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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Supreme Court No. **85791-1**
(COA No. 28403-4-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSE,

Petitioner.

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Douglas Rose, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Rose seeks review of the partially published Court of Appeals decision dated February 8, 2011, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Possession of stolen property based on having a credit card requires that the account information possessed "can be used" to obtain something of value and this possession withholds the account from the true owner. Douglas Rose had a solicitation for another person to open a credit card account and was convicted of possession of stolen property even though he had never tried to use this solicitation for any purpose. Does a person possess a stolen credit card when he has a solicitation to open a new credit card account which would costs \$30 dollars access, the solicitation is not connected to any existing credit card account, and the person who received the mail solicitation threw it into the garbage

because she never intended to open any new credit card account with this solicitation?

2. Does the published decision of the Court of Appeals extend liability for possession of stolen property based on possession of "access device" information beyond the terms of the statute and contrary to previously decided Court of Appeals decisions?

3. Does substantial public interest favor review of the published decision when a fair reading of the Court of Appeals analysis would make a person criminally liable for possessing junk mail sent to another person if the subject of the mail involved an invitation to open a credit card account?

4. The State must prove that the arresting officer had probable cause to arrest another person at a contested hearing. Here, the State alleged the police had probable cause to arrest Rose for possession of drug paraphernalia based solely on a glass tube that contained "a residue." The Court of Appeals agreed that a drug paraphernalia arrest requires more than simple possession of a single tool that could be used to ingest drugs but sua sponte found the officer could have arrested Rose for possessing a controlled substance. Did the State prove it had probable cause to

arrest Rose for possession of a controlled substance when the court found Rose had "a residue" in his possession and the trial court never found there was probable cause that Rose possessed a controlled substance?

D. STATEMENT OF THE CASE.

When the police stopped Douglas Rose and searched him, they found junk mail in his pocket. He had a "mail solicitation" in someone else's name. 6/30/09RP 41. The solicitation was an invitation to open a new credit card account. 6/30/09RP 86. The solicitation required a \$30 activation fee before any new credit card account could be opened. Id.

Ruth Georges threw this credit card advertisement into the garbage after she received it in the mail. Id. She had no interest in paying \$30 to open a new credit card account. Id. She put it in her trashcan. Id.

Rose had visited George's home that day. 6/30/09RP 84. He picked up a cigar box from her garbage, not knowing that the mail solicitation advertising a credit card was inside.

The Court of Appeals concluded that having a mail solicitation offering to open a credit card account is the equivalent of having information of another person's existing, open credit card

account. Slip op. at 7-8. It held that possession of what could be termed junk mail involving a credit card solicitation meets the legal definition of an access device that can be used to obtain something of value. It affirmed his conviction for second degree possession of stolen property based on Rose's possession of this solicitation even without any evidence that Rose he used or tried to use this piece of mail to obtain something of value. Id.

The reason the police approached Rose had nothing to do with Georges' mail solicitation. An officer detained him as he walked down the street in the middle of the day because the officer believed he looked like someone wanted for a trespass allegation. 5/21/09RP 3-6. Just before the officer released Rose having learned the trespass report would not be cause to arrest him, the officer saw a pipe sticking out of Rose's bag. 5/21/09RP 12. He thought the pipe had a white residue in it. He believed the pipe was "consistent with" a tool was used to ingest drugs and arrested Rose for the gross misdemeanor of possession of drug paraphernalia. Id. He had not seen Rose use this implement to ingest any drugs and did not know what the white residue was.

The trial court ruled that the officer had probable cause to arrest Rose for possession of drug paraphernalia. CP 53. The

Court of Appeals affirmed the arrest on different grounds, finding probable cause that Rose possessed a controlled substance based on the residue in the tube, but agreeing that the trial court erred in finding probable cause for the paraphernalia allegation.

The facts are further set forth in the Court of Appeals opinion, pages 1-2, Appellant's Opening Brief, pages 5-7, and Appellant's Reply Brief, pages 1-4, and in the relevant portions of the argument sections therein. The facts as outlined in each of these pleadings is incorporated by reference.

E. ARGUMENT.

1. POSSESSION OF PURPOSEFULLY DISCARDED INVITATION TO OPEN A NEW CREDIT CARD ACCOUNT IS NOT A "AN ACCESS DEVICE," WITHHELD FROM THE OWNER, CAPABLE OF OBTAINING ANYTHING OF VALUE, CONTRARY TO THE PUBLISHED COURT OF APPEALS DECISION

a. Possession of a stolen access device requires evidence that the property was unlawfully taken and withheld from the owner, and does not apply to property that has no value and was purposefully thrown into the trash. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct.

1068 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

Rose was charged with one count of possession of stolen property in the second degree based on an inactivated and unused credit card account application the police found in Rose's possession upon a search incident to his arrest for the unrelated offense of possession of drug paraphernalia. CP 1; 6/30/09RP 29, 41, 86. Possession of stolen property in the second degree as charged requires the prosecution prove Rose possessed a "stolen access device." RCW 9A.56.160(1)(c). A person must retain the property "knowing it has been stolen" and "withhold it" from the true owner for use by another. RCW 9A.56.140(1). An "access device" is defined by statute as a card or other means of "account access" that "can be used alone or in conjunction with another device" to obtain anything of value. RCW 9A.56.010(1).¹

Statutes setting forth the essential elements of criminal offenses must be strictly construed. United States v. Lanier, 520

¹ "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.
RCW 9A.56.010(1).

U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); In re Carson, 84 Wn.2d 969, 973, 530 P.2d 331 (1975) (recognizing criminal statutes are strictly construed against State when they involve a deprivation of liberty). Only conduct “clearly” covered by a criminal statute may be penalized. Lanier, 520 U.S. at 266. “Under the rule of lenity, where a statute is ambiguous, we must interpret it in favor of the defendant.” State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

The statutory definition of an “access device” for possession of stolen property under RCW 9A.56.160(1)(c) requires that the “means of account access” at issue must be capable of being used for obtaining something of value. RCW 9A.56.010(1) (requires access to an account that “can be used”). Furthermore, the offense of possessing stolen property requires that the accused person “withhold or appropriate the same [stolen property] to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). Thus, the accused person must be depriving the owner of use of the property by his or her unauthorized possession.

Here, Rose had a card that had never been activated and never would be activated. 6/30/09RP 84, 86. It was not a card

Georges had ever used and it could not be activated unless Georges paid \$30 to the company. Georges "didn't want it," had no intent to ever pay the \$30 necessary to use this account and consequently she threw the card away. Id. at 86.

In the published portion of the Court of Appeals decision, it concluded that the solicitation to open a new credit card account constituted an access device because, in theory, someone could pay the required \$30 and open the new account and then use the account to obtain something of value. Slip op. at 7. The Court of Appeals reasoned that in theory, a person could first "establish" an account based on the mail solicitation, which at least required paying \$30, and then could use the account.

This reading of the statute fails to give meaning to the plain words of the statute and is unsupported by any existing precedent to its plain language. Its theoretical supposition was also untethered to any actions by Rose, who did not try to establish any account or access anything of value with this mail solicitation.

b. The Court of Appeals decision is contrary to other cases interpreting the meaning of a stolen access device. The Court of Appeals relied on two cases that are simply inapposite,

and did not cite a third case that speaks directly to the circumstances of this case.

The Court of Appeals cited State v. Askham, 120 Wn.App. 872, 885, 86 P.3d 1224, rev. denied, 152 Wn.2d 1032 (2004), a case where the defendant took a valid credit card account number out of a trash can and then used that account information to make purchases. On the other hand, Rose had an unactivated solicitation that could not be used in its present form, even by the card's owner, and he never used it or tried to use it. The controlling statutory definition requires both that the card "can be used" and the person wrongfully possessing the card is withholding such lawful use from the card's owner. RCW 9A.56.010(1); RCW 9A.56.140(1). In the case at bar, the person to whom the card was sent could not have used the card when she last possessed it, she never intended to use the card, and Rose's possession of the card did not affect her ability to use it. Rose did not use the card or try to use it, and the account information he had was unusable.

This case is also unlike State v. Clay, 144 Wn.App. 894, 184 P.3d 674 (2008), rev. denied, 165 Wn.2d 1014 (2009), where the defendant possessed a replacement Mervyns credit card used for a valid on-going account but that particular card had not been

activated by the owner. CP 28. The court in Clay ruled that the statute does not require that the owner possess the card before it was taken. Id. at 898.

Clay is different because the card's owner testified that she had a valid, on-going credit account at Mervyns and that she expected to receive a new credit card for that account but she had not received that card in the mail. 144 Wn.App. at 896, 899. The card's owner would have been able to access her credit account because she had a presently active account with the company. Id. Importantly, the Clay court relied on the fact that "there was 'no testimony that any additional steps needed to be taken to activate that card.'" Id. at 899.

Rose could not have used Georges' card offer to access anything of value. Unlike Clay, where "there was no testimony that any additional steps needed to be taken to activate that card," here, Georges needed to pay money to activate the card, did not have an on-going account with the company, and did not intend to access the account. See Clay, 144 Wn.App. at 899. Thus, the account solicitation did not supply access to an account and does not meet the definition of a stolen access device as set forth by RCW

9A.56.010(1) and the requirements of possession of stolen property under RCW 9A.56.140(1).

The Court of Appeals did not discuss a more pertinent decision involving the status of an account. State v. Schloredt, 97 Wn.App. 789, 987 P.2d 647 (1999). In Schloredt, the defendant argued that an essential element of possessing a stolen access device is that the credit card was valid, and not expired or revoked, at the time the defendant possessed it. This claim was a bit of the stretch in Schloredt, because there was no one had testified that they de-activated their credit cases, yet the defendant asserted that the State must prove the cards were active at the time the defendant had them. Id. at 793-94. The Schloredt Court rejected the defendant's effort to read an additional requirement into the statute. However, the court held that the statutory requirement that an access device "can be used" means that at the card was valid and active at the time the lawful owner last had it. Id. at 794. Applying this analysis to Rose's case, at the time Georges had the information, she tossed it into the trash and never thought she would see it again because she was not going to pay the money needed to open the account. Thus, the credit card solicitation was

not an account that could be used when the owner last possessed it.

The Court of Appeals disregarded pertinent points from other Court of Appeals cases and construed the language of the statute in an unfaithful and overly broad fashion. Its holding has broad application. Under this decision, possession of an offer to open a credit card account is equivalent to possession of an actual credit card account number and is sufficient to establish possession of stolen property. This reasoning is not supported by the language of the statute and is contrary to other cases by the Court of Appeals. This Court should accept review of the published decision to clarify a person's liability when in possession of another person's discarded junk mail.

2. THE COURT OF APPEALS EXCEEDED ITS
AUTHORITY BY DEDUCING THAT
POSSESSION OF A TUBE WITH UNNAMED
RESIDUE ESTABLISHED PROBABLE
CAUSE FOR POSSESSION OF A
CONTROLLED SUBSTANCE

a. An arrest must be supported by probable cause or a valid warrant. The individual right to privacy means that the police may not disturb a person's private affairs unless objective facts indicate that the individual is committing a crime. State v.

Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). The Fourth Amendment to the United States Constitution provides: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Similarly, the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment, as it guarantees that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); Wash. Const. Art. I, § 7. Warrantless seizures are per se unreasonable under the Fourth Amendment and Article I, § 7 absent an exception. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

A police officer needs probable cause to make a warrantless arrest. Grande, 164 Wn.2d at 141. An officer has probable cause to arrest a person if the facts and circumstances within his knowledge are sufficient to cause a person of reasonable caution to believe that the suspect is committing or has committed a crime. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996) (quoting State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

b. There was no probable cause to arrest Rose based on possession of drug paraphernalia. Mere possession of potential drug paraphernalia is not a crime and cannot be the basis for an arrest. State v. O'Neill, 148 Wn.2d 564, 584 n.8, 62 P.3d 489 (2003); State v. McKenna, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998); State v. Lowrimore, 67 Wn.App. 949, 959, 841 P.2d 779 (1992). Using paraphernalia to ingest drugs is a misdemeanor, but a police officer cannot arrest a person for a misdemeanor unless the arrestee commits that crime in the officer's presence. RCW 69.50.412; RCW 10.31.100; O'Neill, 148 Wn.2d at 584 n.8.

The police did not see Rose use drug paraphernalia. 5/21/09RP 13; see RCW 69.50.412. Officer Croskey did not testify that Rose seemed to be under the influence of drugs based on the officer's experience or training. He did not claim to have probable cause that Rose was in possession of a controlled substance. He said he saw a "white, chalky substance" which led him to believe that the glass pipe was "consistent with" drug paraphernalia. 5/21/09RP 12. The court's formal findings of fact find only that Croskey saw "a residue" in the glass pipe. CP 53 (Finding of Fact 12). The court did not find the officer believed this residue was a

controlled substance, and the officer did not see Rose engaging in activity that appeared to him, in his experience, to be actual drug use. See State v. Neely, 113 Wn.App. 100, 108, 52 P.3d 539 (2002) (sufficient evidence use of drug paraphernalia when woman in car with tools used to ingest drugs late at night and appearing to use drugs by body motions).

The Court of Appeals implicitly agrees there was not probably cause to arrest Rose for possession of drug paraphernalia, but it surmised that the officer would have had probable cause to arrest Rose for possession of a controlled substance even though this theory was not the basis for the trial court's ruling. Slip op.at 15.

The Court of Appeals oversteps its authority by relying on a fact that was not established at the suppression hearing. The Court of Appeals ruled that the officer "could have believed that the white powdery substance he saw on a pipe was a controlled substance." Slip op. at 16. Then, without acknowledging that the trial court had not found, the State did not prove, and the officer did not testify that he arrested Rose because he thought Rose possessed a controlled substance, the Court of Appeals decided

that the officer could have believed that Rose possessed a controlled substance. Id.

The Court of Appeals is not a fact-finder. It does not weigh testimony or substitute its opinion for that of the trial court. The court's findings reflect what the State proved. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The court's only finding regarding the residue in the tube was: "Officer Croskrey further saw **a residue** in the tube in the daylight." CP 53 (Finding of Fact 12, emphasis added). From this factual finding, the trial court concluded that the officer had authority to arrest Rose for possession of drug paraphernalia. CP 53 (Conclusion of Law 6).

The Court of Appeals is not free to disregard the trial court's findings and insert its own factual interpretations. The testimony and finding of "a residue" does not support the Court of Appeals determination that the officer had sufficient information to believe the residue was a controlled substance.

The officer saw only a small portion of the pipe: "[a]bout an inch and a half, maybe. Not more than two inches" protruding from a bag. 5/21/09RP 13; CP 53. At the hearing when the defense attorney showed the entire pipe to the officer, the attorney indicated that he did not see any residue in this pipe, and asked whether that

residue had fallen out. 5/21/09RP 13. The officer assured the attorney that he saw residue in the pipe. Id. The attorney responded, "I'm getting old because I tell you what, that's great vision." 5/21/09RP 14. Consequently, this very minute amount of material inside the pipe may have looked white and chalky, but it was such a small amount that the Court of Appeals was not free to sua sponte conclude it provided probable cause to arrest Rose for possession of a controlled substance.

The court did not find the officer had probable cause to believe Rose used the drug paraphernalia, and therefore, probable cause to arrest him for that offense did not exist. The Court of Appeals lacked authority to speculate that the pipe presented sufficient evidence to surmise Rose possessed a controlled substance. Because the arrest was not valid, the search of Rose and his bag were invalid and the evidence obtained should have been suppressed.

This Court should grant review because the trial court and Court of Appeals rulings are contrary to prior decisions of this Court and review would serve the public interest by clarifying the proof required to arrest a person based on potential drug residue.

F. CONCLUSION.

Based on the foregoing, Petitioner Douglas Rose respectfully requests that review be granted because the decision of the Court of Appeals is inconsistent with prior decisions of this Court, contrary to other decisions of the Court of Appeals, and a violation of the constitutional rights to privacy of the state and federal constitutions pursuant to RAP 13.4(b).

DATED this 10th day of March 2011.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 28403-4-III
)	
Respondent,)	
)	
v.)	Division Three
)	
DOUGLAS CRAIG ROSE,)	
)	
Appellant.)	OPINION PUBLISHED IN PART

Korsmo, A.C.J. — The primary question presented in this appeal is whether an inactivated credit card that requires a payment to become activated constitutes an access device. We conclude that it does. In the unpublished portion of this opinion we consider additional issues and affirm the convictions.

FACTS¹

Douglas Rose was arrested September 16, 2008. A search incident to arrest produced methamphetamine and what appeared to be an unactivated credit card in the

¹ Facts relevant to the unpublished portion of this opinion are discussed in conjunction with the issues presented there.

name of Ruth Georges. In addition to Ms. Georges' name, the plastic card had an account number, a sticker with activation instructions, and a magnetic strip on the back. Mr. Rose was charged with possession of stolen property in the second degree and possession of a controlled substance.

Ms. Georges testified that Mr. Rose had visited her apartment the morning of the arrest. She stated that the credit card was hers; she had received it in a mail solicitation. A \$30 fee was required to activate the card. Ms. Georges did not intend to activate the card, so she placed it in a cigar box and put that box in the trash. She did not give Mr. Rose permission to have the card and was unaware that he had it.

Following a bench trial the court found Mr. Rose guilty of second degree possession of stolen property under RCW 9A.56.010(1) and possession of a controlled substance. This appeal timely followed.

ANALYSIS

Mr. Rose challenges the sufficiency of the evidence to support the conviction for second degree possession of stolen property, arguing that the credit card was neither stolen nor an access device. That challenge presents two questions: (1) whether a credit card taken from a trash can inside someone's apartment without permission constitutes stolen property; and (2) whether a credit card received in a mailed solicitation that

requires a fee to be activated constitutes an access device under RCW 9A.56.010(1).

Evidence is sufficient to support a conviction if the evidence permitted the trier of fact to find that each element of the crime had been proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence presented at a bench trial requires a reviewing court to determine whether substantial evidence supports the challenged findings and whether the findings support any challenged conclusions of law. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). Deference is given to the trier of fact who resolves conflicting testimony, evaluates witness credibility and decides the persuasiveness of material evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). Unchallenged factual findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Stolen Property

Mr. Rose argues that the trial court erroneously relied upon *State v. Askham*, 120 Wn. App. 872, 86 P.3d 1224, *review denied*, 152 Wn.2d 1032 (2004), in concluding that the credit card he took from the garbage was stolen. He claims that Ms. Georges abandoned the card by placing it in a trash can located in her apartment,² though he cites

² Mr. Rose challenges the court's finding that Ms. Georges "had thrown the credit card into the trash receptacle that was located in, and at all times relevant hereto, remained in her apartment." Clerk's Papers (CP) at 27 (finding of fact 13). However, the

no authority for that proposition.

A person commits second degree possession of stolen property if he possesses a stolen access device. RCW 9A.56.160(1)(c). “‘Stolen’ means obtained by theft, robbery, or extortion.” RCW 9A.56.010(14). “‘Theft,’” in turn, means to “wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). The “property of another” is an item in which another person has an interest, and over which the defendant may not lawfully exert control absent permission. *State v. Longshore*, 141 Wn.2d 414, 421, 5 P.3d 1256 (2000). Specific criminal intent may be inferred from defendant’s conduct where it is plainly indicated by a logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

This case is factually similar to *Askham* on this point. There the defendant used credit card information he found in another’s garbage. *Askham*, 120 Wn. App. at 885.

record provides sufficient information from which the court could reasonably infer the location of the trash. Ms. Georges testified that while in her apartment, she took the card from her coffee table and placed it into a cigar box, then put that in the trash. Her words were, “I threw it in the garbage can.” Report of Proceedings (RP) (June 30, 2009) at 84, 86. While she did not state where precisely her trash can was, the logical inference is that it was inside. Further, when Mr. Rose testified to his version of events, he stated that while in the apartment, “she stated that she had some garbage to go out, and I just threw everything in the box. . . . I grabbed the box, and I went out.” RP (June 30, 2009) at 103. Drawing reasonable inferences in favor of the State, substantial evidence supports the trial court’s finding that the trash can was inside Ms. Georges’ apartment.

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This court determined that by removing credit card information from the trash without permission, the defendant deprived the credit card's owner of its authorized use. *Id.* at 884-885. The defendant's actions amounted to theft of an access device under RCW 9A.56.040(1)(c). *Id.* at 885.

Similarly here, the taking of the card from the garbage amounted to theft just as much as obtaining the account information from the garbage did in *Askham*.³ *Askham* is controlling in this case. Sufficient evidence supports the trial court's findings and conclusion that the card was stolen from Ms. Georges.

Access Device

Mr. Rose next argues that the trial court incorrectly relied upon *State v. Clay*, 144 Wn. App. 894, 184 P.3d 674 (2008), *review denied*, 165 Wn.2d 1014 (2009), for its conclusion that the unactivated credit card received by mail solicitation was an access device.

"Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

RCW 9A.56.010(1). A credit card may be an access device despite being unactivated, as long as it is capable of activation and use within the meaning of the statute. *Clay*, 144

³ Mr. Rose does not challenge the court's findings that he removed the credit card from Ms. Georges' trash without her consent.

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Wn. App. at 898-899.

In *Clay*, the defendant was convicted of second degree possession of stolen property for possessing a stolen, unactivated Mervyns card that was intended as a replacement card for an existing account. *Id.* at 896. He argued that the State had failed to prove that the card could “be used” to obtain anything of value because the card was unactivated. *Id.* at 897. The court rejected his argument on the grounds that the statutory definition of “access device” did not require the stolen card to have been in the owner’s possession, nor did it require that the card be activated. *Id.* at 898-899. The court found sufficient evidence to uphold Clay’s conviction because no evidence was offered to prevent a rational juror from concluding that the card could have been activated or used by someone else within the meaning of the statute. *Id.*

Mr. Rose attempts to distinguish this case from *Clay* in two ways: (1) this case does not involve an existing credit account, and (2) the card in question could not have been used by its owner to obtain anything of value, and was more akin to an application. Washington courts have not directly addressed whether an unactivated credit card received in a mailed solicitation is an access device.

Questions of statutory interpretation are reviewed *de novo*. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007).

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Statutes are construed to give effect to the legislative intent. *State v. Elmore*, 143 Wn. App. 185, 188-189, 177 P.3d 172, *review denied*, 164 Wn.2d 1035 (2008). In so doing, we effectuate the plain meaning of the statute, give words their ordinary meaning and take into account the context of the statute, related provisions, and the entire statutory scheme. *Id.* We will not read a statute hypertechnically if doing so would yield an absurd result. *Pudmaroff v. Allen*, 138 Wn.2d 55, 65, 977 P.2d 574 (1999).

A plain reading of RCW 9A.56.010(1) shows the card in question here to be an access device because it was capable of being used in the manner described by the statute, *i.e.*, to purchase items of value. *See Clay*, 144 Wn. App. at 898-899. When viewed most favorably to the State, there is sufficient evidence to support the trial court's conclusion that the card in question was an access device under RCW 9A.56.010(1) and *Clay*. The record demonstrates that the card was capable of establishing, and then accessing, a credit account. The card had Ms. Georges' name on it, a sticker that gave instructions how to activate the card, an account number, and a magnetic strip. Though a payment of \$30 was required to both activate the card and establish an active credit account, the record shows that upon activation the card was capable of acquiring items of value. Finally, as in *Clay*, nothing in the record would prevent a rational trier of fact from concluding that the card could be activated by someone other than its owner. That

intermediate steps or other “access devices” may have been required is irrelevant. The statute does not limit the definition of access devices to cards requested by the owner, nor does it exclude inert cards merely because they have yet to be activated. Accordingly, we hold that the card in question is an access device because it was capable of activation, then use in the manner prescribed by RCW 9A.56.010(1).

Substantial evidence supports the trial court’s conclusion that Mr. Rose was in possession of a stolen access device. The judgment and sentence is affirmed.

A majority of the panel having determined that only the forgoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Jury Trial Waiver

Mr. Rose orally waived his right to a jury trial during a pretrial hearing. The trial court requested that a written waiver be filed. None was ever received. Mr. Rose now argues that his oral waiver alone is insufficient to establish a valid waiver.

A criminal defendant has the right to a jury trial under both the federal and state constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 21. This right may be waived in a knowing, intelligent, and voluntarily manner. *State v. Stegall*, 124 Wn.2d 719, 724-725, 881 P.2d 979 (1994). The State bears the burden of demonstrating waiver,

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the validity of which is reviewed *de novo*. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979); *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). Further, we must indulge every reasonable presumption against waiver. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

Generally, a waiver must be submitted to the court in writing. CrR 6.1(a). However, CrR 6.1(a) is not a constitutional requirement, but an evidentiary one. *Wicke*, 91 Wn.2d at 642. Thus, failure to comply with CrR 6.1(a) does not require reversal where the record is sufficient to demonstrate a valid waiver. *Id.* at 644. The record is sufficient where waiver is by personal expression of the defendant; expression by counsel without evidence of discussion between counsel and client is insufficient. *Id.*

On May 28, 2009, Mr. Rose and the trial court engaged in the following pretrial conversation:

THE COURT: Yes.

Now, I'm looking at Cause No. 09-1-00111-5 where the charge is two counts; one a possession of stolen—possession of stolen property in the second degree, and Count II is possession of a controlled substance, methamphetamine.

Mr. Rose, Mr. Thompson has just indicated following denial of a 3.6 motion filed by you, you and Mr. Thompson have discussed waiving your right to a jury trial and proceeding with a—either a stipulated facts trial or a nonjury trial.

Apparently, your intent is to appeal the 3.6 hearing denial and that you're prepared to waive your right to a jury trial in that cause number on those two charges.

Is that correct?

[MR. ROSE]: Yes, Your Honor, it is.

THE COURT: Okay. And so you understand the cause will not be decided by 12 citizens now, but rather it will be decided by one judge.

[MR. ROSE]: That's fine, Your Honor.

THE COURT: And you're comfortable with that?

[MR. ROSE]: Yes, Your Honor.

THE COURT: And you discussed the differences with Mr. Thompson?

[MR. ROSE]: Yeah. We're talking about it as we speak.

THE COURT: Okay. And so you are waiving your right to proceed with a jury trial?

[MR. ROSE]: And that was for the suppression hearing one?

THE COURT: Yes. This is in the case where there was a suppression hearing.

[MR. ROSE]: Yes, Your Honor. I understand then.

Report of Proceedings (RP) (May 28, 2009) at 3-4.

This colloquy demonstrates that Mr. Rose discussed waiver with both his attorney and the trial court. Moreover, he affirmed his understanding and his intent to waive multiple times. Accordingly, we find the oral waiver sufficient to constitute a knowing, intelligent, and voluntary waiver of the right to jury trial.

Investigative Detention

Police officers investigating a burglary initially detained Mr. Rose because he matched the suspect's description. He argues that the initial investigative stop was an unlawful arrest because he was handcuffed and placed in the back of a police car.

"A police officer having a reasonable suspicion based on articulable facts that an individual has committed or is committing a crime may make a brief investigatory stop of that person and ask him for identification and an explanation of his activities even though

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probable cause for an arrest is lacking.” *State v. Swaite*, 33 Wn. App. 477, 481, 656 P.2d 520 (1982). During the stop, an officer may perform a protective pat-down search based upon a reasonable belief that the detained individual is armed and dangerous. *Id.*; *State v. Wakeley*, 29 Wn. App. 238, 243, 628 P.2d 835, *review denied*, 95 Wn.2d 1032 (1981). An investigative detention is not an arrest simply because the individual is not free to leave. *Wakeley*, 29 Wn. App. at 240.

In evaluating the reasonableness of an investigative stop, appellate courts consider the totality of the circumstances, including: (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect’s liberty, and (3) the length of time the suspect is detained. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). An investigative stop is limited in scope and duration to fulfilling the purposes of the stop. *Id.* at 739-741. Where an investigative stop exceeds its proper purpose and scope, probable cause is a necessary justification. *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987). Mr. Rose relies heavily on *Williams* and *Wheeler* for the proposition that being handcuffed and placed in the police car exceeded the scope and purpose of the stop.

In *Williams*, a suspect was handcuffed and placed in a police car merely because his car was parked outside a burgled residence. The court held that the intensity and

scope of the detention was improper because the initial investigation did not focus on the suspect and the length of the 10-minute detention bordered on excessiveness. *Williams*, 102 Wn.2d at 740-741.

In *Wheeler*, police detained a burglary suspect, handcuffed him, and transported him two blocks to be identified by a witness. *Wheeler*, 108 Wn.2d at 233. Though acknowledging the intrusion as “significant,” the court upheld the detention as proper under the factors iterated in *Williams*. *Id.* at 235-237.

Neither *Williams* nor *Wheeler* support the contention that Mr. Rose was arrested by being handcuffed and placed in the back of a police car. Here, Mr. Rose was stopped because the police officer was investigating a burglary. He matched the description of the suspect given by dispatch. The officer testified that he felt he needed to “take control of the subject” due to the nature of the call, Mr. Rose’s strange behavior, fidgeting, and possession of a knife.⁴ He then handcuffed Mr. Rose and detained him in the back of his cruiser for a few minutes until another officer returned from interviewing the victim. These intrusions, though significant, were not unreasonable given the circumstances.

Taking the *Williams* factors into consideration, the detention was (1) for the purpose of investigating a burglary, and based upon articulable facts; (2) no more

⁴ Officers who reasonably believe a suspect is armed can use force to effectuate an investigative stop. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989).

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physically intrusive than necessary to secure officer safety until backup arrived; and (3) sufficiently brief. We conclude that the detention was proper, and did not constitute an arrest.⁵

⁵ In a somewhat difference circumstance, this court has previously determined that telling a person he was under arrest and placing him in a patrol car did not constitute custodial arrest. *State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004).

Probable Cause

Mr. Rose challenges the probable cause of his arrest for possession of drug paraphernalia. He argues that because mere possession of drug paraphernalia is not a crime, the arrest lacked probable cause.

An appellate court reviews a trial court's conclusion of law regarding probable cause *de novo*. *In re Det. of Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). A trial court's findings of fact are reviewed for substantial evidence. *Hill*, 123 Wn.2d at 647. Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The trial court may be affirmed on any basis supported by the record. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

Warrantless searches and seizures are generally *per se* unreasonable under both the federal and state constitutions. U.S. Const. amend. IV; Wash. Const. art. I, § 7; *Williams*, 102 Wn.2d at 736. An officer must have probable cause to make a warrantless arrest. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Probable cause exists when "facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992). Consideration is given to the arresting officer's expertise in identifying criminal behavior.

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State v. Cottrell, 86 Wn.2d 130, 132, 542 P.2d 771 (1975). An arrest supported by probable cause is not invalidated by the officer's reliance upon an offense different than the one for which probable cause exists. *Huff*, 64 Wn. App. at 646.

The use of drug paraphernalia to ingest drugs is a misdemeanor, though possession of drug paraphernalia alone is not a crime. See RCW 69.50.412(1); *State v. McKenna*, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998); *State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992). A warrantless arrest for a misdemeanor may only occur where the crime is committed in the officer's presence. RCW 10.31.100; *State v. Hornaday*, 105 Wn.2d 120, 126, 713 P.2d 71 (1986). Mr. Rose argues that under these statutes and cases, the officer did not have probable cause to arrest him because he did not see Mr. Rose use the residue-coated pipe to ingest drugs.

While mere possession of drug paraphernalia is not a crime, possession of a controlled substance is a felony offense. RCW 69.50.4013(1); *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). Possession of drug residue in a pipe can be properly charged as possession of a controlled substance because no minimum amount of a controlled substance is required. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008).

Here, the record shows that the arresting officer saw a chalky white residue in a

pipe that he believed to be drug paraphernalia. The pipe was sticking out of Mr. Rose's courier bag. The officer could reasonably believe that a white powdery residue on a pipe was a controlled substance. He therefore had probable cause to arrest Mr. Rose for possession of a controlled substance. The fact that the officer instead arrested Mr. Rose for possession of paraphernalia is irrelevant under *Huff*. We therefore affirm the trial court's probable cause determination.

Supplemental Assignments of Error

Appellants are permitted to file a *pro se* statement of additional grounds for review. RAP 10.10(a). However, we will not consider additional grounds where appellant does not state the nature and occurrence of alleged errors. RAP 10.10(c). Mr. Rose contends that his due process and speedy trial rights were violated, he was unlawfully arrested, his counsel was ineffective, he was searched illegally, his civil rights were violated, and his offender score may have been miscalculated. However, he fails to set forth any particular errors, and we are not obligated to search the record in support of these claims. RAP 10.10(c). We will therefore not consider these arguments.

Affirmed.

Korsmo, A.C.J.

WE CONCUR:

No. 28403-4-III
State v. Rose

Sweeney, J.

Siddoway, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 64008-9-I
Respondent,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
GREGORIO BRAVO ORTEGA)	
a.k.a. MARTIN DOMINGUEZ)	
HERNANDEZ,)	
)	
Appellant.)	FILED: February 7, 2011

APPELWICK, J. — Ortega appeals his conviction for possession of cocaine with intent to deliver. Ortega argues the arresting officer did not have the authority to arrest him without a warrant because Ortega did not commit a misdemeanor in his presence as required by RCW 10.31.100. Therefore, the search incident to that arrest was illegal, and the evidence should have been suppressed. The State responds that the arresting officer had probable cause to arrest Ortega for a felony and that the fellow officer rule provided the arresting officer with probable cause to arrest Ortega for a misdemeanor. We hold that the presence requirement of RCW 10.31.100 was satisfied and affirm.

FACTS

After receiving complaints from local business owners, several officers from the Seattle Police Department's Community Police Team organized an investigation into suspicious drug activity in the Belltown neighborhood of Seattle. Officer Chad McLaughlin positioned himself to surveil the street from the second floor of a local business. Officers David Hockett and Anthony Gaedcke, the arrest team, positioned themselves nearby in patrol cars.

From his surveillance location, McLaughlin observed Gregorio Ortega walking aimlessly with co-defendant Alfonso Cuevas. As McLaughlin watched, Ortega and Cuevas attempted to contact passersby through eye contact and head nods. They nodded at two passersby, who then walked with Ortega and Cuevas a short distance until the four of them stopped, and another passerby joined them. Ortega huddled by a payphone with two of the individuals, appearing to make exchanges of small items, while Cuevas paced the sidewalk, looking around. After each exchange, the other individuals quickly left the area. After completing the second suspected transaction, Ortega and Cuevas began walking away together. As they walked away, Ortega and Cuevas were approached by a female, who then walked with them for a few yards. A short time later, Ortega and the female stopped and stepped off the sidewalk to make a quick hand-to-hand transaction while Cuevas again appeared to act as a lookout. Ortega and Cuevas quickly walked away, as did the female. McLaughlin believed he was observing narcotics transactions, but he could not confirm that any of the items exchanged actually constituted a drug sale.

After the third suspected narcotics transaction, McLaughlin believed he had probable cause to arrest Ortega for drug traffic loitering, a gross misdemeanor. McLaughlin radioed Hockett and Gaedcke, informing them that probable cause existed to arrest Ortega and Cuevas and giving specific instructions on the location and appearance of the suspects. Responding immediately by patrol car, Hockett arrested and searched Ortega, locating small rocks of cocaine and \$780 in cash on his person. McLaughlin maintained visual contact with the suspects up to the time of the arrest, which occurred approximately 30 seconds after he radioed the arrest team. McLaughlin packed up his surveillance gear and met with Hockett and Gaedcke, immediately confirming that the suspects were the individuals he had observed.

The State charged Ortega with possession of cocaine with intent to deliver. In a pretrial hearing under CrR 3.6, the trial court heard evidence relating to Ortega's motion to suppress the evidence located during the search incident to arrest. The trial court then concluded that the officers were justified in arresting Ortega and denied the motion to suppress.

The case proceeded to trial. The jury found Ortega guilty as charged. The trial court sentenced Ortega to a standard sentence of 12 months plus one day. Ortega appeals.

DISCUSSION

An officer may conduct a warrantless search of the defendant's person only incident to a valid arrest. State v. Craig, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002). Ortega contends that he was arrested without authority, because the

arresting officer lacked probable cause for a warrantless arrest for a misdemeanor. Therefore, he argues the trial court erred in denying his motion to suppress. We review conclusions of law in an order pertaining to suppression of evidence de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Probable cause is the objective standard by which to measure the reasonableness of an arrest. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause for a warrantless arrest for misdemeanors is limited by RCW 10.31.100, which states in part, "A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer," except as provided in certain listed exceptions.

The presence requirement originated in common law. William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 58 Mo. L. REV. 771, 788-89 (1993); see also City of Tacoma v. Harris, 73 Wn.2d 123, 126, 436 P.2d 770 (1968). The purpose for the common law rule was to allow an officer to prevent a breach of the peace:

"The common law did not authorize the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission."

People v. Phillips, 284 N.Y. 235, 237, 30 N.E.2d 488 (1940) (quoting 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883));

also Schroeder, *supra*, at 788-89. The “in the presence” rule was a balance of “accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy’ with the result that ‘only in the most serious of cases could the warrant be dispensed with.’” State v. Walker, 157 Wn.2d 307, 316, 138 P.3d 113 (2006) (quoting United States v. Watson, 423 U.S. 411, 442, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976) (Marshall, J., dissenting)); see also Carroll v. United States, 267 U.S. 132, 157, 45 S. Ct. 280, 69 L. Ed. 543 (1925) (stating, “[T]he reason for arrest without warrant on a reliable report of a felony [at common law] was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.”).

The legislature codified the presence requirement in 1979. Former RCW 10.31.100 (Laws of 1979, 1st Ex. Sess., ch. 128, § 1). RCW 10.31.100, though in derogation of the common law, accords with the purpose of the common law in the presence rule. Walker, 157 Wn.2d at 316. RCW 10.31.100 favors arrests made pursuant to a warrant but allows for exceptions in limited situations. Id. When originally enacted, the statute contained three exceptions to the warrant requirement. Former RCW 10.31.100 (Laws of 1969, 1st Ex. Sess., ch. 198, § 1); Walker, 157 Wn.2d at 318. The statute has been amended at least 20 times since then and has been expanded to include 24 exceptions. Walker, 157 Wn.2d at 318; RCW 10.31.100. For example, the legislature removed the in the presence requirement for crimes involving physical harm to persons or property,

violations of court orders, unlawful use of drugs and firearms, and specified traffic offenses. RCW 10.31.100. These exceptions reflect the legislature's determination that the need for immediate arrest outweighs the possibility of a mistaken arrest. Walker, 157 Wn.2d at 316. The Supreme Court noted in Walker that the exceptions listed in RCW 10.31.100 address social problems either not recognized or not present during common law, such as domestic violence, driving under the influence, and the individual and social costs of marijuana abuse. Id. at 316-17.

Ortega does not dispute that McLaughlin, as the observing officer, had probable cause to arrest him for the misdemeanor of drug traffic loitering under Seattle Municipal Code (SMC) 12A.20.050(B).¹ But, McLaughlin did not make the arrest. Ortega contends that Hockett, the arresting officer, did not have authority to arrest Ortega, because Ortega did not commit the misdemeanor in Hockett's presence as required by RCW 10.31.100.

The State responds that probable cause transferred from McLaughlin to Hockett under the fellow officer rule, also known as the collective knowledge doctrine or the police team rule. The fellow officer rule is not a creation of English common law. Rather, it was developed as part of a general liberalizing of the common law presence requirement in response to the challenges of policing in modern times with modern technology. See J. Terry Roach,

¹ Under SMC 12A.20.050(B), "A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington."

Comment, The Presence Requirement and the "Police-Team" Rule in Arrest for Misdemeanors, 26 WASH. & LEE L. REV. 119, 119-21 (1969). Washington has adopted the fellow officer rule in the felony context. See, e.g., State v. White, 76 Wn. App. 801, 805, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996); State v. Alvarado, 56 Wn. App. 454, 457-58, 783 P.2d 1106 (1989). Under this rule, in those circumstances where police officers are acting together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect. State v. Maesse, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981) (holding that information obtained by several officers investigating an arson was sufficient to form probable cause for a nonwitnessing officer to arrest the suspect without a warrant); see also State v. Wagner-Bennett, 148 Wn. App. 538, 542-43, 200 P.3d 739 (2009) (information not known by the arresting officer at the time but known by other officers at the time of the arrest was sufficient to form probable cause); State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996) (police department "hot sheet" bulletin may justify an arrest if the police agency issuing the bulletin has sufficient information to provide probable cause); White, 76 Wn. App. at 804-05 (information obtained by officer performing surveillance and radioed to arrest team was sufficient to form probable cause for felony); Alvarado, 56 Wn. App. at 455, 457-58 (same); State v. Sinclair, 11 Wn. App. 523, 531, 523 P.2d 1209 (1974) (radio confirmation from police headquarters that the suspect had an outstanding warrant was sufficient to form probable cause). Cf. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004)

(holding that information obtained from the Department of Licensing may not be subject to the fellow officer rule).

No published misdemeanor prosecution case has explicitly held that the fellow officer rule applies. The State asserts that this court extended the fellow officer rule to misdemeanors in Torrey v. City of Tukwila, 76 Wn. App. 32, 882 P.2d 799 (1994). In Torrey, undercover police officers were investigating violations of standards of conduct at an adult entertainment club. Id. at 34. During the investigation, the undercover police officers observed a violation of the Tacoma Municipal Code that established probable cause for a misdemeanor. Id. at 37. Later that day, another officer arrested the dancers. Id. at 35. In a civil suit against Tukwila claiming violations of several constitutional rights, the dancers claimed that their arrest violated RCW 10.31.100, because the arresting officer was not the officer who observed the misdemeanor. Id. at 39. In response to the dancer's RCW 10.31.100 claim, this court stated, "We have no difficulty applying the fellow officer rule to the facts of this case." Torrey, 76 Wn. App. at 39 (citing Maesse, 29 Wn. App. at 647, and Alvarado, 56 Wn. App. at 456-57, as examples of Washington's adoption of the fellow officer rule). Both Maesse and Alvarado, however, involved arrests based on probable cause for a felony. Maesse, 29 Wn. App. at 648; Alvarado, 56 Wn. App. at 455.

The court in Torrey applied the federal fellow officer rule to a misdemeanor arrest. 76 Wn. App. at 39. The claim was civil rather than criminal and was based on violation of federal rights. Id. at 39-40. But, a claim of violation of RCW 10.31.100 is not grounded in the federal constitution. Id. The

court was not squarely faced with the question before us. We are not constrained by it.

The State contends that Gaddy compels the application of the fellow officer rule here. Gaddy involved an arrest based on information obtained from the Department of Licensing. 152 Wn.2d at 70. The Supreme Court determined that the fellow officer rule did not apply to information obtained outside of law enforcement activities. Id. at 71. It noted that reliance on the fellow officer rule was not warranted. Id. It did not indicate that, the fellow officer rule would apply to arrests under RCW 10.31.100. Gaddy does not address the issue raised here.

The fellow officer rule was not available at common law. It has not been extended to the misdemeanor context under RCW 10.31.100 exceptions to the presence requirement. Neither has the Supreme Court applied the rule to a misdemeanor prosecution. Without these factors, it is for the legislature to extend the arrest authority of law enforcement officers. State v. Whatcom Cnty. Dist. Court, 92 Wn.2d 35, 38, 593 P.2d 546 (1979). We decline to adopt or extend that rule to the misdemeanor context.

Although we decline to adopt the fellow officer rule in the misdemeanor context, we hold that RCW 10.31.100 is not violated under these facts. The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega,

McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.

We hold the arrest of Ortega without a warrant did not violate RCW 10.31.100. Because the arrest was lawful, the search incident to the arrest was valid. Suppression of the evidence obtained during the search was not required. Because we hold that probable cause existed for the misdemeanor, we need not consider the State's argument that it also had probable cause to arrest Ortega for the commission of a felony.

We affirm.

WE CONCUR:

Appelmark, J.

Dyer, C.J.

No. 64008-9-I, State v. Gregorio Ortega

GROSSE, J. (concurring) – I concur in the result for the reasons stated. However, the discussion of the fellow officer rule in the context of RCW 10.31.100 is unnecessary to the decision and could be read as foretelling further judicial evisceration of the statute, something I do not think the majority intends.



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ROSE,

Appellant.

COA NO. 28403-4-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MEGAN BREDEWEG, DPA	<input checked="" type="checkbox"/> U.S. MAIL
BENTON COUNTY PROSECUTOR'S OFFICE	<input type="checkbox"/> HAND DELIVERY
7122 W OKANOGAN AVE BLDG A	<input type="checkbox"/> _____
KENNEWICK, WA 99336-2359	
<input checked="" type="checkbox"/> DOUGLAS ROSE	<input checked="" type="checkbox"/> U.S. MAIL
6204 W RICHARDSON ST	<input type="checkbox"/> HAND DELIVERY
PASCO, WA 99301	<input type="checkbox"/> _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MARCH, 2011.

X _____ *gro*

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