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A. Assignments of Error

Assignments of Error

1. The trial court erred in admitting LaCroix' coerced and involuntary confession.

2. The trial court erred by sustaining witness Torey Tamaki's Fifth Amendment Privilege.

3. The trial court's finding of fact that the interrogation lasted five hours in normal waking hours is not supported by substantial evidence.

4. The trial court's finding of fact that LaCroix' statements are corroborated by Goff's statements is not supported by substantial evidence.

Issues Pertaining to Assignments of Error

1. Under the totality of the circumstances, did the trial court err by determining that LaCroix' decision to make a statement was a free and unconstrained choice and that his statement was voluntary and not coerced?

2. Did the trial court err by sustaining Torey Tamaki's Fifth Amendment Privilege without a sufficient showing?

3. Are the various findings of fact of the trial court supported by substantial evidence?

B. Statement of Facts

Cameron LaCroix was charged in Kitsap Juvenile Court with one count of first degree arson. CP, 1. LaCroix was 17 at the time of trial, but 16 years old at the time of all facts relevant to this case. RP, 646. After a contested CrR 3.5 hearing, the case proceeded by way of a full fact finding trial. The trial court convicted LaCroix and sentenced him to a standard range sentence of 103 to 129 weeks in the JRA. CP, 41. Findings of Fact and Conclusions of Law were entered for both the CrR 3.5 hearing and the trial. CP, 26, 31. A restitution order has been entered assessing \$7.2 million. Supplemental CP. LaCroix appeals.

The Early Morning of July 27, 2009

On July 27, 2009 Janet Bayly reported for work at midnight. RP, 285. She works at the Maytag Cleaners Laundromat. RP, 284. The Maytag Cleaners is in the same building as Papa Murphy's Pizza and shares a parking lot with Shucks Auto Parts. RP, 288. Maytag Cleaners has a large, 25 foot window that stretches across the front of the store. RP, 289. From the inside of the building one could see most of the parking lot in a southerly direction, but if a person was too far in the direction of the Papa Murphy's, he or she would be outside the line of vision. RP, 295.

Around one o'clock, three boys arrived in the parking lot with skateboards. RP, 286. This parking lot is particularly good for

skateboarding in because of its lighting. RP, 298, 656. The boys skateboarded for about 45 minutes, though it could have been a little longer. RP, 292, 298. Because the boys were skateboarding back and forth in front of both the Maytag Cleaners and Papa Murphy's, Bayly could not observe them continuously. RP, 292. However, the sound of the skateboards was very easy to hear and the sound was continuous for the 45 minutes that they were there. RP, 292. She could hear the boys "chitchatting" as well as the "kerplunk, kerplunk" as the skateboards bounced off the curbs. RP, 298-99. Even when the boys were outside her frame of vision, it appeared that there was always more than one sound coming from them. RP, 292. The boys did not seem excited like something traumatic had just happened. RP, 299.

The boys were identified as Cameron LaCroix, Gage Goff, and Torey Tamaki. RP, 655-56. Bayly described one of the boys as having a very pale, sickly appearance and no hair. RP, 287. This boy was almost certainly Gage Goff, a cancer patient who was undergoing chemotherapy at the time. RP, 554. His chemotherapy regime was very strong, consisting of 30 hours per month and leaving him very nauseated, weak, hairless, pale, and tired most of the time. RP, 554, 599.

After at least 45 minutes, Goff was standing in the middle of the 25 foot window when he looked up, pointed in the direction of

McDonald's and Arnold's Furniture, and said, "Oh my gosh." RP, 293-94. It appeared to her that Goff was talking to the other boys, though she could not actually see them. RP, 297, 301. About ten minutes later, Ms. Bayly went to see for herself what was going on and observed several police cars and fire trucks. RP, 294. She thought the McDonald's on Kitsap Way was on fire. RP, 300.

Although Bayly did see a fire, she was mistaken about the fire being at McDonald's. Next door to McDonald's is Arnold's Home Furnishings, at the corner of Kitsap Way and Marine View. RP, 232. The distance from Papa Murphy's/Maytag to Arnold's Furniture store is 387 feet away, one minute and six seconds away at a brisk walk, according to police investigation. RP, 517-18. Arnold's is a large, 66,000 square feet, warehouse-style retail furniture store that has been standing since 1957. RP, 217. The building was built in multiple stages, with several smaller stores added on and it eventually turned into a big furniture store. RP, 160. According to Deputy Fire Marshall Hanson, because this was a large commercial building, the design standards for the windows are required to be stronger than for a standard home. RP, 161. The windows would be required to withstand a very hot fire, and withstand outside forces hitting the window. RP, 161.

The security alarm system maintained at Arnold's first registered a problem at 1:59:25 a.m. RP, 320. The system is designed to take note of any unusual sounds. RP, 320. The fire alarms were activated at 2:00:04 a.m. RP, 326. The alarm is designed to activate if it reaches 135 degrees or detects a rise in temperature of more than 10 degrees per minute. RP, 333. Fire Marshall Six testified that there was a 44 second interval between when the glass broke and when the fire alarm went off. RP, 370.

Selena McGovern was traveling east in a red Toyota Celica on Kitsap Way at approximately 2:00 a.m. RP, 231-32. After crossing Marine Drive, as she passed Arnold's, she observed a red flicker that she thought was a fake fireplace in the southeast corner. RP, 232-33, 246. She did not see any people in the vicinity. RP, 247. As she got closer, she could see that there was a fire inside the building about one to one-and-a-half feet in diameter and growing. RP, 234. She called 911 and reported the fire at 2:00:55 a.m. RP, 234, 344. The fire was on a sofa in the southwest corner, either on the couch or on the arm of the couch. RP, 237-38, 247, Exhibit 8. The distance from the window to the location where McGovern first observed the fire was 18 to 24 inches. RP, 308. She did not see any broken windows, or holes in any windows. RP, 239, 248. As the fire grew, the windows filled up with smoke until the window on the east side of the southwest corner broke. RP, 239. Prior to the window

breaking she did not see any place where smoke was escaping out of any windows. RP, 249. After the window broke, smoke and flames billowed out of the building. RP, 250. McGovern reported the broken windows to the 911 operator at 2:01:52 a.m. RP, 347.

McGovern decided to move her car to a safer location. RP, 240. As she did a U-turn and pulled onto Kitsap Way, she observed three kids carrying skateboards crossing the road from the Papa Murphy's in a southerly direction. RP, 240-41. She described them as walking, not running, but "on a mission, [not] dilly-dallying." RP, 242. McGovern reported her observations of the three kids to the 911 operator at 2:02:25.

Jeremiah Talkington was driving west on Kitsap Way heading towards Arnolds and Marine Drive. RP, 548. His direction of travel would have taken him past the Maytag/Papa Murphy's/Shuck's parking lot, then past the Arnold's store. As he passed the Schuck's Store, he observed three or four males in the parking lot skating, or moving with wheels. RP, 549, 551. Very soon after that, he passed Arnold's. RP, 549. In front of Arnold's was a red car with its flashers on. RP, 548. Talkington turned right onto Marine Drive. RP, 550. He dropped off a friend and then retraced his steps down Marine Drive towards Arnold's. RP, 550. When he arrived back at Arnold's, he saw smoke coming from the building and a police car nearby. RP, 550. He called 911 at 2:04:44. RP, 550, 347.

Bremerton Police Officer Frank Shaw was the first officer to arrive and Officer Billy Renfro arrived soon thereafter. RP, 255. Officer Renfro parked across the street from the fire. RP, 255. Soon after arriving, he observed three young people and made contact with them. RP, 256. Officer Renfro could not recall if he beckoned them over or if they approached him. RP, 257. He told them to contact Officer Shaw. RP, 257. The boys were cooperative and complied with the request. RP, 259.

When Officer Shaw arrived, he observed a large and growing fire in the southeast corner of the building. RP, 266. He started taking pictures. The three juveniles approached him, probably carrying skateboards. RP, 270, 280. The boys said there was a red car that left the area just before the officer arrived. RP, 271. The boys identified themselves as Cameron LaCroix, Gage Goff, and Torey Tamaki. RP, 271. Officer Shaw wrote down their names, dates of birth, and addresses. RP, 276. The information provided by the boys was truthful. RP, 276.

This became a very big fire. RP, 350. Between 85 and 100 fire fighters responded. RP, 375. Photos were taken of the area by fire fighters, including the spectators. RP, 414. One of the photos shows LaCroix, Goff, Tamaki, and three other juveniles (later identified as Kendra Ellsworth, Tai Tamaki, and Myesha) watching the fire from Jiffy Lube across the street. Exhibit 16, RP, 566. LaCroix is pictured sitting on

his skateboard without a backpack. Exhibit 16, RP, 567. Another photo shows a group of spectators at the neighboring McDonald's, including Elijah Thomas. Exhibit 17, RP, 415, 584.

The Fire Investigation

The fire was investigated by Fire Marshall Michael Six and his staff. RP, 348. Eventually, the fire died down to the point where investigators could start "excavating" the building. RP, 357. The investigators were very careful to ensure that nothing was moved that could cause "cross contamination." RP, 358. Each layer of the building was removed and inspected. RP, 359. The layering process creates a timeline for the fire: things on the top are the last to burn and things on the bottom are the first. RP, 391. As Deputy Fire Marshall Hanson testified, a "fire tells a story." RP, 165. The goal is to ascertain where the first heat source came into contact with and ignited the first item. RP, 360. Whenever something of interest is found, it is recorded. For instance, even items as small as the metal clip on the bottom of a candle are searched for and identified. RP, 406. For instance, investigators found a cigarette butt from the 1960's and a matchbox that was nearly as old. RP, 364. But these were ruled out as the sources of the fire. RP, 364. No butane canister was located. RP, 407.

While excavating the fire, a rock was located by Deputy Fire Marshall Craig Hanson in the southeast corner. RP, 157, 172, Exhibit 8. The rock was 3 to 3-1/2 inches thick. RP, 158. The rock was found on top of a debris pile, meaning that it was either moved there somehow after the fire or it landed in that position. RP, 166. Given the number of fire and police personnel in the area and the fact that the area was secured to prevent people from wandering through the sight, Deputy Hanson opined that it was “not likely” that the rock was placed there. RP, 167. The more likely possibilities were that the rock was knocked or kicked into its location or that the rock was on the roof and when the roof collapsed, it fell into the building. RP, 167.

Deputy Hanson testified that he examined the glass in the southeast corner of the building. RP, 170. From his observations, the glass was double-paned and the rock that he located could not have broken through the window unless the glass was previously damaged. RP, 171. Everyone agreed that the building was in good repair and no windows were damaged. RP, 218-19, 305. Paul Dumont, the Arnold’s maintenance man, opined, however, that the windows were single paned. RP, 303. Marshall Six testified, in his opinion, the rock was capable of breaking the window at Arnold’s. RP, 387-89. Six testified that he “sifted through alot of” the windows at Arnold’s, but he did not testify he examined the windows in

the southeast corner. RP, 387. The rock was collected as evidence and placed into a paint can. RP, 419. The paint can and the rock were somehow lost in this investigation and were never admitted as exhibits in this trial. RP, 420.

A trained arson dog, Henny, was run through the area. RP, 361. Henny is trained to “hit” upon any spot where there is a long-chain hydrocarbon. RP, 361-62. Both gasoline and butane are long-chain hydrocarbons. RP, 395. Although Henny hit on 14 spots, investigators concluded that all the hydrocarbons were building supplies used in the construction of the building in 1939 and were not related to the fire. RP, 363, 402. All 14 locations were eliminated as the original start of the fire. RP, 403. Marshall Six concluded there was no evidence of any long-chain hydrocarbon used to start the fire. RP, 372, 400.

Selena McGovern was a significant witness to the fire investigation. RP, 364. Based upon all available information, both physical and eyewitness, Marshall Six concluded that the fire was intentionally set on the couch near the north side window of the southeast corner. RP, 367. The couch was made of 90 percent polyurethane and 10 percent polyester. RP, 409. Given the couch’s material, if a lit cigarette was dropped on the couch, it would be impossible for the cigarette to start the fire; it would go out before starting any fire. RP, 409-10. According to

Six, the only way the fire could have started is if someone propelled something into the building onto the couch. RP, 425. It would not have been possible for someone to ignite the fire who was already inside the building. RP, 425. Six was asked if there was any evidence of accelerant, to which he responded as follows:

Accelerant – I looked it up the other day, just kind of in my mind thinking about this case. Accelerant by definition is only something used to either start or increase the speed of something. So it kind of depends on what time frame you take your starting timeline from. If you start a fire that's small with a Bic lighter, are you using an accelerant to – by lighting a piece of paper, if you're building a campfire, you light the piece of paper to light the kindling, or so on? It's really splitting hairs. Accelerant, as it's used in the fire investigation arena, typically is gasoline, kerosene, diesel, any number of alcohol or some variation of that. There was no indication that the fire, outside of whatever the exact open flame unit was used, there was no indication that that was – beyond that it was accelerated.

RP, 372-73. Six was given several hypotheticals of how the fire started based upon the physical evidence. In one hypothetical, an accelerant is used to light two pieces of paper on fire and thrown into the building. Six responded, "I suppose it's possible, I would say that would still be smaller than what I was figuring" RP, 374. If a pile of newspapers was placed on the couch and then lit with a cigarette, it would be "highly unlikely" that a fire of this size would result, although lighting the same newspapers with an open flame could start the fire. RP 410-11. Finally, he was asked if he

could determine if someone may have used an open flame as a “torch effect,” to which he answered he could not determine that.

The Investigation Focuses on Three Boys

Bremerton Police Detective Mike Davis was the lead detective in this case. RP, 31. Eventually, his investigation focused on the three boys identified by Officer Shaw. RP, 32. LaCroix was interrogated twice, Goff twice, and Tamaki one time. RP, 32. The trial court never heard any details of the interrogation of Tamaki.

Cameron LaCroix Is Interviewed for the First Time

On July 29, 2009, Det. Davis interviewed LaCroix starting at 1:11 p.m.¹ RP, 15. The interview was conducted inside the unmarked patrol car because it was extremely hot outside. RP, 17. Det. Harker was in the back seat. RP, 37. No Miranda rights were read to LaCroix. RP, 37. At the time of LaCroix’ first interview, Det. Davis did not have the benefit of Marshall Six’ report and he did not know that the security system detected a broken window 44 seconds before the fire alarm went off. RP, 459, 471.

After about 20 minutes of discussion, the decision was made to drive LaCroix around the neighborhood in order to retrace his steps. RP,

¹ Because this was a juvenile trial tried without a jury, the parties stipulated that all evidence introduced in the CrR 3.5 hearing was admissible at the trial. RP, 194. In light of the stipulation, the evidence introduced from the CrR 3.5 hearing and evidence introduced at the trial are used interchangeably, unless specifically stated otherwise.

18. LaCroix provided the same basic information during the drive as he did during the initial question/answer period. RP, 463. During the discussion, Det. Davis mentioned that the Bremerton Police Department had a Certified Voice Stress Analyzer (CVSA).² RP, 37. He called it a truth verification test. RP, 462. LaCroix expressed a willingness to take the test and stated he believed he would pass the test. RP, 37.

During the drive through, LaCroix described starting at his friend Kendra's house with a large group of teenagers. RP, 463. At approximately 1:00 a.m., LaCroix, Goff, and Tamaki decided to go skateboarding. RP, 465. The boys walked north on Adele Road, stopping briefly at the Medical Center at the corner of Kitsap Way and Adele to skateboard. RP, 465. They walked across Kitsap Way to R&H Market where LaCroix found an unsmoked cigarette. RP, 466. According to LaCroix, he never smoked the cigarette. RP, 466. They then crossed Marine Drive³ into the parking lot of Arnold's Furniture. RP, 466. They

²In a pre-trial ruling, the trial court ruled that the fact that the CVSA was administered was admissible, along with the fact that he was told that the results of the test were that he was lying, for the limited purpose of demonstrating their impact on Mr. LaCroix. Similarly, the fact that the detectives told Mr. LaCroix was lying was admissible for the same limited purpose. RP, 11. But neither the results of the CVSA nor the opinions of the detectives were admitted for the truth of the matter. RP, 11.

³ Marine Drive and Adele Road are the same road. Kitsap Way runs east-west. Adele runs south of Kitsap Way while Marine Drive runs north.

spent approximately fifteen minutes skateboarding near the benches in front of the building. RP, 467. The boys walked east past the McDonald's to the parking lot shared by Schuck's/Papa Murphy's/Maytag Cleaners. RP, 468. They skateboarded for approximately an hour in the parking lot. RP, 468. Goff was beginning to tire due to his medical condition, so the boys decided to head home. RP, 468. As the boys got ready to cross Kitsap Way, they noticed the fire and a red car parked in front of Arnold's. RP, 469. As the boys crossed Kitsap Way towards Jiffy Lube, the red car drove towards them on Kitsap Way. RP, 469. The boys saw a patrol car and they contacted the deputy, telling him that they had seen a red car near the fire. RP, 469. The boys walked back to Kendra's house, told the group about the fire, and the teenagers walked down and watched the fire fighters. RP, 470. LaCroix said nothing about a backpack, butane canister, lighter, or broken window. RP, 470. The interview ended at 2:38. RP, 38.

Gage Goff Is Interviewed for the First Time

On August 14, 2009, Det. Davis interviewed Goff. RP, 756. The interview started at 10:45 a.m. in his driveway for about thirty minutes. RP, 766. Tiffany Goff, Goff's mother, was present. RP, 591. Goff described his activities on the evening of July 26-27, 2009. RP, 769. The boys started at Kendra's house until Goff, LaCroix, and Tamaki decided to go skateboarding. RP, 769. En route, the boys stopped at the medical

building for ten to fifteen minutes. RP, 770. They then went to Arnold's and skateboarded near the benches for ten to fifteen minutes. RP, 770. They then moved to the Schuck's/Papa Murphy's/Maytag parking lot. RP, 771. While skateboarding in that parking lot, the boys first observed the fire. RP, 771. He observed the fire either just as they were leaving the parking lot or in the process of crossing Kitsap Way. RP, 777. Goff denied having any knowledge of how the fire started. RP, 772.

Det. Davis confronted Goff and told him that he was not being truthful. RP, 771. The detectives kept confronting Goff, telling him he was holding back information. RP, 592. The detectives told Goff that they knew a skateboard had broken and gone through a window. RP, 593, 577. Det. Davis offered to let Goff take a "truth verification test" and Goff agreed. RP, 771. At that time, the group went to the police station so he could take the test, which was administered by Det. Harker. RP, 771-72.

After the test, Detectives Davis and Harker return to Goff and tell him that the test indicated he was being deceptive. RP, 773. According to his testimony, Goff was confused and upset by the information that he had failed the test. RP, 570. Goff was concerned that he could go to juvenile detention for failing the test. RP, 571. Goff was feeling nauseous and dizzy, partly because of his chemotherapy. RP, 571.

Det. Davis challenged Goff, told him he was not being truthful, and suggested that some sort of accident may have occurred at Arnold's. RP, 774. Goff said there was one point when LaCroix was doing a skateboard trick and he lost control of his skateboard, hitting a window. RP, 775. When Goff denied that the window was broken, Det. Davis told him he was withholding information about a broken window. RP, 775.

Goff started crying and, after some more discussion, said that the skateboard had broken through the window and went inside. RP, 776. Ms. Goff could hear the police yelling and Goff yelling and crying. RP, 596. LaCroix was carrying a lit cigarette in his mouth at that time. RP, 776. Goff claimed to be no more than five feet away from LaCroix at the time the skateboard went into the window. RP, 777. LaCroix climbed through the window and retrieved the skateboard. RP, 778. The boys then went to Papa Murphy's and skated for 25 to 45 minutes. RP, 778.

Goff never described a second broken window, a butane canister, or a rock. RP, 779. Goff did not describe Tamaki breaking a second window. RP, 780. Goff remembered seeing a red car near the fire. RP, 778. He also remembered contacting patrol officers at the scene. RP, 779.

The interview ended at 2:27 p.m. RP, 767. Goff was turned over to his mother in the lobby. RP, 780. Goff was distraught, crying, sick to his stomach. RP, 596. A short while later, Ms. Goff returned to the

building very upset. RP, 780. Ms. Goff said that her son had not been truthful about the fire and had implicated LaCroix falsely. RP, 780. She accused the detectives of coercing a confession. RP, 597. The officers chuckled, saying that only happens in the movies. RP, 597-98.

Cameron LaCroix Is Interviewed a Second Time

On September 10, 2009, Det. Davis re-contacted LaCroix in Belfair, Mason County, at 12:45 in the afternoon. RP, 39. LaCroix was walking alone down the street carrying only a skateboard. RP, 46. LaCroix was 16 years old, one month shy of his seventeenth birthday. RP, 23. At that time, Det. Davis arrested LaCroix for arson. RP, 19. LaCroix was advised of the arrest and placed in the patrol car. RP, 39. LaCroix smelled like he had not bathed in a while and he was hungry, saying he could not remember the last time he ate. RP, 46. LaCroix was transported to the Bremerton Police Department for interrogation. RP, 432.

The interrogation proceeded in multiple stages. The room was about ten-foot-by-ten-foot with one door (which was closed) and a round table. RP, 25. The interview was primarily conducted by Det. Michael Davis and Det. Harker. RP, 26, 47. LaCroix had never been arrested before and, not including the July 29 questioning, had never been interrogated before. RP, 673.

During the interrogation, the officers struck three major themes. The first theme was the need for honesty and truthfulness, with the accompanying implication that LaCroix was lying to them. RP, 48. For a total of at least 24 separate times during the nine hour interrogation, detectives told LaCroix that they did not believe he was being honest and truthful and that he was lying to them. RP, 47-48, 67.

The second theme was the degree to which the officers could influence whether he was charged in juvenile court or adult court. RP, 88. The detectives advised LaCroix that they have the ability to make recommendations to the prosecutor about juvenile versus adult jurisdiction and their recommendation would be tied directly to their perception of whether LaCroix was being “honest and truthful.” RP, 87-89.

The third theme was the officers providing information to LaCroix about what other witnesses in the case had provided to the investigation. Det. Davis testified that he believed it was his job to continue to interrogate LaCroix until his story “begins to match the physical evidence.” RP, 69. There were seven distinct times during the interrogation that LaCroix was told details of the investigation. RP, 102.

Ironically, although the detectives gave LaCroix extremely detailed information about the fire investigation, Det. Harker conceded that providing a suspect with information that you have about an investigation

can taint the responses you get from the suspect. RP, 89. Det. Harker treats an interrogation like a “poker game,” with the detectives giving up information in order to get back information from the suspect. RP, 109.

Interrogation-Stage I

At 12:56 p.m., shortly after arresting LaCroix, Det. Davis advised him of his Miranda warnings. RP, 39. Det. Davis asked if LaCroix was willing to talk to him and he said, “Yes, but I told you everything.” RP, 23, 460. During the transport from Belfair to Bremerton, Det. Davis asked LaCroix some background questions. RP, 40. It was during these background questions that Det. Davis first told LaCroix that he did not believe he had been truthful during the first interview. RP, 47. According to LaCroix’s testimony, Det. Davis told him he knew more about the fire and he knew who started the fire. RP, 666. They arrived at 1:25. RP, 24.

Interrogation-Stage II

The second stage started at 1:53. RP, 432, 40. During this hour and 34 minutes of interrogation, LaCroix made no incriminating statements. RP, 432. LaCroix was very quiet during this period and, according to Det. Davis, “in denial.” RP, 474. Det. Davis told LaCroix that security tapes showed that a window was broken before the fire started. RP, 474. Det. Davis told LaCroix that Goff had been interviewed and Goff had implicated LaCroix in breaking the window and possibly

starting the fire. RP, 475. In order to get him to make admissions, Det. Davis showed LaCroix a copy of the probable cause affidavit and read to him portions of Goff's interview. RP, 51. Specifically, Det. Davis read to LaCroix that, according to Goff: (1) Torey Tamaki was a Pyro at times; (2) LaCroix had broken the window; and (3) LaCroix said, "Oh, shit, I broke the window. I can't believe I did that." RP, 53-54. Although Det. Davis denied telling LaCroix that, according to Goff, LaCroix had a lit cigarette in his hand when he broke the window, Det. Harker believed Det. Davis did tell LaCroix that fact. RP, 54, 92. Det. Davis did not tell LaCroix that Goff later recanted his story. RP, 55. Nor was LaCroix told that Goff claimed that the broken window was an accident. RP, 475. LaCroix was told that Goff had taken a "lie detector." RP, 56. The detectives left the room at 3:27. RP, 40.

Interrogation-Stage III

After a short break, the detectives decided to have Detective Sergeant Crane enter the interrogation room to talk with LaCroix. RP, 57. At 4:18 p.m. Det. Crane entered the room for two minutes, told LaCroix that the detectives had probable cause to arrest him based upon statements made by other witnesses, and asked LaCroix to take a CVSA. RP, 40-41, 81, 121. He told LaCroix that it was important to be "honest and truthful" about the Arnold's Fire. RP, 57. At that point, Det. Davis offered LaCroix

the CVSA and he agreed. RP, 58, 433. Det. Davis referred to it as a “truth verification test,” but LaCroix understood the test to be a “lie detector.” RP, 59. Detectives Davis and Harker continued to interrogate LaCroix until the CVSA was ready. RP, 82.

Interrogation-Stage IV

Starting at 4:45 p.m. Det. Robbie Davis⁴ interrogated LaCroix for the purpose of a pre-CVSA interview. RP, 41. At 5:38, Det. Davis administered the CVSA. RP, 42. It took approximately ten minutes to complete the test. RP, 118. At no time during the pre-CVSA interview or during the test did LaCroix make any incriminating statements. RP, 118.

Interrogation-Stage V

At 5:55, Detectives Crane and Davis entered the interrogation room to discuss the results of the CVSA with LaCroix. RP, 42. LaCroix was beginning to tire and had put his head down on the table, but according to detectives was still awake and alert. RP, 125.

LaCroix was told that he had been deceptive on the test. RP, 118. Det. Crane told LaCroix the results of the test indicated that he was being untruthful. RP, 128, 123. Det. Davis said that the test does not differentiate between big lies and small lies, it just shows whether you’re

⁴ All references to Detective Davis are a reference to Michael Davis unless specifically stated otherwise.

being truthful or not. RP, 123. Det. Crane said that “now is the time to be truthful about what happened.” RP, 118-19. He said that “if he wanted to help himself, now was the time” and that his “cooperation could go a long ways to help him.” RP, 119, 123. Det. Crane said that there are two different paths that this case could take, the juvenile path or the “tried as an adult path.” RP, 123. His cooperation could make a difference in which path this case takes. RP, 124. LaCroix started to say that he had nothing to do with the fire, but Det. Crane interrupted him and told him he wasn’t interest in hearing any more of his denials. RP, 129. He told him that he was being untruthful and it was time to start being truthful. RP, 129. Det. Crane reiterated that his cooperation would determine which path he went down. RP, 130. Det. Crane told him to think about it and be truthful when Detectives Davis and Harker returned. RP, 130.

LaCroix described his reaction to being told that he might be transferred to adult court. RP, 672. When he heard that he had lied on the truth verification test, he started to cry. RP, 673. He was scared and wanted to make sure that he stayed in juvenile court. RP, 673. Never having been arrested before, he did not know that the results of the CVSA were not admissible in court and the officers did not tell him the results were inadmissible. RP, 673-74. He decided at that point that he needed to make up a story in order to ensure that he stayed in juvenile court. RP,

675. He decided that the best story to tell is the same story that Goff had given: that he broke the window with his skateboard. RP, 675.

Interrogation-Stage VI

Detectives Crane and Robbie Davis then left the room and were promptly replaced by Detectives Davis and Harker, who started the next stage of the interrogation by telling him it was important to be “honest and truthful.” RP, 58. They interrogated LaCroix from 6:10 to 7:35. RP, 42.

Up to this point in the interview, five-and-a-half hours, LaCroix had made no incriminating statements. RP, 59. Upon being confronted with the failed “truth verification test” and the detectives repeated statements that he needed to be “honest and truthful,” LaCroix made his first incriminating statement, saying that he fell off his skateboard and accidentally hit the window with his skateboard, breaking it. RP, 60, 433. Det. Davis thanked LaCroix for his honesty. RP, 433. LaCroix stated he and his two friends (Goff and Tamaki) then ran to the Papa Murphy’s and skated for an hour, at which time they noticed the fire. RP, 434.

Det. Davis told LaCroix that he did not believe his story. RP, 60, 434. Det. Davis reminded LaCroix that in his July 29 interview, he said he had stated he found a cigarette at the R&H Market. RP, 480-81. LaCroix then said that he had found a cigarette on his way to the Arnold’s store and, because he did not have a lighter, he asked a man to light it for

him at the Market. RP, 435, 481. While doing a trick in the Arnold's parking lot, his skateboard hit a window and the cigarette could have fallen out of his mouth into the building. RP, 436, 482.

LaCroix was shown a map of the neighborhood surrounding Arnold's Furniture and asked to retrace his steps. RP, 483. LaCroix described walking north on Adele to the medical building, skating for approximately 15 minutes, crossing Kitsap Way to the R&H Market, finding a cigarette, crossing to Arnold's parking lot and skateboarding. RP, 483-84. That is when the window was broken and the cigarette dropped. RP, 484. LaCroix testified that the reason he said a cigarette was dropped is that he believed a cigarette could have started the fire. RP, 676.

In response to a question, LaCroix said that he was the only person to break a window, although all three boys were together. RP, 442. LaCroix was asked to point out where the window was broken. RP, 437. LaCroix pointed to a spot four columns west of the southeast corner in the front of the building. RP, 440. The boys then ran to Papa Murphy's and skateboarded for thirty to forty-five minutes. RP, 485. It was Goff who first noticed the fire.⁵ RP, 485, 487. When they looked at the fire they

⁵ Detective Davis did not tell, and Mr. LaCroix had no way of knowing, that Ms. Bayly had observed Mr. Goff see the fire first and point out the fire to the other two boys. RP, 486-87.

noticed a red car. RP, 485. The boys crossed Kitsap Way towards Burger King⁶ and then contacted the patrol officer. RP, 486.

Det. Davis, having been advised of Marshall Six' report, told LaCroix that the fire could not have started that way. RP, 61. LaCroix testified that Det. Davis told him that the Fire Marshall said a cigarette could not have caused the fire. RP, 676. The detectives discussed a variety of facts about the arson investigation, including "the physics of fires, the burglar and fire alarm times, the information about the first 911 caller in the red car, and the different ways a fire could or could not be started." RP, 94. Det. Harker could not remember how long they spent discussing the details of the investigation. RP, 97. Det. Harker also had difficulty recalling exactly what details were provided. RP, 97. Detectives told LaCroix more "evidence from the scene," talked about the window breaking, and told him that the fire could not have started from the electrical system, heating system, or air conditioning system. RP, 99. He was told there had to be an accelerant to start the fire. RP, 100.

LaCroix was told that there was a very short time integral, specifically 44 seconds, between the broken window and the fire alarm and that the room went from 70 degrees to 135 degrees in that time period. RP, 488. Det. Harker told LaCroix that "it is undisputed that the fire

⁶ Burger King and Jiffy Lube are next to each other.

started shortly after the window broke.” RP, 488. Det. Davis told LaCroix that he was not being truthful and to start over, starting from the point when the window broke. RP, 489.

At that point, LaCroix mentioned a butane canister. RP, 94, 444. According to LaCroix’ testimony, he made up the butane can because it was the first thing that came to his mind. RP, 677. LaCroix’ mother owns a butane canister and uses it to fill her lighter, but he has never carried such a canister around. RP, 648. LaCroix felt he needed to make up the story of the butane can because the officers told him a cigarette could not start the fire and he needed something more flammable. RP, 677.

LaCroix told the officers he had a refillable lighter in his backpack, he wrapped some paper on top of the butane can and lit the paper on fire. RP, 444. There was a two to three foot flame. RP, 445. He put the butane can on the ledge of the broken window. RP, 445. The can fell into the room and exploded. RP, 445. He saw a couch or bed on fire. RP, 446, 490. The fire was along the southern exposure of the building. RP, 491. This was LaCroix’s first description of the butane can’s final resting place.

Det. Davis then told LaCroix information that he had learned from the driver of the red car (McGovern). RP, 491. LaCroix was told that she observed the fire as a relatively small fire and that it grew very fast and she was worried she might get burned. RP, 96. He was told she observed

three skateboarders in the vicinity. RP, 96. Det. Davis told LaCroix that McGovern did not observe the fire to have started along the southern exposure of the building. RP, 493. Instead, Det. Davis pulled out a diagram of the inside of the Arnold's showroom and showed it to him. RP, 492, Exhibit 8. LaCroix was told that, according to McGovern, the fire started on the couch closest to the eastern wall of the southeast corner. RP, 492. Using the diagram, LaCroix was told exactly where the fire was first observed. RP, 492. He is then asked if he saw the fire in the location described by McGovern. RP, 493.

Confronted with the fact that the fire observed by McGovern is some distance from the place where he first described starting the fire, LaCroix again changed his story. RP, 493. LaCroix told the detectives, "Maybe I kicked the can and burning paper into the room, because I was mad."⁷ RP, 519, 494. This was LaCroix' second location for the final location of the butane can. LaCroix testified that he felt he needed to say he kicked the can to the couch where McGovern first saw the fire in order to make his story "more believable" and that he "didn't know what to make up." RP, 680-81. LaCroix then said that he kicked the butane can into the showroom. RP, 446. He said he found the butane can at his

⁷ Detectives Davis and Harker provided different versions of this sentence. RP, 494, 519.

residence. RP, 448. He said that the can was the same size as a spray paint can and had a nozzle extension that is held in place by scotch tape. RP, 448. LaCroix said he lost the lighter after the fire. RP, 449.

At 7:35, the detectives took a break. During that break, LaCroix was allowed to have some pizza and Dr. Pepper. RP, 27. By this time, LaCroix was starting to get tired, as evidenced by the fact that whenever the detectives left the room, LaCroix would put his head on the table, as testified to by two detectives. RP, 85, 125. In his testimony, LaCroix said that once when he laid his head on the table, he went to sleep. RP, 670.

Interrogation-Stage VII

The next stage started at 8:58 p.m. RP, 43. LaCroix was crying and saying he did not want to go to jail. RP, 450, 497. Det. Davis told LaCroix that he did not believe that a window was accidentally broken doing a trick. RP, 450. The detectives released “more information about the fire to clear up the situation.” RP, 99. But Det. Harker could not recall what details were released. RP, 99. Det. Harker did remember telling LaCroix, “There is no evidence of a can in the fire debris.” RP, 102. LaCroix testified that the detective told him they did not believe him that he kicked a can into the building because they did not find a can when they were searching. RP, 682.

LaCroix decided to change his story again. RP, 682. He believed that if he told them a believable story they would leave him alone and he would be able to stay in juvenile court instead of adult court. RP, 682. LaCroix said that the window was broken by him using his skateboard as a bat. RP, 451, 498-99. Detectives asked if there was a second window and, according to LaCroix's testimony, he said that there was not. RP, 683.

Det. Davis told LaCroix that they had a audio recording from the security company during which two windows can be heard breaking, not one. RP, 451. Det. Davis told LaCroix that the two windows were broken in rapid succession. RP, 499. Up to this point, nothing had been said by either LaCroix or the detectives about a second window being broken. RP, 100. It was the detectives, not LaCroix, who first mentioned that two windows were broken. RP, 101. LaCroix testified that the officers believed either Tamaki or Goff had broken the second window and they kept asking him if one of them broke it. RP, 683. Although Det. Harker could not recall, he conceded that it was possible that the detectives had suggested to LaCroix that the second window had been broken by Tamaki. RP, 107. LaCroix finally said that there was a second broken window and that Tamaki had thrown a rock through the window. RP, 451-52, 683-84. LaCroix pointed to the fifth and sixth column on the front of the building as the location of the second broken window. RP, 452.

LaCroix described all three boys wadding up pieces of 8-1/2" by 11" notebook paper in the parking lot. RP, 453. Using the butane can, he squirted butane on the paper, and threw the papers and can into the showroom. RP, 454. He saw a fire near the couch. RP, 454. He said Tamaki lit two pieces of paper and threw them in the window. RP, 456.

For the remainder of the interrogation, Det. Davis tried to ascertain where the butane canister is. RP, 502. Det. Davis confronted LaCroix with the fact that the fire investigators never found a butane can in the fire. RP, 502. In response, LaCroix described a third location for the butane can: a dumpster in Westpark. RP, 503. Westpark is a mile to mile-and-half away from Arnold's furniture. RP, 503. Given what Det. Davis knew of LaCroix' movements that night, Det. Davis challenged him, saying it was not believable that he threw the can away at Westpark. RP, 504. So LaCroix came up with location number 4, a dumpster at Jiffy Lube.⁸ RP, 504. But he immediately changed that story and described location number 5: a trashcan somewhere in the vicinity. RP, 505. At that point, Det. Davis told LaCroix that, given he had already admitted starting the fire, he would not be in any additional trouble if he told the true location of the butane canister. RP, 505. So LaCroix comes up with location

⁸ This location was later searched and no butane canister was found. RP, 507.

number 6: the bushes behind Burger King.⁹ RP, 505. Finally, LaCroix claims that he returned to the Burger King at approximately 7:00 a.m., retrieved the can, and brought it home to Port Orchard, its seventh location. RP, 506. According to Det. Davis, it was “highly unlikely that LaCroix could have retrieved the butane canister at that time in the morning while the firefighters were still fighting the fire.” RP, 506.

According to LaCroix’ testimony, the reason he kept changing his story about the location of the butane canister was that he was trying to tell a “believable story.” RP, 684. But every time he described a location, the detectives would challenge him and he would be forced to tell a different story. RP, 684. Finally, he decided to tell a story that he knew they could not challenge: he brought the can home with him. RP, 685.

The interview ended at 9:50 p.m., nine hours and five minutes after his arrest. RP, 507. At 10:05, LaCroix consented to give DNA. RP, 44.

Gage Goff Is Interviewed a Second Time

On September 25, 2009, Det. Davis arrested Goff. RP, 34. He promptly read Goff his Miranda warnings in the same manner as he read LaCroix his Miranda warnings. RP, 34. He asked Goff if he understood his rights, and Goff said, “Yes.” RP, 34. He then asked him, “Having

⁹ This location was also searched and no butane canister was found. RP, 507.

these rights in mind, are you willing to speak with me at this time?” RP, 35. Goff answered, “No.” Despite the fact that Goff had unequivocally invoked his right to remain silent, Det. Davis interrogated him for the next three hours, although what was said is not in the record. RP, 35, 769.

Cameron LaCroix Testifies

According to the testimony of LaCroix, on the evening of July 26, LaCroix met a group of friends at the house of Kendra Ellsworth. RP, 650. The teens were watching TV and playing video games. RP, 650. Three of the teens, including LaCroix, smoked cigarettes. RP, 651. The lighter was provided by Tai Tamaki, the brother of Torey Tamaki. RP, 652. Late in the evening, LaCroix, Goff, and Torey Tamaki decided to go skateboarding. RP, 652.

The boys walked north up Adele towards Kitsap Way. RP, 653. They stopped at the medical center to skateboard for five to ten minutes. RP, 653. They then crossed Kitsap Way, where LaCroix found a cigarette. RP, 653. They continued to the Arnold’s parking lot and started doing skateboard flips off the benches. RP, 654. They were at Arnold’s for ten to fifteen minutes. During that time, LaCroix did not hit any windows with his skateboard, either intentionally or accidentally, and no windows were broken. RP, 654. LaCroix did not see Tamaki with any rocks and he did

not see him break a window with a rock. RP, 655. No fires were started and no butane canisters were present. RP, 655.

The boys then went to Papa Murphy's and skated. RP, 655. They were there about an hour. RP, 657. The boys liked this parking lot best because it has a smooth surface and plenty of light. RP, 656. LaCroix did not know that anyone was inside the Maytag Cleaner's watching them. RP, 656. All three boys were together and remained constantly in line-of-sight. RP, 656. Goff started to tire after about an hour, so the boys decided to head back to Ellsworth's house. RP, 657. Just as they were leaving, Goff noticed the fire and pointed it out to the others, saying, "Oh, my God, look at that." RP, 657. In addition to the fire, LaCroix also saw a red car in front of Arnold's. RP, 659. The red car did a U-turn and started driving towards the boys as they started to cross Kitsap Way. RP, 659. The boys got scared, thinking that the driver of the red car had started the fire and was coming to hurt them because they were witnesses, so they ran around the Burger King and approached a police officer. RP, 659. The officer told them to talk to Officer Shaw, who was in front of Jiffy Lube. RP, 660. The boys then contacted Officer Shaw and told him about the red car and the fact that they believed the driver had started the fire RP, 660. Officer Shaw asked the boys to identify themselves, which they did.

RP, 660. The boys then said they were going to get their friends and come back to watch the fire, which is what they did. RP, 661.

Gage Goff Testifies

Gage Goff stated that on July 26 he went to Kendra Ellsworth's house with a group of teenagers. RP, 555. Late in the evening, LaCroix, Goff, and Tamaki left Ellsworth's house to go skateboarding. RP, 558. None of them had a lighter, matches, or any sort of accelerant. RP, 558-59.

The boys walked up Adele Road to the medical office (he called it the insurance building), where they skated for ten to fifteen minutes. RP, 557, 560. The boys then moved to Arnold's parking lot. RP, 560. On the way, the boys found a cigarette, but they did not have any way of lighting it. RP, 560-61. The boys skated on the benches in front of Arnold's for about thirty minutes. RP, 561-62. LaCroix did not break any windows and did not start any fires. RP, 562. There was no discussion of starting a fire. RP, 562. The boys then walked to Papa Murphy's and skated for thirty to forty-five minutes. RP, 563. As the boys were getting ready to leave, Goff looked towards McDonald's and noticed that Arnold's was on fire. RP, 564. He said, "Look at that." RP, 564. LaCroix and Tamaki were both with him. RP, 564. As the boys crossed the street, they noticed a red car. RP, 564. They saw the red car do a U-turn and drive towards them. RP, 564. The boys thought the red car had something to do with the fire

and ran to Burger King. RP, 564. They ran into a police officer who told them to talk to the police officer at Jiffy Lube. RP, 565. The boys told the second officer their names and what they had seen. RP, 565-66. The boys then went back to Ellsworth's, retrieved their friends, and returned to watch the fire. RP, 566. LaCroix and Tamaki were with Goff the entire time starting from when they left Ellsworth's house the first time until they returned to watch the fire. RP, 568. They did not start a fire. RP, 569.

Elijah Thomas Confesses to Starting the Fire

Elijah Thomas is a ninth grader who has a long history of emotional and behavior problems. RP, 697. At trial, the defense called Thomas to testify. RP, 584. He was shown a photo of himself watching the fire from McDonald's. RP, 584, exhibit 17. He identified himself as the person in swimming shorts and a red shirt watching the fire. RP, 584. He was then asked if he started the Arnold's Furniture fire and he invoked his Fifth Amendment right to remain silent. RP, 584. The trial court found him unavailable as a witness. RP, 587.

In the summer of 2009, Thomas was involved in a Shield summer school program with teacher Dennis Brennan. RP, 698. On July 27, 2009, Thomas arrived at school twenty to twenty-five minutes late at about 8:40 a.m. RP, 699. He was very excited and began roaming around the classroom after being told to take a seat. RP, 699. He smelled like fire.

RP, 705. He loudly blurted out to the other students about the fire at the furniture store. RP, 705. After a few minutes, he said that he threw a fire bomb through a window and started the fire.¹⁰ RP, 706. He talked about taking a rag, putting it in some kind of bottle, and throwing it through the window. RP, 707. Brennan told him to start his schoolwork or he would be asked to go home, at which point Thomas grabbed his backpack and ran out of the room, and did not return for a week. RP, 707.

Dr. Ronald Roesch Testifies

The final defense witness was an expert witness in false confessions, Dr. Ronald Roesch. RP, 718. Dr. Roesch has a Ph.D. in psychology from the University of Illinois and is a professor in psychology at Simon Fraser University in British Columbia. RP, 718-19.

Dr. Roesch performed several psychological tests on LaCroix. Dr. Roesch performed a standard IQ test on LaCroix, and determined that he tests in the 105 to 110 range. RP, 732. He also performed a Personality Assessment Inventory (PAI), which has both clinical and validity scales. RP, 726. The validity scales are designed to recognize people who are malingering rather than presenting themselves in a honest and truthful way. RP, 726. According to the PAI, there was no indication that LaCroix was malingering on the tests. RP, 727. On the clinical scales, LaCroix

¹⁰ Mr. Thomas' statements were introduced pursuant to ER 804(b)(3).

showed mild depression, probably brought on by some family problems and legal problems. RP, 728. It was Dr. Roesch's opinion that LaCroix does not demonstrate any traits common for people who are diagnosed with antisocial or borderline personality disorders. RP, 729.

Dr. Roesch testified about a psychological test first developed by Dr. Gisli Gudjonsson. Dr. Gudjonsson has done extensive study into the degree to which people are amenable to suggestion and is considered a leading expert in this area. RP, 723. Suggestibility is defined as having two aspects: yield and shift. Yield is the extent to which individuals will give in to leading or misleading questions. RP, 724. Shift is the tendency of an individual to shift or change their response under perceived conditions of pressure. RP, 724.

About halfway through his testing of LaCroix, Dr. Roesch performed a "memory" test with LaCroix. The memory test was actually the Gudjonsson Suggestibility Scale. RP, 733. The test is administered by reading a short story about a couple who views a boy falling off his bike going down a hill. RP, 734. The subject is then asked to relate everything he remembers about the story. RP, 734. After fifty minutes, the tester returns to the "memory" test. RP, 734. During the fifty minute delay, the tester continues to do other testing. RP, 735. After the delay, the subject is asked a series of 20 questions about the story. Some of the questions are

leading, some non-leading, some misleading. RP, 735. The tester then says, “Just give me a minute, I’m going to score it. . . You’ve made a number of errors. It’s therefore necessary to go through the questions once more and this time try to be more accurate.” RP, 737. The tester then reasks the same 20 questions. RP, 737. The test reveals a yield score and a shift score. RP, 738. The purpose is to determine the degree to which the subject will yield to the leading or misleading questions and then shift his answers in response to negative feedback.

After completing the Gudjonsson Suggestibility Scale with LaCroix, Dr. Roesch determined that he scored in the 85th percentile for suggestibility compared to other young males his age. RP, 740. According to Dr. Gudjonsson’s research, subjects who score high on the Suggestibility Scale, when they are confronted with police interrogation methods, respond strongly to negative feedback. RP, 741. In other words, when the police officer repeatedly tells them that their answer is not acceptable and a different one is required, people who score high are more susceptible to changing their answers. RP, 741. They are more susceptible to leading questions and misleading questions. RP, 744.

Dr. Roesch also expressed concerns about the degree of information LaCroix was given during his interrogation. RP, 742. According to the research, if a person is motivated to give you what they

think you want, and you give them information that helps them do that, they know the what you are looking for and how to respond. RP, 744.

Dr. Roesch expressed a concern about the length of LaCroix interrogation. RP, 746. Among cases of proven false confessions, there is a strong nexus between the length of the interrogation and the frequency of false confessions. RP, 746. In addition, in cases of DNA exoneration as established by Project Innocence, about 25% of them involved a suspect who had given a false confession. RP, 747. Finally, Dr. Roesch expressed frustration that the interrogation of LaCroix was not tape-recorded. RP, 753. As a consequence, it is impossible to reconstruct exactly what was said and when. RP, 753-55.

C. Argument

1. Under the totality of the circumstances, LaCroix' decision to make a statement was not a free and unconstrained choice, his statement was coerced and involuntary.

At trial, two different images of Cameron LaCroix were presented. On the one hand, LaCroix is a person who acts with the combined strength and speed of Superman and criminal intellect of Lex Luther. On the other hand, he is a juvenile of average, but highly suggestible, intellect who was subjected to a coercive and suggestive interrogation. Everything in this case goes back to the September 10, 2009 interrogation. Either LaCroix'

incriminating statements are “very compelling evidence,” as found by the trial court, or they are a classic example of a false confession. CP, 33.

The Washington Supreme Court recently commented on the need for care when dealing with the possibility of false confessions from juveniles, saying, “False confessions (especially by children), mistaken eyewitness identifications, and the fallibility of child testimony are well documented. State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010), citing Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis.L.Rev. 479, 480-85 (2006) (discussing the false confessions by juveniles to the Central Park jogger case). As Dr. Leo argues in his law review article:

Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors. This is because police, prosecutors, judges, jurors, and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt. Juries tend to discount the possibility of false confessions as unthinkable, if not impossible. False confessions are viewed as contrary to common sense, irrational, and self-destructive. Moreover, police-induced false confessions tend to be facially persuasive because police make sure the confessor includes "elective statements" such as crime scene details, expressions of remorse, the confessor's alleged motives for committing the offense, and acknowledgements of voluntariness.

2006 Wis.L.Rev. at 485. But as the Central Park jogger case demonstrates, police interrogation can produce false confessions. In fact, the police were able to obtain five separate confessions from five suspects, which were determined to be voluntary by the trial court and on appeal.

Given the absence of any DNA at the Arnold's furniture fire, it is unlikely we will ever know with 100% confidence whether LaCroix' confession of September 10, 2009 is true or false. In addition, the legal standard for judging the sufficiency of the evidence on appeal make it fruitless to even attempt to argue the justice of his conviction. Having been tried by a single person without the benefit of a jury, a person who must stand for reelection every four years, LaCroix has been found guilty by a person who found "LaCroix's testimony to [not] be credible." CP, 39. Nor was Goff, the other testifying eyewitness to all of LaCroix' activities that evening, credible. CP, 39. Nor was Janet Bayly, who observed and heard LaCroix and the other two boys continuously from her Maytag window for at least 45 minutes prior to the fire being started, credible. CP, 38. The fact that this incident happened very quickly (44 seconds between the broken window and the fire alarm) and the first person to see the fire, Selena McGovern, did not see the boys until she started driving towards Papa Murphy's, when she saw them walking briskly across the street from the Papa Murphy's parking lot (one minute and six seconds away from

Arnold's at a brisk walk) to Burger King, is somehow converted into evidence of guilt. CP, 37. And Jeremiah Talkington, who simultaneously observed the boys skateboarding at the Papa Murphy's/Maytag parking lot while McGovern's red car investigated the infant fire, does not even get the courtesy of a brush off in the trial court's Findings of Fact and Conclusions of Law. But ignoring this evidence, ignoring the fact that LaCroix could not have humanly been two places at once, and judging the facts solely from the kaleidoscope of the facts most favorable to the non-moving party, LaCroix' confession is sufficient to sustain a finding by a rational trial of fact that he set fire to this building.

The trial court also took great pains to ignore obvious contradictions in the physical evidence in order to find LaCroix guilty, contradictions that most triers of fact would have concluded established a reasonable doubt. For instance, the fact that Deputy Fire Marshall opined that the rock he found (which has since been lost due to *res ipsa loquitur* negligence by either the fire department or police department) probably fell off the roof as the building collapsed because it was on top of the debris and not underneath it as you would expect, was interpreted by the trial court as evidence of guilt because the rock could have ended up there in any number of ways. CP, 38. Likewise, the contradictory evidence about the windows (single pane versus double paned) and the

contradictory opinions by the two fire marshalls about the ability of a two inch rock to break the showroom window was not seen as a problem. Although no butane canister was ever found, there is no indication that butane was used, and Henny the dog did not alert on any long-chain hydrocarbons that could have been created by butane, the fact that butane could not be ruled out as a possible accelerant was seen as evidence of guilt. The fact that defense witnesses testified that LaCroix did not have a backpack that night but could not recall if the backpack was left at his friend Struble's house or at Ellsworth's house, even though a photo of LaCroix watching the fire burn clearly shows that he did not have a backpack that night, demonstrates that the defense witnesses are not credible. CP, 39, Exhibit 16.

Although this Court has very little leeway to judge the facts of the trial, it does have a great deal more leeway to judge the CrR 3.5 hearing. This Court must review the conclusions of law from the CrR 3.5 hearing de novo. State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002). Findings of Fact are treated as verities unless not supported by substantial evidence. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002). And reviewing the trial court's conclusions de novo, this Court should conclude that the trial court incorrectly applied the law and Constitution when it found LaCroix's statement to be voluntary.

The recent case of Doody v. Schriro, 596 F.3d 620 (9th Cir. 2010) offers a appropriate caution. Under analogous facts to LaCroix' case, the Ninth Circuit concluded that the Arizona Court of Appeals had unreasonably applied established federal constitutional law in reviewing the voluntariness of the juvenile's confession. In Doody, the detective repeatedly accused the 17 year old suspect of lying and emphasized the need to tell the truth. Doody at 625. The juvenile had never been involved before with the criminal justice system and was unfamiliar with Miranda warnings. Multiple officers utilized a tag team approach. Doody at 625. The interrogation lasted approximately thirteen hours during which time he became very tired. Although the officers gave the suspect a food and bathroom break, this was after nine hours of interrogation. The Ninth Circuit was very concerned that the detectives, who had a history of eliciting false confessions, had produced yet another one.¹¹ The Ninth Circuit concluded that the Arizona Court of Appeals failed to consider in totality circumstances and granted the writ of habeas corpus.

¹¹ Defendant Doody was not the first person arrested for the murders, nor was he the first to confess. The same team of detectives had previously arrested four adults from Tucson and elicited confessions from all four. The four confessions were subsequently determined to be false and the charges against the four were dismissed. This is powerful evidence of the improper use of police interrogation techniques to obtain a false confession.

The most recent case from our Supreme Court on coerced confessions is State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). In Unga, the Court held that coercive police activity is a prerequisite for a finding that a confession is involuntary. In reviewing the conduct of the police, the court should look at the degree of pressure exerted and the ability of the juvenile to resist the pressure. Unga at 101. The question to be asked is whether the officer's statements and actions were so manipulative or coercive that they deprived the suspect of the ability to make an unrestrained, autonomous decision whether to confess. Unga at 102, citing United States v. Miller, 796 F.2d 598 (3rd Cir. 1986). In Unga, the juvenile suspect was interrogated by a police officer who offered him immunity on one charge in exchange for confessing to an unrelated offense. The Supreme Court held that the confession was voluntary. The Court pointed to the brevity of the interrogation (thirty minutes), there was only one round of interrogation, there was no evidence of a raised voice or intimidation tactics, and the defendant was a 16-1/2 year old gang member with experience with law enforcement. The court held that the confession was voluntary under the totality of the circumstances.

In contrast, the Unga Court cited the case of Haley v. Ohio, 332 U.S. 596, 68 S.Ct 302, 92 L.Ed. 224 (1948) as an example of an involuntary confession. In Haley, a fifteen year old boy was arrested at

midnight, held incommunicado, and subjected to continuous interrogation by a rotation of officers over a five hour period, during which time he was shown the written confessions of two co-defendants, without being advised of his right to an attorney until he wrote out his own confession.

LaCroix' interrogation is more akin to the interrogations in Haley and Doody than Unga. LaCroix was arrested and interrogated for over nine hours by a continuous tag team of rotating officers. During that nine hour period, LaCroix fluctuated between extreme fatigue and emotionality. During the breaks he would lay his head on the table and at least once fell asleep. Other times, when confronted with his "lies," he would break out crying. Detectives admitted at least 24 separate times in this non-recorded interrogation that they accused LaCroix of lying.

The trial court found that the nine hour interrogation was really a five hour interrogation because of the numerous breaks and that it took place during normal waking hours. CP, 27, 34. This finding is not supported by substantial evidence. During the 29 minute transport from Belfair to Bremerton, LaCroix was questioned, although admittedly not as vigorously as later. Once at the station, he was interrogated from 1:53 to 3:27 by Detectives Davis and Det. Harker. From 4:18 to 7:35, he was interrogated almost continuously by a tag team of rotating detectives. Finally, he was interrogated from 8:58 to 9:50. LaCroix gave a DNA

sample at 10:15. This puts the total amount of interrogation as 5 hours and 43 minutes if one does not include the transport time and 6 hours and 12 minutes if one does. In addition, although the interrogation started in “normal waking hours,” it concluded late at night.

But the trial court’s implication misses the point. Even the breaks, as he is forced to sit alone in a 10’ by 10’ room to think about his next move have a psychological impact on a young man who is contemplating whether he will be in juvenile prison or adult prison. In addition, there is evidence in this record that LaCroix, prior to being arrested and interrogated, was physically worn out. At the time of his arrest, he was walking alone on a remote road in Mason County with just his skateboard to keep him company, smelled badly and said he could not remember the last time he had eaten. Repeatedly during the interrogation, he put his head on the desk and at least once he fell asleep. The trial court’s finding this interaction was non-coercive is not supported by substantial evidence.

Overlaying this interrogation was the not-so-subtle threat that the detectives had the power to control LaCroix’ fate. Either he told them what they wanted to hear, in which case he would remain in juvenile court, or he continued to tell them lies, in which case he would be transferred to adult court. LaCroix had never been arrested before, had no prior experience dealing with law enforcement, and had never been read

his Miranda warnings before. Under all these circumstances, it is not surprising that LaCroix started making up stories to satisfy what he perceived the officers wanted.

Further, at least seven times, detectives gave LaCroix detailed information learned from other witnesses in the investigation, although when confronted with this fact, the detectives frequently had difficulty remembering exactly what details they told him in this non-recorded conversation. We know LaCroix was shown the written police report of Goff, although it omitted the fact that Goff immediately recanted his statements. When LaCroix did not correctly describe how and where the fire started, he was told very specific information, including the 44 second interval between the broken window and fire alarm, and the fact of the second broken window. The officers even went so far as to show him the exact location of the initial fire using a diagram of the showroom. Repeatedly during the interrogation, LaCroix would invent a story that he hoped would be “believable,” only to learn that his new story was inconsistent with other evidence, forcing him to invent yet another story. This is most evident in the seven stories he told describing the final resting place of the butane canister. For instance, having been shown specifically where the fire started on a diagram and realizing that he needed to somehow get the fire from where he said the window was broken to where

the fire started, he offered that “maybe” he kicked the can to that location. But that story didn’t work any better, because the fire investigators never found a butane can in the debris.

Dr. Leo notes in the Central Park jogger case, that the amount of accurate detail given by the five false confessors is directly related to the amount of detail provided by the interrogators to each suspect. For instance, none of the five suspects knew initially where in the park the rape had occurred, a detail that one would expect them all to know. But one of the suspects, Mr. Wise, confessed to knowing in his second interview where the rape occurred. The difference: Between the first and second interview, Mr. Wise was taken to the crime scene and shown crime scene photographs. 2006 Wis.L.Rev. at 483-84. Likewise, both Goff and LaCroix described a broken window on the southern side of the building (near where they consistently admitted skateboarding earlier in the evening). It was only when LaCroix was shown a diagram of the showroom and pointed out where McGovern first saw the small fire that LaCroix described breaking a window and starting a fire in that location.

LaCroix was told by the police they had conclusive evidence that he was lying from the fact that he failed the “truth verification test.” The United States Supreme Court has held that the use of a “truth serum” renders a confession involuntary. Townsend v. Sain, 372 U.S. 293; 83 S.

Ct. 745; 9 L. Ed. 2d 770 (1963) overruled on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1; 112 S. Ct. 1715; 118 L. Ed. 2d 318 (1992). The use of the CVSA to coerce false confessions has been the subject of at least one major civil law suit. See Crowe v. County of San Diego, 303 F.Supp.2d 1050 (S.D.Cal., 2004). (Summary judgment denied in suit against manufacturer of CVSA alleging that CVSA caused damage by inducing a false confession). In Contee v. United States, 667 A.2d 103 (D.C. 2005), the Court expressed concern about the use of CVSA results being used to coerce confessions because the officers either untruthfully told suspect that the CVSA revealed that he was lying or did so unreliably. Contee at 104. But despite the Court's reservations, the confession was upheld under the totality of circumstances because: (1) the suspect had made incriminating statements prior to the administration of the test; (2) he was told the results of the test were not admissible in court; and (3) no other circumstances of coercion or trickery were used that, in combination with the CVSA test, convinced the Court that the suspect's will was overcome. Contee at 104-05. In LaCroix' case, he made no incriminating statements prior to the administration of the test, he was not told that the results of the test were not admissible, and the CVSA was just one in a series of coercive techniques designed to get him to confess.

That the CVSA can have a powerful influence on a juvenile is also demonstrated circumstantially by Goff's experience. Like LaCroix, Goff steadfastly maintained the innocence of all three boys until confronted with the fact he was "lying" on the "truth verification test."

The trial court found that LaCroix' confession was corroborated by Goff's confession and that Goff was "credible with the officers during his interview." CP, 36-37. This finding is not supported by substantial evidence. After being confronted with the failed CVSA, Goff made several remarks to detectives. He claimed that LaCroix accidentally broke a window on the southern side of the building near the benches with his skateboard, climbed into the showroom to retrieve his skateboard, and dropped a lit cigarette while inside. This statement is not corroborative of anything. First, it was the detectives, not Goff, who first said that a skateboard had entered the showroom. RP, 593, 577. Second, given the time frame (44 seconds), there was simply not enough time for LaCroix to break the window, climb through the window with its freshly broken glass, retrieve his skateboard, and get away in time for McGovern not to see him. Third, Fire Marshall Six determined that a lit cigarette could never start this fire. RP, 409-10. Fourth, the location of the broken window described by Goff is inconsistent with the location of the fire,

further evidence that the boys were making up facts in order to satisfy the investigators rather than confess to truthful facts.

To the contrary, while the record does not support the finding that Goff's statements corroborate LaCroix, it does amply support a finding that Goff's statements were used to overcome LaCroix' will. Goff, a cancer patient on a heavy chemotherapy regimen, is administered a test of no scientific reliability and told it is a "truth verification test." He is then told that he failed the test, causing him to make incriminating statements about LaCroix. These statements are related to LaCroix, both orally and in writing, at the beginning of his interview. When LaCroix is confronted with his failed "truth verification test," the first story he tells is accidentally breaking a window with a lit cigarette, parroting Goff's statement.

The trial court also had the benefit of expert testimony from a psychologist about character traits unique to LaCroix. Although the trial court did not find Dr. Roesch's testimony persuasive (see CP, 36), this Court is not bound by that determination in reviewing the totality of circumstances de novo. Dr. Roesch presented un rebutted testimony that people who score high on the Gudjonsson¹² Suggestibility Scale are more likely to respond strongly to negative feedback and are more susceptible to

¹² Dr. Gudjonsson is cited approvingly 14 times by Dr. Leo's law review article.

leading questions, misleading questions. RP, 741-74. LaCroix scored very high on the Gudjonsson Suggestibility Scale, with a score that puts him in the 85th percentile for suggestibility compared to other young males his age. RP, 740. This score should be considered accurate for two reasons. First, other testing detected no indication that LaCroix was malingering or otherwise exaggerating his symptoms. Second, LaCroix did not know that he was taking a suggestibility test; he thought it was a memory test.

In reviewing the voluntariness of LaCroix' confession, the parties, the trial court, Dr. Roesch, and ultimately this Court, were all hampered by the fact that this interrogation was not audio or video recorded. Dr. Leo argues in his law review article that "recording the entire custodial interrogation of suspects should be a prerequisite of any new legal test inquiring into the reliability of a confession." 2006 Wis.L.Rev. at 486. Dr. Leo notes that there is a growing trend of requiring all custodial interrogations to be recorded. Prior to 2003, only Alaska and Minnesota required recorded custodial interrogations. Since 2003, prompted by a flurry of false confession cases out of Illinois, five more states have created this requirement, bringing the total to seven. 2006 Wis.L.Rev. at 528. Washington, which has a long history of being a trendsetter on civil liberty issues, is deciding behind the curve in recognizing the need for recorded custodial interrogations. Given the fact that the prosecution

bears the burden of proving the voluntariness of a confession, law enforcement should not be given a free pass by deciding not to record interrogations and forcing every case to become a swearing contest.

Viewing the totality of circumstances in this case, LaCroix' decision to make a statement was not a free and unconstrained choice. His statement was coerced and involuntary. The trial court erred by failing to suppress the statement.

2. The trial court erred by sustaining Torey Tamaki's Fifth Amendment Privilege without a sufficient showing.

Prior to trial, on motion of the State, the trial court appointed attorneys for both Torey Tamaki and Gage Goff. Goff testified as a witness for the defense. The defense also called Tamaki as a witness. RP, 527. Tamaki appeared with his court-appointed counsel, Jeniece LaCross. RP, 528. On the third day of trial, just as it was preparing to rest, the State requested a continuance to try and negotiate an immunity agreement with Tamaki in exchange for his testimony on behalf of the State. RP, 527.

This prompted LaCroix to make an offer of proof. Tamaki was interviewed "repeatedly" by both law enforcement and the defense investigator. RP, 529. In every interview, including a tape recorded interview, Tamaki had consistently maintained that he spent the night of

July 27 with LaCroix and Goff and that none of the three boys started the fire. RP, 529. The court granted a 15 minute continuance. RP, 531.

After the continuance, the State rested without calling Tamaki. RP, 533. LaCroix promptly called him as a defense witness. RP, 533. Defense counsel asked Tamaki a series of questions about the evening of July 26 and early morning hours of July 27. RP, 534. Tamaki, on the advise of Ms. LaCross, invoked his Fifth Amendment privilege to remain silent. Defense counsel for LaCroix objected because “based upon what he’s told me and told my investigator, I don’t believe he has any Fifth Amendment privilege, because he has nothing incriminating to say.” RP, 535. Defense counsel clarified that Tamaki’s interviews with both law enforcement and defense investigators were “internally consistent.” RP, 535. Because Tamaki had consistently never implicated himself in the fire, he was in no “danger” of prosecution. RP, 538.

Ms. LaCross was asked to clarify her position, to which she responded that from her “review of this case file” the State had a “very weak case” against her client, but that he had been arrested and offered immunity, and she did not want her client to give a statement that might make his legal position more “precarious.” RP, 539.

The trial court noted that Tamaki’s prior statements, though exculpatory, were not under oath. The court sustained the Fifth

Amendment privilege. RP, 540. As a result of the court's ruling, Tamaki did not answer any questions.

In State v. Hobble, 126 Wn.2d 283; 892 P.2d 85 (1995), the Supreme Court reviewed an order of contempt brought against a witness who improperly invoked his Fifth Amendment privilege. The witness had pleaded guilty in exchange for his testimony against the defendant. At some point, it became clear that defense counsel intended to cross-examine the witness about the fact that he had given several false names at the time of his arrest. The State refused to give him immunity as to that fact, but the trial court ruled that the misstatements did not expose the witness to criminal prosecution. The Supreme Court agreed.

The danger of incrimination must be substantial and real, not merely speculative. See State v. Parker, 79 Wn.2d 326, 485 P.2d 60 (1971). (must appear to be genuine, not fanciful or illusory, in order to overcome correlative duty to the court and litigants to testify to the truth). Unless the answer to a question would obviously and clearly incriminate the witness, the witness must establish a factual predicate from which the court can, by use of reasonable judicial imagination (aided by suggestions of counsel), conceive of a sound basis for the claim.

State v. Hobble, 126 Wn.2d 283, 892 P.2d 85 (1995) (citations omitted).

In this case, the allegation that Tamaki was in danger of incrimination was speculative and fanciful. Tamaki had been the subject of multiple interviews by both law enforcement and the defense and had

never made any incriminating statements. The law enforcement interviews were after he was arrested and, presumably, advised of his right to remain silent, but he had chosen to tell his story anyway, and his story was that he was with LaCroix and Goff and none of them started the fire. These pre-trial statements were consistent with the sworn testimony of LaCroix and Goff.

The fact that the State offered Tamaki immunity in exchange for his testimony does not change the analysis. Tamaki was apparently offered immunity in exchange for his testimony, but he turned it down, choosing to take his chances with criminal prosecution instead. The trial court erred by sustaining his Fifth Amendment privilege.

D. Conclusion

This Court should suppress the confession, reverse and remand for a new trial with instructions that Tamaki either make a better record of his Fifth Amendment privilege or be required to testify.

DATED this 24th day of May, 2010.

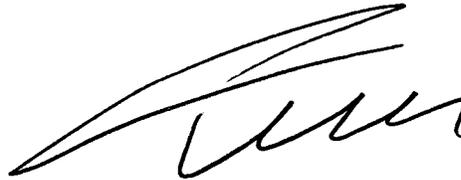
A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

1 On May 24, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, and
2 the MOTION FOR OVERLENGTH BRIEF to the Kitsap County Prosecutor's Office, 614
3 Division St. MSC 35, Port Orchard, WA 98366-4683.

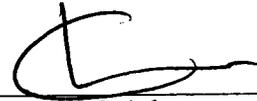
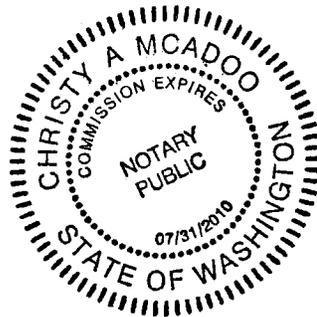
4 On May 24, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, and
5 the MOTION FOR OVERLENGTH BRIEF, to LEGAL MAIL, Mr. Cameron LaCroix, Green
6 Hill School, 375 SW 11th Street, Chehalis, WA 98532.

7 Dated this 24th day of May, 2010.



8
9
10 Thomas E. Weaver
WSBA #22488
Attorney for Defendant

11
12 SUBSCRIBED AND SWORN to before me this 24th day of May, 2010.



13
14 Christy A. McAdoo
15 NOTARY PUBLIC in and for
16 the State of Washington.
17 My commission expires: 07/31/2010