

No. 28566-9-III

Siddoway, J. (dissenting) — The duty of a disfavored driver at a stop sign is discharged when he accords to other drivers the portion of the roadway over which they have a right to pass. *Foster v. Bylund*, 7 Wn. App. 745, 752, 503 P.2d 1087 (1972); *Hemrich v. Koch*, 177 Wash. 272, 275-76, 31 P.2d 529 (1934); RCW 46.61.190. While I agree with the majority that James Pachpe’s suddenly moving forward by a little more than a yard as the patrol car approached qualifies as a failure to exercise ordinary care, a negligent driving infraction requires both negligence and operation of a motor vehicle in a manner that “endangers or is likely to endanger any person or property.” RCW 46.61.525(1)(a).

The trial judge distinguished between the common experience of observing conduct by another driver that we fear or anticipate will create a risk, but is then corrected, versus conduct that creates danger or a likelihood of danger. He did not find danger or a likelihood of danger. At the time of the stop, Mr. Pachpe’s conduct was concluded and Sergeant Mike Russell was apparently the only witness to this 1:45 a.m.

event. There was nothing more to investigate.

I dissent because the trial judge’s unchallenged findings support his conclusion that the officer’s momentary apprehension of a risk that did not materialize fell short of probable cause to stop Mr. Pachpe. The sufficiency of claimed probable cause or reasonable suspicion must be determined by considering the conduct and circumstances deemed relevant within the context of the actual meaning of the applicable substantive provision. 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3(a), at 361 & n.12, 363 n.23 (4th ed. 2004); *see also State v. Prado*, 145 Wn. App. 646, 647, 186 P.3d 1186 (2008) (driver’s brief incursions over lane lines did not justify traffic stop where statute’s requirement is to remain within a single lane of travel “as nearly as practicable”) (quoting RCW 46.61.140(1)).

Siddoway, J.