NO. 47425-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY JOHNSON,

Appellant.

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

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence, the trial court erred in entering CrR 3.6 Finding of Fact #6, to the extent that finding suggests police officers refrained from entering Mr. Johnson's home until they had provided him with *Ferrier*[1] warnings.

2. The trial court erred in concluding the police officers' warrantless search was valid when there was overwhelming evidence that police officers entered Mr. Johnson's home without permission before seeking his consent to search.

3. The trial court erred in concluding the state met its burden of establishing an exception to the warrant requirement when it never made a specific written finding—despite conflict in the testimony—that police officers "knock and talk" approach did not involve illegal entry into Mr. Johnson's barn.

4. In the absence of substantial evidence, the trial court erred in finding Mr. Johnson's consent to a warrantless search was voluntary

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[1] *See State v. Ferrier*, 136 Wn. 2d 103, 118, 960 P.2d 927 (1998) ("[W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.")

despite coercive circumstances, including the officers' illegal entry into Mr. Johnson's home after dark to make contact with him and a thinly veiled threat to arrest him if he refused to cooperate with the search.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to support the trial court's CrR 3.6 finding of fact when the record contains overwhelming evidence that the police officers illegally entered Mr. Johnson's closed barn to make initial contact with him before requesting consent to search?

2. Whether the trial court erred in concluding that the warrantless search was valid when overwhelming evidence showed that police officers illegally entered Mr. Johnson's home to obtain it, and when the trial court's written findings of fact do not specify that the officers refrained from entering Mr. Johnson's home before giving him *Ferrier* warnings?

3. Whether the trial court erred in concluding Mr. Johnson's consent to a warrantless search was voluntary despite coercive circumstances, including the officers' illegal entry into Mr. Johnson's home after dark to make contact with him and a thinly veiled threat to arrest him if he refused to cooperate with the search?

C. STATEMENT OF THE CASE

On January 22, 2014, two Centralia police officers—Officer Adam Haggerty and Officer Chad Withrow—received a tip from an informant that Mr. Johnson had a couple of ounces of methamphetamine in his RV, which was located inside a large barn next to a home in Lewis County. RP2 8-9, 14, 17-18.[2] Without obtaining either a search or arrest warrant, they, accompanied by Lewis County Deputy Bruce Kimsey in separate car, drove up Mr. Johnson's driveway after dark and parked their undercover Cadillac Escalade in front of the barn, playing loud music in an effort to lure him out. RP2 9-10, 17.[3] They were hoping to do a "knock and talk" and were interested both in finding out about where Mr. Johnson bought methamphetamine and in seizing any methamphetamine he had. RP2 9, 20, 38.

From their investigation, the officers knew Mr. Johnson had a camera on the barn, and they parked so that Mr. Johnson would see them and hopefully come out. RP2 18. The barn door was all closed up, and the

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[2] This case has three volumes of verbatim. RP1 refers to the volume containing the transcript of the omnibus hearing (2/26/2015) and trial confirmation (3/12/2015). RP2 refers to the volume containing the transcript of Mr. Johnson's motion to suppress evidence and the stipulated bench trial (3/19/2015). RP3 refers to the volume containing his sentencing hearing (4/1/2015).

[3] Deputy Kimsey was there initially but left to pursue someone who had an outstanding warrant around the time the officers were approaching the Mr. Johnson's barn. RP2 18, 49.

officers thought Mr. Johnson was "roving around somewhere inside there and wasn't viewing his cameras." RP2 18. In fact, Mr. Johnson saw the Escalade on a monitor he had inside the barn; because he did not recognize the Escalade, he stayed inside the barn and continued working on cars. RP2 69.

Officer Haggerty, who testified first at the suppression hearing, said that because Mr. Johnson did not respond to their car being parked out front, the officers "walked in through the big barn" whose "main huge door … was all closed up." RP2 18. They "gave [Mr. Johnson] a yell, 'Mr. Johnson' or 'Jeff. Police. Can we talk?'" RP2 18. Officer Haggerty estimated that he and his partner "went probably a couple feet into the barn to yell to see if he was in there." RP2 19. Though he admitted they went into the barn, he emphasized that they "did not go into the trailer in question." RP2 19. Once Mr. Johnson came forward, they said, "Can we talk to you? Can we go outside and talk?" RP2 19.

Mr. Johnson's account of the officers' approach and entry of his property was similar in that he remembered seeing the officers' car on his video monitor and then the officers entering the barn to talk to him. RP 2 69. He described the officers' approach as follows:

> I was sitting in my trailer and a neighbor from across the street was just leaving. I have a little monitor that sits at the end of my bed. I caught a bright light. I looked at my

> monitor and there was some bright lights sho[ne] in. So I grabbed my glasses off of the counter, put them on and I still couldn't make out what kind of rig it was, so I went out the front of my trailer, *peaked through the barn doors* and seen officers getting out of this Escalade, so I walked over and just kept working on a car. *They came in the barn around the front of the trailer* and said, "Hey, Mr. Johnson, have you seen Mr. Hall lately?"

RP2 69 (emphasis added). Mr. Johnson never heard the officers knock at all and the officers "just walked into the barn." RP2 69-70. Mr. Johnson estimated that the officers got "probably 30 feet through a couple of rooms and then around in front of the trailer" before making contact with him. RP2 70.

Ms. Hamilton, who was in a house adjacent to the barn, and saw the officers approach described essentially the same thing. She saw the officers "g[e]t out of the vehicle and [go] into the barn." RP2 65. She remembered thinking that they entered the barn in an odd way because they went through the tack room. RP2 65. Usually people went in through the big doors on the front of the barn. RP2 65.

Officer Withrow, Officer Haggerty's partner and the second officer to testify, agreed that the officers stayed in the Escalade with the music turned up for a while, hoping Mr. Johnson would come out. RP2 37. However, he said the officers approached the barn, but did not go inside. RP2 38. He testified that they got Mr. Johnson's attention by knocking on

the outside of the barn and asking him to come out, and that Mr. Johnson eventually emerged. RP2 31-32, 38. He said their conversation with Mr. Johnson "began outside," probably within ten feet of the barn. RP2 39.

While Officer Withrow was testifying about how the officers approached Mr. Johnson, defense counsel observed that Officers Withrow and Haggerty appeared to be communicating with each other while Officer Withrow was on the stand: "[E]very time I look at Officer Withrow after a question, he looks right over at Officer Haggerty." RP2 39. Defense counsel was unable to see Officer Haggerty, but said he "[had] a concern" and asked the court to remove Officer Haggerty from the courtroom. RP2 39. The court responded: "I've been watching, Mr. Haggerty isn't doing anything, so your request is denied. He is the investigating officer. He can stay in the courtroom." RP2 39.

Deputy Bruce Kimsey, the Lewis County Deputy who accompanied the other officers to Mr. Johnson's home, was the third officer to testify. He said the officers "approached the shop or the barn area where Jeff Johnson lives" and "when we were walking up to the door, I think the Centralia officers were calling out for Jeff Johnson." RP2 49. He did not see the officers go into the barn to get Mr. Johnson. RP2 52. He "remember[ed] [Mr. Johnson] com[ing] out to the doors of the barn" and talking to the officers in front of the barn door. RP 51-52. At that point,

Deputy Kimsey left for about ten minutes to purse the person with the warrant. RP2 50. When he returned, the officers were inside the barn talking to Mr. Johnson. RP2 50.

After they approached Mr. Johnson, Officer Haggerty encouraged Mr. Johnson to sign *Ferrier* consent form by stating that if he cooperated with law enforcement he could sleep in his own bed that night. RP2 15, 20, 44. Mr. Johnson described the statement as "if I would work with [the police officers], that no one would go to jail that night." RP2 72. The officer's statement was in the context of the request to search Mr. Johnson's trailer. RP 73.

Mr. Johnson signed the *Ferrier* consent form. The police officers then searched his RV and found two ounces of methamphetamine, a digital scale, and packaging material. RP2 11-12; CP 30. About a year later, Mr. Johnson was charged with possession of Methamphetamine with Intent to Manufacture or Deliver under RCW 6950.401(1) and RCW 69.50.401(2)(b).

Before trial, Mr. Johnson filed a motion to suppress evidence from the search, arguing that his consent to the search was invalid under both the state and federal constitutions. CP 4-10. Specifically, Mr. Johnson argued that the state failed to prove by clear and convincing evidence that it provided adequate *Ferrier* warnings because of the coercive

circumstances surrounding the search. CP 4-10.

The trial court denied the motion to suppress and entered the following Findings of Fact and Conclusions of Law:

> 1. On January 22, 2014, Officer Adam Haggerty, Officer Chad Withrow, and Deputy Bruce Kimsey responded to 1242 North Fork Road in Vader to contact Jeffrey Jerome Johnson.
>
> 2. Officers Haggerty and Withrow wanted to conduct a "knock and talk" with Johnson regarding information obtained from an earlier arrest where it was learned that Johnson was selling methamphetamine from a trailer stored inside a barn.
>
> 3. Deputy Kimsey was present because Officers Haggerty and Withrow were with the Centralia Police Department, and had no official jurisdiction at Johnson's residence.
>
> 4. Officers Haggerty and Withrow were wearing street clothing, and were driving an undercover vehicle—a Cadillac Escalade. Deputy Kimsey was in his patrol vehicle, in uniform.
>
> 5. When Officers Haggerty and Withrow arrived at Johnson's residence, they parked their vehicle in front of a security camera and turned their music up loud in an attempt to contact Johnson.
>
> 6. When nobody responded to their presence, Officers Haggerty and Withrow approached the garage and were able to summon Johnson from within.
>
> 7. Johnson was asked to step outside, which he complied. While outside the barn, Johnson was informed of why law enforcement was contacting him.
>
> 8. During this time, Johnson was interacting almost exclusively with Officer Haggerty. Officer Withrow was

serving as a security officer in case something happened, and would roam the area approximately 10 feet away from Officer Haggerty and Johnson. Deputy Kimsey was assisting Officer Withrow.

9. Around this time, a person drove onto the property and was contacted by Deputy Kimsey. Shortly after contact with Deputy Kimsey, this person left in their vehicle. Deputy Kimsey learned that this person had a warrant for their arrest and gave chase in his own vehicle.

10. While Deputy Kimsley was away, Officer Haggerty informed Johnson that he was just interested in his source for methamphetamine, and that he would sleep in his own bed tonight if he cooperated with law enforcement.

11. Johnson agreed to cooperate with law enforcement.

12. Officer Haggerty asked Johnson how much methamphetamine he had inside his trailer. Johnson informed Officer Haggerty he had approximately two ounces. Johnson also admitted to having a digital scale and packaging material.

13. Officer Haggerty completed a Consent to Search form that contained Ferrier warnings. Officer Haggerty was in the practice of verbally summarizing the Ferrier warnings for people as they went over the form. Officer Haggerty also had Johnson read the form. Officer Withrow was able to hear Officer Haggerty verbally reviewing the consent to search form with Johnson at this time.

14. Johnson was wearing glasses, and at no time asked for assistance in reading the form, or indicated that he could not understand the form. Officer Haggerty knew Johnson to have a 12^{th} grade education.

15. Johnson consented to the Ferrier warnings verbally, by granting permission to enter the trailer. Johnson also consented by signing the form where he was supposed to sign. The Ferrier warnings were reviewed with Johnson,

and consent was granted while outside the trailer and barn area.

16. Around this time, Deputy Kimsey returned from his pursuit of the male.

17. Around this time, Jessica Hamilton and Melissa Alderman approached the barn from a house that was also on the property to ask what was going on. On each occasion, Hamilton and Alderman were told that law enforcement was investigating stolen property that Johnson may have information about. The tone used by law enforcement was not forceful, and each time Hamilton and Alderman left on their own volition. Hamilton and Alderman knew that Johnson had bad eyesight, but did not ever mention it to law enforcement.

18. Once permission was granted Officer Haggerty and Withrow, along with Johnson entered the barn area. Officer Haggerty and Johnson entered the trailer. Johnson was not placed in handcuffs at any time during this contact.

19. While inside the trailer, Officer Haggerty discovered the methamphetamine Johnson had mentioned, a digital scale, and packaging materials.

20. Johnson admitted to signing the consent form.

RP2 100, 102; CP 28-30.[4]

Based on these findings, the trial court concluded that "Ferrier warnings were given to Johnson by Officer Haggerty," that "[v]alid consent was given by Johnson," and the consent was "knowing[ly], intelligently, and voluntarily given." RP2 100, 102; CP 31. Mr. Johnson

[4] This version of the Findings of Fact includes handwritten revisions the trial court made when it considered Mr. Johnson's objections to its CrR 3.6 findings. *See* RP3 5-7.

objected to these findings overall and specifically to Findings of Fact #6, 11, 13, 14, and 15. RP3 6-7.[5]

Mr. Johnson waived his right to a jury trial and, based on his lawyer's advice, stipulated to the facts contained in the officers' police report; he also stipulated that the substance found by police was methamphetamine. RP2 103-05; CP 11, 12, 13-17. The trial court conducted a bench trial based on those facts and found Mr. Johnson guilty of possession of methamphetamine with intent to deliver. RP2 105. The court entered Findings of Fact, Conclusions of Law, and Orders for the bench trial. CP 24-27.

The court sentenced Mr. Johnson to 40 months in prison. CP 35. Mr. Johnson timely filed this appeal. CP 42.

D. ARGUMENT

Police officers' warrantless search of Mr. Johnson's home was invalid for two reasons. First, the officers illegally entered Mr. Johnson's barn to seek consent to search his RV, which was located inside it. Because their "knock and talk" approach was illegal and they entered the home before providing *Ferrier* warnings and seeking consent to search, the state did not meet its burden of establishing by clear and convincing

[5] These objections were phrased generally but appear to have challenged the findings as lacking support by substantial evidence in the record. RP3 5-7.

evidence that *Ferrier* warnings were given prior to entering the home. The results of the subsequent search therefore must be suppressed. Second, even assuming the police approached Mr. Johnson legally, his consent to search the RV was involuntary because it was given in a highly coercive setting and specifically in response to a police officer's thinly veiled threat to arrest and jail him, something the state never established the officer had authority to do.

1. Standard of review

When reviewing a denial of a CrR 3.6 motion to suppress, this court reviews whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn. 2d 208, 214, 970 P.2d 722 (1999). In the context of *Ferrier* warnings, the "absence of a finding that all warnings were given before entry is tantamount to a finding they were not given." *State v. Budd*, 186 Wn. App. 184, 199, 347 P.3d 49, *review granted*, 183 Wn.2d 1014, 353 P.3d 641 (2015); *see also State v. Cruz*, 88 Wn. App. 905, 946 P.2d 1229 (1997) (absence of finding on critical factual issue resulted in presumption that state failed to sustain its burden of proving consent to search by clear and convincing evidence). In other words, "[t]he absence of a finding on a material issue is presumptively a negative

finding entered against the party with the burden of proof." *Budd*, 186 Wn. App. at 199, *review granted*, 183 Wn.2d 1014 (2015).

2. The state failed to establish by clear and convincing evidence that the police officers obtained Mr. Johnson's consent before entering his home to search for evidence of drugs.

Article I, Section 7, of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without the authority of law." Wash. Const. Article I, Section 7. Similarly, the Fourth Amendment of the United States Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495 (2013).

Warrantless searches are *per se* unreasonable unless justified by a limited set of carefully drawn exceptions. *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012); *see also Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (warrantless searches "presumptively unreasonable"). This creates an "almost absolute bar to warrantless arrests, searches, and seizures." *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983).

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 133 S. Ct. at 1414. A person's right "to retreat

into his [or her] own home and there be free from unreasonable governmental intrusion" stands at the core of Article 1, Section 7, and the Fourth Amendment. *See Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961); *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994); *State v. Rose*, 128 Wn.2d 388, 391-92, 909 P.2d 280 (1996). The areas "immediately surrounding and associated with the home"—the curtilage—are "part of the home itself" for purposes of the Fourth Amendment and state constitutional counterparts. *Oliver v. United States*, 466 U.S. 170, 176, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984); *Jardines*, 133 S. Ct. at 1414.

One exception to the warrant requirement is the "knock and talk" investigation. In this kind of investigation, police officers approach a person's home without a search warrant to seek consent to search. *Budd*, 186 Wn. App. at 189, *review granted*, 183 Wn.2d 1014 (2015). For a search conducted using this technique to be valid, police officers must follow several carefully drawn rules.

First, the officers must approach the home—and make contact with a person authorized to consent to the search—in a lawful manner. In general, "[t]he license granted by the knock and talk rule is the same license granted to an unknown visitor: it 'typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be

received, and then (absent invitation to linger longer) *leave.*'" *Rosen v. Wentworth*, 13 F. Supp. 3d 944, 949 (D. Minn. 2014) (citing *Jardines,* 133 S. Ct. at 1415 (emphasis added)).

Second, the officers must "inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that [he or she] can revoke, at any time, the consent [he or she] gives, and can limit the scope of the consent to certain areas of the home." *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) (emphasis added). The officers must do this "*prior to entering the home*." *Id.* (emphasis added). At the suppression hearing, the state bore the burden of demonstrating by clear and convincing evidence these requirements were met. *Id.* at 116.

In this case, the state did not satisfy its burden because it did not demonstrate that *Ferrier* warnings were given *prior to entering Mr. Johnson's home*. Officer Haggerty, the lead investigator, admitted that the officers entered the closed-up barn in which Mr. Johnson's RV was located before making contact with him. RP2 19. Ms. Hamilton confirmed this. RP2 65. Mr. Johnson's testimony was also consistent with those accounts: He peeked out at the officers' car through a crack in the barn doors, specifically decided not to come out but instead to keep working on his car. RP2 69-70. Mr. Johnson's behavior represents a classic effort to

"retreat" into his home, one the investigating officers were obliged to respect.

But the officers in this case ignored his nonresponse. They did not "wait briefly to be received, and then (absent invitation to linger longer) *leave*." *Jardines,* 133 S. Ct. at 1415 (emphasis added)). Instead, they entered the closed barn without permission to find Mr. Johnson. This initial entry into Mr. Johnson's home without permission vitiates any consent the officers later obtained after giving Mr. Johnson *Ferrier* warnings, even though the officers ultimately gave Mr. Johnson *Ferrier* warnings outside the barn.

It is true that one officer testified that the officers made contact with Mr. Johnson in a different way, namely, by knocking on the barn door. RP2 30-31, 38. He said that the officers did not enter the barn before they obtained Mr. Johnson's consent. RP2 38. However, the trial court's written factual findings did not resolve the conflict in the officers' testimony. In the most relevant findings, the court first found that "[w]hen Officers Haggerty and Withrow arrived at Johnson's residence, they parked their vehicle in front of a security camera and turned their music up loud in an attempt to contact Johnson." CP 28-30 (Finding of Fact #5). Then the court found: "When nobody responded to their presence, Officers Haggerty and Withrow approached the garage and were able to

summon Johnson from within." CP 28-30 (Finding of Fact #6). This finding makes clear that Mr. Johnson was inside the barn, but says nothing about the officers' position at the time they made contact. The finding potentially suggests the officers were inside the building when the called out for Mr. Johnson (as Officer Haggerty, Ms. Hamilton, and Mr. Johnson testified); or it could be read to suggest they were outside the garage, as Officer Withrow testified.[6]

Likewise, the findings that relate to Mr. Johnson's signing of the *Ferrier* warning form state only that he signed the form outside the barn—they do not specify whether, as much of the testimony suggests, the officers entered the barn before obtaining consent. *See* Finding of Fact #15 (stating "consent was given while outside the trailer and barn area").

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[6] At the conclusion of this case, Mr. Johnson objected to Finding of Fact #6, apparently on the ground that it was not supported by substantial evidence:

> MR. CLARK: I'm going to object as a whole but more specifically I'm going to object to number six. We had mixed testimony, one where they went in and got him, one where they said they stayed out and he came to them.
>
> THE COURT: Well, just because there was conflicting testimony, that doesn't mean that the Court can't make a finding. That's what the Court does.
>
> MR. CLARK: I understand.

RP3 6. The court did not revise or otherwise clarify Finding of Fact #6 in response to Mr. Johnson's objection, and its verbal commentary does not clarify the meaning of its ambiguous written finding.

Because the trial court's written findings do not resolve these ambiguities, the state has failed to satisfy its burden of demonstrating by "clear and convincing" evidence that the officers refrained from entering Mr. Johnson's home prior to giving him *Ferrier* warnings. *See Ferrier*, 136 Wn.2d at 118 (imposing a burden on the state to prove by clear and convincing evidence that the required warnings were given prior to entering the home).

In this context, the most appropriate remedy is to reverse the trial court's denial of Mr. Johnson's suppression motion. The absence of this critical finding creates a presumption that the state failed to sustain its burden of proof. *See Cruz*, 88 Wn. App. at 906 (absence of finding on critical factual issue resulted in presumption that state failed to sustain its burden of proving consent by clear and convincing evidence). A review of the testimony given at the suppression hearing shows there was overwhelming evidence that the officers, in fact, entered Mr. Johnson's home illegally before asking him for consent to search.

3. The state likewise failed to establish that Mr. Johnson's consent—obtained after the officers' initial illegal entry—was voluntary

Even assuming the state demonstrated police officers gave *Ferrier* warnings prior to entering Mr. Johnson's home for the first time, it also failed to demonstrate by clear and convincing evidence that Mr. Johnson

voluntarily consented to the search in question after he was provided appropriate warnings.

For a warrantless search to be valid under the "knock and talk" exception, the investigating police officers must first provide *Ferrier* warnings prior to entering the home and obtain consent. This consent must be knowing, intelligent, and voluntary. *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987). The voluntariness of consent is determined by "considering the totality of circumstances surrounding the alleged consent." *Shoemaker*, 85 Wn.2d at 211–12 (discussing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

In this case, the trial court erred in finding that Mr. Johnson voluntarily consented to the search. As the Washington Supreme Court has acknowledged, the "knock and talk" investigative procedure is inherently coercive. *Ferrier*, 136 Wn.2d at 115. This is why the state has the burden to demonstrate by clear and convincing evidence that a person's consent to a warrantless search was knowing, intelligent, and voluntary. *Id.* at 111.

The circumstances surrounding this particular search are too coercive to support the trial court's finding that Mr. Johnson's consent was voluntary. He did sign the form the officers presented to him. However, he

did so only after multiple police officers approached the house during the dark, and after he unsuccessfully avoided contact with the officers because they illegally entered his closed up barn to find him. The police officers were persistent and willing to trespass into Mr. Johnson's home even after he indicated his preference to be left alone. By itself, this intrusion created a highly coercive atmosphere from Mr. Johnson's perspective.

But the officers did not stop there. After entering Mr. Johnson's barn, Officer Haggerty issued a thinly-veiled threat to arrest and jail Mr. Johnson by stating that "he would sleep in his own bed tonight if he cooperated with law enforcement" by letting them search his home. RP2 15. Making matters worse, this threat involved deception. It was not clear at that point Officer Haggerty could have followed through on the threat legally for two reasons: The officers themselves were unsure they had probable cause to make an arrest or obtain a search warrant; and, in any event, as the trial court found, neither of the officers in the barn with Mr. Johnson had authority in the jurisdiction where he lived. RP2 25; CP 28-30 (Finding of Fact #3); *see also United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973) ("Where the consent is obtained through a misrepresentation by the government … or under inherently coercive pressure and the color of the badge … such consent is not voluntary.").

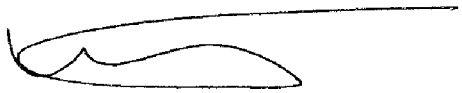
Taken together, the officers' illegal nighttime entry and unsupported threats to take legal action created an atmosphere so coercive that Mr. Johnson's consent could not have been voluntary. The trial court lacked substantial evidence to find otherwise.

E. CONCLUSION

There was overwhelming evidence that police officers entered Mr. Johnson's home to find him *before* asking for his consent to search. The resulting search was therefore invalid. Even if the officers provided proper *Ferrier* warnings before entering Mr. Johnson's home, the search was still invalid because Mr. Johnson's consent was involuntary. Given the coercive circumstances at work in this "knock and talk"—which included officers' veiled threat to arrest and jail Mr. Johnson—the record lacks substantial evidence to support the trial court's findings and conclusions to the contrary. For these reasons, this Court should reverse Mr. Johnson's conviction and suppress the results of the police officers' illegal search.

Respectfully submitted this 19th day of November 2015.

LAW OFFICE OF LISA E. TABBUT



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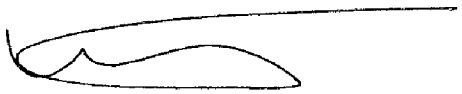
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Jeffrey Johnson/DOC# 866918 Larch Corrections Center, 15314 NE Dole Valley Road, Yacolt, WA 98675.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 19, 2015, in Winthrop, Washington.



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