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NO. 70123-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TODD GAUTHUN, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA L. LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Police officers may conduct an investigatory stop if they have a reasonable and articulable suspicion that an individual is involved in criminal activity, i.e., there is a substantial possibility that criminal conduct has occurred or is about to occur. Less than 15 minutes after Erin Waldon called 911 to report two juvenile males attempting to break into her home, Officer Ross found Todd Gauthun, Jr. and another teenage boy at a Metro bus stop about one-third of a mile from Waldon's home. They were the only individuals in the area who resembled the descriptions Waldon gave, and their wet hair and dry T-shirts were incongruent on the cold, rainy day, suggesting that they may have removed their outer clothing to avoid detection. Upon contact with the officer, the boys appeared nervous and provided an illogical explanation for their presence at the bus stop. Did the trial court correctly conclude that the officer had sufficient grounds to make an investigatory stop?

2. Whether police conduct exceeds the permissible scope of an investigative stop depends upon the totality of the circumstances, including the purpose of the stop, the amount of physical intrusion on the suspect's liberty, and the length of time of the seizure. Here, police stopped Todd Gauthun, Jr., and his

companion to investigate the attempted burglary of Waldon's home, and the investigation was limited to confirming the boys' names and birth dates, inquiring about their recent activities and whereabouts, taking their photos, and facilitating Waldon's showup identification. The amount of physical intrusion upon the youths' liberty was minimal: officers did not approach with lights and sirens on, draw their weapons, frisk the boys, put them in handcuffs, order them to sit or lie on the ground, or put them in the back of a patrol car. Rather, the officers approached the boys casually, asked if they would mind stepping away from others at the bus stop and opening their backpacks, and moved them closer to Waldon's location. In all, Gauthun was detained for only about 20 minutes before he was arrested. Did the trial court correctly conclude that the officers acted within the lawful scope of an investigatory stop?

3. An out-of-court identification procedure satisfies due process if it is not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. Here, Waldon had an adequate opportunity to view the boys at her window, gave reasonably accurate descriptions of them to the police, was given standard warnings about in-field identifications, and refused to identify the boys until she had a close, clear view of their faces.

At that point, Waldon immediately and unequivocally identified the boys as the people who tried to break into her home. Did the trial court act within its discretion in finding that the identification was reliable and admissible?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Todd Gauthun, Jr., was charged by amended information with attempted residential burglary. CP 5. Gauthun moved to exclude all evidence obtained following the investigatory stop, as well as certain custodial statements. CP 6-72. The juvenile court combined the CrR 3.5/3.6 hearings with its fact-finding adjudication. RP 11.[1] The court excluded certain of Gauthun's statements to police because the State was unable to prove that he had been fully advised of his rights. RP 329. The court admitted the other evidence, concluding that the investigatory stop was proper in both inception and scope. CP 99; RP 329. The court also admitted Waldon's out-of-court and in-court identifications of Gauthun. The court adjudicated Gauthun guilty of attempted residential burglary and imposed a sentence of five days in juvenile detention, 15 days

[1] The Verbatim Report of Proceedings consists of three consecutively paginated volumes. The State refers to the material by page number only.

of electronic home monitoring, six months of probation, and 16 hours of community service. CP 83, 99-100; RP 360-67.

2. SUBSTANTIVE FACTS

On May 3, 2013, just before 9:50 a.m., Erin Waldon was inside her Kent home when she heard repeated doorbell-ringing and banging on her front door. CP 77-78; RP 35-36. As she walked toward the front door, she saw the door knob jiggling. CP 78; RP 36. She then saw two juvenile males outside, trying to open her kitchen window. CP 78; RP 36. The window blinds were lowered, but the slats were turned horizontal, so her view of the boys was essentially unobstructed. CP 78; RP 48.

Waldon stood within two feet of the window while she and the boys looked at each other for "[a]t least a good three seconds, if not longer." RP 54. During this time, she could only see the boys from their upper chests to the top of their heads. CP 79; RP 49. Although Waldon's gaze was primarily focused on the boy with darker features, she was able to observe both individuals. CP 78; RP 78. Their eyes widened and they looked surprised to see Waldon. RP 53. They froze for a couple of seconds and then ran away. RP 53.

Waldon promptly called 911 at 9:50 a.m. CP 79. She described one of the boys "as 5'8", approximately 14-15 years old, very thin, dark black hair, and Asian, wearing dark clothing." CP 96. She described the other one "as 5'8", approximately 14-15 years old, very thin, reddish brown hair, possibly wearing a backpack, wearing dark clothing." CP 96.

Officer John Ross responded to Waldon's home at 9:53 a.m. CP 96; RP 58. Ross searched the area around Waldon's apartment complex, but found no teenagers. CP 96; RP 95. Waldon had indicated that the boys ran off to the north, but based upon his experience, Ross believed the boys would likely head south, towards the nearby Kent-Meridian High School, so Ross headed in that direction. RP 100, 167-68. Within minutes, he noticed two teenage boys at a bus stop a few hundred yards away from the high school. CP 96; RP 101. While no one else in the area resembled the boys Waldon described, Ross noticed that one of these boys was "tall, skinny, possibly reddish hair" and "the other kid had olive type complexion that could have, I thought, may have been an Asian male description." RP 101. Waldon had reported that the boys were wearing dark tops, but one of the boys (Gauthun) was wearing a white T-shirt when Ross noticed him.

RP 171, 234. Ross found it peculiar that the boys were only wearing T-shirts, since the weather was cold and rainy. CP 96-97; RP 103. Ross also noticed that the boys' shirts were dry despite the rain, but their hair was wet. RP 102. He knew from experience that sometimes "suspects will remove items of clothing to try to deceive people that might be looking for them." RP 103. Based on his observations and experience, Ross inferred that the boys had recently removed some outer clothing. CP 97; RP 103.

Officer Ross radioed that he had two possible suspects and contacted the boys, who identified themselves as Dakota Green and appellant Todd Gauthun, Jr. CP 97. Ross asked to speak to them privately, away from others at the bus stop. RP 127. The boys confirmed that they attended Kent-Meridian High School, and Ross asked why they were not in school. CP 97; RP 135. They claimed that Green had left a book at a friend's house, and they were on their way to school after retrieving it. CP 97; RP 148-49. Because their school was only a few hundred yards away, Ross did not consider their explanation for their presence at the bus stop to be credible. CP 97; RP 148-49.

Waldon had reported that one of the boys at her window had a backpack. When Officer Ross contacted them, both of the boys

had backpacks. RP 132. Ross noticed that Gauthun's backpack seemed very full. RP 132. He asked if the boys would "mind opening [the backpacks] up to make sure there's just school stuff in there?" RP 132. Gauthun voluntarily opened his bag, revealing a jacket that was red on one side and dark gray on the other side. CP 97; RP 132-34. The gray side was wet, which confirmed Ross's suspicion that Gauthun had recently been wearing a dark top, as Waldon had described. CP 97; RP 134.

At 10:07 a.m., less than five minutes after Officer Ross radioed that he had located suspects matching Waldon's descriptions, Officer Jason Jones arrived at the bus stop with Waldon. RP 135. Jones had read Waldon the standard admonition about field identification procedures. RP 270. Gauthun and Green were standing about 45 feet away, and Waldon had to look through the raindrop-covered passenger-side window of Jones's patrol car to see them. CP 97; RP 62, 274. Waldon said that the suspects "kind of look like the boys, but she wasn't 100 percent sure." RP 274. Waldon told Jones that she could not see the boys clearly, and did not want to make an identification unless she was certain. CP 97-98; RP 62, 274.

Officer Jones left the car to continue investigating and to photograph the boys for a future montage in case other witnesses came forward. CP 98; RP 277. When he returned, Waldon asked if the officers could bring the boys closer so she could get a better look. CP 98; RP 64, 276. The officers positioned the boys directly in front of the patrol car in which Waldon was sitting. RP 139. As soon as Waldon was able to see the boys through the windshield, which was cleared of rain by the wipers, she identified them without hesitation. CP 98; RP 281. "She yelled, 'That's them.' And then she said she didn't get a good look at what they were wearing but she'll never forget their faces." RP 282. She also "stated she was 100 percent sure." Id. At 10:25 a.m., just 35 minutes after Waldon called 911, Jones placed Green and Gauthun under arrest. CP 98; RP 139-40.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE DISCOVERED DURING A LAWFUL TERRY STOP.

Gauthun contends that Officer Ross lacked sufficient basis to stop him, so the evidence discovered during the encounter should have been suppressed, and his conviction for attempted

residential burglary must therefore be reversed. Because the record establishes that Ross had a reasonable and articulable suspicion that Gauthun and Green were involved in criminal activity when he initiated the stop, Gauthun's claim must be rejected.

In reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's factual findings, and whether those findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. Id.

Brief investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Acrey, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). A Terry stop is justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "The

reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000). The totality of the circumstances includes factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Officer Ross had reasonable suspicion to stop Gauthun and Green. The boys were the only two individuals in the area who resembled the descriptions of suspects in the attempted burglary, and they were still together. They were located within minutes of the incident and only about one-third of a mile away from the scene. They seemed nervous and had shifty eyes. RP 130. Additionally, they appeared to have recently removed outer clothing despite the cold, rainy weather, and their explanation for being at a bus stop instead of school was not credible. Under the circumstances, it was reasonable for Officer Ross to believe that the teens were involved in the attempted burglary.

Gauthun contends, however, that he and Green did not match Waldon's descriptions because Gauthun's hair is brown, not reddish brown; because Gauthun was wearing a white T-shirt, not dark clothing; because Waldon described the boys as the same height, but Green is actually shorter than Gauthun; and because Green is not Asian. Given the similarities between the boys and Waldon's descriptions, none of these discrepancies undermine the basis for the Terry stop.

Waldon described the first suspect as a white male, 14-15 years old, 5'8", very thin, with reddish brown hair. RP 55-56, 99, 267. Gauthun is a white male, 15 years old at the time of the crime, about 5'10", skinny, with what Officer Ross believed was "possibly reddish" hair. RP 101, 170. Waldon described the second suspect as a "possibly Asian" male, 14-15 years old, 5'8", very thin, with dark hair and a relatively dark complexion. RP 55-56, 98-99, 267. Green is somewhat shorter than Gauthun's 5'10" height, had dark hair and a darker "olive" complexion, and Officer Ross thought he "could have been possibly southeast Asian." RP 101, 170. Waldon saw one of the boys with a backpack. RP 56. Both Gauthun and Green had backpacks. And Waldon described the boys as wearing darker colored T-shirts. Gauthun was wearing a white T-shirt when

Officer Ross contacted him, but given Ross's observations about the boys' wet hair yet dry shirts on the wet day, that discrepancy is inconsequential.

Because Gauthun and Green matched the descriptions of the suspects, were located near in time and distance to the incident, and their appearance and explanation for their activity were suspicious, Officer Ross was entitled to make a brief investigatory stop. The trial court did not err.

2. OFFICERS ACTED WITHIN THE LAWFUL SCOPE OF THE TERRY STOP.

Gauthun next contends that, even if the Terry stop were initially lawful, the seizure was unlawfully extended when police continued to detain him after Waldon said she was uncertain whether Gauthun and Green were the boys she had seen at her house. He is mistaken.

The permissible scope of a Terry stop depends on the specific circumstances of each case. State v. Sweet, 44 Wn. App. 226, 232, 721 P.2d 560 (1986). In general, investigative stops must be "temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative

method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Id. (quoting Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). "If the results of the initial stop dispel an officer's suspicions, then the officer must end the stop. If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged." Acrey, 148 Wn.2d at 747. Three factors must be considered in determining whether police exceeded the permissible scope of a Terry stop: "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

In this case, all three factors support the conclusion that the officers acted within the permissible scope of a Terry stop. First, the purpose of the stop was to investigate a known crime: the attempted burglary of Waldon's home. Second, the officer's investigative methods intruded very little on the boys' physical liberty. Although Officer Ross asked the boys to step away from others at the bus stop to speak privately, he did not draw a weapon, place them in handcuffs, frisk them, or direct them to sit or lie upon

the ground or to sit in the back of a patrol car. And third, the entire detention lasted only about 20 minutes before the boys' arrests.

Gauthun argues that Waldon's initial inability to identify the boys required the police to release Gauthun and Green. But Waldon did not rule out that Gauthun and Green were the perpetrators. Rather, she said that "they kind of look like the boys," and explained that she needed a better view to be certain. RP 62, 64, 274. Thus, Waldon's initial uncertainty did not dispel the officers' suspicions that Gauthun and Green had been involved. RP 147, 277. The officers then questioned the boys separately for a few more minutes, unsuccessfully attempting a ruse to encourage Gauthun to confess. When the ploy did not work, and absent Waldon's positive identification, the officers intended to release the boys. But even then, their suspicions were not dispelled. Officer Jones photographed the boys for a future montage in case other witnesses came forward. RP 278. When the officers brought the boys closer at Waldon's request, she made an immediate and unequivocal identification, and the detention ended with Gauthun's and Green's arrests. CP 98.

Gauthun also contends that the search of his backpack was unlawful, and the discovery of the dark clothing inside cannot justify

the extended detention. He argues the search was not permissible as a weapons frisk under Terry, and that his consent to the search was invalid because he was not informed of his right to refuse. As an initial matter, Gauthun did not raise the propriety of the backpack search below and does not argue that it presents a manifest constitutional error reviewable under RAP 2.5. Accordingly, this Court should decline to consider the issue.

Even if this Court reaches Gauthun's involuntary consent claim, it should reject the argument. Gauthun relies on State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998), for the proposition that consent to search cannot be voluntary unless the subject is informed of the right to refuse or limit consent. See Brief of Appellant at 21. But our supreme court has expressly limited the application of Ferrier to "knock and talk" procedures. State v. Tagas, 121 Wn. App. 872, 878, 90 P.3d 1088 (2004). "Ferrier, in short, does not require warnings in every case where police obtain search authority by consent." Id.

Whether consent was voluntary or the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The totality of the circumstances includes "(1) whether

Miranda[2] warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent." State v. Bustamante-Davila, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999). These factors are not exclusive. O'Neill, 148 Wn.2d at 588. "Additional factors that may affect the voluntariness of consent include express or implied claims of authority to search, prior illegal police action, prior cooperation or refusal to cooperate, and police deception as to identity or purpose." State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333 (1990). "The various relevant factors are weighed against one another and no one factor is determinative." State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 795 (1990); State v. Nelson, 47 Wn. App. 157, 734 P.2d 516 (1987) ("Although knowledge of the right to refuse consent is relevant, it is not absolutely necessary. ... Miranda warnings are not a prerequisite to a voluntary consent. Merely because an individual is in ... custody ... does not mean that consent is coerced." (Citations omitted.)).

Gauthun argues that his consent was not voluntary because he had not received Miranda warnings, was not told of his right to

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

refuse consent, was 15 years old, and has a below-average IQ. But other circumstances demonstrate that Gauthun's consent was valid. At the time Officer Ross asked Gauthun to open his bag, he was not in custody and was not entitled to Miranda warnings. See State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) ("[A] detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of Miranda."). Officer Ross made no express or implied claim of authority to search Gauthun's bag. See O'Neill, 148 Wn.2d at 589 (consent involuntary when officer told defendant told that he did not need consent or a warrant to search but could simply arrest O'Neill and search the car incident to arrest). Rather, Officer Ross asked the boys whether they would "mind" opening up the backpacks. RP 132. There was no prior illegal police action, and the police did not deceive the boys as to their identity or purpose. Further, although Gauthun was not advised of his rights before opening his backpack, it is worth noting that this was not Gauthun's first run-in with the law – he had previously received a deferred disposition for attempted assault in the second degree. RP 375. Under the totality of the

circumstances, Gauthun's consent to search his backpack was voluntary.

But even if Gauthun's consent was invalid and the fruits of that search were suppressed, it makes no difference to the lawfulness of the Terry stop. Gauthun asserts that the presence of a wet jacket inside his backpack was one of the factors cited by Officer Jones to justify the extended detention. Brief of Appellant at 19. But even without the jacket, the officers' observations that the boys were peculiarly underdressed for the weather and that their shirts were dry but their hair was wet led them to conclude that the boys had recently removed their outerwear. RP 278-79. Even if police never found the gray jacket, this reasonable inference diminished the significance of the discrepancy between Waldon's description and Gauthun's appearance.

Because the detention was temporary, lasted no longer than necessary to effectuate the purpose of the stop, and utilized investigative methods that were no more intrusive than necessary to confirm or dispel the officer's suspicion in a short period of time, this Court should conclude that the officers acted within the lawful scope of the Terry stop. See Williams, 102 Wn.2d at 738 (citing Royer, 460 U.S. at 500). The trial court should be affirmed.

3. WALDON'S FIELD IDENTIFICATION OF GAUTHUN WAS ADMISSIBLE.

Gauthun argues that Waldon's in-field identification of him and Green as the would-be burglars was impermissibly suggestive and that it, as well Waldon's later in-court identification, should have been suppressed. Because Gauthun cannot establish that the identification procedure created a substantial likelihood of misidentification, his argument fails.

An out-of-court identification procedure satisfies due process if it is not so impermissibly suggestive as to give rise to "a substantial likelihood of irreparable misidentification." State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)). A defendant claiming a due process violation must first establish that the identification procedure was unduly suggestive. Id. If this threshold burden is satisfied, the court then determines whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. Id. A trial court's decision to admit evidence of an out-of-court identification is within the sound discretion of the court and subject

to review for abuse of discretion. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001).

"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). The key inquiry in determining admissibility is whether the identification is reliable despite any suggestiveness. Rogers, 44 Wn. App. at 515 (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)).

To determine whether the suggestiveness of an identification procedure creates a substantial likelihood of misidentification, the reviewing court considers five factors: (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).

Here, while Waldon faced the two boys briefly ("at least a good three seconds, if not longer"), she was in close proximity to them. RP 54. Waldon testified that she was only two feet away from the kitchen window and that the two boys were immediately on the other side. The open blinds did not impede Waldon's view, which was essentially "unobstructed." RP 48. Waldon made eye contact with Green and "got a reasonable identifying look at" Gauthun as well. RP 78. Her attention was focused on the boys' faces. RP 77, 86. She was attentive enough to be able to describe each boy's position in relation to each other, herself, and her front door, and to register the reaction of each boy upon seeing her through the window. CP 95. Waldon's attention and opportunity to view the boys contributes to the reliability of her identification.

Further, Waldon's description of the boys was reasonably accurate. As explained above, Waldon accurately described the boys' ages, build, height, and complexions. Although Waldon erroneously indicated that Green was Asian, she explained that she chose that as the closest descriptor suggested by the 911 operator. RP 55. Green is not Asian, but he does have dark hair and a dark complexion, and it appeared to Officer Ross that "he could have been possibly southeast Asian." RP 170. Additionally, Waldon saw

that one of the boys had a backpack. Both Gauthun and Green had backpacks when stopped. Moreover, the boys were still together. The accuracy of Waldon's description further contributes to the reliability of her later identification.

Less than thirty minutes had passed between the time of the attempted break-in and the confrontation. Waldon called 911 at 9:50 a.m., within minutes after the boys ran away from her house. CP 95. Officer Ross was at her home by 9:53 a.m. CP 96. Within ten minutes, Ross radioed that he had located the potential suspects. CP 96. Waldon arrived at that location at 10:07 a.m. CP 97. About ten minutes later, after the boys were moved closer to the patrol car, Waldon positively identified them. CP 98. The short period of time between Waldon's observation of the boys at her window and her opportunity to view them at the showup procedure also supports the reliability of her identification.

Finally, once Waldon was able to view the boys close up and through a clear window, she "recognized them instantly" and was "100% sure" of the identification. RP 65. Although Gauthun makes much of Waldon's initial uncertainty, her refusal to identify the boys without a closer look actually makes her eventual positive identification all the more reliable. When she first arrived at the

location where Gauthun and Green were detained, the boys were 45 feet away, it was drizzling or misting, and the window she had to look through was covered with rain drops. Had Waldon's objectivity been compromised by the circumstances of the showup, she would not have said that the boys were too far away to identify. It is precisely because Waldon was relying on her recent memory of the attempted break-in – and not the circumstances of the showup – that she needed to get closer to Gauthun and Green before being able to identify them. RP 62. Further, Waldon had been given the standard admonishment about in-field identifications[3] and was determined to make an identification only if she was truly certain. Waldon testified, "I didn't want to identify if it wasn't the actual person that had tried to break in. Because, you know, there's cases that people do that, so I wanted to be sure." RP at 62. Under these circumstances, Waldon's certainty upon seeing the boys close up contributes to the reliability of her identification.

Gauthun contends that cross-racial elements of Waldon's identification of Green support the likelihood of misidentification.

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[3] Officer Jones testified that he informed Waldon, "You'll be asked to look at the person or persons we have stopped. The fact that we have this person stopped and may be handcuffed, should not influence your judgment. You should not conclude or guess a person is the one who committed the crime. You are not obligated to identify anyone. It's just as important to free innocent persons from suspicion, as it is to identify guilty parties." RP 270.

"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." Brief of Appellant at 39 (quoting 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)). Gauthun represents that Waldon is Caucasian.[4] Brief of Appellant at 40. But since Gauthun is also Caucasian, the possibility that Waldon is better able to identify people of her own race strengthens the reliability of her identification as to Gauthun. Gauthun argues, however, that the fact that he and Green were not presented separately for identification means that "the cross-racial risks of misidentifying [Green] carried over to [Gauthun], who was identified more because of his proximity to [Green] than due to his own features." Brief of Appellant at 40. The record does not support that inference. First, while Waldon testified that she got a better look at Green, she explained, "I still got a reasonable identifying look at the other child as well." RP 78. The trial court found that Waldon "was credible" and that she "was able to observe the other

[4] Gauthun offers no citation to the record for the proposition that Waldon is Caucasian.

[lighter-featured] individual"; findings that Gauthun does not challenge and which are verities on appeal. CP 95, 98; RP 365. There is no indication in the record that Waldon identified Gauthun based upon his proximity to Green.

Gauthun also contends that expert Geoffrey Loftus's testimony demonstrated that Waldon's identification was unreliable. Of course, Dr. Loftus did not testify as to the particulars of this case and had no basis to do so. RP 234-35. Moreover, the trial court relied on Dr. Loftus's testimony to conclude that Waldon's identification was reliable. The court noted that the view Waldon had of the boys' faces, framed by the window, differed from the situations in the studies Dr. Loftus relied on. RP 360. Additionally, Loftus's testimony that witnesses can only take in so much information suggests that Waldon's focus on the boys' faces makes her recall of their features more reliable. RP 204, 362. Unlike some of the situations described by Dr. Loftus, the absence of weapons and Waldon's safe position inside her locked home insulated her from some of the distractions Dr. Loftus described, like the need to find an escape route. RP 362. Further, the court pointed out that the post-event memory contamination forces described by Dr. Loftus were not an issue in this case. RP 364.

The boys were not handcuffed, not sitting on the ground or in the patrol car, and the interaction between the boys and the police appeared casual and non-threatening to Waldon. RP 364. Finally, the court noted that Waldon's testimony made her perception of her confidence in her identification more reliable than the situations described by Dr. Loftus. In particular, Waldon's refusal to identify the boys until she got a good look at their faces indicates that she was "charting her own course instead of being influenced or intimidated by the situation with the officers. She spoke up. She indicated she wanted a closer view. When she got a closer view, she indicated she was certain it was them." RP 365. In sum:

> The Court finds here that [Waldon's] testimony was credible. Her testimony, coupled with Dr. Loftus's – which talked about all the things that can distract and chip away and create unreliability in an identification – his testimony actually allowed the Court to understand better what was especially reliable about [Waldon's] view.

RP 365.

Because an analysis of the reliability factors reveals no likelihood that Waldon's identification of Gauthun was so impermissibly suggestive as to render the identification unreliable, this Court should affirm his conviction.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Gauthun's conviction for attempted residential burglary.

DATED this 3rd day of January, 2014.

Respectfully submitted,

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Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. GAUTHUN, Cause No. 70123-1 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of January, 2014

UBrame

Name
Done in Seattle, Washington