

66376-3

66376-3

NO. 66376-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
RASHID HASSAN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL HEAVEY

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	6
1. BECAUSE HASSAN WAS LAWFULLY ARRESTED, THE TRIAL COURT PROPERLY DENIED HIS MOTION TO SUPPRESS .....	6
a. Standard Of Review .....	6
b. Hassan's Arrest Was Lawful Because He Committed A Crime In Hazard's Presence And Hazard Directed The Arrest .....	7
c. Hazard Had Probable Cause To Arrest Hassan For A Felony .....	12
2. TESTIMONY ABOUT THE MARIJUANA FOUND ON HASSAN WAS HARMLESS AND THE TRIAL COURT PROPERLY DECLINED TO GRANT A MISTRIAL .....	19
a. Relevant Facts .....	19
3. HASSAN WAS NOT PREJUDICED BY THE DELAY IN ENTRY OF CrR 3.6 FINDINGS .....	25
D. <u>CONCLUSION</u> .....	27

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Garske v. United States, 1 F.2d 620  
(8th Cir. 1924) ..... 10

United States v. Watson, 423 U.S. 411,  
96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)..... 11, 12

Washington State:

Ang v. Martin, 154 Wn.2d 477,  
114 P.3d 637 (2005)..... 23

City of Snohomish v. Swoboda, 1 Wn. App. 292,  
461 P.2d 546 (1969)..... 11

City of Tacoma v. Harris, 73 Wn.2d 123,  
436 P.2d 770 (1968)..... 11

State v. Acrey, 148 Wn.2d 738,  
64 P.3d 594 (2003)..... 6

State v. Bourgeois, 133 Wn.2d 389,  
945 P.2d 1120 (1997)..... 21

State v. Brown, 139 Wn.2d 757,  
991 P.2d 615 (2000)..... 17

State v. Day, 161 Wn.2d 889,  
168 P.3d 1265 (2007)..... 7

State v. Fore, 56 Wn. App. 339,  
783 P.2d 626 (1989), review denied,  
114 Wn.2d 1011 (1990)..... 16

State v. Heaven, 127 Wn. App. 156,  
110 P.3d 835 (2005)..... 24

<u>State v. Huff</u> , 64 Wn. App. 641, 826 P.2d 698 (1992).....	12
<u>State v. Jones</u> , 97 Wn.2d 159, 641 P.2d 708 (1982).....	24
<u>State v. Maesse</u> , 29 Wn. App. 642, 629 P.2d 1349 (1981).....	17
<u>State v. Ortega</u> , 159 Wn. App. 889, 248 P.3d 1062, <u>review granted</u> , 171 Wn.2d 1031 (2011).....	8, 9, 10, 11, 12, 17
<u>State v. Quincy</u> , 122 Wn. App. 395, 95 P.3d 353 (2004), <u>review denied</u> , 153 Wn.2d 1028 (2005).....	25
<u>State v. Rodriguez</u> , 146 Wn.2d 260, 45 P.3d 541 (2002).....	24
<u>State v. Rodriguez-Torres</u> , 77 Wn. App. 687, 893 P.2d 650 (1995).....	14
<u>State v. Smith</u> , 68 Wn. App. 201, 842 P.2d 494 (1992).....	25, 26
<u>State v. Sondergaard</u> , 86 Wn. App. 656, 938 P.2d 351 (1997).....	12
<u>State v. Tibbles</u> , 169 Wn.2d 364, 236 P.3d 885 (2010).....	7
<u>State v. Vasquez</u> , 109 Wn. App. 310, 34 P.3d 1255 (2001).....	7
<u>State v. Walker</u> , 157 Wn.2d 307, 138 P.3d 113 (2006).....	11
<u>State v. White</u> , 76 Wn. App. 801, 888 P.2d 169 (1995).....	12, 13, 15, 16, 17
<u>Torrey v. City of Tukwila</u> , 76 Wn. App. 32, 882 P.2d 799 (1994).....	18

Constitutional Provisions

Federal:

U.S. Const. amend. IV ..... 7

Washington State:

Const. art. I, § 7..... 7

Statutes

Washington State:

RCW 10.31.100..... 7, 9, 12, 13, 18  
RCW 69.41..... 8  
RCW 69.50..... 8  
RCW 69.50.401..... 13, 16  
RCW 69.50.4011..... 13  
RCW 69.50.4012..... 13  
RCW 69.52..... 8  
SMC 12A.20.050..... 8

Rules and Regulations

Washington State:

CrR 3.6..... 2, 3, 25, 26  
CrR 8.3..... 20

Other Authorities

WPIC 50.07 ..... 16

**A. ISSUES PRESENTED**

1. An officer may conduct a warrantless arrest for a misdemeanor committed in his presence. The officer who witnessed the misdemeanor need not physically lay hands on the defendant, provided that he participates in the arrest. Here, Sergeant Hazard witnessed Hassan commit the gross misdemeanor of drug traffic loitering. Hazard directed the rest of his team to arrest Hassan, maintained visual and radio contact with the team, and confirmed that they had arrested the correct person. Was Hassan's warrantless arrest for drug traffic loitering lawful? If not, was there probable cause to arrest Hassan for a felony when Hazard witnessed him conduct three hand-to-hand narcotics transactions?

2. The improper admission of evidence is harmless unless there is a reasonable possibility that the outcome of the trial would have been materially affected had the error not occurred. Hassan was charged with possession of cocaine with the intent to deliver. The trial court admitted testimony that Hassan also possessed marijuana at the time of his arrest. Was any error admitting the marijuana testimony harmless when the evidence overwhelmingly

showed that Hassan had been delivering crack cocaine, not marijuana? Did the trial court properly refuse to declare a mistrial?

3. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Rashid Hassan was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that Hassan possessed cocaine with the intent to deliver it on August 27, 2009. CP 1.

Trial occurred in July of 2010. The trial court denied Hassan's CrR 3.6 motion to suppress. CP 129-32; 1RP<sup>1</sup> 66-67. A jury found Hassan guilty as charged. CP 69. The court

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<sup>1</sup> The verbatim report of proceedings will be referred to as follows: 1RP (7/6/2010, 7/7/2010, 7/8/2010); 2RP (7/12/2010, 7/13/2010); 3RP (8/3/2010); 4RP (10/20/2010); and 5RP (12/7/2010).

sentenced Hassan to a prison-based Drug Offender Sentencing Alternative ("DOSA"). CP 105-15.

2. SUBSTANTIVE FACTS.

Sergeant Mark Hazard has been with the Seattle Police Department for 23 years and is currently assigned to the narcotics unit. 1RP 19-21. He has extensive experience working with Anti-Crime Teams, which focus on street narcotic investigations. 1RP 20. In his career, Hazard has been involved in close to a thousand narcotics arrests. 1RP 21.

On August 27, 2009, Hazard was working as the surveillance officer in a "see-pop" narcotics operation with the West Precinct's Anti-Crime Team.<sup>2</sup> 1RP 25. Hazard was stationed on the roof of the Belltown Inn, a five-story building at the corner of Third Avenue and Bell Street. 1RP 25. Using his binoculars, he had a good view of the activity near the entrance to Kelly's Tavern, across the street from the Belltown Inn. 1RP 25. The area is known for high narcotics activity. 1RP 23-24. In fact, because of

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<sup>2</sup> The facts relating to Hazard's observations are based on his testimony at the CrR 3.6 hearing. Hazard's testimony at trial was similar to that from the CrR 3.6 hearing. See generally 2RP 15-30.

numerous complaints about narcotics activity, the West Precinct Anti-Crime Team spends more time in that area than anywhere else in downtown Seattle. 1RP 24.

At around 9:30 p.m., Hazard noticed six people loitering on the corner. 1RP 26. Hazard looked away briefly and when he returned his attention to Kelly's Tavern, the group of loiterers were surrounding Hassan. 1RP 26. Hassan reached into his left breast pocket and handed something to a man on crutches. 1RP 28. Hassan then handed something to another man, who inspected it and popped it into his mouth. 1RP 28. Hassan also put something in a woman's hand; she inspected the item and popped it into her mouth. 1RP 28. The items were too small for Hazard to identify them. 1RP 42. Hazard did not see anyone give Hassan money. 1RP 39.

Based on Hazard's training and experience, these three encounters were consistent with hand-to-hand crack cocaine transactions. 1RP 27. The area was particularly known for crack cocaine. 1RP 23. Drug users frequently store crack cocaine in their mouths because it is not water soluble and can be swallowed to avoid police detection. 1RP 29-30. Because crack cocaine has a numbing effect, placing it in the mouth also helps to verify that it is

real. 1RP 29-30. Crack cocaine is the only drug typically stored in a user's mouth. 1RP 45.

After the third transaction, Hassan entered Kelly's Tavern and the people who had surrounded him left the area. 1RP 28. When Hassan did not exit, Hazard directed Officers David Blackmer and Martin Harris to contact Hassan, who he described as a black male with dreadlocks, wearing a white dress shirt and blue jeans. 1RP 47. There were about 10 people in the bar; Hassan was the only person who matched the description provided by Hazard. 1RP 47-48. Blackmer and Harris asked Hassan to step outside to the street. 1RP 47. Once Hazard verified that they had the correct person, Blackmer arrested Hassan. 1RP 48. Blackmer found two crack rocks in Hassan's left breast pocket and some marijuana in his front right pants pocket. 1RP 48.

Hassan testified at trial. He admitted that he possessed crack cocaine on the day of his arrest, but denied engaging in any hand-to-hand transactions. 2RP 33-44.

**C. ARGUMENT**

1. BECAUSE HASSAN WAS LAWFULLY ARRESTED, THE TRIAL COURT PROPERLY DENIED HIS MOTION TO SUPPRESS.

Hassan contends that his arrest for the misdemeanor of drug traffic loitering was not lawful because Hazard, the only officer who witnessed the crime, did not physically arrest him. Therefore, Hassan argues, the trial court erred when it denied his motion to suppress the crack cocaine found during a search incident to arrest. Hassan's claim should be rejected because Hazard arrested Hassan with the assistance of Blackmer and Harris. Alternatively, Hazard had probable cause to arrest Hassan for the felonies of delivery of a controlled substance and possession with intent to deliver, so whether he personally arrested Hassan is legally irrelevant.

- a. Standard Of Review.

Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Whether a trial court's findings of fact support its conclusions of law regarding probable cause for an arrest presents a legal question reviewed

de novo. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001).

- b. Hassan's Arrest Was Lawful Because He Committed A Crime In Hazard's Presence And Hazard Directed The Arrest.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). As a general rule, warrantless searches and seizures are per se unreasonable, unless the State can show that the search falls under one of the exceptions to the warrant requirement. Id. at 893-94. Search incident to a lawful arrest is one exception to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

A police officer may arrest a person without a warrant for committing a misdemeanor when the offense is committed in the presence of the officer.<sup>3</sup> RCW 10.31.100. Hassan does not challenge the trial court's finding that Hazard had probable cause to believe that he was committing the gross misdemeanor of drug

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<sup>3</sup> The legislature has adopted several exceptions to the "presence" rule, none of which are applicable to Hassan's case. See RCW 10.31.100.

traffic loitering.<sup>4</sup> Rather, Hassan claims that his arrest violates RCW 10.31.100 because Hazard, who was the only officer to witness the crime, did not physically lay hands on Hassan during the initial detention.

This Court recently rejected an identical argument in State v. Ortega, 159 Wn. App. 889, 248 P.3d 1062, review granted, 171 Wn.2d 1031 (2011). In Ortega, officers conducted a similar narcotics operation in the Belltown neighborhood. Id. at 892. Just like in Hassan's case, the surveillance officer watched Ortega conduct three hand-to-hand transactions. Id. at 892-93. The surveillance officer radioed to his arrest team, informing them that there was probable cause to arrest Ortega and his look-out for drug traffic loitering. Id. at 893. The arrest team detained both suspects, finding drugs and cash on Ortega. Id. The surveillance officer maintained visual contact with the suspects up until the time of arrest. Id.

On appeal, Ortega argued that the arresting officer did not have authority to arrest him because he did not commit the

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<sup>4</sup> Under Seattle Municipal Code 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."

misdemeanor in the arresting officer's presence, as required by RCW 10.31.100. Id. at 896. This Court rejected Ortega's argument, finding that his arrest did not violate RCW 10.31.100. Id. at 898. Noting that the surveillance officer saw the criminal activity and directed the arrest, this Court held that the surveillance officer's "continuous contact made him a participant in the arrest." Id. "Although [the surveillance officer] was not the officer who actually put his hands on Ortega, [he] was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team." Id.

Just as in Ortega, Hazard's continuous contact with the arrest team rendered him a participant in the arrest. Hazard maintained radio contact with the arrest team, relaying his observations of Hassan's potential narcotics transactions. 1RP 46. Hazard gave a detailed description of the suspect to the arrest team and directed them to enter Kelly's Tavern and detain Hassan. 1RP 47. The arrest team located Hassan and took him outside, at which point Hazard verified that they had the correct suspect. 1RP 48. Hassan was then arrested. 1RP 48. Although Hazard did not physically detain Hassan, he directed the arrest and maintained nearly continuous contact with the team.

Hassan attempts to distinguish his case from Ortega by noting that, unlike the surveillance officer in Ortega, Hazard "did not leave his post and meet his colleagues and Hassan at the scene of arrest." Brief of Appellant at 11 (citing Ortega, at 893). Although the record is silent as to what Hazard did after Hassan's arrest, that detail does not meaningfully distinguish his case from Ortega. The relevant question is whether officers had the authority to arrest Hassan for drug traffic loitering without a warrant. Their authority depends on their direct knowledge that he committed a misdemeanor. Thus, what the surveillance officer did after Ortega's arrest had no bearing on the outcome of the case, unless it were to suggest that the officer never witnessed Ortega commit a misdemeanor.

Hassan also argues that this Court's ruling in Ortega contravenes the rules of statutory construction and should be disregarded. Hassan contends that an offense occurs in an officer's presence only if the officer is "near" the crime. Hassan is incorrect. A crime is committed within an officer's presence whenever "his senses afford him knowledge that such is the fact." Garske v. United States, 1 F.2d 620 (8th Cir. 1924). The "presence" rule is satisfied whenever sensory perception permits a

reasonable inference that a misdemeanor is being committed. City of Snohomish v. Swoboda, 1 Wn. App. 292, 295, 461 P.2d 546 (1969) (illegal sale of firecrackers occurred in officers' presence, despite the fact that the crime occurred in a house while officers were watching from their car, approximately 150 feet away). See also City of Tacoma v. Harris, 73 Wn.2d 123, 126-27, 436 P.2d 770 (1968) (disturbance of the peace occurred in officers' presence when officers, who had received previous complaints of noise, heard loud noises coming from the defendant's house after 2:00 a.m.).

Finally, Ortega is consistent with the purpose of the "presence" rule. At common law, 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...." 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)). When an offense occurs in an officer's presence, a warrantless arrest "presents no danger that an innocent person might be ensnared, since the officer observes both the crime and the culprit

with his own eyes." Watson, 423, U.S. at 426-27 n.1 (Powell, J., concurring). Because the surveillance officer in Ortega, observed both the crime and the suspect with his own eyes, the "presence" rule's purpose of preventing mistaken arrests was served.

c. Hazard Had Probable Cause To Arrest Hassan For A Felony.

Even if Hassan's warrantless arrest for drug traffic loitering violated RCW 10.31.100, the arrest was still lawful because officers also had probable cause to arrest Hassan for the felonies of delivery of a controlled substance and possession of a controlled substance with intent to deliver.<sup>5</sup>

"Probable cause for a warrantless arrest 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. White, 76 Wn. App. 801, 804-05, 888 P.2d 169 (1995) (quoting State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992)). A police officer who has probable cause to believe that a person has committed a felony may arrest

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<sup>5</sup> A reviewing court may affirm for any basis apparent in the record if the record is sufficiently developed. State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

that person without a warrant, regardless of whether the crime was committed in the officer's presence. RCW 10.31.100. An arrest is lawful, pursuant to the fellow officer rule and RCW 10.30.100, if the officer has probable cause to believe that a person has committed or is committing a felony. RCW 10.30.100; White, 76 Wn. App. at 804-05. It is a felony to deliver narcotics or counterfeit controlled substances.<sup>6</sup> It is also a felony to possess controlled substances with the intent to deliver them.<sup>7</sup>

Hassan's case is similar to the facts of State v. White, 76 Wn. App. 801, 888 P.2d 169 (1995). White was a lookout person in what appeared to be a drug transaction. White, 76 Wn. App. at 803. The observing officer was using binoculars from the top floor of a parking garage, looking at the street below. Id. He saw White and a co-defendant on the sidewalk, where they were eventually approached by another man. Id. White directed the buyer to the co-defendant, who took money from the man and dropped something on the ground. Id. The buyer picked up the object and put it in his mouth. Id. After this, White looked behind him, made

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<sup>6</sup> RCW 69.50.401; RCW 69.50.4011; RCW 69.50.4012.

<sup>7</sup> Id.

hand movements with the co-defendant, and all three then walked in different directions. Id. The officer could not tell what, if anything, had passed between White and the co-defendant. Id.

The appellate court found that, based on the observing officer's narcotics training and experience in reviewing these facts, it appeared that White was part of a drug transaction. Id. at 804-05. Accordingly, the court held that these observations were sufficient to give police probable cause to believe that White had participated in a drug transaction. Id.

Hassan's case is also similar to State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995). CP 71. In Rodriguez-Torres, a police officer witnessed a man pass Rodriguez-Torres money and then take an object out of his hand. Id. at 689. As the officer approached to investigate, someone yelled "Police!" Id. The other man then took his money back from Rodriguez-Torres, dropped the object he had been inspecting on the ground, and fled. Id. Rodriguez-Torres picked up the object and fled in the other direction. Id. After following him for a distance, the officer arrested Rodriguez-Torres and searched him, recovering cocaine. Id. at 690. The appellate court held that, based on his observations, the

officer had probable cause to arrest Rodriguez-Torres for possession with intent to deliver. Id. at 693.

In light of Hazard's training and extensive experience with narcotics investigations, there were facts sufficient for a reasonably cautious person to believe that Hassan was involved in a drug transaction and was carrying drugs with the intention of delivering them. Hassan was surrounded by six people who appeared to be loitering for the purpose of buying drugs in an area notorious for drug use. He removed a package from his left breast pocket and gave small items to three people. Two of the people inspected the item and then popped the item into his or her mouth. This behavior was consistent with a drug transaction. The transactions took place in an area known for crack cocaine activity. It was reasonable for Hazard to believe that Hassan was involved in three narcotics transactions and that he was carrying drugs with the intent to deliver them. White, at 804-05. There was probable cause to arrest Hassan for delivery of a controlled substance or possession with intent to deliver.

Hassan contends that Hazard did not have probable cause for a felony because he did not see money exchanged. Hassan's emphasis on the lack of money elevates that single factor to a

litmus test. The totality of the circumstances surrounding an exchange, rather than an officer's ability to identify an object or see money is the test probable cause. State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989) ("Absolute certainty by an experienced officer as to the identity of a substance is unnecessary to establish probable cause."), review denied, 114 Wn.2d 1011 (1990); White, 76 Wn. App. at 803-05 (probable cause where officer observed through binoculars circumstances indicating a drug transaction, though officer was unable to identify the object exchanged). Moreover, delivery of a controlled substance requires only the transfer, not the sale, of the controlled substance; the exchange of money is not element of delivery of a controlled substance. RCW 69.50.401; WPIC 50.07. Hazard saw Hassan deliver small items to three people who had suddenly converged on him in a notorious drug sales location--two of whom popped the items into their mouths--and then all parties went their separate ways. Given his training and experience, Hazard had probable cause to arrest for a felony.

Because there was probable cause to believe that Hassan committed a felony, the fellow officer rule applies, Hassan's arrest was valid, and his claim of an unlawful search fails.

Although this Court declined to extend the fellow officer rule to misdemeanor arrests in Ortega, The State renews that argument in order to preserve the issue for further review.

The fellow officer rule provides that where police officers are acting together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered to decide whether there was probable cause to apprehend a particular subject. State v. Brown, 139 Wn.2d 757, 791, 991 P.2d 615 (2000). In other words, an arresting officer has probable cause to arrest a defendant even if another officer actually observed the crime. White, 76 Wn. App. at 804-05 (holding that it was proper for an officer to arrest the defendant when another officer had established the probable cause by observing the defendant involved in narcotics transactions.) The probable cause that is known to one officer is imparted to all of his or her fellow officers. See id.; State v. Maesse, 29 Wn. App. 642, 646-47, 629 P.2d 1349 (1981).

Hazard was part of a team with Blackmer and Harris. 1RP 22. The team organized so that Hazard would survey the area from the roof of the Belltown Inn and communicate his observations to the "arrest team" of Blackmer and Harris, who were nearby in their police cars. 1RP 22, 46-47. During the surveillance, Hazard

communicated his observations in real time over the radio to Blackmer and Harris. 1RP 46-47. After radioing the viewed drug transactions and establishing probable cause for a crime, Hazard directed the arrest team to Hassan's location to arrest him.

1RP 47.

The fellow officer rule imparted the probable cause established by Hazard's observations to Blackmer and Harris since they were in a joint investigation. Since all three officers at the scene were working as a unit, each had a lawful basis to arrest Hassan pursuant to the fellow officer rule. Accordingly, Blackmer's arrest of Hassan was valid.

Although no published case in Washington has applied the fellow officer rule to criminal cases involving warrantless misdemeanor arrests, the rule has been applied in a civil action alleging violation of RCW 10.31.100. Torrey v. City of Tukwila, 76 Wn. App. 32, 882 P.2d 799 (1994). The State urges this court to extend the fellow officer rule to misdemeanor arrests.

2. TESTIMONY ABOUT THE MARIJUANA FOUND ON HASSAN WAS HARMLESS AND THE TRIAL COURT PROPERLY DECLINED TO GRANT A MISTRIAL.

Hassan argues that the trial court erred in admitting testimony that officers found marijuana in his right pants pocket at the time of his arrest and that the trial court improperly denied his motion for a mistrial. Hassan's claim should be rejected. Any error in admitting the marijuana testimony was harmless and the trial court properly declined to grant a mistrial sua sponte.

a. Relevant Facts.

Officer Blackmer searched Hassan incident to arrest. At trial, he offered the following summary of the search:

Q: What did you find?

A. I found two crack cocaine rocks in his upper left breast pocket of his shirt. And then in his right front pant pocket was --

[DEFENSE COUNSEL]: Objection, Your Honor. Relevancy.

THE COURT: Overruled.

A. In his right front pants pocket was .8 grams of marijuana.

Q: And what did you -- what did you do with what you found in the upper left breast pocket?

A: The crack cocaine rocks I went and field tested. It came back positive for cocaine. I packaged those up along with the marijuana.

1RP 111-12. At the conclusion of Blackmer's direct examination, defense counsel requested a sidebar. 1RP 112. According to the parties' summary of the sidebar, defense counsel was concerned about testimony regarding the marijuana and the field test, believing that there might have been pretrial rulings excluding both lines of testimony. 1RP 113. The parties confirmed that the court had excluded testimony about the field test, but that there had not been any motion regarding the marijuana. 1RP 113-14. The prosecutor acknowledged that he had failed to advise Blackmer that the field test evidence had been excluded. 1RP 114-15. Defense counsel asked for additional time to consider filing a motion regarding the field test evidence. 1RP 115.

When trial reconvened, defense counsel filed a motion to dismiss pursuant to CrR 8.3(b), or in the alternative, motion for a mistrial. CP 65-68. The written motion was based solely on the admission of the field test evidence. CP 65-68. Similarly, counsel's oral argument did not mention the testimony about the marijuana. 2RP 45-46. Before addressing the field test evidence, though, the trial court acknowledged that it ordinarily would have sustained the

objection to the testimony about the marijuana. 2RP 50. However, the court ruled, "While it is marginally possibly prejudicial to the defendant, I don't think it comes anywhere near prejudicing the case of Mr. Hassan sufficient to warrant a dismissal or a mistrial."

2RP 50.

Hassan first argues that the trial court erred when it overruled his objection to the relevancy of the marijuana testimony. Although the marijuana evidence might have been marginally relevant, the trial court clearly indicated that it ordinarily would have sustained the objection.<sup>8</sup> However, any error in admitting the evidence was harmless.

Because the alleged error involves the violation of an evidentiary rule, rather than a constitutional mandate, the error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120

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<sup>8</sup> Although the trial court apologized multiple times for not sustaining Hassan's objection, it appears that any error was due to the vague nature of Hassan's objection and the failure to move in limine to exclude the evidence. There was no prior discussion about the fact that Blackmer found marijuana in Hassan's pants' pocket. An offer of proof would have assisted the court in its ruling, as the specific reason for the relevancy objection was not clear from the context or prior motions. Once Blackmer testified about the marijuana, Hassan never moved to strike or renewed his objection.

(1997). Any error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

Here, Hazard testified that he watched Hassan engage in three hand-to-hand transactions. Hazard saw Hassan retrieve items from his front breast pocket and give them to three loiterers. Hazard testified that two of the buyers placed the items in their mouths, which is how drug users often store crack cocaine. The transactions occurred in an area primarily known for crack cocaine sales. The rocks of crack cocaine were found in Hassan's front breast pocket, whereas the marijuana was found in his pants pocket. The evidence strongly supported the jury's conclusion that Hassan intended to deliver the crack found in his pocket.

Hassan argues that the alleged error was not harmless because Hazard testified that the area was known for "mostly crack cocaine and some marijuana." 2RP 18. Hazard's remarks were made at the beginning of his testimony, and were not connected to his testimony about Hassan. Both Hazard and Harris emphasized that the area was primarily known for crack cocaine. 2RP 8, 18. There was no further testimony about the marijuana and it was never referenced in closing arguments. The evidence showed that

Hassan was dealing the items retrieved from his breast pocket, rather than items stored in his pants pocket. Moreover, the testimony that Hassan had .8 grams of marijuana in his pants' pocket was of minor significance when compared to the overall evidence. A jury who believed that Hassan possessed two rocks of crack would not convict simply because he also possessed a small amount of marijuana.

Hassan next assigns error to the trial court's finding that the marijuana evidence was harmless. App. Br. at 1. The trial court never made such a ruling. Instead, without a request from Hassan, the trial court sua sponte considered whether the erroneous admission of the marijuana testimony required a mistrial. Finding that the evidence was only "marginally possibly prejudicial," the trial court determined that any error in admitting the marijuana evidence did not merit a mistrial. 2RP 50. Although he does not expressly challenge it, Hassan is implicitly challenging the trial court's refusal to grant a mistrial sua sponte.<sup>9</sup>

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<sup>9</sup> Because Hassan offers no argument regarding whether a mistrial should have been granted, this Court should decline to address the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

At trial, Hassan's request for a mistrial was based solely on the field test evidence. Hassan never requested a mistrial, or any other remedy, for the marijuana testimony. Hassan cites no authority to suggest that the trial court had a duty to grant a mistrial sua sponte. Indeed, jeopardy attached once the jury was sworn. State v. Heaven, 127 Wn. App. 156, 161, 110 P.3d 835 (2005). Hassan had a right to proceed to verdict. In the absence of Hassan's request for a mistrial, principles of double jeopardy might have precluded retrial. See State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982).

Even if Hassan had requested a mistrial, the trial court would have been correct in denying one. Trial courts should grant mistrials only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. Id. at 269. Appellate courts will not overturn a trial court's denial of a motion for mistrial unless there is a "substantial likelihood" that the error prompting the mistrial affected the jury's verdict. Id. at 269-70. As explained above, the marijuana evidence was of minimal significance to the case, and

the trial court was correct in finding that the defendant was not sufficiently prejudiced so as to justify a mistrial.

3. HASSAN WAS NOT PREJUDICED BY THE DELAY IN ENTRY OF CrR 3.6 FINDINGS.

Hassan argues that his case should be remanded for entry of findings of fact and conclusions of law under CrR 3.6(b). This argument should fail because the trial court entered written findings on July 25, 2011, and Hassan cannot show any prejudice. CP 129-32.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992).

However, unlike Smith, here the court entered findings that have not delayed resolution of Hassan's appeal. There is no resulting prejudice.

Nor can Hassan establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 129-32. The language of the findings is consistent with the trial court's oral ruling. 2RP 42-44. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 133-34.

In light of the above, Hassan cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

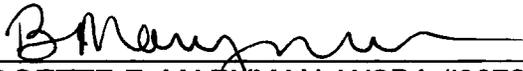
D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hassan's conviction.

DATED this 2 day of September, 2011.

Respectfully submitted,

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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RASHID HASSAN, Cause No. 66376-3-1, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

9/2/11  
Date

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