SUPREME COURT NO. 97548-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONG PHAM,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 51213-1-II
Clark County No. 16-1-02172-7

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, LONG PHAM, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Pham seeks review of the July 16, 2019, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Although he had no reasonable suspicion Pham was engaged in criminal activity, a deputy contacted Pham as he walked down the street and asked him questions about the car he had just left. Once Pham answered a few questions, the deputy told him he wanted to talk to Pham about whether the car was stolen. Where the deputy's accusation indicated that compliance with his request might be compelled, must evidence obtained as a result of the seizure be suppressed?

2. After Pham's credibility had been attacked on cross examination regarding his criminal history, the defense sought to reopen its case to present a declaration of Pham's criminal history prepared by the State during plea negotiations. The court denied Pham's motion to reopen based on its determination that the document was inadmissible under ER 410. Where the document does not constitute a guilty plea, an offer to

plead guilty, or a statement in connection with such plea or offer, does the court's erroneous application of ER 410 require reversal?

D. STATEMENT OF THE CASE

At about 11:30 in the evening of October 15, 2016, Clark County Sheriff's Deputy Ryan Preston was on routine patrol when he pulled into the parking lot of a 7-Eleven. RP 29-31. He saw a newer model Ford Fusion in the parking lot, and as he does in every parking lot he enters while on patrol, he ran the license plates. RP 30, 34-35. While waiting for information on the vehicle, he circled the building. RP 36. When he again approached the Fusion, he saw a man, later identified as Long Pham, walking away from the car. When Pham noticed Preston's patrol car he changed directions and started walking down the street. RP 36-37.

By this point Preston had learned that the Fusion had not been reported stolen and that the registered owner was a woman. RP 40. He followed Pham in his patrol car, and when Pham stopped at a corner Preston pulled up next to him and initiated a conversation. RP 42. Preston asked Pham if he had just come from the Fusion, and Pham said he had. RP 42-43. Preston asked who owned the car, and Pham said a friend, although he sounded uncertain and could not identify that person. RP 43. Preston then told Pham that he wanted to talk to him about whether the car was stolen. RP 46, 57. In response, Pham immediately fled. RP 43, 46.

Preston continued to follow Pham, and when he saw Pham throw a backpack from his shoulders, he decided to detain Pham. RP 58. As Preston approached he saw Pham fall and a plastic container fall from his hand. RP 58. Preston handcuffed Pham and placed him in his patrol car. RP 159. Preston searched Pham and the backpack. He recovered a container of buprenorphine, a glass pipe which Pham said he used to smoke methamphetamine, straws and a scale with residue of what appeared to be heroin, empty plastic baggies, a plastic container of heroin, and a container of methamphetamine. RP 166, 169, 171-75, 177-79, 182, 262-65.

Pham was charged with unlawful possession of heroin with intent to deliver, unlawful possession of methamphetamine, and unlawful possession of buprenorphine. CP 115-16; RCW 69.50.401(1), (2)(a); RCW 69.50.4013(1). He moved to suppress the evidence discovered in the backpack and on his person, arguing that Preston lacked reasonable suspicion to detain him during their initial encounter. RP 65; CP 2-14.

The State agreed that Pham's startled reaction to seeing Preston and his quick departure from the area did not give rise to a reasonable suspicion that Pham was engaged in criminal activity. RP 70. It argued that Preston did not seize Pham merely by engaging him in conversation, and a reasonable person in Pham's position would feel free to leave. The

encounter did not turn into a seizure until Preston had reasonable suspicion of criminal activity, when Pham started throwing things as he ran. RP 68- 70.

The court recognized that until Pham started throwing the bag he was carrying there was no justification for a *Terry* stop. RP 73. It found, however, that there was no seizure during the social contact, and Preston "did not say anything to direct or command [Pham] to speak with him." CP 156; RP 74. But once Pham threw the backpack, the circumstances created reasonable suspicion of criminal activity and the subsequent seizure was permissible. RP 73-74. It denied Pham's motion to suppress. RP 74.

The case proceeded to trial. Preston described the incident and testified that when he asked Pham about the drugs in his possession Pham said he was dealing drugs and that he was a middleman. RP 185-86.

Pham testified in his defense. He admitted possessing the controlled substances and explained that he is a drug addict and they were for his personal use. RP 275-76. He denied telling Preston he was a drug dealer, saying he would not confess to something he has never done before. RP 273.

On cross examination the State was permitted to ask Pham about a prior conviction for possession of methamphetamine with intent to deliver,

to impeach his testimony that drug dealing is something he has never done before. RP 279-80, 283. When asked about the prior conviction, however, Pham responded that as far as he knew he did not have a conviction for possession with intent on his record. RP 283. The State attempted to refresh his recollection with a certified copy of the conviction documents. Pham agreed that the documents pertained to him and contained his signature. RP 284-88. He maintained, however, that his "rap sheet" did not include a possession with intent conviction. RP 288-89, 291.

After the defense rested and the State presented rebuttal testimony from Preston, defense counsel moved to reopen. In an offer of proof counsel indicated that the State had made an offer of settlement prior to trial. Attached to that offer was a declaration of Pham's criminal history. The declaration of criminal history described the conviction relied on by the State to impeach Pham as possession of methamphetamine. There is no conviction for possession with intent listed in the declaration. Counsel had shared the offer and attached declaration with Pham. RP 338-39. Counsel argued that the declaration was relevant to Pham's credibility because it would help explain why Pham was confused when he testified that he had no conviction for possession with intent. RP 339-41. The court ruled that the proposed evidence violated ER 410 because it was a statement in

connection with an offer of settlement, and therefore it could not be admitted. RP 342-43.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS'S HOLDING THAT PHAM WAS NOT UNLAWFULLY SEIZED CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION FOR REVIEW. RAP 13.4(b)(1), (3).

The Fourth Amendment of the U.S. Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...." Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is well established that Art. I, sec. 7 is more protective than the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

Warrantless seizures are per se unreasonable, or unlawful, under both the Fourth Amendment and Article I, section 7. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Where the State seeks to introduce evidence obtained via warrantless seizure, the State bears a burden to prove one of the narrowly drawn and jealously guarded

exceptions to the warrant requirement applies. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

Here, Preston followed Pham as he walked down the street and contacted him when he stopped at an intersection. Preston asked Pham if he had just come from the Ford Fusion and Pham said he had. Preston asked Pham if he was the registered owner, and Pham said the car belonged to a friend. Preston then told Pham that he wanted to talk to him about the vehicle and whether it was stolen. CP 156. Pham immediately started running away through the parking lot. CP 156. Preston followed, and when he saw Pham throw a backpack he had been carrying, he took Pham into custody. *Id*. Preston admitted that at the time he contacted Pham there was no reasonable suspicion that criminal activity was afoot, and he had no reasonable suspicion until Pham threw the backpack as he was running. RP 52.

Pham argued that evidence found in the backpack and on his person must be suppressed because it was the product of an unlawful detention. Preston did not have reasonable articulable suspicion that Pham was engaged in criminal activity and thus no justification for conducting a *Terry*[1] stop. CP 12-14.

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Under the *Terry* exception to the warrant requirement officers may briefly detain a suspect for investigation where there is a "'reasonable suspicion' that the detained person was, or was about to be, involved in a crime." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (quoting *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). Both the Fourth Amendment and Article I, section 7 require the officer's suspicion to be "grounded in 'specific and articulable facts.'" *Z.U.E.*, 183 Wn.2d at 617 (quoting *Terry*, 392 U.S. at 21)). Because Article I, section 7 is more protective than the Fourth Amendment, it "generally requires a stronger showing by the State." *Z.U.E.*, 183 Wn.2d at 617 (citing *Acrey*, 148 Wn.2d at 746-47, 64 P.3d 594; *Hendrickson*, 129 Wn.2d at 69, 917 P.2d 563).

The standard of review for determining whether a seizure occurred is a mixed one of fact and law. Factual findings are reviewed for "substantial evidence." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The legal determination of whether such facts constitute a "seizure" for Fourth Amendment and Art. I, sec. 7 analysis is reviewed *de novo*. *State v. Hansen*, 99 Wn. App. 575, 577-78, 994 P.2d 855 (2000).

To determine whether a seizure has occurred, courts consider whether "circumstances ... amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'"

Florida v. Royer, 460 U.S. 491, 499, 502, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983) (plurality) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497); *see also State v. Crespo Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing *Mendenall*, 446 U.S. at 554).

Under Art. I, sec. 7, the following police actions constitute a "nonexclusive list" which "likely result in seizure ... the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *U.S. v. Mendenhall*, 446 U.S. at 554-55)).

In particular, commands such as "halt," "stop, I want to talk to you," and "wait right here" qualify as seizures. *See State v. Whitaker*, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), *review denied*, 116 Wn.2d 1028 (1991); *State v. Ellwood*, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); *State v. Sweet*, 44 Wn. App. 226, 230, 721 P.2d 560, *review denied,* 107 Wn.2d 1001 (1986); *State v. Friederick*, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Here, Pham was seized under both the Fourth Amendment and Art. 1, sec. 7, by Preston's show of authority. *See Terry*, 392 U.S. at 19, n. 16 (noting seizure occurs when officers restrain liberty through force or show of authority).

As the State admitted and the trial court recognized, there was no reasonable, articulable suspicion of criminal activity at the time Preston stopped to talk to Pham. RP 70, 73. Preston found it curious that Pham had turned and walked away upon spotting him, and he wanted to question Pham. And Preston was curious whether the car Pham had been walking near was stolen, but he had no specific facts which could elevate his curiosity to a reasonable suspicion that Pham was engaged in anything criminal. RP 45.

What started as a permissible social contact, in which Preston merely engaged Pham in conversation and asked a few questions, ripened into a seizure when Preston told Pham he wanted to talk to him about whether the car was stolen. This accusation that Pham was knowingly associated with a stolen vehicle carried the implication that compliance with Preston's request might be compelled. *See Harrington*, 167 Wn.2d at 664 ("the use of language or tone of voice indicating that compliance with the officer's request might be compelled" constitutes a seizure).

The Court of Appeals holds that Preston's words were not sufficient to amount to a seizure, reasoning that unless there is also an authoritative tone of voice, display of a weapon, physical contact or a request to search, a reasonable person would not feel he was being compelled to stay. Opinion, at 8-9. The Court's attempt to characterize Preston's words as a mere request for information ignores the implicit accusation, which itself can be seen as compulsion. The Court's holding conflicts with *Harrington*, which recognized that the use of certain language can amount to a seizure.

That Preston's language constituted a show of authority is demonstrated by the fact that Pham fled the scene rather than simply declining to talk and continuing on his way. The Court of Appeals dismisses this fact as irrelevant, noting that the test is whether a reasonable person would have believed he was free to leave. Opinion, at 9. The Court overlooks that fact that Pham's reaction is evidence of the impact of the words used. While a reasonable person might not have chosen to flee as Pham did, Preston's words would be still interpreted by a reasonable person as a command to stay. The evidence does not support the trial court's finding that the deputy "did not say anything to direct or command the Defendant to speak with him" or its conclusion that Preston's initial contact with Pham did not rise to the level of a seizure. CP 156-57.

Where the State fails to prove that an exception to the warrant requirement applies, all evidence or statements derived directly or indirectly must be suppressed unless sufficiently attenuated from the initial illegality. *Wong Sun v. United States*, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995). Courts apply a "but-for analysis." *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

Here, the evidence found in Pham's backpack an on his person, as well as the statements he made when he was arrested, would not have been obtained but for the unlawful seizure. It should be suppressed and the charges against Pham dismissed.

2. THE ERRONEOUS APPLICATION OF ER 410 TO EXCLUDE RELEVANT EVIDENCE CRUCIAL TO THE DEFENSE RAISES A SIGNIFICANT CONSTITUTIONAL QUESTION AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE FOR REVIEW. RAP 13.4(b)(3), (4).

At trial, the defense moved to reopen its case to present evidence regarding the State's offer of settlement prior to trial, arguing it was relevant to Pham's credibility because it explained why Pham testified as he did about his prior convictions. RP 338-41. The court denied the motion based on its ruling that the evidence was inadmissible under ER 410. RP 342-43. That rule provides:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer….

ER 410(a). "The purpose underlying the rule is to encourage the disposition of criminal cases through plea bargaining by allowing an accused to participate candidly in plea discussions, without the fear that his plea or plea-related statements will be used against him at trial." *State v. Hatch*, 165 Wn. App. 212, 217, 267 P.3d 473 (2011) (citing *State v. Nowinski*, 124 Wn. App. 617, 621, 628, 102 P.3d 840 (2004)). This rule was designed to protect the defendant and by its terms applies to statements made in connection with an offer to plead guilty. It does not apply to statements made by the State during the plea bargaining process.

The Court of Appeals noted that the State conceded the trial court erred in ruling the defense evidence was inadmissible under ER 410. Opinion at 10. The Court of Appeals points out that the trial court found Pham had ample opportunity to clarify his confusion about his prior conviction on redirect examination. It holds, therefore, that the court properly refused to allow Pham to reopen the defense, regardless of the erroneous ruling. *Id*. What the Court of Appeals overlooks is that the trial court's finding is based completely on its misapplication of ER 410. It

found that Pham had ample opportunity because it believed the proposed evidence was inadmissible under ER 410. Thus, the sole reason the trial court denied Pham's motion to reopen the defense was its erroneous ruling that ER 410 rendered the proposed evidence inadmissible. The erroneous ER 410 ruling and denial of the motion to reopen are not separate issues; they are one and the same.

The trial court's error was prejudicial to the defense, which rested on Pham's credibility. Pham admitted being in possession of the charged substances but testified they were for his personal use. He denied telling Preston that he was a drug dealer and said he would not confess to something he had never done. RP 273. The State was permitted to offer evidence that Pham had been convicted previously of possession of methamphetamine with intent to deliver, to impeach his testimony. RP 279. Pham explained that he did not think he had a possession with intent conviction on his record because it was not included in his rap sheet. RP 283, 288. Evidence that he was in fact shown a declaration of criminal history which identified the offense as possession of methamphetamine, rather than possession with intent to deliver, would have helped the jury evaluate his credibility and was therefore crucial to the defense. The constitutional right to present a complete defense is a fundamental element of due process. *See Holmes v. South Carolina*, 547 U.S. 319, 324, 126

S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The court's ruling impacted Pham's right to present a complete defense, and reversal is required.

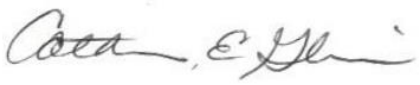
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Pham's convictions.

DATED this 15th day of August, 2019.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Long Pham,* Court of Appeals Cause No. 51213-1-II, as follows:

Long Pham, DOC#344171
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

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

Catherine E. Glinski
Done in Manchester, WA
August 15, 2019

Filed
Washington State
Court of Appeals
Division Two

July 16, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LONG PHAM, Appellant.	No. 51213-1-II UNPUBLISHED OPINION

SUTTON, J. — Long Pham appeals his jury trial convictions for unlawful possession of a controlled substance (heroin) with intent to deliver, unlawful possession of a controlled substance (methamphetamine), and unlawful possession of a controlled substance (buprenorphine). He argues that the trial court erred when it denied his motion to suppress the evidence discovered following a search of his backpack and person and when it refused to admit additional evidence under ER 410 after both parties had rested their cases. The State concedes that the ER 410 ruling was error, but it argues that the trial court properly refused to reopen the defense to consider this evidence. We hold that the trial court did not err when it concluded that Pham's initial contact with law enforcement was a social contact, and the admissibility of the additional evidence is irrelevant in light of the trial court's unchallenged ruling denying Pham's motion to reopen the defense. Accordingly, we affirm.

FACTS

I. CONTACT AND ARREST

The unchallenged findings of fact from the suppression hearing in this case establish the following background facts.[1] Around 11:30 PM on October 15, 2016, Clark County Sheriff's Detective Ryan Preston was on routine patrol and decided to run a check on the license plate of a vehicle that was parked in an unusual location in a convenience store parking lot. While waiting for information about the vehicle, Detective Preston "circled the parking lot." Clerk's Papers (CP) at 156, 1 Report of Proceedings (RP) at 34, 36. Detective Preston learned that the vehicle was owned by a female. When the detective again approached the vehicle, he saw Pham walking away from it.

Remaining in his patrol car, Detective Preston approached Pham without activating the patrol vehicle's lights and sirens. Using a normal speaking tone, Detective Preston asked Pham if he had come from the store, and Pham stated that he had. The detective then asked Pham if he was the vehicle's registered owner. Pham "stated with uncertainty that the vehicle belonged to a friend." CP at 156 1 RP at 45-46. The detective "then told [Pham] that he wanted to talk to him about the vehicle and whether it was stolen." CP at 156, 1 RP at 46. Pham "immediately started running away through the parking lot." CP at 156, 1 RP at 46.

As Pham fled, the detective followed in his patrol car and observed Pham discard his backpack. Pham eventually fell, and Detective Preston was able to detain Pham. "Detective

[1] Unchallenged findings of fact are considered verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Preston did not give [Pham] any commands or orders to stop at any point prior to his arrest." CP at 156.

After arresting Pham, the detective searched Pham's backpack, a small plastic container that [Pham] dropped when he fell, and [Pham's] person, and found items associated with drug sales and use, heroin, Subutex,[2] and methamphetamine. The State charged Pham by amended information with possession of a controlled substance (heroin) with intent to deliver, unlawful possession of a controlled substance (methamphetamine), and unlawful possession of a controlled substance (buprenorphine).

II. MOTION TO SUPPRESS

Pham moved to suppress the evidence found during the search following his arrest. He argued that Detective Preston lacked reasonable articulable suspicion to justify a *Terry*[3] stop. The State responded that the initial contact was a lawful social contact and that Detective Preston lawfully initiated the *Terry* stop after Pham ran away and started discarding items.

Detective Preston, the only witness to testify at the suppression hearing, testified to the facts set out above. In addition, Detective Preston testified that he did not tell Pham that "he wasn't free to leave or anything like that." 1 RP at 43.

The trial court denied the motion to suppress. The trial court's written findings are described in the facts above. The trial court also entered the following conclusion of law:

[2] Subutex is a brand name for buprenorphine.

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

> *Detective Preston's initial contact with the Defendant was a social contact and did not rise to the level of a seizure*. The contact occurred in a public place, there were no lights or sirens activated, there were no other officers present, and [Pham] was free to leave. Whether Detective Preston was investigating a potential crime at the time of his initial contact with [Pham] did not elevate the social contact to a seizure.

CP at 157 (emphasis added).

III. TRIAL

A. TESTIMONY

At trial, Detective Preston testified about his initial contact with Pham, Pham's flight, the fact Pham discarded his backpack, and the container that was in Pham's hand when he fell. The detective also testified that he found "multiple drug paraphernalia items, as well as multiple drugs" during a search incident to arrest. 2 RP at 159.

Detective Preston further testified that Pham had admitted that he had been "distributing or delivering, selling, drugs." 2 RP at 185. Pham also told Detective Preston that "he was a middleman." 2 RP at 186.

Pham testified that he was a drug addict and admitted that he had possessed the methamphetamine, heroin, and buprenorphine that Detective Preston found after the arrest. Pham asserted, however, that the drugs were for personal use. He also denied having admitted that he was a drug dealer or to ever having dealt drugs.

On cross-examination, Pham denied having any prior convictions for possession with intent to deliver. Even after the State presented Pham with a copy of a 2014 judgment and sentence signed by Pham showing a guilty plea conviction for a possession with intent to deliver charge, Pham continued to deny having pleaded guilty to such a charge and asserted that this conviction was not on his "rap sheet." 3 RP at 289.

On redirect, Pham again asserted that he did not have a conviction for possession with intent to deliver on his "rap sheet." 3 RP at 291. Defense counsel rested without asking for any additional time to present evidence that could have explained why Pham did not think he had a conviction for possession with intent to deliver.

B. MOTIONS TO ADMIT DECLARATION OF CRIMINAL HISTORY AND TO REOPEN THE RECORD

After both parties rested, Pham's counsel advised the trial court that the State's plea offer in this case included a declaration of criminal history that did not list any possession with intent to deliver convictions and advised the trial court that this document was relevant to explain Pham's "confusion" regarding whether he had a prior possession with intent to deliver conviction. 3 RP at 306-07. When the trial court responded that a request to admit the declaration of criminal history was untimely, Pham moved to reopen the defense.

The trial court stated that it was not preventing Pham from arguing that he had been confused based on other evidence in the record, but it ruled that the declaration of criminal history was inadmissible under ER 410[4] because it was part of a plea offer. The trial court also denied the motion to reopen the defense, noting that Pham had "ample opportunity" to clarify Pham's confusion on redirect examination, well before both parties had rested. 3 RP at 343.

The jury found Pham guilty as charged. Pham appeals.

[4] ER 410(a) provides in part: "Except as otherwise provided in this rule, evidence of . . . an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

ANALYSIS

I. DENIAL OF MOTION TO SUPPRESS

Pham first challenges the trial court's denial of his suppression motion. He argues that, taken in context, Detective Preston's telling Pham that he "wanted to talk to [Pham] about the vehicle and whether it was stolen" amounted to a direction or command to Pham to speak to the detective and that this show of authority elevated the social contact to a seizure. Br. of Appellant at 11; CP at 156. We disagree.

A. LEGAL PRINCIPLES

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect a citizen's right to be free from unreasonable search and seizure and a citizen's freedom from interference in his or her private affairs. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). Whether police have seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). The trial court's factual findings are "'entitled to great deference, but the ultimate determination of whether those facts constitute a seizure'" is a question of law that we review de novo. *Harrington*, 167 Wn.2d at 662 (internal quotation marks omitted) (quoting *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

A "seizure occurs when 'considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe [that he] is free to leave or decline a request due to an officer's use of force or display of authority.'" *Harrington*, 167 Wn.2d at 663 (quoting *State v. Rankin*, 151 Wn.2d 689, 695, 925 P.3d 202 (2004)). This determination is an objective determination based on the officer's actions. *Rankin*, 151 Wn.2d at 695. "The relevant

question is whether a reasonable person in the individual's position would feel he or she was being detained." *Harrington*, 167 Wn.2d at 663 (citing *State v. O'Neill*, 148 Wn.2d 564, 581, 62 P.3d 489 (2003)).

But "[a] 'social contact' is not a seizure." *State v. Guevara*, 172 Wn. App. 184, 188, 288 P.3d 1167 (2012) (quoting *Harrington*, 167 Wn.2d at 664-65). And when an officer suspects the possibility of criminal activity, he or she may question an individual and ask for identification without effecting a seizure. *O'Neill*, 148 Wn.2d at 577. A social contact falls "someplace between an officer's saying 'hello' to a stranger on the street" and an investigative detention. *Harrington*, 167 Wn.2d at 664. Police actions likely to result in a seizure rather than social contact include "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *Guevara*, 172 Wn. App. at 188 (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)).

B. NO SEIZURE

Here, the trial court's unchallenged findings of fact do not show that Detective Preston displayed his weapon, physically touched Pham, blocked Pham's path, or attempted to prevent Pham from leaving. The trial court also found that Detective Preston "used a normal speaking tone when questioning" Pham. CP at 156. These factors weigh in favor of concluding that the detective's contact with Pham was a social contact, at least until the point Pham fled.

Pham argues, however, that Detective Preston's statement that he "wanted to talk to [Pham] about the vehicle and whether it was stolen," taken in context, "carried the implication that compliance with [Detective] Preston's request might be compelled." Br. of Appellant at 11; CP at 156. We disagree.

Asking a question about possible illicit activity does not amount to a seizure unless the question was asked in a coercive manner. *State v. Thorn*, 129 Wn.2d 347, 353-54, 917 P.2d 108 (1996), *overruled on other grounds by O'Neill*, 148 Wn.2d at 571. Here, the trial court found that Detective Preston told Pham that "he wanted to talk to [Pham] about the vehicle and whether it was stolen." CP at 156. But the trial court did not find that the detective commanded Pham to speak to him, told Pham that he could not leave, used an authoritative tone of voice, displayed a weapon, touched Pham, asked for permission to search Pham, or physically blocked Pham from leaving. Nor did the trial court find that any other officers were present. A reasonable person would have felt free to end the encounter and walk away.

Citing *Harrington*, Pham contends that the Detective's questioning was essentially an accusation that Pham was "knowingly associated with a stolen vehicle," so it "carried the implication that compliance with Preston's request might be compelled." Br. of Appellant at 11. But Pham's reliance on *Harrington* is not persuasive.

In *Harrington*, the court held that the cumulative effect of a series of police actions can amount to a progressive intrusion sufficient to establish a seizure even though each individual action would not amount to a seizure. 167 Wn.2d at 669-70; *see also State v. Bailey*, 154 Wn. App. 295, 300, 224 P.3d 852 (2010). But *Harrington* is factually distinguishable from this case because there was more than one officer present, the officers asked for permission to pat

Harrington down for officer safety concerns, and the officers physically patted Harrington down. 167 Wn.2d at 660-61. Here, there were no such similar circumstances. Thus, the degree of intrusion here was significantly less and, therefore, not as suggestive of a seizure as the contact in *Harrington*. Instead, in this case, the detective's focus was on a request for information. And "[i]t is well settled that a mere request for information does not constitute a seizure." *State v. Whitaker*, 58 Wn. App. 851, 854, 795 P.2d 182 (1990).

Pham further asserts that his decision to flee rather than decline to talk to Detective Preston and walk away shows that the detective's "language constituted a show of authority." Br. of Appellant at 11. But the test is whether a reasonable person would have believed he was not free to leave, not whether Pham subjectively believed he was not free to leave. *Harrington*, 167 Wn.2d at 663; *State v. Butler*, 2 Wn. App. 2d 549, 566, 411 P.3d 393 (2018) (citing *Young*, 135 Wn.2d at 510 (rejecting the use of a subjective test in seizure analysis)). Thus, Pham's subjective assessment of the situation is irrelevant.

Pham also cites *Whitaker*, *State v. Ellwood*, 52 Wn. App. 70, 757 P.2d 547 (1988), *State v. Sweet*, 44 Wn. App. 226, 721 P.2d 560 (1986), and *State v. Friederick*, 34 Wn. App. 537, 663 P.2d 122 (1983). But the cases listed in *Whitaker* all involve situations where there were clear showings of authority by law enforcement. 58 Wn. App. at 853-54. Similarly, *Ellwood*, *Sweet*, and *Friederick* are distinguishable because, unlike here, each of these cases involved officers directly commanding a defendant to wait, to halt, or to stop. *Ellwood*, 52 Wn. App. at 73-74; *Sweet*, 44 Wn. App. at 230, *Friederick*, 34 Wn. App. at 540.

The trial court did not err when it concluded that the detective's initial contact with Pham was a social contact. Accordingly, Pham fails to show that the trial court erred when it denied his motion to suppress.

II. Motion To Admit Additional Evidence and Motion To Reopen Defense Case

Pham next argues that the trial court erred when it ruled that the declaration of criminal history from the plea offer was inadmissible under ER 410. Even if this ruling was error, which the State concedes it is, the error is harmless because the trial court properly refused to allow Pham to reopen the defense regardless of this evidentiary ruling.

The trial court denied Pham's motion to reopen the defense because Pham had ample opportunity to clarify his confusion about his prior conviction on redirect examination. Pham does not challenge this ruling. Nor has he responded to the State's argument that the trial court properly refused to allow Pham to reopen the defense. Because Pham does not challenge the trial court's denial of his motion to reopen the defense, that decision stands regardless of the ER 410 ruling. Because the trial court declined to reopen the case, whether the declaration of criminal history was admissible is immaterial and Pham fails to show that he is entitled to relief on this ground.

CONCLUSION

We hold that the trial court did not err when it concluded that Pham's initial contact with law enforcement was a social contact and denied the motion to suppress, and the admissibility of the additional evidence is irrelevant in light of the trial court's unchallenged ruling denying Pham's motion to reopen the defense. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Melnick, J.

MELNICK, J.

GLINSKI LAW FIRM PLLC

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