

FILED
Court of Appeals
Division III
State of Washington
3/26/2018 10:47 AM
35351-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL DUNBAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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 implied 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 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-exigent 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.

II. ISSUES PRESENTED

1. Whether the trial court's findings of fact from the CrR 3.6 hearing are supported by substantial evidence?

2. Whether the trial court properly ruled that the defendant had no expectation of privacy on the driveway/easement/access road leading to the property on which his trailer was parked?
3. Whether the trial court properly determined that law enforcement's contact with Mr. Dunbar was only a social contact until the defendant was placed under arrest for outstanding misdemeanor warrants, at which point, he was lawfully seized?
4. Whether the defendant preserved any confrontation clause error in the admission of testimony regarding an anonymous 911 caller who reported the Sundown Drive house was probably a meth lab, where defense counsel's objection to the testimony was on relevancy grounds?
5. Whether the defendant preserved any argument that the testimony regarding the 911 call was inadmissible ER 404(b) evidence, where defense counsel did not object on this basis below?
6. If it was error to admit evidence relating to the 911 call, was its admission harmless beyond a reasonable doubt?

III. STATEMENT OF THE CASE

On September 13, 2016, the defendant was charged by information with one count of possession of a controlled substance, methamphetamine, in the Spokane County Superior Court. CP 3. The defendant moved to

suppress the methamphetamine, arguing violations of the Fourth Amendment and article 1, section 7 of the Washington Constitution. CP 10-13. The Honorable John Cooney heard testimony and argument on the CrR 3.6 motion. CP 32-36; Kerbs RP 1-54. The matter proceeded to trial before the Honorable Timothy Fennessey and, on May 3, 2017, a jury found the defendant guilty as charged. CP 74; Wilkins RP 1-350. The court sentenced the defendant to a standard range sentence of 12 months and a day of confinement, along with mandatory LFOs. CP 264, 267.

CrR 3.6 hearing.¹

Spokane County Deputy Griffin Criswell responded to investigate an anonymous call of a suspicious vehicle at 4130 South Sundown Drive in Spokane County on September 9, 2016. Kerbs RP 8. The 911 call provided that a white travel trailer had appeared on the property the previous evening, that the house at that location was likely a meth lab, and there was a lot of traffic at the location at night, with car doors slamming, “keeping neighbors up at night.” Kerbs RP 8. The legal owner, based on the described license plate, was Mary Ferrall, with a registered address approximately five miles from the Sundown location. Kerbs RP 9.

¹ Because the defendant has challenged a number of the trial court’s findings of fact from the CrR 3.6 hearing, this portion of the brief will refer to the testimony provided at that hearing, rather than the findings of fact made by the court after that hearing. The trial court’s findings of fact are addressed below.

The Sundown property was located in a subdivision called “Ponderosa” in the Spokane Valley, and the address can be accessed either from Sands Road via Bowdish on the east side of the property, or by driving south on Shafer Road, and turning east onto Sundown (i.e., approaching from the west). Kerbs RP 9. The Sands entrance was blocked by a gate, at which Deputy Griffin’s partner, Deputy Loucks, parked his patrol car, but did not enter the property. Kerbs RP 11.

A portion of Sundown Drive provides access to three residences. Kerbs RP 10. Deputy Criswell characterized this unpaved area as an easement or private driveway. Kerbs RP 10. There was dispute whether there were no trespassing signs visible on the property or roadway at the time Deputy Criswell drove on the easement/driveway.

At the east end of the easement/driveway, Deputy Criswell observed a Suburban in front of the house on the easement/driveway. Kerbs RP 10. A trailer was also visible at the southeast end of the house. Kerbs RP 10. Deputy Criswell observed Deputy Loucks speaking with the female passenger of the Suburban. Deputy Criswell exited his car, walked up to the driver’s side of the Suburban, and immediately recognized Mr. Dunbar in the driver’s seat. Kerbs RP 11. Having had “numerous contacts” with Mr. Dunbar, who was “rather prolific,” Deputy Criswell checked Mr. Dunbar for warrants by calling radio. Kerbs RP 11. Mr. Dunbar had

three misdemeanor warrants for his arrest. Kerbs RP 11. Once the warrants were confirmed, Deputy Criswell arrested Mr. Dunbar on the warrants, and searched him incident to arrest, locating a wadded-up plastic grocery sack which contained a substance later determined to be methamphetamine. Kerbs RP 12. Deputy Criswell arrested the defendant.

The trial court heard from both the Deputy Criswell and Mr. Dunbar at the suppression hearing. Judge Cooney issued a written memorandum opinion, determined that Mr. Dunbar was not seized until law enforcement confirmed that he had outstanding arrest warrants, denied the motion to suppress, and requested written findings of fact and conclusions of law. CP 32-35. Those findings and conclusions of law incorporated the court's written memorandum. CP 36-44.

Trial.

Prior to trial, defense counsel orally moved to exclude testimony that the anonymous 911 call surmised the residence at 4130 South Sundown was a meth lab. Wilkins RP 93. Defense counsel argued that this testimony was more prejudicial than probative and could lead to confusion. Wilkins RP 93-94. Defense counsel requested that, in lieu of direct testimony that the caller believed there to be a meth lab in the house, Deputy Criswell testify to nothing more than he responded to the property to investigate "suspected or suspicious activity ... occurring at that address." Wilkins

RP 95. Again arguing that the prejudicial effect of the testimony outweighed any probative value, defense counsel then stated, “it will leave the jury to draw inferences that aren’t really in evidence. We don’t have the ability to contest whether the house is a meth lab. And we can’t cross-examine the caller from 911.” Wilkins RP 97. The court ruled:

I don’t find any reason to – to exclude the description of the 911 call as that is in the officers’ minds when they attend the – when they respond to the property at issue. And so I’m not going to change or require the State to limit the testimony of Officer Criswell if, in fact, that is his testimony with regard to what he recalls about the call and his response.

So with regard to the exclusion of the home at 4130 Sundown Road, I believe that’s been an issue in this case long enough that there was an opportunity to have additional discovery and/or additionally address the issue prior to the oral motion today, so I’m denying the oral motion.

Wilkins RP 100-101.

The deputy did testify that he responded to a call of a suspicious vehicle at the property. Wilkins RP 195. Specifically, he stated the CAD report indicated a “white travel trailer showed up sometime last night and provided a Washington plate, and [said] the trailer is on the yard at [that] location. House is likely a meth lab, lots of traffic at night, car doors slamming at night keeping neighbors up at night.” Wilkins RP 195.

During cross examination, defense counsel inquired into the nature of the 911 call. Deputy Criswell admitted that the caller was anonymous and that he had no way to know the caller's veracity. Wilkins RP 218.

During closing argument, neither party referred to the residence as a reported meth lab. The State merely stated that "a caller placed a call ... into 911 and indicated that there was some activity going on out at 4130 South Sundown Drive." Wilkins RP 301.

IV. ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Standard of review.

Defendant challenges a number of the trial court's findings of fact, entered after the CrR 3.6 hearing. Great deference is given to the trial court's factual findings. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Accordingly, where the trial court has weighed the evidence and denied a motion to suppress the evidence, an appellate court limits its review to determine whether substantial evidence supports the challenged findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Where substantial, but disputed, evidence supports the findings of fact and conclusions of law, an

appellate court will not disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974).

Substantial evidence exists when it is enough "to persuade a fair-minded person of the truth of the stated premise." *Russell*, 180 Wn.2d at 866-67. Stated differently, substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). If the standard is satisfied, an appellate court does not substitute its judgment for that of the trial court even though the appellate court might have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist.*, 149 Wn.2d at 879-80; *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Stated differently, an appellate court will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *In Re Pers. Restraint of Stenson*, 174 Wn.2d 474, 488, 276 P.3d 286 (2012). Circumstantial evidence is as reliable as direct evidence when viewing the sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In addition, an appellate court defers to the trial court on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

The party challenging a finding of fact must demonstrate the lack of substantial evidence to support it. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The defendant has challenged 21 of the trial court's findings of fact, yet fails, with any specificity, to demonstrate how the evidence is insufficient to support most of those findings of fact. That is the defendant's burden. For this reason alone, the defendant's challenges to the findings of fact must fail. In any event, as discussed below, the challenged findings are supported by substantial evidence.²

1. Finding of fact 3: "Sundown Drive is a public residential asphalt roadway that allows for vehicular traffic to travel northwest and southeast." CP 41.

Defendant claims that "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." Appellant's Br. at 10. Although perhaps unclear on a black and white photocopy, a color copy of Attachment A to the defendant's motion to suppress demonstrates the presence of asphalt and gravel at the location of the livestock gate. CP 31. A color copy of this photograph was provided to the trial court for its review. Kerbs RP 5.

²The defendant does not challenge findings of fact 1, 2, 5, 8, 9, 12, 15-19. Unchallenged findings of fact are verities on appeal. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

Furthermore, the fact that the court made a second finding of fact regarding the “void” in Sundown Drive (finding of fact 4), indicates that finding of fact 3 speaks not to the character of the “void” in the roadway, but rather to the character of the paved asphalt leading to the “void” on both the north and south ends of the void. Although not admitted at the hearing, defense counsel utilized at least one county map for demonstrative purposes, which the trial court was able to observe and rely upon.³ Kerbs RP 13 (general reference to maps), RP 21 (referred to as “county property map” and “this other map”), RP 23 (Deputy Criswell asked to mark on the map where he contacted Mr. Dunbar), RP 26 (Mr. Dunbar asked by defense counsel to identify map), RP 36 (defense counsel’s argument referring to the “county map” by the Bureau of Land Management), RP 41 (defense counsel referring to “county map”). It is likely upon this unadmitted map (or maps) that the trial court made its finding that Sundown Drive (not the void) is a public roadway. The defendant has failed to demonstrate otherwise. Sufficient evidence exists supporting finding of fact 3.

³ It would be an odd rule that would allow a party to proffer a demonstrative exhibit at a CrR 3.6 hearing but fail to admit that exhibit, and then, on appeal, challenge the trial court’s findings of facts based upon that exhibit. Yet, that is what the defendant ostensibly requests this Court to allow.

2. Finding of fact 4: “A void in Sundown Drive exists in the area of 4130 S. Sundown Drive where the parcel of real property upon which 4130 S. Sundown Drive is located, prevents Sundown Drive from fully connecting. However, a privately owned unpaved roadway runs through the property allowing Sundown Drive to fully connect.” CP 42.

In this finding of fact, the term “void” references the easement or private driveway connecting Sundown Drive. Deputy Criswell testified that one may access the void in Sundown Drive either from Bowdish Road and Sands, or from the other direction, from Shafer Road. Kerbs RP 9. He testified that he travelled on a driveway or easement to reach the location where Mr. Dunbar’s vehicle was ultimately located. Kerbs RP 10. Deputy Criswell testified that Deputy Loucks was “at the end of the road” near the gate on one side of the property, and that he drove down Sundown, to where it “ends” and becomes “an easement or ... road extension or whatever it is that comes through the property.” Kerbs RP 17,18, 20. He testified that the “roadway” providing access to three properties is “probably classified as an easement through the property if not a private driveway.” Kerbs RP 22. Again, the trial court was able to view the map(s) and photograph proffered by and relied upon by the defendant at the hearing.⁴ Substantial evidence exists supporting finding of fact 4.

⁴ Interestingly, it does not appear that the defendant proffered a photograph of the entrance to the Sundown “void” that was actually utilized by Deputy Criswell in accessing the property.

3. Finding of fact 6: “Where Sundown Drive ends on the northwest side, there is nothing prohibiting entry onto the unpaved roadway.” CP 42.

Deputy Criswell testified that there was no sign at the northern entrance, where he entered the roadway, indicating that he was entering private property. Kerbs RP 10-11. Similarly, he testified that there was a gate at the southern entrance, and testified there was no gate at the other end. Kerbs RP 11, 21. This finding of fact is based on the testimony and logical inferences from that testimony.

4. Finding of fact 7: “Defendant’s allegation that there is a no trespassing sign posted at the northwest entry is disputed by Deputy Criswell who has visited the property many times.” CP 42.

Deputy Criswell testified that he knew from “previous experience” that there were not any “no trespassing” signs on the south end of the property. Kerbs RP 18. He testified that he had been to the property before, and knew Mr. Dunbar was not the owner. Kerbs RP 12, 19. The only error in this finding of fact might be the use of the term “many times” – that language was used by the deputy prosecutor in his argument, rather than by the deputy sheriff in his testimony.⁵ Kerbs RP 38. In any event, it is ultimately irrelevant whether the deputy had been to the property once, or

⁵ At the subsequent CrR 3.5 hearing, however, Deputy Criswell testified “I’d been down that road several times actually to access that property on Sundown and the property previous to that on various calls throughout the years.” Wilkins RP 58.

many times before – his testimony was that he had been there before and there were no “no trespassing signs.” Furthermore, as discussed below, the presence of no trespassing signs is irrelevant to the proper analysis in this case.

5. Finding of fact 10: “Approximately 8:40 a.m., Deputy Criswell entered the property from the northwest entrance where he did not recall seeing any no trespassing signs.” CP 42.

Deputy Criswell testified at approximately 8:40 a.m. he entered the property from the northwest entrance. Kerbs RP 8. He did not observe any “no trespassing” signs when he entered the property from that entrance. Kerbs RP 18 (“I didn’t notice any [signs] from my side”). This finding is supported by substantial evidence.

6. Finding of fact 11: “No photographs or documentary evidence was *admitted* that showed no trespassing signage at the northwest entrance.” CP 42 (emphasis added).

The State is unaware of any photographs or documentary evidence that was *admitted* at the CrR 3.6 hearing demonstrating the presence of no trespassing signage at the northwest entrance, where Deputy Criswell entered the property. The events of this case occurred in 2016. Kerbs RP 7. The Google photograph introduced by the defendant of the southern entrance (with the gate) where Deputy Loucks was located, was taken in 2011. CP 31 (indicating “Image Capture *Sep 2011*” (emphasis added)). No other photographs or documentary evidence were admitted at trial, although

as discussed above, both Deputy Criswell and Mr. Dunbar drew on a map or maps that were not admitted at the hearing. Kerbs RP passim. The court did not err in entering this finding of fact.

7. Finding of fact 13: “Near the southeast entrance, Deputy Criswell discovered Mr. Dunbar sitting in the driver’s seat of a Chevrolet Suburban, facing northwest.” CP 42.

Deputy Criswell testified that Mr. Dunbar was in the driver’s seat of a Chevy Suburban. Kerbs RP 10-11. Both Mr. Dunbar and Deputy Criswell described the direction in which the Suburban was parked when asked to draw on the unadmitted map. Kerbs RP 23-24, 28-29. Substantial evidence supports this finding, and defendant has failed to demonstrate otherwise.

8. Finding of fact 14: “Deputy Criswell parked his vehicle facing southeast on the opposite side of the roadway as Mr. Dunbar.” CP 42.

Both Mr. Dunbar and Deputy Criswell described the direction in which the Suburban was parked, when asked to draw on the unadmitted map. Kerbs RP 23-24, 28-29. Substantial evidence supports this finding, and defendant has failed to demonstrate otherwise.

9. Finding of fact 20: “There was no evidence presented that law enforcement seized Mr. Dunbar prior to his being arrested for the active warrants.” CP 43.

To the extent that this finding of fact passes on whether a seizure occurred, it is better classified as a conclusion of law. “The label applied to the finding or conclusion is not determinative; the court will treat it for what

it really is.” *Stastny v. Board of Trustees*, 32 Wn. App. 239, 246-47, 647 P.2d 496 (1982). The State will address this conclusion of law in its substantive argument, below.

10. Finding of fact 21: “There was no evidence presented that either deputy turned on their emergency lights, displayed any weapons, or gave commands or gestures directing or restricting Mr. Dunbar’s actions.” CP 43.

No evidence was presented indicating that either officer activated emergency lights, displayed weapons, or gave commands or gestures directing or restricting Mr. Dunbar’s actions. Kerbs RP passim. Defendant apparently assigns error to this finding because “there is no requirement that there be flashing lights and sirens for there to be seizure.” Appellant’s Br. at 23. The legal significance of these facts is not addressed by the finding of fact itself. If it did, it would be a conclusion of law. The trial court’s finding is supported by the record, in that no testimony was offered demonstrating the officers used their lights, sirens or gave commands.

11. Finding of fact 22: “The only action taken by either deputy was Deputy Loucks waving his arms above his head to get Mr. Dunbar’s or his passenger’s attention.” CP 43.

This finding of fact should be read in conjunction with finding of fact 21, and is supported by the record, as Mr. Dunbar testified, “we were stopped by this officer, saying, hey, hey, waiving [sic] his arms. And my girlfriend ... rolled down the window and proceeded to talk to him. Kerbs RP 28.

12. Finding of fact 23: “There was no evidence of any use of force, show of authority, or commands made by the deputies. The deputies may have been investigating a suspicious vehicle but did not seize anybody.” CP 43.

To the extent that this finding of fact passes on whether a seizure occurred, it is better classified as a conclusion of law. The State will address this conclusion of law in its substantive argument, below. Otherwise, the factual finding merely repeats finding of fact 21 and 22.

13. Finding of fact 24: “Mr. Dunbar did not testify that he did not feel free to leave or that either deputy attempted to direct his conduct or actions.” CP 43.

Mr. Dunbar never testified that he did not feel free to leave. This finding of fact is merely a finding that no testimony was given on the subject. Thus, it is supported by the record.

14. Finding of fact 25: “The unpaved roadway or driveway is exposed to the public road at two separate locations even though one location is blocked by a gate.” CP 43.

This finding of fact merely restates the trial court’s earlier findings of fact. It is, therefore, supported by the record as discussed above.

15. Finding of fact 26: “The area surrounding the property appears to consist of residential neighborhoods.” CP 43.

Deputy Criswell testified that 4130 South Sundown is in the subdivision⁶ in the Valley called Ponderosa. Kerbs RP 9. The anonymous

⁶ Subdivision: “(2) something produced by subdividing such as ... (b) a tract of land surveyed and divided into lots for purposes of sale, esp: one with houses built on it.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1242 (11th ed. 2003).

call regarding the suspicious trailer at the property reported that there was “a lot of traffic at night and car doors slamming keeping neighbors up at night.” Kerbs RP 8. The finding of fact that the area surrounding the property consists of residential neighborhoods is supported by substantial evidence.

16. Finding of fact 27: “Compellingly, the driveway not only services the location where Mr. Dunbar was found, but also services two other homes along the roadway.” CP 43.

Deputy Criswell testified the roadway, driveway or easement services three different properties. Kerbs RP 10. Deputy Criswell had previously spoken with “one of the property owners” and testified the properties are listed under a trust. Kerbs RP 19. At least one other family member lives in a different property serviced by the roadway. Kerbs RP 19. Ostensibly referring to the unadmitted map, the deputy discussed the two other houses on the property during cross examination. Kerbs RP at 20-21. Furthermore, the defendant testified that although the properties are owned by the same owner, the owner leases the properties out to other individuals. Kerbs RP 29-30. This finding of fact was supported by substantial evidence.

17. Finding of fact 28: “Each of these homes presumably has residents and guests who access the property using the same roadway.” CP 43.

This is a reasonable inference that is based upon finding of fact 27 and the underlying testimony supporting that finding. The court did not err in entering this finding.

18. Finding of fact 29: “Deputy Criswell had accessed the property using that same route on numerous other occasions and had never noticed any indication that entry was prohibited.” CP 43.

Deputy Criswell testified that he knew from “previous experience” that there were not any “no trespassing” signs on the southern end of the property. Kerbs RP 18. He testified that he had been to the property before, and knew Mr. Dunbar was not the owner. Kerbs RP 12, 19. The only error in this finding of fact might be the use of the term “numerous other occasions” – similar language was used by the deputy prosecutor in his argument, rather than by the Deputy in his testimony, as explained regarding finding of fact 7, above. Kerbs RP 38. As also explained above, it is ultimately irrelevant whether the deputy had been to the property once, or many times before – his testimony was that he had been there before and there were no “no trespassing signs.”

19. Finding of fact 30: “Deputy Criswell described the roadway as an easement for the benefit of all three homes.” CP 43.

Deputy Criswell described the roadway as an easement “accessible to all [three] properties. Kerbs RP at 22. He also classified it as potentially

a private driveway. Kerbs RP at 22. This finding is supported by substantial evidence. In any event, defendant concedes that it is irrelevant to his argument whether the roadway is classified as an easement or private driveway. Appellant's Br. at 11 n. 2.

20. Finding of fact 31: "It was reasonable for Deputy Criswell to enter the property through this roadway for the purpose of investigating suspicious activity." CP 43.

This finding of fact is better classified as a conclusion of law. "The label applied to the finding or conclusion is not determinative; the court will treat it for what it really is." *Stastny*, 32 Wn. App. at 246-47. The State will address why this conclusion of law is correct in its substantive argument, below.

21. Finding of fact 32: "Given these factors, Mr. Dunbar, as a guest of one of the residents of the property, has no reasonable expectation of privacy from a vehicle traveling onto the property using the roadway." CP 43.

This finding of fact is also better classified as a conclusion of law. The State will address why this conclusion of law is correct in its substantive argument, below.

B. THE TRIAL COURT CORRECTLY RULED AGAINST SUPPRESSION OF THE EVIDENCE.

Standard of review.

Conclusions of law from an order on a suppression motion are reviewed de novo. *Russell*, 180 Wn.2d at 866-67. This Court may affirm the

trial court on any grounds supported by the record below. *See e.g., State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000) (State entitled to argue any grounds supported by the record to sustain the trial court’s order); *State v. Vanderpool*, 145 Wn. App. 81, 85, 184 P.3d 1282 (2008) (Court of Appeals can affirm on any alternative legal basis supported by the record.)

1. The defendant did not have a legitimate expectation of privacy.

Under both the Fourth Amendment and article 1, section 7 of our state constitution, a warrantless search is per se unconstitutional unless the search falls within a well-recognized exception to the search warrant requirement. *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). “This constitutional protection is at its apex ‘where invasion of a person’s home is involved.’” *Eisfeldt*, 163 Wn.2d at 635 (quoting *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007)). Because exceptions to the warrant requirement are narrowly drawn, the State bears the burden of establishing the validity of a warrantless search. *Eisfeldt*, 163 Wn.2d at 635. Whether the particular vantage point breaches the privacy expectation of the resident is a factual determination. *State v. Seagull*, 95 Wn.2d 898, 903, 632 P.2d 44 (1981). “The area ‘immediately surrounding and associated with the home’—what our cases call the curtilage—[is] ‘part of the home itself for Fourth Amendment purposes.’” *Florida v. Jardines*, 569 U.S. 1, 5-6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

Under the “open view” exception to the warrant requirement, an observation by law enforcement must take place from a non-intrusive vantage point. *State v. Barnes*, 158 Wn. App. 602, 612, 243 P.3d 165 (2010). Our Supreme Court in *Seagull* held that under the Fourth Amendment “a substantial and unreasonable departure from such an [impliedly open] area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.” *Seagull*, 95 Wn.2d at 902-03

A warrantless intrusion into the curtilage of a residence, however, is not automatically an unconstitutional invasion of privacy:

It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonably respectful citizen.

Seagull, 95 Wn.2d at 902-03.

In determining whether an officer exceeded the scope of “open view,” the court considers whether the officer: “(1) spied into the house, (2) acted secretly, (3) approached the house in daylight, (4) used the normal, most direct access route to the house, (5) attempted to talk with the resident, (6) created an artificial vantage point, and (7) made the discovery

accidentally.” *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *Seagull*, 95 Wn.2d at 905).

The use of fences, gates, and restrictive signage *may* affect the degree to which areas of curtilage and access routes are impliedly open. *See State v. Johnson*, 75 Wn. App. 692, 705-06, 879 P.2d 984 (1994) (fenced and gated property, with “No Trespassing” and “Private Property” signs, showed that access way was not open), *review denied*, 126 Wn.2d 1004, 891 P.2d 38 (1995); *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (blocking long driveway with closed gate demonstrated subjective expectation of privacy in area beyond gate); *State v. Chaussee*, 72 Wn. App. 704, 709-10, 866 P.2d 643 (1994) (no trespassing signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs). Also, a property is less likely to be impliedly open late at night. *See State v. Gave*, 77 Wn. App. 333, 338, 890 P.2d 1088 (1995).

This case is most similar to *Chaussee*. In that case, officers had received an anonymous tip of a marijuana grow on the defendant’s property. An aerial view of the property revealed a marijuana garden. An officer drove to the location in an attempt to find the garden, driving up a common access road, past nine “no hunting” and “no trespassing signs.” He passed

through an open gate leading to the defendant's residence. 72 Wn. App. at 705-06.

This Court determined that the roadway was a common access road, used by several property owners. *Id.* at 709. There were no barking dogs. Delivery drivers, hunters, and members of religious groups used the road. The gate to the defendant's residence was open. There were no high fences or security devices. And, compellingly, the presence of "no trespassing" signs, alone, did not create a legitimate expectation of privacy. *Id.* at 710 (citing *U.S. v. Traynor*, 990 F.2d 1153 (9th Cir. 1993)).

As in *Chaussee*, Mr. Dunbar had no legitimate expectation of privacy that the access road would not be used to access the three properties in the Sundown "void." There were no dogs present. There were no high fences. One side of the access road was blocked by a gate, which Deputy Loucks respected; however, the other ingress, used by Deputy Criswell, was not blocked by any gate.⁷ If a property owner does not create a privacy interest by merely posting trespassing signs, then Mr. Dunbar, as

⁷ The use of a gate on one side of a property, but not on the other most likely indicates that the property owner wishes vehicle or pedestrian traffic by the ungated route.

a mere visitor or overnight guest could not have any more expectation of privacy than that of the property owner.⁸

Furthermore, Deputy Criswell did not spy into any of the houses or trailers on the property; he acted openly; he entered the property in daylight; he used the normal, most direct access route to the house; he spoke with the first occupant he encountered, Mr. Dunbar; he did not create an artificial vantage point; and he discovered Mr. Dunbar's presence accidentally. Thus, the factors delineated in *Myers, supra*, indicate that Deputy Criswell acted as a reasonably respectful citizen and found Mr. Dunbar in "open view."

As noted by the trial court, Deputy Criswell and Mr. Dunbar did not agree as to whether the roadway was posted "no trespassing." Ultimately, under *Chaussee*, it does not matter whether signs were present or not. No

⁸ An overnight guest in someone's home can have a legitimate, reasonable privacy interest inside the host's home. *See Minnesota v. Carter*, 525 U.S. 83, 89-90, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (citing *Minnesota v. Olson*, 495 U.S. 91, 98-99, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)); *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007). However, "a guest cannot be said to have the same sacrosanct privacy interests in the home that we ascribe to the homeowner." *State v. Thang*, 145 Wn.2d 630, 638, 41 P.3d 1159 (2002). Even if a defendant has automatic standing to challenge a search, such standing does not confer upon the defendant the same rights and authority as a tenant or homeowner. *State v. Libero*, 168 Wn. App. 612, 617, 277 P.3d 708 (2012).

other steps were taken by the property owner to exclude individuals or maintain privacy on the property.⁹

Thus, the trial court's findings of fact 31 and 32, which, as explained above, are truly conclusions of law, are correct. They state: "It was reasonable for Deputy Criswell to enter the property through this roadway for the purpose of investigating suspicious activity," CP 43 (finding of fact 31); and "Given these factors, Mr. Dunbar, as a guest of one of the residents of the property, has no reasonable expectation of privacy from a vehicle traveling onto the property using the roadway," CP 43 (finding of fact 32). If there is no legitimate privacy interest in this roadway/easement/driveway, as explained above, then the officer's actions were reasonable under the

⁹ Thus, it also does not matter that Deputy Criswell later testified at the CrR 3.5 hearing that he observed one "no trespassing" sign. "On the left side of the property there is a barbed wire – well on the left side of the easement there is a section of barbed wire fence and a no trespassing sign on that side that's opposite of the residence where Mr. Dunbar was found." Wilkins RP 57-58. Deputy Criswell also stated, however, "I did not go onto the property that was posted with the no trespassing. I drove down the county easement. I didn't plat the property out before I went." RP 57-58. If the presence of no trespassing signs is legally insignificant in the absence of other factors indicating an owner's desire to exclude others from the property or maintain privacy, then it is irrelevant whether the officer was aware of a sign on, near, or adjacent to the property.

Additionally, a different Superior Court judge determined that the sign referenced by Deputy Criswell in the CrR 3.5 hearing "indicated that he saw a no trespassing sign posted on property that he does not find associated with this driveway or easement." Wilkins RP 91. The subsequent judge determined that the findings of fact made by Judge Cooney and the later testimony of Deputy Criswell were not "dramatically different." Wilkins RP 92.

circumstances. The trial court did not err in entering these “conclusions of law.”

2. Detention of the defendant during warrant check.

Deputies were investigating a report of a suspicious vehicle and a potential meth lab in the residence at the Sundown property. Although this was an anonymous tip, the deputies were well within their rights to investigate the tip, including speaking with individuals at the property who were willing to converse with them. The mere fact that law enforcement stops to talk with an individual or individuals does not mean that those individuals are seized by law enforcement within the meaning of the Fourth Amendment or article 1, section 7 of the State constitution. A “social contact” is not a seizure. To determine whether an encounter with police is a social contact or an investigative detention, our Supreme Court has repeatedly embraced examples given in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). *See, e.g., State v. Harrington*, 167 Wn.2d 656, 665, 222 P.3d 92 (2009).

Article I, section 7 of our state constitution grants greater protection to individual privacy rights than the Fourth Amendment. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Article I, section 7, provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The text focuses on disturbance of

private affairs, which casts a wider net than the Fourth Amendment's protection against unreasonable search and seizure.

Pursuant to article I, section 7 seizure occurs when “considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.” *Rankin*, 151 Wn.2d at 695. The standard is “a purely objective one, looking to the actions of the law enforcement officer.” *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. *State v. O'Neill*, 148 Wn.2d 564, 581, 62 P.3d 489 (2003). An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away. *Mendenhall*, 446 U.S. at 554.

In *Young*, the court enumerated a nonexclusive list of police actions likely resulting in seizure: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55). “In the absence of some such evidence, otherwise inoffensive contact between a

member of the public and the police cannot, as a matter of law, amount to a seizure of that person.” *Id.* In that regard, “not every public street encounter between a citizen and the police rises to the stature of a seizure. Law enforcement officers do not ‘seize’ a person by merely approaching that individual on the street or in another public place, or by engaging him in conversation.” *State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984). This rule also applies to motorists. *O’Neill*, 148 Wn.2d at 575-78. The defendant bears the burden of proving a seizure occurred in violation of article I, section 7. *Young*, 135 Wn.2d at 510.

In *Harrington*, supra, our Supreme Court determined that the initial interaction between the defendant and police officer was a social contact. The officer did not activate his emergency lights or siren. The officer approached the defendant on foot and asked whether they could talk. The defendant consented to speak with the officer without duress or compulsion. The officer did not block the defendant’s egress. “Under existing law, [the officer’s] initial actions did not rise to the level of a seizure.” 167 Wn.2d at 665.

As in *Young*, it is the defendant’s burden to establish that he was seized. He cannot do so. The mere act of a police officer waving his arms in the air or requesting to speak to another person does not arise to the level of a seizure. The trial court made this finding, which, under the

circumstances, was correct. There was no show of force. The trial court determined there was no use of police lights or sirens, use or threatened use of weapons, commands or other indicia that Mr. Dunbar and his passenger, who actually did voluntarily speak with Deputy Loucks, were not free to leave, or would not feel as though they were not free to leave. Mr. Dunbar never testified that he did not feel free to leave. The mere fact that there were two officers on scene does not, alone, transform the contact from a social contact to a seizure. *See Harrington*, 167 Wn.2d at 666; *State v. Hansen*, 99 Wn. App. 575, 994 P.2d 855 (2000). This was, as the trial court determined, a social contact by law enforcement officers. Under *O'Neill*, *supra*, this contact was permissible. *See also, State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005) (Mote, as passenger in parked vehicle, was not seized when officer engaged in social contact and asked for identification, ran warrant check and found arrest warrant).

Deputy Criswell then recognized the “rather prolific” Mr. Dunbar as the driver of the vehicle. This was not a situation where the defendant was unknown to law enforcement. Law enforcement did not need to request the defendant’s name or identification. There was no seizure to effectuate discovery of the identity of the driver. There was no demand for a driver’s license or for the defendant to provide his name. The defendant was already

familiar to Deputy Criswell. Under *O'Neill* and *Mote*, the defendant was not seized until he was arrested on the misdemeanor warrants. This claim fails.

C. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING THE ANONYMOUS CALLER'S REPORT OF A POSSIBLE METH LAB ON THE PROPERTY.

Defendant repeatedly asserts that the trial court erred in admitting the CAD¹⁰ report at trial. Appellant's Br. at 24, 26, 29. To the extent that this language makes it appear that the report, itself, was admitted at trial, it is inaccurate. To be clear, Deputy Criswell testified to the substance of the CAD report, specifically, the details of the anonymous 911 call, but the report was not admitted into evidence.

1. The defendant failed to specifically object to the testimony on the grounds that the testimony violated the Confrontation Clause; the objection was, therefore, waived.

Defendant complains that the trial court failed to address the defense objection to Deputy Criswell's testimony that he responded to a call of a possible meth lab in the house on the Sundown property. Appellant's Br. at 24. The trial court failed to address this issue because defendant's objection was not sufficient enough to actually assert a violation of defendant's right to confrontation. The defendant actually objected on relevance grounds, i.e.,

¹⁰ A computer aided dispatch (CAD) printout records all law enforcement radio traffic involving 911 calls, including both citizen callers and law enforcement officers. *State v. Howerton*, 187 Wn. App. 357, 369 n.3, 348 P.3d 781 (2015).

that the testimony was more prejudicial than probative and could lead to jury confusion. Wilkins RP 93-97. Within the argument regarding the prejudicial effect of the testimony, defense counsel merely stated, “it will leave the jury to draw inferences that aren’t really in evidence. We don’t have the ability to contest whether the house is a meth lab. And we can’t cross-examine the caller from 911.” Wilkins RP 97.

This statement was not definite enough to put the trial court on notice that the defendant was objecting on *both* relevance and confrontation grounds. Defendant did not provide any briefing supporting a confrontation objection. Defendant did not, in writing, move in limine to limit the Deputy’s testimony on confrontation grounds. The defendant never cited the Sixth Amendment or any case law involving the confrontation clause, such as *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). An objection must be sufficiently specific to inform the trial court and opposing counsel the basis of the objection and an opportunity to correct the alleged error. *See e.g., State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009),¹¹ a defendant loses the right to confront witnesses by failing to assert it at trial. *Id.* In *State v. O’Cain*, 169 Wn. App. 228, 247-48, 279 P.3d 926 (2012), Division One of this Court declined to consider a confrontation clause argument raised for the first time on appeal. In that case, at trial, the defendant objected to evidence on relevance grounds and did not assert a violation of his right to confrontation.

The court reasoned that if it were not the defendant’s burden to object on confrontation grounds, trial judges would be placed in the untenable position of either *sua sponte* interposing a confrontation objection or knowingly presiding over a trial headed for likely reversal on appeal. *O’Cain*, 169 Wn. App. at 243.

Requiring the defendant to assert the confrontation right at trial is ... consistent with other Sixth Amendment jurisprudence. Indeed, were this not the defendant’s burden, the trial judge would be placed in the position of *sua sponte* interposing confrontation objections on the defendant’s behalf—or risk knowingly presiding over a trial headed for

¹¹In *Melendez-Diaz*, the United States Supreme Court declared that the defendant *always* has the burden of raising his federal confrontation clause objection at trial. The Court reasoned:

It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.

557 U.S. at 327 (internal citations omitted).

apparent reversal on appeal. Such a state of affairs is obviously untenable. Trial judges should be loathe to interfere with the tactical decisions of trial counsel—the delegation of which lies at “the heart of the attorney-client relationship.” *Taylor v. Illinois*, 484 U.S. 400, 417, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). As our state Supreme Court has noted, it would be “ill-advised to have judges ... disrupt trial strategy with a poorly timed interjection.” *State v. Thomas*, 128 Wn.2d 553, 560, 910 P.2d 475 (1996). Indeed, such interjections could impermissibly “intrude into the attorney-client relationship protected by the Sixth Amendment.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994).

Id. at 243-44.

The court ultimately concluded that objecting on confrontation grounds is a tactical decision for defense counsel and that, absent such an objection, ER 103¹² precludes the predication of error on confrontation grounds and prevails over RAP 2.5(a)(3) (allowing appellate courts to consider errors, including “manifest error affecting a constitutional right,” for the first time on appeal). *Id.*

Division One reached the same conclusion in *State v. Fraser*, 170 Wn. App. 13, 282 P.3d 152 (2012). There, the defendant objected to

¹²ER 103(a)(1) states:

Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

- (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

evidence at trial on the ground that it was more prejudicial than probative. *Id.* at 25. For the first time on appeal, he argued that the evidence violated his right to confrontation. *Id.* The court reaffirmed its decision in *O’Cain*, holding that Fraser waived his confrontation argument by not objecting on that particular ground at trial. *Id.* at 26. The court added an alternative analysis that if RAP 2.5(a)(3) is read as a state procedural exception to the objection requirement for confrontation clause errors, Fraser would still not be entitled to review because he failed to make a showing of manifest constitutional error. *Id.* at 26-27.

The defendant’s objection to the testimony at trial was insufficient to preserve a confrontation clause error for appeal.

2. Additionally, the defendant cannot show manifest error.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense

of fairness, perhaps best expressed by this court in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), this Court has indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)

(quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

An error is considered manifest when there is actual prejudice. The focus of this analysis is on whether the error is so obvious on the record as to warrant appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

“[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O'Hara*, 167 Wn.2d at 100. Importantly, “[i]t is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *Id.*

Defense counsel’s complaint that she could not cross-examine the 911 caller regarding his or her statement that one of the residences on Sundown Drive could be a meth lab was insufficient to put the trial court on

notice that the defendant's true objection was on Sixth Amendment grounds. And, the error is not manifest because the 911 caller had nothing to do, whatsoever, with the defendant's possession of methamphetamine. The defendant was not located in the house that was a suspected meth lab. There was no other testimony regarding the nature of the house. The defendant was associated with the trailer on the property, not the residence. Any confrontation clause error was waived and is not a manifest or obvious error warranting appellate review.

3. The defendant's ER 404(b) claim was unpreserved and is not an error of constitutional magnitude allowing for review under RAP 2.5.

The defendant also claims that the trial court should have engaged in a ER 404(b) analysis before allowing Deputy Criswell to testify regarding the anonymous 911 call. Appellant's Br. at 26. The State is unable to locate, anywhere in the record, a specific objection to this testimony based on ER 404(b) or that the State sought to admit this testimony to prove the defendant's propensity to possess methamphetamine. As stated above, an objection must be sufficiently specific to inform the trial court and opposing counsel the basis of the objection and an opportunity to correct the alleged error. *See e.g., Padilla*, 69 Wn. App. at 300. Error may not be based on an overruled objection when the objection is so indefinite as to not call the

court's attention to the real reason for the testimony's inadmissibility. *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976).

Additionally, an evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Thus, an evidentiary error claim, such as this, is not reviewable under RAP 2.5 where the objection was not preserved at trial. *See State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009).

4. Error, if any, was harmless.

If the record supports a finding that the jury verdict would be the same absent the error, harmless error may be found. *State v. Berube*, 150 Wn.2d 498, 506, 79 P.3d 1144 (2003). A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). This court employs the "overwhelming untainted evidence" test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In this case, the circumstances surrounding the contact and arrest of Mr. Dunbar are of no consequence, and involve only legal issues to be decided by the court. The only factual issue in the case to be decided by the

jury was whether or not Mr. Dunbar possessed a controlled substance that was methamphetamine.

Here, the deputy testified that when he arrested Mr. Dunbar on the misdemeanor warrant the plastic bag containing the substance was in the defendant's pants pocket. Wilkins RP 200. The substance was contained in a pouch, and was wrapped in a plastic grocery sack with the end tied in a knot. Wilkins RP 201. Thus, there was no issue of constructive possession, and the substance was not found pursuant to a search of the residence or the trailer on the property.

Deputy Criswell opened the plastic bag to perform a field test on the substance. Wilkins RP 201. It field-tested positive for methamphetamine. Wilkins RP 213. Deputy Criswell transported the plastic bag and methamphetamine to the property facility, where it was kept until Detective McCrillis retrieved it and took it to the Washington State Patrol Crime Lab for testing. RP 213, 274-75.

The analyst at the lab testified that she retrieved the sample from the secure property vault at the lab, stored it in her personal evidence locker, and did not test the substance without having thoroughly cleaned the workspace first, to avoid contamination. RP 241-43. When the analyst opened the evidence bag containing the plastic bag and methamphetamine,

she noticed the bag was “leaking a little”¹³ because the white piece of plastic in which the methamphetamine was located was not a closeable bag, and “some crystals” had come out into the inner plastic bag.¹⁴ Wilkins RP 257-58. Two separate tests of the substance confirmed it was methamphetamine. RP 259.

The State established, beyond a reasonable doubt, that the substance within Mr. Dunbar’s pants pocket was methamphetamine. The singular reference to the 911 caller’s speculation that the residence at the property was a meth lab did not contribute to the verdict. Neither party repeated the reference to the Sundown property potentially being a meth lab. It was not argued by either party in closing argument. And, defense counsel was able to cross examine Deputy Criswell and call into question the veracity of the unverified, anonymous tip. Any error in admitting the testimony was harmless beyond a reasonable doubt.

¹³ “So [the crystals weren’t] outside the bag. It was just a piece of plastic that was twisted up at the top and a few were leaking out, but it was all contained within the same plastic bag.” Wilkins RP 265.

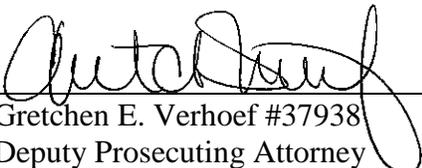
¹⁴This testimony would make sense to the jury in light of the fact that Deputy Criswell had to untie the knot in the plastic to field test the methamphetamine, but did not indicate that he retied it upon placing it in an evidence bag.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the trial court and jury verdict in this case.

Dated this 26 day of March, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

NO. 35351-6-III

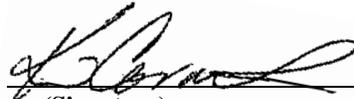
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
wapofficemail@washapp.org

3/26/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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