IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28611-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
RONALD LEE COLLINS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Ronald Lee Collins appeals his convictions for possession of a controlled substance with intent to deliver and possession of psilocin. He assigns error to the trial court's dismissal of his motion to suppress the evidence. He also challenges the court's finding that he was not detained and that the actions of the arresting officer constituted a social contact. We conclude that the officer's encounter did not constitute a seizure. And when Mr. Collins admitted there was marijuana in the brownies he was selling, probable cause existed for the arrest. We affirm the trial court and the convictions.

FACTS

On August 9, 2009, Grant County Sheriff's Office Deputy Jason Ellard was at the Gorge camp area during a concert event. Deputy Ellard and the other officers were dressed in their marked uniforms, wearing gun belts and badges. At around 2:00 a.m., Deputy Ellard and Deputy Bradley Poldervart were walking through Vendor Row, an area where vendors sell merchandise and food. Vendor Row was packed with people at the time.

As the officers walked through the crowd, Deputy Ellard noticed Ronald Collins sitting at a table. Individually wrapped brownies, two totes of brownies, and one tote of muffins were on the table. After passing Mr. Collins, Deputy Ellard turned and made eye contact with Mr. Collins. Deputy Ellard testified that Mr. Collins got that deer-in-the-headlight look and began packing his bag as if to leave.

Upon seeing Mr. Collins's response to the eye contact, Deputy Ellard approached Mr. Collins. Deputy Ellard spoke with Mr. Collins while Deputy Poldervart stood within 15 feet, to the right of Mr. Collins. Deputy Poldervart was there to ensure that Mr. Collins did not try to run. Deputy Poldervart could not hear the exchange between Deputy Ellard and Mr. Collins.

Deputy Ellard asked Mr. Collins, "'[W]hat's going on? How come you're packing up?'" Report of Proceedings (RP) (Sept. 16, 2009) at 10. Mr. Collins said that he was tired and was going to bed. Deputy Ellard wondered aloud why Mr. Collins would leave since there were so many people still in the area. Deputy Ellard then stated, "'I think you're packing up because there's marijuana or hash in these brownies . . . . [W]hat do you think about that?'" RP (Sept. 16, 2009) at 10. Mr. Collins then admitted that the brownies did contain marijuana. Deputy Ellard testified that the exchange lasted "[m]aybe a minute." RP (Sept. 16, 2009) at 11. Mr. Collins was then placed under arrest by Deputy Ellard.

Deputy Ellard never asked for identification. He never tried to prevent Mr. Collins from leaving. He never touched Mr. Collins or his belongings before the arrest. He did not show any force or make any threats or demands of Mr. Collins. Deputy Ellard testified there was a pathway for Mr. Collins to leave the area.

During the exchange between Deputy Ellard and Mr. Collins, there were four other officers engaged with another person within 20 feet. These officers then assisted Deputy Ellard and Deputy Poldervart in escorting Mr. Collins out of the area.

At a CrR 3.5 hearing, Mr. Collins testified that Deputy Ellard had instructed him to sit down and not to leave. The court found the testimony of Deputy Ellard more

credible than that of Mr. Collins. This difference in testimony led to the court denying Mr. Collins's motion to suppress the evidence. A jury then convicted Mr. Collins of possession of a controlled substance with intent to deliver and possession of psilocin. This appeal followed.

ANALYSIS

The appellate court reviews a trial court's conclusion suppressing evidence de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004 (2010). The question of whether officers seize a person is a question of both law and fact. *Id.* The determination of whether an encounter amounted to a warrantless seizure is a question of law. *Id.*

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution." *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). "[A] seizure occurs, under article I, section 7, when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). For a seizure to pass constitutional muster, "that seizure must be based on 'specific and articulable' objective

facts that give rise to a reasonable suspicion." *Bailey*, 154 Wn. App. at 300 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

"'It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.'" *Rankin*, 151 Wn.2d at 694 (quoting *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002)). "[T]he test . . . is a purely objective one, looking to the actions of the law enforcement officer." *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

"'[A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not "seized" the citizen.'" *Bailey*, 154 Wn. App. at 300 (quoting *State v. Gleason*, 70 Wn. App. 13, 16, 851 P.2d 731 (1993)). The test is "whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact." *Id.* "'[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request'" are all examples of factors that may take a social contact to the realm of seizure. *Young*, 135 Wn.2d at 512 (quoting *United States v.*

Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

Mr. Collins first argues that he was seized because a reasonable person would not have felt free to leave or disregard the officers. Mr. Collins compares the facts of his case with those found in *Harrington* where the defendant was approached by a single officer, but then a second officer arrived and stood guard. *State v. Harrington*, 167 Wn.2d 656, 666, 222 P.3d 92 (2009). In *Harrington*, the defendant was already engaged with the first officer when a second officer arrived. The court stated that "[a] second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events and, for this reason, [the trooper's] presence contributed to the eventual seizure of [the defendant]." *Id.* In *Bailey*, the court stated that "in *Gleason* as in *Harrington*, two officers were present, creating more of an environment of investigation." *Bailey*, 154 Wn. App. at 302.

In the instant case, however, Deputy Poldervart was near the conversation between Deputy Ellard and Mr. Collins from the beginning. There was no sudden arrival of additional officers. However, Deputy Poldervart was admittedly in the area to make sure Mr. Collins did not try to flee. Two other officers were also in the vicinity, but they were engaged with another individual. As this court stated in *Bailey*, the presence of other officers in the area should be a factor in determining whether a reasonable person would

have felt free to leave.

Mr. Collins argues that, similar to the facts in *Harrington*, Deputy Ellard became more confrontational and intrusive as the encounter progressed. In *Harrington*, the officer asked the defendant to remove his hands from his pockets. *Harrington*, 167 Wn.2d at 666-67. The court stated that "asking a person to perform an act such as removing hands from pockets adds to the officer's progressive intrusion and moves the interaction further from the ambit of valid social contact, particularly if the officer uses a tone of voice not customary in social interactions." *Id.* at 667.

When Deputy Ellard approached Mr. Collins, his first query was, "'[W]hat's going on? How come you're packing up?'" RP (Sept. 16, 2009) at 10. Mr. Collins told the officer that he was tired and was going to bed. Deputy Ellard then asked why Mr. Collins would be leaving with so many potential customers in the area. Deputy Ellard then told Mr. Collins, "'I think you're packing up because there's marijuana or hash in these brownies . . . . [W]hat do you think about that?'" RP (Sept. 16, 2009) at 10. Mr. Collins then admitted there was marijuana in the brownies. Deputy Ellard testified that there was a pathway for Mr. Collins to leave had he chosen to do so. Deputy Ellard also denied that he told Mr. Collins to sit down. Under these facts, the contact did not constitute a seizure, and Mr. Collins's statement was admissible.

Mr. Collins next argues that the social contact was a pretext to investigate him. "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). In *Ladson,* the defendant was followed by officers who waited for him to commit a traffic violation so they could make a valid stop. *Id.* at 346. The court suppressed the evidence obtained from the search. *Id.* at 360.

In *Bailey*, the court distinguished a pretextual traffic stop from a social contact. *Bailey*, 154 Wn. App. at 302-03. In *Bailey*, the officer saw a man walking down a deserted street, asked him what he was doing, and asked to see his identification. *Id.* at 298. The defendant handed the officer his identification and informed the officer that there may be an outstanding arrest warrant for him. *Id.* In regards to the pretext of the encounter, the court stated "the officer did not illuminate his spotlight, emergency lights, or siren. He simply asked Mr. Bailey, who was on foot, whether he had a minute to talk, where he was going, and whether he would provide identification." *Id.* at 303. The court held that the subsequent arrest was constitutional. *Id.*

The facts surrounding the contact with Mr. Collins are more similar to those found in *Bailey* than in *Ladson*. Deputy Ellard was suspicious of Mr. Collins; however, he did

not follow Mr. Collins and make a traffic stop as a pretext for a search. Deputy Ellard approached Mr. Collins and engaged him in a brief dialogue. This led to Mr. Collins admitting to the crime of possession. We conclude that the trial court did not err by denying the motion to suppress.

Mr. Collins also asserts that during closing remarks "the Prosecutor made statements to the effect of 'something is wrong he didn't even testify.'" Statement of Additional Grounds for Review. He believes that this statement was in violation of his Fifth Amendment right to not incriminate himself. However, the record contains no such statement.

During closing argument, the prosecutor stated that Mr. Collins never indicated to the officers that the person sitting at the table with him at the time of the encounter actually owned the brownies. The prosecutor stated that "there's no indication that this marijuana, these brownies, these muffins belong to anybody other than Mr. Collins." RP (Oct. 22, 2009) at 170. Defense counsel objected, stating "I'm sorry, your Honor, I have to object to the reference to the defendant not saying anything." RP (Oct. 22, 2009) at 170. The judge responded, "[y]our objection is noted, Counsel." RP (Oct. 22, 2009) at 170.

"To prevail on a claim of prosecutorial misconduct, a defendant must show first

that the prosecutor's comments were improper and second that the comments were prejudicial." *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). "When a prosecutor improperly remarks on a defendant's failure to testify, it violates his Fifth Amendment privilege against self-incrimination." *State v. French*, 101 Wn. App. 380, 386, 4 P.3d 857 (2000). Here, the prosecutor's words touched on the lack of denial by Mr. Collins when arrested. This statement by the prosecutor may have been improper.

"In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *Warren*, 165 Wn.2d at 28. In *Warren*, the court held that the prosecutor's conduct was improper but was overcome by the court in giving jury instructions. *Id.* It, thus, did not amount to prejudice. *Id.* at 36.

In this case, the prosecutor made a comment that may have been improper. But in light of the totality of the circumstances, the one statement by the prosecutor was not likely prejudicial toward Mr. Collins.

Lastly, Mr. Collins asserts that the dismissal of two potential jurors created a disadvantage for him. This court's review is limited to issues contained in the record. "Where . . . the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." *State v. McFarland*, 127 Wn.2d

322, 335, 899 P.2d 1251 (1995). The voir dire portion of the proceeding was not transcribed. If other facts exist to support Mr. Collins's contentions, he must present them in a personal restraint petition. *See id.*

We affirm the convictions for possession of a controlled substance with intent to deliver and possession of psilocin.

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.

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Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.