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Court of Appeals  
Division III  
State of Washington  
4/17/2019 11:32 AM

No. 36326-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

HECTOR SALINAS,

Appellant

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

NO. 18-1-00129-7

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err by denying the defendant's suppression motion.
- B. The police had sufficient reasonable suspicion that the defendant was involved in an assault involving a knife and properly conducted a *Terry* stop. Therefore, his Fourth and Fourteenth Amendment rights were not violated.
- C. For the same reason, his right to privacy under Article I, section 7 of the Washington Constitution was not violated.
- D. The Finding of Fact (e), that officers served a valid search warrant on the vehicle, was correct and not in error.
- E. The Conclusion of Law No. 2, that there was reasonable suspicion to stop the vehicle in which the defendant was a passenger, was supported by the evidence and was not in error.
- F. The Conclusion of Law No. 3, that the officers were justified in conducting a high risk or felony stop was supported by the evidence and was not in error. Further, the issue is not whether the police conducted a "high risk" stop on the vehicle, but whether they had sufficient facts to stop the vehicle at all.

- G. The Conclusion of Law No. 4, that the doctrine of plain view applied to allow the police to observe suspected baggies of drugs in the open passenger door pocket, was correct and not in error.

## II. STATEMENT OF FACTS

- A. **The police stop a vehicle reported to have an occupant who participated in a large fight at a bar and who is armed with a knife.**

On January 7, 2018, citizens started calling 911 at 01:00:19 A.M., about a fight in progress involving a large number of individuals in the parking lot of the Gaslight bar. CP 29. A second 911 caller, at 01:01:21 A.M., stated that one subject had a knife. CP 30. The subject with the knife got into a white Buick SUV, with a partial license plate of 46163 and left southbound on George Washington Way. CP 31 (see entries at 01:02:46, 01:02:59, and 01:03:32.)

The police distilled this information as follows: There was a fight involving a large group of people in the parking lot of the Gaslight Bar in Richland, WA., on January 7, 2018, at about 1:00 A.M. RP<sup>1</sup> at 7, 53, 57. A caller to the 911 dispatch stated that a man involved in the fight had a knife and was in a white SUV and gave a partial license plate, 46163. RP

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<sup>1</sup> Unless otherwise indicated, RP refers to the verbatim report of proceedings from 3.6 hearing on 07/31/2018.

at 10, 41, 65. The SUV left southbound on George Washington Way. RP at 57.

Scott Hutson, a deputy with the Benton County Sheriff's Office, provided assistance. RP at 38-39. He saw a white SUV with a matching Oregon license plate fleeing south on George Washington Way in Richland. RP at 41. This was the only SUV on the road; in fact, there was almost no traffic. RP at 49. Hutson stopped the vehicle and waited for backup. RP at 41.

The rest of the incident leading to the discovery of drugs in the passenger door pocket of the SUV are not contested in this appeal. However, it may be helpful to understand how the drugs were discovered.

The driver of the vehicle was Mireles Landa, the defendant's significant other for 10 years. RP at 75. Dep. Hutson called her out of the vehicle first and she complied with his directions. RP at 43. Meanwhile, the defendant was disobeying directions by opening his car door and yelling at the police, "Why are you arresting my wife?" RP at 59.

After securing Ms. Landa, a Richland Police Officer, Sergeant Bryce Henry, told the defendant to get out of the vehicle and walk backwards to him with his hands in the air. RP at 60. At some point the defendant said "F— this", lowered his hands and started walking toward

the SUV. RP at 61. Henry tackled him before he made it back to the SUV. RP at 62.

Officer Brigit Clary went back to the SUV to make sure no one else was in it and saw the baggie in the open passenger door pocket. RP at 15-16; See App. A. Based on this, she obtained a search warrant for the vehicle. RP 08/13/2018 at 65.

**B. The trial and verdict**

The testimony was over in one hour and two minutes, from 1:33 P.M. to 2:35 P.M. CP 87-88. A forensic scientist testified that her laboratory tests determined the baggy contained cocaine. RP 08/13/18 at 83. Officer Clary testified how she found the drugs in the passenger door pocket. RP at 63. She found the defendant's wallet in the passenger seat in the search of the SUV. RP 08/13/2018 at 70. She also testified that the defendant told her that the reason he tried to get back to the SUV was to close the door, believing that the police could not get into the vehicle if he shut the door. RP 08/13/2018 at 64. As far as ownership of the drugs, the defendant admitted the drugs were "all mine." *Id.*

The jury began deliberations at 3:40 P.M. CP 89. The jury had an inquiry at 4:35 P.M. that said "We would like a definition of dominion and control." CP 62. The Court responded: "Please refer to the instructions" at 4:45 P.M. *Id.* Probably because of the hour, the Court stated, "I will ask

our bailiff to inquire of the jury how much additional time they intend to deliberate, understanding that we don't want to influence the length of their deliberations but we also want to know what we're in for." RP 08/13/2018 at 119.

The jury reached a verdict by 5:06 P.M. CP 89.

### III. ISSUES

- A. Did the 911 call from a citizen informant that there was a large fight in the parking lot of a bar, that one of the participants had a knife and fled in a white SUV with a specific license plate provide sufficient reasonable suspicion to conduct a *Terry* stop on the vehicle?
1. What is the standard on review regarding *Terry* stops and citizen informants to 911?
  2. In this case, did the 911 calls provide reliable information for the police to have a reasonable suspicion that the vehicle stopped was occupied by a suspect in the fight?
  3. Are other assignments of error well taken?
    - a) Does the plain view doctrine allow the police to look into the pocket of a passenger door which the occupant left open?

- b) Does the Conclusion of Law that the police were entitled to make a felony or high risk stop impact the case?
- B. Can the defendant establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court asking at 4:45 P.M. the bailiff to inquire how much additional time the jury needed to deliberate?
- 1. What is the standard on review for such claims?
  - 2. Did the defendant waive the argument by not objecting to the Judge's request to the bailiff to inquire about how much additional time the jury intended to deliberate?
  - 3. Can the defendant establish that the trial court's inquiry improperly influenced the jury's verdict to a reasonable substantial possibility?

#### IV. ARGUMENT

- A. **The 911 call provided the police a reasonable suspicion that the white SUV stopped had a participant in the fight outside a bar and that the participant was armed with a knife.**
- 1. **Standard of Review: The totality of circumstances are considered for a *Terry* stop, citizen informants are deemed presumptively reliable, and the police are given more leeway if there is a tip about a serious crime or potential danger.**

Courts consider the totality of circumstances to determine whether an informant's tip possesses sufficient indicia of reliability to support the reasonable suspicion justifying a *Terry* stop. *State v. Howerton*, 187 Wn. App. 357, 365, 348 P.3d 781 (2015). In determining the reliability, courts can consider the reliability of the informant, whether the information was obtained in a reliable fashion, and whether the officers can corroborate any details of the informant's tip. *Id.* All three factors need not be present. *Id.*

Considering the first factor, the reliability of the informant, citizen informants are deemed presumptively reliable. *Id.* at 366. *Navarette v. California*, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014) explained why 911 callers are often reliable. That case dealt with a 911 caller who reported a possible DUI and stated that a pickup ran her off the road. The Court stated that the factors supporting her reliability included that she was an eyewitness, made the report contemporaneously, and called 911 which makes her accountable since the police can trace the call.

Finally, courts often given more leeway to the police when a 911 report is made concerning a serious crime or a potential danger. *State v. Z.U.E.* 183 Wn.2d 610, 623, 352 P.3d 796 (2015).

2. **The 911 calls provided reliable information for the police to form a reasonable suspicion that the white SUV stopped was occupied by a participant in the fight and that he was armed with a knife.**

The first 911 caller, at 01:00:19 A.M., provided specific, direct information about a crime in progress: There was a fight involving a large number of individuals in the parking lot of the Gaslight bar. CP 29. A second 911 caller, at 1:01:21 A.M. stated that one subject had a knife. CP 30. The subject with the knife got into a white Buick SUV, with a partial license plate of 46163. CP 31 (See entries at 1:02:46 and 1:02:59).

The police accurately processed this information. With almost no traffic on the road at that hour and no other SUVs, Deputy Hutson had no problem locating the white Buick SUV with the corresponding license plate. RP at 49.

All three factors mentioned in *Howerton* are satisfied. The citizen informants are deemed to be presumptively reliable. The 911 callers were relating information obtained in a reliable way: they were calling about their direct observations of a large fight in the parking lot of a bar. Finally, one caller reported that a participant who was armed with a knife was fleeing in a white SUV with a particular license plate. The police corroborated that information by seeing the white SUV with the corresponding plate traveling on the road and in the direction exactly as the 911 caller stated.

Concerning the corroboration factor, the defendant emphasizes that the corroboration was of “innocuous facts”, specifically that the vehicle in

question was driving on the road and in the direction as stated by the 911 caller. Br. of Appellant at 10. However, corroboration can be evidence that shows the presence of criminal activity or that the informer's information was obtained in a reliable fashion. *Z.U.E.*, 183 Wn.2d at 618. Here, a 911 caller said that the suspect was in a white Buick SUV, traveling southbound on George Washington Way with a partial plate of 46163. The police saw a white Buick SUV traveling southbound on George Washington Way with a matching license plate. That is good evidence that the 911 caller obtained the information in a reliable fashion.

Based on a totality of circumstances, the police had sufficient reasonable suspicion to conduct a *Terry* stop on the vehicle and its occupants. The defendant left the passenger door open which led to the police observing the baggies in the pocket of that door.

The defendant's reliance on *State v. Z.U.E.*, 183 Wn.2d is misplaced. The facts in *Z.U.E.* are substantially different than in this case, and the *Z.U.E.* court did not change the basic principles that citizen 911 callers are reliable. Rather, the *Z.U.E.* court held that the information provided by the 911 callers, assuming it was accurate, was insufficient in that case for a *Terry* stop.

In *Z.U.E.*, a 911 caller reported seeing a shirtless, black man, between 18-19 years old, 145 pounds with hair so short he was almost

bald, carrying a gun “in a ready position” in a park in Tacoma. Other callers reported seeing a shirtless man carrying a gun getting into a white or gray two-door car with approximately eight others. *Id.* at 614.

Another caller said she saw a 17-year-old female hand a gun off to a shirtless man, who then carried the gun through the park. The caller did not say why she believed the girl was 17. *Id.*

The police arrived at the park about six minutes after the initial 911 call and did not see a bald or shirtless man. Nor did they see a white/grey two-door car. They did see a female who matched the description of the young woman who handed a gun off to the shirtless man. She entered a four-door grey car occupied by two male passengers, neither of whom matched the description of the shirtless, bald man with a gun. *Id.* at 614-15.

They stopped this vehicle. The police stated they believed they were investigating a minor in possession of a firearm case and/or a gang-related assault with a deadly weapon. *Id.* at 615. However, the primary reason they stopped car was because the female who entered it matched the description of the 911 caller who said a 17-year-old girl handed a gun off to a shirtless man. *Id.* at 615.

Regarding the stop of the four-door grey vehicle to search for the shirtless, bald, gun-wielding man, none of the occupants of the car

matched this description. In fact, the car itself did not match the description of the vehicle this shirtless man entered. The information from the 911 caller did not provide information to stop the vehicle. In that sense, the 911 caller, who said that a shirtless, black, almost bald man got into a grey/white two door vehicle occupied by about eight others, was unreliable for the police to search a four-door vehicle occupied by two men who did not match the description of the suspect. *Id.* at 622.

Regarding the stop to investigate a minor in possession of a firearm charge, the 911 caller did not have any known ability to ascertain the female was 17 rather than 18. The *Z.U.E.* court assumed the 911 caller reported honestly, but it would be very difficult for an observer watching a female hand a gun to a man to state reliably the age of the female. *Id.* at 623.

The differences between *Z.U.E.* and this case are that here, there was a reporting of a crime observed as it was happening: a fight in a parking lot. The 911 caller said a suspect was in a white, Buick SUV traveling southbound on a particular road and gave a partial license plate. The police found that exact SUV on that particular road, going southbound. The police did not have to speculate about the 911 callers. They reported straightforward crimes—an assault in a parking lot— and gave a straightforward description of the suspect vehicle.

**3. Other challenges to the Findings or Conclusions are not well taken.**

- a) **The defendant challenges Conclusion of Law 4, that “the doctrine of plain view allowed the officers to investigate the vehicle and they lawfully observed the suspected narcotics.”**

See CP 69. The defendant does not follow up with this in his brief.

An assignment of error that is not argued in the brief need not be considered. *Estes v. Hopp*, 73 Wn.2d 263, 268-69, 438 P.2d 205 (1968).

Nevertheless, the police are allowed to look into a car from the outside.

*State v. Gibson*, 152 Wn. App. 945, 955, 219 P.3d 964 (2009).

- b) **The defendant also assigns error to the Conclusion of Law No. 3, that the police were justified in using a high risk or felony stop.**

See CP 69. However, whether the police conduct a high risk stop or not is immaterial. Even with a traffic infraction, the police may order the driver to either stay in a vehicle or to exit it. *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986). Here, once the stop of the white SUV with the matching license plate was made, the police had the authority to remove the suspects. It did not matter whether the police did so by having both occupants leave the car casually at the same time or having one occupant put her hands up and walk backwards to the police.

- B. The trial court did not improperly coerce or interfere with jury’s verdict.**

**1. Standard on review.**

To prevail on a claim of improper judicial interference with the verdict, a defendant must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention. *State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983). This requires an affirmative showing and may not be based on mere speculation. The totality of circumstances are considered regarding the trial court's intervention into the jury's deliberations. *Id.* at 177-78.

**2. The defendant waived his right to appeal this issue by not objecting to the trial judge's request to the bailiff.**

*State v. Dunleavy*, 2 Wn. App. 2d 420, 409 P.3d 1077 (2018) discussed this issue. *Dunleavy* held that the issue of judicial coercion does affect a constitutional right, under RAP 2.5 (a)(3). However, the *Dunleavy* court held that the error was not "manifest", or obvious. *Id.* at 427. Therefore, the court declined to review the claimed error of judicial coercion. *Id.*

**3. Addressing the substance of the claim, the defendant cannot meet his burden to prove by a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention.**

*State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978) has a relevant passage:

We are not prepared to say that a trial judge . . . can make no inquiry at all regarding the progress of deliberations. Here the judge was first advised of the numerical division by the bailiff, who had been sent to inquire of the foreman. Had he confined his inquiry to that procedure, we would find it difficult to say that he exercised undue influence upon the jury.

*Id.* at 739.

The trial judge here did not ask about any vote counts or numerical divisions of the jury. The hour was late for courthouse personnel—4:45 P.M. The judge would soon have to make a decision on whether to hold over a clerk, bailiff, court reporter, and courthouse security, or excuse a jury for the night. There was no effort to ask or suggest that the jury come to a decision.

This was in stark contrast to the trial judge in *Boogaard*. In that case, at 9:30 P.M. a “night duty judge” asked the bailiff to determine how the jury was divided. *Id.* at 735. He was informed the vote was 10-2 but was not told in which direction. *Id.* The judge called the jury into court and asked each juror if they could reach a decision in a half hour. One juror said no, the others said yes. A half hour later, the jury had a verdict. *Id.*

The *Boogaard* court held this violated CrR 6.15 (f)(2), which provides, “After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the

consequences of no agreement, or the length of time a jury will be required to deliberate.” The trial judge implied that the jury should come to an agreement within a half hour and that it should be in accord with the majority opinion. *Boogaard*, 90 Wn.2d at 739.

*State v. Lee*, 77 Wn. App. 119, 889 P.2d 944 (1995) involved the same type of inquiry as the trial judge made herein. In *Lee*, at the end of the business day, the judge directed the bailiff to find out whether the jury wished to continue deliberations during the evening or return the following morning. Nine jurors thought further deliberations would not help, three thought they might come to a verdict. *Id.* at 125. The court directed the jury to return the following morning. The *Lee* court actually complimented the trial judge for using commendable caution. *Id.* Here, the involvement of the trial judge was less than the judge in *Lee*.

In this case, the trial judge did not suggest anything to the jury. He asked the bailiff to inquire “how much additional time they intend to deliberate.” RP 08/13/2018 at 119. This was not a request to limit their deliberation, to come to a conclusion, or for the minority viewpoint to give up.

Finally, there is no reasonable possibility that the jury’s verdict was impacted by anything other than the evidence. The defendant confessed that the drugs were “all mine.” They were found on the

passenger side of the vehicle—his side. His desire to close the passenger door of the SUV makes sense in light of Officer Clary's discovery of drugs in the pocket of that door. The jury deliberated more than it took to present all the testimony.

## V. CONCLUSION

The trial court properly denied the defendant's suppression motion. The defendant was in a vehicle identified by a 911 caller as driving away a participant, who had a knife, and was involved in a large fight in a parking lot at 1:00 A.M. The 911 callers made contemporaneous reports of the fight and the defendant's flight therefrom. The reliability of the 911 caller should be presumed. The 911 caller's observations were corroborated by the police locating the vehicle in question going southbound on George Washington Way in Richland, WA, just as the caller stated. Based on the totality of circumstances, the police had a reasonable suspicion that the occupants of the vehicle were involved in the fight and that one of them was armed with a knife. The *Terry* stop was proper.

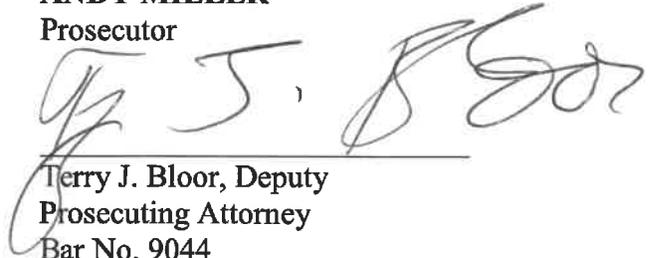
On the issue of the trial judge coercing a verdict, the defendant did not object at trial. But, there was no coercion. A judge is allowed to inquire at the end of a business day whether the jury wants to continue to deliberate or come back in the morning. There was nothing more that the trial judge did.

The conviction should be affirmed.

**RESPECTFULLY SUBMITTED** on April 17, 2019.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", is written over a horizontal line. The signature is cursive and somewhat stylized.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Backlund & Mistry  
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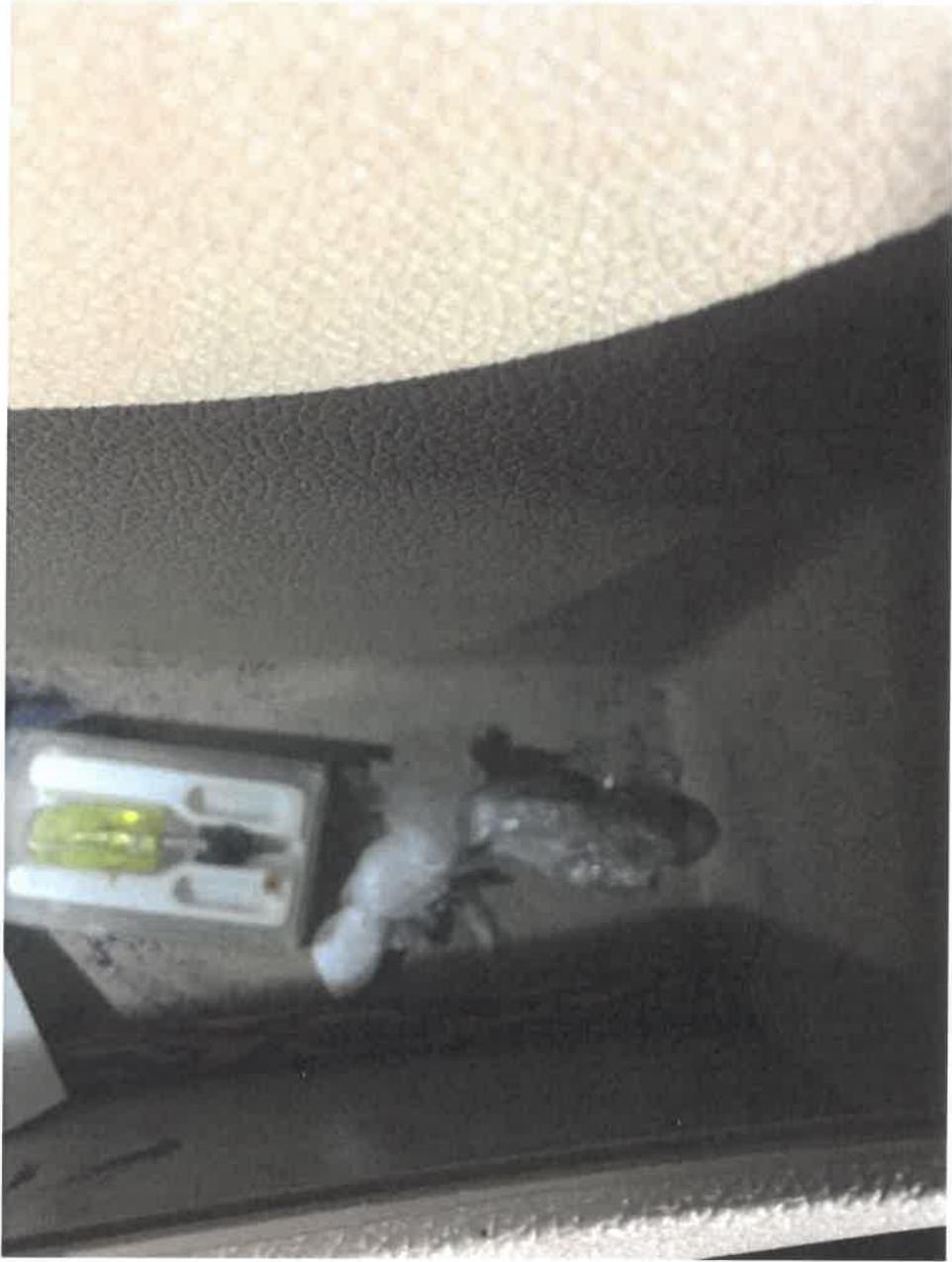
E-mail service by agreement  
was made to the following  
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Signed at Kennewick, Washington on April 17, 2019.

  
Demetra Murphy  
Appellate Secretary

## **Appendix A**

Exhibit 1: Photo of baggies in passenger door pocket.



**BENTON COUNTY PROSECUTOR'S OFFICE**

**April 17, 2019 - 11:32 AM**

**Transmittal Information**

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