IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28403-4-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DOUGLAS CRAIG ROSE,	)	
	)	**OPINION PUBLISHED**
Appellant.	)	**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 In the unpublished portion of this opinion we consider additional issues and affirm the convictions.

FACTS[1]

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[1] Facts relevant to the unpublished portion of this opinion are discussed in conjunction with the issues presented there.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

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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.

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.

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).

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,

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

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).

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.

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.

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Korsmo, A.C.J.

WE CONCUR:

Sweeney, J.

Siddoway, J.