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

STATE OF WASHINGTON, Respondent

v.

LONG PHAM, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02172-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court correctly concluded that Deputy Preston engaged Pham in a social contact when he asked Pham questions about the vehicle that he was walking from where Deputy Preston used a normal speaking tone, remained in his police vehicle without activating its lights or siren, did not take any measure to block Pham's path or prevent him from leaving, did not direct or command Pham to speak with him, and where no other law enforcement officer was present.**
- II. **The trial court did not abuse its discretion when it declined to reopen Pham's case for the admission of rehabilitation evidence.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Long Pham was charged by amended information with Possession of a Controlled Substance with Intent to Deliver – Heroin, Possession of a Controlled Substance – Methamphetamine, and Unlawful Possession of a Controlled Substance – Buprenorphine for an incident occurring on or about October 15, 2016. CP 115-16. The possession with intent count also included a school bus stop route enhancement. CP 115. On October 5, 2017, a CrR 3.6 hearing on Pham's motion to suppress evidence was held before the Honorable Daniel Stahnke. RP 14-74. Judge Stahnke denied Pham's motion and later entered the associated findings and conclusions. RP 72-74; CP 155-58.

The case proceeded to a jury trial before Judge Stahnke on October 11, 2017 and concluded the next day with the jury's verdicts convicting Pham as charged. RP 154-380; CP 187-191. The trial court sentenced Pham to a standard range sentence of 90 months confinement, which included the school bus stop route enhancement. RP 395-98; CP 197-200. Pham filed a timely notice of appeal. RP 399; CP 213.

B. STATEMENT OF FACTS¹

At about 11:30 PM on October 15, 2016, Clark County Sheriff's Deputy Ryan Preston was working patrol when he observed a Ford Fusion parked in a parking stall at a 7-Eleven. RP 29-31, 40-41, 54-55. He noticed that the Fusion was parked around the corner from the entrance to store instead of being parked near the front entrance of the store where many open stalls remained available. RP 40, 54-56. As he always does, Dep. Preston ran the license plates from the parked cars including the Fusion. RP 30-35. While waiting for a return of information on the Fusion, i.e., whether it was a stolen vehicle, Dep. Preston drove in a circle around the building. RP 36, 40-41. As he circled back and approached the Fusion, he saw a man, later identified as Long Pham walking away from the car. RP 36-37.

¹ For the part of the incident relevant to Pham's suppression issue the State will cite from the report of the proceedings from the CrR 3.6 hearing. The evidence presented at that hearing largely mirrors the trial testimony. For the rest of the incident the State will cite from the report of proceedings from the trial testimony.

As soon as Pham saw Dep. Preston he stopped, turned, and began walking in a different direction. RP 36-38, 40, 46. Contemporaneous to this observation, Dep. Preston learned that the Fusion had not been reported stolen and that the registered owner was female. RP 41-42. Nevertheless, Dep. Preston began to drive in the direction in which he saw Pham walk and:

[w]hile still inside my vehicle, I rolled down my driver's window, with no lights on -- no spotlight, no overhead light, no sirens, nothing, pull up next to the -- who was later determined to be the defendant, and said, "Hey, are you coming from the Ford Fusion?" Which he replies, "Yes." I ask who's the owner of the Ford Fusion, and in an uncertain voice, he said, "A friend," but could not identify that friend. At which point, I said, "I would like to talk to you." I never told him he wasn't free to leave or anything like that. I said, "I would like to talk to you about this car, to see if it's stolen." At which point, the defendant took off running eastbound on 44th Street, behind Benny's Pizza. And while he's running, I observed a sports -- usually it's -- I describe it as a bag that you put shoes in. It cinches on the top, which was on his back. I see it be thrown, once he crosses St. Johns. . . .

RP 42-43, 45-46, 56-57. Dep. Preston testified that he spoke in a level tone that was not raised when he asked Pham the above questions. RP 56. He also testified that there were no other officers present during his initial contact with Pham, that he did not do anything physical to block Pham from leaving the scene, and that he did not make any commands or demands to Pham. RP 57. Furthermore, Dep. Preston testified that he did

not feel that he had a reasonable suspicion to stop and detain Pham until after he saw Pham throw the backpack from his person. RP 58. Dep. Preston also observed Pham drop a pink container from his hand when he fell during his continued attempt to flee. RP 58.

At that point, Dep. Preston had caught up to and detained Pham. RP 159. Dep. Preston then searched Pham and the backpack incident to arrest. RP 159-160. He recovered a container of buprenorphine, a glass pipe that Pham said he used to smoke methamphetamine, straws and a working scale with residue of what appeared to be heroin, multiple empty plastic baggies (more than a dozen), a plastic container of heroin, and a container of methamphetamine. RP 166-67, 169, 171-79, 182, 192-94, 260-66. Dep. Preston testified that based on his training and experience the amount of heroin found was greater than a personal-use amount. RP 179-181, 207-08, 298.

Dep. Preston also testified about Pham's responses to his questions:

[Dep. Preston:] I explained that -- explained the items that I found, . . . and explained to him, based on my training and experience how those large amount of quantity of substance and number of bags -- the small unused bags -- looked as if he was distributing or delivering, selling, drugs.

[State:] And what was his response to that?

[Dep. Preston:] Initial response was a head nod up-and-down, followed by the yes. And then I confirmed by asking, you know, "Is -- is your answer yes?" And he said yes.

[State:] Okay. So you asked him, specifically, if he was dealing drugs?

[Dep. Preston:] Yes. I asked him specifically, "Are you dealing drugs?" And the answer was yes.

RP 184-85, 199, 295. Pham also told Dep. Preston that his position in the drug dealing hierarchy was one of "a middleman." RP 186, 199.

Pham testified in his defense. While he admitted possessing all the controlled substances in question, he claimed that they were for his personal use as he was a drug addict. RP 274-77, 283, 289, 291. Pham also denied telling Dep. Preston that he was a drug dealer and denied any plans to sell the drugs in his possession on October 15, 2016. RP 273-74, 292.

ARGUMENT

- I. **The trial court correctly concluded that Deputy Preston engaged Pham in a social contact when he asked Pham questions about the vehicle that he was walking from where Deputy Preston used a normal speaking tone, remained in his police vehicle without activating its lights or siren, did not take any measure to block Pham’s path or prevent him from leaving, did not direct or command Pham to speak with him, and where no other law enforcement officer was present.**

Whether a person is seized by the police is a mixed question of law and fact. *State v. Bailey*, 154 Wn.App 295, 299, 224 P.3d 852 (2010) (citing *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). “What the police said and did and what the defendant said and did are questions of fact.” *Id.* The legal consequences that flow from those facts are questions of law to be reviewed de novo. *State v. Lee*, 147 Wn.App. 912, 916, 199 P.3d 445 (2008). Challenged findings of fact, however, are binding provided that they are supported by substantial evidence and “where the findings are unchallenged, they are verities on appeal.” *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Butler*, 2 Wn.App.2d 549, 556, 411 P.3d 393 (2018). The burden of proving a seizure occurred is on the defendant. *State v. Thorn*, 129 Wn.2d 347, 355, 917 P.2d 108 (1996); *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

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). “If a reasonable person under the circumstances would feel free to walk away” and terminate the encounter at his own choosing then the encounter with the police is not a seizure. *Id.* The standard is “a purely objective one, looking to the actions of the law enforcement officer.” *Young*, 135 Wn.2d at 501; *O’Neill*, 148 at 575 (holding that “[w]hether a seizure occurs does not turn upon the officer’s suspicions”).

A social contact is a contact between police and citizens that does not rise to the level of a seizure. *Harrington*, 167 Wn.2d at 665. “It occupies an amorphous area in our jurisprudence, resting someplace between in officer’s saying ‘hello’ to a stranger on the street, and at the other end of the spectrum, an investigative detention. . . .” *Id.* While the term “social contact” suggests the lack of an “investigative component” that is not how the term is applied “in the field—and in th[e] court[s].” *Id.*; *O’Neill*, 148 Wn.2d at 577 (rejecting “the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of

criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop”).

The social contact doctrine acknowledges that citizens “expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens’ questions, comments, and information citizens may offer.” *O’Neill*, 148 Wn.2d at 576. Thus, generally no seizure occurs where a police officer merely asks an individual whether they will answer questions or when the officer makes some further request that falls short of immobilizing the individual. *State v. Nettles*, 70 Wn.App. 706, 710, 855 P.2d 699 (1993); *Harrington*, 167 Wn.2d at 666-67. In fact, during a social contact the police may ask a person a question that suggests an investigative component or that could result in an incriminating response without rendering that person seized. *Thorn*, 129 Wn.2d at 349-354 (holding that officer who approached a parked car and asked the driver “[w]here is the pipe?” did not seize him); *State v. Withers*, 188 Wn.App. 1064, 2015 WL 4458526 (2015) (holding that an officer who contacted two individuals that fit the description of possible bicycle thieves did not seize them despite talking to them about the bicycle theft report and asking the defendant to keep his hands visible); *State v. Larson*, 198 Wn.App. 1061, 2017 WL 1593000 (2017) (holding that a social contact did not

transform into a seizure where an officer asked a person if she would exit her vehicle and whether she had been using drugs).²

On the other hand, our cases have found certain factors indicative that a person was seized:

“[e]xamples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be 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.... In the absence of some such evidence, 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.”

Young, 135 Wn.2d at 512 (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)). Similarly, an officer’s request to search or frisk a person is inconsistent with a social contact. *State v. Guevara*, 172 Wn.App. 184, 190-91, 288 P.3d 1167 (2012); *Harrington*, 167 Wn.2d at 679. Moreover, an officer’s actions must be viewed cumulatively because a series of actions that individually do not render a person seized may combine to constitute a seizure of the person. *Harrington*, 167 Wn.2d at 668-670.

² *Withers* is an unpublished decision of this Court and *Larson* is an unpublished decision from Division I. GR 14.1(a) states that “unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

O'Neill is instructive. 148 Wn.2d 564. There, in summary, our Supreme Court held that the defendant was not seized by an officer when the officer: (1) pulled his patrol car into a closed store's parking lot late at night; (2) pulled up behind a parked vehicle; (3) shined his spotlight on the vehicle; (4) approached the vehicle on foot; (5) shined a flashlight into the sole occupant's face; (6) asked the occupant to roll down the driver's side window; (7) asked the occupant for his purpose in being parked there; (8) in response to being told that the car would not start, asked the driver to attempt to start it; (9) asked the occupant for identification; and (10) asked the occupant for registration and insurance. *Id.*

Here, none of the factors suggesting a seizure were present when Dep. Preston contacted Pham. There was not "the threatening presence of several officers;" the "display of a weapon by an officer; [or] . . . some physical touching of the person of" Pham; nor was there "the use of language or tone of voice indicating that compliance . . . might be compelled." *Harrington*, 167 Wn.2d at 664 (internal quotations omitted) (quoting *Young*, 135 Wn.2d at 512) (quotation and citation omitted). Accordingly, "[i]n the absence of some such evidence, 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." *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55). Instead, Dep. Preston

used a normal speaking tone when he asked Pham two simple questions—whether he had just come from the Ford Fusion and who was the registered owner of the Fusion—before informing Pham that he would talk to Pham about the vehicle and whether it was stolen. RP 42-43, 45-46, 56-57. Pham responded to Dep. Preston’s last inquiry by running away and ditching his backpack. RP 42-43, 45-46, 56-57. Thus, substantial evidence supports the trial court’s factual finding that Dep. Preston “did not say anything to direct or command the Defendant to speak with him” and its conclusion that Dep. Preston’s “initial contact with the Defendant was a social contact and did not rise to the level of a seizure.” CP 156-67 (Finding of Fact #1.3; Conclusion of Law #2.4).

II. The trial court did not abuse its discretion when it declined to reopen Pham’s case for the admission of rehabilitation evidence.

Pham testified at trial. When asked by his counsel about Dep. Preston’s testimony that Pham had confessed to him that he was a drug dealer, Pham responded “I never say that. . . . I never would confess to something that I’ve never done before.” RP 273. As a consequence, the State, on cross-examination, asked Pham about a prior conviction for Possession of a Controlled Substance with Intent to Deliver and admitted into evidence certified copies of Pham’s statement of defendant on plea of guilty and the associated judgment and sentence. RP 277-79, 283-89.

Nonetheless, Pham contended that he did not have a possession with intent to deliver conviction on his record and, instead, insisted that his “rap sheet” showed only drug possession convictions. RP 283, 288-89, 291.

After Pham testified, the defense rested its case. RP 293. The State then put on rebuttal evidence and rested again while Pham declined to put on a rebuttal case or otherwise reopen. RP 293, 303. Finally, after a recess and some preliminary discussions concerning the jury instructions, Pham’s trial counsel discussed with the court the possibility that a declaration of criminal history that the State had provided as part of a plea offer did not contain a conviction for Possession of a Controlled Substance with Intent to Deliver. RP 306-314. Pham’s trial counsel suggested that this document may explain Pham’s confusion regarding whether he had been convicted for possession with intent. RP 306-07, 309, 311. At that time, however, Pham’s counsel did not have a copy of the document but explained that “this goes to reopening defense, which we could technically do.” RP 313-14.

The trial court, to the extent that a request to reopen was made, denied the request. RP 314. As it had earlier explained in response to trial counsel regarding the criminal history document, each party had rested multiple times and “[w]ell, the time -- the time has passed for -- I mean, that question may very well have been asked of him.” RP 311, 313.

Following an additional recess and during more discussions of the jury instructions, Pham's trial counsel attempted to revisit the declaration of criminal history issue. RP 336-38. Pham's trial counsel now possessed the document to which he had previously referred. RP 338.

He explained that the criminal history document listed, amongst other crimes, a conviction for possession of methamphetamine instead of possession with intent to deliver. RP 338-39. In arguing about the document, the trial court declared that whole document itself was inadmissible under ER 410.³ RP 341-43. Pham's trial counsel, on the other hand, continued to discuss the document as the basis for his client's confusion, but offered no theory of admissibility nor did he seek to reopen his case; rather he seemed to suggest the document should just be admitted into evidence and presented to the jury. RP 340-43. Ultimately, the trial court denied trial counsel's request and noted, in addition to court's ER 410 conclusion, that "[a]t the time he [(Pham)] was cross-examined, this information about a plea . . . became known to him. He had an opportunity to review it. There was ample opportunity to redirect examination of him to try to clarify his confusion. That offer was given to defendant, to the defendant's counsel." RP 343. Thus, the trial court made essentially two rulings: (1) defense could not reopen its case or submit the criminal

³ Pham correctly argues that ER 410 does not apply to the situation at hand. Br. of App. at 13-14.

history evidence to the jury; and (2) the evidence Pham sought to admit was inadmissible under ER 410.

Pham correctly argues that the “court erred in ruling that the offered evidence was prohibited under ER 410.” Br. of App. at 13. ER 410 applies to statements made by the defendant as part of the plea bargaining process and is not applicable to the criminal history document in question. Br. of App. at 13-14. Nonetheless, a reviewing court can affirm the trial court’s decision on any grounds that are supported by the record. *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); *State v. McNally*, 125 Wn.App. 854, 863, 106 P.3d 794 (2005).

“The decision to reopen a proceeding to introduce additional evidence is one left to the sound discretion of the trial court.” *State v. Barnett*, 104 Wn.App. 191, 199, 16 P.3d 74 (2001) (citations omitted) *called into doubt on other grounds by State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015). Accordingly, a trial court’s decision “on whether or not to reopen a case will not be reversed absent a ‘showing of manifest abuse of discretion *and* prejudice resulting to the complaining party.’” *Id.* (emphasis added) (quoting *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992)). Prejudice results, if, within a reasonable probability, the error materially affected the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Barnett and *State v. Luvene* are instructive. 104 Wn.App. at 198-99; 127 Wn.2d 690, 903 P.2d 960 (1995). In *Barnett* the defendant originally declined to testify. 104 Wn.App. at 198-99. The court then recessed for the evening and returned the next morning at which point the defendant changed his mind and sought to testify despite the trial court being prepared to instruct the jury and move forward with closing argument. *Id.* The trial court denied his request. *Id.* *Barnett* held that “[s]imply put, [the defendant] changed his mind. But he did so too late. The defense had rested.” *Id.* The reviewing court further commented that the “court’s decision not to disrupt the trial schedule to accommodate [the defendant’s] testimony—testimony which arguably would have hurt [the defendant’s] case—appears to be a sound one. On this record, we can hardly say that the trial judge abused his discretion.” *Id.* at 199.

In *Luvene* the:

defense first attempted to introduce [the defendant’s] Washington State Identification Card into evidence after the testimony was completed and both sides had rested. The identification card would have shown that [the defendant] is 5 feet 6 inches in height, shorter than one of the witnesses identified the assailant as being. The defense counsel claimed that he had intended to introduce this evidence during the trial, but it had slipped his mind. The defense requested that the information on the identification card be presented to the jury, either through a stipulation or by reopening the case. The trial court refused the defense request, noting that the jury had ample opportunity to view [the defendant] in both a sitting and a standing position

throughout the trial, and that there had been other evidence of his height presented to the jury.

127 Wn.2d at 711. Our Supreme Court held that the trial court did not abuse its discretion in refusing to reopen to the case in order to admit the identification card into evidence. *Id.*

Here, the trial court similarly acted well within its discretion when it declined to allow Pham to reopen his case for the purposes of attempting to admit his criminal history into evidence regardless of its erroneous ER 410 ruling. First, Pham has still failed to offer a theory of admissibility for the document.⁴ Second, Pham never formally moved to reopen his case. *See* RP 338-344. Third, the admission of the document, like in *Barnett*, arguably would have hurt Pham's case more than helped it. CP 208-210.⁵ Fourth, and most importantly, as the trial court correctly held, Pham's trial counsel had ample opportunity to try to clear up or explain the source of Pham's confusion during his redirect examination or by choosing to put on a rebuttal case. But instead, Pham rested and declined to put on a rebuttal case—only seeking to admit the criminal history document when the court was ready to instruct the jury and proceed to closing arguments.

⁴ The State acknowledges the reason why Pham would want at least a portion of the document admitted into evidence and the evidence is relevant in the sense that it has some rehabilitative value.

⁵ Due to the length of Pham's criminal history redacting this document to show what Pham intended without also making clear Pham's criminal history was extensive (even going beyond his own testimony) seems a task unlikely to succeed.

Consequently, the trial court did not err when it declined to allow the reopening of Pham's case or the submission of evidence after all parties had rested.

Even assuming the trial court erred by not admitting the criminal history document, the error did not prejudice Pham since he cannot establish by a reasonable probability that the error materially affected the outcome of the trial. The evidence of Pham's guilt was overwhelming. After hearing about Pham's flight, the drugs and drug evidence discovered on his person and in his discarded backpack, his admissions to Dep. Preston, and his certified prior conviction for possessing drugs with the intent to deliver them, it's extraordinarily unlikely that the jury would have acquitted Pham of Possession of a Controlled Substance with Intent to Deliver upon viewing or hearing more about his "rap sheet."

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CONCLUSION

For the reasons argued above, this Court should affirm Pham's convictions.

DATED this 9th day of July, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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