2003

State of Utah v. Jose Manuel Vallasenor-Meza : Brief of Appellee

Utah Court of Appeals

Jeanne B. Inouye; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Guy Probert; Deputy County Attorney; Counsel for Appellee.
Margaret P. Lindsay; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20030738-CA
JOSE MANUEL VALLASENOR-MEZA, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS OF POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (2003), POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (2003), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (2003), ENTERED UPON A CONDITIONAL GUILTY PLEA IN THE FOURTH JUDICIAL DISTRICT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Utah Attorney General's Office
160 East 300 South
PO BOX 140854
Salt Lake City, UT 84114-0854

GUY PROBERT
Deputy Utah County Attorney

Counsel for Appellee

MARGARET P. LINDSAY
99 East Center Street
PO BOX 1895
Orem, Utah 84059-1895

Counsel for Appellant

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20030738-CA
JOSE MANUEL VALLASENOR-MEZA, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS OF POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (2003), POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (2003), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (2003), ENTERED UPON A CONDITIONAL GUILTY PLEA IN THE FOURTH JUDICIAL DISTRICT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

JEANNE B. INOUYE (1618)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Utah Attorney General's Office
160 East 300 South
PO BOX 140854
Salt Lake City, UT 84114-0854

GUY PROBERT
Deputy Utah County Attorney

Counsel for Appellee

MARGARET P. LINDSAY
99 East Center Street
PO BOX 1895
Orem, Utah 84059-1895

Counsel for Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JOSE MANUEL VALLASENOR-MEZA, Defendant/Appellant.	: : : :	Case No. 20030738-CA

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of possession with intent to distribute a controlled substance, a second degree felony in violation of Utah Code Ann. § 58-37-8 (2003), possession with intent to distribute a controlled substance, a third degree felony in violation of Utah Code Ann. § 58-37-8 (2003), and possession of drug paraphernalia, a class B misdemeanor in violation of Utah Code Ann. § 58-37a-5 (2003), entered upon a conditional guilty plea in the Fourth Judicial District, Utah County, the Honorable Steven L. Hansen presiding. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Issue. Did the trial court err when it denied defendant's motion to suppress?

Standard of Review. The appellate court "review[s] the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard. However, [the court] review[s] the trial court's conclusions of law based on these findings for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Veteto*, 2000 UT 62, ¶ 8, 6 P.3d 1133 (quotation and citation omitted).

CONSTITUTIONAL STATUTES, PROVISIONS, AND RULES

The following constitutional provision is relevant to this appeal.

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant was charged with possession with intent to distribute a controlled substance (cocaine) in a drug-free zone, a first degree felony, possession with intent to distribute a controlled substance (marijuana) in a drug-free zone, a second degree felony, and possession of drug paraphernalia in a drug-free zone, a class A misdemeanor. R4-5.

Following a preliminary hearing, the trial court bound defendant over on all charges. R21-22; 93:20. Defendant moved to suppress evidence found when police officers entered his home, and the trial court held an evidentiary hearing on the motion. R23-24, 34-35, 92. The trial court denied the motion, finding that the officers had probable cause and exigent circumstances to support the entry. R54-57, 75-76.

Defendant entered a guilty plea, reserving his right to appeal the denial of the motion to suppress. R59-71, 73-74. Defendant was sentenced to an indeterminate prison term of one to fifteen years. R80. The court suspended the prison term and ordered that defendant serve a term of 180 days in the county jail. R80-81.

Defendant timely appealed. R83.

STATEMENT OF THE FACTS

On February 25, 2003, Clair Call received a telephone call from his brother. R92:5. His brother said that he had just listened to a message from their sister on his answering machine," indicating that she and her boyfriend "were in a fight," and it "sounded like she was getting beat up." *Id.* The brother mentioned "yelling and screaming" and said that the fight "[s]ounded bad" and "violent." *Id.*

Because his brother was hesitant to telephone the police, Call said that he would contact the police himself. *Id.* When Call phoned the police, he told them that "it sounded like [his sister] was getting beat up." *Id.* at 6. He told them, "[F]rom the sound of it, the way the machine had been left on accidentally, [my brother] was hearing it, and it made it sound like it was going on right then." *Id.* He indicated that defendant "was beating the crap out of [his sister]." *Id.*

At the suppression hearing, Call explained that he had not actually heard the message on the answering machine and did not know when his sister had made the call, but he "assumed it was like right then." *Id.* at 5-6.

Call knew the location of the residence, a trailer home, but he did not remember the house number. *Id.* He therefore agreed to meet the police officers and take them to the home. *Id.* at 6-7.

Orem City police officer Michael Parsons and his partner, Officer Garcia, received a dispatch indicating that a family fight was in progress. *Id.*; R93:18. The dispatcher stated that the reporting party would meet Parsons at the entrance to the trailer court and take him to the trailer where the incident was occurring. R92:12. When Parsons and Garcia arrived, they met Call. *Id.* Call stated that he had made a mistake about the location and that the location was within a trailer park approximately three blocks north. *Id.* Parsons followed Call to the trailer park, which was located across the street from the Orem Skateboarding Park, and Call led him to the trailer. *Id.* at 12; R93:17.

Upon exiting the vehicle, Parsons "immediately made contact with the defendant as he was sticking his head out the door." R92:12-13. Defendant was not cooperative. *Id.* at 13. Parsons and Garcia advised defendant that they "were there on a report of a fight in progress between him and his girlfriend." *Id.* Defendant responded, stating that "there had been a fight, but it was over, and she was gone." *Id.* Parsons, however, "was under the impression that the fight was ongoing" and "that [the girlfriend] was possibly inside hurt or worse." *Id.*

Parsons and Garcia then asked for permission to enter the trailer and "confirm the safety of both parties." *Id.* Defendant would not let them enter. *Id.* Instead, he "st[ood] there with the door held up real close behind him." *Id.* "He had one hand held up very

close against the door and [was] being very guarded about what was behind the door." *Id.*

Parsons stated that he and Garcia asked defendant to show them the other hand so that they "could confirm that he wasn't holding a weapon." *Id.* at 14. Defendant would not bring his second hand outside the door. *Id.* Parsons then stood back, and Garcia drew his weapon. *Id.* The officers had to tell defendant three times to show them his hands. R93:12. They told defendant, "You need to show us your hands right now." R92:14-15. At that, defendant "slid out a little bit" and "showed [them] both hands." *Id.* at 15. As they talked with him, however, he kept sticking his hands in his pockets." *Id.* They "asked him not to because [they] were concerned for [their] safety." *Id.* Defendant remained "furtive and wouldn't answer questions and kept putting his hands in his pockets." *Id.*

The police officers repeatedly asked defendant to come outside. R93:12-13. When he finally exited the trailer, they asked him to come to the bottom of the steps where they searched him for weapons. *Id.* R92:15. At that time, they asked, "Is there anybody in the trailer?" *Id.* Defendant said, "Yes." *Id.* They then asked if the girlfriend was in the trailer. *Id.* Defendant said, "No, no, no; nobody is in the trailer." *Id.* Officer Parsons stated, "I felt with the way he was acting [the girlfriend] was possibly inside and injured and went to check on her welfare." *Id.*

Parsons entered the trailer only to determine whether the girlfriend was in the trailer. R93:13. Parsons stated, "I was under the impression it had just happened, and I thought she would still be there possibly hurt or worse. I walked to the . . . back bedroom

and was not able to locate her." *Id.* He continued, "As I got to the back bedroom and saw that she wasn't in there, I saw a marijuana pipe at first." *Id.* Turning to walk out of the trailer, he "observed in front of [him] a kitchen table and what appeared to be a large quantity of cocaine." *Id.* at 14.

Parsons then called to Garcia to place defendant in custody. *Id.* He also called his supervisor because "there was such a large amount, it appeared to be packaged for resale, and I wanted to call my sergeant down because I thought we might need to get some other agencies involved." *Id.*

When the supervisor, Sergeant Mallinson, arrived, he asked defendant's consent to search the apartment, and defendant gave consent. *Id.* Contraband seized included 26.6 grams of cocaine, 213.3 grams of marijuana, and a marijuana pipe. *Id.* at 13, 16. Defendant claimed that all of the drugs belonged to him, but stated that he was going to tell the judge that he found them in a garbage can. *Id.* at 17.

Defendant's girlfriend later returned to the trailer. *Id.* at 19. Upon her return, the officers learned that she had been at work. *Id.*

SUMMARY OF ARGUMENT

1. Police officers had probable cause to believe that a crime had been or was being committed. The trial court properly concluded that the report by an identified citizen-informant, together with defendant's inconsistent answers and suspicious behavior, supported a reasonable belief that a crime had been committed.

2. Exigent circumstances existed to justify a warrantless arrest. Under the circumstances, police had a reasonable basis to support a belief that the girlfriend was

injured and in need of help, that the beating would continue if entry were delayed, and/or that defendant would take action to conceal evidence of the assault if the entry were delayed.

3. The trial court did not clearly err when it found that defendant gave inconsistent statements about whether or not the girlfriend was in the trailer. Even assuming that the trial court made a minor misstatement of the order of defendant's responses, that misstatement did not undermine its finding that defendant's inconsistent behavior gave the officers reason to believe that the victim may still have been inside or its determination that exigent circumstances existed.

ARGUMENT

Defendant claims that "the warrantless search of [his] home violated the Fourth Amendment as it was not justified by probable cause and exigent circumstances." Br. Appellant at 8. This claim fails.

The trial court concluded that "Officer Parsons did possess probable cause and exigent circumstances did exist to allow him warrantless entry into Defendant's residence." R55. The court reasoned that the officer had probable cause to believe a crime was occurring "because he was informed of the crime by an identified citizen informant." *Id.* The Court reasoned that the officer's belief that an exigency existed was based on several factors: (1) "the victim's brother reported to the Officer that his sister was 'getting the crap beat out of her'" and "this abuse was currently in progress, " (2) defendant "only partially opened his door and kept one hand hidden behind the door, raising concern for the Officer's safety as well as the safety of the victim," (3) defendant

"was acting extremely nervous and suspicious during the encounter," and (4) "when Officer Parsons asked Defendant about the wherabouts of his girlfriend the Defendant gave a conflicting and suspicious answer." R54-55. "This answer enhanced the Officer's suspicion that the victim may [have been] in the home and in need of assistance." R54.

"The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801 (1991).

Warrantless searches, particularly those inside a home, are presumptively unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967) (citations omitted); *see also United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296 (1984); *Payton v. New York*, 445 U.S. 573, 586-87, 100 S.Ct. 1371 (1980); *State v. Cushing*, 2004 UT App 73, ¶ 25, 88 P.3d 368, *cert. granted*, 90 P.3d 1041 (Utah 2004). "The burden of establishing the existence of one of the exceptions to the warrant requirement is on the prosecution." *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990).

One exception to the warrant requirement is "exigent circumstances," that is, "a plausible claim of specially pressing or urgent law enforcement need." *Illinois v. McArthur*, 531 U.S. 326, 331, 121 S.Ct. 946 (2001). A warrantless entry is justified under the exigent circumstances exception if "it [i]s supported by probable cause and exigent circumstances." *State v. Comer*, 2002 UT App 219, ¶ 21, 51 P.3d 55 (citing *State v. Yoder*, 935 P.2d 534, 540 (Utah App. 1997)).

A. The officers had probable cause to believe that an offense had been or was being committed by defendant.

"Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *State v. Dorsey*, 731 P.2d 1085, 1087 (Utah 1986) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)); *accord Comer*, 2002 UT App 219, at ¶ 21; *Yoder*, 935 P.2d at 540. A determination of probable cause is based on the totality of the circumstances. *Maryland v. Pringle*, ___ U.S. ___, 124 S.Ct. 795, 800 (2003) ("probable cause standard . . . depends on the totality of the circumstances"); *accord Yoder*, 935 P.2d at 540. In determining the existence of probable cause, the courts look to what the officers had reason to believe at the time of their entry, not to what subsequently occurred. *Ker v. California*, 374 U.S. 23, 41 n.12, 83 S.Ct. 1623 (1963) ("It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe at the time of their entry.") (citation omitted); *State v. Ashe*, 745 P.2d 1255, 1262 (Utah 1987) ("The existence of probable cause and exigent circumstances must be determined by evaluating the facts available at the time of the warrantless entry and search.") (quotation and citation omitted).

Looking at the totality of the circumstances in this case, probable cause existed to support a belief that a crime had been or was being committed. The officers had reasonably trustworthy information. A known citizen informant, Clair Call, had

telephoned police to tell them that his sister's boyfriend was "beating the crap out of her." R92:6. Call not only made the report, but went with the officers to the trailer where he believed the assault was occurring. *Id.* at 12-16. *See Comer*, 2002 UT App 219, at ¶ 22 (holding that an identified citizen informant is high on the reliability scale).

When police officers arrived, defendant appeared furtive. *Id.* at 15. His holding the door closed and his unwillingness to show his hands were factors supporting the officers' concerns that defendant had assaulted his girlfriend. *Id.* at 13-14. Defendant appeared to be attempting to prevent the officers from seeing something inside the home. *Id.* at 13. Defendant answered both "yes" and "no" to officers' questions about whether anyone was in the trailer, again suggesting that he was attempting to conceal something. *Id.* at 15-16. Such furtive behavior, when coupled with the reliable report of the citizen informant, provided the officer with probable cause to believe that a crime had been or was being committed. *See Comer*, 2002 UT App 219, at ¶ 23 (observing that resident's abrupt withdrawal from conversation with police about domestic violence report and unexplained retreat into home was a suspicious circumstance, conveying apparent attempt to hide something and contributing to establishment of probable cause); *State v. Spurgeon*, 904 P.2d 220, 227 (Utah App. 1995) (stating that "false denials often are significant in probable cause determinations" and "evasive responses [to police questions] in conjunction with highly suspicious behavior may be used to determine the existence of probable cause"); *Provo City Corp. v. Spotts*, 861 P.2d 437, 440 (Utah App. 1993) (noting case law holding that "furtive gestures" helped constitute probable cause);

State v. Holmes, 774 P.2d 506, 511 (Utah App. 1989) (holding that "furtive movements" are "certainly relevant in establishing probable cause").

1. Probable cause existed even though the identified citizen informant did not himself witness the beating.

Defendant argues that trustworthiness cannot be presumed where the citizen informant is not a victim or witness of the crime. Br. Appellant at 12. Defendant cites to no case so holding, but only to case law holding that trustworthiness can be presumed "when a citizen-informant provides information as a victim or a witness of a crime." *Id.* (citing *Comer*, 2002 UT App 219, ¶ 22). This precedent does not support the converse proposition.

In any case, the issue before the court was not whether the court could presume trustworthiness, but whether the facts supported a reasonable belief that a crime has been or was being committed, that is, whether or not probable cause existed. Probable cause must be determined from the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317 (1983). The probable cause standard is a "practical, nontechnical conception." *Id.* at 231 (quotation and citation omitted). "In dealing with probable cause, . . . as the very name implies, [the courts] deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicicans, act." *Id.* (quotation and citation omitted).

In looking at the totality of the circumstances, the trial court properly held that the police officers had probable cause. R55. While the identified citizen informant did not

himself witness the beating, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [were still] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or [wa]s being committed." *Yoder*, 935 P.2d at 540 (quotation and citation omitted).

Clair Call, the citizen informant, was not only identified, but was willing to become involved by accompanying the police officers to the trailer park. R92:6, 12. He was not a mere stranger to the offense and the parties: he was the victim's brother, and he knew defendant, who had been his sister's common-law partner for almost five years. *Id.* at 6; R93:6; PSI at 2. The informant did not witness the crime, but received a report from his brother, who had learned of the offense from the victim's message on his answering machine. R92:5, 6.

Further, Call provided a reasonable explanation for why he was reporting the crime when the witness was not—the witness, i.e., the victim, was in the process of having "the crap beat out of her." *Id.* at 6. Police could reasonably have concluded that the victim would have had difficulty making a first-hand report and therefore contacted her brother. Reliance on a report from the victim's brother, who indicated that the report was recorded on another brother's answering machine and who apparently had nothing to gain from filing a false report, was reasonable. *See id.* at 5.

The report made under these circumstances, together with the defendant's suspicious behavior when contacted, fully supported a determination that probable cause existed to believe that a crime had been committed. *See id.* at 13-15.

2. **Defendant's behavior did not dispel any suspicions raised by the initial report.**

Defendant claims that he "provided police with information that should have dispelled the suspicions raised by the initial report." Br. Appellant at 13. This claim is contrary to the findings of the trial court, including its findings that defendant's only partially opened the door, kept his hand hidden, gave inconsistent answers about the presence of anyone else in the trailer, and acted extremely nervously and suspiciously. R54-55. These circumstances "contributed to Officer Parson's reasonable belief that the victim may [have been] inside the home and in need of immediate assistance." R54. Not only did defendant fail to dispel the suspicions raised by Call's report, his behavior exacerbated the officer's concerns. *See Comer*, 2002 UT App 219, at ¶ 23; *Spurgeon*, 904 P.2d at 227; *Spotts*, 861 P.2d at 440; *Holmes*, 774 P.2d at 511.

B. Exigent circumstances existed to support the warrantless entry.

"Probable cause is never enough to search . . . and seize . . . without a warrant." *Comer*, 2002 UT App 219, at ¶ 24 (quotation and citation omitted). However, "a warrantless search of a residence is constitutionally permissible where probable cause and exigent circumstances are proven." *Id.* (quotation and citation omitted).

"Exigent circumstances are those that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *State v. Comer*, 2002 UT App 219, at ¶ 24 (quotation and citation omitted). "[W]hile 'exigent circumstances' have

multiple characteristics, the guiding principle is reasonableness, and each case must be examined in the light of facts known to the officers at the time they acted." *Id.* (quotation and citation omitted). In determining the existence of exigent circumstances, the courts properly "consider[s] all the facts and circumstances which occurred up to and at the time the police entered the house." *Ashe*, 745 P.2d at 1262. They "evaluat[e] the facts available at the time of the warrantless entry and search." *Id.; cf. United States v. Banks*, 540 U.S. 31, ___, 124 S.Ct. 521, 527 (2003) (observing that reasonableness of search "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight") (citation and quotation omitted).

Exigent circumstances made the warrantless entry in this case reasonable. The officers had probable cause not only to believe that a domestic violence offense had been committed, but that it was being committed. The victim's brother told the police that "it sounded like [his] sister was getting beat up," that the beating "was going on right then," and that defendant "was beating the crap out of her." R92:6. Thus, the police had received not only a report that a family fight was in progress, but that the fight involved severe violence and not mere quarrelling.

Moreover, defendant's furtive movements and inconsistent statements about the presence of someone else in the trailer "could reasonably have indicated to the officers that any of a number of scenarios might be about to occur, each of which would cause an officer to reasonably believe there was no time to get a warrant and/or that his presence was necessary to prevent physical harm to persons or destruction of evidence." *Comer*, 2002 UT App 219, ¶ 26. The officers could reasonably have feared that defendant had

seriously harmed the victim and that she was in need of immediate help, that defendant "might immediately resume the [beating] reported by the citizen informant," or that defendant might attempt "to cover up evidence of already-perpetrated domestic violence." *Id.* These facts supported a "conclu[sion] that exigent circumstances existed, justifying the officers' warrantless entry into [defendant's] home." *Id.*

Compared with *Comer*, where this Court found both probable cause and exigent circumstances to support a warrantless home entry following a report of domestic violence, this case presents greater exigencies. As in *Comer*, police received a reasonably trustworthy report of domestic violence from an identified citizen informant. *See* 2002 UT App 219, ¶ 22. When the officers contacted defendant in this case, as when officers contacted the defendant in *Comer*, defendant's actions heightened the officers' concerns and suggested that it would be unreasonable to take the time to get a warrant. *See id.* But in this case, unlike *Comer*, police officers had more than a domestic violence report. Here, they had a report not just of a fight, which could have been nothing more than a quarrel, but a report that serious violence had occurred and was ongoing. *See* R92:6.

Under these circumstances, the officers' entry was not only reasonable, but necessary where the circumstances would have caused "a reasonable person to believe that entry . . . was necessary to prevent physical harm to [the girlfriend]" or "destruction of relevant evidence." *Comer*, 2002 UT App 219, at ¶ 24. Had the officers *not* entered under these circumstances, they may, in fact, have been derelict in their duty.

C. The trial court's factual findings regarding defendant's inconsistent answers about the presence of someone in the trailer are not clearly erroneous. Even if the trial court's findings misstate the order of defendant's inconsistent statements, the fact of the inconsistencies, not their order, was central to the conclusion that exigent circumstances exited.

Defendant states that the trial court found that "Defendant initially told [Officer Parson] that the victim was present inside but then told the Officer that they had a fight several hours earlier and that she was now at work." Br. Appellant at 10, citing R55. Defendant argues that this finding is clearly erroneous and suggests that it undermines "the trial court's analysis concerning exigent circumstances." *Id.* at 10-11.

In its memorandum decision, the trial court noted that "when Officer Parsons asked Defendant about the whereabouts of his girlfriend the Defendant gave a conflicting and suspicious answer." *Id.* at 54-55. "Rather than calmly explaining that [he and his girlfriend had] had a fight earlier and that she was currently at work, [defendant] appeared excessively concerned about not letting the Officer see inside his home."[1] *Id.* at 54. Further, when Officer Parsons asked about defendant's girlfriend, defendant "[f]irst . . . replied that she was in the house but then . . . .changed his story and said she was at work. This answer enhanced the Officer's suspicion that the victim may be in the home and in need of assistance." *Id.*

---

[1] While in some circumstances, an individual's desire to prevent police from looking into his or her home may suggest nothing more than an exercise of his right to privacy, "seemingly innocent conduct may become suspicious in light of the initial tip." *Comer*, 2002 UT App 219, at ¶ 23 (quotation and citation omitted).

This finding is not clearly erroneous. On cross-examination at the suppression hearing, Parsons stated that "when we asked if [the girlfriend] was inside, [defendant] said yes. Then he said, No, no; she's at work." *Id.* at 16. The trial judge was entitled to make a determination that the cross-examination testimony, which presented defendant's inconsistent statements in a different order from that given during direct examination, was accurate.[2]

In any case, even if the trial court's finding regarding the order in which defendant made his inconsistent statements were erroneous, the order was inconsequential. What was significant was the fact that defendant had made inconsistent statements about whether someone was or was not in the trailer. That matter was uncontroverted. Therefore, the trial court's finding that "Defendant gave a conflicting and suspicious answer" to questions about the girlfriend's presence in the trailer was not clearly erroneous. R54. Neither was the trial court's related finding that defendant's answer "enhanced the Officer's suspicion that the victim may [have been] in the home and in need of assistance" clearly erroneous. *Id.*

Thus, even assuming that the trial court misstated the order in which defendant's inconsistent statements were made, its finding that defendant's answers were inconsistent and that the inconsistencies contributed to a reasonable belief that exigent circumstances

---

[2] On direct examination at the suppression hearing, Parsons stated that when he told defendant he had come to investigate "a report of a fight in progress between him and his girlfriend," defendant acknowledged that there had been a fight, asserted that it was over, and said that his girlfriend was gone. R92:13. Asked again if there was anybody in the trailer, defendant said yes. *Id.* at 15. Asked if the girlfriend was in the trailer, defendant said, "No, no, no; nobody is in the trailer." *Id.*

existed was not erroneous. If the trial court misstated the order of the statements, that mistatement does not undermine the trial court's conclusion that exigent circumstances existed.[3]

CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted this 9th day of September, 2004.

MARK L. SURTLEFF
ATTORNEY GENERAL

JEANNE B. INOUYE
ASSISTANT ATTORNEY GENERAL

---

[3] Defendant also claims that any additional evidence found after defendant gave consent to search "was not sufficiently attenuated from the officers[']' unconstitutional entry into the residence." Br. Appellant at 16. Evidence "obtained by police exploitation of a prior illegality" is not admissible. *State v. Hansen*, 2002 UT 125, ¶ 62, 63 P.3d 650. Here, however, no prior illegality occurred. Officers had both probable cause and exigent circumstances to justify the warrantless entry of defendant's home.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2004, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

MARGARET P. LINDSAY
99 East Center Street
PO BOX 1895
Orem, Utah 84059-1895

Counsel for Appellant

Jeanne B. Inouye
JEANNE B. INOUYE