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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 331105-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Plaintiff/Respondent,

Vs.

CORBIN BIRD, Defendant/Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The State's response relies on little more than rhetoric, unsupported statements, and citations to materials that were never part of the record below and cannot form a basis for affirming the trial court's erroneous order. The fundamental issue in this case is simple: can a juvenile be convicted as an accomplice to trespass simply because the principal yelled a racial slur when he was in the curtilage of the residence, an area open to the public? As a legal and practical matter, the answer is no, unless the Court wishes to criminalize mere speech.

The Court should reverse the order of the trial court and vacate the Findings of Fact and Conclusions of Law and Disposition.

II. ARGUMENT IN REPLY

A. THE RECORD IS INSUFFICIENT TO SUPPORT THE CHARGES AGAINST MR. BIRD

The crux of the State's argument regarding sufficiency of the evidence is that the average citizen should know that he

should not participate in this sort of “illegitimate” act. *State’s Response at 10-11*. Again, the State merely assumes what it says is true without legal authority. *See State’s Response at 11*. The State’s *ipse dixit* approach is unsettling.

The State’s response sets up a straw man and argues that Appellant’s position is that “all juveniles should be exempt from any type of punishment.” *State’s Response at 10*. This hyperbolic statement is, of course, quite absurd, and Appellant has never made any such argument. Mr. Bird’s argument, which really was not disputed in the response, is that the juveniles were legally able to approach an unfenced, un-gated home open to the public via the sidewalk and ring the doorbell because they had never been provided notice they were unwelcome.¹

The State notably does not address the due process requirement of notice required to convict under the Criminal Trespass statute nor the First Amendment implications involved

¹ It is clear from the exhibits that the door was open to the public and was not gated. *See Exhibits 1-3, 6-7*.

in this case. No doubt it does not because its position is counter to these requirements. A person does not commit a crime simply because the State believes the person should know better. The law does not require a person to guess as to what would constitute a crime—they must have express notice that the action in question does rise to the level of criminal conduct. Lanzetta v. State of N.J., 306 U.S. 451, 453, 59 S.Ct. 618 (1939).

In addition, a racial slur cannot be criminalized unless it is considered a “true threat”, which it obviously was not in the current case. The trial court’s ruling unlawfully expands the criminal trespass statute, ignores the limitation of RCW 9A.36.080, and impedes on the First Amendment right to freedom of speech.

The State argues that even if the juveniles did not “remain” unlawfully they entered the property unlawfully. *State’s Response at 10*. The flaw in that argument is that there is nothing illegal about approaching someone’s door, as we have demonstrated in the opening brief. This is the curtilage open to

the public. The State's sole contention is that the use of the word "nigger" transformed a non-crime into a crime.

B. THE COURT SHOULD NOT CONSIDER THE MATERIALS THE STATE SUBMITTED THAT ARE NOT PART OF THE RECORD

RAP 10.3(a)(5) states that "[r]eference to the record must be included for each factual statement." Courts of appeals will not consider matters outside the trial record. State v. McFarland, 127 Wn. 2d 322, 335, 899 P.2d 1251, 1257 (1995). Accord State v. Stockton, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) (matters referred to in the brief but not included in the record cannot be considered on appeal). Bich v. General Elec. Co., 27 Wn. App. 25, 614 P.2d 1323 (1980) (alleged improper remarks on final argument not contained in record). Statements in appellate brief that are unsupported in record will not be considered on appeal. Housing Authority of Grant County v. Newbigging, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001).

Further, "[t]he general rule is that appellate courts will not consider issues raised for the first time on appeal." State v.

Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). See also Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (“In general, issues not raised in the trial court may not be raised on appeal.”); Wilson Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470 (2011) (same) (declining to consider argument not raised at the trial court level).

The State’s response brief is replete with factual material not submitted to or considered by the trial court. In its response, the State refers to (and indeed attached as an Appendix) the entire police report and probable cause affidavit. In addition, the State lists additional acts and information that is listed in the lengthy police report which were never admitted, testified to, or stipulated to at trial. *See State’s Response at 11*. There is no evidence any of this was ever made part of the record or considered below. Because the material is not part of the record, it cannot be considered on appeal.

To support its use of this new material, the State simply claims that defense counsel “referred to and indicated to the trial

court that it could consider the probable cause affidavit,” and thus the “series of statements and reports is now a portion of the record.”

What is remarkable about this statement is that it is entirely unsupported. The State cites no authority whatsoever to support this bald assertion that the record somehow greatly expands with a simple comment from the defense counsel during closing statements. The State refers to no case from any court in any jurisdiction. It just asserts that what it says is true. It is not, and the Court should strike and not consider the material.

The State’s argument is not well founded and is incorrect. It is well settled law in Washington that closing arguments at trial are not to be considered evidence. *See e.g., In re Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004). The discussion regarding the probable cause statement occurred during the closing in this case and was as follows:

Defense: “It’s in the probable cause affidavit in this case. . . .”

Court: “Can I consider that? I didn’t think that was in evidence?”

Defense: “Well, I think you can consider it in the context of . . . this case and possibly in reexamining the decision of whether there was even probable cause to begin with in this case.”

RP at 294.

No documents were offered by either party at that time nor later in arguments that would even clarify what the probable cause affidavit was that defense counsel was referring to during closing statements. No other discussion ensued regarding any additional facts that are contained in the “probable cause affidavit” that were not presented at trial. More importantly, the trial court only relied on the facts that were presented during witness testimony and not any of the facts that may be contained in the extensive police report that the State attempts to introduce now.

Thus, there is no legal or factual basis for the State to attempt to unilaterally expand the record. The Court should not

consider the new material and determine the merits of this appeal on the actual record.²

III. CONCLUSION

The State's response does little other than recite its own subjective and unsupported belief that the acts were illegitimate. The Court should overturn the findings of fact and disposition entered by the trial court and reverse the conviction. The Court should also reverse the decision of the trial court denying the motion for recusal.

Respectfully submitted this 11th day of March, 2016.


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² Unfortunately, it is difficult to ascertain which facts were actually presented in trial and which were introduced by the State from the police report because the State failed to cite to the record in most instance. RAP 10.3(a)(5) states that “[r]eference to the record must be included for each factual statement.” It is appropriate for the Court not to consider any factual statements that are unsupported by a citation to the actual record.

CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned sent to the attorneys of record a copy of this document addressed to the following:

For Plaintiff: Mr. David Trefry Yakima County Prosecuting Attorney's Office Appellate Division P.O. Box 4846 Spokane, WA 99220	<input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail* <input type="checkbox"/> via hand delivery *by agreement of the parties
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Executed this 11th day of March, 2016, at Yakima,
Washington.



DEANNA M. BOSS