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No. 35351-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MR. DUNBAR'S PRIVACY RIGHTS AND RIGHT TO BE FREE FROM ILLEGAL SEARCH AND SEIZURE WERE VIOLATED.

a. Mr. Dunbar was located on private property that was not open to the public.

Mr. Dunbar's privacy rights were violated by Deputy Criswell's warrantless entry onto private property that was not impliedly open to the public.

The prosecutor compares this case to *State v. Chaussee*, but ignores the fact that in *Chaussee*, the property dweller "had no control over who used the road" that police traversed to get to her home. *State v. Chaussee*, 72 Wn. App. 704, 709, 866 P.2d 643 (1994). And the "no trespass" signs were on the neighbor's property, not hers. *Id.* at 710.

Officer Criswell entered onto private property where Mr. Dunbar stayed. RP (3/30/17) 12, 26-27. Officer Criswell described it as an easement through property, "if not a private driveway." RP (3/30/17) 22. He went up the private driveway, where he located Mr. Dunbar sitting in his vehicle in front of the house. RP (3/30/17) 10. This driveway was not an open route as was the case in *Chaussee*. 72 Wn. App. at 709. Rather, it was part of a family trust, with the house up the hill belonging to a family member of the house where Mr. Dunbar was located. RP (3/30/17) 19.

The court did not discredit Mr. Dunbar's description of no trespassing signage, nor did it specifically credit Officer Criswell's contradictory testimony about the signage on the property. (AOB at 10-11); CP 41-44 (FF# 4, 7). Combined with the presence of the closed gate and private driveway, these factors establish the residents' subjective intent to close off the property. *State v. Johnson*, 75 Wn. App. 692, 706, 879 P.2d 984 (1994) (A "No Trespassing" sign, though not dispositive of the establishment of privacy, is a factor that is to be considered in conjunction with other manifestations of privacy, such as a closed gate or a fence in determining the intent to close off the property).

This governmental trespass without a warrant requires suppression of evidence seized from the property. Const. art. 1, § 7.

b. Even if the private property was impliedly open, Deputy Criswell exceeded the scope of the invitation when he ran Mr. Dunbar's name for warrants, because this is not the conduct of a reasonably respectful citizen.

The prosecutor fails to address the fact that Mr. Dunbar's constitutional privacy rights were invaded by the officer running his name for a warrant check, regardless of whether this court finds the property to be impliedly open or not.

Even if private property is impliedly open to the public, police must conduct themselves as a reasonably respectful citizen

would. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The prosecutor fails to properly consider this limitation of an officer's conduct while on private property, addressing only the argument of the property's status as impliedly open and then conflating the reasonableness of the officer's conduct while on the property with analysis of whether the officer lawfully detained Mr. Dunbar while on the private property. Brief of Respondent at 26-30.

The act of running a person's name through a police database far exceeds the invasiveness of the police looking through a person's garbage which was prohibited in *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). It simply is not reasonable conduct of an ordinary citizen.

Similarly, under the Fourth Amendment, the conduct of an officer who enters onto private property is limited to "a specific purpose." *Florida v. Jardines*, 569 U.S. 1, 9, 133 S.Ct. 1409, 185 L.Ed 2d 495 (2013). *Jardines'* description of a limited, implicit license does not include the invasive procedure of running a person's name through a police database for warrants. *See Jardines*, 569 U.S. at 8 (an implicit license allows the visitor to approach the home by the front path, knock, wait briefly to be received, and then leave).

The prosecutor tries to categorize the police conduct in Mr. Dunbar's case as falling under the "open view" doctrine. Brief of Respondent at 21-22. But as addressed in Mr. Dunbar's Opening Brief, this doctrine does not apply, because though Mr. Dunbar was in open view, his warrant status was not. Appellant's Opening Brief at 17-18.

Deputy Criswell's conduct of running Mr. Dunbar's name for warrants was an invasive police investigative procedure that exceeded the scope of any possible implied invitation to enter the property, which is prohibited under the state and federal constitutions. Const. art. 1, § 7; U.S. Const. amend IV; AOB at 12-14.

c. Mr. Dunbar was seized by Deputy Criswell.

The prosecutor fails to account for the fact that Deputy Criswell's seizure of Mr. Dunbar took place on private property, which distinguishes it from the so-called consensual encounters that occur in the public, as analyzed in all of the cases cited by the prosecutor. Brief of Respondent at 26-29; *State v. Young*, 135 Wn.2d 498, 513, 957 P.2d 681 (1998) (Young was on a public street in public view); *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (public airport concourse); *State v. Harrington*, 167 Wn.2d 656, 669, 222 P.3d 92 (2009)

(the police officer initiated contact on the street). When a person walks away on a public street, her privacy rights are not compromised as they would be by walking away from a police officer who is left to wander around on the private property. And the officer's act of coming onto private property is much more directed at the inhabitant of the property than during a random encounter on the street, which would also make a person feel less able to walk away.

As cited by the prosecutor in *Young*, factors that transform a consensual encounter into a seizure is a nonexclusive list, which includes "language or tone of voice indicating that compliance with the officer's request might be compelled." 135 Wn.2d at 512 (citing *Mendenhall*, 446 U.S. at 554–55); Brief of Respondent at 27. A police officer flagging a person down by waving his arms as happened here certainly qualifies as one of these factors that turns a consensual encounter into a seizure. (FF #22). The additional factor of this encounter taking place on private property, where a person's freedom to leave is greatly curtailed, makes the deputies' conduct towards Mr. Dunbar a seizure under Article I, § 7 and the Fourth Amendment.

The trial court's findings in support of its conclusion that Mr. Dunbar was not seized are in error. The court relied on the fact that Mr. Dunbar did not testify that "he did not feel free to leave," (FF # 24) and an

officer waving his arms to stop a vehicle located on private property is not a form of “command” or “gesture” that directed or restricted Mr. Dunbar’s actions. (FF #21, 22, 23, 24). These findings do not support the court’s conclusion of law, that this police conduct was not a seizure. AOB 21- 24 (citing e.g. *Young*, 167 Wn. App. at 930); *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).

The court’s erroneous denial of Mr. Dunbar’s motion to suppress evidence violated his privacy rights and right to be free from illegal search and seizure, requiring reversal.

2. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR THAT POLICE WERE INVESTIGATING A “METH LAB.”

Mr. Dunbar objected to the introduction of evidence about a “meth lab” because it violated his confrontation right and was prejudicial. The court’s error in allowing this highly prejudicial testimony affected the jury’s verdict.

a. The error was preserved by Mr. Dunbar asserting his right to cross-examine the declarant.

The prosecutor on appeal makes the entirely baseless claim that in order for Mr. Dunbar to preserve his objection to the officer’s testimony about the contents of the CAD report, he was required to submit briefing or move in limine for exclusion of the officer’s testimony. Brief of Respondent at 31. The relevant inquiry for preservation of an objection on

appeal is that the “objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error.” *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Additionally, “the propriety of [a ruling on a general objection] will be examined on appeal if the specific basis for the objection was ‘apparent from the context.’” *Id.* at 300. In *Padilla*, the request for a sidebar and discussion of a case with the court made apparent, under the circumstances, that the court understood the objection and was able to rule on it. *Id.* at 300-301.

Here, Mr. Dunbar objected to the contents of the CAD report being testified to on the basis that “we can’t cross-examine the caller from 911.” RP (5/1/17) 97. This was an objection on confrontation clause grounds.

Additional authority cited by the prosecutor on appeal that this objection had to be made pre-trial is inapplicable. *Melendez-Diaz* involved the admission of a lab report that the court noted, could be objected to pre-trial once the prosecution gives notice of its intent to admit this evidence at trial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326, 129 S. Ct. 2527, 2541, 174 L. Ed. 2d 314 (2009) (“In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the

defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial”).

Here, the prosecution gave no notice of its intent to admit as evidence the CAD report’s substantive contents at trial; thus the requirement of pre-trial objection is baseless.

State v. O’Cain requires the defendant to assert his confrontation right at or before trial. 169 Wn. App. 228, 235, 279 P.3d 926 (2012). This is precisely what Mr. Dunbar did when he objected on the basis that he could not cross-examine the declarant who made the statement contained in the CAD report. RP (5/1/17) 97. His objection preserves the issue for appeal.

Because this was preserved error, the prosecutor’s analysis under the manifest error standard is irrelevant. Brief of Respondent at 34-37. But even if this Court were to adopt the prosecutor’s claim that this is unpreserved error, it would still meet the RAP 2.5(3) criteria for review, where the objection is “practical and identifiable” as required *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Mr. Dunbar’s assertion at trial that he had a right to cross-examine the declarant is so fundamental that any judge would be able to identify the nature of this objection as an assertion of his right to confront and cross-examine witnesses as guaranteed by the Sixth Amendment. U.S. Const. amend. VI.

b. Mr. Dunbar objected to Deputy Criswell testifying about the contents of the CAD as more prejudicial than probative—this adequately preserves an ER 404(b) objection for review on appeal.

Mr. Dunbar also objected to officer testifying to the contents of the CAD report because the prejudice of the evidence outweighed its probative value. RP (5/17/17) 96-97.

Mr. Dunbar was charged with possession of methamphetamine. CP 3. Defense counsel specifically objected to mention of the suspected methamphetamine production, requesting the court to limit the testimony from the CAD to “suspicious activity, or “suspected drug activity and not methamphetamine.” RP (5/1/17) 96. This objection was followed by argument that such evidence is more prejudicial than probative. RP (5/1/17) 97. This ER 404(b) objection was “apparent from the context.” *Padilla*, 69 Wn. App. at 300. Accordingly, the prosecutor’s claim of being “unable to locate, anywhere in the record, a specific objection to this testimony to prove the defendant’s propensity to possess methamphetamine” has no weight. BOR at 37.

The court was required to engage in the full analysis under ER 404(b) before allowing this highly prejudicial propensity evidence. RP (5/1/17) 97. The prosecutor did not provide any non-propensity purpose

for the evidence,¹ but the court did, allowing it to come in on the basis of what was in the “officer’s mind when they attend the -- when they respond to the property at issue.” RP (5/1/17) 100-101.

Rather than engaging in the required analysis under ER 404(b), the court allowed the evidence in to reflect what was in the “officer’s mind,” which in this case, was an invalid non-propensity purpose, because the officer’s state of mind was not relevant to the element of possession of methamphetamine. RP (5/1/17) 101; Appellant’s Opening Brief at 26-28. The prosecutor on appeal even concedes this lack of relevance in the assertion that “the circumstances surrounding the contact and arrest of Mr. Dunbar are of no consequence.” Brief of Respondent at 38. This admission under (3) of the required ER 404(b) balancing test, determining the relevant purpose for the evidence, was in error. *See State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). And the court further erred in failing to consider all four parts of the ER 404(b) balancing test. *Id.*

¹ The trial court rejected the prosecutor’s argument that Mr. Dunbar was attempting to “relitigate” the court’s rulings from the 3.5 and 3.6 hearings. RP (5/1/17) 100.

c. This was not harmless error under any standard.

The constitutional harmless error standard requires proof beyond a reasonable doubt that the jury verdict cannot be attributed to the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Mr. Dunbar's defense at trial was that the prosecutor did not prove beyond a reasonable doubt that the substance in Mr. Dunbar's pocket was methamphetamine. Appellant's Opening Brief at 29-30.

The testimony about Mr. Dunbar being arrested at the site of a suspected "meth lab" would surely have made the jury more likely to find the prosecutor met this burden in the face of Mr. Dunbar's challenge to the evidence establishing the substance was in fact methamphetamine. Appellant's Opening Brief at 29-30.

B. CONCLUSION

The trial court committed reversible error by refusing to suppress the evidence seized in violation of Mr. Dunbar's privacy rights under Article I, sec. 7, and his right to be free from illegal seizure under the Fourth Amendment. The court also erred in admitting evidence in violation of Mr. Dunbar's Sixth Amendment Confrontation Clause right and ER 404(b). Reversal is required on each of these grounds.

DATED this 25th day of April, 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	NO. 35351-6-III
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DANIEL DUNBAR,)	
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APPELLANT.)	

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