

NO. 69119-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DIANTRE JEFFERSON,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY J. McCARTHY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Assignments of error on appeal must be supported by legal authority and argument. Jefferson designates 25 assignments of error, but challenges most only by contending that they were findings made "in the absence of substantial evidence," with no additional argument or authority. Should this Court refuse to consider those particular assignments of error?

2. Pretext stops, where police follow a driver or passenger in a vehicle they suspect was involved in criminal activity, looking for a traffic violation to serve as an excuse to execute a traffic stop, are unconstitutional. To determine whether or not a stop was based upon a pretext, courts look at the totality of the circumstances. Here, the officers did not follow Jefferson nor did they suspect him of being involved in criminal activity; rather, they pulled him over moments after noticing that he was not wearing his seatbelt. Was the stop of Jefferson's van constitutional?

3. Exclusion of evidence based on relevancy is left to the trial court's wide discretion, and will only be reversed when there is a finding of a manifest abuse of discretion. Here, the defendant assigns error to the trial court's refusal to admit a videotape made by the defense attorney depicting a view of the defendant's van

from behind. The video was not taken by any witness who testified, and was shot at a separate time and place than the relevant incident. Jefferson provides no argument nor does he cite to any authority in support of his challenge. Should this Court refuse to address the admissibility of the video, and, even if this Court were to address the trial judge's suppression of the video, was it within the trial court's discretion to exclude it?

4. The Washington Supreme Court has mistakenly held that the burden is on the State to prove that an exception to a warrantless search or seizure was valid by "clear and convincing" evidence. When a trial court's findings of fact and conclusions of law are not sufficient to permit meaningful review upon appeal, the case should be remanded to the trial court for improved findings. Here, the trial court found that it was a "close call," but that the State had carried its burden in proving an exception to the warrant requirement for Jefferson's warrantless search and seizure "by a preponderance of the evidence." Because the "clear and convincing" standard is currently the law, should this Court remand to the trial judge for clarification regarding whether the State also met its burden by clear and convincing evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Diantre Jefferson was stopped by King County Sheriff's Gang Unit on October 29, 2011 as part of a traffic stop. 1RP 12.¹ After the officers saw a gun clipped to his waist, Jefferson, a felon, was arrested and eventually charged with Unlawful Possession of a Firearm in the Second Degree (UPFA 2). CP 1. Judge McCarthy was the trial judge, and presided over the pretrial hearings, including a Criminal Rule 3.6 (CrR 3.6) motion challenging Jefferson's stop by police as pretextual and the seizure of the gun as an unlawful search and seizure. 1RP 3-197. Judge McCarthy ruled that the stop was not pretextual, and that therefore the gun was lawfully seized. CP 83-88. He signed CrR 3.6 findings accordingly. CP 83-88; 1RP 59-67. In his findings regarding the legality of the stop and search of Jefferson's person, Judge McCarthy ruled that "The State has carried its burden by a preponderance of the evidence." CP 87. Following the trial court's findings, Jefferson submitted to a stipulated trial, and was found guilty. CP 58, 72, 78; 2RP 73.

¹ This brief will cite to the Verbatim Report of Proceedings as follows: 1RP (6/18/12) and 2RP (6/20/12).

2. SUBSTANTIVE FACTS AND TESTIMONY
REGARDING THE STOP.

Jefferson was arrested on October 29, 2011, for UPFA 2, after being stopped by members of the King County Sheriff's Gang Unit for not wearing his seatbelt. 1RP 52-68. King County Detective Miller, one of the officers who stopped Jefferson, testified that the Gang Unit's work consisted of proactive police work as well as patrol assistance. 1RP 5-6. In its patrol function, the Gang Unit makes social contacts, suspicious person stops, vehicle stops, handles calls, and otherwise conducts "the work of a patrol officer." 1RP 7. On October 29, Miller was riding with other Gang Unit members, King County Sheriff's Detective Olmstead, and Department of Corrections Specialist Rongen; Rongen drove the Gang Unit's unmarked Escalade. 1RP 13, 83-85.

While the Gang Unit's main mission is to investigate gang-related crimes, the officers testified that much of their work also involves "normal police stuff," like stopping citizens for speeding, "turning violations," and other "random traffic infractions." 1RP 129. Olmstead said that "more than half" of the time on the Gang Unit is devoted to "non-gang" investigations." 1RP 134. The officers admitted that the Gang Unit actually gives very few traffic

citations, but that traffic stops in and of themselves are a good way of staying in contact with the community and that they usually result in a warning. 1RP 104. All of the officers testified that they were conducting routine patrol when they first noticed Jefferson's van. 1RP 84-85.

Rongen testified that he had first seen Jefferson enter his van at a gas station, while Miller testified that he saw Jefferson for the first time only after his van was stopped. 1RP 13, 88. Miller initially noticed that Jefferson was not wearing his seatbelt because he could "see the outline of the seatbelt hanging next to the driver and could not see a shoulder strap running across" him. 1RP 15. Olmstead and Rongen testified similarly. 1RP 90, 135. Between 30-45 seconds after pulling out of the gas station where Rongen first saw Jefferson's van, the Gang Unit executed a traffic stop for the seatbelt violation, and Jefferson pulled over into a nearby parking lot. 1RP 92, 137. Rongen testified that about 15 seconds elapsed between when Miller signaled him to stop the van for the seatbelt violation and the actual stop because Rongen wanted to permit the van to "proceed through" an intersection, a technique that he described as "standard procedure." 1RP 92.

During the officer's testimony, both parties explored the details leading up to the stop in their direct and cross examinations of each witness. Miller testified that he pointed out the seatbelt violation to Rongen and then Miller ran Jefferson's license plate in his computer. 1RP 17. Miller learned that the van's license tabs were expired. 1RP 22. In response to a question from the State while on the stand, Miller testified that he did not know Jefferson's race at the time of the stop (Jefferson is African-American). 1RP 21. Specialist Rongen testified that he knew that Jefferson was an African-American male because he had seen him walk up to his van while Rongen rolled through a gas station. 1RP 90-91.

Once Jefferson had parked in the parking lot, all three officers approached his car. 1RP 22. According to Rongen, having all three members of the enforcement team contact a stopped car is the Gang Unit's standard method of approaching an occupied vehicle, even for a simple traffic infraction conducted while on patrol. 1RP 55. Miller testified that Jefferson appeared "very nervous" and his hands were "shaking." 1RP 23-24. Rongen was standing about eight feet behind Olmstead, but heard Olmstead ask Jefferson why he was so nervous. 1RP 93-94. Olmstead testified that Jefferson was repeating his questions and appeared very

nervous, which in turn raised safety concerns for Olmstead, who asked Jefferson to step out of the car. Olmstead explained this from the witness stand:

...it's one of those things that once somebody gets out of the car and you're able to pat them down, then you can actually lower it down a little and you can have a real conversation with them. 1RP 140.

As Jefferson turned in his car seat, Miller noticed what looked like a "plastic clip on an inside-the-pants holster" protruding from Jefferson's waist. 1RP 25. Once Jefferson stepped out of the van, Miller noticed that his pants appeared to be weighted down on the side with the clip and announced to his colleagues that he believed Jefferson had a gun. 1RP 26.

Olmstead and Rongen placed Jefferson in handcuffs and Miller asked him if he had a gun; Jefferson said that he did and that he used it for protection. 1RP 26. Then Miller learned, via radio, that Jefferson had a felony conviction, and the police officers arrested him for UPFA 2. 1RP 27-28.

At the conclusion of the CrR 3.6 hearing, the Honorable Judge McCarthy found that the stop was not pretextual and the seizure of Jefferson was legal:

So I think that the Court finds that the stop itself, the evidence does not persuade the Court that it was pretextual; that there was a basis for the stop. ...

So as stated, it's a close case, but I believe that the State has carried its burden by a preponderance of the evidence, and the motion to suppress is denied.

2RP 66-67. Following the trial judge's findings, Jefferson and his attorney agreed to a stipulated trial, and the trial court found him guilty as charged. 2RP 73. Judge McCarthy entered findings of fact and conclusions of law where he indicated that he found the police officers "credible." CP 83-88.

3. FACTS REGARDING THE VIDEO.

During Jefferson's case at trial, his attorney attempted to admit a video he had produced. 1RP 194. The attorney had shot video of Jefferson's van as he drove behind it to show "what can be seen" from that vantage point, and sought to admit it through Jefferson's testimony. 1RP 194. The State objected to its admissibility, arguing that the defendant could not "authenticate whether the video accurately portrays the amount of reflection or visibility from someone standing behind the vehicle because he was in the vehicle and was not sharing the point of view of the camera." 1RP 194. Jefferson's attorney countered that this

objection went to the weight that should be given to the video evidence, but not its admissibility. 1RP 194.

The trial court ruled as follows:

I'm going to sustain the objection on the grounds that I think it is obviously an attempt to recreate his driving the van on a city street at a different time and place. And I think because of the different time and place it really has marginal relevance as far as the Court is concerned. Attempting to recreate the conditions, the sunlight, and all of that, I think after the fact is, is not relevant.

The Court suppressed the video but admitted it as an "offer of proof." 1RP 194-96.

C. ARGUMENT

1. THIS COURT SHOULD NOT ADDRESS JEFFERSON'S ASSIGNMENTS OF ERROR #1-17, 22 AND 23, BECAUSE HE PROVIDES NO AUTHORITY, ARGUMENT OR EXPLANATION TO SUPPORT THEM.

Jefferson opens his appellate brief with 25 assignments of error. Brief of Appellant at 1-7. Assignments 1-17 simply state, "in the absence of substantial evidence the trial court erred in finding..." and then insert the court's factual findings. Brief of Appellant at 1-7. Assignments of error 22 and 23 state that the court's incorporation of its oral findings and conclusions was

"in error," but provide no supporting argument or authority. Brief of Appellant at 6-7. Because Jefferson provides no argument, authority or explanation justifying his contention that there is no "substantial evidence" to support the court's factual findings in this section, this court should disregard assignments of error 1-17, 22 and 23².

Under RAP 10.3(a)(6), assignments of error on appeal must be supported by argument, "together with citations to legal authority." Without argument or authority to support them, this Court should not address Jefferson's assignments of error.

RAP 10.3(a)(6); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). With no argument or authorities to challenge them, the trial court's findings should be considered verities on appeal.

See State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

While the remainder of Jefferson's brief contends that Jefferson's traffic stop was pretextual, this is a separate argument from whether or not the trial court's factual findings are supported by "substantive evidence," which provides the basis for most of Jefferson's assignments of error. Additionally, each of the factual

² Jefferson's assignments of error 18-21 are not individually argued, but they deal with the trial court's legal conclusions, which are challenged in the corpus of his brief and therefore, in compliance with a liberal reading of RAP 10.3(a)(6).

findings Jefferson challenges are directly supported by testimony from witnesses at trial.³ When findings of fact are supported by substantial evidence, viewed as verities, they are undisturbed on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Because Jefferson's assignments of error 1-17 and 22-23 do not comply with the RAP, fail to cite argument or authority, and are, in fact, supported by the record, this Court should not consider them on appeal.

2. THE STOP WAS NOT PRETEXTUAL.

Jefferson could argue that the portion of his briefing that argues that the stop was pretextual serves to undermine each individualized finding of fact made by the trial court, thereby providing argument and authority to support his many assignments of error. But the stop was not pretextual, and the trial court's findings in support of that conclusion are buttressed by substantial

³ For example, in his second assignment of error, Jefferson claims that there was not substantial evidence to support FoF 1(e), where the court found that the Gang Unit was on "standard patrol" on October 29, 2011, the day of Jefferson's arrest. But Miller testified that the Gang Unit was "just conducting patrol" the day they arrested Jefferson and Rongen said that the unit was "working a random patrol" on that same day. RP 13, 84. The response is similar to each assignment of error, 1-17, where the testimony of witnesses directly supported the trial judge's findings.

evidence. In addition, the trial court's legal conclusion that the stop was not pretextual is sound.

A pretextual stop occurs when police officers use a traffic violation as an excuse to pull someone over, when their real intent is "not to enforce the traffic code, but to conduct a criminal investigation unrelated to driving." State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Because a pretextual traffic stop is a seizure that cannot be constitutionally justified for its true reason, it has been deemed unconstitutional by Washington courts. Id. at 351. To determine whether a traffic stop is a pretext, the court should consider the totality of the circumstances, "which include both the subjective intent of the officer" and the "objective reasonableness of the officer's behavior." State v. Montes-Malindas, 144 Wn. App. 254, 260, 182 P.3d 999 (2008).

Jefferson contends that the totality of the circumstances here shows that the stop was pretextual, but the evidence does not support his argument. The Gang Unit on patrol took only a few moments to pull Jefferson over after the officers first saw his van, and they acted in the ordinary course of their patrol duties when they initiated the traffic stop because of Jefferson's failure to use his seatbelt.

In Montes-Malindas, a police sergeant noticed several people in a parked van acting nervously and switching seats with each other. Montes-Malindas, 144 Wn. App. at 257. The sergeant observed as they left the van and entered a Walgreens store, before returning to the van. Id. As the van drove away, the sergeant noticed that it did not have its headlights on, despite the late hour. Id. The van drove for about 100 meters before its headlights were illuminated. Id. It was only after the headlights came on that the sergeant pulled the van over. Id. Because of the suspicious activity the sergeant had witnessed earlier, and the fact that the driver did not have a license, the sergeant searched the occupants and the van, finding a firearm and drug paraphernalia. Id. at 258. The trial court found that the sergeant's testimony was credible that he did not follow the driver of the van *looking* for a legal reason to pull him over and that his intent was only to stop the driver for the headlight violation.

But upon review, Division 3 considered the totality of the circumstances, including both the subjective intent of the sergeant and the objective reasonableness of his behavior. Id. at 260. The court noted that although the sergeant justified the stop of the van based on its delay in turning on its headlights, the sergeant also

testified that he was suspicious of the activity he saw occurring in the van before deciding to follow it; moreover, the sergeant admitted that those suspicions were on his mind when he pulled the van over. Id. at 261. The sergeant approached the passenger's side first, and spoke to the passengers, not the driver, "suggesting that the stop was premised on more than the driver's actions." Id. As he approached the van, the sergeant had called for an additional officer, which also suggested to the court that this was "something more than a traffic stop." Id. at 262. Perhaps most compelling for the court was the fact that the sergeant actually waited until the violation no longer existed before executing the stop – the van's lights were turned on *prior* to the sergeant initiating the traffic stop. Id. Based on the entirety of the circumstances, the court concluded that the sergeant was not "on routine patrol," but was instead conducting "surveillance of the van." Id. Because the stop was based on pretext, the court reversed Montes-Malindas' conviction.

Montes–Malindas is consistent with other Washington cases where pretext stops have been found – police officers suspecting other criminal behavior used a stop for a traffic infraction to investigate a possible crime, rather than the noncriminal traffic

infraction. See Ladson, 138 Wn.2d at 345-47, 979 P.2d 833 (gang detectives stopped vehicle for traffic infraction in order to investigate drug dealing); State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999) (officer watching narcotics trafficking in a building stopped car to identify driver who left the location); State v. Myers, 117 Wn. App. 93, 69 P.3d 367 (2003) (officer who suspected driver's license was suspended stopped vehicle for traffic citations while awaiting record check on license status); State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006) (counsel ineffective for not challenging stop where officer who suspected vehicle might have been stolen made traffic stop for infractions).⁴

But Washington courts have also consistently ruled that a police officer making a traffic stop in the course of patrol duties does not commit a pretext stop merely because the officer suspects other criminal activity is also occurring. For example, in State v. Nichols, 161 Wn.2d 1, 162 P.3d 1122 (2007), an officer witnessed a car pull out of a parking lot into the street, crossing over to the far lane of travel instead of into the closest lane. The officer suspected that the driver did not want to drive in front of the patrol car because

⁴ The most recent Washington Supreme Court opinion on pretextual stops, State v. Arreola, ___ Wn.2d ___, 290 P.3d 983 (2012), deals with a stop where the police provided mixed motives for the stop. Because the police here only provided one reason for Jefferson's stop, his seatbelt violation, it is not applicable.

of some criminal purpose. He pursued the car for the lane violation, and pulled it over. 161 Wn.2d at 4-5.

On review, the court concluded that there was no basis for finding a pretext stop because there was no evidence that the officer was performing anything other than routine patrol duties when he observed what he thought were traffic infractions. Id. at 12. It was objectively reasonable for the officer to stop to investigate the turning violation. Id. at 12-13. The fact that the officer did not cite for the infraction also did not turn the stop into a pretext. Id. at 14.⁵

In State v. Minh Hoang, 101 Wn. App. 732, 6 P.3d 602 (2003), a police officer was observing a neighborhood known for drug transactions. Id. at 734-35. At 4:00 a.m., the defendant drove up and talked to one group of people standing near the street, then drove forward to do the same with another group. Id. Suspecting that the driver was attempting to purchase drugs, but seeing no evidence that any drugs had been exchanged, the officer waited and watched. Id. The car then turned without signaling. The

⁵ Jefferson argues that he was not cited for the seatbelt infraction, but the record does not explicitly state one way or another. Brief of Appellant at 29. The context of many questions on direct and cross examination, however, seems to infer that Jefferson was not cited for the seatbelt violation.

officer immediately turned on his lights and stopped the defendant.

Id.

The trial court found that the officer would have made the stop (for an illegal turn) even if he had not observed the suspicious behavior, thus determining that the stop was not pretextual. The Court of Appeals affirmed, noting:

Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

Id. at 742.

Here, all three of the officers testified that, while they were part of a "Gang Unit," their duties also routinely involved patrolling for traffic violations. 1RP 7, 13, 83-85, 129. It was in this capacity that they pulled Jefferson over, and the trial court's findings of fact are consistent with this testimony. CP 83-88. Unlike Montes-Malindas and DeSantiago, the officers here did not conduct surveillance of Jefferson before noticing the infraction, and there is no evidence that he aroused their suspicions for anything other than his failure to wear his seatbelt. Accordingly, this stop was not pretextual, and this court should affirm.

Nonetheless, Jefferson seems to contend that the stop itself was racially motivated,⁶ but of the three arresting officers, only Rongen had actually seen Jefferson before the stop and that was moments prior to Jefferson entering his van; the rest of the officers saw only an unrecognizable silhouette at the wheel. 1RP 13, 91, 136. While it was only Rongen that knew Jefferson's race, the detective that noticed the infraction and suggested the traffic stop was Miller. 1RP 15, 17. Further, the officers stopped Jefferson's van within seconds of witnessing the infraction, and it was Olmstead's initial intent to provide only a warning to Jefferson. 1RP 162. Once Olmstead noticed Jefferson's extreme nervousness, Olmstead believed there was a safety issue, and asked Jefferson to step out of the car. 1RP 139.

Like in Nichols, there was no evidence that these officers were performing anything other than their patrol duties when they stopped Jefferson. The lack of pretext is even clearer here than in Minh Hoang, where the police officer deliberately observed the defendant and suspected criminal activity prior to pulling him over.

⁶ To support this inference, Jefferson points out that over half of the stops (9 out of 15 recorded stops) conducted by Olmstead in 2011 were of black suspects. Brief of Appellant at 24. Jefferson omits two factors elicited in testimony: 1) the statistics introduced by Jefferson at trial were limited to stops where Olmstead actually called radio, and were not representative of most of his traffic stops, and 2) Detective Olmstead patrolled in neighborhoods that had large minority populations. 1RP 167-75.

101 Wn. App. 734-35. Here, there was no opportunity to observe Jefferson beforehand, and even if there had been, there was no suspicious behavior – he was only seen by Rongen walking to his car from a gas station. The hanging seatbelt silhouetted in the rear window was the only impetus for the stop. The police officers had a legal subjective basis for stopping Jefferson and their actions were objectively reasonable. The challenged findings of fact are supported by substantial evidence, and the trial court's legal conclusions are sound.

3. THE COURT ACTED WITHIN ITS DISCRETION
WHEN IT SUPPRESSED THE VIDEO
RE-RECREATION SUBMITTED BY JEFFERSON.

Jefferson contends that the trial judge abused his discretion when he refused to review the video Jefferson's attorney produced, allegedly capturing a view of Jefferson's minivan from behind. Brief of Appellant at 8. Jefferson, however, provides neither argument nor authority in support of his contention. As argued above, this Court should not consider assignments of error made without argument and authority. RAP 10.3(a)(6); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Even if this Court were to consider Jefferson's contention that the video should not have been suppressed, the trial judge ruled that the video was not relevant pursuant to ER 401⁷ because it was shot at a different time and place than the actual incident. 1RP 194-96. Further, foundation for the video was never established pursuant to ER 901(a)⁸ because Jefferson could not testify that the view of the camera's eye was similar to the view the police officer's had the day they pulled over Jefferson.

A trial judge has wide latitude when determining the admissibility of demonstrative evidence. Jarstad v. Tacoma Outdoor Recreation, Inc., 10 Wn. App. 551, 561, 519 P.2d 278 (1974). Judge McCarthy acted well within that latitude when he suppressed the video.

4. THIS COURT SHOULD REMAND TO THE TRIAL JUDGE FOR CLARIFICATION REGARDING THE BURDEN OF PROOF FOR THE CrR 3.6 HEARING.

Jefferson argues that Judge McCarthy applied the incorrect burden of proof to his analysis of the facts during the CrR 3.6

⁷ ER 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

⁸ In order to establish the foundation for an exhibit under ER 901(a), the admitting party must provide "evidence sufficient to support a finding that the matter in question is what its proponent claims."

hearing. The trial court found that the stop was not pretextual and that removing Jefferson from the van was legal, but explicitly stated that the State had met its burden by a "preponderance of the evidence." CP 87. According to State v. Garvin, the State must show by *clear and convincing* evidence that a warrantless search or seizure meets an exception to the warrant requirements. 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

But the precedent that every exception to a warrantless search or seizure must be proven by clear and convincing evidence is erroneous, and arises from the recent dictum in Garvin, which relies exclusively on State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). As pointed out by the dissent in State v. Doughty, 170 Wn.2d 57, 67, 239 P.3d 573, 578 (2010) (another warrantless search and seizure case), "Smith did not recognize a clear and convincing burden for all warrant exceptions; instead only the voluntariness of consent had to be shown by clear and convincing evidence." Doughty, 170 Wn.2d at 67 (Fairhurst, J., dissenting) (citing Smith, 115 Wn.2d at 789). Because of the potentially coercive nature of police interaction where defendants are asked to consent to a search, this heightened standard under these specific circumstances makes sense, and is well-established in case law.

In fact, the two cases cited by Smith in support of the clear and convincing standard deal with the voluntariness of a consent to search made by a defendant *already under arrest* and not with any other exception to a warrantless search. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975), and State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987). Garvin is the only case where Washington courts have imposed a “clear and convincing” standard for a warrant exception outside of the consent context. The dictum in Garvin, then, is unsupported in case law and counter to comparable Fourth Amendment jurisprudence (e.g., the State must prove a voluntary and intelligent waiver of Miranda rights by a “*preponderance of the evidence*.” State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894, 897 (1979) (emphasis added)). This Court should not adhere to it.

Should this Court adhere to the clear and convincing standard, however, this case should be remanded back to the trial court for additional findings. Where findings are required, they must be sufficiently specific to permit meaningful review. In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Here, assuming that the trial misconstrued the State’s burden, a meaningful review is not possible. If, however, the trial judge finds

that the same findings had been established by clear and convincing evidence, then the State can readily argue that those findings are supported by substantive evidence, as it has in this brief.

Therefore, assuming that this court decides that "clear and convincing" is the correct standard, the case should be remanded to Judge McCarthy⁹ for clarification regarding whether or not the State had met its burden.

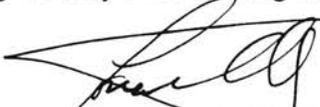
D. CONCLUSION

For the foregoing reasons, this Court should affirm. Alternatively, this case should be remanded back to Judge McCarthy for new findings indicating the correct burden of proof.

DATED this 18 day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

TOMÁS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

⁹ While the Honorable Judge Harry McCarthy has since retired, he still serves as a Judge Pro Tempore and could be available to clarify his ruling.

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 Marla L. Zink, 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. DIANTRE JEFFERSON, Cause No. 69119-8 -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 18 day of March, 2013

A handwritten signature in black ink, appearing to read 'Bora Ly', with a long horizontal flourish extending to the right.

Name Bora Ly
Done in Seattle, Washington