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NO. 284034-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

DOUGLAS CRAIG ROSE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00111-5

BRIEF OF RESPONDENT

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STATEMENT OF RELEVANT FACTS

On September 16, 2008, Officer Croskrey of the Richland Police Department was dispatched to a possible trespass or burglary in progress. (RP 05/21/09, 3). Officer Croskrey began looking for the suspect using a description provided by the 911 caller and relayed by Dispatch. (RP 5/21/09, 6). The description provided was that of a white male with black hair and some gray, wearing tan shorts, black shoes, and white socks, and carrying a green army bag. (RP 5/21/09, 8).

Officer Croskrey saw a white male matching the description provided about five apartment units north of the caller's location, which was consistent with the caller's report of the suspects direction of travel. (RP 5/21/09, 7). Officer Croskrey stopped his patrol car, exited, and asked the male to stop. (RP 5/21/09, 7).

Officer Croskrey could see a knife clipped to the male's front pocket and the male fidgeted as he was contacted by Officer Croskrey. (RP

05/21/09, 9). Officer Croskrey asked him to set the bag down, step away from it, and handcuffed the male for officer safety. (RP 5/21/09, 11). Officer Croskrey saw the defendant's hand moving rapidly, and his feet shifting around, which he described as fidgeting. (RP 5/21/09, 24). Officer Croskrey removed the knife, patted down the male for additional weapons, and had the male sit in the back of the officer's patrol car. (RP 5/21/09, 11). He told the male that he was not under arrest, but that he was being detained in reference to the reported trespass. (RP 5/21/09, 25). The male was identified as the defendant, Douglas Rose. (RP 6/30/09, 26). Officer Croskrey then waited for Officer Jenkins, the primary officer. (RP 5/21/09, 11-12, 25).

Officer Jenkins responded to the reporting party's apartment at 345 Van Giesen in Richland, then went to go meet Officer Croskrey. (RP 6/30/09, 12-13). Officer Jenkins was at that address for a few minutes, and then went to

assist Officer Croskrey. (RP 6/30/09, 12). As Officer Croskrey was speaking to Officer Jenkins, he looked at the bag and could see a glass pipe protruding from a side pocket with a white chalky substance attached to the inner portion of the pipe. (RP 5/21/09, 12, 26). He recognized the pipe as being consistent with what Officer Croskrey believed to be drug paraphernalia. (RP 5/21/09, 12). Officer Croskrey then arrested Rose for possession of drug paraphernalia. (RP 5/21/09, 26).

Officer Croskrey also located a credit card in the defendant's pocket. (RP 6/30/09, 41). When Officer Croskrey removed the card from the defendant's pocket, the defendant stated that he had just found it. (RP 6/30/09, 41). The card had the name of Ruth Georges on it. (RP 6/30/09, 84). It had been sitting on Ruth Georges' coffee table until she placed it in a cigarette box, which she then placed in a garbage can within her apartment. (RP 6/30/09, 84, 86). Ms. Georges

never gave anyone permission to have it. (RP 6/30/09, 84). The defendant left Ms. Georges' apartment approximately one hour before an officer called to ask her about the card. (RP 6/30/09, 89).

RELEVANT PROCEDURAL HISTORY

Based on the circumstances of this case, the defendant was charged with one count of Possession of Stolen Property in the Second Degree, and one count of Unlawful Possession of a Controlled Substance, Methamphetamine. (CP 1-2).

The defendant moved to suppress the evidence in this case. (CP 5-8). A CrR 3.6 Hearing was held on May 21, 2009. (RP 5/21/09, 1-). The CrR 3.6 Motion to Suppress was denied. (RP 5/21/09, 37-40).

On May 28, 2009, defense counsel stated that he was ready for trial, filed motions regarding the defendant's right to a speedy trial, and indicated that on this case, the defendant wished to proceed either to a Bench Trial or a

Stipulated Facts Trial. (RP 5/28/09, 2-3). The court then conducted a colloquy with the defendant, wherein the defendant indicated that he understood and wished to give up his right to a jury trial. (RP 5/28/09, 3-4). The court stated that it "would want his written waiver of his right to a jury trial". (RP 5/28/09, 4, line 21-22). No written waiver was ever provided to the court.

A bench trial was held on June 30, 2009. (RP 6/30/09). After the evidence was presented, the court entered judgments of guilty on both charges. (CP 23-25).

ARGUMENT

1. LAW ENFORCEMENT PROPERLY DETAINED THE DEFENDANT WHILE INVESTIGATING POTENTIAL CRIMES.

It is a well settled point of law that an individual may be detained for investigative purposes when an officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably

warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). There must be "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).

In this case, a 911 caller reported a trespass, informed the officers of the description of the suspect, and advised which direction the suspect had gone after leaving. (RP 05/21/09, 6-7). Officer Croskrey located the defendant, who matched the physical description provided, on the street named by the reporting party and in the immediate vicinity of the alleged trespass. (RP 05/21/09, 7-8). Based on those facts, Officer Croskrey lawfully detained the defendant to investigate the reported trespass. (RP 05/21/09, 10-11).

An officer may make a limited search of weapons for the purpose of officer safety during an investigative detention when the officer has a

reason to believe that the person with whom he is dealing may be armed and dangerous. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S.Ct. 1868 (1968). The question then is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Id.* at 27; State v. Harvey, 41 Wn. App 870, 874-75, 707 P.2d 146 (1985). A frisk for weapons is justified when an officer learns of or observes a weapon on the individual being detained. See State v. Olsson, 78 Wn. App 202, 895 P.2d 867 (1995); State v. Swaite, 33 Wn. App 477, 481, 656 P.2d 520 (1982) (a frisk for weapons is justified when a detainee has a knife on his belt).

During his contact with the defendant, Officer Croskrey observed the defendant to have a weapon, and saw the defendant move his hands and feet in an erratic manner. (RP 05/21/09, 24). Based on those facts, Officer Croskrey lawfully handcuffed the defendant, removed the weapon he

did see, and performed a frisk for additional weapons. (RP 05/21/09, 25). The defendant was not arrested at the time that he was handcuffed, as Officer Croskrey informed him, but was detained in handcuffs for officer safety. (RP 05/21/09, 25). The defendant was detained for only a few minutes while Officer Jenkins took the initial report at the victim's apartment, and then met with Officer Croskrey. (RP 05/21/09, 25). The officers then observed the pipe in the defendant's bag. (RP 05/21/09, 25-26).

2. THE DEFENDANT WAS PROPERLY ARRESTED FOR UNLAWFULLY POSSESSION OF DRUG PARAPHERNALIA.

An officer may arrest an individual when the officer has probable cause to believe a misdemeanor is being committed when the misdemeanor occurs in the presence of the officer. RCW 10.31.100.

The possession of paraphernalia, coupled with bizarre and emotionally unstable behavior ... gives rise to probable cause to arrest for

violation of RCW 69.50.412(1). State v. Lowrimore, 67 Wn. App. 949, 959, 841 P.2d 779 (1992). In this case, the defendant walked into a woman's apartment and exhibited fidgety behavior while speaking with the officer. This information, combined with the presence of a pipe with residue, clearly gives the officer probable cause to believe that the defendant is unlawfully in possession of drug paraphernalia.

The defendant also states that the court did not find that the officer had probable cause to believe that the defendant used the paraphernalia. (Appellant's Brief, 33). However, this issue was never raised in the Superior Court. Accordingly, this statement should not be relied upon to determine whether or not the officer had probable cause to arrest the defendant.

3. THE DEFENDANT VALIDLY WAIVED HIS RIGHT TO A TRIAL BY JURY.

A defendant has a right to a trial by jury. CONST, art I, § 21. However, a defendant may waive

the right to a jury. State v. Valdobinos, 122 Wn.2d 270, 288, 858 P.2d 199 (1993). A defendant waiving the right to a jury must do so knowingly, intelligently, and voluntarily. State v. Vasquez, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), citing State v. Bugai, 30 Wn. App. 156, 157, 632 P.2d 917 (1981). The waiver of a right to a jury may be done either in writing or orally on the record. Vasquez, 109 Wn. App. at 319, citing State v. Wicke, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); State v. Rangel, 33 Wn. App. 774, 775-76, 657 P.2d 809 (1983).

Jury waivers should be made in writing. Vasquez, 109 Wn. App. at 321. But they are nonetheless effective if made knowingly, intelligently, and voluntarily in open court. *Id.*, citing CrR 6.1(a); Wicke, 91 Wn.2d at 645-646 (waiver may be made orally in open court); and Rangel, 33 Wn. App. at 775-76. Failure to complete a written waiver pursuant to CrR 6.1 does not result in reversal if the record is

otherwise sufficient to show a valid waiver. State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

In this case, the defendant expressed understanding on the record that he wanted to waive his right to a trial by jury, that he understood that the case would now be decided only by a judge, and that he had discussed it with his attorney. (RP 05/28/09, 3-4). The defendant further expressed his understanding which case of the two pending would be proceeding without a jury, and indicated that he wished to waive his right to a jury. (RP 5/28/09, 3-4).

The defendant relies in part on State v. Hos, 154 Wn. App. 238, 225 P.3d 389 (2010). However, the defendant in Hos filed neither a written waiver nor engaged in any sort of colloquy on the record with the judge regarding her right to a trial by jury. Hos, 154 Wn. App. at 244. This is clearly distinguishable in this case where the defendant unequivocally expressed

his desire to waive his right to a jury. Accordingly, the Court should find that the defendant validly waived his right to a jury trial.

**4. SUFFICIENT EVIDENCE SUPPORTS THE
CONVICTION FOR POSSESSION STOLEN
PROPERTY IN THE SECOND DEGREE.**

Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted *most strongly* against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*emphasis added*). An inquiry on appeal regarding the sufficiency of the evidence does not require the reviewing court to determine whether it believes

the evidence at trial proves guilt beyond a reasonable doubt. Green, 94 Wn.2d at 221. Instead, the reviewing court must only ascertain that any reasonable fact-finder could have found guilt beyond a reasonable doubt based on the evidence presented at trial. *Id.*

In evaluating the sufficiency of the evidence on appeal, the court is obliged to defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. State v. Hayes, 81 Wn. App. 425, 430, 914 P.2d 788 (1996), *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Furthermore, circumstantial evidence is considered as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 637, 618 P.2d 99 (1980).

a. The card found on the defendant was an access device.

An access device is defined as 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. The card need not have been activated in order to be an access device. State v. Clay, 144 Wn. App. 894, 898-899, 184 P.3d 674 (2008). The appropriate question is whether the card could have been used to obtain anything as defined in RCW 9A.56.010, not the status of the card with its issuer. *Id.* at 899.

In this case, the victim would have been required to pay thirty dollars in order to activate the card with the issuing company. This case is indistinguishable from that of State v. Clay. The status of the card with the issuer does not mean that the card cannot be used to obtain money, goods, or services. The State presented sufficient evidence that the defendant was in possession of stolen property in the

second degree based on the fact that the card was an access device.

b. The card remained the property of Ruth Georges despite its presence in her garbage.

A person commits the crime of Possessing of Stolen Property in the Second Degree when he or she possesses a stolen access device. RCW 9A.56.160. Stealing information from an individual's garbage deprives the owner of the authorized use. State v. Askham, 120 Wn. App. 872, 885, 86 P.3d 1224 (2004). In Askham, the defendant removed the victim's credit card number from the curbside garbage. *Id.*

In this case, the State presented evidence that the owner of the card, Ruth Georges, did not intend to use the card, but placed it in a cigarette box inside a garbage can. (RP 6/30/09, 84, 86). She did not give the defendant permission to take or have the card. (RP 6/30/09, 84). The defendant testified that he was unaware of the card, and that it was simply in a bag of

garbage that he obtained from Ms. Georges. (RP 6/30/09, 106-107). Officer Croskrey testified that he removed the card from the defendant's pocket, the defendant stated that he had just found it. (RP 6/30/09, 41). The finder of fact specifically found that the defendant did not have permission to remove the card from Ms. Georges' garbage and knowingly possessed the stolen card.

CONCLUSION

The defendant was properly detained while law enforcement investigated the situation. The defendant was properly arrested for Unlawful Possession of Drug Paraphernalia. The defendant knowingly, intelligently, and voluntarily waived his right to a jury trial. Sufficient evidence was presented to convict the defendant of Possessing Stolen Property in the Second Degree. Accordingly, the defendant's convictions for Possessing Stolen Property in the Second Degree

and Unlawful Possession of a Controlled
Substance, Methamphetamine, should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of
April 2010.

ANDY MILLER

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 284034

vs.

DECLARATION OF SERVICE

DOUGLAS CRAIG ROSE,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on April 28, 2010.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on April 28, 2010.



PAMELA BRADSHAW