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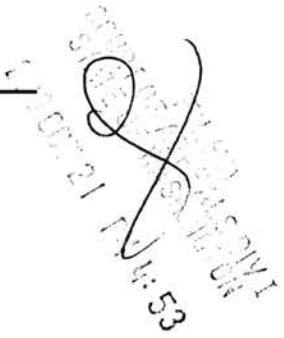
NO. 70123-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE



STATE OF WASHINGTON,

Respondent,

v.

T.G.
(D.O.B. 3/12/97),

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

For a period of three seconds, Erin Waldon saw two boys attempting to open her kitchen window. She focused on the boy closer to the window, who was not T.G. Police stopped T.G. and D.G. at a bus stop, requested to search T.G.'s backpack, checked their identities with their school, and asked Ms. Waldon whether these were the boys at her home. Ms. Waldon could not identify them.

Rather than release either boy, the police continued to detain them while Ms. Waldon watched. They separated the two boys, gave *Miranda* warnings, took their photographs, and tried to trick them into confessing. When the police moved the boys closer for a second show-up, Ms. Waldon identified them as the people she saw outside her window.

The police lacked sufficient information to detain T.G. or authority to search his backpack. The resulting unduly suggestive show-up produced an unreliable identification that should not have been admissible against T.G. Because no other evidence connects T.G. to the incident, his adjudication for attempted residential burglary must be reversed.

B. ASSIGNMENTS OF ERROR.

1. T.G. was unlawfully seized, searched, and subjected to a prolonged detention in violation of the Fourth Amendment and article I, section 7.

2. The in-court and out-of-court identification procedures were impermissibly suggestive and produced an unreliable identification, contrary to T.G.'s right to due process of law.

3. The court erred in entering CrR 3.6 finding of fact 13, regarding whether T.G. matched the description of the perpetrator. CP 96.

4. The court erred in entering CrR 3.6 finding of fact 17, which incorrectly states that T.G. voluntarily opened his backpack. CP 97.

5. The court erred in entering CrR 3.6 finding of fact 19, because Ms. Waldon did not explain her reasons for being unable to identify T.G. at the time of the first show-up. CP 97-98.

6. To the extent it is construed as a finding of fact, the Court erred in entering CrR 3.6 conclusion of law 3 because the seizure was not justified by sufficient evidence. CP 99.

7. To the extent it is construed as a finding of fact, the Court erred in entering CrR 3.6 conclusion of law 6 because the identification was inadmissible. CP 100.

8. The court erred in entering the CrR 6.1 finding of fact 25, incorrectly implying that Ms. Waldon's identification stemmed from the incident rather than the lengthy on-the-street detention and in-court proceedings. CP 82.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A person may be seized only if police have individualized suspicion of his involvement in criminal activity and he must be released when evidence shows the person was not involved in the suspected criminal activity. T.G. was seized because he met a broad description of being a white teenage boy with brown hair and he was detained even after the complaining witness was unable to identify him. Was T.G. seized for a prolonged period of time absent reasonable suspicion?

2. A teenager lawfully consents to a police search of his closed backpack during an investigative detention only if the consent is intelligent and voluntary. A police officer detained 15-year-old T.G., asked for identification, called a police officer stationed at his school,

and requested that T.G. let him search his backpack without telling him he had the right to refuse or informing him of any of his rights. Did the police search T.G.'s backpack without obtaining his informed and meaningful consent?

3. A show-up identification is inherently suggestive and will be inadmissible if obtained in an unreliable fashion. The complaining witness had a very quick glimpse of two boys outside her window, was focused on the other boy during this short viewing opportunity, gave descriptions that did not match T.G. or D.G., and did not identify either boy when she first saw them. When the complainant changed her identification at a second joint show-up that occurred after she watched police officers interrogate the boys when she was unable to identify them initially, was the identification the product of unreliable and suggestive police procedures?

D. STATEMENT OF THE CASE.

On May 3, 2012, Erin Waldon heard her doorbell ring and knocking on her front door. 1RP 35. As she walked toward the door, she noticed two boys standing outside her kitchen window and saw one boy's hand on the window. 1RP 36, 43. She looked at them "for about three seconds," then they ran away "really fast." 1RP 37, 55.

The window Ms. Waldon looked through was covered by slatted blinds that were turned open so they formed lines across the glass. 1RP 48; *see* Ex. 3 (showing closed, narrow blinds). Based on the few seconds she glimpsed the two boys through her slatted blinds, Ms. Waldon gave a description to the 911 operator. 1RP 38. She described the boys as very thin, 14 to 15 years old, and of the same height.1RP 38, 39, 55; 2RP 170, 276; Pretrial Ex. 2. She said they were both "wearing t-shirts" and possibly "one had a backpack."1RP 38; Pretrial Ex. 2.[1]

Ms. Waldon "focused in" on one boy who was closer to the window and had darker hair and darker skin tone.[2] 1RP 37, 39, 78. The 911 operator asked Ms. Waldon for the race of either boy, suggesting options such as black, Caucasian, Asian. 1RP 38. Ms. Waldon said the boy near the window was Asian because it was "the closest nationality that [the operator] suggested." 1RP 39, 71. Ms. Waldon described the second boy as light skinned with "reddish" brown hair. 1RP 98. At trial

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[1] At trial, Ms. Waldon changed her original description and said the boys could have been wearing long sleeve shirts or sweatshirts but she was not sure. 1RP 86.

[2] Ms. Waldon said, "I'm referring to the person -- the one that I focused in on, he wasn't blond, basically, and he wasn't pale. That's what I mean when I say darker hair and darker skin." 1RP 39.

she said she did not get a good enough look at the second boy's hair other than that it was lighter than the first boy's hair. 1RP 78.

Officer John Ross arrived at Ms. Waldon's house. 1RP 95. She directed the officer northbound. 1RP 97. After circling the neighborhood with no success, Officer Ross headed toward the Kent-Meridian high school because there would be school-aged youths in the area. 1RP 167. The officer traveled south toward the school although Ms. Waldon said the boys ran north. 1RP 166.

The first two teenagers Officer Ross saw were at a bus stop near the high school. 2RP 168. He noticed that the boys had hair that looked wetter than their shirts and it had been raining earlier. 1RP 101; 2RP 129. One boy, D.G., "from a distance, he could have been possibly Southeast Asian. I wasn't sure, but there was some type of ethnicity in there." 1RP 170. Officer Ross thought that D.G. looked "Latino or American" up close. 2RP 170. In his police report, Officer Ross wrote that D.G. was Native American. CP 51; *See* Ex. 8 (photographs of T.G. and D.G.).

T.G. was also as at the bus stop and he had brown hair, not reddish, as described by Ms. Waldon. 2RP 170, 171; Ex. 8. Neither boy looked "very thin" as the initial description stated. Pretrial Ex. 2; Ex. 8.

Nor did T.G. have a dark t-shirt – he wore a white t-shirt with gray lettering. 2RP 171; Ex. 8. Contrary to Ms. Waldon's description, T.G. and D.G. were different heights and both boys had backpacks. 2RP 132, 171; Pretrial Ex. 2.

At 10:03 a.m., ten minutes after Ms. Waldon's 911 call, Officer Ross radioed that he had the possible suspects. 2RP 269. He directed the boys to move about 25 feet away from the bus stop so he could talk to them. 2RP 127, 129. T.G. and D.G. complied. 2RP 128. He asked the boys what they were up to and why they were not in school. 2RP 131. They said they had gone back to T.G.'s house to get his books and were on their way back to school. CP 37.

They denied any involvement in a burglary and maintained that they had come straight to the bus stop after getting the books. 2RP 246, 248. Officer Ross told them they had "pretty big bags" and "requested" that they open them "to make sure there's just school stuff in there." 2RP 132. The boys did as they were told. 2RP 133. Officer Ross saw that T.G. had a reversible jacket in his bag that was dark colored on the inside and that side was wet. 2RP 133, 173, 280. Ms. Waldon had not described either boy as wearing a jacket. The officer continued talking to both boys, asking for identification and checking with the police

officer stationed at their school to confirm their enrollment and dates of birth. 2RP 135.

Two more uniformed police officers, Nixon and Graff, arrived on the scene during this time period. 2RP 171, 245,253. Officer Ross testified that the youths were not free to leave during this encounter. 2RP 171-72.

Officer Jason Jones drove Ms. Waldon and her husband in his police car to the scene for a show-up identification. 2RP 135. Officer Jones asked Ms. Waldon to look out the car window at both boys, who stood together. 1RP 60. From what Officer Ross described as a distance of 35-45 feet, Ms. Waldon said she was unsure if the boys were the people she saw at her home. 1RP 61, 66; 2RP 136.[3] Ms. Waldon said her vision is "better than 20/20" and she did not complain that any obstacles blocked her view at the time. 1RP 62; 2RP 291-92.

After Ms. Waldon said she was not sure that either boy was involved, Officer Jones left Ms. Waldon and her husband inside the police car while he and Officer Nixon questioned T.G. and D.G. 2RP 276. For at least 10 minutes, the officers separated T.G. and D.G. from each other, read some of their *Miranda* rights from police-issued books,

and pressed them about the incident. 2RP 137, 246, 248. Officer Jones photographed each boy for police records. 2RP 278.

Because they did not have grounds to arrest the boys, Officer Jones returned to his police car to drive Ms. Waldon to her home. 2RP 276. At this time, Ms. Waldon asked Officer Jones if he could move the boys closer. 1RP 64; 2RP 146-47, 276. Officer Ross brought them to the front of the bumper, which Ms. Waldon estimated as ten feet from her. 1RP 22, 65; 2RP 140. When T.G. and D.G. stood together at the front of the police car, Ms. Waldon then identified them as the people who had been at her home. 2RP 282, 301.

T.G. was charged with attempted residential burglary. The trial court refused to bifurcate the CrR 3.5 and 3.6 motions from the fact-finding adjudication. 1RP 9-11. The court denied T.G.'s CrR 3.6 motion to suppress the fruits of the illegal detention and unduly suggestive identification, but granted his motion to suppress statements T.G. made without *Miranda* warnings. 2RP 329, 331.

Dr. Jeffrey Loftus testified about factors affecting the reliability of show-up identifications following brief viewings of criminal activity, but the court concluded that Ms. Waldon's identification was not

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[3] Ms. Walden initially estimated the boys to be 50 yards away. 1RP 21.

irreparably tainted by suggestive procedures and her limited opportunity to observe during the incident. 2RP 218-19, 223, 226, 240, 363-67. The court admitted Ms. Waldon's out-of-court and in-court identification of T.G. and adjudicated him guilty as an accomplice to attempted residential burglary. CP 82.

E. ARGUMENT.

1. **The officers unlawfully detained T.G. for an unjustified duration without individualized suspicion**

a. *The state and federal constitutions prohibit unjustified seizures.*

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The protection of privacy and individual rights afforded by article I, section 7 is greater than that guaranteed by the Fourth Amendment and "recognizes a person's right to privacy with no express limitations." *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.2d 489 (2003) (citing *State v. White*, 97 Wn.2d 92, 108, 110, 640 P.2d 1061 (1982); *State v. Ferrier*, 136 Wn.2d 103, 111, 960

P.2d 927 (1998)); U.S. Const. amend IV**Error! Bookmark not defined.**.[4]

An officer may conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). When evaluating a *Terry* investigatory stop, a court must make two inquiries: "First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related in scope to the circumstances which justified the interference in the first place?" *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). Here, the answer to both inquiries is 'no.'

b. *The officers seized T.G. when detaining and questioning him, searching his bag, and directing his movements for over 20 minutes.*

"[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). It

[4] The Fourth Amendment provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

is "elementary that all investigatory detentions constitute a seizure." *State v. Armenta,* 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Whether the facts may be characterized as a seizure "is a legal question this court reviews de novo." *State v. Beito*, 147 Wn.App. 504, 508-09, 195 P.3d 1023 (2008).

Commanding a person to halt or demanding information from the person generally indicates a seizure has occurred. *O'Neill*, 148 Wn.2d at 577. The arrival of multiple police officers, physical touching of the person, or using words or a tone of voice "indicating that compliance with the officer's request might be compelled" are factors that "likely" result in a seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). Demanding someone show her hands or directing her to wait under circumstances in which a reasonable person would not feel free to decline constitutes a seizure. *State v. Carne*y, 142 Wn.App. 197, 202, 174 P.3d 142 (2007); *Beito*, 147 Wn.App. at 509. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 U.S. at 16.

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searches and seizures, shall not be violated."

Here, T.G. and D.G. were detained as part of a criminal investigation, which the officers made clear in their line of questioning. Officer Ross arrived in a marked police car, followed by three other officers. 2RP 126, 136-36. He instructed the boys to move away from the bus stop and asked them to explain where they were going and what they had been doing. 2RP 128-29. He requested their identification cards and when they did not have any, he took their names and dates of birth, then called a police officer stationed at their high school to confirm their identities. 2RP 135. The officers directed the boys to submit to one show-up, then continued to detain and question them, photographed them, and requested that they submit to a second identification procedure. 2RP 135, 137, 139. Officer Ross agreed that T.G. and D.G. were not free to leave. 2RP 171-72. T.G. and D.G. were "seized" as that term was intended under article I, section 7 and the Fourth Amendment.

c. *The Terry stop was unlawful at its inception because the police did not have individualized suspicion of T.G.'s involvement in a crime*

T.G.'s seizure is lawful only if the officer had specific and articulable facts giving rise to a reasonable suspicion that he was involved in criminal activity. *State v. Bray*, 143 Wn.App. 148, 150, 177

P.3d 154 (2008). "Merely associating with a person suspected of criminal activity 'does not strip away' individual constitutional protections" because constitutional protections are possessed individually. *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999) (quoting *State v. Broadnax,* 98 Wn.2d 289, 296, 654 P.2d 96 (1982) and *Ybarra v. Illinois,* 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)). "[A]n individual's mere proximity to others independently suspected of criminal activity" does not justify an investigative stop; "the suspicion must be individualized." *State v. Richardson*, 64 Wn.App. 693, 697, 825 P.2d 754 (1992).

Officer Ross admitted he stopped the first two teenaged boys he saw. 2RP 168-69. They were standing at a bus stop along with other people, not hiding. 2RP 169. The boys did not meet Ms. Waldon's description *individually*, contrary to the court's finding. CP 96.

Ms. Waldon reported one of the perpetrators was Asian. 1RP 98. Neither T.G. nor D.G. were Asian. 2RP 170. Officer Ross thought. D.G. had "some type of ethnicity in there" but did not believe he looked Asian. 2RP 170. At different points he identified D.G. as Southeast Asian, American, or Latino. 2RP 170. Although matching the identified race of a suspect can support a *Terry* stop, the fact that D.G. was of

some non-Caucasian race was not individualized and particularized suspicion as to him. *See State v. Almanza-Guzman*, 94 Wn.App. 563, 567, 972 P.2d 468 (1999) ("Race or color alone is not a sufficient basis for making an investigatory stop").

D.G.'s ambiguous "ethnicity" does not provide individualized suspicion to seize T.G. Ms. Waldon said the second boy who stood outside her window was wearing a dark t-shirt, but T.G. wore a white t-shirt. 1RP 55. She said the second boy had reddish hair while T.G. had brown hair. 2RP 171; Ex. 8. She said the boys were the same height and only one had a possible backpack, but T.G. and D.G. were different heights and both had backpacks. 2RP 170; Pretrial Ex. 2.

T.G. was not out of breath or sweating, although Ms. Waldon said the two boys ran away "really fast" and this flight occurred only minutes before the boys were stopped at the bus stop. [5] 1RP 55, 95; 2RP 169. Officer Ross testified that they appeared a "little nervous" when he approached, but he described a minor degree of nervousness typical of a person skipping school and there was no question that T.G. and D.G.

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[5] *See e.g., State v. Wheeler*, 108 Wn.2d 230, 232-33, 737 P.2d 1005 (1987) (defendant was detained where he was wearing a bright blue shirt with white stripes, as described by victim, and was sweating and out of breath as if he had been running). T.G.'s clothing did not match that described by Ms. Waldon

were supposed to be at school. 1RP 130. Neither boy fled nor evaded Officer Ross. 2RP 132. Being "a little nervous" in front of a police officer, especially when being questioned about why they were not in school, does not provide a reasonable basis to suspect T.G was involved in an attempted burglary. *See State v. Henry*, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995) ("most persons stopped by law enforcement officers display some signs of nervousness").

T.G. was seized because he was in a public place during the day instead of in school, had wet hair on a day that it had been raining, and was standing near a person who might have some ethnicity. This does not rise to the level of reasonable articulable suspicion where the boys did not match Ms. Waldon's description. *See State v. Martinez*, 135 Wn.App. 174, 180-81, 143 P.3d 618 (2006) (presence in a public place after dark in area of recent vehicle prowls does not provide "particularized suspicion" of criminal activity). Officer Ross did not have authority to stop and hold T.G. for extended questioning. The court's finding that the detention was justified is legally incorrect. CP 99-100.

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and neither boy appeared to be sweating or out of breath after what would have been a 7-9 minute run. 2RP 273.

d. *The seizure was unlawfully extended.*

"If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594, 599 (2003); *Bray*, 143 Wn.App. at 154. In considering the scope of the intrusion, the court must consider: (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d 733. If police actions exceed the proper scope of a valid *Terry* stop, they can be justified only if supported by probable cause to arrest. *Id.* at 740.

i. *The officers exceeded the permissible duration of the detention after the complainant did not identify T.G. as a possible burglar.*

Even if the initial detention was permitted based on the possibility that T.G. and D.G. were the people Ms. Waldon saw outside her home, they should have been released once Ms. Waldon did not identify them as the perpetrators. The officer had confirmed their identities, knew their names and dates of birth, and the complainant did not confirm that they committed a crime. 2RP 135.

Instead of releasing T.G. once Ms. Waldon could not identify him, the officers increased the custodial and intrusive nature of the

detention. They separated T.G. and D.G. from each other. 2RP 137, 176, 245. D.G. was read his *Miranda* warnings and the *Miranda* rights were discussed in a limited way with T.G., indicating the police considered the detentions to be custodial in nature. 2RP 137, 246-47, 278. Officer Jones photographed T.G. and D.G. because he still considered them suspects. 2RP 175, 292, 295.

As they separately questioned T.G. and D.G. at the scene after Ms. Waldon had not identified either boy, Officers Jones and Nixon pressed both boys to snitch on the other, telling each that the other one had already confessed to the burglary. 2RP 248, 292-93. At the same time, Officer Ross remained on the telephone with a police officer employed by T.G.'s school to further investigate T.G. and D.G. 2RP 135. This additional period of questioning lasted at least 10 minutes. 2RP 300-01. Contrary to the implication in Finding of Fact 19, Mr. Waldon did not initially ask for a second chance to view the two boys or complain that she needed to see them closer. CP 97-98.

There was no reasonable basis to continue the seizure after the complainant did not identify either boy, particularly where no further evidence demonstrated their involvement in a burglary. By continuing to detain T.G., subjecting him to more aggressive questioning,

photographing him as a suspect of a crime, and then requiring him to submit to a second identification procedure after the police had lost their authority to detain T.G., the officers violated T.G.'s right to be free from unjustified invasion of his private affairs.

ii. *The seizure cannot be justified by the unlawful search of T.G.'s backpack.*

One factor used to justify T.G.'s extended detention was that even though he wore a white t-shirt, Officer Ross had looked inside T.G.'s backpack, taken out a jacket stored inside the backpack, and found it wet on the inside. 2RP 279. Because the inside of the jacket was dark-colored and it was wet on that side, the police claimed it showed T.G. was hiding the fact that he had been wearing a dark top, just as Ms. Waldon had described the perpetrators wearing. 2RP 279. Officer Ross lacked authority to search T.G.'s backpack as part of the investigative detention.

Warrantless searches are per se unreasonable under our state constitution, subject to a limited set of carefully drawn exceptions. *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012). The State bears the burden of establishing that an exception to the warrant requirement applies. *Id.*

The trial court entered a finding that Officer Ross's search of the backpack was voluntary, but the court's finding is contrary to the record and inconsistent with law governing properly obtained consent to search a person's personal property. CP 97 (Finding of Fact 17). Officer Ross said he asked T.G. if he could look inside his backpack, but Officer Ross characterized his direction to T.G. that he open his backpack as a "request" rather than something that T.G. had the option to refuse. 2RP 132.

The only type of search permitted during a *Terry* stop is a brief frisk for weapons if the officer reasonably believes her safety or that of others is endangered. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The pat down may not be used as a pretext to search for evidence of a crime. *Id.* at 254. Here, neither boy was suspected of being armed and dangerous; no one claimed the backpack was searched for safety reasons; and the search was not a "pat down" for potential weapons. Instead, the officers were looking for evidence connecting the boys with an attempted burglary. The backpack's search is not justified as a weapons frisk under *Terry*.

To satisfy the consent exception to the warrant requirement, the prosecution bears the burden of proving a person's consent was

voluntarily obtained based on "informed and meaningful" understanding of the right to refuse consent. *State v. Schultz*, 170 Wn.2d 746, 757, 248 P.3d 484 (2011). The requirement of informed consent is based on recognized 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" to deny consent to a warrantless search." *State v. Khounvichai*, 149 Wn.2d 557, 564, 69 P.3d 862 (2003).

Under article I, section 7, a person must be warned that she is not required to provide consent to search her home in order for consent to be validly obtained. *Ferrier,* 136 Wn.2d at 112. The rights afforded by article I, section 7 may not be waived by "silent acquiescence" or by failing to object when they are too afraid or "too dumbfounded" to speak up. *Schultz*, 170 Wn.2d at 757. Just as a person's home may not be searched without a warrant or a legitimate exception to the warrant requirement, a person's backpack may not be searched by police without a warrant or applicable carefully drawn exception to the warrant requirement. *See State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) ("validity of the initial stop does not justify the intrusion" into personal property).

Under the Fourth Amendment, whether consent was freely and voluntarily obtained depends on the court weighing the totality of circumstances, including balancing: (1) whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; (3) whether the consenting person had been advised of his right not to consent; and (4) whether the person whose consent was sought was in custody of the police at the time. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80, 85 (2004). The prosecutor's burden of proving that the consent was "freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1792, 20 L.Ed.2d 797 (1968).

Here, Officer Ross did not tell T.G. he had the right to refuse the "request" that he open up his backpack for the officer to search, which shows the search was not obtained by informed consent. 2RP 132; *see Ferrier*, 136 Wn.2d at 115. T.G. had not received *Miranda* warnings or other explanation of his right to remain silent or receive an attorney's aid. 2RP 330. T.G. was 15-years-old, receiving special education services in high school, and had an IQ of 80, thus lacking the education

and experience to know of his right to refuse absent a search warrant. CP 68.

T.G.'s age increases the likelihood that he did not know, understand, or believe he could say no to officer's request to search his bag. *See J.D.B. v. North Carolina*, _ U.S. _, 131 S. Ct. 2394, 2406, 180 L.Ed.2d 310 (2011). A child's age has an objectively discernible relationship to his understanding of his freedom of action. *Id.* at 2404. Not only are children "generally are less mature and responsible than adults," they "often lack the experience, perspective, and judgment" to avoid detrimental choices and "are more vulnerable or susceptible to outside pressures" than adults. *Id.* at 2403 (internal citations omitted).

Having never been informed of his right to refuse consent, the prosecution did not prove that T.G., a 15 year-old boy with a limited IQ, rationally and meaningfully consented to the officer's request to search his backpack, contrary to the court's finding. CP 97. The information the police obtained from searching T.G.'s backpack cannot be used to support the lengthy detention.

iii. *The officers lacked authority to extend the seizure based on potential tobacco possession or missing school.*

Although the court made no findings that the police had authority to detain T.G. other than for the investigation of an attempted burglary, Officer Jones implied in his testimony that he felt justified in continuing the detention due to boys's absence from school and the cigarettes found in T.G.'s possession. 2RP 296. Neither reason justified the continued detention.

If the answers to the officer's investigatory questions do not provide probable cause to arrest, then the suspect must be released. *See State v. White*, 97 Wn.2d 92, 106, 640 P.2d 1061 (1982). Where police questioning extends beyond the initial basis for the stop and into an unrelated criminal investigation that does not separately authorize a seizure, the detention becomes unlawful. *Henry*, 80 Wn App. at 551.

Being absent from school is not a crime for which police may arrest someone, and therefore it does not justify a *Terry* stop, which requires suspicion of criminal activity. Internal school disciplinary procedures dictate the scope of any punishment that results from failing to appear at school. RCW 28A.225.010. To the extent the police could question T.G. about his absence from school under their community caretaking function, the police conducted and completed their investigation into whether T.G. should be at school. Officer Ross had a

lengthy conversation with the school resource officer and confirmed T.G.'s identity and attendance at a nearby school. 2RP 132. Any discipline that the school would deliver due to T.G.'s tardiness would be at the discretion and under the authority of the school. RCW 28A.225.010. Notably, Officer Ross was the person who was in contact with T.G.'s school, not Officer Jones, and Officer Ross did not claim that the school had relayed any authority to detain T.G. due to his failure to attend school that morning. Any permissible questions about whether T.G. should be at school had been resolved before the first identification procedure, when Officer Ross spoke with the school resource officer and ascertained T.G. provided accurate information about his name, age, and school of attendance. 2RP 132. Detaining him for further questioning about schooling was not justified.

Officer Jones also asserted that T.G. had cigarettes that he was too young to possess. 2RP 276, 279. The court made no finding that T.G. possessed cigarettes or that the seizure was justified as an investigation of such possession. CP 94-101. Officer Ross was the person who first detained T.G. and he did not see T.G. in possession of cigarettes, therefore, the police must have found cigarettes when

searching T.G., but the police lacked authority to search T.G., as discussed above.

It is not a crime, but a "class 3 civil infraction," for a minor to possess cigarettes and it is not an arrestable offense. RCW 70.155.080; RCW 10.73.100; *see State v. Duncan*, 146 Wn.2d 166, 175, 177, 43 P.3d 513 (2002). The police could issue a civil infraction notice but they already had T.G.'s name and date of birth, which were verified by school resource officer, and needed no further detention to issue a notice of civil infraction. *Duncan*, 146 Wn.2d at 174.

Officer Ross never claimed he was investigating tobacco possession and Officer Jones's passing reference to having found cigarettes does not justify the prolonged detention for activity that does not constitute a crime. The officers were not authorize to continue the detention to further investigate non-criminal activity when they had already received any relevant information about where T.G. went to school and whether he was old enough to possess cigarettes. These pretexts do not justice the continued detention.

e. *All fruits of the unconstitutional Terry stop should be suppressed.*

All evidence obtained directly or indirectly through the exploitation of an illegal seizure must be suppressed. *State v. Buelna Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009); *Rankin*, 151 Wn.2d at 700; *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). When a criminal conviction rests on an in-court identification that is "the fruit of a suspect pretrial identification," both the pretrial and the in-court identifications are excluded. *United States v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *State v. Le*, 103 Wn.App. 354, 366, 12 P.3d 653 (2000). The improperly gathered evidence resulting from T.G.'s unauthorized detention and search must be suppressed.

2. **Ms. Waldon identified T.G. only after a suggestive showup that renders her claim that T.G. was present unreliable and insufficient as the sole basis for his conviction.**

a. *An out of court identification procedure violates due process when it is so suggestive it creates a substantial likelihood of misidentification.*

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977);

Manson v. Brathwaite, 432 U.S. 98, 144, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *see* U.S. Const. amend. XIV; Const. art. I, § 3. A two-step inquiry is involved: first, a court must determine whether the identification procedure is suggestive. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A suggestive identification procedure is one that unduly calls attention to one individual over others. *Id.* If the police used a suggestive procedure, the court decides whether the suggestiveness created a substantial likelihood of misidentification. *Id.* There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn.App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972).

Against this standard, the show-up procedure conducted in T.G.'s case was so suggestive as to create a substantial likelihood of misidentification.

b. *The showup procedure was impermissibly suggestive.*

Show-up identifications are inherently suggestive because the eyewitness views only those particular people that the police have identified as suspects. *State v. Ramires*, 109 Wn.App. 749, 761, 37 P.3d 343, *rev. denied*, 146 Wn.2d 1022 (2002); *see State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006). As this Court has noted, "the practice of showing suspects singly to persons for the purpose of identification has been widely condemned." *State v. Rogers*, 44 Wn.App. 510, 516, 722 P.2d 1349 (1986).

Suggestive procedures increase the likelihood of misidentification. *Wade*, 388 U.S. at 228. A witness's recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. *Brathwaite*, 432 U.S. at 112. "[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and thus his susceptibility to suggestion is the greatest." *Wade*, 388 U.S. at 229.

Dr. Jeffrey Loftus further explained the dangers of show-up identification procedures following brief observations in testimony the court found helpful. 2RP 365. When a witness's memory of an event is

initially hazy or incomplete, it is particularly susceptible to being inaccurate. 2RP 200. Post-event information may supplant original memories of an incident where the witness is unaware that the memory has been shaped by information received later. 2RP 201. Additionally, Dr. Loftus explained that memory tends to be inaccurate is whether the identification procedure is conducted in a biased or leading manner. 2RP 201.

Showup identifications are more likely to produce inaccurate results because the witness is more inclined to provide a positive identification and may feel social pressure. 2RP 211-12. When two suspects are displayed in a joint show-up, there is an increased chance of false identification of at least one person, because the witness may infer the second person was involved if the first person looks like a perpetrator. 2RP 214. Because Ms. Waldon was focused on the boy with darker hair like D.G.'s hair, and had a limited view of the second boy, it is more likely that T.G. was identified based on his proximity to D.G. and not based on his own facial features.

Recent empirical evidence and case law supports Dr. Loftus's testimony and the increased concern with misidentification since *Wade*, *Biggers*, and *Brathwaite*. "Indeed, studies conducted by psychologists

and legal researchers since *Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable." *Comm. v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995). "Eyewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases." Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 TxWLR 123, 129 (Winter 2011); *see* Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 118 n.83 (2002) ("Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be 'notoriously unreliable--in some circumstances more often wrong than right.'" (citation omitted)).

The identification procedure used in the case at bar was far more suggestive than typical, even for an inherently suggestive show up. Ms. Waldon's memory of the incident was hazy and incomplete making her particularly susceptible to an inaccurate identification. 2RP 200. She had a short period of a few seconds to view two people through slatted blinds, which would divide her limited attention span. 2RP 209. She focused on the Asian-looking boy who was closer to her, and was unsure that either boy was involved when she first saw the two

teenagers. 1RP 39, 64. Her limited physical description of the second boy and her lack of certainty at the initial show-up demonstrate that her original memory was the type that tends to be inaccurate. 2RP 200, 209

She received post-event information coloring her memory and perception. 2RP 201. After the event, Ms. Waldon watched police officers separate, question, search, and photograph the two boys, sending an implicit message that the police believed the two were involved. 2RP 246, 277-78. The police also told her that the boys confessed once arrested. 1RP 90.

Officer Jones told Ms. Waldon the police "had two suspects in custody that fit [her] description," before he drove her to the bus stop where T.G. and D.G. were being detained. 2RP 269, 59. *Cf.* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later*, 33 Law & Hum. Behav. 1, 6-7 (Feb. 2009)**Error! Bookmark not defined.** (rates of misidentification increase when law enforcement tell witness police have found a suspect); *see State v. McDonald*, 40 Wn.App. 743, 746, 700 P.2d 327 (1985). This post-event information affected her memory as well as her inclination to give a positive identification. 2RP 193-94, 201.

The procedure was conducted in a biased manner because T.G. and D.G. were shown to Ms. Waldon standing *together*. Where Ms. Waldon only had a fleeting glimpse of the second perpetrator, looking at the two suspects as a single unit made a guilt-by-association finding more likely, particularly when it followed the witness's viewing of several officers interrogating and searching the suspects. 2RP 214.

A similar impropriety occurred in *Harris v. State*, 350 A.2d 768, 771 (Del. 1975), where the court held that a second show-up, conducted ten minutes after an initial show-up that did not produce a positive identification, was unnecessarily and impermissibly suggestive. When an initial show-up fails to produce an identification, further police actions indicating the officers's belief that the suspects committed the offense constitutes improper efforts to persuade the witness to produce an identification. *Id.*; *see* 2RP 217.

The police officer's comments to Ms. Waldon before she viewed the show-up, and their continued efforts to investigate the boys while Ms. Waldon watched after she did not identify them, undoubtedly affected how she perceived T.G. and D.G., and gave her a far stronger memory of T.G. then she would have formed during the brief incident. 2RP 217-18. It bolstered her confidence and shaped her memory of the

event. Richard A. Wise, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 Conn. Law Rev. 435, 458-59 (2009) (explaining increase in eyewitness's confidence of identification, particularly after police confirm correct person identified).

The identification procedure was impermissibly suggestive in light of all these factors.

c. *The suggestive show-up procedure created a substantial likelihood of misidentification.*

Evidence of a show-up identification should be excluded if the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Linares*, 98 Wn.App. at 401 (discussing *Brathwaite*, 432 U.S. at 114). Because the show-up procedure used with T.G. was unduly suggestive, the court must determine the likelihood of misidentification. *Barker*, 103 Wn. App. at 905. Factors to consider include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Brathwaite*, 432 U.S. at 114.

The witness's opportunity to view the suspect is evaluated based on the amount of time that a witness had to view the perpetrator and the circumstances under which the observation took place. *Barker*, 103 Wn. App. at 905. For example, in *Rogers*, the court explained that the witness had a good opportunity to view the witness when they were both in the same room for 20 minutes, and the suspect was "never out of [the witness's] sight." 44 Wn. App. at 516. In contrast, the court in *McDonald* stated that the witness's opportunity to view the suspect was "limited" when the criminal incident took five to six minutes, and two to three of those minutes the suspect was not directly in the witness's view. 40 Wn App. at 747.

Here, Ms. Waldon estimated she viewed the boys for "a good three seconds or longer" through slatted blinds. 1RP 54. Dr. Loftus explained that victims tend to overestimate the amount of time they viewed the perpetrators. 2RP 206. Even if Ms. Waldon saw the perpetrators for three seconds, her focus was on the person who was closer to the window, with a darker complexion. 1RP 78. She had "a better look" at this person with darker hair and only glimpsed the second person farther from the window. 1RP 79, 88-89. Ms. Waldon's extremely limited viewing of the second person weighs against the

reliability of her later identification and increases the likelihood that her memory of T.G. was from the show-up and police interaction rather than from the incident. 2RP 217.

The second factor that courts consider is the degree of attention the witness paid to the perpetrator at the time of the crime. *Barker*, 103 Wn.App. at 905. Dr. Loftus explained that witnesses have a finite ability to perceive an event and when their attention is also drawn to other concerns, such as how to call for help or escape, or other distractions including multiple perpetrators, they are further limited in the attention they can pay to a perpetrator's identity. 2RP 203-05.

In some cases, witnesses have significant time to observe the perpetrator. For example, in *State v. Traweek*, 43 Wn.App. 99, 104, 715 P.2d 1148 (1986), the witness "watched the two men closely from the moment they entered the store." In another case, the witness spoke with the offender, walked down the street with him, and hugged him before parting. *State v. Fortun-Cebada*, 158 Wn. App. 158, 171, 241 P.3d 800 (2010). These circumstances did not create a substantial likelihood of misidentification. *Id.*

Here, the entire incident happened quickly. Ms. Waldon was startled and scared when she saw people trying to enter her home and

she had a about three seconds to view the two people outside her window until they turned and ran. 1RP 54-55. Even then saw them through slatted blinds.1RP 48. Ms. Waldon armed herself with a shotgun before the police arrived, showing her anxiety despite her claim she felt calm. 1RP 84; 2RP 287. Ms. Waldon "focused in" on the darker colored person, but there were two perpetrators, so her attention was divided. 1RP 88. Because her focus was not on the person who was purportedly T.G., the lighter colored boy, she formed less of a memory of the second person.

The third factor is the accuracy of the witness's description. *Barker*, 103 Wn.App. at 905. Descriptions need not be perfect to be accurate in satisfaction of the third prong. *See, e.g.*, *Rogers*, 44 Wn. App. at 516 ("Baker's description of Rogers was essentially accurate."). But some differences between a witness's description and the identified suspect's appearance weigh against admissibility. For instance, in *McDonald*, the witness stated that the suspect wore a blue short-sleeved shirt and jeans, while the person arrested for the offense wore khaki pants and a long-sleeved shirt. 40 Wn.App. at 747.

Ms. Waldon said the perpetrators were wearing dark t-shirts. 1RP 73. T.G. was wearing a white shirt with writing. Ex. 8. Both were

wearing backpacks, although Ms. Waldon thought only one perpetrator possibly had a backpack. 1RP 38; Pretrial Ex. 2. T.G. had brown hair, not reddish-brown like one of the perpetrators. *Id.* D.G. was potentially Latin-American and not Asian. 2RP 170. Though Ms. Waldon's description matched some general characteristics of the boys, it missed the mark in significant other ways.[6]

The fourth factor is the witness's level of certainty. Ms. Waldon initially was uncertain and could not identify the boys. 2RP 273. After watching T.G. and D.G. surrounded by police officers, detained, photographed, searched and questioned for ten minutes, Ms. Waldon said she was 100% sure they were the perpetrators. 2RP 282. Courts and scientists have noted that there is no correlation between an eyewitness's level of certainty and the accuracy of the identification. *See e.g.*, *Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005) ("In the 32 years since the decision in *Neil v. Biggers*, the idea that a witness's certainty in his or her identification of a person as a perpetrator

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[6] Dr. Loftus testified that in experiments with optimal conditions, such as good lighting and no stress, participants were able to identify faces they saw for short periods of time with only 60% accuracy. 2RP 207-08. Stress decreases this accuracy. 2RP 208. Because Ms. Waldon previously worked as a nursing assistant, the State claimed she was accustomed to stress, yet her panic after the incident showed otherwise and she never said she worked in a stressful nursing environment. 1RP 38; 2RP 357. When police arrived, Ms. Waldon was frantic,

reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies." (internal quotation marks omitted)); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001).

Courts are required to look to the totality of the circumstances to determine whether the identification procedure violated due process. Here, additional factors support the likelihood of misidentification. One of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, 176 Wn.2d 611, 637, 294 P.2d 679 (2013) (Wiggins, J., dissenting) (citing James M. Doyle, *Discounting the Error Costs: Cross–Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 Psychol. Pub. Pol'y & L. 253 (2001)). "The cross-race effect, also known as the own-race bias or other-race-effect, refers to the consistent finding that adults are able to recognize individuals of their own race better than faces of another, less familiar race." John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, in 2 Handbook of Eyewitness Psychology: Memory for People, 257, 257-58 (Rod C. L. Lindsay et al. eds., 2006).

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scared, excited, and holding a shotgun. 2RP 287.

Ms. Waldon is Caucasian, but D.G. is Latin-American, according to Officer Ross. 2RP 170. Ms. Waldon misidentified D.G.'s race as Asian. The cross-racial nature of the identification here increases the risk of misidentification. She testified that she got the best look at the Asian perpetrator and did not even know the hair color of the other perpetrator (who she later identified as T.G.). 1RP 78. At the showup procedure, Ms. Waldon was not asked to identify each boy individually, but instead identified them collectively, making it more likely that the cross-racial risks of misidentifying D.G. carried over to T.G., who was identified more because of his proximity to D.G. than due to his own features.

The time between the offense and confrontation, while supporting the reliability of the identification, is not enough to counteract the unreliability of the above factors. T.G. had no burglary tools or implements showing he was involved in an attempted burglary, or any stolen property. Ms. Waldon conceded she was focused on the other person, who stood closer to the window, not the lighter colored person in the position that she placed T.G. In light of the totality of the circumstances, where the identification resulted from suggestive police tactics, there was substantial likelihood of misidentification.

d. *The conviction must be reversed because there was insufficient evidence to convict T.G. absent the out-of-court identification.*

The admission of an impermissibly suggestive identification, is presumed prejudicial. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). The State bears the burden of proving beyond a reasonable doubt that the fact finder would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

Without the identification, T.G. would not have been convicted, as the court agreed in its oral ruling. 2RP 360-61. There was no other evidence that he was the perpetrator. *Id.* Yet the in-court identification of T.G. occurred after Ms. Waldon had spent over ten minutes watching the police question T.G. The brevity of the original incident in which Ms. Waldon's attention was divided by looking at two boys, she was focused on someone who was not T.G., and she was panicked after the incident, impact her initial memory. After the short incident, she received information that T.G. confessed and she watched T.G. as the police displayed their suspicion that he was one of the perpetrators, improperly inflating her confidence and altering her memory. 2RP 239.

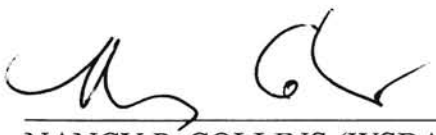
The post-event information undermines Ms. Waldon's ability to make an in-court identification strictly based on her memory of the incident rather than the effect of seeing T.G. arrested while in the company of a boy who looked like the other perpetrator. Due to the erroneously admitted and improperly obtained out-of-court identification, T.G. is entitled to a new trial where the identification is suppressed. Because there is no evidence connecting T.G. to the incident other than the suspect identification, reversal and vacation of the adjudication are required.

F. CONCLUSION.

T.G.'s conviction should be reversed and dismissed to the lack of admissible evidence proving he committed the charged offense.

DATED this 21st day of October 2013.

Respectfully submitted,



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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. TODD GAUTHUN JR., Defendant,	No. 12-8-02353-2 WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO SUPPRESS EVIDENCE AND IDENTIFICATION EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on February 11, 2013 – February 12, 2013 before the Honorable Judge Linde. After considering the sworn testimony and arguments of counse, and having received exhibits, now makes and enters the following findings of fact and conclusions of law as required by CrR 3.6:

A. FINDINGS OF FACT

1. On May 3, 2013, Erin Waldon called 911 to report that two juvenile males were outside her kitchen window, opening the window. The window is above a bush, which does not block the window. The bush is not located on a sidewalk or a common walkway and there is very little room for a person to stand between the bush and the window.

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2. Ms. Waldon later identified the two juvenile males as the respondent, Todd Gauthun, and Dakota Green.

3. Ms. Waldon was standing within two feet of her kitchen window when she saw Mr. Gauthen and Mr. Green. The window blinds were lowered, but the slats were turned perpendicular, so she could see through the window. Nothing else obstructed Ms. Waldon's view to or through the window.

4. Ms. Waldon's gaze was primarily focused on the juvenile with dark hair and a darker complexion, who did not match the respondent's description. While she was primarily staring at the darker complexioned individual, she was able to observe the other individual.

5. Ms. Waldon stared at the respondents for approximately three seconds. During this time, she saw Mr. Gauthun and Mr. Green from their upper chests to the top of their heads. Mr. Gauthun and Mr. Green looked surprised to see her.

6. Ms. Waldon observed that Mr. Green and Mr. Gauthun stood side by side. From Ms. Waldon's point of view, Mr. Green stood to the right of Mr. Gauthun, which placed Mr. Green in between Mr. Gauthun and the home's front door.

7. Ms. Waldon saw one of the juvenile males' hands was on her window frame, and that the window was being opened. The window was stopped by a wooden dowel placed in the window track. The dowel prohibited the window from sliding open any further. The dowel was placed in the window track for added safety.

8. After approximately three seconds, Mr. Gauthun and Mr. Green ran away.

9. After the juveniles had departed, Ms. Waldon first called her husband, and then she called 911 at 9:50 am.

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10. Ms. Waldon described the juveniles to the 911 operator. She described Mr. Green as 5'8", approximately 14-15 years old, very thin, dark black hair, and Asian, wearing dark clothing. She described Mr. Gauthun as 5'8", approximately 14-15 years old, very thin, reddish brown hair, possibly wearing a backpack, wearing dark clothing.

11. At 9:53 am, Officer Ross arrived at Ms. Waldon's home and she gave him a description of the juveniles that stood at her window. As he talked with her Officer Jones arrived at Ms. Waldon's home.

12. Officer Ross left Ms. Waldon's home, got into his car and performed an area check, looking for the suspects. Because both suspects were described as approximately 14-15 years old, Officer Ross suspected they may be students at Kent Meridian High School, which is within walking distance of Ms. Waldon's home.

13. At 10:03 am, Officer Ross drove southbound on 104th Ave SE, and he noticed two individuals matching Mr. Green's and Mr. Gauthun's description standing at a bus stop. Officer Ross notified Officer Jones that he found two suspects matching Ms. Waldon's description. He requested Officer Jones to bring Ms. Waldon to the bus stop for an in-field identification.

14. Officer Ross indicated on a map that the bus stop is approximately a third of a mile away from Ms. Waldon's home and a few hundred yards from Kent Meridian High School.

15. Officer Ross contacted Mr. Green and Mr. Gauthun. He noted that their hair was wet, yet their t-shirt s appeared to be dry. Additionally, he noticed that it was 50 degrees outside and raining, but neither Mr. Green nor Mr. Gauthun wore a jacket. Given the weather, the fact that their shirts were dry but their hair was wet, Officer Ross

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suspected that Mr. Green and Mr. Gauthun may have recently removed some clothing.

16. Officer Ross identified the suspects as Mr. Green and Mr. Gauthun. He also confirmed that they attended Kent Meridian High School. They told him that Mr. Green left a book at a friend's house and that they were on their way to school. Officer Ross found it odd that they were waiting at a bus stop even though their school was a few hundred yards away.

17. Officer Ross noticed that Mr. Gauthun backpack appeared full. He asked Mr. Gauthun if there were school supplies inside. In response, Mr. Gauthun voluntarily opened up his bag, revealing a jacket that was red on one side and dark gray on the other side. The dark gray side appeared wet, which led Officer Ross to suspect that Mr. Gauthun had recently worn this jacket with the dark gray side exposed to the rain.

18. At 10:07 am, Officer Jones transported Ms. Waldon and her husband, who had arrived at the house, to Officer Ross' location. A few minutes earlier, before they had left Ms. Waldon's home Officer Jones had read Ms. Waldon the standard admonition on in-field identifications out of the Kent Police Department codebook. At that time, Ms. Waldon indicated that she understood the standard admonition.

19. Ms. Waldon told Officer Jones that she could not be certain that the two suspects were the same juvenile males she saw earlier. She explained she was not certain because the suspects were standing about 45 feet away and she was looking out the front passenger side window, which was covered in raindrops. Additionally, Ms. Waldon stated that she did not want to identify the wrong people and would not make

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an identification unless she was positive. Officer Jones did not recall hearing Ms. Waldon state why she could not make a positive identification. All he remembered was that she had been unable to make a positive identification at that time and that he exited the car to contact the youth. Neither Mr. Green nor Mr. Gauthun was in handcuffs at that time.

20. Officer Jones exited his patrol vehicle and spoke with Officer Ross, Mr. Green, and Mr. Gauthun. Officer Jones photographed the juveniles.

21. After approximately ten minutes, Officer Jones returned to his patrol vehicle in order to transport Ms. Waldon back to her home. When Officer Jones reentered his patrol vehicle, Ms. Waldon asked if it was possible to bring the suspects closer to the vehicle. Officer Jones requested Officer Ross to bring Mr. Green and Mr. Gauthun closer to his patrol vehicle. This time Ms. Waldon looked at Mr. Green and Mr. Gauthun from approximately 25 feet away through the front windshield, which had been cleared by the car's windshield wipers. Neither Mr. Green nor Mr. Gauthun were in handcuffs. Ms. Waldon immediately stated, "That's them. I'll never forget their faces." She stated she was 100% certain.

22. At 10:25 am, Officer Jones exited his patrol vehicle and informed Mr. Green and Mr. Gauthun that they were under arrest. Officer Jones handcuffed Mr. Green and Officer Ross handcuffed Mr. Gauthun.

23. During the trial, Ms. Waldon, relying on her memory of this incident, positively identified Mr. Gauthun as the lighter-skinned juvenile male at her window on the morning of May 3, 2012.

24. The testimony of Ms. Waldon was credible.

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B. CONCLUSIONS OF LAW

1. When evaluating a *Terry* investigatory stop, see Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a court must make two inquiries: "First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related *in scope* to the circumstances which justified the interference in the first place?" State v. Wheeler, 43 Wn. App. 191, 195, 716 P.2d 902 (1986) aff'd, 108 Wn.2d 230, 737 P.2d 1005 (1987) (quoting State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984)).

2. In assessing the scope of intrusion, the court must consider: (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained. *Williams, supra,* 102 Wash.2d at 740, 689 P.2d 1065. If police actions exceed the proper scope of a valid *Terry* stop, they can be justified only if supported by probable cause to arrest. Wheeler, 43 Wn. App at 196.

3. Officer Ross' initial interference Mr. Gauthun's freedom of movement was justified at its inception. He stopped Mr. Gauthun and Mr. Green based on Ms. Waldon's description. His suspicion was based on reasonable articulable suspicion that the respondent had been involved in criminal activity. The purpose of stopping Mr. Gauthun and Mr. Green was to investigate an attempted residential burglary, the amount of intrusion was limited, and the length of detention was the least intrusive to verify or dispel the officers' suspicion. See Wheeler, 43 Wn. App. at 198-99.

4. Showup identifications are not per se unnecessarily suggestive, and one held shortly after the crime is committed and in the course of a prompt search for the suspect is permissible. State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986). Evidence

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of a showup identification should be excluded only if the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id.

5. The key inquiry in determining admissibility of the identification is reliability. Id. at 515-16. Factors to consider include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Id. at 516 (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977))
6. The identification of the respondent by Ms. Waldon is admissible because the identification procedure was not impermissibly suggestive and was reliable.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

DATED this 2nd day of ~~March,~~ April 2013.

Barbara Linde

JUDGE BARBARA LINDE

Presented by:

Joseph Kolker

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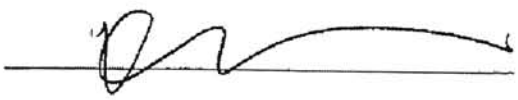

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APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

STATE OF WASHINGTON, Plaintiff, vs. TODD GAUTHUN, JR., B.D. 3/12/97, Respondent.	No. 12-8-02353-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 6.1(d) AND JuCR 7.11(d)

THE ABOVE-ENTITLED CAUSE having come on for trial before the Honorable Barbara Linde, undersigned judged in the above-entitled court: the State of Washington having been represented by Deputy Prosecuting Attorney Joseph Marchesano; the Respondent appearing in person and having been represented by his attorneys, Katherine Hurley and Jack Guthrie; the Court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusion of law.

A. FINDINGS OF FACT

1. On May 3, 2013, Erin Waldon was inside her home using the bathroom. Her home is located in the Kentshire Apartments, in Kent, Washington. To the right of

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Ms. Waldon's front door is a window. The window is above a bush, which does not block the window. The bush is not located on a sidewalk or a common walkway and there very little room for a person to stand between the bush and the window.

2. While inside the bathroom, Ms. Waldon heard repeated knocking on her front door and ringing on the doorbell. Ms. Waldon assumed her husband forgot his keys and was trying to get inside the house.

3. After Ms. Waldon finished using the bathroom and washed her hands, she walked out of her bathroom towards the front door. As she exited the bathroom, she saw her front door knob jiggling. Ms. Waldon knew that the front door was locked, but that the storm door, located on the outside, was not locked.

4. As she passed her kitchen window, she saw two juvenile males outside of her window. Ms. Waldon later identified the two juvenile males as the respondent, Todd Gauthun, and Dakota Green.

5. Ms. Waldon was standing within two feet of her kitchen window when she saw Mr. Gauthen and Mr. Green. The window blinds were lowered, but the slats were turned perpendicular, so she could see through the window. Nothing else obstructed Ms. Waldon's view to or through the window.

6. Ms. Waldon's gaze was primarily focused on the juvenile with dark hair and a darker complexion, who did not match the respondent's description. While she was primarily staring at the darker complexioned individual, she was able to observe the other individual.

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7. Ms. Waldon stared at the respondents for approximately three seconds. During this time, she saw Mr. Gauthun and Mr. Green from their upper chests to the top of their heads. Mr. Gauthun and Mr. Green looked surprised to see her.
8. Ms. Waldon observed that Mr. Green and Mr. Gauthun stood side by side. From Ms. Waldon's point of view, Mr. Green stood to the right of Mr. Gauthun, which placed Mr. Green in between Mr. Gauthun and the home's front door.
9. Ms. Waldon saw one of the juvenile males' hands was on her window frame, and that the window was being opened. The window was stopped by a wooden dowel placed in the window track. The dowel prohibited the window from sliding open any further. The dowel was placed in the window track for added safety.
10. After approximately three seconds, Mr. Gauthun and Mr. Green ran away.
11. There was a screen on the outside of Ms. Waldon's kitchen window. After this incident, Ms. Waldon looked outside her house and noted that the screen had been removed and was placed on the ground. Additionally, Ms. Waldon found her storm door propped open, a tear in the screen, and that the hinges on the door were bent.
12. After the juvenile's had departed, Ms. Waldon first called her husband, and then she called 911 at 9:50 am.
13. At 9:53 am, Officer Ross arrived at Ms. Waldon's home and she gave him a description of the juveniles that stood at her window. As he talked with her Officer Jones arrived at Ms. Waldon's home.
14. Officer Ross left Ms. Waldon's home, got into his car and performed an area check, looking for the suspects. Because both suspects were described as approximately 14-

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15 years old, Officer Ross suspected they may be students at Kent Meridian High School, which is within walking distance of Ms. Waldon's home.

15. At 10:03 am, Officer Ross drove southbound on 104th Ave SE, and he noticed two individuals matching Mr. Green's and Mr. Gauthun's description standing at a bus stop. Officer Ross notified Officer Jones that he found two suspects matching Ms. Waldon's description. He requested Officer Jones to bring Ms. Waldon to the bus stop for an in-field identification.

16. Officer Ross indicated on a map that the bus stop is approximately a third of a mile away from Ms. Waldon's home and a few hundred yards from Kent Meridian High School.

17. Officer Ross contacted Mr. Green and Mr. Gauthun. He noted that their hair was wet, yet their t-shirt's appeared to be dry. Additionally, he noticed that it was 50 degrees outside and raining, but neither Mr. Green nor Mr. Gauthun wore a jacket. Given the weather, the fact that their shirts were dry but their hair was wet, Officer Ross suspected that Mr. Green and Mr. Gauthun may have recently removed some clothing.

18. Officer Ross identified the suspects as Mr. Green and Mr. Gauthun. He also confirmed that they attended Kent Meridian High School. They told him that Mr. Green left a book at a friend's house and that they were on their way to school. Officer Ross found it odd that they were waiting at a bus stop even though their school was a few hundred yards away.

19. Officer Ross noticed that Mr. Gauthun backpack appeared full. He asked Mr. Gauthun if there were school supplies inside. In response, Mr. Gauthun

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voluntarily opened up his bag, revealing a jacket that was red on one side and dark gray on the other side. The dark gray side appeared wet, which led Officer Ross to suspect that Mr. Gauthun had recently worn this jacket with the dark gray side exposed to the rain.

20. At 10:07 am, Officer Jones transported Ms. Waldon and her husband, who had arrived at the house, to Officer Ross' location. A few minutes earlier, before they had left Ms. Waldon's home Officer Jones had read Ms. Waldon the standard admonition on in-field identifications out of the Kent Police Department codebook. At that time, Ms. Waldon indicated that she understood the standard admonition.

21. Ms. Waldon told Officer Jones that she could not be certain that the two suspects were the same juvenile males she saw earlier. She explained she was not certain because the suspects were standing about 45 feet away and she was looking out the front passenger side window, which was covered in raindrops. Additionally, Ms. Waldon stated that she did not want to identify the wrong people (and wouldn't ID unless) unless she was positive. Officer Jones did not recall hearing Ms. Waldon state why she could not make a positive identification. All he remembered was that she had been unable to make a positive identification at that time and that he exited the car to contact the youth. Neither Mr. Green nor Mr. Gauthun was in handcuffs at that time.

22. Officer Jones exited his patrol vehicle and spoke with Officer Ross, Mr. Green, and Mr. Gauthun. Officer Jones photographed the juveniles.

23. After approximately ten minutes, Officer Jones returned to his patrol vehicle in order to transport Ms. Waldon back to her home. When Officer Jones reentered his patrol vehicle, Ms. Waldon asked if it was possible to bring the suspects closer to the

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vehicle. Officer Jones requested Officer Ross to bring Mr. Green and Mr. Gauthun closer to his patrol vehicle. This time Ms. Waldon looked at Mr. Green and Mr. Gauthun from approximately 25 feet away through the front windshield, which had been cleared by the car's windshield wipers. Neither Mr. Green nor Mr. Gauthun were in handcuffs. Ms. Waldon immediately stated, "That's them. I'll never forget their faces." She stated she was 100% certain.

24. At 10:25 am, Officer Jones exited his patrol vehicle and informed Mr. Green and Mr. Gauthun that they were under arrest. Officer Jones handcuffed Mr. Green and Officer Ross handcuffed Mr. Gauthun.

25. During the trial, Ms. Waldon, relying on her memory of this incident, positively identified Mr. Gauthun as the lighter-skinned juvenile male at her window on the morning of May 3, 2012.

26. Even assuming that Mr. Green was the individual who removed Ms. Waldon's screen and opened her window, Mr. Gauthun was ready and willing to assist in attempting to break into Ms. Waldon's home by being in between Ms. Waldon's window and bush during the incident.

27. The incidents occurred on May 3, 2013, in King County, Washington.

28. The testimony of Ms. Waldon was credible.

B. CONCLUSIONS OF LAW

1. The above-entitled court had jurisdiction of the subject matter and of the Respondent in the above-entitled cause.

2. The following elements of Attempted Residential Burglary, the crime charged, have been proved by the State beyond a reasonable doubt by convincing evidence: On May

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3, 2012, Todd Gauthun attempted to enter and remain unlawfully in the dwelling of Erin M. Waldon, with the intent to commit a crime against a person or property therein, in King County, Washington.

3. Attempt as used in the charge means that the respondent committed an act which was a substantial step towards the commission of the charged crime with the intent to commit that crime.

4. The respondent is guilty beyond a reasonable doubt of the crime of Attempted Residential Burglary as charged in the Amended Information.

5. Judgment should be entered in accordance with Conclusion of Law 4.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

DATED this 20 day of March, 2013.

JUDGE BARBARA LINDE

Presented by:

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Deputy Prosecuting Attorney

Katherine Hurley, WSBA # 37863
Respondent's Counsel
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. T. G., Juvenile Appellant.	)))))))))	NO. 70123-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] T. G. 418 KENNECK AVE N KENT, WA 98032	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF OCTOBER, 2013.

X_____

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