

NO. 42397-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHERYL DANCER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00031-0

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that Officer Elton was required to advise her of the *Ferrier* warnings is without merit when the Supreme Court has specifically limited *Ferrier* to cases involving "knock-and-talks" where: (1) the police are searching for contraband or evidence of a crime; (2) enter the home with consent; and, (3) once inside explain their true motive and ask for permission to search? Thus, when none of those situations were present in the case at bar, did the trial court err in finding that *Ferrier* warnings were not required?

2. Whether the Defendant's claim that even if *Ferrier* warnings were not required her consent was nevertheless involuntary is without merit when substantial evidence from the record below demonstrates that her consent was, in fact, voluntary?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cheryl Dancer was charged by information filed in Kitsap County Superior Court with one count of possession of methamphetamine. CP 1. After the trial court denied the motion to suppress, the Defendant agreed to submit the case to the trial court on stipulated facts. CP 65. The trial court found the Defendant guilty and then imposed a standard range sentence. CP 68, 100. This appeal followed.

B. FACTS

The Defendant was charged with possession of methamphetamine after an officer (who had obtained the Defendant's consent to enter her home to look for a suspect in an assault) saw the drugs in plain view in the Defendant's bedroom. CP 4-6. Prior to trial the Defendant moved to suppress the drugs, arguing that the search was unlawful because the officer did not inform her of the *Ferrier*¹ warnings prior to obtaining her consent. CP 7.

The State filed a written response arguing that *Ferrier* warnings were not required. CP 137. A CrR 3.6 hearing was then held on May 16, 2011. At the hearing Officer Aaron Elton of the Bremerton Police Department testified concerning the events at issue, as outlined below. RP 5.²

On June 20, 2010 Officer Elton was dispatched to a 7-Eleven store to contact the victim of a domestic violence assault. RP 10. Officer Elton contacted the victim who reported that she had been assaulted by her boyfriend (Shaun Johnson), and Officer Elton observed that the victim had "the beginnings of a very large black eye." RP 10, 29. The victim also reported that Mr. Johnson and the victim's children were at their shared residence in the 3200 block of Halverson in East Bremerton. RP 10-11. The

¹ *State v Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

² All of the references to the Report of Proceedings (RP) in this brief are from the May 16,

victim also stated, however, that there was a possibility that the children might have been handed over to the Defendant, who was the victim's next-door neighbor. RP 11.

Officer Elton then went to the victim's residence to try and locate Mr. Johnson, but the residence was empty. RP 11. A K-9 unit was used to try and track Mr. Johnson, and the K-9 stayed near the house where the assault had taken place and also circled around to the north side of the residence towards the Defendant's residence. RP 11-12. Officer Elton then decided to go to the Defendant's residence and at the CrR 3.6 hearing Officer Elton explained his reasons for doing so as follows:

So I thought it was appropriate to at least speak with Ms. Dancer related to the, excuse me, the K-9 track and the fact that the kids were there, and whatever information she may have about the suspect.

RP 12.

Officer Elton then knocked on the Defendant's door and spoke to the Defendant when she came to the door. RP 12. Officer Elton was outside on the front porch and the Defendant was at the door. RP 12. Officer Elton spoke to the Defendant about what the victim had reported regarding the assault, Mr. Johnson, and the children. RP 12-13. The Defendant confirmed

2011 CrR 3.6 hearing.

that the children were with her, but she said that she had observed Mr. Johnson walking away from the area on Halverson Street. RP 13.

Officer Elton further testified that at that point in the evening the Defendant was not a suspect in any crime. RP 14. Rather, she was just a neighbor who had enough of a relationship with the victim or the suspect that they felt comfortable leaving the kids with her. RP 14.

While he was still standing outside the residence, Officer Elton asked the Defendant if he could come inside to look for the Mr. Johnson. RP 29. The Defendant responded by telling Officer Elton that he could, and Officer Elton explained that the Defendant was very cooperative and respectful throughout his contact with her. RP 29, 37.³

Officer Elton testified that the sole reason that he asked to enter the residence was to look for Mr. Johnson. RP 14-15, 29, 38-39. Officer Elton also explained that he was not searching for any evidence in the home nor was he trying to avoid having to obtain a search warrant, but rather he was simply looking for the suspect in the assault. RP 14-16, 38-39.

³ Officer Elton also explained that in his work he has encountered many people who were mentally incapable of giving consent, and that his opinions in this regard were primarily based on his interactions with those people. RP 36. Officer Elton stated that throughout his conversation with the Defendant there was nothing that caused him any concern regarding the Defendant's ability to consent, and that there was nothing out of the ordinary with respect to his contact with the Defendant and that their conversations or contact were "appropriate." RP 36-37.

Officer Elton did not read the Defendant the *Ferrier* warnings, and explained that he did not do so because he was not conducting a “knock and talk.” RP 19-20. Officer Elton explained that he has conducted “knock-and-talks previously, and when asked if he provides *Ferrier* warnings when conducting a knock-and-talk Officer Elton he explained, “I absolutely do. Very clear case.” RP 10. With respect to the present case, Officer Elton thus explained that the if he had been doing a “knock-and-talk” he would have advised the Defendant of the *Ferrier* warning, but he did not feel this was necessary since he was not looking for evidence, but rather was merely looking for Mr. Johnson as part of the assault investigation. RP 19-20.

Officer Elton then entered the Defendant’s home and the Defendant accompanied him as he looked for Mr. Johnson. RP 15. Officer Elton did not open any cabinets or drawers, but only looked in rooms or closets where a person might be hiding. RP 15. Eventually Officer Elton came to a locked room and he asked the Defendant if he could look inside. RP 16. The Defendant agreed and she then unlocked the door for the officer. RP 16. Officer Elton and the Defendant then went into the room and Officer Elton saw that there was a small mattress on the floor and a small table, and that,

Right there, at that location, I could see a glass meth pipe and some baggies of meth that were later tested and positive and some packaging that matched these baggies of meth. It was right there. You couldn’t do anything but see it.

RP 16-17. Officer Elton then told the Defendant that he would be collecting the evidence “because I was standing right there,” and that he would like to speak with her outside. RP 17. The Defendant acknowledged that the items were hers, and continued to be very cooperative. RP 18. As Officer Elton was still investigating the assault (and because the Defendant was cooperative), he did not arrest the Defendant. RP 18-19. Officer Elton then left and continued to actively investigate the assault case. RP 18-19.

At the conclusion of the CrR 3.6 hearing the trial court denied the defense motion to suppress and held that the present case was not a “knock-and-talk” and the *Ferrier* warnings were not required. RP 84-85. The court also explained that its ruling was based on the “general principles enunciated by the Supreme Court in *State v. Khounvichai*, 149 Wn.2d 557.” RP 84. The court also noted that Officer Elton was actively investigating a domestic violence assault and was looking for the suspect (whom the police had probable cause to arrest). RP 84-85. Finally, the court noted that “It seems to me that the defense is asking me to go one step beyond where any published case has gone, and I’m not inclined to do so.” R 84-85. The trial court’s ruling was later set out in written Findings of Fact and Conclusions of Law. CP 58-61.

III. ARGUMENT

- A. **THE DEFENDANT'S CLAIM THAT OFFICER ELTON WAS REQUIRED TO ADVISE HER OF THE FERRIER WARNINGS IS WITHOUT MERIT BECAUSE THE SUPREME COURT HAS SPECIFICALLY LIMITED FERRIER TO CASES INVOLVING "KNOCK-AND-TALKS" WHERE: (1) THE POLICE ARE SEARCHING FOR CONTRABAND OR EVIDENCE OF A CRIME; (2) ENTER THE HOME WITH CONSENT; AND, (3) ONCE INSIDE, EXPLAIN THEIR TRUE MOTIVE AND ASK FOR PERMISSION TO SEARCH. AS NONE OF THOSE SITUATIONS WERE PRESENT IN THE CASE AT BAR, THE TRIAL COURT DID NOT ERR IN FINDING THAT *FERRIER* WARNINGS WERE NOT REQUIRED.**

The Defendant argues that the trial court erred in denying the defense motion to suppress because Officer Elton should have been required to advise the Defendant of her *Ferrier* warnings. App.'s Br. at 6-15. This claim is without merit because *Ferrier* warnings were not required in the present case because Officer Elton's entry into the Defendant's home was not a "knock-and-talk" as defined by the Supreme Court and none of the coercive aspects found in a true "knock-and-talk" were present in this case. In addition, *Ferrier* warnings were not required because the Supreme Court has specifically held that *Ferrier* warnings are only required when an officer intends to search for "contraband or evidence of a crime," and in the present

case Officer Elton asked to enter the Defendant's home for the sole purpose of looking for a suspect in a serious assault.

This court has previously summarized the holding the *Ferrier* opinion. *State v. Johnson*, 104 Wn.App. 489, 504, 17 P.3d 3 (2001), discussing *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). In *Ferrier*, an informant told officers that Ferrier was growing marijuana in her house. The officers lacked facts from which to infer the informant's veracity, so they also lacked probable cause to arrest Ferrier or search her house. *See Johnson*, 104 Wn.App. at 504, citing *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984) (probable cause has two prongs: personal knowledge and veracity). Notwithstanding this deficiency, four officers went to her house to conduct a "knock-and-talk." All four were armed and wore black raid jackets with "police" emblazoned across the front. When they arrived at her house, some went to the front and some to the back. Those at the front knocked, and she came to the door. They identified themselves, and she invited them into the living room. When all four were in the living room, they confronted her with the unverified information that she was growing marijuana, and they asked if she would consent to a search of the house. They did not have probable cause to arrest; they did not tell her she had the right to refuse consent, limit consent, or revoke consent; and they did not give *Miranda* warnings. She signed a written consent form, and they found marijuana.

Based on Article I, § 7 of the Washington Constitution, the Washington Supreme Court held that the situation was “inherently coercive,” *Johnson*, 104 Wn.App. at 504, *citing Ferrier*, 136 Wash.2d at 115, 960 P.2d 927. The officers thus were required to mitigate coercion by advising Ferrier of her right to refuse consent and her right to limit or revoke consent. *Johnson*, 104 Wn.App. at 504, *citing Ferrier*, 136 Wash.2d at 118, 960 P.2d 927. The officers had not done that, so the marijuana was suppressed. *Id.*

This Court has also previously noted that after *Ferrier* the Washington Supreme Court has “limited *Ferrier* to the kind of coercive searches the police employed there.” *Johnson*, 104 Wn.App. at 505, *citing State v. Williams*, 142 Wash.2d 17, 26, 11 P.3d 714 (2000). Accordingly, it applies only to situations in which the police employ a “knock-and-talk” procedure,⁴ which the Supreme Court has defined as follows:

In a “knock-and-talk” procedure, not having obtained a warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. After being allowed to enter, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises.

Johnson, 104 Wn.App. at 505, *quoting Bustamante-Davila*, 138 Wn.2d at 976-77.

⁴ See *Johnson*, 104 Wn.App. at 505, *citing State v. Bustamante-Davila*, 138 Wash.2d 964,

Similarly, in *Williams* the Supreme Court specifically held that *Ferrier* was limited to “situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.” *Williams*, 142 Wn.2d at 28. In *Williams*, a citizen had contacted a police officer and informed him that Harlan Williams, the defendant, had a warrant out for his arrest and that he was currently at a local residence. *Id.* at 19. The citizen also provided a description of the defendant's clothing and green van. The officer confirmed that Williams had an outstanding felony arrest warrant, and the officer then drove to the described residence and identified the defendant's green van parked outside in the parking lot. *Id.* at 19. Two officers approached the apartment's open door and called inside for Williams. The tenant, Alan Jelinek, appeared at the doorway. An Officer told Jelinek that he was looking for the defendant, whose van was in the parking lot. Jelinek said that he did not know the defendant or the owner of the green van.

Id. at 20. The officer advised Jelinek that there was a warrant for Williams' arrest and asked for Jelinek's consent to enter into the apartment to look for the defendant. Jelinek consented and stepped back to allow the officers to enter. *Id.* at 20.

When the officers entered the apartment, they immediately spotted the defendant and identified the defendant by the scars on his arms. *Williams*,

980, 983 P.2d 590 (1999).

142 Wn.2d at 20. The defendant shortly thereafter confirmed his identity and the officers placed the defendant under arrest. In a search incident to the arrest, the officers found .8 grams of a black tar heroin in the defendant's pocket. *Id.* On appeal, Williams argued that *Ferrier* applied and that the officers had failed to advise Jelinek of his *Ferrier* warnings. *Id.* at 24-25. The Court, however, rejected this argument stating,

We do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty. To apply the *Ferrier* rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. Instead, we limit the requirement of a warning to situations where police seek to conduct a search *for contraband or evidence of a crime* without obtaining a search warrant.

Williams, 142 Wn.2d at 27-28 (emphasis added).

Furthermore, in *State v. Khounvichai*, 149 Wn.2d 557, 69 P.3d 862 (2003) the Supreme Court again held that *Ferrier* warnings “are required only when police officers seek entry to conduct a consensual search for contraband or evidence of a crime.” *Khounvichai*, 149 Wn.2d at 559. In *Khounvichai* officers had responded to a malicious mischief report and the complainant told the officers that a man named McBaine was the possible suspect and

gave them a possible address for the suspect. *Khounvichai*, 149 Wn.2d at 559. The officers then went to the address to question McBaine about the incident and knocked on the door. A resident name Ms. Orr answered the door and the officers asked if Mr. McBaine was present as they wanted to talk to him. *Id.* at 559. Ms. Orr told the officers that Mr. McBaine was her grandson and that he was home and she eventually waved the two officers inside. *Id.* One of the officers followed Ms. Orr down a hallway towards a closed bedroom door where Ms. Orr knocked on the door and stated, “there is someone here to see you.” *Id.* at 560. When the door opened the officers smelled marijuana and one of the occupants of the room (Mr. Khounvichai) later made a sudden dash across the room and out of the officers’ sight. Concerned about a possible weapon, one of the officers ran into the bedroom where he then saw Mr. Khounvichai reaching into a closet. After a brief struggle a bag of cocaine fell out of Mr. Khounvichai’s hand, and he was subsequently arrested and charged with possession of cocaine. *Id.*

On appeal, Khounvichai argued that police officers must advise a resident of the *Ferrier* warnings when requesting entry into a home to speak to a person as part of a criminal investigation because a request for entry is a request to search. *Khounvichai*, 149 Wn.2d at 561. In its opinion the Supreme Court first went through the *Ferrier* case and then explained,

We have since clarified that the *Ferrier* requirement is limited to situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search and have declined to broaden the rule to apply outside the context of a request to search. See *State v. Williams*, 142 Wash.2d 17, 28, 11 P.3d 714 (2000) (*Ferrier* warnings not required where police request consent to enter a home to arrest visitor pursuant to a valid arrest warrant); *State v. Bustamante-Davila*, 138 Wash.2d 964, 981, 983 P.2d 590 (1999) (*Ferrier* warnings not required where police and agent of Immigration and Naturalization Services gained consensual entry to defendant's home to serve a presumptively valid deportation order).

In *Williams*, we noted that police often enter homes for investigative purposes, such as inspecting break-ins, vandalism, and other routine responses. 142 Wash.2d at 27, 11 P.3d 714. We found no constitutional requirement that officers warn of the right to refuse entry every time an officer enters a home to investigate because “[t]o apply the *Ferrier* rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry.” *Id.* at 27-28, 11 P.3d 714.

Moreover, as the State correctly contends, there is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes. When police obtain consent to search a home pursuant to a “knock and talk” they go through private belongings and affairs without restriction. Such an intrusion into privacy is not present, however, when the police seek consensual entry to question a resident. Furthermore, the requirements of *Miranda*, 384 U.S. at 478-79, 86 S.Ct. 1602, already serve to protect citizens from coercive questioning.

We adopted the *Ferrier* rule out of a concern that citizens may be unaware that a warrant to search is required or, if aware, may be too intimidated by an officer's presence in the home to deny consent to a warrantless search. As the State correctly emphasizes, the *Ferrier* warnings target searches and not merely contacts between the police and individuals. In sum, when police seek to conduct a warrantless search of the

home, the *Ferrier* warnings achieve their purpose; when police officers seek entry to question a resident, the home is merely incidental to the purpose.

Khounvichai, 149 Wn.2d at 563-64. The Supreme Court then held that *Ferrier* warnings were not required under the facts of *Khounvichai*, and the Court concluded by again noting that “the *Ferrier* rule applies to situations where police seek entry to a home to conduct a warrantless search for contraband or evidence of a crime.” *Khounvichai*, 149 Wn.2d at 564, citing *Williams*, 142 Wn.2d at 27-28.⁵

Other Washington appellate decisions have reached similar conclusions. For instance, in *State v. Dodson*, 110 Wn.App. 112, 39 P.3d 324 (2002) officers were looking for a suspect named Charles Evans in a recent theft of a truck and a three-wheeler off road vehicle. A park ranger reported seeing a person matching Mr. Evans’ description near the property of Mr. Harnden. *Dodson*, 110 Wn.App. at 116. ~~The stolen truck had been found~~ nearby and “three-wheeler” tracks had been found leading to the Harnden property. *Id.* Three officers then went to the Harnden property and knocked on the door of the residence, and Mr. Harnden came to the door. Officers

⁵ The Defendant in *Khounvichai* also argued that *Ferrier* should apply even when an officer only asks to enter to talk to an occupant about an alleged offense because such a request has the same result as a request to enter and conduct a search since the officer by entering will be conducting a “search” of anything in plain view. *Khounvichai*, 149 Wn.2d. at 564. The Court, however, rejected this argument, noting that it is well established that a discovery made in plain view is not a “search.” *Id.* at 565. Thus, the Defendant’s claim that every

asked if Mr. Evans lived on the property, and Mr. Harnden replied, “No. I ran him off.” *Dodson*, 110 Wn.App. at 116. He later informed them that Mr. Evans had brought a three wheeler to the property a few days earlier. *Id.* at 117. The officers then asked if they could look around the property to see if Mr. Evans had returned, and Mr. Harnden then accompanied them as they went around the property and into a nearby travel trailer which Mr. Harnden called a “guest house.” *Id.* As the officers opened the door they were immediately confronted with a strong chemical odor that the recognized as being associated with a meth lab. *Id.* A warrant was then obtained, and a subsequent search revealed the presence of a meth lab, weapons, and other drugs. *Id.* at 118. Mr. Harnden and two other residents (including Dobson) were eventually charged with various crimes. *Id.*

On appeal, Harnden argued that the police conducted a “knock-and-talk” and were thus required to give him the *Ferrier* warnings. *Dodson*, 110

Wn.App. at 124. The Court of Appeals rejected this argument, noting that,

A knock and talk is a police procedure whereby police seek permission to enter a residence with the intent to obtain consent to search for evidence or contraband. [*Ferrier*] at 115, 960 P.2d 927. To mitigate the coercive effect of a knock and talk, the officers must warn the residents of their right to refuse consent. *Id.* at 116, 960 P.2d 927. In this case, however, the officers were not conducting a knock and talk. Their investigation was not inherently coercive because they

entry potentially involves a plain view search was without merit. *Id.* at 566.

were not seeking evidence to incriminate Mr. Harnden, but only looking for information on the whereabouts of Mr. Evans and the three-wheeler he was suspected of stealing. In fact, the officers did not even seek consent to search Mr. Harnden's residence at that point; they merely asked if they could check out the other buildings and trailers on the property to see if Mr. Evans had returned. Accordingly, Mr. Harnden's consent to search the vehicles on his property was voluntary.

Dodson, 110 Wn.App. at 124.

In short the Washington courts have repeatedly made it clear that *Ferrier* warnings are required only when police officers seek entry to conduct a consensual search for “contraband or evidence of a crime.” *Khounvichai*, 149 Wn.2d at 559, 564; *Williams*, 142 Wn.2d at 27-28; *Bustamante-Davila*, 138 Wash.2d at 980, 983-84; *Dodson*, 110 Wn.App. at 124. In addition, the courts have “limited *Ferrier* to the kind of coercive searches the police employed there.” *Johnson*, 104 Wn.App. at 505, citing *State v. Williams*, 142 Wash.2d 17, 26, 11 P.3d 714 (2000).

Applying these principles to the present case demonstrates that the trial court did not err. Rather, the record shows that Officer Elton's sole purpose in entering the Defendant's residence was to look for Mr. Johnson. There is nothing in the record to indicate in any way that Officer Elton's intent was to search for “contraband or evidence of a crime.” *Ferrier*, therefore, is simply inapplicable.

Similarly, the facts demonstrate that none of the coercive aspects of a “knock-and-talk” were present. As outlined above, Washington courts have defined “knock-and-talk” as follows:

In a “knock-and-talk” procedure, not having obtained a warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. *After being allowed to enter*, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises.

Johnson, 104 Wn.App. at 505 (emphasis added), quoting *Bustamante-Davila*, 138 Wash.2d at 976-77. Given this definition, the trial court in the present case did not err in finding that Officer Elton’s actions did not amount to a “knock-and-talk.” CP 60. This finding was amply supported by the record because Officer Elton was not searching for contraband or evidence.

In addition, the record shows that Officer Elton did not hide his true intentions from the Defendant. To the contrary, he explained the situation to the Defendant and informed her that he wanted to enter to see if Mr. Johnson was inside. *State v. Overholt*, 147 Wn.App. 92, 193 P.3d 1100 (2008) (Noting *Ferrier* was inapplicable for several reasons, including that the “*Ferrier* court’s concern about policing entering the property before expressing their true purpose – obtaining consent to search” was not at issue when the officer in *Overholt* engaged in no deception about his purpose).

Furthermore, Officer Elton did not ask to enter the house and then, only after the initial entry had been permitted, ask for permission to search the residence once inside. *See, e.g., Johnson*, 104 Wn.App. at 505, *citing State v. Williams*, 142 Wash.2d 17, 26, 11 P.3d 714 (2000). The coercive aspects of a true “knock-and-talk,” therefore, were simply absent from the present case.

In short, as Officer Elton did not ask to enter the Defendant’s home in order to search for contraband of evidence of a crime, and because the officer’s actions do not meet the well established definition of a knock-and-talk and because the coercive aspects of *Ferrier* were notably absent from the present case, the trial court did not err in holding that *Ferrier* did not apply.

The Defendant, however, cites *State v. Freepon*, 147 Wn.App. 689, 197 P.3d 682 (2008), and claims that it stands for the proposition that *Ferrier* is not limited to cases involving a search for “contraband or evidence of a crime.” *See App.’s Br.* at 12-13. *Freepons*, however, is distinguishable from the present case and does not stand for the broad proposition that the Defendant claims it does.

In *Freepons*, a car registered to Adam Byrne was involved in a one-car accident and officers found that the car appeared to have been rolled. *Freepons*, 147 Wn.App. at 691. A window was broken and the alarm was

activated, but the door was locked and the police apparently found no one at the scene. *Id.* at 691. Several hours later 19 year old Adam Byrne was found lying in a ditch approximately one mile away. Mr. Byrne was dirty and smelled of intoxicants, but denied knowing anything about the car accident. *Id.* at 691. Mr. Byrne explained he had last seen his car while it was parked at the residence of another person, Mr. Hazzard. Mr. Byrne did admit that had been drinking at a party at Mr. Hazzard's residence, and he explained that his brother Bryan Byrne had also been at the party and that perhaps his brother had taken the car. *Id.*

Officers then went to Mr. Hazzard's residence and when they arrived they observed several dozen empty beer cans in the yard and through a window they could see three Benton County Road signs in the house. *Id.* at 691-92. The deputies recognized the signs as stolen property and believed there had been underage drinking on the premises. *Id.* When officers knocked on the door Mr. Hazzard and Mr. Freepons, both of whom were 18 years old, came to the door. "Because of the evidence of criminal activity and contraband," the officers gave *Miranda* warnings to Mr. Hazzard and Mr. Freepon. *Id.* at 692. The men agreed to allow the officers inside to look for Bryan Byrne, and once inside an officer found growing marijuana. *Id.* at 692. Both were charged with manufacture of a controlled substance, and prior to

trial the defendants moved to suppress arguing that *Ferrier* warnings were required. The trial court denied the motion. *Id.* at 693.

On appeal, Division Three of the Court of Appeals held that the officers “intention to search the residence for evidence of a crime was clear, and noted that the fact that officers had advised the defendant’s of their *Miranda* rights showed “that the deputies anticipated that they would find what they were looking for—evidence of criminal activity within the home.” *Freepons*, 147 Wn.App. at 694-95.

The facts of *Freepons*, however, are distinguishable from the present case. In *Freepons* although the officers went to the residence looking for a potential suspect, the officers immediately saw evidence of a crime outside the residence. In addition, the officers could see stolen property inside the residence. Thus, the officers were well aware that their entry into the house would likely reveal contraband or evidence of a crime; a fact which the court found was further evidenced by the officer’s decision to Mirandize the defendants.

In the present case, however, Office Elton was not confronted with any such evidence. Rather, the record demonstrates that Officer Elton repeatedly testified that his sole purpose in asking to enter the Defendant’s home was to look for Mr. Johnson. The defense, in fact, conceded below that

Officer Elton did not have an ulterior motive or some sort of furtive or secret purpose in asking to enter the residence. RP 56. Given these facts, *Freepons* is distinguishable.⁶

B. THE DEFENDANT’S CLAIM THAT EVEN IF *FERRIER* WARNINGS WERE NOT REQUIRED HER CONSENT WAS NEVERTHELESS INVOLUNTARY IS WITHOUT MERIT BECAUSE SUBSTANTIAL EVIDENCE FROM THE RECORD BELOW DEMONSTRATES THAT HER CONSENT WAS, IN FACT, VOLUNTARY.

The Defendant next claims that even if *Ferrier* warnings were not

⁶ Even if *Freepons* wasn’t distinguishable, *Freepons* simply cannot be read as an attempt by the Court of Appeal to somehow overrule the Supreme Court’s clear pronouncement that *Ferrier* warnings are required only when police officers seek entry to conduct a consensual search for “contraband or evidence of a crime.” *Khounvichai*, 149 Wn.2d at 559, 564; *Williams*, 142 Wn.2d at 27-28; *Bustamante-Davila*, 138 Wash.2d at 980, 983-84; *Dodson*, 110 Wn.App. at 124. In addition, the Defendant’s claim that the Supreme Court denial of review in *Freepons* means that the “Supreme Court apparently agreed with the majority [opinion in *Freepons*]” is not supported by any citation that would support such a conclusion. App.’s Br. at 13. Discretionary review by the Supreme Court, of course, is completely discretionary. See RAP 13.4. The State is unaware of any authority for the claim that a denial of a motion for discretionary review can be understood to mean that the Supreme Court adopts or approves of the decision below. Furthermore, in the parallel context of appeals to the United States Supreme Court, that Court has made it clear that a denial of a writ of certiorari had no precedential value whatsoever and cannot be viewed as an expression of opinion on the merits of the lower court’s decision. See, e.g., *Teague v. Lane*, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (“As we have often stated, the ‘denial of a writ of certiorari imports no expression of opinion upon the merits of the case.’ *US v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923) (Holmes, J.). *Accord, Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1, 93 S.Ct. 647, 650, n. 1, 34 L.Ed.2d 577 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497, 73 S.Ct. 397, 437-441, 97 L.Ed. 469 (1953). The ‘variety of considerations [that] underlie denials of the writ,’ *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917, 70 S.Ct. 252, 254, 94 L.Ed. 562 (1950) (opinion of Frankfurter, J.), counsels against according denials of certiorari any precedential value.”).

required, the trial court nevertheless erred because the record did not demonstrate that the Defendant's consent was voluntary. App.'s Br. at 13-14.

This claim is without merit because substantial evidence from the record below demonstrates that the Defendant's consent was voluntary.

As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment and article I, section 7 unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). A consent search is one of those exceptions. See Wash. Const. art. I, § 7; *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). For consent to be valid, a person must consent freely and voluntarily. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

If the free and voluntary character of the consent is challenged, the State must prove that the individual consented freely and voluntarily, not as a result of duress or coercion. *Id.*; *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). Whether consent was voluntary is a question of fact to be determined from the totality of the circumstances. *O'Neill*, 148 Wn.2d at 588 (citing *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)).

The prosecution must show the free and voluntary character of the consent by clear and convincing evidence. *Smith*, 115 Wn.2d at 789 (citing *State v. Nelson*, 47 Wn.App. 157, 163, 734 P.2d 516 (1987)). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). The court's factual findings must be upheld if supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent, and convincing evidence. *Id.* (citing *In re Dependency of C.B.*, 61 Wn.App. 280, 286, 810 P.2d 518 (1991)).

Among the factors considered in a “totality of circumstances” analysis are whether *Miranda* warnings were given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person had been advised of his or her right not to consent. *Smith*, 115 Wn.2d at 789. No one factor is determinative. *Id.* The court may also consider other factors, such as whether the person had been cooperating or refusing prior to giving consent, *State v. Flowers*, 57 Wn.App. 636, 645, 789 P.2d 333, *review denied*, 115 Wn.2d 1009 (1990); whether the defendant was in custody, *O'Neill*, 148 Wn.2d at 589; and whether law enforcement had to repeatedly request for consent, *O'Neill*, 148 Wn.2d at 591. Although knowledge of the right to refuse consent is relevant, it is not absolutely necessary. *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987).

In the present case the Defendant argues that the lack of *Miranda* warnings in the present case weighs in favor of a finding that the Defendant's consent was not voluntary. This argument is without merit because the Defendant was never in custody, and the fact that no *Miranda* warning was given is not a factor if no such warnings were required. *O'Neill*, 148 Wn.2d at 588; *State v. Leupp*, 96 Wn.App. 324, 333, 980 P.2d 765 (1999) (finding that lack of *Miranda* warnings was not an issue since there was no reason for officer to give defendant *Miranda* warnings as defendant was not in custody and not even suspected of a crime); *Nelson*, 47 Wn.App. at 163 (*Miranda* warnings are not a prerequisite to voluntary consent). Similarly, although the Defendant was not advised of her right to refuse consent, when the subject of a search is not in custody and the question is whether consent is voluntary, knowledge of the right to refuse consent is not a prerequisite of a voluntary consent. *O'Neill*, 148 Wn.2d at 588 (citing *Schneckloth*, 412 U.S. at 248–49).

The relevant inquiry is whether the totality of the circumstances supported a finding that the consent was voluntary. In the present case Officer Elton explained that although he has in the past come across individuals who were unable to meaningfully consent, there was nothing about his interaction with the Defendant that indicated she was unable to give meaningful consent. RP 36-37. Specifically, Officer Elton explained that there was “nothing out of the ordinary” about his interactions with the

Defendant and the contact seemed “appropriate.” RP 37. No contrary evidence was even suggested below. Officer Elton also testified that he did not “coerce” the Defendant, nor did he “threaten” her. RP 37. In addition, the Defendant was very cooperative throughout her encounter with Officer Elton and she never refused to consent nor did Officer Elton have to ask her repeatedly for her consent to enter the home. RP 15, 37.

Given these facts, the trial court could reasonable conclude from the totality of the circumstances that the Defendant’s consent was voluntary. The Defendant’s claim to the contrary, therefore, must fail.

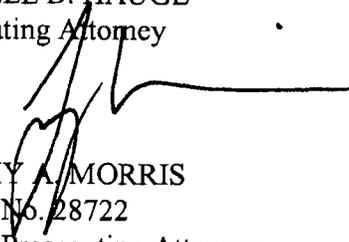
IV. CONCLUSION

For the foregoing reasons, Dancer’s conviction and sentence should be affirmed.

DATED March 9, 2012.

Respectfully submitted,

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