

NO. 68019-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JERDALE NECOY JACKSON,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
3

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Police located the defendant in a residence in which he was unlawfully present and then placed him under arrest on an outstanding warrant.

Did the trial court correctly find that the defendant had no standing to challenge a search of the residence?

Did the trial court correctly find that even if the defendant did have standing to challenge the search, because the officers were lawfully inside the residence and had reason to believe a person may have been hiding in the bedroom and might pose a threat to them, the officers could lawfully walk down the hallway and look in the bedroom?

2. In convicting the defendant of felony violation of a no-contact order, a certified copy of a no-contact order from a prior case was admitted into evidence. The word "refused" was written on the signature line of the order. Did the trial court correctly hold that the word "refused," just like the rest of the information contained in the no-contact order, was admissible under the confrontation clause because the information written on the order was not "testimonial" as articulated by the Supreme Court?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant was charged in count I with Felony Violation of a No-Contact Order (hereinafter FVNCO) for having contact with Michelle Valdez in violation of a court order, and in count II with Fourth-Degree Assault for assaulting 16-year-old D.V. (Michelle's son). CP 1-6. A charge of violation of a no-contact order is elevated to a felony if the person has been convicted on at least two prior occasions for violation of a no-contact order.

RCW 26.50.110. At the time of this incident, the defendant had six such prior convictions. CP 108-09; 1RP 86. He stipulated for the purposes of trial that he had twice been previously convicted. 2RP 38.

Prior to trial, D.V. recanted. CP 8-9. Thus, upon the State's motion, the court dismissed the assault charge. CP 8-9. The defendant proceeded to trial on the FVNCO charge. A jury found the defendant guilty as charged.¹ CP 66. The defendant received a standard range sentence of 15 months. CP 67-75.

¹ The verbatim report of proceedings is cited as follows: 1RP—11/8/11, 2RP—11/9/11, 3RP—11/10/11, and 4RP—11/18/11.

2. FACTS FROM THE CrR 3.6 SUPPRESSION HEARING.

On March 30, 2011, Officer Benjamin Tseng was working routine patrol when he received a dispatch of a physical domestic violence incident at an apartment complex on 320th Street in Federal Way. 1RP 20-22. Officer Tseng responded to the complex and contacted 16-year-old D.V. 1RP 21-23. D.V. reported that his "stepfather" had struck him, that he had wrapped an extension cord around his hand and struck him once. 1RP 23. He said his stepfather went by the nickname J-Ride and described him as a thin African-American man wearing a t-shirt, do-rag and sweatpants. 1RP 23. At the time, Officer Tseng believed that the physical contact was likely lawful corporal discipline as he observed only a transient mark on D.V.'s thigh. 1RP 23-24, 36-37.

Officer Tseng then went to the apartment for the purpose of making sure that D.V.'s parents were aware of him having made a report, and to confirm that what had occurred was indeed corporal discipline. 1RP 24. D.V. told Officer Tseng that both his mother and stepfather were at the apartment. 1RP 24.

Officer Tseng knocked on the door and a woman answered. 1RP 24. The woman was Michelle Valdez, D.V.'s mother.

1RP 25-26. Officer Tseng asked if he could come inside and Michelle opened the door fully, took a step back and allowed Officer Tseng to enter.² 1RP 25.

Michelle jokingly asked Officer Tseng what it was that D.V. had done. 1RP 25. Officer Tseng explained that he was there to talk with her and her husband. 1RP 25. Michelle responded that she wasn't married. 1RP 25. Her demeanor also quickly changed from her initial friendly disposition. 1RP 25. Officer Tseng then asked if her boyfriend was home, but instead of answering the question, Michelle asked repeatedly why he wanted to know. 1RP 26. Officer Tseng then tried again, this time asking Michelle if there was anyone named J-Ride home. 1RP 26. Again, Michelle did not answer the question. 1RP 26. Instead, she continued to ask what the officers wanted. 1RP 26. Officer Tseng then told Michelle that D.V. had called the police and reported that his stepfather had struck him. 1RP 26. Michelle proclaimed that nothing had happened. 1RP 26.

While Officer Tseng was asking about J-Ride, Michelle moved into the pathway of the hallway as if to block the officers. 1RP 27. This behavior, along with Michelle's suspicious way of

² Prior to entry, Officer Smith had arrived and joined Officer Tseng. 1RP 24.

answering the officer's questions and her refusal to answer basic questions like whether someone was home or not, aroused the officer's suspicion that someone was hiding in the apartment. 1RP 27, 42. Considering the initial complaint was one of a violent act, Officer Tseng was concerned that someone could surprise them and be a threat to all of them. 1RP 27-29. For safety reasons, Officer Tseng decided to check the rooms to see if anyone was hiding there. 1RP 27-29. Officer Tseng estimated the apartment as being only 800 to 900 square feet. 1RP 27.

While Officer Smith led Michelle by the arm and escorted her over to the couch in the living room, Officer Tseng walked down the hallway. 1RP 28, 41. Michelle never asked the officers to leave nor asked them to stop. 1RP 28-29.

From his position in the hallway, Officer Tseng saw the defendant standing in the bedroom. 1RP 29. He was asked to come out into the living room, which he did, and was asked his name. 1RP 29. He first gave a false name, but when asked again, he gave his real name. 1RP 30.

In running the defendant's name, it was discovered that he had a no-bail warrant for escape. 1RP 51-52. He was then placed under arrest. 1RP 52. Officers also discovered that there was a

no-contact order preventing the defendant from having any contact with Michelle. 1RP 53. When told about the no-contact order, he became belligerent, admitted that he knew about the order, and said that neither Colorado nor Washington could tell him who he could be with. 1RP 32-35. Michelle refused to give a statement, but told the officers that the defendant had been staying in the apartment for the past month. 1RP 52.

The defendant did not testify at the CrR 3.6 hearing and did not present any evidence. 1RP 55.

The trial court held two things.³ First, the Court found that the defendant, being in the apartment unlawfully, did not have standing to contest the search of Michelle's apartment. Second, the court held that even if the defendant did have standing to contest the search, it was lawful and reasonable for the officers to conduct a cursory search of the apartment.

3. SUBSTANTIVE FACTS.

The evidence admitted at trial was substantially the same as the evidence admitted at the CrR 3.6 hearing, with the below noted differences.

³ The court's oral findings are found at 1RP 106-11. The court's written findings, which incorporate the court's oral findings, are found at CP 76-80.

With the pretrial dismissal of the assault charge, the parties agreed to sanitize the testimony and omit the reason why the police were responding to the scene. 2RP 5. Essentially, the State and defense agreed that the officers would testify that they responded to the scene, that they spoke with D.V. about an unspecified matter, and that they then decided to speak with D.V.'s parents. See 2RP 5, 13-14.

Officer Tseng testified similarly to his testimony in the CrR 3.6 hearing, including the fact that at the scene, the defendant acknowledged that he was aware of the no-contact order. 2RP 22-23.

The defendant called Michelle Valdez to the stand. 2RP 62. She testified that back in 2007, when the defendant was in custody, she had told him that it was her understanding that the no-contact order would be subsequently lifted when he got out of jail. 2RP 63. She testified that the paperwork was to be sent to her but that she never received anything. 2RP 64. On cross-examination, she verified her own identity, she verified the identity of the defendant and she verified that the District Court of the County of Pueblo in Colorado had issued a no-contact order preventing the defendant

from having contact with her. 2RP 72. She said that both she and the defendant were aware of the order. 2RP 73.

The defendant did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

The defendant contends that when Officer Benjamin Tseng walked down the hallway of Michelle Valdez's apartment for officer safety reasons, his actions constituted an unconstitutional search. Therefore, he asserts, all evidence discovered as a result of Officer Tseng's act should have been suppressed, to wit: the defendant being in contact with Michelle in violation of a court order. This claim should be rejected. The trial court correctly found that the defendant lacked standing to challenge the search. The trial court also correctly found that even if the defendant had standing to challenge the officer's act of walking down the hallway, this act was permissible under the constitution.

1. THE DEFENDANT DID NOT HAVE STANDING TO CHALLENGE A SEARCH OF MICHELLE'S RESIDENCE.

A party must have standing to challenge an unlawful search or seizure under the federal and state constitutions. State v. Picard, 90 Wn. App. 890, 895-96, 954 P.2d 336 (citing State v.

Carter, 127 Wn.2d 836, 904 P.2d 290 (1995)), rev. denied, 136 Wn.2d 1021 (1998). It is a defendant's burden to prove that he has standing to raise a search or seizure issue. Picard, 90 Wn. App. at 896 (citing State v. Jackson, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996), rev. denied, 131 Wn.2d 1006 (1997)).⁴

a. There is No Factual Basis For The Defendant To Claim That He Had Standing To Challenge The Search Of Michelle's Apartment.

Despite being on notice that the State was contending that he did not have standing to raise a search issue (see CP 23-30), the defendant presented no evidence at the CrR 3.6 hearing establishing a factual basis to claim he had standing to challenge the search of Michelle's apartment. He did not testify and he

⁴ The Court in Jackson provided a general outline on the burdens of proof in regards to the various steps of a search and seizure claim:

Turning to the motions to suppress, we preliminarily examine the parties' respective burdens of proof. Generally, a defendant must show that he or she is entitled to constitutional protection. This includes the burden of showing that a privacy or possessory interest was invaded, that government agents participated in the invasion, and that the defendant has standing, automatic or otherwise, to contest the invasion. Once a defendant shows that he or she is entitled to constitutional protection, the parties' burdens vary according to whether the State acted with a warrant. If it did not, it must show justification for its actions. If it did, the defendant must show a lack of justification for its actions.

Jackson, 82 Wn. App. 601-03 (internal citations and footnotes omitted); see also United States v. Salvucci, 448 U.S. 83, 85, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) (one who brings a motion to suppress must allege and establish that he himself was the victim of an invasion of privacy).

presented no evidence that he was on the lease, that he paid rent, that he kept any of his possessions at the apartment, that he stayed there on an everyday basis, that he had a key to the apartment, that he had open access to the apartment, that he did not have another residence where he lived,⁵ and that if he did in fact stay at the apartment, what the arrangement was or scope of her permission to be present. Further, the defendant did not ask, and the court did not enter, any findings of fact supporting the claim he now makes on appeal.

The only “evidence” that the defendant now claims “established” that he had an interest in Michelle’s apartment sufficient to establish standing is a comment by an officer that Michelle said the defendant had been “staying” there for a month. 1RP 52 (see Def. br. at 8). This is insufficient. The defendant failed to present sufficient evidence to the trial court to meet his burden of proving he had standing to challenge the search of Michelle’s apartment. Similarly, this court cannot make that determination. Appellate courts do not make factual findings and do not weigh credibility. State v. Myers, 133 Wn.2d 26, 38,

⁵ The address the defendant listed with the Department of Licensing as his residence was not Michelle’s apartment. See Pretrial Exhibit 3 (remarked and admitted at trial as Trial Exhibit 4).

941 P.2d 1102 (1997); State v. Walker, 153 Wn. App. 701, 708, 224 P.3d 814 (2009). An appellate court need not consider an issue when the record does not contain sufficient facts to resolve the claim. Walker, 153 Wn. App. at 708. The defendant's standing argument is based on nothing more than speculation and conjecture, not facts, and therefore his argument must be rejected.

b. There Is No Legal Basis For The Defendant To Assert He Had Standing Under The Fourth Amendment.

To qualify for Fourth Amendment protection, a criminal defendant must prove that he has standing to contest the invasion of privacy. State v. Jacobs, 101 Wn. App. 80, 87, 2 P.3d 974 (2000). Standing to claim the protection of the Fourth Amendment depends upon "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Jacobs, 101 Wn. App. at 87 (citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)). Two questions must be asked. First, "has the individual manifested a subjective expectation of privacy in the object of the challenged search?" California v. Ciraolo, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986). Second, "is society willing to recognize that expectation as reasonable?" Id.

As applicable here, and as the United States Supreme Court has held, society does not recognize as reasonable the privacy rights of a defendant whose presence at the scene of the search is wrongful or unlawful.

Obviously ... a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate."

Jacobs, at 87 (citing Rakas, 439 U.S. at 143 n.12).

The Jacobs case is another case on point. Jacobs was prohibited by court order from having "any contact" with James Russell. Jacobs, at 82. On November 17, 1998, a call was placed to 911 from Russell claiming that "things had gotten out of hand." The call was then disconnected. Officers responded and found Russell outside his home. Russell admitted that Jacobs had beaten him but he claimed that everything was now okay and that nobody was inside the house. He told the officers they were not allowed to go inside and check. Nonetheless, for officer safety reasons, and to make sure there were no other victims inside, the officers entered Russell's home and discovered Jacobs inside.

Jacobs challenged the search before the trial court. The trial court found Jacobs had no standing to challenge the search. The Court of Appeals affirmed despite the fact that the evidence showed that Jacobs kept clothing at Russell's home, that he had Russell's permission to be at the home, and that he came over regularly to shower and change his clothing. The Court held that Jacobs had no legitimate expectation of privacy in Russell's home—that Russell's consent to contact did not, and could not, overcome the court order that made contact unlawful. Jacobs, at 87-88.

Here, the defendant was prohibited by court order from “contacting or directly or indirectly communicating with the victim,” Michelle Valdez. Pretrial Exhibit 1 (provision number 3).⁶ The defendant addresses this provision of the no-contact order by claiming that the provision “did not specifically exclude him from the residence where he was arrested” (see Def. br. at 16) and by relying on State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007). However, even if he could rely on Wilson, he fails to acknowledge the other provisions in the no-contact order.

⁶ Pretrial Exhibit 1, listed as the Pueblo County District Court No Contact Order, was remarked and admitted as Trial Exhibit 2.

Wilson was convicted of first-degree burglary for entering the home he shared with his girlfriend and assaulting her. Wilson, 136 Wn. App. at 600-01. At the time of the burglary, there was a no-contact order in place that prohibited Wilson from having contact with his girlfriend. However, the order did not prohibit Wilson from being in the home. Wilson, at 600-01. In fact, the State conceded that if the girlfriend had been in another room of the home or she had not been home at the time of Wilson's entry, Wilson's presence in the home would have been lawful. Id. at 608. Still, the State argued that the no-contact order made Wilson's entry into his own home "unlawful," thus satisfying the "unlawful entry" element of burglary. The Court disagreed, recognizing that under the State's theory, if Wilson had gone to a friend's house, been invited inside by the friend while Wilson's girlfriend was inside, the entry into the friend's home would have been considered unlawful. This case has no application here.

The defendant's presence in Michelle's apartment by itself was unlawful. In claiming that the no-contact order did not specifically prevent the defendant from being in Michelle's apartment, the defendant fails to acknowledge one of the other provisions of the no-contact order. Specifically, the order states

that the defendant “[s]hall vacate the home of the victim(s), stay away from the home of the victim(s), and stay away from any other location the victim(s) is/are likely to be found.” Pretrial Exhibit 1 (provision number 2). Thus, even if Michelle were not present in her apartment, the defendant’s presence would be unlawful.

The defendant also fails to cite State v. Sanchez, 166 Wn. App. 304, 271 P.3d 264 (2012), a case that directly contrasts Wilson, and is factually akin to the situation herein.

Sanchez, like Wilson, was prohibited by court order from having contact with a specific person. However, unlike the situation in Wilson, but like the situation here, Sanchez was also prohibited by court order from having contact with the victim’s residence. Sanchez, 166 Wn. App. at 306. After the court order was entered, Sanchez moved back into the residence with the victim and thereafter he committed a sexual assault upon her. He was then charged with burglary. Sanchez’s presence in the residence in violation of the court order is what the State used to prove the “unlawful entering or remaining” element of the burglary charge.

The Court of Appeals rejected Sanchez’s claim that his case was akin to the Wilson case. Instead, the Court held that because the no-contact order prohibited Sanchez not only from having

contact with the victim, but also her residence, the burglary charge was appropriate because his presence was unlawful. Sanchez, at 267-68.

Under Rakas, supra, and the cases cited above, the defendant has no standing to challenge the search of Michelle's apartment. See Rakas, 99 S. Ct. at 141 (“‘wrongful’ presence at the scene of a search would not enable a defendant to object to the legality of the search”).⁷

c. The Defendant Waived Any Article I, Section 7 Claim.

There are situations wherein the Washington Constitution provides broader protection than the United States Constitution, although that is not always the case. To help determine whether the Washington Constitution provides greater protection than its federal counterpart in a particular situation, courts engage in a

⁷ The defendant also cites to cases wherein courts have had to determine whether “guests” had standing to object to the legality of searches of the premises they had been invited. See Def. br. at 12-13. These cases have no relevance here. Guests have a legal right to be on the premises searched, and thus, they may have standing to object to a search of the premises depending on the nature of their invitation to be present and status as a guest. See Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). But burglars, for example, and persons like the defendant here, have no legal right to be on the premises searched, their presence itself is unlawful, and thus they have no standing to object to a search of the premises. Rakas, supra.

so-called Gunwall analysis.⁸ At times, where the constitutional provisions have already been analyzed with respect to the specific factual and legal issue at hand, courts do not require that a Gunwall analysis be conducted. See State v. O'Neil, 148 Wn.2d 564, 584 n.9, 62 P.3d 489 (2003) (Gunwall analysis not necessary only where it is well settled that the particular exception to the warrant requirement is narrower under state law than the Fourth Amendment). The defendant contends that is the situation that exists here.

It is true that courts have held that in certain situations Article I, Section 7 has been interpreted as providing greater protection than its federal counterpart and therefore a Gunwall analysis is unnecessary. Still, in the situation presented here, any argument that the defendant has standing under the state constitutional has been waived, regardless of whether a Gunwall analysis needed to be done or not.

In his written motion to suppress, the defendant generically stated that "[t]his motion is based on the records and files herein,

⁸ Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The analysis requires an examination of (1) the textual language of the constitutional provisions, (2) differences in texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 61-62.

the Fourth Amendment to the United States Constitution, Article I, Section 7, of the Washington State Constitution, Criminal Rule 3.6, the Washington State Privacy Act, codified in RCW 9.73, the defense brief in support of this motion, and any evidence that may be adduced at the hearing on this motion.” CP 10. Other than this generic statement, the defendant never made any argument that the result of the trial court’s decision on standing would be different under the Washington Constitution than the Fourth Amendment. This, in spite of the fact that the trial court specifically stated that it was unsure whether the Washington Constitution provided broader protection in this area, directly and specifically invited the defendant to provide the court with briefing or case law. 1RP 109. The court added, “if anyone wants to raise that [Article I, Section 7 claim], I’m going to leave it to you to do so and let me know in the morning.” 1RP 109. The defendant never did. Thus, the court specifically made her ruling under the Fourth Amendment. 1RP 110; CP 79.

On appeal, the defendant seems to argue that the trial court was expected to, or required to, make the defense argument for him. The defendant criticizes the trial court for asking the parties about whether a Gunwall analysis was necessary and for failing to decide the case under the Washington Constitution. But it is not

the trial court's job to make the defense argument. It was incumbent upon the defendant to properly raise the issue because when a defendant treats an issue only in passing and cites no authority for his argument, the "[p]assing treatment of the issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), reversed on other grounds by 132 Wn.2d 193 (1997); see also In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion); State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986) (bare allegations unsupported by citation to authority, or persuasive reasoning cannot sustain the defendant's burden), rev. denied, 110 Wn.2d 1002 (1988). The defendant had an obligation to make a reasoned argument and to cite to relevant case law if he intended to raise a state constitutional argument in this case. He failed to do so and therefore this issue has been waived.

d. There Is No Legal Basis For The Defendant To Assert He Had Standing Under Article I, Section 7.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his

home invaded, without authority of law.” The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” As explained in section b above, standing under the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the place to be searched. Rakas, 439 U.S. at 143. The expectation of privacy must be one that society is willing to recognize as reasonable. Ciraolo, 476 U.S. at 211.

The Supreme Court has been quite clear, under the Fourth Amendment, a person unlawfully on the premises searched has no standing to object to the legitimacy of the search. Rakas, 439 U.S. at 143 n.12. At the same time, a violation of the right to privacy under Article I, Section 7 may occur when the government has “unreasonably intruded into a person’s ‘private affairs’” Carter, 127 Wn.2d at 848. In certain situations, the scope of the protection under Article I, Section 7 may be different than the Fourth Amendment.

The defendant contends that he had standing under Article I, Section 7, even if he did not have standing under the Fourth

Amendment. In other words, the defendant claims that a person who is unlawfully present in a place to be searched has standing to challenge the search of that location if it involves what he claims is the person's "private affair." In this context, his argument cannot be supported.

The Supreme Court has stated that the "private affair" provision of Article I, Section 7, protects "those interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). While the defendant cites to cases discussing the privacy one has in his or her own home (see Def. br. at 19), it does not follow that citizens of this state have held that there is a privacy interest preventing a search for a person in a home when that person is unlawfully in the home.⁹

2. THE "SEARCH" OF MICHELLE'S APARTMENT WAS A REASONABLE ACTION TAKEN DURING THE EXECUTION OF A COMMUNITY CARETAKING FUNCTION.

The defendant argues that Officer Tseng's walking down the hallway and looking into the bedroom of Michelle's apartment was

⁹ Additionally, as stated in section C 1 a above, no evidence was presented that the apartment searched was the defendant's home. For example, Michelle Valdez could have been the sole party on the lease, with the defendant being present merely as a guest.

an unconstitutional “protective sweep.” The defendant is incorrect. While the attorneys at trial characterized Officer Tseng’s actions as a “protective sweep,” this term seems to be a term of art limited to situations wherein there has been an arrest of an individual and then a “protective sweep” follows.¹⁰ No arrest or detention occurred prior to Officer Tseng walking down the hallway and looking into the bedroom. Rather than being justified as a “protective sweep,” Officer Tseng’s action was justified because he was lawfully inside Michelle’s apartment while engaged in a community caretaking activity and an officer in such a situation may take reasonable action to protect himself and the person or persons he is with— which is what occurred here.

a. A “Protective Sweep.”

The United States and Washington Constitutions prohibit most warrantless searches of homes. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Police may only search without a warrant under one of the few carefully drawn exceptions to the warrant requirement. Id. Here, the defendant calls Officer Tseng’s

¹⁰ While the attorneys used the term “protective sweep” in arguing their positions, the trial court did not use the term in its written findings. See CP 76-80. The trial court characterized Officer Tseng’s action as a “cursory search.” CP 77, 79.

action of walking down the hallway and looking into the bedroom a “protective sweep.” It is not.

The term “protective sweep” appears to be a term of art. Under this doctrine, while making a lawful arrest, officers may conduct a reasonable “protective sweep” of the premises for security purposes. State v. Hopkins, 113 Wn. App. 954, 959-60, 55 P.3d 691 (2002) (citing Maryland v. Buie, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)). This is not a search in the conventional sense but rather an extension of a Terry¹¹ frisk or pat down. See Buie, 494 U.S. at 331-34. When affecting an arrest inside a home or residence, law enforcement may, “without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Buie, 494 U.S. at 334. The purpose of the sweep is to assure officers “that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.” Id. at 333.

If the protective sweep extends beyond the immediate adjacent area of the arrest, officers must have a reasonable belief,

¹¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

based on specific and articulable facts, that the area to be swept might harbor a person posing a danger to the officers on the scene. Buie, 494 U.S. at 337; Hopkins, 113 Wn. App. at 959-60. But “[i]f the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety.” Hopkins, at 959. A protective sweep extends only to cursory inspections of places where a person could be found and may last only as long as necessary to dispel the suspicion of danger. Buie, at 334, see also In re Sealed Case 96-3167, 153 F.3d 759 (D.C. Cir. 1998) (small bedroom a few feet down the hall from bedroom where defendant was arrested was “immediately adjacent”); United States v. Lauter, 57 F.3d 212 (2nd Cir. 1995) (bedroom was “immediately adjoining” area of arrest given small size of apartment).

If officers had cause to, and had arrested Michelle Valdez, Officer Tseng’s action in walking down the hallway to look for a person hiding there would have been justified as a “protective sweep.” However, as that term is used, because no arrest was made prior to the “search,” the doctrine does not directly apply.

b. The Cursory Search Was A Reasonable Action Taken During The Course Of A Community Caretaking Function.

Officers did not present themselves at Michelle's door with the intent to conduct a search. Rather, they went to her door as part of their community caretaking function¹² to discuss with Michelle and D.V.'s stepfather the fact that D.V. had reported to them that he had been struck.¹³ Once validly inside Michelle's

¹² Local police have multiple responsibilities, only one of which is the enforcement of criminal law. State v. Acrey, 148 Wn.2d 738, 748, 64 P.3d 594 (2003). Citizens look to the police to assist them in a variety of circumstances, including delivering emergency messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid. Id.

Law enforcement officers generally act pursuant to either law enforcement or community caretaking objectives. The difference between the two stems from the officers' underlying motives. The law enforcement function includes conduct that is designed to detect or solve a specific crime, such as making arrests, interrogating suspects, and searching for evidence. Community caretaking, on the other hand, is based on a service notion that police serve to ensure the safety and welfare of the citizenry at large.

Acrey, at 748 (citing John F. Decker, Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions, 89 J.Crim. L. & Criminology 433, 445-46 (1999)).

¹³ When officers enter a home with the intent to conduct a search, and obtain consent to search in lieu of obtaining a search warrant, it is required that officers inform the occupant that, *inter alia*, the person does not need to consent and can revoke consent at any time. State v. Ferrier, 136 Wn.2d 103, 106, 960 P.2d 927 (1998). Officers did not need to give "Ferrier warnings" here because they had no intent to conduct a search when they obtained consent to enter the residence. See State v. Khounvichai, 149 Wn.2d 557, 69 P.3d 862 (2003) (Ferrier warnings not required where police request entry to a home merely to question or gain information regarding an investigation); State v. Williams, 142 Wn.2d 17, 28, 11 P.3d 714 (2000) (Ferrier warnings not required where police request consent to enter a home to arrest a visitor); State v. Leupp, 96 Wn. App. 324, 333-34, 980 P.2d 765 (1999) (Ferrier warnings not required where officers arrived at residence in response to a 911 call), rev. denied, 139 Wn.2d 1018 (2000).

apartment, when the officers had a reasonable belief that there could be a person hiding in the apartment who posed a danger to themselves or others, the officers were not required to ignore the threat, or turn their backs to the threat and flee; rather, they were permitted to make a cursory search of the area the threat could be located.¹⁴ The fact that the protection of the public or the officers might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render a search unreasonable. Cady v. Dombrowski, 413 U.S. 433, 447, 93 S. Ct. 2523, 2531 (1973).

In City of Seattle v. Hall, the Court was asked to rule on the lawfulness of an officer frisking an individual who voluntarily approached the officer and whom the officer felt could be dangerous—although there was no basis to arrest the individual or

¹⁴ For the first time on appeal, the defendant claims that the officers did not enter into the apartment with Michelle's permission. This claim, along with being waived for failure to raise the issue below, is not supported by the evidence. The defendant cites to State v. Schultz, 170 Wn.2d 746, 248 P.3d 484 (2011) and claims that Michelle merely "acquiescence" to the officers' entry into her apartment. Def. br. at 28. However, in Schultz, the officers intended to enter the residence to conduct a search—that was not the situation here. Additionally, in Schultz, the officers never asked for permission to enter the residence—the officers simply walked in when the resident opened the door. Schultz, 170 Wn.2d at 756-57. That is not the case here. The officers specifically asked Michelle for her permission to enter, 1RP 25, at which point Michelle opened the door all the way and stepped aside, clearly communicating that she wanted the officers to step inside. 1RP 25; CP 77.

conduct a "Terry stop"¹⁵ of the individual. 60 Wn. App. 645, 651-52, 806 P.2d 1246 (1991). The Court held that officers do have the "right to self-protection." Id. at 652. The officers may "take the necessary precautions to protect themselves and others from a potentially dangerous individual." Id.

In State v. Angelos, officers and emergency medical technicians entered Angelos's living room after she called 911 and reported she had overdosed on drugs. 86 Wn. App. 253, 254, 936 P.2d 52 (1997), rev. denied, 133 Wn.2d 1034 (1998). After Angelos was taken from the home, officers searched the bathroom for additional drugs that could pose a danger to children in the home. The Court ruled the search did not require a warrant. Id. at 254-56.

In Kalmas v. Wagner, the Supreme Court ruled that officers invited into a home for community caretaking reasons did not conduct an unlawful search. 133 Wn.2d 210, 213-14, 943 P.2d 1369 (1997). "[T]he public's interest in having the police perform a community caretaking function" outweighed "the individual's interest in freedom from police interference," Kalmas, 133 Wn.2d at 216-17

¹⁵ To justify an investigatory detention or "Terry stop," an officer must have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the detention. Terry, 392 U.S. at 21.

(quoting State v. Mennegar, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994)).

In State v. Nettles, the Court stated that as part of their “community caretaking” function, police officers must be able to approach citizens and permissively inquire as to whether they will answer questions. 70 Wn. App. 706, 712, 855 P.2d 699 (1993), rev. denied, 123 Wn.2d 1010 (1994). “In furtherance of this function,” the Court held, “it is not unreasonable to permit a police officer in the course of an otherwise permissive encounter to ask an individual to make his hands visible.” Id.

In State v. Loewen, the Court stated that “[w]arrantless searches by police officers have been upheld when an emergent situation has been found to have existed.” 97 Wn.2d 562, 567-68, 647 P.2d 489 (1982) (discussing medical emergency exception).

In State v. Nichols, officers responded to a report of a fight in progress involving six to eight people armed with beer bottles and chains. 20 Wn. App. 462, 581 P.2d 1371, rev. denied, 91 Wn.2d 1004 (1978). The officers were informed that the participants had left and that one of the participants lived in the house at the end of the alley. The officers went to the house and knocked on the door

but received no response. Seeking other possible participants, injured persons, or persons who might be hiding, the officers entered the garage through an open door and found a stolen car. The Court held that in conducting their investigation to determine whether anyone had been injured, the officers acted reasonably in entering the garage. The court held that the officers had reasonable grounds to believe their assistance was necessary for the protection of life and that the purpose of the search was not to arrest or seize evidence. Nichols, 20 Wn. App. at 466.

In State v. Barboza, officers responded to a report of shots fired. 57 Wn. App. 822, 790 P.2d 647, rev. denied, 115 Wn.2d 1014 (1990). The officers were met by Laura Barboza, who informed them that armed men had taken her husband away in a car. The officers then conducted a brief search of the home and discovered a marijuana grow operation. In upholding the search, the court found that “although the officers had no specific evidence or reason to believe that someone might be concealed in the house or that a wounded person might be in the house, nevertheless, under all the circumstances, the entry into the house without a search warrant was justified on the basis of exigent circumstances.” Barboza, 57 Wn. App. at 828. It was also undisputed that the

search was not motivated by an intent to arrest or seize evidence.

Id.

In each of the above cases, a search was conducted without a warrant. Generally “[a] warrantless search of a residence is per se unreasonable under the Fourth Amendment to the United States Constitution and Const. art. 1, § 7, unless it falls within a few specifically established and well-delineated exceptions.” Barboza at 825 (citing State v. Chrisman, 100 Wn.2d 814, 817, 676 P.2d 419 (1984) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967))). There must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. Barboza, at 825 (citing State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978)). For instance, when premises contain persons in imminent danger of harm or information that will disclose the location of a threatened victim or the existence of such threat, police may search the premises without first obtaining a warrant. State v. Raines, 55 Wn. App. 459, 463-64, 778 P.2d 538 (1989) (citing State v. Lynd, 54 Wn. App. 18, 20, 771 P.2d 770 (1989)). A warrantless search is also reasonable if necessary for the safety of the public and officers. State v.

McAlpin, 36 Wn. App. 707, 716-18, 677 P.2d 185, rev. denied, 102 Wn.2d 1011 (1984).

Here, Officer Tseng did not walk down the hallway to conduct a search for evidence of a crime, to place someone under arrest, or to conduct a general search for contraband. Instead, he walked down the hallway for a single purpose, to ensure his safety and the safety of the others in the apartment when he had a reasonable belief that someone was possibly hiding in the bedroom and that this person could pose a danger to the officers lawfully in the apartment. Officer Tseng's "search" lasted no longer than necessary in time or scope. The defendant cites to no case that holds that an officer performing a community caretaking function and inside a residence lawfully, must turn and flee from potential danger—potentially placing themselves and others at greater risk of harm. The circumstances here, like the circumstances in the above listed cases, justified a limited cursory search to ensure the safety of the officers and others in Michelle's apartment.

c. Officers Are Allowed To Protect Themselves Even Under State Law.

The defendant next contends that even if officers in a residence lawfully are entitled to protect themselves from danger by

conducting a cursory search under the Fourth Amendment, officers are not allowed to similarly protect themselves under state law.

Under both the Fourth Amendment and Article I, section 7, an officer may conduct a warrantless search incident to arrest. See O'Neil, 148 Wn.2d at 584. One of the main justifications for allowing such a search is the protection of the officer performing his duty. State v. Johnson, 128 Wn.2d 431, 451, 909 P.2d 293 (1996).

Under both the Fourth Amendment and Article I, Section 7, an officer may conduct an investigative or "Terry stop" based upon less evidence than is needed for probable cause to make an arrest. Acrey, 148 Wn.2d at 747; State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). An officer making a lawful investigative stop may protect himself by conducting a warrantless search for concealed weapons whenever the officer has reason to believe that the suspect is armed and dangerous. Acrey, at 747-48 (citing Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)); Kennedy, 107 Wn.2d at 12-13.

Further, "[i]n this State, the 'community caretaking function' exception to the warrant requirement encompasses not only the search and seizure of automobiles, but also situations involving either emergency aid or routine checks on health and safety."

Acrey, at 749-50 (an officer contacting a youth late at night was allowed to conduct a pat-down search for his own safety while he attempted to contact the youth's mother); see also State v. Hos, 154 Wn. App. 238, 247, 225 P.3d 389 (upholding the admission of evidence obtained during a warrantless search based upon the community caretaking exception to article I, section 7), rev. denied, 169 Wn.2d 1008 (2010); accord, State v. Johnson, 104 Wn. App. 409, 415-18, 16 P.3d 680, rev. denied, 143 Wn.2d 1024 (2001).

In all of the above situations, an officer is permitted to conduct a warrantless search for the protection of the public and the officer under an exception to the warrant requirement of the Fourth Amendment and article I, section 7. Still, the defendant contends that here, under article I, section 7, Officer Tseng could not walk down the hallway of Michelle's apartment to protect himself and others while he was engaged in a community caretaking function. This is not consistent with the law. Officers have always been allowed to protect themselves and the public when they are lawfully engaged in their duties. See State v. Valdez, 167 Wn.2d 761, 771-73, 224 P.3d 751 (2009) (justifying search incident to arrest under article I, section 7). A warrantless search under article I, section 7, is allowed where there exists the

“authority of law.” State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). The “authority of law” under article I, section 7 is consistent throughout all of the above examples—officers are allowed to protect themselves and the public when conducting an arrest, when conducting an investigatory stop, or when engaged in a community caretaking function.

3. THE TRIAL COURT DID NOT ERR IN ADMITTING AN UNREDACTED CERTIFIED COPY OF THE NO-CONTACT ORDER.

The defendant claims the trial court erred in admitting a no-contact order (Trial Exhibit 2) without first redacting a certain word from the document. Specifically, he claims that the word “refused,” written on the signature line, was “testimonial evidence” under the confrontation clause and therefore the word should have been redacted before the no-contact order was admitted into evidence. This claim fails for two reasons. First, the no-contact order—including the word “refused,” is a public record that was not prepared in anticipation of litigation, and therefore it is not “testimonial evidence” subject to the confrontation clause. See State v. Hubbard, ___ Wn. App. ___, 279 P.3d 521 (2012) (rejecting a claim that a clerk’s minute entry that showed Hubbard had been served with a no-contact order was testimonial evidence

under the confrontation clause). Second, even if testimonial, any error in not redacting the single word was harmless beyond a reasonable doubt.

The confrontation clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The clause has been interpreted as prohibiting “testimonial” hearsay statements in a criminal case without an opportunity for cross-examination. Hubbard, 279 P.3d 521. If the evidence to be admitted is not “testimonial” in nature, then the admission of the evidence is not subject to confrontation clause concerns. Id.; State v. Kirkpatrick, 160 Wn.2d 873, 882, 161 P.3d 990 (2007), overruled by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). In other words, hearsay statements that are “nontestimonial” do not implicate the confrontation clause and are admissible if they fall within a hearsay exception. Hubbard, (citing State v. Saunders, 132 Wn. App. 592, 601, 132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007)).

Statements made “in anticipation of litigation” are testimonial in nature and subject to the confrontation clause. State v. Holzkecht, 157 Wn. App. 754, 766, 238 P.3d 1233 (2010) (citing

Melendez–Diaz v. Massachusetts, 557 U.S. 305, 311-12, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), rev. denied, 170 Wn.2d 1029 (2011)). For example, “extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” are testimonial. Melendez–Diaz, 557 U.S. at 310 (citing Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

On the other hand, certain statements are by their very nature not testimonial. For example, medical reports created for treatment purposes are not testimonial. Melendez-Diaz, 557 U.S. at 312 n.2. Business records also are considered not testimonial. Jasper, 174 Wn.2d at 109; Crawford, 541 U.S. at 56. And as pertinent here, “[c]ertified records that are not prepared for use in a criminal proceeding also are not testimonial.” Hubbard, at 2 (citing Jasper, at 112); see also State v. Mares, 160 Wn. App. 558, 564, 248 P.3d 140 (2011) (public records are generally admissible absent confrontation because, having been created for the

administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial).

Here, the no-contact order is a certified court record and public record admissible under the recognized hearsay exceptions of RCW 5.44.010¹⁶ and RCW 5.44.040.¹⁷ The certified no-contact order is self-authenticating under ER 902 and does not require extrinsic evidence to prove authenticity.¹⁸

¹⁶ RCW 5.44.010, titled, Court Records and Proceedings—When admissible, provides as follows:

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

¹⁷ RCW 5.44.040, titled Certified Copies of Public Records as Evidence, provides as follows:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

¹⁸ ER 902(d), titled Self-Authentication, Certified Copies of Public Records, provides as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following...A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with section (a), (b), or (c) of this rule or complying with any applicable law, treaty or convention of the United States, or the applicable law of a state or territory of the United States.

The defendant does not contest that, except for the inclusion of the word “refusal,” the no-contact order was properly admitted under court rule, statute and the confrontation clause. But the defendant fails to articulate a meaningful distinction wherein the word “refusal” is testimonial, whereas the entire rest of the document is not. None of the information in the document was created for purposes of further litigation—including the word “refusal” included at the same time and for the same purpose as all the other information in the document.

The no-contact order was used against the defendant at trial. It was used to prove that he was specifically prohibited from having contact with Michelle Valdez. The order provided his full name, date of birth, sex, race, height, weight, hair color and eye color. The order also provided the protected person’s name, date of birth, sex and race. The order states that the defendant was found to be “a credible threat to the life and health of the Protected Person,” and that the defendant had been “personally served,” and been given an “opportunity to be heard.” The order then specifies that the defendant shall have no contact with Michelle, shall vacate her home, shall stay away from her home and shall stay away for any location Michelle is to be found. All these critical facts were used

against the defendant in proving the charge against him. However, the order was admissible under the confrontation clause because it was not prepared for the purpose of future litigation. As the Supreme Court has stated:

Business and public records are generally admissible absent confrontation not because they qualified under an exception to the hearsay rules, but because—having been created for administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Melendez-Diaz, 557 U.S. at 324.¹⁹

The word "refused" is no more testimonial than any other notation, statement or word contained in the no-contact order. It does not matter who wrote the word on the paper—whether the judge, an attorney or the court clerk wrote the word. The bottom line is that just like all the other facts included in the no-contact order, it is a public record of the court proceedings and was not prepared for litigation. Thus, it is not testimonial and the trial court here was correct in refusing to redact the single word from the order. See Hubbard, supra (clerk's minute entry made during sentencing on a prior conviction to show defendant had been served with a no-contact order did not violate the confrontation

¹⁹ Nothing in the Court's most recent confrontation clause decision affects the analysis of this case. See Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221 (June 18, 2012).

clause); State v. Benefiel, 131 Wn. App. 651, 655-56, 128 P.3d 1251, rev. denied, 158 Wn.2d 1009 (2006) (judgment and sentence admitted to prove the defendant had been sentenced to a term of community custody did not violate the confrontation clause) contrast, Melendez-Diaz, supra (crime lab certificate indicated testing results of substance seized from defendant was prepared for purposes of his trial on drug charges); Jasper, supra (department of licensing document indicating defendant's driving status prepared for purposes of trial on driving while license suspended charge).

In any event, any error in not redacting the word "refused" was harmless beyond a reasonable doubt. Confrontation clause errors are subject to harmless-error analysis. Jasper, 174 Wn.2d at 117 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). Under this standard, the State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id.

The word "refused" was of little relevance. The order itself indicated that the defendant had been served with the order, the jury was informed that he already had at least two no-contact order violation convictions, Michelle admitted that the defendant knew

about the order and the defendant told the police that he knew about the order. Thus, any error in not redacting the single word "refused," was harmless under any standard of review.

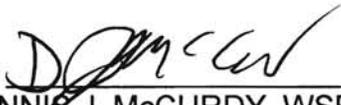
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 27 day of July, 2012.

Respectfully submitted,

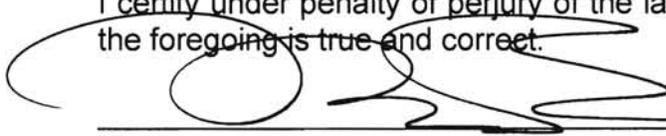
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
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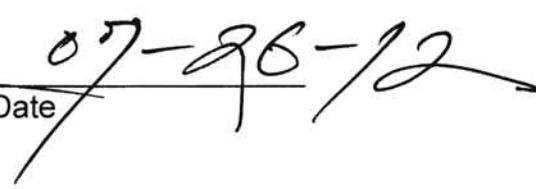
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JACKSON, Cause No. 68019-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date