RP 38. Officer Henderson arrived and saw Oster sitting on the front porch of 275 SW Second Street. RP 39. The house at 275 SW Second Street was known by Officer Henderson to be vacant. RP 38-39. Officer Henderson contacted Oster. RP 39. Oster told Officer Henderson that she knew somebody who lived at the house and some of Oster's belongings were inside the house. RP 39. Oster also told Officer Henderson that she was waiting for someone to let her inside the house so she could retrieve her possessions. RP 39. Officer Henderson noticed that Oster was sweating, evasive and really nervous. RP 39. Officer Henderson formed the opinion that she was under the influence of some sort of controlled substance. RP 39.

Officer Renshaw arrived at the scene. RP 40. Officer Henderson and Officer Renshaw noticed a purse that was sitting on the front porch of 275 SW Second. RP 40. Officer Renshaw picked up the purse and asked Oster if it belonged to her. RP 40-

41. Officer Henderson stated Oster replied something to the effect of, "I don't know." RP 41. Officer Renshaw told Oster then she would not mind if Officer Renshaw looked in the purse. RP 41. At this point Officer Renshaw was walking back to Officer Henderson and Oster. RP 41. Oster ran over to Officer Renshaw and grabbed the purse from him and began to walk away. RP 41. Oster told Officer Renshaw as she attempted to leave with the purse that he could not look at it. RP 41. The officers attempted to grab Oster and she started pulling, pushing and screaming. RP 41. Due to Oster's combative nature, Officer Henderson handcuffed her and seated her in the back of his patrol car. RP 41.

After Oster was seated in the patrol car, Officer Henderson observed that inside of the purse there was a glass smoking pipe on the top, which was visible from looking at the purse. RP 42. Also located inside the purse was a large knife. RP 42. Officer Henderson placed Oster under arrest for obstruction and possession of drug paraphernalia and transported her to the Lewis County Jail. RP 43.

Corrections Officer (CO) Penelope Justice works at the Lewis County Jail. RP 50. CO Justice explained the procedure that takes place when a female is brought into the jail. RP 51-52.

CO Justice testified that any hands on searching, from pat downs to strip searches, is done by a person of the same gender. RP 51.

CO Justice stated that on September 8, 2010 she came in contact with Oster at the Lewis County Jail. RP 50-51. During a strip search of Oster CO Justice noticed a piece of plastic sticking out of Oster's bra. RP 53. Oster started crying and saying she was sorry. RP 53. The bindle was found inside Oster's bra, between the fabric and her skin. RP 54. The bindle contained a white powdery substance. RP 54. CO Justice handed the bindle to Sergeant Smith, who field tested the substance. RP 55. CO Justice stated that she handed the bindle to her sergeant, who handed it over to Officer Henderson. RP 56.

Jason Dunn, a forensic scientist with the Washington State Crime Laboratory, testified regarding the testing of the bindle that was found on Oster. RP 59-61. The bindle contained methamphetamine. RP 63. The weight of the methamphetamine was three-tenths of a gram. RP 64.

The trial court convicted Oster of Possession of Methamphetamine. RP 67; CP 29-30. Oster was sentenced to 30 days in jail. CP 33. Oster timely appealed her conviction. CP 42-51.

III. ARGUMENT

A. THE POLICE'S INITIAL CONTACT WITH OSTER DID NOT IMPERMISSIBLY INTRUDE UPON HER PRIVATE AFFAIRS BECAUSE OSTER WAS NOT SEIZED UNTIL SHE OBSTRUCTED THE OFFICER'S INVESTIGATION.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. Art. I, § 7. The Washington State Constitution grants greater privacy rights to an individual than the Fourth Amendment of the United States Constitution. *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008).

A person is seized within the meaning of the Fourth Amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Not every encounter between an officer and an individual amounts to a seizure. *Id.* at 551-55.

Oster argues in the first four sections of her brief that she was impermissibly seized by the police officers. See Brief of Appellant 6-13. Oster does not explain how police seized her until she argues that when she decided to terminate the contact by walking away the police grabbed her. Brief of Appellant 11.

Oster's characterization of the contact that occurred between herself and the officers is grossly inaccurate and her description of how she chose to terminate the contact with the police is lacking key facts.

1. The Officer's Initial Contact With Oster Was A Social Contact.

Social contacts between police and citizens are permitted under Article I, Section 7 of the Washington State Constitution. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). "A police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention." *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). Social contact made where an officer subjectively suspects the possibility of criminal activity does not necessarily constitute a seizure. *State v. O'Neill*, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003). The subjective intent of an officer is generally irrelevant in determining whether a person has been seized. *Id.* at 575. "[T]he key inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact." *State v. Bailey*, 154 Wn. App. 295, 300, 224 P.3d 852 (2010), citing *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

The Supreme Court found permissible social contact where an officer contacted an individual walking on a sidewalk at 11:00 p.m. for the purpose of seeing what he was doing in the area. *State v. Harrington*, 167 Wn.2d 656, 665, 222 P.3d 92 (2009). In *Harrington*, the officer did not activate his lights or siren. *Id.* at 665. The officer approached the individual on the sidewalk and did not block him from leaving. *Id.* at 665. The officer asked the individual what he was doing and where he was going. *Id.* at 668. The court found that a reasonable person would not have felt his freedom of movement was restrained. *Id.* at 665. The encounter later developed into a seizure when the officer asked the individual to remove his hands from his pockets, requested to frisk the individual, and a second officer arrived on the scene. *Id.* at 660-70.

In *Bailey*, the court found an officer's contact with an individual on a deserted street "to determine if he had business [] there or if he was legitimately headed somewhere" was social contact. *State v. Bailey*, 154 Wn. App at 298. The officer asked the defendant "where he was going and what he was up to." *Id.* at 298. The officer then asked the individual for identification. *Id.* at 302.

The court found the officer's contact did not amount to a seizure.

Id. at 302.

In Oster's case the police were responding to the report of a suspicious female that was wandering in the area of the 200 block of Second Street in Chehalis. RP 5. Officer Henderson arrived in the area and contacted Oster who was standing on the sidewalk in front of 275 Second Street, a residence that has been known in the past for criminal activity. RP 5. According to Officer Henderson Oster was making statements to him about wanting to go inside the residence because she had some belongings that were inside the house. RP 5. Officer Henderson characterized Oster's speech as rambling because some of her statements did not make sense. RP 5. Officer Henderson tried to get some more information from Oster, how she got to the neighborhood and what exactly she wanted from the house. RP 6. Officer Henderson noticed Oster was sweaty, nervous and seemed evasive. RP 6. Officer Henderson, based upon his training and experience, formed the opinion that Oster appeared to be under the influence of a controlled substance. RP 6. This contact with Oster was approximately two minutes long. RP 7.

Officer Renshaw showed up on the scene, walked up to the front porch of 275 Second Street where there was a purse sitting on the porch. RP 7. Officer Henderson and Oster were approximately 15 to 20 feet away from the porch. RP 7. One of the officers asked Oster if she knew who the purse belonged to. RP 7. Oster replied, "I don't know." Officer Renshaw then picked up the purse and said something to the effect of, if it's not yours, you don't mind us looking in it, do you? RP 7. Officer Renshaw was walking back towards where Officer Henderson and Oster were standing. RP 7. According to Officer Henderson, Oster, "rolled around, grabbed the purse out of his [Officer Renshaw's] hands and started walking down the sidewalk saying, 'no, no, this is mine, you can't look at it.'" RP 7.

Nothing in the record, up to the point where Oster grabs the purse out of the hands of Officer Renshaw, supports the premise that she was seized. See RP 4-13. There was no testimony that either officer told her she was not free to leave. See RP 4-13. Oster was not handcuffed during this time. See RP 4-13. Oster was speaking to Officer Henderson while standing on the sidewalk in front of a residence. RP 5. There was no testimony that either officer even asked Oster to provide any identification. See RP 4-

13. Oster obviously felt she was free to leave because not only did she walk off, but she also felt entitled to snatch the purse out of Officer Renshaw's hands. RP 7.

Oster argues that because the police were responding to an anonymous call the police subjected Oster to an unlawful search and seizure because there was no showing that the information was reliable. Brief of Appellant 7. This argument confuses the issues. The officers did not seize Oster until after she attempted to walk off with a purse that she originally denied any knowledge of ownership. RP 7-8. The issue of whether the officers were investigating Oster regarding the suspicious person call is irrelevant. See, *State v. O'Neill*, 148 Wn.2d at 574-75. Oster was free to leave and as evidenced by her actions felt free to leave up until the point where officers physically detained her. RP 3-8.

Oster also argues to this court that the State cannot allege that the contact between Oster and the officers was a social contact because the State did not argue that at the CrR 3.6 hearing. Brief of Appellant 10. The record in this case includes the State's arguments put forward to the trial court in its brief in support of the admission of the evidence. CP 10-15. The trial court stated at the beginning of the CrR 3.6 hearing, "I've read the briefs, worked

through this, read some cases.” RP 3. The State included in its briefing to the trial court that the contact up until Oster grabbed the purse from Officer Renshaw was a social contact. CP 14. Therefore, Oster’s contention that the State did not raise that the initial contact with Oster was a social contact is false.

2. The Contact Transformed Into A *Terry* Stop When Oster Attempted To Walk Away With The Purse.

A social contact between police and an individual can develop into a lawful investigative detention when based on an officer’s reasonable suspicion. *State v. O’Neill*, 148 Wn.2d at 582. To justify a *Terry* stop under the Fourth Amendment of the United States Constitution, a police officer must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d at 20. The level of articulable suspicion necessary to support an investigation detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because the stop is significantly less intrusive than an arrest. *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 357 (1979).

In *O'Neill*, the court found an individual was not seized when an officer contacted him sitting in a parked car outside of a store which was closed for the night and which the officer knew had been burglarized twice in the previous month. *State v. O'Neill*, 148 Wn.2d at 571-75. The officer asked the individual where he was going and to see his identification. *Id.* at 572. The individual told the officer he had driven to the location, but his car would not start. *Id.* at 572. The individual gave the officer the registration for the vehicle and stated his license had been revoked. *Id.* at 572. The court found that the individual was not seized at that point during the contact. *Id.* at 593. The contact later developed into a lawful investigative detention when the officer asked the individual to step out of his car. *Id.* at 581. The court found the seizure of the defendant was lawful because the officer had at least a reasonable suspicion that the individual was involved in criminal activity. *Id.* at 582.

In Oster's case, the officers attempted to detain her after she denied ownership of a purse, then upon one of the officers stating he was going to look inside of the purse (likely to determine ownership of the purse), Oster grabbed the purse out of the hands of the officers and attempted to leave with it. RP 7-8. At the point

where Oster physically took the purse, which she initially claimed no knowledge of, from Officer Renshaw the officers had a reasonable and articulable suspicion that Oster was obstructing their official duties and had every right to detain her for investigatory purposes. There was a substantial possibility that Oster was attempting to willfully hinder, delay or obstruct the officer's determination of ownership of the purse. See RCW 9A.76.020. The officers had the right to order Oster to stop, which they did, and when she failed to obey the command, physically detain her. RP 8.

Oster was not impermissibly seized by Officer Henderson and Officer Renshaw. Officer Henderson had a social contact with Oster, which morphed into a *Terry* stop and then an arrest. Her conviction should be affirmed.

B. OSTER WAS LAWFULLY ARRESTED FOR OBSTRUCTING A LAW ENFORCEMENT OFFICER.

A person is guilty of obstructing a law enforcement officer when he or she, "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1). The State agrees with Oster that in accordance to the decision in *State v. Williams* the crime of obstruction does require the defendant to do more than make a

false statement to a police officer. *State v. Williams*, 171 Wn.2d 474, 485, 251 P.3d 877 (2011). The obstruction statute requires conduct which hinders, delays or obstructs a law enforcement officer. *Id.*

Oster claims the officers arrested her for obstruction based solely upon a false statement she gave the officers. Brief of Appellant 14. This is a mischaracterization of what led to Oster being arrested for obstruction. Officer Henderson stated in CrR 3.6 hearing, “[i]t was my intention at the point after she (Oster) grabbed the purse away from Officer Renshaw I was going to arrest her for obstructing us.” RP 10-11. While Officer Henderson acknowledged that he did not tell Oster she was under arrest until after the officers discovered the drug paraphernalia in the purse, the conduct that led to the detention and formal arrest was clearly her conduct in physically taking the purse from Officer Renshaw, failing to follow commands to stop, then struggling with the officers when they attempted to retrieve the purse from Oster. RP 8-11. This is conduct far and beyond the false statements Officer Henderson believed Oster may have been giving him during his initial contact with her. RP 9.

Oster denied ownership interest or knowledge in a purse that was left upon a porch. 6-7. When Officer Renshaw went to look inside the purse (presumably to determine ownership and locate the rightful owner) Oster grabbed the purse from Officer Renshaw and walked away. RP 7. Officer Renshaw was performing his official duties and Oster's conduct willfully hindered, delayed and obstructed his ability to perform those duties. See RP 6-7. Oster was lawfully arrested for obstruction. The evidence found at the jail was a direct result of this lawful arrest and the trial court properly ruled that the contraband (methamphetamine) found on Oster at the jail was admissible. Oster's conviction should be affirmed.

C. THE STATE CONCEDES THAT UNLAWFUL POSSESSION OF DRUG PARRAPHERNALIA IS NOT A CRIME.

The State concedes that Unlawful Possession of Drug Paraphernalia is not a crime. The crime is unlawful use of drug paraphernalia, as found in RCW 69.50.412. There was no evidence introduced at the suppression hearing that would support an arrest for use of drug paraphernalia. RP 4-13. It is the State's contention that the search of the purse and the evidence obtained from it (i.e. the glass pipe) are of no consequence because Oster was lawfully arrested for Obstructing a Law Enforcement Officer as

argued in the previous sections. Further, the trial court, in its oral ruling and written findings found that Oster was lawfully arrested for Obstruction and as a result was lawfully booked into jail and subsequently searched. RP 19-20; CP 23.

The State would like to point out, for the sake of argument purposes, that as long as the officer had probable cause to arrest for the obstruction at the time of the search, the search of the purse incident to that arrest was lawful, regardless of whether the search occurred before the arrest. See *State v. Harell*, 83 Wn. App. 393, 400, 923 P.2d 698 (1996). This is a non-issue in this case because as conceded, possession of drug paraphernalia is not a crime, and Oster was lawfully arrested and booked into jail for obstructing a law enforcement officer as argued in the previous sections.

D. SOME OF THE TRIAL COURT’S FINDINGS OF FACT FROM THE SUPPRESSION HEARING DO NOT REFLECT THE TESTIMONY GIVEN AT THE CrR 3.6 HEARING.

Oster contends that “every single ‘finding’ contains ‘facts’ that were not before the suppression court.” Brief of Appellant 19. Oster also states it was her counsel that attempted to set a hearing to enter findings, but the court wanted to enter the findings on the day of trial. Brief of Appellant. While the State admits that some of the findings of fact (which were improperly labeled undisputed

facts) were not admitted through testimony at the CrR 3.6 hearing, the State takes issue with Oster's characterization that every single finding has errors. Further, the record is clear that it was the State that initially requested the court set a hearing for entry of findings. RP 21. The trial court ultimately decided the findings would be entered the morning of trial and Oster's trial counsel would have the opportunity to make any objections at that time. RP 21. Oster in her brief does not argue that findings 1.7, 1.8, 1.9 or 1.10 contain any incorrect facts. Brief of Appellant 20-21. The State will address the findings Oster takes issue to.

1.1 On 09-08-2010 at 1800 hours, Chehalis Patrols were dispatched to the report of a disorderly and suspicious female wandering the area of 275 SW 2nd Street.

CP 21. The only part of Finding 1.1 that was not testified to by Officer Henderson is the word disorderly. RP 5; CP 21. Officer Henderson testified that "[a]bout 18:00 hours I received a report via dispatch of a suspicious female that was wandering around in the area of Second Street, about the 200 block." RP 5.

1.2 Patrols were advised that the female was sitting on the porch of 275, which is a vacant residence.

CP 22. The state concedes there was no testimony elicited at the CrR 3.6 hearing regarding the residence being vacant.

1.3. Officer Henderson arrived and saw a female standing on the sidewalk in front of the residence. She began rambling about her belongings being inside the 275 residence.

CP 22. This is an accurate statement of the testimony given by Officer Henderson. RP 5-6. There is nothing in the record that disputes Officer Henderson's characterization that Oster was rambling when she spoke to him. RP 4-13.

1.4 Henderson observed that the female was breathing rapidly and sweating. She was nervous and evasive.

CP 22. Oster is correct, there was no evidence presented through the testimony at the CrR 3.6 hearing that Oster was breathing rapidly. RP 5-6.

1.5 It appeared to Henderson that, based on his training and experience, the female may be exhibiting the signs of being under the influence of some substance.

CP 22. Oster argues that Officer Henderson did not say that Oster was under the influence of some substance and the finding misrepresents his testimony. Brief of Appellant 20. Oster's argument fails, as finding 1.5 was an accurate statement, although condensed, of the testimony elicited from Officer Henderson. RP 6;
CP 22. The questioning and testimony at the CrR 3.6 hearing was:

Henderson: At that point, based on my experience, I started to form the opinion she might be under the influence.

State: In your training and experience as a police officer have you had training in terms of what people look like when they're under controlled substances?

Henderson: Yes.

State: And in your experience, too, as a police officer, you've actually made those observations yourself?

Henderson: Yes, I have.

State: Was that consistent with what you observed Ms. Oster on September 8, 2010?

Henderson: Yes, it was.

RP 6. Oster's claims in her brief regarding the under the influence testimony are inaccurate, far-fetched and misleading. See Brief of Appellant 20; RP 6.

1.6 Officer Renshaw (Chehalis PD) arrived. He noticed a large brown leather purse lying on the front porch of the residence. Henderson heard Renshaw ask the female if the purse was hers. She said, "No, I don't know who that belongs to."

CP 22. Oster is correct there was not any testimony given during the suppression hearing that described the purse as large, brown and leather. RP 7-9. The purse was described an "open top floppy bag." RP 9

1.11 Oster became combative, so the officers placed her in handcuffs and placed her in the back of Officer Henderson's patrol vehicle.

CP 22. This is an accurate description of the undisputed testimony of Officer Henderson during the CrR 3.6 hearing. RP 8. The testimony of Officer Henderson was, "[w]e pulled the purse out of her (Oster's) grasp, there was a physical struggle, she tried to pull away several times. We ended up pinning her up against the patrol car, getting the handcuffs on her, eventually got her in the patrol car." RP 8. Officer Henderson also stated Oster was yelling and screaming. RP 8. Oster's statement that she was grabbed, restrained and immediately handcuffed does not accurately reflect Officer Henderson's testimony. Brief of Appellant 21; RP 8. It should also be noted that in Oster's brief, she cites finding "1.11 After grabbing her purse from Renshaw, Oster became combative. Finding 1.11, CP 22." Brief of Appellant 21. The State is unsure where Oster is pulling the text and citation for finding 1.11, because her quotation of the wording of the finding is incorrect. See CP 22.

1.12 The officers looked in the purse and saw a large glass smoking device in plain sight near the top of the purse.

CP 22. Oster is correct the officer did not testify and the State did not admit any evidence at the CrR 3.6 hearing that the pipe was

large. Officer Henderson did testify that the purse “is basically an open top floppy bag and this pipe was sitting right on top.” RP 9.

This can be characterized as plain sight.

1.13 She was taken to the Lewis County Jail. At the jail, she was booked and read her Miranda warnings.

CP 23. Oster is correct, the testimony at the suppression hearing was that she was advised of her rights in the field, not at the jail.

RP 9.

1.14 While being searched, Corrections Officer Justice found a small baggie with a crystal substance inside. The baggie was found in Oster’s bra during the search.

CP 23. Oster is correct, this testimony was not brought out at the suppression hearing. The evidence admitted at the CrR 3.6 hearing was that Oster was booked into the jail and when she was strip searched a corrections officer recovered what appeared to be a controlled substance. RP 10. The State would note that nothing in Henderson’s testimony implicates the hearsay rule because the rules of evidence need not apply at a suppression hearing. See ER 1101(c)(3).

1.15 Justice gave the substance to Henderson, who then field tested the substance. The substance field tested positive for methamphetamine.

CP 23. Oster is correct, this testimony was not elicited at the CrR 3.6 hearing.

E. OSTER'S DUE PROCESS RIGHT WAS NOT VIOLATED BY THE DELAYED ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE CrR 3.6 HEARING.

The Fourteenth Amendment to the United States

Constitution guarantees that the State will not deprive a person of their liberty without due process of law. At the conclusion of an evidentiary hearing, "the court shall enter written findings of fact and conclusions of law." CrR 3.6(b). A trial court errs if it enters findings of fact from a suppression hearing that are not supported by substantial evidence. *State v. O'Neill*, 148 Wn.2d at 571. If such an error occurs it is not grounds for reversal if the error is harmless, meaning the error is merely academic, formal or trivial and does not affect the outcome of the case. *State v. Gonzales*, 90 Wn. App. 852, 855 954 P.2d 360 (1998), *review denied*, 136 Wn.2d 1024 (1998).

While the State acknowledges that some of the findings of fact are incorrect by adding additional facts which were not testified to during the CrR 3.6 hearing, Oster cannot show she was prejudiced by the delay or the errors contained within the findings of fact that were entered. If the court was either to redact the

incorrect facts out of the findings or look to the trial court's oral rulings, it is obvious that the conclusions of law are supported by the testimony and are consistent with the trial court's oral ruling. See RP 19-20. The trial court specifically held that when Oster snatched the purse from Officer Renshaw and attempted to run away from the officers she was obstructing. RP 20; CP 23. This was a misdemeanor committed in the officer's presence and therefore an arrestable offense. RP 20; CP 23. The search of the purse was permissible incident to arrest. RP 20; CP 23. The trial court also found, "we have a lawful arrest, the lawful custodial arrest leads to her being taken to the jail, there was a lawful booking search at the jail, all the items that were seized as a result of this contact are admissible at a trial in this matter." RP 20. This oral conclusion is consistent with conclusions of law 2.4 and 2.5. CP 23. Any error created by the delay and incorrect findings of fact are harmless and Oster's conviction should be affirmed.

F. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT.

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prove prosecutorial misconduct, the defendant must show that the deputy prosecutor's conduct was

both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). If defense counsel fails to object to the prosecutor's misconduct the reviewing court will only reverse the conviction if the conduct is so flagrant and ill-intentioned that the resulting prejudice is incurable. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.2d 553 (2009).

Oster appears to allege it was by the State's design that the findings were entered the morning of trial and that the State used this positioning to intentionally mislead the trial court. Brief of Appellant 24. The State would remind Oster and this court that the State requested a hearing be set to enter findings. RP 21. The trial court found an additional hearing to be unnecessary and findings could be entered the morning of trial. RP 22. There was no ill-intent on the part of the deputy prosecutor who wrote the findings of fact and conclusions of law.² If the court looks at the State's brief in response to the motion to suppress, it becomes clear where the erroneous findings of fact came from. CP 10-11, 21-23. The

² The State would just like to note for the Court and counsel's benefit that the findings were written without the aid or benefit of a transcript of the hearing.

findings of fact written by the deputy prosecutor mirror the facts alleged in the State's brief. CP 10-11, 21-23. The findings were cut and pasted from the State's CrR 3.6 response brief. CP 10-11, 21-23. While this was admittedly poor trial practice, it was not an evil or ill-intentioned action done in an attempt to "get one past" the trial court or unfairly better the State's position.

Again, while not good trial practice, the acts of the deputy prosecutor were not so flagrant and ill-intentioned that the resulting prejudice is incurable. The conclusions of law are sound and the erroneous findings do not create a substantial likelihood that the outcome of the trial was affected. The trial court ruled the evidence admissible based upon the testimony heard at the CrR 3.6 hearing. Nothing in the findings of fact change the trial court's pretrial ruling on admissibility of the methamphetamine discovered in Oster's bra when she was booked into the Lewis County Jail. Therefore, Oster's conviction should be affirmed.

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IV. CONCLUSION

For the reasons argued above this court should affirm
Oster's conviction for possession of methamphetamine.

RESPECTFULLY submitted this 15th day of July, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 
SARAH BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON 11 JUL 18 AM 9:57
DIVISION II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,) NO. 41850-9-II
Respondent,)
vs.) DECLARATION OF
) MAILING
DANITA K. OSTER,)
Appellant.)
_____)

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 15, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jordan B. McCabe
Attorney at Law
PO Box 6324
Bellevue, WA 98008-0324

DATED this 15 day of July, 2011, at Chehalis, Washington.

[Signature]
Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office