

COURT OF APPEALS
DIVISION II

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

NO. 41311-6-II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES M. AFENIR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00263-0

BRIEF OF RESPONDENT

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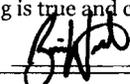
SERVICE	Jordan B. McCabe Law Office of Jordan McCabe PO Box 6324 Bellevue, WA 98008-0324	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: March 29, 2011, at Port Angeles, WA <div style="text-align: right; margin-top: 10px;">  #40537 </div>
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I. STATEMENT OF THE ISSUES:

1. Whether the defendant waived any appellate argument contesting law enforcement's entry into the apartment, and the evidence subsequently obtained, because he never requested a suppression hearing.
2. Whether the defendant has standing to challenge the probable cause to arrest his roommate/guest.
3. Whether the defendant consented to law enforcement's entry into the apartment when he invited the officer into his home and directed the officer's movements throughout the residence.
4. Whether the defendant received effective assistance of counsel when his attorney did not move to suppress physical evidence at trial despite the fact that the defendant consented to the officer's entry and the evidence was obtained pursuant to a search warrant.
5. Whether the defendant's interaction with law enforcement was a consensual encounter when (1) the defendant invited the police into his apartment, (2) the police followed the defendant's explicit directions to locate a third-party inside the apartment, (3) the police asked the defendant if he would be willing to give a statement, and (4) the defendant was free to leave after he gave his statement to law enforcement.
6. Whether the defendant's statement to law enforcement was admissible when it was made during a consensual encounter, after he received a *Miranda*¹ warning, and affirmed that he understood his rights.
7. Whether there is sufficient evidence to support a conviction under RCW 69.53.010 when the defendant was the lessee of the apartment, he permitted another

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

individual to reside in the apartment rent-free, and he knew his roommate was selling methamphetamine out of the apartment.

8. Whether RCW 69.53.010 is constitutional as applied to the defendant.

II. STATEMENT OF THE CASE:

The defendant, James Afenir, leased a one-bedroom apartment in Port Angeles, Washington. RP (8/25/2010) at 202-03. In Autumn 2008, Afenir noticed two individuals living out of a truck in a nearby parking lot: Robert Beck and Kim McCartney. RP (8/25/2010) at 162-63. Shortly before Christmas, Afenir invited Beck and McCartney to live with him until they could arrange their own housing. RP (8/25/2010) at 166.

Afenir allowed his guests to take the bedroom, while he slept on a couch in the living room. RP (8/25/2010) at 55, 57, 166-67. Beck resided in the apartment over the next six months.² RP (8/25/2010) at 169. Afenir never accepted rent from his guests. RP (8/25/2010) at 167, 202.

On June 22, 2009, Corporal Jesse Winfield arrested a woman and obtained a warrant to search her vehicle. RP (8/25/2010) at 44; CP Supp. at 2-3. Inside the vehicle was a backpack, which contained illicit

² However, Afenir also testified that Beck only kept his belongings in the apartment and stayed there about three times a week after April 2009. *See e.g.*, RP (8/25/2010) at 170-71, 198.

substances: methamphetamine and other controlled pain medications.³ RP (8/25/2010) at 44; CP Supp. at 2-3. Winfield determined the backpack belonged to Beck because (1) the backpack contained Beck's cell phone, and (2) the officer previously saw Beck in the woman's company prior to the arrest. RP (8/25/2010) at 44-48, 62-63; CP Supp. at 2-3. Winfield believed he had probable cause to arrest Beck for possession of a controlled substance with intent to distribute. RP (8/25/2010) at 44, 46-48; CP Supp. at 2.

On June 28, 2009, Winfield learned that Beck could be found inside Afenir's apartment. RP (8/25/2010) at 44, 49; CP Supp. at 2. Winfield knocked on the apartment door, which Afenir answered. RP (8/25/2010) at 49, 96; CP Supp. at 2. Winfield explained he was looking for Beck. RP (8/25/2010) at 96; CP Supp. at 2. Afenir said Beck was in the bedroom and invited the officer inside. RP (8/25/2010) at 49-50, 97, 184; CP Supp. at 2. Winfield contacted dispatch, asked for a second unit, and entered the apartment. CP Supp. at 2.

Afenir directed Winfield to the bedroom. RP (8/25/2010) at 49-50; CP Supp. at 2. When Winfield entered the bedroom, he did not see Beck. CP Supp. at 2. Winfield exited the bedroom and asked Afenir if he was sure that Beck was inside the apartment. CP Supp. at 2. Winfield

³ Beck admitted he did not have a prescription for the pain medications. CP Supp. at 3.

explained that he intended to arrest Beck, and that he was concerned Beck was hiding. CP Supp. at 2. Afenir affirmed that Beck was in the bedroom. CP Supp. at 2.

Winfield asked where the doors off the bedroom led. CP Supp. at 2. Afenir explained they were the closet and bathroom doors. CP Supp. at 2. Winfield asked if it would be okay if he checked for Beck in the bathroom. CP Supp. at 2. Afenir said, “go ahead.” CP Supp. at 2. Winfield opened the bathroom door, saying “hello”, and observed Beck sitting on the toilet. CP Supp. at 2. Beck replied, “just a minute.” CP Supp. at 2. Winfield advised Beck that he was under arrest and told him to finish. CP Supp. at 2. When Beck finished and exited the bathroom, Winfield placed him under arrest. RP (8/25/2010) at 50; CP Supp. at 2.

In the bedroom, Winfield saw various items that indicated illegal drug activity. RP (8/25/2010) at 67-68. Upon his arrest, Beck admitted there were drugs in the apartment. RP (8/25/2010) at 98; CP Supp. at 3.

Winfield spoke briefly with Afenir about Beck’s activities. RP (8/25/2010) at 50. Winfield then asked if Afenir would be willing to give a statement to Detective Clay Rife. RP (8/25/2010) at 33; CP Supp. at 3. Afenir agreed and exited the apartment to speak with Rife. CP Supp. at 3. Winfield then applied for a telephonic warrant to search the premises. RP (8/25/2010) at 99; CP Supp. at 4.

Rife conducted a recorded interview with Afenir's permission.⁴ RP (8/25/2010) at 25-28, 124, 185. Rife spoke with Afenir outside the apartment and inside his police cruiser. RP (8/25/2010) at 28, 124. Rife read Afenir his *Miranda* rights before asking the defendant any questions. RP (8/25/2010) at 26-27, 124. Afenir said he understood his rights. RP (8/25/2010) at 26-27, 125.

Afenir informed the detective that Beck was living in the apartment and everything in the bedroom belonged to his roommate. RP (8/25/2010) at 125. Afenir said he was the sole person responsible for the apartment because he was the only lessee. RP (8/25/2010) at 125. Afenir claimed he only entered the bedroom when he needed to access the bathroom. RP (8/25/2010) at 125-26, 167, 171-72. Afenir admitted Beck was selling methamphetamine out of the apartment. RP (8/25/2010) at 126-27, 129, 131, 139-42, 145. After the interview, Afenir was free to go about his business. CP Supp. at 4.

A search of the apartment produced methamphetamine, paraphernalia, and other indicia of drug sales throughout the residence. Inside the bedroom, officers discovered methamphetamine, pills, a loaded syringe containing a controlled substance, syringe packaging, powder

⁴ Afenir claims he spoke with law enforcement because they told him that they were only interested in Beck. RP (8/25/2010) at 31, 33, 35-36.

residue, baggies, spoons, pipes, scales and other weighing items, records of drug transactions, body fluid clean-up kits, and a police scanner. RP (8/25/2010) at 55-68, 78-80. In the living room, police found a drug kit, spoons with a powder residue, a meth pipe, scales, used syringes, and a loaded syringe with methamphetamine. RP (8/25/2010) at 69-73, 81-84, 91. Many of the recovered items were in plain view. RP (8/25/2010) at 67-68.

The State charged Afenir with “Unlawful Use of a Building for Drug Purposes.” CP 37. The defense never requested a 3.6 hearing to suppress the physical evidence against Afenir.

At a bench trial, Afenir denied there was any unlawful drug activity happening in the apartment. RP (8/25/2010) at 187-88. However, he admitted individuals regularly visited Beck.⁵ RP (8/25/2010) at 188. During these visits, Afenir testified that Beck’s guests would often go into the bedroom and close the door. RP (8/25/2010) at 188. According to Afenir:

... I can’t search everybody that comes in and out of my apartment. If I were to ask them if they were doing drugs, they would have just told me no. So they were leaving, and that was going to be the end of it.

⁵ In fact, while officers searched the residence, two individuals visited the apartment looking for Beck. One of these individuals also admitted that Beck was involved in the methamphetamine trade. *See* CP Supp. at 5-8.

RP (8/25/2010) at 189. Nonetheless, Afenir affirmed he himself purchased methamphetamine from Beck. RP (8/25/2010) at 190.

The trial court found the following facts⁶:

1. On June 28, 2009, the defendant's apartment was searched by Corporal Jesse Winfield and Detective [Clay] Rife.
2. The small one bedroom and one bathroom apartment is situated at 108 W. 5th St[reet] in Port Angeles, Washington State.
3. The apartment is leased by the defendant and was under his control.
4. The defendant allowed Robert Beck to reside in the only bedroom in the apartment from Dec. 2008 to June 28, 2009.
5. Controlled substances and drug paraphernalia were found both in the single bedroom and the living room of the defendant's apartment.
6. State's Exhibit #26 consisted of scales of the type commonly used to weigh controlled substances and was found by the front door of the apartment.
7. State's Exhibit #30 consisted of a drug kit purse which was found under the defendant's couch in the living room.
8. State's Exhibit #29 consisted of drug paraphernalia which was found inside the drug kit purse found underneath the couch in the living room.

⁶ Afenir does not assign error to these factual findings. As such, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

9. State's Exhibit #31 consisted of multiple syringes of a type commonly used to ingest controlled substances and was found in the living room outside the bedroom door.
10. State's Exhibit #25 was a police scanner used to follow law enforcement activity and was found in open view in the bedroom.
11. The defendant testified that he was aware of the presence of the scanner.
12. Two individuals were staying in the single bedroom of the apartment while the defendant sleeps on the couch in the living room.
13. State's Exhibit #17 consisted of a black tin container which contained multiple clear small plastic baggies of a type commonly used to package controlled substances.
14. The State's Exhibits demonstrate a clear indication of drug use in the apartment.
15. The court finds that the defendant is experienced with [the] drug culture and that the defendant was aware these items mentioned above in the State's Exhibits existed in his apartment.
16. The evidence shows that there was more than recreational use of controlled substance occurring in the apartment.
17. Detective Rife testified from his own recollection that the defendant indicated that he uses methamphetamine and obtained it from Robert Beck who lived in the bedroom of the apartment. In his testimony at trial the defendant admitted obtaining methamphetamine from Mr. Beck on at least three occasions.

18. The Defendant knew that other persons were purchasing illegal controlled substances from Mr. Beck in the apartment. When referring to the people who would come to his apartment the defendant testified that “I was not stupid” and that “I couldn’t search everyone” and that “they were leaving and that was the end of it.”

19. The defendant allowed illegal drug activity to continue in his home despite having knowledge that it was occurring in his home.

CP 19-21. Pursuant to RCW 69.53.010 and *State v. Sigman*, 118 Wn.2d 442, 826 P.2d 144 (1992), the trial court concluded, beyond a reasonable doubt, that Afenir was guilty of the charged offense. RP (8/25/2010) at 219-22; CP 21

The trial court sentenced Afenir to 32 days confinement, with credit for two days already served, and converted the remaining sentence to 240 community service work hours. RP (10/14/2010) at 233; CP 8; Afenir appeals.

III. ARGUMENT:

A. THE DEFENDANT WAIVED ANY CHALLENGE TO THE WARRANTLESS ENTRY INTO THE APARTMENT.

Mr. Afenir claims the physical evidence introduced at trial was fruit of the poisonous tree. *See* Brief of Appellant at 7-12. At trial, however, Mr. Afenir never requested a CrR 3.6 hearing to suppress the

evidence against him. This Court should hold Mr. Afenir waived any argument to suppress the physical evidence against him, and he cannot raise this issue for the first time on appeal.

“Error predicated upon evidence allegedly obtained by illegal search and seizure cannot be raised for the first time on appeal.” *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539, *cert. denied*, 389 U.S. 871 (1967); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Some cases have suggested that such error might be considered a “manifest error affecting a constitutional right,” which could be raised for the first time on appeal. *See e.g., State v. Donohoe*, 39 Wn. App. 778, 782, 695 P.2d 150, *review denied*, 103 Wn.2d 1032 (1985). However, such analysis misses a key point. The constitution only requires exclusion of illegally obtained evidence based upon a timely objection. “While the constitutional rights of the individual are to be preserved, those rights are dependent, for their recognition, upon a timely assertion.” *State v. Gunkel*, 188 Wash. 528, 534-35, 63 P.2d 376 (1936). Thus, absent a timely objection, the admission of evidence is not error, even if that evidence was illegally obtained.

Similarly, there is no constitutional right to have evidence excluded without a proper objection. If the defense fails to bring a timely and proper suppression motion, the admission of evidence cannot be

“manifest error affecting a constitutional right.” Modern case law acknowledges this rule.⁷ See e.g., *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009), *review granted*, 168 Wn.2d 1005 (2010) (defendant waived his right to challenge the legality of the search under *Gant* by failing to file a motion to suppress this evidence pursuant to CrR 3.6 or by failing to object to its admission at trial); *State v. Nyegaard*, 154 Wn. App. 641, 646, 226 P.3d 783 (2010) (“a defendant waives his right to appeal the admission of evidence seized in a vehicle search incident to arrest if he fails to challenge that search below”); *State v. Trujillo*, 153 Wn. App. 454, 222 P.3d 129 (2009) (an attack on the sufficiency of probable cause to support an arrest may not be raised for the first time on appeal under RAP 2.5(a)); *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990) (defendant had burden to request hearing to support in-court identification; absent the request there was no error).

Here, the defense never filed a suppression motion pursuant to CrR 3.6. As such, the State has not had an opportunity to ensure the record clearly demonstrates that the physical evidence was lawfully obtained.

⁷ However, the State notes that some cases appear to carve out an exception for a challenge predicated upon a new case. See e.g., *State v. Burnett*, 154 Wn. App. 650, 228 P.3d 39 (2010) (the defendant’s failure to challenge the lawfulness of the search below, did not waive his right to raise the issue on appeal); *State v. Harris*, 154 Wn. App. 87, 224 P.3d 830 (2010) (under RAP 2.5(a)(3), an appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right); *State v. McCormick*, 152 Wn. App. 536, 216 P.3d 475 (2009) (a defendant may raise a *Gant* challenge on appeal even if the defendant did not file a motion to suppress evidence in the trial court).

Afenir cannot now argue, for the first time on appeal, that the evidence against him was unlawfully obtained. This Court should reject Afenir's argument and hold that he has waived the present issue.⁸ *Silvers*, 70 Wn.2d at 432; *Mierz*, 127 Wn.2d at 468.

B. THE DEFENDANT DOES NOT HAVE STANDING TO CONTEST THE ARREST OF HIS ROOMMATE.

Mr. Afenir goes to great lengths to challenge the basis for Beck's arrest. *See* Brief of Appellant at 9-13. However, Afenir does not have standing to raise this issue on appeal.

The rights protected by the federal and state constitutions are personal to the individual. *State v. Takesgun*, 89 Wn. App. 608, 610, 949 P.2d 845 (1998) (citing *Rakas v. Illinois*, 439 U.S. 128, 131 n.1, 99 S.Ct. 421, 424 n.1, 58 L.Ed.2d 387 (1978)). In order to establish standing to challenge a search, or to suppress evidence obtained as "fruit of the poisonous tree," the defendant must show that the search or seizure violated his/her *own* expectation of privacy or property interest. *Rakas*, 439 U.S. at 137-38. Additionally, an attack on the sufficiency of probable

⁸ In the alternative, this Court may remand the case with instructions that the trial court hold a hearing to allow the State to introduce evidence regarding the existence of any applicable exceptions to the warrant requirement. *See State v. Bliss*, 153 Wn. App. 197, 222 P.3d 107 (2009).

cause that supports an arrest cannot be raised for the first time on appeal. *State v. Trujillo*, 153 Wn. App. 454, 222 P.3d 129 (2009).

At trial, the defense never questioned the probable cause supporting Beck's arrest. This Court should hold that this issue is not preserved on appeal. More importantly, Afenir cannot allege a constitutional violation on behalf of a third party.

C. THE POLICE LAWFULLY ENTERED THE APARTMENT PURSUANT TO THE DEFENDANT'S CONSENT.

Mr. Afenir claims the evidence against him was the product of "egregious violations" of his right to remain free of unlawful searches and seizures. *See* Brief of Appellant at 8. However, Mr. Afenir conveniently forgets that he consented to the officer's entry. This Court should reject Mr. Afenir's argument.

Generally, the appellate courts consider warrantless searches to be per se unreasonable. *See e.g. State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). However, there are a few narrow exceptions to the warrant requirement. *Id.* A defendant's consent is one exception to the warrant requirement. *Id.*

The State bears the burden of establishing the validity of a warrantless entry based upon consent. *State v. Mathe*, 102 Wn.2d 537,

540, 688 P.2d 859 (1984). The State must meet three requirements to show a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent. *Reichenbach*, 153 Wn.2d at 131. The voluntariness of consent is a question of fact based on the totality of the circumstances.⁹ *Reichenbach*, 153 Wn.2d at 132.

Here, Afenir gave the police his voluntary consent to enter the apartment. Corporal Winfield knocked on the apartment door. RP (8/25/2010) at 49; CP Supp. at 2. When Afenir answered, Corporal Winfield explained who he was and that he was looking for Beck. RP (8/25/2010) at 96; CP Supp. at 2. Afenir replied that Beck was in the bedroom and he invited the officer inside. RP (8/25/2010) at 49-50, 96-97, 184; CP Supp. at 2. While Winfield was wearing his police uniform, *see*

⁹ The State recognizes that “the home receives heightened constitutional protections.” *See State v. Bustamante-Davila*, 138 Wn.2d 964, 979, 983 P.2d 590 (1999) (quoting *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)). Pursuant to these protections, the Washington Supreme Court has held that if law enforcement fails to advise a resident, prior to entering the home, that he/she may lawfully refuse consent to a search pursuant to a “knock and talk” procedure, any consent given is invalid. *See State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). However, the Washington Supreme Court only requires a *Ferrier* warning in situations where officers seek entry into a home to search for contraband without the authority of a warrant. *See State v. Thang*, 145 Wn.2d 630, 636, 41 P.3d 1159 (2002); *Bustamante-Davila*, 138 Wn.2d at 980-81. Thus, when officers do not employ a “knock and talk” procedure, as in this case, the court employs a “totality of the circumstances” test to determine whether the consent was valid. *Thang*, 145 Wn.2d at 637; *Bustamante-Davila*, 138 Wn.2d at 981.

RP (825/2010) at 96, there is nothing in the record to show he gained access to the apartment via coercion / intimidation.

Second, Afenir had the lawful authority to invite the officer into his home. Afenir admitted that he was the sole person responsible for the lease. RP (8/25/2010) at 125. Thus, he was legally able to consent to the officer's entry. *State v. Thang*, 145 Wn.2d 630, 638, 41 P.3d 1159 (2002) ("A host or third party who has dominion and control over the premises may consent to a search, whether it is for purpose of arrest or seizure of evidence").

Finally, Winfield only entered the premises to locate and arrest Beck. Upon entry, Winfield followed Afenir's directions to locate Beck in the bedroom. RP (8/25/2010) at 49-50; CP Supp. at 2. When Winfield was unable to locate Beck in the bedroom, Afenir gave the officer permission to search the adjoining bathroom. CP Supp. at 2. Winfield then located Beck and placed him under arrest. RP (8/25/2010) at 50; CP Supp. at 2. There is nothing in the record to show Winfield exceeded the scope of consent voluntarily given by Afenir.

This Court should conclude Corporal Winfield lawfully entered Afenir's apartment. While Winfield eventually conducted a search of the entire apartment, the search was supported by a warrant that was obtained from a neutral magistrate after the officer (1) observed signs of drug

activity, (2) Beck admitted there were drugs in the apartment, and (3) Afenir confirmed that Beck was involved in the methamphetamine trade. RP (8/25/2010) at 67-68, 98; CP Supp. at 2-4. There was no error.

D. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Afenir claims he received ineffective assistance of counsel because his attorney did not move the trial court to suppress the physical evidence at trial. *See* Brief of Appellant at 13-15. This argument is without merit.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) the deficient performance prejudiced the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Under the prejudice prong, a defendant must show a reasonable probability that, but for counsel's error, the result would have been different. *Id.* at 335. Afenir cannot satisfy either prong of this test.

Some defendants will attempt to raise a suppression motion that was not considered by the trial court in the direct appeal under the heading of ineffective assistance of counsel. This tactic is disfavored by the appellate courts, which require the defendant to establish from the trial court record: (1) the facts necessary to adjudicate the claimed error, (2) the trial court would likely have granted the motion if it had been made, and (3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *See McFarland*, 127 Wn.2d at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Here, Afenir never moved the trial court to suppress the evidence against him. Thus, there exists no record of the trial court's determination of the issue.

However, even a de novo review of the record (which relieves Afenir of his burden to show the alleged error was manifest) does not show his attorney was deficient or any resulting prejudice. *See McFarland*, 127 Wn.2d at 333. As stated above, the record clearly demonstrates that (1) Afenir consented to Corporal Winfield's entry into the apartment, and (2) the subsequent search that produced the physical evidence was conducted pursuant to a search warrant. There was no legal basis upon which trial counsel could base a motion to suppress. Thus, Afenir's attorney did not render ineffective assistance when he refused to

file a frivolous motion; and the absence of a frivolous motion did not prejudice the defense. This Court should affirm.

E. THE DEFENDANT’S STATEMENTS TO LAW ENFORCEMENT ARE ADMISSIBLE.

Mr. Afenir appears to argue that he was unlawfully detained and by virtue of his detention his statements were inadmissible. *See* Brief of Appellant at 15-18. He also argues that he was constructively denied the protections of *Miranda* because law enforcement allegedly told him “he was not the focus of the investigation.” *See* Brief of Appellant at 18-23. These arguments are without merit because (1) he was not detained when he made his statements, (2) the statements were not the product of a custodial interrogation, and (3) the officers did not “cajole” the defendant to give statements against his interest. This Court should affirm.

1. Afenir’s interaction with law enforcement was a consensual encounter.

Not every interaction between an officer and a citizen constitutes a seizure. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998); *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). *See also Florida v. Bostick*, 501 U.S. 429, 434-35, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *United States v. Mendenhall*, 446 U.S. 544, 552-53, 100 S.Ct. 1870, 64 L.Ed.2d 497

(1980). There are three types of permissible encounters between police officers and citizens: (1) the consensual encounter, which may be initiated without any objective level of suspicion; (2) the investigative detention, which must be supported by a reasonable suspicion of criminal activity if the interaction is nonconsensual; and (3) the arrest, which is valid only if supported by probable cause. The present case involves the first category – a consensual encounter. Thus, there was no seizure and constitutional protections were not implicated.

The Washington Constitution, article I, section 7,¹⁰ provides greater protection to individual privacy rights than the Fourth Amendment.¹¹ *Rankin*, 151 Wn.2d at 694. Under article I, section 7, a seizure occurs when “considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). *See also Rankin*, 151 Wn.2d at 695; *State v. O’Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

¹⁰ The Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7

¹¹ The Fourth Amendment provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” U.S. Const. amend IV.

The standard is “a purely objective one, looking to the actions of the law enforcement officer[.]” *Harrington*, 167 Wn.2d at 663; *Rankin*, 151 Wn.2d at 695; *O’Neill*, 148 Wn.2d at 574; *Young*, 135 Wn.2d at 501. 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; *O’Neill*, 148 Wn.2d at 581. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away, refuse the officer’s request, or terminate the encounter. *Harrington*, 167 Wn.2d at 663; *O’Neill*, 148 Wn.2d at 574. If the encounter is consensual, then no reasonable suspicion is required, and the interaction will not trigger constitutional scrutiny unless it loses its consensual nature. *See Bostick*, 401 U.S. at 434.

The Washington Supreme Court has embraced a nonexclusive list of police actions that will likely turn a consensual encounter into a 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.” *Harrington*, 167 Wn.2d at 664 (citing *Mendenhall*, 446 U.S. at 554-55; *Young*, 135 Wn.2d at 512). Additionally, where the encounter takes place is another factor, but it is not dispositive. *Bostick*, 501 U.S. at 437. In the absence of any such evidence, an

otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Harrington*, 167 Wn.2d at 664. The defense bears the burden of proving a seizure occurred in violation of article I, section 7. *Harrington*, 167 Wn.2d at 664; *O'Neill*, 148 Wn.2d at 574; *Young*, 135 Wn.2d at 510.

Here, the defense fails to meet its burden because the totality of the circumstances reveals that Afenir's contact with Corporal Winfield and Detective Rife was consensual. Winfield knocked on the apartment door, which Afenir answered. RP (8/25/2010) at 49, 96; CP Supp. at 2. Winfield explained that he was looking for Beck, and Afenir invited him into the apartment. RP (8/25/2010) at 49-50, 97, 184; CP Supp. at 2. At all times inside the apartment, Winfield followed Afenir's directions. RP (8/25/2010) at 49-50; CP Supp. at 2. When Winfield was unable to locate Beck, he sought Afenir's permission to search the bathroom. CP Supp. at 2. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest.

At the time of the initial contact, Corporal Winfield was the sole officer on the scene. CP Supp. at 2. While Winfield was wearing his police uniform, *see* RP (8/25/2010) at 96, and entered Afenir's residence, *see* RP (8/25/2010) at 49, there is nothing in the record to show he was anything but courteous and respectful to Afenir. Winfield did not seize Afenir

simply by knocking on his door, *see* RP (8/25/2010) at 49; CP Supp. at 2, nor by asking him a few brief questions regarding Beck's activities, *see* RP (8/25/2010) at 50, CP Supp. at 2. *See O'Neill*, 148 Wn.2d at 581 ("The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a *Terry* stop."); *Thorn*, 129 Wn.2d at 352 ("A police officer does not necessarily seize a person by striking up a conversation or asking questions.").

Similarly, there is nothing in the record to show that Corporal Winfield or Detective Rife pressured Afenir to give a statement. Winfield *asked* if Afenir would give a statement to Rife. RP (8/25/2010) at 33; CP Supp. at 3. Afenir agreed to the interview and followed Rife out of the apartment. RP (8/25/2010) at 28, 33, 124; CP Supp. at 3. In an abundance of caution, Rife read Afenir his *Miranda* warnings, explicitly advising him that (1) he had the right to remain silent, (2) anything he said could be used against him in court, (3) he had the right to have an attorney present during the interview, and (4) he could exercise his rights at any time and discontinue the interview. RP (8/25/2010) at 26-27, 124. Afenir said he understood his rights. RP (8/25/2010) at 26-27, 125.

While the interview was conducted in the back of a police car, *see* RP (8/25/2010) at 28, 124, this single fact does not elevate the consensual encounter to a seizure. The record does not explain why the interview occurred in the back a patrol vehicle. However, the reason need not be sinister. The State submits Rife conducted the interview in his patrol car so that (1) Afenir would have a place to sit, and (2) the quality of the recording would not be lessened due to ambient noise associated with conducting an interview outside. Nonetheless, the record does reveal (1) the interview occurred in public, *see* RP (8/25/2010) at 28, 124; (2) the detective used a pleasant and respectful tone of voice throughout the interview, *see* RP (8/25/2010) at 29; (3) the detective never brandished his weapon, *see* RP (8/25/2010) at 28-29; (4) there were no other officers present during the interview, *see* RP (8/25/2010) at 28; and (5) the defendant was free to leave at the end of the interview, CP Supp. at 4.

After reviewing the “totality of the circumstances” surrounding the interaction between Afenir and law enforcement, this Court should hold that the encounter was consensual and a reasonable person in the same situation as the defendant would have been free to refuse the officer’s requests and terminate the encounter.¹² This Court should affirm.

¹² Even assuming *arguendo* that Winfield’s brief questions regarding Beck’s activities and Rife’s interview elevated the counter to an investigative detention, the officers at that point had a reasonable suspicion to detain the defendant. Winfield knew Afenir was the

2. Afenir's statements to law enforcement were not the product of a custodial interrogation and a *Miranda* warning was not required.

The well-known *Miranda* warnings are a prophylactic protection against the inherently coercive nature of custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). When either custody or interrogation are not present, *Miranda* warnings are unnecessary. *Id.* at 444. Here, the parties dispute whether Afenir was in custody at the time he made certain statements to law enforcement. Appellate courts review the determination of custodial status de novo. *State v. Lorenz*, 152 Wash.2d 22, 36, 93 P.3d 133 (2004).

In Washington, the appellate courts apply an objective test to determine whether the defendant was in custody: “whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.” *Lorenz*, 152 Wn.2d at 36-37. To establish that an interrogation was custodial, “[t]he defendant must show some objective facts indicating his or her freedom of movement was restricted.” *State v. Post*, 118 Wn.2d 596, 607, 826 P.2d 172 (1992).

lessee of the apartment. *See* CP Supp. at 2. Winfield observed signs of drug activity when he entered the bedroom. RP (8/25/2010) at 67-68. Beck admitted that there were drugs in the apartment. RP (8/25/2010) at 98; CP Supp. at 3. Beck also said he occasionally provides methamphetamine to Afenir. CP Supp. at 3. This created a reasonable suspicion that Afenir was engaged in some criminal activity in the apartment.

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In *State v. Green*, 91 Wn.2d 431, 437, 588 P.2d 1370 (1979), the Washington Supreme Court held that the defendant was not in custody when he was interviewed at a police station, but came to the station voluntarily and was free to leave. *See also State v. Lewis*, 32 Wn. App. 13, 17, 645 P.2d 722 (1982) (interview was noncustodial because the defendant came to the police station voluntarily, was never arrested, and was free to leave at will).

Similar circumstances are present here. After Corporal Winfield arrested Beck, he asked Afenir if he would be willing to provide a statement to Detective Rife. RP (8/25/2010) at 33, CP Supp. at 3. Afenir agreed and voluntarily followed the detective out of the apartment. CP Supp. at 3. While Afenir sat inside Rife's patrol car during the interview, he was never in police custody to a degree associated with formal arrest. There is nothing in the record to show Detective Rife physically restrained Afenir. RP (8/25/2010) at 28-29. The officer spoke with Afenir in a calm and courteous manner. RP (8/25/2010) at 29. Finally, Afenir was allowed to leave after the interview.¹³ CP Supp.

There is no evidence in the record that Afenir tried to leave or was prevented from doing so. As such, Afenir has not shown any "objective facts indicating his ... freedom of movement was restricted." *State v. Post*,

¹³ The police did not arrest Afenir until after they completed a search of his apartment. CP Supp at 5.

118 Wn.2d 596, 607, 826 P.2d 172 (1992). A reasonable person in Afenir's circumstances would not have believed he "was in police custody to a degree associated with formal arrest." *Lorenz*, 152 Wn.2d at 37. As such, Afenir's interrogation was not custodial and his statements were admissible regardless of having first received his *Miranda* warnings.

3. Afenir knowingly, voluntarily, and intelligently made statements to law enforcement.

Mr. Afenir contends that his statements to Detective Rife should have been suppressed because his waiver of *Miranda* was obtained by deception and, therefore, was not made knowingly and voluntarily. *See* Brief of Appellant at 18-23. This argument fails.

To determine whether a confession is coerced, the trial court looks to the "totality of the circumstances" including the defendant's condition, the defendant's mental abilities, police conduct, and any promises or misrepresentations. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (citing *State v. Rupe*, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984)). There must also be a causal relationship between the promise and the confession indicating that the defendant's "will was overborne." *Broadaway*, 133 Wn.2d at 132.

Here, Corporal Winfield asked Afenir if he would be willing to give a statement to Detective Rife. RP (8/25/2010) at 33; CP Supp. at 3.

Afenir agreed to speak with Rife. RP (8/25/2010) at 33; CP Supp. at 3. Detective Rife read Afenir his *Miranda* rights. RP (8/25/2010) at 26-27. Afenir acknowledged that he understood his rights and agreed to speak with the officer. RP (8/25/2010) at 26-27, 125. Under a totality of the circumstances, there is no evidence that Afenir's will was overborne.

Afenir testified that he only agreed to speak with Rife because:

He [Detective Rife] said that they weren't there for me; they were there for Rob Beck. And the way I understood it was that if I could give them any information that would help, and that's what I did.

RP (8/25/2010) at 33. *See also* RP (8/25/2010) at 31. However, Afenir's *Miranda* warnings, which he understood, clearly advised him that he had the right to remain silent and any statement he made could be used against him. RP (8/25/2010) at 26-27, 124-25. Furthermore, even if Rife's alleged statement is construed as a false assurance, there is no causal relationship between the purported promise and Afenir's decision to give a statement. Afenir had already agreed to give a statement to law enforcement pursuant to Winfield's request and before Rife allegedly said the police were primarily interested in Beck's activities CP Supp. at 3.

The totality of the circumstances demonstrates that Afenir understood his *Miranda* rights and voluntarily, knowingly, and intelligently waived them. Because the trial court's refusal to suppress the

verbal statements was supported by a sufficient quantity of evidence in the record, this Court should affirm.

F. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

Mr. Afenir claims there is insufficient evidence to support his conviction. *See* Brief of Appellant at 23-25. The argument is without merit.

This Court reviews a claim of insufficient evidence for “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). A defendant who challenges the sufficiency of the evidence necessarily admits the truth of the State’s evidence and all reasonable inferences that can be drawn from that evidence. *Id.* at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

RCW 69.53.010(1) provides:

It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or

mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW[.]

The statute, by its own terms, applies to any “lessee” of a “building, room, space, or enclosure.” RCW 69.53.010.

Afenir argues that there was insufficient evidence that he made a room available for the purpose of unlawful drug activity. At trial, Afenir relied on *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000). In *Ceglowski*, the defendant’s conviction for maintaining a drug house was reversed and dismissed for insufficient evidence. 103 Wn. App. at 348. The conviction, however, was based on RCW 69.50.402, which prohibits a defendant from maintaining a space in order to keep or sell drugs.

The statute under which Afenir was convicted is different. RCW 69.53.010 prohibits the lessee of an apartment from “knowingly mak[ing] available for use [a] room, space, or enclosure” for drug related purposes. Thus, it is not Afenir’s purpose in maintaining a residence, or his charitable act of providing housing to a homeless individual, that concerns the State. What concerns the State is that Afenir had knowledge of Beck’s illicit activities within the residence, and he allowed his roommate to continue selling methamphetamine from the apartment. *State v. Sigman*,

118 Wn.2d 442, 447, 826 P.2d 144 (1992) (holding a defendant can be convicted under RCW 69.53.010 if he knew of the illegal activity, yet permitted that illegal activity to continue). *See also United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991) (stating a similar federal statute requires only that the proscribed activity be present and that the defendant knew of the activity and allowed that activity to continue).

It is undisputed that Afenir leased the apartment and was the sole person responsible for the unit. RP (8/25/2010) at 125; CP 19; CP Supp. at 2. Afenir told the officers that he was allowing Beck to live in the apartment. RP (8/25/2010) at 125; CP 19. Afenir admitted that he knew Beck was selling methamphetamine out of the apartment. RP (8/25/2010) at 126-27, 129, 131, 139-42, 145; CP 21; CP Supp. at 3. There is sufficient evidence that Afenir knowingly made a room, space, or enclosure available to another to engage in the traffic of methamphetamine. *See* CP 19-21.

G. RCW 69.53.010 IS CONSTITUTIONAL AS APPLIED IN THE PRESENT CASE.

Mr. Afenir appears to argue that RCW 69.53.010 is unconstitutional because it allows the State to obtain a conviction without proving a criminal act. *See* Brief of Appellant at 25-28. This argument is without merit.

The Washington Supreme Court has already held that RCW 69.53.010 is constitutional. *State v. Sigman*, 118 Wn.2d 442, 826 P.2d 144 (1992). The *Sigman* Court refused to find that the statute was vague on its face, or unconstitutionally vague as applied to the defendant, who had knowledge of illegal drug activity on his rental property and deliberately chose to do nothing about it. 118 Wn.2d at 445-48. The same is true in the present case.

Here, there is a criminal act. Afenir, who had dominion and control over the apartment in question, made a bedroom available to Beck even though he knew his roommate was selling methamphetamine out of said bedroom/apartment.¹⁴ RP (8/25/2010) at 125-27, 131, 139-42, 145; CP 21; CP Supp. at 2-3. Afenir deliberately chose not to do anything to stop the illegal activity.¹⁵ The State's decision to file charges under RCW 69.53.010, and the resulting conviction, did not violate Afenir's right to due process. *See State v. Sigman*, 118 Wn.2d 442, 826 P.2d 144 (1992). This Court should affirm.

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¹⁴ The trial court found that illegal drugs and paraphernalia were discovered throughout the apartment, which made it readily apparent that "more than recreational use of controlled substances [was] occurring in the apartment." CP 19-20.

¹⁵ If Afenir had made efforts to prevent the drug trafficking that occurred from his apartment, he would have had an affirmative defense to the charge. *See* RCW 69.53.010(2).

IV. CONCLUSION:

Based upon the arguments above, the State respectfully requests that this Court affirm Mr. Afenir's conviction.

DATED this March 29, 2011.

DEBORAH KELLEY
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian Patrick Wendt", written in a cursive style.

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