SUPREME COURT OF THE STATE OF WASHINGTON

Supreme Court Case No. 919844

STATE OF WASHINGTON, Respondent,

v.

DANIEL BRYON KINGMA, Petitioner.

AMENDED PETITION FOR DISCRETIONARY REVIEW

Appeal from the Washington Court of Appeals, Division Three

COA Case No. 32634-9-111

Daniel Bryon Kingma
P.O. Box 1754
Moses Lake, WA 98837

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Court Cases

Washington State Court Cases

Foreign State Court Cases

Statutes and Constitutional Provisions

A. IDENTITY OF PETITIONER

DANIEL BRYON KINGMA petitions this court to accept review.

B. DECISION

The decision terminating review attached herewith as Appendix B.

C. ISSUES ON REVIEW

1. Can a police officer, who is neither a property owner nor the agent of a property owner, create a trespass violation by asking a person to leave private property on one day, and then arrest the same person when he subsequently returns to the property on a later date?

2. For purposes of determining whether probable cause exists to arrest a person for criminal trespass, does the fact that a person has been invited onto the premises by the property owner constitute an "affirmative defense," or, rather, does it negate one of the essential elements of the offense?

3. Prior to arresting a suspect for criminal trespass, and when presented with sufficient facts to negate one of the elements of criminal trespass, does an arresting officer have a duty, under the Fourth Amendment and under article 1, section 7, to conduct further investigation as to such facts?

4. Does a family member's agitated emotional state, together with his use of profanity and obscene hand gestures, constitute evidence that he is unlawfully present on the premises for purposes of criminal trespass?

D. STATEMENT OF THE CASE

On October 14, 2013, Daniel Bryon Kingma, was arrested by Grant County Sheriff's Office, Corporal Mansford, for criminal trespass on his father's (Dale Kingma's) property. 1/15/14 RP 46–49. Corporal Mansford searched Daniel incident to the arrest and found a small baggie containing methamphetamine.[1] 1/15/14 RP 49; CP 97. The State charged Daniel with criminal trespass in the first degree and possession of a controlled substance, to wit, methamphetamine. CP 1–2; 11–12. Kingma moved to suppress evidence on the ground that the police lacked probable cause to arrest him. CP 15–57. After holding a suppression hearing, the trial court denied the motion. 1/15/14 RP 17–92; CP 71–74. In issuing its written ruling on the motion to suppress, the trial court relied on the testimony of three law enforcement officers and Daniel. CP 71. Daniel's father did not testify. Daniel filed written objections to the proposed findings. CP 60–68.

At the suppression hearing, the following testimony was presented. On October 6, 2013, Grant County Sheriff's Deputy David DeLaRosa responded to a theft of a motor vehicle report made by the father. 1/15/14 RP 22–24. Dale wanted Daniel to leave the property and not come back.

---

[1] Daniel and Dale's first names are used to avoid confusion.

1/15/14 RP 24, 28. The deputy verbally told Daniel that he "had to leave 'cause he was going to be trespassed from the property." 1/15/14 RP 26. Delarosa intended to notify the dispatch center to enter a "flag" in the Spillman database that Daniel was "trespassed" from the property. 1/15/14 RP 26, 28–29. The deputy told Daniel that his father wanted him to make arrangements to pick up his property at another time. 1/15/14 RP 29.

One week later, on October 14, 2013, Corporal Mansford responded to a trespass complaint at the father's property. 1/15/14 RP 38–40; CP 29. Dale explained that Daniel had arrived there to get some golf clubs, had come onto the property, and wanted to fight him. 1/15/14 RP 42. The father showed the corporal a picture he'd taken with his phone just before he reported the incident to dispatch, which showed Daniel in an agitated state, and "flipping the bird" with both hands. 1/15/14 RP 42–44. Corporal Mansford wrote out a written statement that the father signed. 1/15/14 RP 44–45; CP 29. The statement read:

> Danny Kingma trespassed on 10-14-13 wanted a set of golf clubs. Danny came onto my property yelling misc. profanity & wanted to fight. This is my son & I have a business to run, and can't have him on my property.

CP 29. *Nowhere in this written statement does Dale ever allege that he told his son to leave the property that day and that his son refused to leave.* Daniel was no longer on the property when Corporal Mansford arrived, and

his father had last seen him go across the street to a neighbor's house. 1/15/14 RP 42, 46. Neither Dale's oral nor his written statements mentioned the actual words that Daniel had used toward him.

The corporal asked dispatch to check the law enforcement database referred to as "Spillman" and was advised that it showed Deputy DeLaRosa had previously "trespassed" Daniel on October 6, 2013. 1/15/14 RP 45. Corporal Mansford then went to the neighbor's property. He recognized Daniel from prior contact and by the clothing worn in the cell phone photograph that Dale had shown him. 1/15/14 RP 46–47. Daniel told Mansford he had gone to the property to get a set of golf clubs that his father was going to put out there for him, and that he only went onto the property when his father invited him onto the property. 1/15/14 RP 48.

The father did not testify at the suppression motion hearing nor at the jury trial. Contrary to the rendition of facts set forth by the court in Findings 2.13 and 2.14, there is no support in Corporal Mansford's testimony for the claims that (1) the father asked Defendant to leave, (2) this request set in motion Daniel's attempting to fight his father, and that (3) the father took the picture when his son was supposedly "refusing" to leave and attempting to fight. 1/15/14 RP 38–54. Although the father had not told the deputy he'd invited his son onto the property, Corporal Mansford testified he never asked the father whether or not he had invited Daniel onto the

property. 1/15/14 RP 48. Without further investigation, the corporal arrested Daniel for criminal trespass. 1/15/14 RP 48–49. A jury subsequently convicted Daniel of possession of a controlled substance. CP 108.

On appeal, Daniel assigned error, *inter alia*, to findings of fact 2.13 and 2.14, and claimed that his arrest violated both the Fourth Amendment and article 1, section 7 of the state Constitution because Corporal Mansford lacked probable cause to arrest him, arguing (1) that the information from the Spillman database was too unreliable to establish that Daniel had previously received sufficient notice that his father was excluding him from the property and (2) that Corporal Mansford had a duty to conduct additional investigation once Daniel explained that he had been invited onto the property by his father. The Court of Appeals disagreed, finding sufficient evidence for Corporal Mansford to conclude that Daniel had committed trespass and that Corporal Mansford did not have a duty to conduct additional investigation because the alleged invitation constituted an "affirmative defense" which Corporal Mansford had no duty to investigate under RCW 9A.52.090(3), citing *State v. Fry*, 168 Wn. 2d. 1, 8, 10, 228 P.3d 1 (2010); *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029 (1999).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

1) **The decision of the Court of Appeals is in conflict with a decision of the Supreme Court. RAP 13.4(b).**

Probability, not a prima facie showing of criminal activity, is the standard for probable cause. *State v. Patterson*, 83 Wash.2d 49, 55, 515 P.2d 496 (1973). A defense that necessarily negates an element of an offense is not truly an affirmative defense. *State v. W.R., Jr.*, 181 Wash. 2d 757, 762, 336 P.3d 1134, 1137 (2014) citing *State v. Fry*, 168 Wash.2d 1, 7, 228 P.3d 1 (2010). Daniel's claim that he was invited negated the essential element of "entered or remained unlawfully" where there was no evidence that he was told to leave the premises on the date in question. The use of abusive names, yelling, and profanity are constitutionally protected and cannot be the basis for an arrest. *State v. E.J.J.*, Sup. Ct. (Slip opinion) No. 88694-6, 2015 WL 3915760, at 1 (June 25, 2015).

2) **The decision of the Court of Appeals is also in conflict with another decision of the Court of Appeals. RAP 13.4(b)(1).**

The Court of Appeals erroneously concluded, contrary to *State v. Bowers*, 36 Wash. App. 119, 123, 672 P.2d 753, 755 (1983), "Dale informed Corporal Mansford that Daniel had trespassed on his property on the day in question. A logical inference from Dale's statement was that Daniel was not invited or otherwise privileged to be on the property." Dale's statements were purely conclusory, without any factual basis given to support them.

3) A significant question of law under the Constitution of the State of Washington or of the United States is involved.

The issue is whether Cpl. Mansford had a duty to investigate further, those facts tending to negate one of more essential elements of criminal trespass, before invoking "the awesome power of arrest and detention." Under federal constitutional law, the police have such duty in situations in which there exists conflicting evidence—i.e., evidence that negates the essential elements of the alleged crime—as to whether the person has in fact committed the crime of which he is accused, as illustrated by the following decisions of the U.S. Court of Appeals: *Moore v. The Marketplace Restaurant*, 754 F.2d 1336 (7th Cir.1985); *Kuehl v. Burtis*, 173 F .3d 646, 651 (8th Cir.1999); *Sevigny v. Dicksey*, 846 F.2d 953, 957–58 (4th Cir.1988); *Merriman v. Walton*, 856 F.2d 1333, 1335 (9th Cir.1988); cert. denied, 491 U.S. 905 (1989); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir.1986). Our state Constitution affords greater protections against warrantless searches than does the Fourth Amendment. *State v. O'Neill*, 148 Wash. 2d 564, 595, 62 P.3d 489, 506 (2003).

4) Daniel's claim that he only went onto the property after his father had invited him is properly characterized as information negating the essential element of "unlawfully" entered or remained.

Court of Appeals was of the view that Daniel's claim that he had been invited onto the property, a claim that was not contradicted by anything his

father had told Cpl. Mansford, was nevertheless an "affirmative defense" as provided by RCW 9a.52.090(3). Petitioner respectfully disagrees. As the Supreme Court recently noted in *State v. W.R.*, Jr., 181 Wash. 2dat 762, the mere fact that a statute describes certain facts as constituting an "affirmative defense" is not dispositive. Since Dale had only told Mansford that Daniel "trespassed" and never specifically stated that he had told Daniel to leave that day, the information proffered by Daniel that his father had invited him onto the property was information that negated the probable cause, because it established that his presence on the property was lawful.

5) Dale's conclusory statements that Daniel "trespassed" on October 14, 2013, did not supply probable cause.

An arresting officer's probable cause to arrest must be grounded on a factual basis of criminal activity, and not on the mere conclusion of another. *State v. Bowers*, 36 Wn. App. 119, 123 (1983). Establishing a factual basis for the informant's allegations is essential to ensure that information communicated to police was not based on sheer speculation or provided by an honest informant who simply misconstrued innocent conduct. *Sieler*, 95 Wn.2d at 48-49.

As in the case of *Bowers*, Petitioner does not argue that Dale was not a credible informant. Rather, Petitioner focuses on the possibility that Dale may have misunderstood the law or that he may have misconstrued innocent

or constitutionally protected conduct which, in and of itself, does not constitute criminal trespass. "Where, however, the information of the defendant's criminal activity is merely in conclusory terms, such as here, credibility of the informant in the abstract will not suffice." *State v. Bowers*, 36 Wash. App. 119, 123, 672 P.2d 753, 755 (1983) *citing Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964).

The bare conclusions of even a reliable informant, without more, cannot give rise to a reasonable suspicion of criminal activity. *State v. Lesnik*, 84 Wn.2d 940, 944 (1975). "There must still exist some measure of objective fact from which the conclusion of criminal conduct can reasonably be derived. To hold otherwise would be to expose every citizen's right of privacy against arbitrary invasion by others to the unfettered exercise of an officer's discretion." *Campbell v. State of Wash. Dep't of Licensing*, 31 Wash. App. 833, 837, 644 P.2d 1219, 1221 (1982), *citing State v. Stroud*, 30 Wash.App. 392, 397-98, 634 P.2d 316 (1981), *quoting Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979).

6) Probable cause was established neither by Deputy Delarosa's previous interaction with Daniel, in which he informed him that he "had to leave 'cause he was going to be trespassed from the property," nor by the information provided to Cpl. Mansford via dispatch.

At no time during the suppression hearing did the State establish that

Deputy Delarosa acted as an authorized agent for the property owner. A police officer who is neither an owner of a property nor an agent of an owner of a property cannot create a trespass violation by asking a person to leave and then arrest the person when he refuses to do so. *Glispie v. State*, 955 N.E.2d 819 (Ind. Ct. App. 2011). See also *Perry v. State*, 139 Ga. App. 207, 228 S.E.2d 195 (1976); *St. Louis Cnty. v. Stone*, 776 S.W.2d 885 (Mo. Ct. App. 1989); *Grossman v. St. John*, 323 S.W.3d 831 (Mo. Ct. App. 2010); *Templin v. State*, 159 Ala. 128, 129, 48 So. 1027, 1028 (1909); *Palmer v. State*, 112 So. 3d 606, 608 (Fla. Dist. Ct. App. 2013) *quoting Gestewitz v. State*, 34 So.3d 832, 834 (Fla. 4th DCA 2010) ("[A] police officer—under the trespass statute—may issue a trespass warning for unauthorized entrance into a structure, but does not have the legal authority to conduct an investigatory stop or arrest for trespass unless the owner or his agent first warned the potential trespasser."); *State v. Blair*, 65 Wash. App. 64, 70 (1992) ("However, the fact that the officer had told Blair not to return to the premises does not, in itself, create probable cause for arresting him on the charge of criminal trespass.").

With regard to the incident of October 6th, Deputy Delarosa testified that he responded to a complaint that Daniel allegedly took his father's vehicle without permission. 1/24/2014 RP at 24. Delarosa testified that he talked to Daniel and his father, and "[i]t was resolved with Mr. Kingma and

his dad coming to an arrangement that he would leave the property and not come back." *Id.* The prosecutor then asked, "Now, but then—did you advise him he was trespassed from the property," to which Delarosa responded in the affirmative. *Id.* Delarosa told Daniel at that time that he was not to come back, *Id.*, but did not testify by what authority he provided such advice. Delarosa never informed Daniel that he was acting as Dale's agent. *Id.*

On cross-examination, Delarosa explained that he told Daniel that he needed to leave because "he was going to be trespassed" from the property, indicating that some future action would take place but not indicating by whom such action would be taken. *Id.* at 26. Delarosa further testified that Daniel's father may not even have been within earshot at the time. *Id.* Compare with *State v. Blair,* 65 Wn. App. 64, in which the Seattle Housing Authority had entered into an agreement with the Seattle Police Department authorizing the latter to warn and arrest anyone trespassing on the premises, thereby making the Seattle P.D. authorized agents for this purpose.

Delarosa testified that he had nothing in writing from Dale Kingma making him his authorized agent for purposes of excluding Daniel. RP 27. And there was no testimony that Dale had issued any type of notice, written or otherwise, temporarily or permanently excluding Daniel from the property. *Id.* Instead, Delarosa's only description of what transpired between Dale and his son on October 6th was an oral "arrangement" that Daniel

would leave and not come back. RP 24. However that communication was garbled by some later discussion about Daniel needing to make arrangements with his father to return to the property in the future in order to collect his belongings:

> Q Okay. Did you mention anything to him about coming back to get his property at another time?
>
> A Yes.
>
> Q And what was that?
>
> A Oh, I told -- He -- His dad had requested -- to make arrangements with his father to come pick up his property on a later date.

Id. at 29. It is noteworthy that the request for such arrangements came from Dale and not Daniel. Thus the communication to Daniel was not a clear notice that he could never return to the property. Rather, the father explicitly indicated that Daniel should make arrangements to return at a later date to pick up his property, and this should have placed law enforcement on notice that Daniel might have permission to return to Dale's property at some point in the future; however, it does not appear from the record that Delarosa ever noted this in the Spillman database.

Deputy Delarosa explained why he told Daniel that he was *going* to be trespassed. "Yes, 'cause as soon as I got done talking with him I was

going to call -- notify our dispatch center to flag him in our Spillman that he was trespassed from the property, since he does not live there." 1/15/14 RP at 24. Cpl. Mansford later described checking Spillman on October 14, 2013, and confirming that Daniel had previously been "trespassed" from the premises by Deputy Delarosa. "I had contacted the MAC dispatch to have them research Daniel to find out if he had ever been criminally trespassed and it documented in the law enforcement database we refer to as Spillman, and they came back in the affirmative and said that Dep. DeLaRosa had trespassed him on October 6th, I believe, of that year." 1/13/2014 RP at 45. A reasonable inference is that Deputy Delarosa never noted in Spillman that Dale had requested for Daniel to make arrangements to return at a later date to collect his belongings. Later in the suppression hearing, Mansford described in general terms the procedure that he typically follows when "trespassing" a subject from private property:

> Q And, what is the process for -- trespassing someone from property?
>
> A Mr. Owens, the process that we use is -- if some -- a property owner or a business owner has somebody that they would like trespassed off their property, we verbally contact them, we advise them that "You are criminally trespassed from this property and you are to not return."

Q You do that verbally.

A Yes.

Q Do you -- Is there any form that you have to sign that you fill out that you give to (inaudible)?

A No.

Q Is there any form that the victims who are asking the person to stay off the property, that they sign to advise them of that?

A No.

1/15/14 RP at 53-54. Mansford thus described a process in which a subject is simply told by a law enforcement officer, "You are criminally trespassed from this property and you are to not return." There is no written memorialization of what was said and no information that the deputy sheriff acts as the owner's agent for purposes of this notice.

Mansford's testimony differed from Deputy Delarosa's testimony in one important respect. According to Mansford, the subject is told, "You are criminally trespassed." According to Delarosa, he simply told Daniel that he needed to leave because he was *going* to be trespassed. The Grant County Sheriff's Office did not show that it followed a uniform procedure that would form the basis of a reliable database from which an officer in the field can confirm that a suspect has been excluded from a property.

For the above-stated reasons, probable cause was not established by the information relayed to Mansford by dispatch. The fellow officer rule does not apply to misdemeanors. *State v. Ortega*, 177 Wash. 2d 116, 127, 297 P.3d 57, 62 (2013). Thus information known to Deputy Delarosa but not relayed to Mansford could not have supplied the basis for probable cause on a nonviolent misdemeanor offence such as criminal trespass.

Likewise the information provided by dispatch could not have supplied probable cause to arrest. The Spillman Database should not be deemed presumptively reliable; although there certainly have been times where the courts have found information obtained from a government database to be presumptively reliable. See. e.g., *State v. Gaddy*, 152 Wn.2d 64, 69, 93 P.3d 872, 874-75 (2004) (information from DOL in police database "presumptively reliable" for purposes of drivers' license info).

But in contrast with *Gaddy*, the Grant County Sheriff's Office employed an inherently unreliable procedure. It is premised upon the erroneous assumption that an officer in the field has the authority to exclude a person from private property without express authorization from the owner, without any agency agreement, and without any oral or written notification from the owner to the subject who is being excluded. The procedures vary considerable. One deputy tells a subject that he is "going to be trespassed" while another informs the person that he is "criminally

trespassed and may not return." Under such circumstances, the Spillman database relied upon by the Grant County Sheriff's Office is not an inherently reliable source of information for purposes of supplying probable cause to arrest.

7) Probable cause was not established by the information relayed to Corporal Mansford by Dale Kingma.

Petitioner concedes that Dale Kingma could have established at least an articulable suspicion for criminal trespass simply by saying that he had told Daniel to leave his property that day, and that Daniel refused to leave; but this never happened. The record contains three references to information supplied by Dale regarding his allegation that his son was trespassing on his land on October 14, 2013. Dale reported to MAC dispatch that Daniel was trespassing. 1/15/14 RP at 51. Mansford also testified, "Well, Dale had explained to me that his son Daniel had been trespassing on the property. He [Daniel] had arrived there to get some golf clubs, had come onto the property and wanted to fight his dad." 1/15/14 RP at 42.

Finally, Dale provided a written statement (quoted Supra, at 3). CP 29 [admitted as Exhibit 2]. In each of these three instances, all that Dale actually reported was *his conclusion* that his son was trespassing. Dale did not supply Mansford with any specific facts from which Mansford could conclude that Daniel's presence on the property was actually unlawful. The

trial court erred in entering Finding of Fact 2.13, which states, in part, "When Dale asked him to leave Daniel was attempting to fight Dale." CP 72-73. There is absolutely no testimony anywhere in the record that Dale ever asked Daniel to leave. Furthermore the trial court never resolved the disputed facts with separate conclusions as required by Criminal Court Rule 3.5(c). Thus it is not entirely clear that the trial court actually adopted the "disputed facts" as the court's facts.

Finding of Fact 2.14 is similarly erroneous. It states, "Dale showed the picture he took of Daniel when Daniel was on the property *refusing to leave* and attempting to fight to Mansford." CP 72-73. Again, this finding contains two highly questionable assertions, the first being that Daniel was "refusing to leave" and the second being that Daniel was "attempting to fight." There was no testimony that Daniel was "refusing to leave." Such a finding implies that Daniel was asked to leave; but there is no evidence in the record that Daniel was ever asked to leave. Similarly, the statement attributed to Dale is that Daniel was *wanting* to fight, not that he was attempting to fight. There is no evidence in the record that Daniel ever actually attempted to fight his father.

As in the case of *State v. Blair*, 65 Wash. App. at 70, Mansford arguably had an articulable suspicion that Daniel might be trespassing on October 14th, based on the fact that Deputy Delarosa had admonished Daniel

not to return on October 6th and that Daniel had been the subject of previous trespassing complaints at the residence.

8) **The Court of Appeals erred in concluding that findings of fact 2.13 and 2.14 were supported by Corporal Mansford's testimony and in concluding that the court's findings support the conclusion that probable cause supported the Petitioner's arrest.**

The Court of Appeals Unpublished Opinion states:

> The court's findings, in turn, support the conclusion that Corporal Mansford had probable cause to arrest Daniel for criminal trespass. To recap the findings; (1) Corporal Mansford had been to Dale's property on previous trespass calls involving Daniel, (2) Dale stated that Daniel was trespassed from his property and that Daniel had entered the property in an agitated and aggressive state, (3) dispatch confirmed that Daniel had been trespassed from his father's property, (4) Dale showed Corporal Mansford a photo of Daniel on his property, and (5) Dale provided a written statement, asserting that Daniel trespassed on his property on October 14, 2013. Taken together, these facts would lead a reasonable officer to conclude that Daniel was trespassing.

See Unpublished Opinion at 7-8. As for (1), prior arrests or convictions do not, by themselves, afford sufficient grounds for believing that a person is currently engaging in criminal activity. *State v. Hobart*, 94 Wn.2d 437, 446-447 (1980). The law does not permit the police to assume that certain individuals are perpetually engaged in criminal behavior. As explained in *Hobart*:

> If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed. To the

> best of our knowledge, the law does not countenance such an assumption.

Id. [Footnote omitted]. With regard to (2), it is not the case that the Findings of Fact state that "Dale stated that Daniel was trespassed from his property." *Dale never stated that Daniel was trespassed from his property,* and the Findings of Fact never attributed such a statement to Dale. As for (3), the fact that dispatch "confirmed" that Daniel had been "trespassed" from the property on October 6th does not establish that his presence there on October 14th was actually unlawful. Given the lack of reliability of the Spillman database, it does little more than confirm that there had been a previous incident involving Daniel and his father. The Spillman record fails to establish that the property owner ever excluded him from the property.

As for (4), the photo of Daniel "flipping the bird" only establishes that Daniel was engaging in constitutionally protected conduct by expressing anger toward his father. It does not establish that he was committing the crime of criminal trespass. And finally, with regard to (5), Dale's various statements that Daniel was "trespassing" are merely conclusory in nature, as argued, *supra*, at 6-9. In short, it is not the case that the Superior Court's blatantly erroneous findings of fact support the conclusion that Mansford had probable cause to arrest.

CONCLUSION

In conclusion, the Court should accept review and should reverse both the Court of Appeals and the Superior Court. Deputy Delarosa and the Grant County Sheriff's Office lacked authority to permanently exclude Daniel from his father's property. But even if Delarosa did have the authority to exclude Daniel from his father's residence on October 6th, the information supplied by Daniel on October 14th, that he only entered the property because his father had invited him, was reasonable and would have negated the essential elements of criminal trespass if proven true. Corporal Mansford had a duty to investigate further. The bare conclusions of Dale Kingma that Daniel "trespassed" on October 14th, without more concrete information as to the particular facts constituting the crime, are insufficient to establish probable cause. The Court should accept review and reverse the judgment below.

DATED this 14th Day of August, 2015

Respectfully submitted,

DANIEL BRYON KINGMA
PETITIONER

APPENDIX A

Declaration of Service

DECLARATION OF SERVICE

COMES NOW DAVID BUSTAMANTE, and declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on the ~~10th~~ 17th day of August, 2015, I caused the subjoined Amended Petition for Discretionary Review, in the matter of *State of Washington, Respondent, v. Daniel Bryon Kingma, Petitioner*, Supreme Court Cause No. 919844, to be served on the Respondent, State of Washington, by personally hand-delivering a true and correct copy to the offices of the Grant County Prosecuting Attorney's Office located at 35 C Street N.W., Ephrata, Washington 98823.

Signed at Ephrata, Washington, this ~~10th~~ 17th day of August, 2015.

David Bustamante

DAVID BUSTAMANTE
Declarant

APPENDIX B

Unpublished Opinion of the Court of Appeals, Division 3

FILED
JUNE 23, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DANIEL BRYON KINGMA, Appellant.	)	No. 32634-9-III UNPUBLISHED OPINION

KORSMO, J. — Daniel Bryon Kingma appeals his conviction for unlawful possession of methamphetamine, contending the trial court erred in denying his motion to suppress evidence seized pursuant to a search incident for arrest for criminal trespassing. Mr. Kingma contends that the search was unlawful because law enforcement lacked probable cause to believe he committed a crime. We find no error and affirm.

FACTS

On October 14, 2013, Grant County Corporal Gary Mansford was called to Dale Kingma's residence regarding an alleged trespass by his son, Daniel Kingma, age 40.[1] When Corporal Mansford arrived at Dale's property, Dale explained that Daniel had

[1] To avoid confusion, we refer to Dale and Daniel Kingma by their first names. We intend no disrespect.

come onto the property to retrieve golf clubs that Dale had placed on the edge of the property. According to Dale, when Daniel arrived he was high on drugs, yelling, and wanting to fight. Dispatch confirmed that Daniel had been trespassed from his father's property on October 6, 2013, by Grant County Sheriff's Deputy David Delarosa.

Dale told Corporal Mansford that he had last seen Daniel crossing the street to a neighbor's house. Corporal Mansford contacted Daniel in the neighbor's driveway. Daniel admitted going onto his father's property, but claimed his father had invited him. Corporal Mansford arrested Daniel for criminal trespass. During a search incident to arrest, he found methamphetamine in Daniel's pocket.

The State charged Daniel with possession of a controlled substance (methamphetamine). Clerk's Papers (CP) at 1. Daniel moved to suppress the methamphetamine in a CrR 3.6 hearing.

At the hearing, Deputy Delarosa testified that on October 6, 2013, he responded to a call from Dale regarding the theft of a car. He stated that Dale and Daniel eventually agreed that "[Daniel] would leave the property and not come back." Report of Proceedings (Jan. 15, 2014) (RP) at 24. Deputy Delarosa told Daniel that he was trespassed from his father's property and notified dispatch to flag Daniel in the Spillman database as trespassed from Dale's property.

Corporal Mansford testified that he had been involved in previous incidents regarding Daniel trespassing on his father's property. He stated that when he arrived at Dale's property on August 14, 2013, Dale told him that Daniel had arrived to get some golf clubs, but that Daniel had entered the property wanting to fight. Corporal Mansford stated that Dale showed him a photograph he took of Daniel just before Corporal Mansford arrived at the property. The photograph shows Daniel on Dale's property flipping his two middle fingers to Dale. Exhibit 1. Corporal Mansford also obtained the following written statement from Dale:

> Danny Kingma trespassed on 10-14-13 wanted a set of golf clubs
> Danny came onto my property yelling misc. profanity and wanted to fight.
> This is my son and I have a business to run. And I can't have him on my property.

Exhibit 2.

Corporal Mansford also testified that the Spillman database confirmed that Daniel had been trespassed from his father's property about a week earlier. According to Corporal Mansford, when he contacted Daniel, Daniel told him his father had invited him onto the property to retrieve his golf clubs.

Dale did not testify at the CrR 3.6 hearing. Daniel testified that he believed he had the right to be on his father's property because he was not given written notice that he

was trespassed from the property. He also stated that he had made arrangements with his father to return to the property and retrieve personal property.

Defense counsel argued that Daniel's claim that he was invited onto the property negated probable cause and that a "reasonably cautious" officer would have investigated the claim. RP at 85.

The trial court denied Daniel's motion to suppress the evidence, concluding, "Corporal Gary Mansford had formed information that led to the deputy developing probable cause to believe that Daniel Kingma had unlawfully trespassed upon [Dale's] property." CP at 73. The court entered the following disputed findings of fact:

> **DISPUTED FACTS:**
>
> 2.12 On October 6, 2013 Deputy Delarosa contacted Daniel Kingma 4156 Rd. F NE and verbally informed the defendant that he was trespassed from that property. On the same date the information of the defendant being trespassed was entered into the information system "Spillman".
>
> 2.13 Dale Kingma informed Corporal Mansford that Daniel Kingma was trespassing on Dale Kingma's property. That Daniel had arrived to retrieve Daniel's golf clubs, and would not leave. When Dale asked him to leave Daniel was attempting to fight Dale. Dale took a picture with his cell phone of Daniel while Daniel was on the property and attempting to fight Dale.
>
> 2.14 Dale showed the picture he took of Daniel when Daniel was on the property refusing to leave and attempting to fight to [sic] Corporal Mansford.

> 2.15 Corporal Mansford testified he has been to that residence and property before on the same type of call. At that time Daniel Kingma was asked to leave the property and not return.
>
> 2.16 Dispatch advised Corporal Mansford that Deputy David Delarosa had notified Dispatch that on October 6th, 2013, Daniel Kingma had been notified by Deputy Delarosa that he was trespassed from going to, or going on, the property located at 4156 Rd F NE, Moses Lake, Washington.
>
> 2.17 Deputy David Delarosa testified that on October 6th, 2013 he had informed Daniel Kingma verbally at the scene that Daniel was trespassed from 4156 Rd F NE, Moses Lake Washington and was not to come back. Deputy Delarosa then put the information that Daniel Kingma was trespassed from 4156 Rd. F NE, Moses Lake Washington, in the Spillman system for all officers and dispatches information.
>
> 2.[1]8 Both Deputy's [sic] testified that Daniel Kingma informed them that he had been on the property but had been told by Dale Kingma he could go on the property to get his golf clubs. Daniel Kingma told the Deputies that he only went on the property when he was told he could go on the property.

CP at 72-73.

A jury found Daniel guilty of unlawful possession of methamphetamine.

ANALYSIS

Daniel argues that his arrest violated the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution because Corporal Mansford lacked probable cause to arrest him. Specifically, he contends that (1) information in the Spillman database was unreliable and (2) additional investigation was required to establish whether Daniel was on his father's property for a legitimate purpose.

Accordingly, he argues that the trial court should have suppressed the methamphetamine seized during the search incident to arrest.

In reviewing the denial of a motion to suppress, we must determine whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Police may conduct a warrantless search incident to arrest as long as there is probable cause to arrest at the time of the search. *State v. O'Neill*, 104 Wn. App. 850, 868-69, 17 P.3d 682 (2001). Probable cause exists where the facts and circumstances known to the arresting officer are sufficiently trustworthy to cause a reasonable officer to believe that an offense has been committed. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

Daniel first assigns error to the trial court's disputed findings of fact 2.12 to 2.18. However, in footnotes, he devotes argument only to findings 2.13, 2.14, 2.16, and 2.18, contending there is no testimony to support findings of fact 2.13, 2.14, and 2.16, and that finding of fact 2.18 omits the word "invited" in summarizing Corporal Mansford's testimony. Regarding the remaining findings, 2.12, 2.15, and 2.17, Daniel does not

provide specific argument as required by RAP 10.3(a)(6). Accordingly, we treat the findings as verities on appeal. *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990).

We find substantial evidence supports the challenged findings. First, findings of fact 2.13 and 2.14 are supported by Corporal Mansford's following testimony:

> Dale Kingma had explained to me that his son Daniel had been trespassing on the property. He had arrived there to get some golf clubs, had come onto the property and wanted to fight his dad...
>
> [Dale] took a photograph of Daniel as he was getting more and more aggressive, agitated. He stepped back, took a – took a photograph of – of Daniel, and – called MAC dispatch.

RP at 42.

Finding of fact 2.16 is supported by Corporal Mansford's testimony that dispatch confirmed that Deputy Delarosa had trespassed Daniel from his father's property on October 6, 2013. As to finding 2.18, we find it immaterial that the court failed to use the word "invited" in summarizing Corporal Mansford's testimony. The finding adequately reflects that Daniel told law enforcement officers that his father invited him onto the property.

The court's findings, in turn, support the conclusion that Corporal Mansford had probable cause to arrest Daniel for criminal trespass. To recap the findings; (1) Corporal Mansford had been to Dale's property on previous trespass calls involving Daniel, (2)

Dale stated that Daniel was trespassed from his property and that Daniel had entered the property in an agitated and aggressive state, (3) dispatch confirmed that Daniel had been trespassed from his father's property, (4) Dale showed Corporal Mansford a photo of Daniel on his property, and (5) Dale provided a written statement, asserting that Daniel trespassed on his property on October 14, 2013. Taken together, these facts would lead a reasonable officer to conclude that Daniel was trespassing.

Daniel's arguments to the contrary are not convincing. He asserts that Corporal Mansford did not have probable cause to arrest him because the information in the Spillman database was unreliable and Corporal Mansford improperly assumed Daniel had been given legally sufficient notice of the trespass. This argument misses the mark. Even if the information in the Spillman database was incorrect, the probable cause determination stands. Probable cause turns on what the arresting officer knew at the time of the arrest. This information must be "reasonably trustworthy." *State v. Conner*, 58 Wn. App. 90, 97-98, 791 P.2d 261 (1990). We do not evaluate probable cause in a hypertechnical manner. *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282 (1992).

Corporal Mansford had no reason to doubt the reliability of the information provided by dispatch. In the absence of circumstances indicating the report was unreliable, the information was "reasonably trustworthy" and Corporal Mansford properly

relied on it in forming probable cause. *Conner*, 58 Wn. App. at 97-98. Moreover, in evaluating probable cause, we consider the *totality* of the known suspicious circumstances. *State v. Terranova*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Thus, even if we were to conclude that the facts of the Spillman notice were unreliable, the other facts, detailed above, adequately established probable cause.

Next, citing *State v. Blair*, 65 Wn. App. 64, 827 P.2d 356 (1992), Daniel asserts that Corporal Mansford should have conducted additional investigation to determine whether Daniel was on the property for a legitimate purpose. We disagree. Although Washington provides an affirmative defense to criminal trespass if "[t]he actor reasonably believed that the owner of the premises . . . would have licensed him or her to enter or remain," it is well settled that officers are not required to weigh affirmative defenses. RCW 9A.52.090(3); *State v. Fry*, 168 Wn.2d 1, 8, 10, 228 P.3d 1 (2010); *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029 (1999). Thus, in this case, whether Daniel believed he had permission to be on Dale's property is irrelevant to the issue of probable cause.

Blair, the case on which Daniel relies, does not compel a different result. *Blair* involved an agreement between the Seattle Police Department and the Seattle Housing Authority authorizing the police department to warn and arrest anyone trespassing on the

premises of a public housing complex. The officer in that case testified that the agreement allowed him to "admonish" any person whom he believed had engaged in illegal activity or who had been arrested on the premises of the housing complex. *Blair*, 65 Wn. App. at 66. The officer admonishes the person not to return to the complex or he or she will be arrested for trespassing.

The officer stopped Blair as he was walking into the housing complex and arrested him for trespassing without investigating Blair's statement that he was visiting a friend. In arresting Blair, the officer relied solely on the fact that he had previously instructed Blair not to enter the complex when the officer had arrested Blair in a nearby parking lot for drug activity. Division One of this court held that although the officer had an articulable suspicion that Blair was trespassing, "the fact that the officer had told Blair not to return to the premises *does not, in itself,* create probable cause for arresting him on the charge of criminal trespass." *Id.* at 70 (emphasis added).

The facts here are markedly distinguishable. In addition to the information that Officer Delarosa had trespassed Daniel from the property, Dale informed Corporal Mansford that Daniel had trespassed on his property on the day in question. A logical inference from Dale's statement was that Daniel was not invited or otherwise privileged to be on the property. Additionally, *Blair* predates *McBride* and *Fry* and did not analyze

whether the affirmative defense negates probable cause. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *In re Electric Lightware, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

In both *McBride* and *Fry*, the arresting officers had substantial facts and information to support the respective potential affirmative defenses. Nevertheless, both cases hold that an officer is not required to determine whether the affirmative defense is met. *Fry*, 168 Wn.2d at 8; *McBride*, 95 Wn. App. at 40. Here, Corporal Mansford had a legal foundation for the arrest based on probable cause. Under well settled precedent, he was not required to dispel every explanation or hold a quasi-trial to determine whether Daniel was invited onto the property. We therefore affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, J.

Siddoway, C.J.