

34905-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTONIO MARCELL MITCHELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. SUMMARY

Defendant, Antonio Mitchell, was trespassed from the Spokane Greyhound-Amtrak intermodal station (“Greyhound station” hereinafter). A few days following his release from jail after serving time for conspiracy to possess a controlled substance, methamphetamine, which had occurred at the Greyhound-Amtrak station, he returned to the station and was asked by security to leave, which he did. After three days of Mr. Mitchell returning to the station and, upon his refusal to leave when asked to do so by security, police were called. Police arrived and arrested Mitchell for trespass after talking with security and determining that Mitchell had been twice previously trespassed from the station by a police officer and was on the premises during the period he had been trespassed from the premises. Upon booking, methamphetamine was found in his sock.

II. ISSUES PRESENTED

1. Was the evidence sufficient to establish that the defendant unlawfully remained at the Greyhound-Amtrak intermodal station managed by the Kiemle Hagood real estate company?
2. Was defendant deprived of effective trial counsel where trial counsel did not file a motion to suppress the methamphetamine found in defendant’s sock during jail booking?

3. Was defendant deprived of effective assistance of counsel by trial counsel's strategic evidentiary decision to not object to one hearsay response regarding the records kept by the police department?

III. STATEMENT OF THE CASE

A. Trial facts.

On July 15, 2016, about 9:00 p.m., Spokane Police Officer Alexis Kester responded to a trespassing call at 221 West First Avenue, Spokane, the Greyhound station. RP 87. This building contains the Greyhound Bus Station, the Amtrak Station, a police substation which is open from 8:00 a.m. to 5:00 p.m., and a Teriyaki Grill. RP 150-51. The station is open to the public. The building is managed by the property management company, Kiemle and Hagood. RP 167.¹ The rules regarding admission or use of the center are "no violence, no rude behavior, drugs, [or] loitering." RP 152. These rules are posted. *Id.*

¹ The Spokane Intermodal Center is an intermodal transport facility located in Spokane, Washington, United States. Built in 1891 for the Northern Pacific Railway, the historic facility now serves as a station, refueling, and service stop for the Amtrak Empire Builder, as well as the Greyhound. "Spokane Intermodal Center." Wikipedia. https://en.wikipedia.org/w/index.php?title=Spokane_Intermodal_Center&oldid=760558606.

The City of Spokane has owned the Spokane Intermodal Center since 1992 and was spending about \$123,000 a year for security, which it hoped to reduce to \$61,000 by moving a police precinct into the building. <http://www.spokesman.com/stories/2016/jan/21/new-spokane-police-precinct-opens-at-the-intermoda/>.

Upon arrival, Officer Kester contacted Security Officer Power, an employee of Securitas Security Services, a private company assigned to provide security for this building. RP 89-90, 149. Security Officer Power requested that Mitchell be arrested for trespass due to the numerous contacts he had had with Mitchell that day. RP 90, 156-57. Security Officer Power explained that Mitchell had been at the building some three days earlier, on July 13, 2016. RP 158. At that time, Power informed him of his status as a trespasser, at which time he left. RP 158-59. Mitchell returned the next day, July 14, and was again asked to leave. RP 157. A picture was taken by Security Officer Power depicting Mitchell sitting underneath one of the “no loitering” signs after he was asked to leave the premises. RP 161. Mitchell left that day only after law enforcement, Lieutenant Sprague, was called and had a discussion with him. RP 158. Mitchell was not arrested because Security Officer Power was satisfied that he finally left. *Id.*

Then, on July 15, 2016, Security Officer Power again observed Mitchell around 5:00 p.m., sitting in the terminal. RP 153. Upon contacting him and determining he did not have a bus or train ticket, he was again notified that he was trespassing and was asked to leave. RP 154-55. He left, but returned around 8:00 p.m. RP 154. At that time, he was again told he was trespassing and needed to leave, which he did, only to return around 8:30 p.m. *Id.* Again, after being advised he was trespassing, he left, only to

return twenty minutes later. RP 154-55. This time, after the request was made that he leave, he did not leave, and law enforcement was contacted. RP 155. Officer Kester and her partner arrived around 15 minutes later and contacted Mitchell after talking with Security Officer Power. RP 87-90.² Officer Kester also contacted dispatch. RP 90. Dispatch keeps records of “how long somebody’s trespassed from a location.” RP 90. The dispatch records indicated Mitchell had two incidences where he was trespassed from the same address, the Greyhound station, and that he was at the building within the period of time that he was trespassed from the building. RP 90. The officers contacted Mitchell, arrested him, and transported him to jail. RP 91-92. At jail, during booking, methamphetamine was found in his sock. RP 93, 120.

The jury was instructed on the defenses to trespass:

It is a defense to a charge of criminal trespass in the first degree that: the premises were at the time open to members of the public and the defendant complied with all lawful conditions imposed on access to or remaining in the premises.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a

² Officer Kester: “After I talked to Mr. Power about what had occurred and he advised he wanted to pursue charges for trespass, I went and contacted Mr. Mitchell.” RP 90.

reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 25 (instruction 17).

Mitchell was convicted of first degree trespass and possession of methamphetamine.

B. Sentencing.

The State noted that “[t]his offense occurred four days after Mr. Mitchell was released from jail following sentencing on a Conspiracy to PCS-methamphetamine, *also occurring at the Intermodal Depot.* (SC#16117003)” CP 30 (emphasis added). Mitchell had an offender score of 20 and was sentenced to a midrange sentence of 18 months on the felony possession of methamphetamine as well as 364 days on the trespass. He had four convictions for first degree trespass in 2015. CP 64-67. The sentences ran concurrently. CP 67.

IV. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT UNLAWFULLY REMAINED AT THE GREYHOUND STATION MANAGED BY THE KIEMLE HAGOOD REAL ESTATE COMPANY.

Mitchell claims the state failed to prove he unlawfully entered or remained in the Greyhound station and further, that the State failed to prove he acted unlawfully while at the station.

Citing *State v. Green*, 157 Wn. App. 833, 239 P.3d 1130 (2010), Mitchell broadly claims “notice to the accused that his license to enter the premises has been revoked is not enough for the State to meet its burden of proof.” But, *Green* is a long way from the present case. In *Green*, a school district issued the defendant a trespass notice prohibiting her from going to her child’s elementary school except under very limited circumstances. *Green*, 157 Wn. App. at 838-40. As the basis for the trespass notice, the district asserted the defendant’s alleged disruptive behavior at the school’s curriculum night and disregard for a staff member’s instructions in the school parking lot. *Id.* at 842. At trial, an attorney for the school district testified to the reasons for the trespass notice but admitted he had no personal knowledge of the events underlying its issuance. *Id.* at 852. Over the defendant’s hearsay objection, the trial court admitted this testimony to explain the school’s reason for issuing the trespass notice but not to prove the alleged disruptions occurred. *Id.* The defendant testified that she had not been disruptive. *Id.* at 842-43. Because there was no competent testimony to establish that the school district had any factual basis for revoking the defendant’s *statutory right* to access her child’s school under RCW 28A.605.020, the court held that the State failed to prove the lawfulness of the trespass notice. *Id.* at 852. The court reversed the trespass conviction. *Id.* at 853.

Of import, the defendants in *Green, supra*, and *State v. R.H.*, 86 Wn. App. 807, 939 P.2d 217 (1997), both asserted that they had not engaged in the behavior alleged as the basis for the trespass notice. In contrast, here, Mitchell presented no such evidence, nor did he contest testimony establishing the fact that he had acknowledged that he knew he was trespassed from the premises. RP 166. Therefore, the burden did not shift to the State to establish a lawful basis for the trespass notice,³ although in any event, the jury was instructed that it was a defense to a charge of criminal trespass that: the premises were at the time open to members of the public and the defendant complied with all lawful conditions imposed on access to or remaining in the premises, and that the State had the burden of proving beyond a reasonable doubt that the trespass was not lawful, and moreover, if the jury found that the State had not proved the absence of this defense beyond a reasonable doubt, it was their duty to return a verdict of not guilty on the trespass charge. CP 25.

The nature of the public property involved has a bearing on what type of use, and limitations on its use, are proper. The extent to which the

³ See *State v. Olson*, 182 Wn. App. 362, 375-76, 329 P.3d 121 (2014): “Thus, *once* a defendant has offered some evidence that his or her entry was permissible under RCW 9A.52.090, the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter. [*City of Bremerton v. Widell*, 146 Wn.2d at 570, 51 P.3d 733.]”

City of Spokane may restrict Mitchell's right of access depends upon how the station's public areas are characterized for the purposes of First Amendment analysis. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (even in public forums, speech is subject to valid time, place, and manner restrictions). Public property is divided into three categories for this analysis, each of which is governed by different First Amendment standards. *Id.* at 45-46. "At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 45 (citation omitted). "A second category consists of public property which the state has opened for use by the public as a place for expressive activity." *Id.* The third is "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* at 46.

Here, the Greyhound station is delegated to the third, or lowest category, because it is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46; *Bering v. SHARE*, 106 Wn.2d 212, 221-22, 721 P.2d 918 (1986) (speech in public forums is subject to valid time, place, and manner restrictions). The Supreme Court, and the State Supreme Court, have specifically held that

public transit is not a public forum. *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (holding the airport terminal was a nonpublic forum for First Amendment purposes, and the prohibition on solicitation of contributions satisfied a reasonableness requirement); *Lehman v. Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (city transit system was not a First Amendment forum and refusal to accept political advertising did not result in a First or Fourteenth Amendment violation); *City of Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988) (public bus is not a public forum). *See also U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764-66 (D.C. Cir. 1983) (holding public areas of airport in third category); *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981) (same), *cert. dismissed*, 458 U.S. 1124 (1982). This category of public property also includes jails, military bases, and interstate highway rest stops. *de la O v. Hous. Auth. of City of El Paso, Tex.*, 417 F.3d 495 (5th Cir. 2005).

With respect to this property not traditionally used as a public forum, the United States Supreme Court has repeatedly explained that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *Perry*, 460 U.S. at 46 (quoting *U.S. Postal Serv. V. Council of Greenburgh Civic Assoc*, 453 U.S. 114, 129,

101 S.Ct. 2676, 69 L.Ed.2d 517 (1981)). Accordingly, the State may reserve a nonpublic forum for its intended purposes, whether communicative or not, and impose regulations on speech provided they are reasonable and content-neutral. Time, place and manner restrictions may also be imposed. As our State Supreme Court emphasized in *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 360-61, 96 P.3d 979 (2004), *as amended* (Sept. 14, 2004):

There must be some point at which the government's relationship to things under its dominion and control is treated in the same manner as a private owner's property interest in the same kinds of things, and in such circumstances, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *U.S. Postal Serv.*, 453 U.S. at 129-30, 101 S.Ct. 2676 (quoting *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) and citing *Adderley v. Florida*, 385 U.S. 39, 47, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)).

Mighty Movers, Inc., 152 Wn.2d at 360-61 (emphasis added).

When a nonpublic forum is at issue, restrictions are constitutional "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Mitchell does not contend that the rules posted at the Greyhound station are unreasonable.

Because the State is like a private property owner that controls property generally open to the public, this case is akin to *State v. Kutch*,

90 Wn. App. 244, 951 P.2d 1139 (1998). There, this Court held that the defendant's violation of a notice expressly banning him from a shopping mall for one year after a shoplifting incident satisfied the "unlawful entry," or first degree trespass component of second-degree burglary. *Id.* In so holding, this Court noted "[a] private property owner may restrict the use of its property to those purposes for which it is lawfully dedicated so long as the restrictions are not discriminatory." *Id.* at 247 (citing *Adderley v. Florida*, 385 U.S. 39, 47, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966)). Mitchell does not suggest that there was a discriminatory motive in the present case. Therefore, like the owner of *private* property, the City of Spokane could restrict the use or presence on the premises of such property to only those having business there.

In *Kutch*, this Court also observed that a private property owner's right to exclude others extends even if the property is otherwise open to the public. 90 Wn. App. at 247, *and see State v. McDaniels*, 39 Wn. App. 236, 240, 692 P.2d 894 (1984). Further, when a private property owner notifies a person that his or her license, invitation, or privilege to enter that property has been revoked, that person's presence may be unlawful for the purposes of proving a trespass. As in the present case, a person's presence may be unlawful because of a revocation of the privilege to be there.

State v. Collins, 110 Wn.2d 253, 258, 751 P.2d 837 (1988); *Kutch*, 90 Wn. App. at 249.

In *Kutch*, on appeal, Kutch argued that the “no trespassing” order was insufficient because it was issued by the store’s security guard, but not the owner of the mall or its agent. The court disagreed, holding: (1) “A private property owner may restrict the use of its property to those purposes for which it is lawfully dedicated so long as the restrictions are not discriminatory”; and (2) the security guard acted within the scope of his authority in issuing the “no trespassing” order. 90 Wn. App. at 247-48. Furthermore, the court noted that the security guard explained the revocation to Kutch and the consequences of reentering the mall. *Id.* at 248.

Here, Mitchell was asked to leave the Greyhound station because he was loitering,⁴ and because he had been trespassed from the building. Loitering was a posted prohibited condition on the license to remain. The management company of the Greyhound station, Kiemle Hagood, restricted the use or access to its property to people who were using the facility for traveling purposes, and did not allow use of the premises to those who were

⁴ Merriam Webster’s Collegiate Dictionary 11th Ed. 732 (2003) defines: “Loiter *vi* [ME] (14c) 1: to delay an activity with idle stops and pauses: DAWDLE 2a: to remain in an area for no obvious reason b: to lag behind *syn* see DELAY.”

loitering. Mitchell had no bus or train ticket on the day he was arrested after being notified that he was trespassing and needed to leave. RP 154-55, 162. He was asked if he was aware that he was trespassed from the station; he acknowledged that he knew he was trespassed from the premises. RP 166.

Mitchell was arrested at approximately 9:00 p.m. There was nothing open in the building at that time. RP 177-78. (“During from 6:00 P.M. when Greyhound closed until the time Mr. Mitchell was arrested. Everything in the building was closed”).

Here, Security Officer Power had issued Mitchell a no trespass admonishment form that Mitchell simply refused to sign. RP 166. He was advised by Power of his trespass status on July 13, 2016, just two days before his arrest. RP 158. In fact, he was told numerous times that if he was not actually traveling, he was trespassed from the building. RP 173 (“I’ve told him numerous times he’s trespassed. If he’s not actually traveling, he’s not allowed in the building at all”). Mitchell had departed before when requested to leave. However, this time he refused to leave. Police were called. Mitchell was still present when they arrived. That satisfies the requirements for trespassing - remaining unlawfully.

Like the mall security officer in *Kutch*, Security Officer Power acted within the scope of his authority in issuing the no trespassing order to Mitchell and asking him to leave. Mitchell had no travel ticket, and the

businesses were closed. Mitchell acknowledged he knew he was trespassing. Thus, the jury could conclude that Power's request that Mitchell leave was sufficient to revoke his license, privilege, or invitation to remain on the Greyhound station.

Separately, Officer Kester contacted dispatch. RP 90. Dispatch keeps records of "how long somebody's trespassed from a location." RP 90. The dispatch records indicated Mitchell had two incidences where he was trespassed from the same address, the Greyhound station, and that Mitchell was at the building within the period of time during which he was trespassed from the building. RP 90. Any public invitation to enter and remain in the Greyhound station previously possessed by Mitchell was revoked by the property owner. There is no dispute that Mitchell was ordered to leave and did not, and that plainly decides this case in favor of the State. The evidence of trespass was overwhelming.

B. DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE TRIAL COUNSEL WHERE TRIAL COUNSEL DID NOT FILE A MOTION TO SUPPRESS THE METHAMPHETAMINE FOUND IN DEFENDANT'S SOCK DURING JAIL BOOKING.

1. There was probable cause to arrest the defendant.

Mitchell raises an argument he failed to address to the lower court. A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *State v. Torres*, 198 Wn. App. 864, 875,

397 P.3d 900 (2017). While appellate counsel has cast the issue as an ineffective assistance of counsel claim for failing to bring a motion to suppress, the facts necessary to address the underlying suppression claim are not in the record on appeal and, in this case, prevent the defendant from establishing prejudice, the necessary second prong of an ineffective assistance of counsel argument. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest).

Mitchell bases his ineffective assistance claim on the premise that the “State failed to prove the lawfulness of the alleged trespass.” App. Br. at 10. Mitchell takes aim at the wrong target. The State would be required to establish that probable cause to arrest him existed at the time of his arrest, not that he was guilty of trespass. Because the State was not asked to prove the probable cause component of the arrest, it was not required to do so, and the record should be considered insufficient to address this new claim. *Riley*, 121 Wn.2d at 31.

For example, the non-trial sentencing record establishes that Mitchell was recently released from jail having completed serving his sentence for conspiracy to possess methamphetamine “*also occurring at the Intermodal Depot. (SC#16117003).*” CP 30. Were there any sentencing

conditions or no-contact provisions contained in that case, or arising from the arrest in that case? The judgment and sentence in this case also includes Mitchell's many prior convictions for first degree trespass committed in 2015, begging the question of whether any of these trespass convictions had occurred at the Greyhound station? See CP 58 (four first degree criminal trespass convictions in 2015). Security Officer Power testified that he had previously issued Mitchell a "no trespass" admonishment form that Mitchell refused to sign. RP 166. What effect would this form, if it were produced for a suppression hearing, have on the relinquishment of any privilege Mitchell may have previously possessed to enter the Greyhound station? What effect would the dispatch records indicating Mitchell had two incidences where he was trespassed by the police from the *same address*, the Greyhound station, and the fact that Mitchell was at the building within the period of time that he was trespassed from the building? See RP 90.

In any event, probable cause existed for the arrest for trespass. Officer Kester, talked with Security Officer Power prior to contacting Mitchell. "After I talked to Mr. Power about what had occurred and he advised he wanted to pursue charges for trespass, I went and contacted Mr. Mitchell." RP 90. Additionally, Officer Kester received dispatch reports of trespass notices given to Mitchell. These records establish when a police officer issued a trespass notice to particular individuals and the

duration of the trespass prohibition. RP 90. These reports established Mitchell had previously been trespassed from the Greyhound station, and was trespassing at the time he was arrested.

Mitchell fails to establish a record that counsel was ineffective for failing to request a suppression hearing, and that such a motion would have resulted in the suppression of the methamphetamine. Without an affirmative showing of actual prejudice, that the motion to suppress likely would have prevailed, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3). *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).

Finally, the officers in this case had a factual basis to arrest Mitchell as explained above. They talked to Security Officer Power at the situs of the crime while Mitchell was still present. There was sufficient cause to arrest Mitchell, and any defense he may have had to the trespass allegation, that the premises were at the time open to members of the public and that he complied with all lawful conditions imposed on access to or remaining in the premises, is not a consideration in a probable cause determination. Although Washington provides an affirmative defense to criminal trespass if “[t]he actor reasonably believed that the owner of the premises ... would have licensed him or her to enter or remain,” it is well settled that officers are not required to weigh affirmative defenses. RCW 9A.52.090(3);

State v. Fry, 168 Wn.2d 1, 8, 228 P.3d 1 (2010); *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029 (1999).

2. *Dispatch records can be used to establish probable cause.*

To the extent Mitchell fleetingly relies on *State v. Marcum*, 116 Wn. App. 526, 66 P.3d 690 (2003) and *State v. O’Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001), for the overwhelmingly broad proposition that “a dispatch record alone does not supply probable cause for arrest,”⁵ such reliance is misplaced.

Marcum only cites *O’Cain* to distinguish it factually and thereby find the stop and arrest of Marcum lawful.⁶ In *O’Cain*, the appellate court held that when a seizure based *solely* on a police dispatch containing information provided to police by third-party victims *is challenged in court*, the good faith of the officers executing the seizure does not relieve the State of its burden to prove a factual basis for the seizure. 108 Wn. App. at 553.

⁵ Br. of App. at 13.

⁶ *Marcum*, 116 Wn. App. at 532: “Officer Meyer’s positive identification of Mr. Marcum after the stop together with the dispatch report of a suspended license is probable cause to arrest. RCW 10.31.100(3)(e) authorizes a warrantless custodial arrest for driving with a suspended license. *State v. Reding*, 119 Wn.2d 685, 691, 835 P.2d 1019 (1992). The factual basis for this warrantless arrest was *probable cause*. *O’Cain*, 108 Wn. App. at 544, 31 P.3d 733.”

O’Cain involved a computerized database listing stolen vehicles, the accuracy of which had *not been established*, and was a record that was based upon members of the *public* calling in stolen vehicle reports. The dispatch record in the instant case is dissimilar to the computerized database addressed in *O’Cain*, and is an individualized trespass business record of specific police officers issuing individualized notices of trespass. *See State v. Bellerouche*, 129 Wn. App. 912, 917, 120 P.3d 971 (2005) (“A trespass notice is not the functional equivalent of testimony, and may be admitted as a business record”). Moreover, unlike *O’Cain*, here the dispatch record was not the sole basis for the arrest. The arrest was not based solely on a hunch. Officer Kester talked with Security Officer Power *prior* to contacting Mitchell. There was sufficient probable cause for the arrest. Again, because the dispatch reports and records are not in the trial record, Mitchell cannot establish that he would have prevailed on a suppression motion, and therefore, cannot establish prejudice.

C. DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL’S STRATEGIC EVIDENTIARY DECISION TO NOT OBJECT TO ONE HEARSAY RESPONSE REGARDING THE RECORDS KEPT BY THE POLICE DEPARTMENT.

To the extent Mitchell claims his right to confrontation was violated by the hearsay evidence from dispatch records that he was trespassed from the Greyhound station, introduced in the form of hearsay, the claim is not

preserved because there was no objection made to this testimony at trial. A defendant who fails to raise a hearsay objection in the trial court waives it on appeal. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482-83, 6 P.3d 1160 (2000) (failure to object to hearsay testimony at trial waives appellate review); *State v. Robinson*, 120 Wn. App 294, 300, 85 P.3d 376 (2004), *review denied*, 152 Wn.2d 1031 (2004) (defendant waived a due process claim by failing to object to the use of hearsay at his special sex offenders sentencing alternative revocation hearing); *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995) (a conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver).

Additionally, it is not self-evident or manifest that records kept by the police of the notices of trespass issued to individuals are testimonial in nature. Therefore, the issue should not be considered by this Court because it is unpreserved and not manifest. RAP 2.5. However, these records appear to qualify as business records. Under *Crawford*, business records are specifically identified as nontestimonial hearsay that do not implicate the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 56, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

1. *Trespass notices issued by the police are business records.*

The trespass notice reports are reliable business records. *See Bellerouche*, 129 Wn. App. at 917 (“A trespass notice is not the functional equivalent of testimony, and may be admitted as a business record”). Business records are presumptively reliable if they are made in the regular course of business and with no apparent motive to falsify. *State v. Ziegler*, 114 Wn.2d 533, 537-38, 789 P.2d 79 (1990). There is no showing that these trespass records were prepared with an eye towards trial or that the records are a functional equivalent of testimony. Business records that have been “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial” are not testimonial and therefore are not subject to the confrontation clause. *State v. Doerflinger*, 170 Wn. App. 650, 661, 285 P.3d 217 (2012), citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S.Ct. 2527, 2540, 174 L.Ed.2d 314, (2009). Therefore, there is no manifest constitutional error and the confrontation claim should be rejected.

2. *Ineffective assistance of counsel claim.*

Relying on confrontational principles, Mitchell contends his counsel was ineffective because his Sixth Amendment right to confront witnesses against him was violated when the trial court admitted the officer’s

testimony that records kept by the police indicated he had been trespassed from the Greyhound station. Br. of App. at 17.

However, even if the police records of notices of trespass issued are *testimonial* hearsay, counsel was not ineffective for not objecting to the record. To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). This court gives great deference to trial counsel's performance and begins the analysis with a strong presumption counsel performed effectively. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Johnston*, 143 Wn. App. 1, 16, 177 P.3d 1127 (2007). The decision of when or whether to object is a classic example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Madison*, 53 Wn. App. at 763.

Here, the records would have been easily obtained as someone works at police dispatch 24/7. Hard copies, or logs of the actual notifications

of trespass of would likely have been marked as exhibits and entered into the record after meeting the slight foundation necessary to their admission. The likely prejudicial circumstances surrounding the underlying reasons necessitating the no trespass orders may have come into evidence. The trial record makes it evident that Mitchell's seasoned attorney⁷ would rather argue the case *without* the prejudicial documents and that additional proof. In closing, he clearly attacked the lack of documentation in the instant case:

When addressed on that when asked Mr. Power where is your evidence that he had been trespassed, nothing. Not one thing. It's in my binder back at wherever.

RP 207.

And:

A public building that's open 24 hours even that anyone has access to it. There's no reason to deny somebody access unless you have trespassed them. Now, the State keeps saying he was trespassed, and we heard from Officer Kester who said when I looked on the screen and he had been trespassed and when asked do you have evidence of that? You have evidence that he knew that? Do you have anything that shows a piece of paper saying you're not allowed to go to this otherwise entirely open public building? No. Part of your instructions ask that you consider the evidence or the lack of evidence, and in this case, the lack of evidence consists of no trespass notices. They talk about them, and they say there's some. We don't have them. We're not going to give them to you. You don't get that, but we told him

⁷ Derek Reid, WSBA # 34186 admitted to practice in 2003.

we're pretty sure we told him. I guess my question about that is I'm wondering if it's sure that that trespass notice exists[?]

RP 209.

Counsel's choice not to object to "unproven" references to defendant's notices of trespass was a strategic choice. No error can be based upon this trial tactic. In any event, the evidence of trespass provided by Security Officer Power was sufficient to establish that any error in this regard was harmless. Mitchell has failed to overcome the strong presumption of effective representation of counsel sufficiently to satisfy the first prong of the *Strickland* test. Mitchell also has failed to establish that he suffered actual prejudice sufficient to satisfy the second prong of the *Strickland* test.

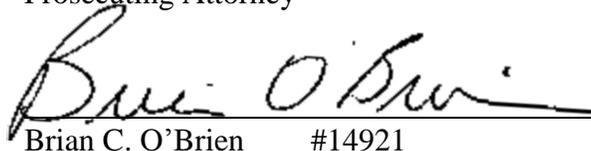
V. CONCLUSION

The evidence was more than sufficient to establish that the defendant unlawfully remained at the Greyhound station owned by the City of Spokane and managed by the Kiemle Hagood real estate company after being trespassed from the property and after being asked to leave the property. Defendant was not deprived of effective trial counsel where trial counsel did not file a motion to suppress the methamphetamine found in defendant's sock during jail booking as there was no basis that would support a finding that the arrest of the defendant was illegal.

The defendant was not deprived of effective assistance of counsel by trial counsel's strategic evidentiary decision to not object to one hearsay response regarding the records kept by the police department.

Dated this 30 day of August, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent/Appellant

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO M. MITCHELL,

Appellant.

NO. 34905-5-III

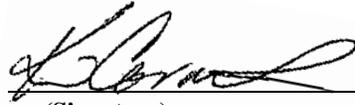
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 30, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
Wapofficemail@washapp.org

8/30/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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