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No. 35351-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Police entered onto private property to investigate an unverified anonymous tip. While investigating on the property without a warrant, the officer recognized Mr. Dunbar sitting in the driver's seat of a vehicle. Even though the officer had no particularized suspicion that Mr. Dunbar was engaged in criminal conduct, Mr. Dunbar was stopped and prevented from leaving while police ran his name through dispatch and found that he had outstanding misdemeanor warrants. Police arrested Mr. Dunbar on the warrants, and in a search incident to arrest, found a small amount of methamphetamine in Mr. Dunbar's pocket, for which he was charged with one count of possession of a controlled substance.

The trial court denied Mr. Dunbar's motion to suppress the methamphetamine uncovered as a result of the police officer's invasion of his privacy rights under Article I, section 7 and unlawful search and seizure under the Fourth Amendment, concluding that the police officer's entry onto private property and check for warrants was a permissible "social contact" under Article I, section 7.

Mr. Dunbar proceeded to trial where the jury heard that police came to his property to investigate a "meth lab," which was inadmissible propensity evidence that violated his right to confrontation.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Dunbar's motion to suppress evidence found as a result of the officer's warrantless, unlawful entry onto private property that was not impliedly open to the public.

2. Even if the private property was impliedly open to the public, the police exceeded the scope of this implied invitation by checking Mr. Dunbar's name for warrants immediately upon entry onto the property.

3. The trial court erred in finding that Mr. Dunbar was not detained in violation of his right to privacy under Article I, section 7.

4. The trial court erroneously concluded that police detention of Mr. Dunbar while checking his name for warrants was a permissible "social contact" under Article I, section 7.

5. The trial court erroneously entered finding of fact numbers 3, 4, 6, 7, 10, 11, 13, 14, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, pursuant to the 3.6 hearing, absent substantial evidence in the record.

6. Mr. Dunbar's right to confrontation was violated when at trial, police testified about the contents of a CAD report containing the non-existent report of an anonymous caller.

7. The trial court erred in admitting the police officer's irrelevant, prejudicial testimony at trial about an anonymous caller's report about a "meth lab" on Mr. Dunbar's property.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 of the Washington Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Warrantless searches are per se unreasonable absent a valid exception to the warrant requirement under both the state and federal constitutions. Const. art. I, sec. 7; U.S. Const. amend. IV. A person may express a subjective intent to close their property. Did Officer Criswell’s entry onto private property without a warrant constitute a trespass onto private property requiring suppression of the evidence seized as a result of this initial trespass?

2. If private property is impliedly open to the public, police activity on the property is permitted only to the degree that the law enforcement officer acts like a reasonably respectful citizen while entering the property. Did the officer exceed the scope of this implied invitation by entering onto private property and running Mr. Dunbar’s name for warrants, in violation of Const. art. I, sec. 7?

3. In addition to Mr. Dunbar’s right to privacy on private property under Article I, section 7, the Constitution also guarantees him the right to be free from illegal search and seizure. Did the trial court err in finding that Mr. Dunbar was not unlawfully detained when an officer flagged him

down as he was driving out his driveway, and another officer approached him from the other direction and ran his name for warrants?

4. The Fourth Amendment and Art. I, sec. 7 prohibits detention of a person absent reasonable suspicion of criminal activity. Did the officer unlawfully detain Mr. Dunbar absent an articulable suspicion that criminal activity was underfoot in violation of state and federal constitution?

5. The Sixth Amendment and Article I, section 22 provide the right to confront and cross-examine witnesses. Did police officer testimony about the contents of a CAD report, in which an anonymous caller reported that the property where police arrested Mr. Dunbar was a “meth lab,” where there was no on-going emergency, and the call merely relayed information about past events, violate Mr. Dunbar’s confrontation right because he was unable to cross-examine the caller about these testimonial statements?

6. ER 404(b) prohibits the introduction of evidence of uncharged misconduct except in limited circumstances. Under ER 404(a), evidence of “other” malfeasance is categorically inadmissible to identify the character of a person and thus show action in conformity therewith. Did the trial court err in allowing the jury to hear that police were responding to an unverified, anonymous call about a “meth lab” at the property where

Mr. Dunbar was arrested for possession of a controlled substance, where this evidence served no relevant purpose and prejudiced him at trial?

D. STATEMENT OF THE CASE

Officer Griffin Criswell went onto private property where Daniel Dunbar stayed in order to investigate an anonymous call about suspicious drug activity. RP (3/30/17) RP 12, 26-27; CP 41-42 (FF #2, 4) (“privately owned unpaved roadway”). This property can be approached from the east and the west. RP (3/30/17) 9. Officer Criswell approached from the west. RP (3/30/17) 9. Officer Loucks, the second officer, responded from the east side of the property, which was blocked by a fence and a gate. RP (3/30/17) 9, 28; CP 42 (FF #9).

Daniel Dunbar was backing out of the driveway when he was stopped by Officer Loucks, who was waving his arms above his head to get Mr. Dunbar or his passenger’s attention. CP 43(FF #22); RP (3/30/17) 28. Officer Criswell approached the driver’s side window and recognized the driver of the vehicle as Mr. Dunbar. RP (3/30/17) 11, 24. Deputy Loucks remained outside the gate that lined the southeast side of the property, but was speaking to Mr. Dunbar’s passenger from that location. CP 42 (FF #18); RP (3/30/17) 11.

Officer Criswell arrested Mr. Dunbar after learning that he had several outstanding misdemeanor warrants. RP (3/30/17) 12. The officer

searched him incident to arrest on the warrants and located a small amount of methamphetamine in his pocket. CP 1; RP (3/30/17) 12. Mr. Dunbar was charged with one count of Possession of a Controlled Substance. CP 3.

The defense moved to suppress the methamphetamine found in Mr. Dunbar's pocket under Article I, section 7 and the Fourth Amendment. CP 10; RP (3/30/17) 32.

The trial court denied the defense's motion to suppress, finding that Officer Criswell engaged in nothing more than a "social contact" that was permitted under Article 1, section 7 of the Constitution, and that the officer's entry onto private land and subsequent detention of Mr. Dunbar while he ran his name for warrants did not violate the state or federal constitutional privacy protections or right to be free from unreasonable searches and seizures. CP 44; RP 100-101

Mr. Dunbar proceeded to trial, where the jury was allowed to hear, over defense objection, that the police were on Mr. Dunbar's property to investigate an anonymous call about a "meth lab." RP 100-101, 195. Mr. Dunbar was subsequently convicted as charged. CP 74.

E. ARGUMENT

**1. Police violated Mr. Dunbar's right to privacy under Article I, section 7 and the Fourth Amendment by entering private property without a warrant, and then far exceeding the scope of any permissible activity on the property by running Mr. Dunbar's name for warrants.**

a. The state and federal constitutions protect a person's right to be free from governmental trespass on private property.

Warrantless searches are per se unreasonable under both the Fourth Amendment and Article I, section 7. U.S. Const. Amend. IV; Const., art I, sec. 7; *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The constitutional protection against warrantless searches applies most strongly to a person's home. *Ross*, 141 Wn.2d at 312. Residents maintain the same expectation of privacy in the curtilage surrounding the home. *State v. Jesson*, 142 Wn. App. 852, 858, 177 P.3d 139. The closer an officer comes to entering the home, the greater the protection. *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990).

A trial court's denial of a motion to suppress will not be upheld absent substantial evidence to support its findings of fact, which must support the trial court's conclusions of law. *Jesson*, 142 Wn. App. at 857-858. The court's conclusions of law are in turn reviewed de novo. *Id.* at 858.

b. Police entry without a warrant onto private property that was closed off to the public violated Mr. Dunbar's right to privacy under Art. I, sec.7.

“Washington has a long tradition of protecting private property interests from unwanted intrusions.” *State v. Johnson*, 75 Wn. App. 692, 702, 879 P.2d 984 (1994). *Johnson* observed that even prior to statehood, Washington allowed individuals to exclude others from their property, and the law has not changed in this regard. *Id.* This “presence of the long history of territorial and state laws prohibiting trespass indicates that Washington places important emphasis on a person’s right to exclude others from his or her private property, regardless of the size or developed state of that property.” *Johnson*, 75 Wn. App. at 702.

Under Article I, section 7, a person may express a subjective intent to close their property. *Johnson*, at 705. A house located in an isolated setting, hidden from the road and from neighbors, with a long driveway that is blocked by a closed gate, demonstrates “a subjective expectation of privacy in the area beyond the gate.” *Ridgway*, 57 Wn. App. at 918. And the use of fences, gates, and restrictive signage all indicate that guests are not invited onto private land. *Johnson*, 75 Wn. App. at 706-07 (fenced and gated property with “No Trespassing” and “Private Property” signs showed that access way was not open.); *State v. Gave*, 77 Wn. App. 333, 338, 890 P.2d 1088 (1995) (“No trespassing” signs are one factor to be

considered in conjunction with other manifestations of privacy.”). In conjunction with “No Trespassing” signs, a closed gate, primitive road, and secluded location of a home are sufficient to show that a private property is not impliedly open to the public. *Jesson*, 142 Wn. App. at 859.

Like in *Johnson*, *Ridgeway*, and *Jesson*, the private property where Mr. Dunbar stayed showed the same implied closure from the public that should have prohibited police entry onto the property absent a warrant.

Officer Criswell entered private land that he knew to be part of a large piece of property that was part of a trust belonging to the same family RP (3/30/17) 19 (Officer Criswell talked to the property owners before, and he knew that the property went quite a distance up the hill, and another family member lived up at the top of the hill). Mr. Dunbar described that the property belonged to the same owner. RP (3/30/17) 29.

Officer Loucks responded from the east side of the property, which was blocked by a fence and cattle gate. RP (3/30/17) 28; CP 42 (FF #5, 18) (fence and gate prevent entry onto the unpaved roadway). Officer Criswell came from the West, by way of the private driveway or easement. RP (3/30/17) 22. It was not marked as a street on the county map. RP (3/30/17) 21. The three homes located on the southwest side of the unpaved road each had “No Trespassing” signs posted in front of them. CP 42 (FF #8); RP (3/30/17) 29. Mr. Dunbar was not visible to Officer

Criswell prior to his entry onto the private property. RP (3/30/17) 24.

Officer Criswell had to travel up the driveway about 110-120 yards. RP (3/30/17) 22. He located Mr. Dunbar inside a vehicle that “was running in front of the house on the driveway.” RP (3/30/17) 10.

Officer Criswell testified that the driveway is “probably classified as an easement through the property, if not a private driveway.” RP (3/30/17) 22. Thus the court’s finding of fact that “Sundown Drive is a public residential asphalt roadway that allows for vehicular traffic to travel northwest and southeast” is not supported by the record where there was no testimony about the road being asphalt, and there was no evidence that it was public. CP 41(FF #3).<sup>1</sup>

Officer Criswell gave conflicting testimony about the signage. At the 3.6 hearing, he testified that he did not believe there were “No Trespassing” signs posted. RP (3/30/17) 17-18. However, at the 3.5 hearing held about one month later, Officer Criswell stated that there was in fact a “No Trespassing” sign opposite of the property on the left side, opposite to where he contacted Mr. Dunbar. RP (5/1/17) 57-58. He entered

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<sup>1</sup> Only in the subsequent 3.5 hearing did the officer state the driveway “transitions from asphalt to dirt, gravel and dirt.” RP (5/1/17) 63.

the property despite knowing there was a “No Trespassing” sign on the other side of the property. RP (5/1/17) 58.

Though the court’s finding of fact indicate the trespass signs were a “disputed,” issue, it did not find Officer Criswell’s account more credible than Mr. Dunbar’s account that there were in fact “No Trespassing” signs. CP 41-44 (FF #4, 7).

Defense counsel brought Officer Criswell’s conflicting testimony about the “No Trespassing” signs to the court’s attention after the 3.5 hearing, but the trial court found that Officer Criswell said that the “No Trespassing” signs were not posted on the property associated with the driveway he entered.<sup>2</sup> RP (5/1/17) 91. But even if the court was correct in finding that Officer Criswell’s later testimony pertained only to the signs to the east entrance, he knew these entrances to be part of the same large piece of private property, held in trust, with separate properties belonging to at least some of the same family members. RP (3/30/17) 19. Thus, like in *Jesson*, the nature of the land itself, which had a long private driveway in which the activity therein is unobservable absent entry onto what is

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<sup>2</sup> The court also alternated between calling the driveway police entered an “easement.” RP (5/1/17) 91. It makes no difference for purposes of this analysis because there was no evidence that the easement was not exclusive to the property holders. *See McConiga v. Riches*, 40 Wn. App. 532, 540, 700 P.2d 331 (1985) (easement for the private use of the property owners).

known to be private property, with its primary entrance marked off by cattle gates and no trespassing signs, cannot be justified given the efforts of the private property owners to demarcate this large parcel of land as private. *Jesson*, 167 Wn.2d at 859.

Absent a warrant, police entry onto this private land was not permitted, requiring suppression of the methamphetamine seized from Mr. Dunbar as a result of this unreasonable intrusion into his private affairs.

*Johnson*, 75 Wn. App. at 709.

c. Under Article I, section 7, even if the private property was impliedly open to the public, police exceeded the scope of the implied invitation by running Mr. Dunbar's name for warrants while on the property.

Absent a clear indication that the property owner does not expect uninvited visitors, police may enter the curtilage areas of the home, such as an access route or driveway. *Jesson*, 142 Wn. App. at 858 (citing *Ross*, 151 Wn.2d at 312); *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); *Gave*, 77 Wn. App. at 337.

When police enter private property that is impliedly open to the public to investigate absent a warrant, they are limited to conducting themselves as would a “reasonably respectful citizen.” *Ross*, 141 Wn.2d at 312; *Jesson*, 142 Wn. App. at 858 (citing *Seagull*, 95 Wn.2d at 902). This may include entering the property to speak with occupants as part of an

investigation of a possible crime. *Jesson*, 142 Wn. App. at 859. “Whether the intrusion into an area has substantially and unreasonably exceeded the scope of an implied invitation depends on the facts and circumstances of the particular case.” *Gave*, 77 Wn. App. at 337 (citing *State v. Maxfield*, 125 Wn.2d 378, 398, 886 P.2d 123 (1994)).

In *State v. Ross*, police surreptitiously entered onto private property at night, seeking information to support their affidavit of probable cause for a search warrant, which exceeded the scope of any implied invitation, and thus constituted an unlawful search. *Ross*, 141 Wn.2d at 311-315.<sup>3</sup>

Even placing garbage out for collection, beyond the curtilage of the home does not mean that police may intrude in one’s private affairs in a way that exceeds the expected conduct of the average citizen.

While it may be true an expectation that children, scavengers, or snoops will not sift through one’s garbage is unreasonable, average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion.

*State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990).

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<sup>3</sup> Though police originally went to home that was impliedly open to the public on the basis of an anonymous tip, the court in *Ross* did not analyze the validity of this initial entry.

Here, police entered onto private property to investigate a non-existent, unverified caller's anonymous tip about "suspicious activity" on the property. CP (FF # 1, 2); RP 22, 15.

Mr. Dunbar's vehicle was located in front of the house, in the driveway. RP (3/30/17) 10, 26, 29. This is thus well within the protected curtilage of the house. *Gave*, 77 Wn. App. at 337. After recognizing Mr. Dunbar, the officer ran his name for warrants. RP (3/30/17) 11. Officer Criswell never sought permission to be on the property. RP (3/30/17) 22. Police had no information about a particular person. RP (3/30/17) 16.

Though it is reasonable to expect that people may wander onto private property and even look around out of curiosity, or here, for police to enter private property to briefly ask questions about an investigation, no reasonable person would expect a police officer to enter private property and immediately run a search of his name for warrants in order to make an arrest, as occurred here. This was a violation of Mr. Dunbar's privacy because it defied any expectation of reasonable conduct while on the property. *See Ross*, 141 Wn.2d at 313; *Boland*, 115 Wn.2d at 577-78. Suppression of evidence gathered as a result of this invasion of Mr. Dunbar's privacy requires suppression. *Ross*, 141 Wn.2d at 314.

d. The Fourth Amendment also limits police conduct to the original stated purpose of the warrantless entry.

Likewise, the Fourth Amendment's protections extend to those areas in which a person has a "reasonable expectation of privacy." U.S. Const. amend. IV; *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (citing *Smith v. Maryland*, 442 U.S. 735, 740–41, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). And "an individual reasonably may expect that an area immediately adjacent to a home will remain private." *Id.* (citing *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). Curtilage, under the Fourth Amendment, is "the area around the home to which the activity of home life extends." *Struckman*, 603 F.3d at 739. Courts have therefore extended Fourth Amendment protection to the curtilage of a home. *Id.*

And though police may enter the curtilage of a home to contact its inhabitants without a warrant, the Fourth Amendment does impose limitations on police conduct while on the private property: "[T]he constitutionality of such entries into the curtilage hinges on whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home." *U.S. v. Perea-Rey*, 680 F.3d 1179, 1187-1188 (2012). "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose." *Florida*

*v. Jardines*, 569 U.S. 1, 9, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

“This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *Id.* at 8.

In *Jardines*, “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence” went well beyond the scope of this license. *Id.* In *U.S. v. Perea-Rey*, the police exceeded consensual entry into the curtilage of the home when they did not give the inhabitants of the property the opportunity to ignore the initial basis for the warrantless entry, which was a “knock-and-talk.” *Perea-Rey*, 680 F.3d. at 1188. Seizure of the inhabitants located within the curtilage of the home absent a warrant was not permitted under the Fourth Amendment. *Id.* at 1188-89.

Mr. Dunbar was found in the driveway, right outside the home. RP (3/30/16) 8. He was thus within the curtilage for purposes of the Fourth Amendment. *Struckman*, 603 F.3d at 739. Police went well beyond a consensual “knock and talk” about suspicious activity on the property, and instead sought evidence of Mr. Dunbar’s warrant status in order to arrest him. This is far more akin to the unreasonable investigative search in *Jardines*, where “officers learned what they learned only by physically

intruding on Jardines' property to gather evidence." *Jardines*, 569 U.S. at 11.

Exceeding the scope of the implied invitation requires suppression of evidence found in violation of the Fourth Amendment. *Perea-Rey*, 680 F.3d at 1189 (citing *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963))

e. The "open view" doctrine does not apply.

Even if Mr. Dunbar were visible from outside the property, as he was to Officer Loucks, who did not recognize him, it cannot be argued that Mr. Dunbar's warrant status was in "open view" when Officer Criswell saw Mr. Dunbar and then contacted dispatch to run his name for warrants. RP (3/30/17) 30. Under the "open view" doctrine, an officer who is lawfully on the property that is impliedly open to the public, and is able to detect something utilizing his senses, does not conduct a search within the meaning of the Fourth Amendment. *Ross*, 141 Wn.2d at 313 (citing *Seagull*, 95 Wn.2d at 901). Though Mr. Dunbar's identity may have been openly identifiable to the officers, his warrant status was not, as it required contacting police dispatch to find out his warrant status.

The police violated Mr. Dunbar's privacy rights by trespassing onto private property without a warrant. Even if this court does not find that the property was closed to the public, police exceeded the scope of

any implied invitation by running Mr. Dunbar's name for warrants.

Suppression of the small amount of methamphetamine found in violation of Mr. Dunbar's privacy rights must be suppressed.

**2. Police illegally detained Mr. Dunbar under Article I, section 7, and the Fourth Amendment, when he was not permitted to exit his driveway while police ran a warrant check, absent reasonable suspicion to detain him.**

Article I, sec. 7 limits police disturbance of a person's private affairs, and the Fourth Amendment prohibits the detention of a person without reasonable suspicion. Const. art. I, sec. 7; U.S. Const. amend. IV. A seizure occurs when a person's freedom of movement is restrained and when considering all the circumstances, a reasonable person would not believe that he is free to leave or decline a request due an officer's show of authority. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P. 3d 489 (2003). The determination is "purely objective." *Id.* If objectively viewed, there is a seizure, that seizure is valid only where there are "specific and articulable facts which, taken together, with rational inferences from those facts, reasonably warrant" detaining the individual. *O'Neill*, 148 Wn. 2d at 576; *Terry v. Ohio*, 392 U.S. 1, 21, 88, S.Ct. 1868, 20 L. Ed.2d 889 (1968).

Whether police have seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

a. Police lacked reasonable suspicion to detain Mr. Dunbar under both Article I, section 7 and the Fourth Amendment, where the sole basis for their incursion onto his property and seizure of Mr. Dunbar was an unverified, anonymous tip.

Prior to detaining a person, “the officer must have a well-founded suspicion that the individual is engaged in criminal activity” and must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Carney*, 142 Wn. App. 197, 202, 174 P.3d 142 (2007) (citing *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (quoting *Terry*, 392 U.S. at 21).

An anonymous tip lacking an indicia of reliability is not sufficient to give a police officer reasonable suspicion of criminal activity to justify a *Terry* investigative stop. *Florida v. J.L.*, 529 U.S. 274, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000); *State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835 (1981) (citing *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (“An informant’s tip cannot constitutionally provide police with such a (well-founded) suspicion unless it possesses sufficient ‘indicia of reliability.’”))

If a citizen-informant refuses to give his name, or if only the name of the informant has been relayed to the police, “the police may not be justified in concluding the tip comes from a reliable source.” *Wakeley*, 29

Wn. App. at 241 (citing *State v. Chatmon*, 9 Wn. App. 741, 515 P.2d 530 (1973)). “The bare report of an unknown, unaccountable informant” who does not explain the basis of the report or inside information is not reliable. *J.L.*, 529 U.S. at 271; *see also State v. Cardenas-Muratalla*, 179 Wn. App. 307, 316, 319 P.3d 811 (2014) (Neither an informant nor the informant’s tip is reliable where an officer knows nothing about the 911 caller, the caller did not give his name, and the 911 operator was unable to reach the caller on a call-back).

Where an unreliable informant’s tip was not corroborated by any observations by the officers of suspected criminal activity, an investigatory stop of an individual based on this tip is not permitted. *Cardenas-Muratalla*, 179 Wn. App. at 317 (The informant’s tip was not corroborated by any observations by the officers of suspected criminal activity).

In Mr. Dunbar’s case, an unidentified party reported to police that a suspicious vehicle and travel trailer appeared at the 4130 South Sundown address. CP 41 (FF #2). The officer had no information about the identity of the caller, who was listed as “anonymous.” RP (3/30/17) 14-15, 22. This was not an emergency call. RP (3/30/17) 15. There was no concern about a crime in progress. RP (3/30/17) 15. The anonymous caller gave no specific information about any individuals on the property. RP

(3/30/17) 16. And Officer Criswell had no reason to believe that the reported travel trailer seen on the property was stolen when out to the property. RP (3/30/17) 16. There was thus no basis for police to detain Mr. Dunbar pursuant to this unverified, uncorroborated, anonymous tip.

b. Police detained Mr. Dunbar to conduct a warrant check; this was not a “social contact,” it was a seizure.

The court erroneously ruled that the officer’s investigation of Mr. Dunbar’s warrant status conducted on his private property was a “social contact,” not an “investigative detention.” CP 44.

“Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer’s saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e. *Terry stop*).” *Harrington*, 167 Wn.2d at 664. An encounter may lose its consensual nature and become a seizure for Fourth Amendment or article I, section 7 purposes if “the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” U.S. Const. amend. IV; *State v. Young*, 167 Wn. App. 922, 930, 275 P.3d 1150 (2012) (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).

“‘Social contact’ suggests idle conversation about, presumably, the weather or last night’s ball game—trivial niceties that have no likelihood of triggering an officer’s suspicion of criminality. The term ‘social contact’ does not suggest an investigative component.” *Harrington*, 167 Wn.2d at 664. Courts have allowed that an interaction that takes place in the public, where an officer asks for an individual’s identification, is a “social contact.” *Harrington*, 167 Wn.2d at 664–65

However, “a series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively.” *Harrington*, 167 Wn.2d at 668. In *Harrington*, the Court analyzed police officer-initiated contact with *Harrington* on a dark street. *Id.* at 669. At first, the officer allowed *Harrington* to use the sidewalk, “and did not otherwise block *Harrington*’s egress from the site.” *Id.* at 665. However, the arrival of a second officer and the officer’s request that the pedestrian remove his hands from his pockets were factors that turned a “social contact” into a seizure. *Id.* at 667 (“asking a person to perform an act such as removing hands from pockets adds to the officer’s progressive intrusion and moves the interaction further from the ambit of valid social contact, particularly if the officer uses a tone of voice not customary in social interactions.”) The Court observed that a second officer’s sudden

arrival at the scene “would cause a reasonable person to think twice about the turn of events and, for this reason, [the officer’s] presence contributed to the eventual seizure of Harrington.” *Id.* at 666; 669 (“These facts create an atmosphere of police intrusion, culminating in a request to frisk.”). Similarly, an officer saying, “Stop, I need to talk to you,” is a seizure. *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

There is no requirement that there be “flashing lights and sirens” for there to be a seizure, as erroneously required by the trial court. CP 43 (FF #19, 20, 21). Thus, the court applied the incorrect legal standard for determining whether a person was seized. CP 43 (FF #19-24); CP 44. And the court’s finding that “there was no evidence of any use of force, show of authority, or commands made by the deputies” is not supported by the record. CP 43 (FF #23). Here, Mr. Dunbar was driving away from his property as he was flagged down and stopped by Officer Loucks, who was waving his arms above his head to get Mr. Dunbar’s or his passenger’s attention. CP 43 (FF# 22); RP (3/30/17) 28. Then a second officer came up to his driver side window, on private property, from behind his vehicle. He asked Mr. Dunbar if he had warrants, then ran his name to check. RP (3/30/17) 11, 30. Mr. Dunbar would not have felt free to leave where an officer commanded information from him that could lead to his arrest while another officer surrounded him on the other side. This was not a

consensual encounter. It was a seizure. *Harrington*, 167 Wn.2d at 668-669; *Gatewood*, 163 Wn.2d at 541.

Because police detained Mr. Dunbar without a legal basis, the fruits of this unlawful detention must be suppressed. *Carney*, 142 Wn. App. at 204-205; *J.L.* 529 U.S. at 166, 269, 274.

**3. The trial court impermissibly allowed the jury to hear that police were investigating a “meth lab,” in violation of Mr. Dunbar’s confrontation right and ER 404(b).**

a. Admission of the CAD report violated Mr. Dunbar’s confrontation right.

Mr. Dunbar moved to limit police testimony about a reported “meth lab” on the basis that the caller was not subject to cross-examination. RP (5/1/17) 97. The court allowed the evidence in as to the officer’s state of mind, when responding to the property, but did not address the defense objection on confrontation clause grounds. RP (5/1/117) 100. This was reversible error.

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant “to be confronted with the witnesses against him.” U.S. Const. amend. VI. Similarly, article I, sec. 22 guarantees the right of a defendant to “meet the witnesses against him face to face.” Const. art. 1, § 22.

The right to confrontation is a constitutional question subject to de novo review. *State v. Price*, 158 Wn.2d 630, 638–39, 146 P.3d 1183 (2006).

The Confrontation Clause prohibits the introduction of testimonial statements of witnesses absent from trial unless the declarant is unavailable, and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. O’Cain*, 169 Wn. App. 228, 249, 279 P.3d 926 (2012) (“The confrontation clause bars the admission of testimonial hearsay statements where the declarant does not testify at trial and the defendant had no prior opportunity to confront the witness under oath.”).

Statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

In *Davis*, the Supreme Court held that a caller’s statements to a 911 operator were nontestimonial because: (1) the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to establish or prove some past fact, but to describe current

circumstances requiring police assistance; (2) the caller was speaking about events as they were actually happening, rather than describing past events; (3) a 911 caller is usually facing an “ongoing emergency; and (4) the statements elicited by the operator were necessary to be able to “*resolve* the present emergency, rather than simply to learn ...what ... happened in the past.” *Id.* at 827 (emphasis in original).

At trial, Officer Criswell testified that he responded to an anonymous call describing the property where Mr. Dunbar was arrested by police as “likely a meth lab, lots of traffic at night and car doors slamming at night keeping neighbors up at night.” RP (5/1/17) 195. Here, unlike in *Davis*, the caller’s statements contained in the CAD were not intended to resolve a present emergency, as there was no crime in progress, and the call was about the activities of the prior night that did not require immediate officer attention. RP (3/30/17) 15-16. Admission of the substance of these testimonial statements violated Mr. Dunbar’s right to confront and cross-examine the witnesses against him.

b. The CAD report was unverifiable, not admitted for a proper purpose, and the court failed to weigh the probative value of the CAD against its clear prejudice to Mr. Dunbar.

Mr. Dunbar also objected to the police officer testimony on the basis that this testimony was highly prejudicial and served no relevant, non-propensity purpose. RP (5/1/17) 96-97. The trial court overruled this

objection, finding simply that the 911 call reflected what was “in the officers’ mind when they attend the—when they respond to the property at issue.” RP (5/1/17)101.

“ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Non-propensity purposes for admitting other bad acts may include “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

The proponent of prior bad act evidence bears the burden of establishing that the act is offered for a proper purpose. *Gresham*, 173 Wn.2d at 420. A trial court’s ruling is reviewed for abuse of discretion, and will not be upheld if the decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

When a trial court admits evidence under ER 404(b), it must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial

effect.” *Gunderson*, 181 Wn.2d at 923. This weighing must be done on the record. *Id.*

Here, the court did not find by a preponderance of the evidence that the house where Mr. Dunbar was located was a “meth lab.” Nor could it have, where this “evidence” was nothing more than an unverified anonymous tip, and no “meth lab” was found. Second, the court’s stated reason for admitting the evidence was the officer’s state mind. This was not a proper ER 404(b) use, because any potential relevance would be to Mr. Dunbar’s state of mind, not the officer’s, were this an element of the offense. *See Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (where intent is an element of the offense, other acts evidence may be admissible to show state of mind of the accused). But intent is not an element of the charged offense of possession of a controlled substance. RCW 69.50.4013; CP 70 (State not required to prove element of knowledge or intent in possession of a controlled substance). This evidence served no relevant purpose other than to show propensity for the charge of possession of methamphetamine. Finally, the court failed to conduct “the proper four-step analysis on the record.” *Gunderson*, 181 Wn.2d at 923.

Further compounding this error, the trial court also failed to give the required limiting instruction to the jury. *Id.* (citing *State v. Lough*, 125

Wn.2d 847, 864, 889 P.2d 487 (1995)); CP 57-73 (no limiting instruction for the use of propensity evidence).

It was an abuse of discretion for the trial court to not conduct an ER 404 (b) analysis on the record, and there was no tenable basis for its admission had the court conducted the proper analysis.

c. Admission of the unverified, anonymous caller's report of a "meth lab" at the property where Mr. Dunbar was arrested and charged for possession of methamphetamine was not harmless error under either the constitutional or non-constitutional harmless error standards.

Confrontation Clause errors are subject to constitutional harmless error analysis. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012).

This means the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The erroneous admission of ER 404(b) evidence requires reversal if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Gunderson*, 181 Wn.2d at 926.

The court's erroneous admission of this highly prejudicial evidence fails under both tests. Under *Chapman*, the State cannot meet its burden to show that the officer's description of where he contacted and arrested Mr.

Dunbar as a “meth lab” was not harmless, where the defense theory at trial was that the State was unable to establish beyond a reasonable doubt that the substance Mr. Dunbar possessed was methamphetamine, because there was a leaking substance on the outside of the bag that might have contaminated the substance inside the bag that was tested and found to be methamphetamine. RP (5/3/17) 311-315 (argument in closing); RP (5/2/17) 251-267 (extensive cross-examination of the forensic scientist about possible contamination of the substance and reliability of the testing). Had the jury not heard that Mr. Dunbar was arrested at a supposed “meth lab,” the defense’s theory about contamination would have had much greater weight with the jury, materially affecting the outcome where there was evidence of leaking in the unsealed interior bag that sat in a locker for nearly five months before it reached the lab for testing. RP 313-315.

Because this error was not harmless under either standard, reversal is required. *Chapman*, 386 U.S. at 24; *Gunderson*, Wn.2d at 926-927.

#### F. CONCLUSION

Police violated Mr. Dunbar’s privacy rights by entering private property that was not open to the public. Should this court find the private driveway was impliedly open, police exceeded the implied invitation of a reasonably respectful citizen by running Mr. Dunbar’s name for warrants,

absent any connection to their stated purpose for being on the property. These invasions of privacy under the state and federal constitutions require suppression of the evidence seized as a result of this invasion of Mr. Dunbar's privacy rights. In the alternative, the court erred in denying Mr. Dunbar's motion to suppress evidence obtained as a result of an illegal detention under state and federal law. Reversal for a new trial is also required for the court's admission of highly prejudicial evidence that served no relevant purpose and violated Mr. Dunbar's right to confront and cross-examine witnesses.

DATED this 23rd day of January, 2018.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35351-6-III
	)	
DANIEL DUNBAR,	)	
	)	
APPELLANT.	)	

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