IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

No. 31638-6-III

Grant County Superior Court No. 10-1-00061-8

STATE OF WASHINGTON
Respondent,

vs.

MICHAEL ALLEN BUDD
Appellant.

APPELLANT'S REPLY TO

RESPONDENT'S BRIEF

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1. Reply to Procedure

There is no reply to the State's procedure (procedural history) section.

2. Reply to Facts

The Detective was never able to determine the source of the anonymous tip. (RP 29: 10-11) The chat logs were of a sexual nature. However, none of the proffered "chats" from the anonymous informant mentioned the ages of any of the participants. The chats did not discuss the production or trading of child porn. The chats did not discuss rape or any other type of coerced or nonconsensual sexual activity. In totality, they were merely a collection of innocuous online sex chats. (RP 29-30; CP 137-145)

The Detective at first testified in open court that she believed the chat logs specifically mentioned the Defendant stating that he wanted to engage in sexual activities with his daughter. (RP 30) However, on cross-examination, the Detective admitted that the chat logs did not make any such mention of the Defendant's daughter or of any 3rd party. *Id*. The State's Answer Brief states: "One such discussion involved defendant

referencing sex with his nine-year-old daughter. (RP 6) In fact, there was no such discussion anywhere in the chat logs supplied by the anonymous informant. [1]

When the Detective first contacted the Defendant, she testified that she had informed the Defendant that she had received a tip that the Defendant had child pornography on his computer. (State's Answer Brief at p.3). The defendant had answered that "if one does something often enough that they will get caught." (State's Answer Brief *Ibid).* The Defendant's statement is equivocal in that it does not identify any criminal acts with any clarity. Nevertheless, the Detective proceeded with her warrantless search and informed the Defendant that if he did not consent, she could and would seek a search warrant.

The rest of the exchange concerns the *Ferrier* warnings which were not provided in their entirety by the Detective prior to the three law enforcement officers' entry into the Defendant's home. The entry into the home was, ostensibly for the purpose of going over these *Ferrier* warnings.

C. Reply to Counter-Argument

1. The State has not met its burden to show that it complied with *Ferrier*.

The record is quite clear that the officers entered the defendant's house without a warrant for the purpose of going over the *Ferrier* warnings. (RP 17-18) However, if the warnings given prior to the Defendant's "consent" were sufficient as the State contends,

[1] The deputy prosecutor, Mr. Willmore, currently assigned to write the state's brief is newly assigned to this matter. Deputy prosecutor Owens tried this matter originally in the trial court.

then there would not have been a need to have gone over these *Ferrier* warnings a second time.

The Detective, by her testimony, apparently believed that the Defendant's general consent to allow law enforcement to enter the Defendant's house was sufficient. The Detective in her testimony stated:

> "When he agreed to give consent, I explained to him that I had a waiver that he would need to sign, and it would give him rights as to how much we could search, that he could stop the search. I didn't go into great detail."

(RP 16)

The Detective clearly stated her intention to fully explain the *Ferrier* warnings once the officers had already breached the Defendant's house. *Ferrier* simply does not allow this.

The rule under *Ferrier* is well-settled that, when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give and can limit the scope of the consent to certain areas of the home. (*Ferrier*, 136 Wn.2d at 118) *Ferrier* held that these warnings are required because a knock and talk is inherently coercive. (*Id*. at 115)

Nowhere in the Detective's testimony does she mention that she discussed with the Defendant the fact that he had the right to define the scope of the officer's search. Also conspicuously missing is the part of the *Ferrier* warning that consent may be withdrawn by the person giving consent ***at any time*** during the search and seizure. (emphasis added)

The facts of the instant case most closely resemble *State v. Westvang*, 301 P.3d 64 (2013), a recent Washington Court of Appeals - Division II decision.

In *Westvang*, officers were conducting a "fugitive sweep" looking for an individual with an active warrant for his arrest. The officers received uncorroborated information that the person that they sought frequently resided at a particular residence and might possibly be located there. The police then went to that address and knocked, encountering Ms. Westvang, the owner of the residence.

The officers informed Westvang that they were searching for a Mr. Miller who had an active warrant. Ms. Westvang replied that he was not there. The officers noticed that Westvang appeared nervous and thought that she might be hiding Miller. The officers then asked if they could enter her residence to look for Miller.

Although the officer informed Ms. Westvang that she did not have to consent to their entry, she was not informed that she could end the search at any time or that she could limit the search to particular areas of the house. During the course of their search, the officers discovered contraband and Ms. Westvang was ultimately charged with delivery of a controlled substance.

Division II of the Washington State Court of Appeals rejected the State's argument that officers need not give *Ferrier* warnings under such circumstances prior to entry of a home.

Here in the instant matter, the State argues, in essence, that by a totality of the circumstances test, full compliance with *Ferrier* has been met. The State bases this upon the Defendant’s request to the Detective that the search not take place in front of his girlfriend. (RP 35-36) First, this request does not affect the scope of the search, so the

State's reliance on this request as proof that the Defendant understood this right is misplaced. Any homeowner could reasonably believe that an officer's assent to such a request was granted solely at the largess of the officer rather than as a result of a conscious waiver of a constitutional right. The *Ferrier* warnings require that warnings be provided prior to any police breach of a home for a warrantless search of contraband or other evidence in the home. *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003).

In the instant case, both the provision of the *Ferrier* warnings and of the Defendant's consent is lacking. Under *Ferrier*, the result of incomplete warnings, when required, is clear. The evidence seized must be suppressed under the fruit of the poisonous tree doctrine. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

2. <u>The provision of *Ferrier* Warnings is a bright-line rule and not a totality of the circumstances test</u>.

The State misapplies the totality of the circumstances test vis-à-vis the provision of the *Ferrier* warnings in the first instance. Instead, the State erroneously applies a "totality of the circumstances" test to both the provision of the *Ferrier* Warnings and also to the issue of Defendant's consent.

The first part of the test, whether or not the Defendant was provided with the *Ferrier* warnings, remains a bright line test for instances when police officers seek entry to conduct a consensual search for contraband or evidence of a crime. (*State v. Khounvichai* at 559.) If a Defendant was properly provided with *Ferrier* warnings, then

the issue of whether the defendant consented freely and voluntarily, and not as a result of duress or coercion is a question of fact to be determined by a totality of the circumstances. *State v. Smith* 115 Wn.2d 775, 789 801 P.2d 975 (1990); *State v. O'Neill*, 148 Wn.2d 564, 588 62 P.3d 489 (2003) (citing *Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). See also, *State v. Freepons*, 147 Wn.App. 689 (2008) (police requested and obtained consent to search a residence for a 3rd party.) However, evidence established that the police also intended to search the residence for contraband and other evidence of a crime.)

In the instant case, the warnings required by *Ferrier* were never provided to the Defendant prior to the warrantless search for evidence for which his consent was clearly required.

D. Conclusion

As stated previously in the Defendant's briefing and illustrated by case law, the abbreviated warnings given to the Defendant in this matter are insufficient for the State to meet its burden to show that the Defendant's consent for the officers to enter his home to conduct a search and seizure was voluntary.

The trial court erred by finding that the Defendant had properly consented to the entry of law enforcement into his home. Based on the *Ferrier* violation, the defendant's conviction should be reversed and the seized evidence suppressed as a matter of law.

Respectfully submitted this 28th day of March, 2014.

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I certify that, on this 28th day of March, 2014, I caused a copy of Appellant's Reply to Respondent's Brief to be sent by U.S. Mail, first-class postage prepaid, to:

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