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Supreme Court No. 96801-2

Court of Appeals No. 353516-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL HERBERT DUNBAR,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Daniel Dunbar, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision no. 353516-III, issued on January 8, 2019, pursuant to RAP 13.3 and RAP 13.4(b)(1),(2),(3) and (4). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Washington courts require that police conduct themselves as would a reasonable citizen when they enter the curtilage of a home without legal authority. Mr. Dunbar requests review by this Court, under RAP 13.4(b)(3) and (4), to determine whether it violates Article I, section 7 and the Fourth Amendment for police to enter private property without a warrant, and then run a warrant check of a person located on the property, absent reasonable suspicion, because such conduct far exceeds the scope of an implied invitation to the public? And can this police conduct on private property be justified as a "social contact?"

Additionally, a person may express a subjective intent to close off private property to the public, which police may not enter without legal authority. Const. art. I, sec. 7; U.S. Const. amend. IV. Does the Court of Appeals' analysis of the private property closure in Mr. Dunbar's case conflict with existing Court of Appeals' and this Court's decisions that examine a private owner's subjective intent, not whether it is merely

"foreseeable" that the public would enter onto the property, necessitating review under RAP 13.4(b)(1), (2), (3), and (4)?

2. Where the Court of Appeals found that the admission of a CAD report stating the house is likely a "meth lab" violated Mr. Dunbar's confrontation right but was not harmless error, does this determination merit review under RAP 13.4(b)(3) where this violation of Mr. Dunbar's confrontation right about the central issue at trial could not have been harmless?

C. 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"). 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.

Officer Criswell ran a warrant check and 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. Mr. Dunbar also moved to exclude the hearsay contents of a CAD report that described the property Mr. Dunbar was located on as a possible "meth lab." RP 100-101, 195.

The Court of Appeals affirmed the trial court's denial of Mr. Dunbar's motion to suppress, finding that Officer Criswell engaged in nothing more than a "social contact" that was permitted under Article 1, section 7, and that the officer's entry onto private land and subsequent detention of Mr. Dunbar to run his name for warrants did not violate the state or federal constitutional privacy protections or his right to be free from unreasonable searches and seizures. CP 44; RP 100-1011; slip op. at 8-10.

The Court of Appeals acknowledged that the trial court erred in admitting a hearsay statement that the location where Mr. Dunbar was

arrested was a possible "meth lab," but found the error harmless despite the fact that the only disputed issue at trial was whether the prosecution met its burden of proof that the substance seized from Mr. Dunbar was in fact methamphetamine. Slip op. at 10-12.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review under RAP 13.4(b)(1)(2)(3) and (4) to decide the important constitutional and privacy questions regarding the permissible scope of police conduct when they enter onto private property without lawful authority and then detain a person without reasonable suspicion while retrieving warrant information about the person.

The Court of Appeals failed to properly consider the importance of the private property interest at stake in analyzing Mr. Dunbar's challenge to the police conduct in detaining him on his private property, warranting review by this Court under RAP 13.4(b)(1), (2), (3) and (4).

(a) Conducting a warrant check is not conduct of a "reasonably respectful citizen" and thus exceeds the scope of permissible police conduct on private property when police enter without a warrant.

Where, as in Mr. Dunbar's case, police enter private property without a warrant, they must conduct themselves as would a "reasonably respectful citizen." *State v. Ross,* 141 Wn.2d 304, 312, 4 P.3d 130 (2000). This may include entering the property to speak with occupants as part of an investigation of a possible crime. *State v. Jesson*, 142 Wn. App. 852, 859, 177 P.3d 139 (2008). "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." *State v. Gave,* 77 Wn. App. 333, 337, 890 P.2d 1088 (1995) (citing *State v. Maxfield,* 125 Wn.2d 378, 398, 886 P.2d 123 (1994)).

And though police may enter the curtilage of a home to contact its inhabitants without a warrant, the Fourth Amendment imposes 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.

Here, police entered onto private property to investigate a non-exigent, 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.

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.

Though it is reasonable to expect that police may 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. 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; *see also, State v. Boland,* 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion). Exceeding the scope of the implied invitation requires suppression of evidence found in violation of the Fourth Amendment. *U.S. v. Perea-Rey,* 680 F.3d 1179, 1189 (2012) (citing *Wong*

Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)).

The Court of Appeals failed to properly consider the permissible scope of police conduct while on private property, simply finding in a footnote that the police conduct did not violate Mr. Dunbar's right to privacy because the warrant information is contained in a "public database," not on private property. Slip op. 8-9, footnote 4. The permissible scope of police conduct after they enter onto private property without legal authority is a constitutional question and matter of substantial public interest that merits review by this Court. RAP 13.4(b)(3) and (4).

(b) The justification of a "social contact" should not apply to police-citizen interactions on private property.

The Court of Appeals also determined that police contact with Mr. Dunbar fell short of a "seizure," approving of the trial court's determination that police contact with Mr. Dunbar on private property was nothing more than a "social contact." Slip op. at 8-10; CP 44.

As this Court recognizes, there may be no seizure when police have a consensual encounter with a person in a public place: "No seizure occurs where an officer approaches an individual in public and *requests* to talk to him or her, engages in conversation, or *requests* identification, so long as the person involved need not answer and may walk away. *State v. O'Neill*,

148 Wn.2d 564, 577–78, 62 P.3d 489 (2003) (internal citations omitted) (emphasis in original). Accordingly, this Court allows that an interaction that takes place in the public, where an officer asks for an individual's identification, is a "social contact" and not a seizure. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009).

The Court of Appeals applied the legal justification of a "social contact" for the police contact with Mr. Dunbar on private property, despite the fact that the concept of a "social contact" is premised on the police-citizen interaction taking place in public. Slip op. at 8-10. Mr. Dunbar seeks review by this Court to determine whether a "social contact" that does not amount to a seizure applies to police-citizen interactions on private property. RAP 13.4(b)(3), (4).

(c) <u>The Court of Appeals' reliance on "foreseeability" to determine whether a person has expressed a subjective intent to close their property to the public conflicts with existing case law, necessitating review under RAP 13.4(b)(1), (2), (3), and (4)</u>.

"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*, 75 Wn. App. 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." *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990). 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.); *Gave*, 77 Wn. App. at 338 ("'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*, *Ridgway*, 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. 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.

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.

Here the land is remote with a long private driveway in which the activity therein is unobservable, with a primary entrance marked off by cattle gates and no trespassing signs, which establish the efforts of the private property owners to demarcate this large parcel of land as private. *Jesson*, 167 Wn.2d at 859. Despite this expression of subjective intent to close the property to the public, the Court of Appeals reasoned it was still "foreseeable that a variety of unknown visitors and business persons would access the area." Slip op. at 7. This reasoning is contrary to existing case law, meriting review by this Court of this constitutional privacy issue that is of substantial public interest. RAP 13.4(b) (1), (2), (3), and (4).

2. Where the sole contested issue at trial was whether the State proved that the substance seized from Mr. Dunbar was in fact methamphetamine, did the Court of Appeals err in finding harmless the trial court's erroneous admission of a hearsay statement that the location where Mr. Dunbar was arrested was a "meth lab?"

The Court of Appeals correctly determined that the trial court's admission of hearsay evidence that the location where Mr. Dunbar was arrested was a reported "meth lab," but erred in finding this error harmless beyond a reasonable doubt, where the sole issue at trial was whether Mr. Dunbar in fact possessed the substance methamphetamine. Slip op. at 12. Mr. Dunbar requests review by this Court under RAP 13.4(b)(3).

E. <u>CONCLUSION</u>

Based on the foregoing, Mr. Dunbar respectfully seeks review of this decision under RAP 13.4(b)(1),(1),(3), and (4).

Respectfully submitted this the 30th day of January 2018.

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

STATE OF WASHINGTON,	)	No. 35351-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
DANIEL HERBERT DUNBAR,	)	
	)	
Appellant.	)	

PENNELL, J. — Daniel Herbert Dunbar appeals his conviction for unlawful possession of methamphetamine. We affirm.

FACTS

On a September morning in 2016, two Spokane County sheriff's deputies were dispatched to 4130 South Sundown Drive in response to an anonymous report of

suspicious activity. The report indicated there had been a lot of nighttime traffic at the address and that a house on the property was believed to be a "meth[1] lab." 1 Report of Proceedings (RP) (Mar. 30, 2017) at 8.

Sundown Drive is a paved county road, located in a residential area. The property at 4130 South Sundown Drive bisects Sundown Drive and hosts three separate houses. Although Sundown Drive does not run through 4130 South Sundown Drive, a private driveway connects the two ends of Sundown Drive and provides access for the three houses. A cattle gate blocks the driveway on the east, where it meets Sundown Drive. There is no gate on the west.

The first law enforcement officer at the scene arrived at the gated entry on the east end of the driveway. This initial officer did not enter the property; rather, he remained outside the gate. Shortly after the officer arrived, a Chevrolet Suburban began to back out of the driveway away from the easternmost house on the property. Daniel Dunbar was driving the vehicle. His girlfriend was also in the car. The officer stopped the Suburban by "waving his arms" and "saying, hey, hey." *Id*. at 28. Mr. Dunbar's girlfriend rolled down her window and began speaking with the officer from a distance of 15 feet.

[1] Methamphetamine.

Deputy Griffin Criswell arrived shortly after the first officer. He approached the area from the west side of the driveway, which was not blocked by a gate. From the area where Deputy Criswell parked his vehicle, he was unable to see inside the Suburban.

Deputy Criswell was familiar with Mr. Dunbar, and knew that Mr. Dunbar had frequent interactions with the criminal justice system. Upon walking up to the Suburban and contacting its occupants, Deputy Criswell recognized Mr. Dunbar and asked him if he had any outstanding warrants. Mr. Dunbar responded that he was not aware of any. Deputy Criswell then called Mr. Dunbar's name into radio dispatch and confirmed several misdemeanor warrants for Mr. Dunbar's arrest. [2] Mr. Dunbar was then arrested and searched.

During the search incident to arrest, Deputy Criswell found a small plastic grocery bag in Mr. Dunbar's pocket. The bag was knotted shut. Inside the bag, Officer Criswell discovered a milky, crystalline substance that field-tested positive for methamphetamine. The state crime lab later confirmed the substance was methamphetamine.

Mr. Dunbar was charged by information with possession of a controlled substance. Prior to trial, he moved to suppress evidence seized at the time of his arrest. He argued

[2] Deputy Criswell explained he ran Mr. Dunbar's name for warrants, "[b]ecause I've had numerous run-ins with him and he's rather prolific." 1 RP (Mar. 30, 2017) at 11.

law enforcement violated his right to privacy by arresting him on a private driveway. According to Mr. Dunbar, the driveway at 4130 South Sundown Drive was marked with three separate no trespassing signs, one for each of the houses serviced by the driveway. Deputy Criswell denied seeing any such signs.

Based on the evidence presented at the hearing, the trial judge denied Mr. Dunbar's suppression motion. The court recognized that the driveway was privately owned and not a part of Sundown Drive. However, it determined that Deputy Criswell's use of the driveway was not unreasonable, given that the driveway serviced three homes. Although the parties had not raised the issue of whether Mr. Dunbar had been unconstitutionally seized prior to his formal arrest, the trial judge found that "[t]here was no evidence presented that law enforcement seized Mr. Dunbar prior to his being arrested for the active warrants." Clerk's Papers (CP) at 39.

A different judge presided over Mr. Dunbar's trial. Just prior to trial, the court held a hearing regarding the admissibility of Mr. Dunbar's post-arrest statements to Deputy Criswell. At this hearing, Deputy Criswell admitted seeing the no trespassing signs. However, Deputy Criswell explained he did not believe the no trespassing signs pertained to the driveway. He testified that there was no gate blocking his access to the driveway. The trial court determined that Mr. Dubar's post-arrest statement was subject

to suppression. However, the court did not disturb the prior trial judge's decision as to whether there had been an unlawful search.

At trial, the State offered isolated testimony from the dispatch report, indicating that officers were responding to a potential "meth lab." The testimony was as follows:

> Q: And did the radio provide you with details of that suspicious vehicle?
> A: They did. If I could consult the CAD, which is our computer-aided dispatch program. It said a white travel trailer showed up sometime last night and provided a Washington plate, and says trailer is on the yard at location. *House is likely a meth lab*, lots of traffic at night and car doors slamming at night keeping neighbors up at night.

1 RP (May 2, 2017) at 195 (emphasis added). No additional testimony was elicited regarding the "meth lab" allegation. The allegation was not repeated at any point during trial or summation.

Mr. Dunbar's defense consisted of challenging the State's ability to prove that the substance in his possession was methamphetamine. Counsel elicited the fact that the bag containing the methamphetamine was found to be "leaking" at the time it arrived at the state crime lab. 2 RP (May 2, 2017) at 257-58; 2 RP (May 3, 2017) at 265-66. The jury heard testimony on how the evidence was stored, including the use of Ziploc bags at the property, and additional Ziploc bags and an evidence envelope once the evidence was

sent for storage. The jury also heard testimony on the crime lab's anticontamination measures and the transportation measures used to guard against evidence contamination.

Mr. Dunbar was convicted of possession of a controlled substance. He was sentenced to 12 months and 1 day of confinement. Mr. Dunbar now timely appeals from that judgment and sentence.

ANALYSIS

The trial court's suppression rulings

Review of a trial court's suppression rulings involves mixed questions of fact and law. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). A trial court's factual findings are reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Legal conclusions are reviewed de novo. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014).

Private driveway

Mr. Dunbar argues Deputy Criswell violated his right to privacy[3] by entering the private driveway at 4130 South Sundown Drive without a warrant. According to Mr. Dunbar, Deputy Criswell's conduct amounted to an illegal search and evidence obtained from the search, including the methamphetamine, should have been suppressed.

[3] U.S. CONST. amend. IV; WASH. CONST. art. I, § 7.

We find no illegal entry or search. Law enforcement, like members of the public, have implied permission to attempt contact with a home's occupants during daylight hours by utilizing a home's driveway. *State v. Ross*, 141 Wn.2d 304, 312-13, 4 P.3d 130 (2000). A no trespassing sign, alone, is insufficient to manifest an intent to revoke this implied permission. *State v. Jesson*, 142 Wn. App. 852, 858-59, 177 P.3d 139 (2008). Instead, additional indicators of privacy such as a high fence, closed gate, security device, dogs, or remote location are necessary to relay a property holder's intent to close a home's access route to the public. *Id.; see also State v. Chaussee*, 72 Wn. App. 704, 710, 866 P.2d 643 (1994).

The facts in this case do not suggest that the implied invitation to access the houses on South Sundown Drive had been revoked or that Deputy Criswell ventured into an area that was not impliedly open to the public. The three houses on South Sundown Drive shared a single driveway. It was therefore foreseeable that a variety of unknown visitors and business persons would access the area. Deputy Criswell did not deviate from what would reasonably be expected of a business invitee or some other visitor. He did not deploy subterfuge to enter the property. He was at the property during daylight hours and did not breach any closed gates or fences. Given the totality of these circumstances, the trial court correctly determined Deputy Criswell did not engage in an illegal warrantless

search when he made contact with Mr. Dunbar in the driveway to 4130 South Sundown Drive.

Seizure of Mr. Dunbar

Mr. Dunbar also argues that he was illegally seized without a warrant when law enforcement officers stopped his vehicle, asked him about outstanding warrants, and ran his name for warrants.[4] Mr. Dunbar has the burden of demonstrating illegal seizure. *State v. O'Niell*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). He has not met this requirement.

A law enforcement officer may engage members of the public in social interactions without implicating constitutional rights to be free from governmental intrusion. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009); *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). Whether a particular interaction with law enforcement amounts to a seizure or a social contact requires objectively assessing the totality of the surrounding circumstances. An encounter will rise to the level of a seizure only when the officer's use of force or show of authority would lead a reasonable

[4] Mr. Dunbar also argues that the warrant check violated his right to privacy. This complaint is unfounded as warrant information is contained within a public database, not private property.

person to feel compelled to remain on the scene or to comply with law enforcement's commands. *O'Neill*, 148 Wn.2d at 574; *Young*, 135 Wn.2d at 511.

Prior to his arrest on outstanding warrants, Mr. Dunbar's contact with the law enforcement officers was very limited. His vehicle had been flagged down by the initial officer at the scene. However, law enforcement did not signal that Mr. Dunbar was required to stop his car by using a siren or overhead lights. *Harrington*, 167 Wn.2d at 665 (absence of siren or overhead lights indicative of social contact). In fact, the two patrol cars on the scene were located a considerable distance from Mr. Dunbar's vehicle. *Id.* (inference of social contact when patrol car was out of sight). In addition, the evidence at the suppression hearings did not show that, prior to the arrest, law enforcement officers ever directed Mr. Dunbar's movements or sought to control the scene. *See id.* at 666-67 (request to remove hands from pocket suggestive of seizure). Nor did officers engage in threatening conduct, such as physically touching Mr. Dunbar, displaying their weapons, requesting a frisk, or using strong language. *Id.* at 666-68 (explaining circumstances that convert a social contact into a seizure).

The only pre-arrest circumstances that could have been indicative of a seizure, as opposed to a social contact, were the presence of two officers and Deputy Criswell's question regarding warrants. These were not sufficiently intrusive to convert Mr.

Dunbar's exchange with Deputy Criswell into a nonconsensual seizure. The record does not suggest that the presence of two officers, as opposed to one, made the scene "threatening." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). Given the apparent history between Deputy Criswell and Mr. Dunbar, a reasonable person in Mr. Dunbar's position would have expected to have his name run for warrants. Accordingly, Deputy Criswell did not change the nature of his interaction with Mr. Dunbar merely by referencing this obvious issue. The trial court's conclusion that Mr. Dunbar's pre-arrest contact with Deputy Criswell did not amount to seizure was warranted.

Admission of contents of 911 call at trial

At trial, Mr. Dunbar moved to exclude testimony regarding the details of the anonymous 911 call. Specifically, Mr. Dunbar objected to the caller's claim regarding a suspected "meth lab." Mr. Dunbar argued that this allegation was irrelevant and its admission would deny Mr. Dunbar his right of cross-examination.[5] U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The trial court allowed the State to elicit evidence of the

[5] Mr. Dunbar also challenges the admission of the anonymous allegation on grounds of improper character evidence under ER 404. However, the record does not show that he raised this specific objection in the trial court. Accordingly, an objection based on character evidence grounds has been waived on appeal, and this court will not address it on the merits. RAP 2.5(a).

allegation under the theory that it was relevant to the state of mind of the law enforcement officers.

We agree with Mr. Dunbar: the evidence in question should have been excluded. The anonymous caller's allegation that the property housed a "meth lab" had little technical relevance to the State's case. Law enforcement could have easily explained their reasons for going out to South Sundown Drive without mentioning that specific issue. But at the same time, the anonymous caller's allegation was at least somewhat suggestive of guilt[6] and, as such, raised concerns regarding Mr. Dunbar's constitutional right to confront adverse witnesses. *See State v. Lui*, 179 Wn.2d 457, 480, 315 P.3d 493 (2014) (confrontation clause applies to witnesses against the defendant). The information relayed by the caller was testimonial, in that it relayed evidence of a past crime to law enforcement. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Because cross-examination of the anonymous caller was never afforded or even possible, the caller's inculpatory statements should have been excluded.

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[6] Given that Mr. Dunbar's defense was that the State failed to prove the substance in his pocket was methamphetamine, the anonymous caller's allegation that Mr. Dunbar was driving away from a suspected "meth lab" could have suggested to the jury that the substance in Mr. Dunbar's pocket was, in fact, methamphetamine. Evidence need not be conclusive, nor even strong, to be inculpatory.

While the trial court should have excluded the anonymous caller's "meth lab" allegation, we find this error harmless beyond a reasonable doubt. *See State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (confrontation clause violations are subject to a harmless error analysis). The reference to the anonymous caller's allegation was brief, it was not repeated, and it did not pertain to Mr. Dunbar's defense regarding mishandled evidence. In addition, the untainted evidence at trial was overwhelming. Accordingly, "where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, [a confrontation clause violation] is harmless." *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), *aff'd by Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Having reviewed the record, we find no reasonable possibility that the outcome of Mr. Dunbar's trial would have been different had the trial court excluded the 911 caller's allegation. The conviction is therefore affirmed.

REQUEST TO STRIKE TRIAL COURT COSTS

Citing *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Mr. Dunbar has filed supplemental briefing requesting that we strike the $200 criminal filing fee and $100 deoxyribonucleic acid (DNA) collection fee imposed by the trial court at sentencing. *Ramirez* was decided after the close of briefing in this case. The decision held that the

2018 amendments[7] to Washington's legal financial obligation scheme apply prospectively to cases on direct appellate review at the time of enactment. Of interest to Mr. Dunbar, the 2018 amendments prohibit imposition of a $200 criminal filing fee on defendants who are indigent at the time of sentencing as defined by RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h). Also prohibited is the assessment of a DNA database fee if the state has previously collected the defendant's DNA as a result of a prior conviction. RCW 43.43.7541.

The record before the court indicates Mr. Dunbar's request for relief is controlled by *Ramirez*.[8] Specifically, Mr. Dunbar was indigent at the time of sentencing as defined by RCW 10.101.010(3)(a) (receiving public assistance) and RCW 10.101.010(3)(c) (receiving income of 125 percent or less of the current federally established poverty level) and Mr. Dunbar's lengthy felony record is an indication that a DNA fee has been previously collected. Accordingly, we grant Mr. Dunbar his requested relief on this issue and direct the trial court to strike the $200 criminal filing fee and the $100 DNA fee from Mr. Dunbar's judgment and sentence.

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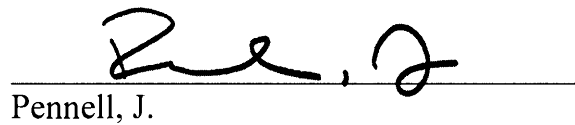
[7] LAWS OF 2018, ch. 269.

[8] The State has not responded to Mr. Dunbar's supplemental assignment of error.

CONCLUSION

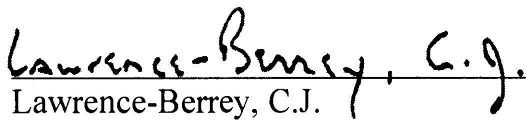
Mr. Dunbar's conviction is affirmed. This matter is remanded to the trial court with instructions to strike the $200 criminal filing fee and the $100 DNA collection fee from Mr. Dunbar's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

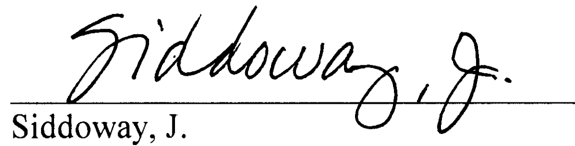


Pennell, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

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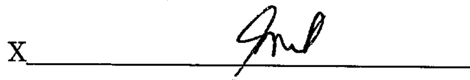
I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GRETCHEN VERHOEF [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] DANIEL DUNBAR 813308 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2019.

X 

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