

NO. 40158-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CAMERON LACROIX,

Appellant.

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PORT ORCHARD

ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-8-00643-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 23, 2010, Port Orchard, WA *L. Morrison*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. UNDER THE TOTALITY OF THE CIRCUMSTANCES, SHOULD THE TRIAL COURT'S DETERMINATION THAT LACROIX'S DECISION TO MAKE A STATEMENT WAS A FREE AND UNCONSTRAINED CHOICE AND THAT HIS STATEMENT WAS VOLUNTARY AND NOT COERCED BE UPHELD?
2. SHOULD THE TRIAL COURT'S DECISION TO SUSTAIN TOREY TAMAKI'S FIFTH AMENDMENT PRIVILEGE BE UPHELD?
3. SHOULD THE TRIAL COURT'S VARIOUS FINDINGS OF FACT BE UPHELD WHERE THERE IS SUBSTANTIAL EVIDENCE IN THIS CASE TO SUPPORT THEM?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cameron LaCroix was charged by information in the Kitsap County Superior Court – Juvenile Division with one count of Arson in the First Degree pursuant to RCW 9A.48.020. CP, 1. A contested CrR 3.5 hearing was held prior to the fact finding, and LaCroix's statement was not suppressed. CP, 29. Following the fact finding, the trial court convicted LaCroix as charged and imposed a standard range disposition of 103 to 129 weeks at the Juvenile Rehabilitation Administration. CP, 41.

B. FACTS

Overview of Case

Arnold's Home Furnishings, a furniture store in Bremerton,

Washington, caught on fire at approximately 2:00 a.m. on July 27, 2009. RP, 217, 326. After extensive investigation, the fire was determined to have started in the southeast corner of the building and to have been intentionally set. RP, 367. The appellant, Cameron LaCroix, was skateboarding with two friends in the vicinity of Arnold's at the time of the fire. RP, 435. LaCroix was arrested on September 10, 2009 and taken to the Bremerton Police Department where he made an incriminating statement to detectives. RP, 19, 24, 60, 431, 433.

The CrR 3.5 Hearing

On July 27, 2009, there was a large fire at the Arnold's Furniture building in Bremerton, Washington. RP, 15. Detective Mike Davis with the Bremerton Police Department responded to the scene of the fire on July 27, 2009 and was later assigned as lead detective for the case. RP, 15.

On July 29, 2009, Detective Davis made contact with Cameron LaCroix because LaCroix had been contacted in the area at the time of the fire. RP, 15, 16. Detective Davis and LaCroix agreed that they would meet at the home of LaCroix's friend, Daniel Struble. RP, 16. LaCroix spoke with Detectives Mike Davis and Rodney Harker in Detective Davis' vehicle due to the extremely hot temperature that day. RP, 17. LaCroix made a statement to Detectives Davis and Harker that day. RP, 18.

On September 10, 2009, Detectives Mike Davis and Rodney Harker

located LaCroix in Belfair, Washington and arrested him at 12:45 p.m. RP, 19, 24. He was handcuffed and placed into the front seat of Detective Davis' police vehicle. RP, 21, 77. At 12:56 p.m., Detective Davis read LaCroix his Miranda¹ rights as well as juvenile warnings, and LaCroix said he understood his rights. RP, 21, 22, 23. LaCroix waived his rights and said he wished to speak to the detectives, but he had told them everything. RP, 23, 78. LaCroix was almost seventeen, he was coherent, he did not appear to be under the influence of any substance, and he appeared to understand what the detectives were saying to him. RP, 23, 24, 79. LaCroix smelled as if he had not bathed and said he did not remember the last time he had eaten. RP, 46.

Detectives Harker and Davis transported LaCroix to the Bremerton Police Department and arrived there at 1:25 p.m. RP, 24. During the trip to the Police Department, the detectives obtained background information from him. RP, 47. Detective Davis told LaCroix he did not believe LaCroix had been completely truthful during the previous interview, but the detectives did not ask LaCroix questions about the Arnold's fire. RP, 47, 79.

At the Bremerton Police Department, LaCroix was brought to an approximately 10 foot by 10 foot interview room with a round table and three chairs. RP, 25. Detective Davis gave him some water and a breakfast bar. RP, 25. From 1:53 p.m. until 3:27 p.m., Detectives Davis and Harker

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

interviewed LaCroix. RP, 25. Detective Davis told LaCroix it was important to be truthful and honest about what happened with the fire. RP, 48. Detective Davis read part of a probable cause statement to LaCroix which included a statement from Gage Goff which said LaCroix had said, "Oh, shit I broke the window. I can't believe I did that." RP, 54. LaCroix was also told Goff said Torey Tamaki was a "pyro at times." RP, 53. The detectives did not tell LaCroix that Goff later recanted his statement. RP, 55. At 3:27 p.m., the detectives asked LaCroix if he needed anything, and he requested to use the restroom. RP, 81.

Detective Sergeant Kevin Crane was the supervisor of the general investigations unit at the Bremerton Police Department. RP, 120. At 4:18 p.m., he went into the interview room with LaCroix and explained that Detectives Mike Davis and Rodney Harker were being honest with the information they had, and he encouraged LaCroix to be truthful. RP, 121. Sergeant Crane did not ask any questions, and the contact lasted one to two minutes. RP, 81, 122.

Detectives Mike Davis and Rodney Harker went back into the interview room at about 4:20 p.m. RP, 27, 82. They talked with LaCroix about participating in a Computer Voice Stress Analyzer (CVSA), and LaCroix agreed to participate. RP, 27, 28, 82.

Detective Robert Davis met with LaCroix beginning at 4:45 p.m. in

the conference room. RP, 114. Detective Robert Davis asked LaCroix if he was hungry or wanted anything to drink, but LaCroix said he was fine. RP, 115. Detective Davis also offered LaCroix an opportunity to use the restroom which LaCroix declined. RP, 115. Detective Robert Davis interviewed LaCroix for thirty-five to forty minutes, and then he conducted the CVSA. RP, 115. The CVSA took less than ten minutes concluding at about 5:48 p.m., and LaCroix was returned to the original interview room. RP, 115 118. At 5:55 p.m., Detective Robert Davis and Sergeant Crane advised LaCroix he had been deceptive during the CVSA. RP, 118.

Sergeant Crane told LaCroix the CVSA showed he was being deceptive and this was his opportunity to be truthful. RP, 122, 123. Sergeant Crane also explained that his cooperation could help make a determination whether his case went down the juvenile path or the adult path. RP, 123, 124. This contact lasted about five minutes. RP, 124.

Detectives Mike Davis and Rodney Harker interviewed LaCroix again from 6:10 p.m. until 7:25 p.m. Detective Davis told LaCroix it was important to be honest and truthful about what had occurred. RP, 58. The detectives provided information about the investigation including the three elements needed to start a fire, the very short period of time between the burglar and fire alarms, the driver of the red car was the first person to call 911, and the different ways a fire could and could not be started. RP, 93, 94.

At some point detectives told him the fire was small when first observed and grew fast, the fire was observed on the couch opposite the windows, the driver of the red car saw three youths with skateboards, the fire was not caused by electrical or other systems in Arnold's, and no evidence of a can was found in the fire debris. RP, 96, 97, 98, 99, 102.

Between 6:10 p.m. and 7:25 p.m., LaCroix began to make incriminating statements. RP, 60. He began by saying that he accidentally hit the window with his skateboard and the window broke. RP, 60. Detective Davis advised LaCroix he did not believe the story about how the window was broken. RP, 60. LaCroix initially denied smoking a cigarette in the Arnold's parking lot, and Detective Davis challenged him and told him that Goff had already said LaCroix had been smoking. RP, 61. LaCroix later said that Goff and Tamaki were a distance away from him when the window broke, and Detective Davis challenged LaCroix again telling him this was inconsistent with what Goff had said. RP, 62. When LaCroix provided details which were inconsistent with the fire investigation, the detectives reminded LaCroix he needed to be honest. RP, 62. As the questioning went on, Detective Davis told LaCroix he needed to be honest about how the window got broken just before the fire started. RP, 62. LaCroix told the detectives a butane canister had been used to start the fire. RP, 63, 110. As the detectives discussed the butane canister with LaCroix, he told them the

butane canister had fallen into a broken window by accident and exploded. RP, 63. Detective Davis challenged LaCroix and asked him if that was a true and honest account of what happened. RP, 63. Detective Davis told LaCroix a witness had seen the fire several feet away from the window, so he did not believe the canister had just fallen in. RP, 64.

At 7:25 p.m., a dinner break was taken. LaCroix was provided with pizza and soda, and he used the restroom. RP, 27, 28, 83.

Detectives Mike Davis and Rodney Harker resumed the interview at 8:58 p.m. and continued until 9:50 p.m. RP, 28. The detectives told LaCroix there were some things they wanted to clear up with him. RP, 64. Detective Davis told LaCroix he did not believe his story that the window had been broken while LaCroix performed a skateboard trick and he did not believe the skateboard had flown into the air and broke the window. RP 64. Detective Davis told LaCroix his story that he broke the window with his skateboard and immediately lit the butane canister and set it on the window ledge did not make any sense. RP, 65. Detectives then told LaCroix that two windows had been broken before the fire started. RP, 65. Detective Davis told LaCroix he needed to clear up the discrepancy with the number of windows broken. RP, 65. Detective Davis told LaCroix he believed a second person was involved in breaking the second window, and LaCroix was not being honest about this. RP, 65. Detective Davis again told LaCroix he needed to be honest and

truthful about what happened. RP, 66. After discussing the window, the detectives returned to the subject of the butane canister, and Detective Davis told LaCroix twice he did not believe his story about how the butane canister got into the building. RP, 66, 67. The detectives discussed with LaCroix what had happened to the butane canister, challenged his first story that he had hidden it at Westpark, and then told LaCroix to stop lying about where the canister was. RP, 67. In this last portion of the interview, Detective Harker also challenged LaCroix about trying to conceal information about the involvement of Tamaki and Goff. RP, 66.

Detective Rodney Harker also discussed the issue of adult versus juvenile jurisdiction several times during the interview, and LaCroix was told the detectives make recommendations to the prosecutor. RP, 87. The discussions about adult and juvenile jurisdiction and recommendations to the prosecutor came up in the context of LaCroix being told he needed to be truthful and honest. RP, 88.

During the interview, LaCroix provided the detectives with a statement which contained details that matched the physical evidence. RP, 69. The detectives did not tell LaCroix what to say. RP, 69. The detectives did not tell LaCroix butane could have been used to start the fire at Arnold's, and LaCroix was the first person to talk about butane being used. RP, 110. LaCroix provided the detectives with a detailed description of the butane

canister, and where he had obtained it. RP, 110.

Throughout the time the detectives spent with LaCroix on September 10, 2009, LaCroix did not demonstrate any intellectual difficulties, he did not appear to be under the influence of any substance, he never asked for an attorney, and he never asked for the interview to end. RP, 29, 84, 85, 116, 125. According to Detective Harker, LaCroix put his head down on the table during breaks, but LaCroix never said he was tired, and he did not have trouble staying awake during the interview. RP, 85. Detective Robert Davis did not recall LaCroix acting tired, but instead seemed more bored than anything. RP, 116. Sergeant Crane saw LaCroix put his head down on the table, but LaCroix was awake and alert as Sergeant Crane spoke to him. RP, 125. Detectives Mike Davis and Harker described the interview with LaCroix as calm and conversational. RP, 29, 85.

The Fact Finding²

Arnold's Home Furnishings, a furniture store housed within a 66,000 square foot building in Bremerton, Washington, caught on fire at approximately 2:00 a.m. on July 27, 2009. RP, 217, 231. As a result of the fire, the east side of the building and a small building behind it were totally ruined. RP, 222. About 17,000 feet on the west side of the building and the

² The parties stipulated that all evidence introduced at the CrR 3.5 hearing would be incorporated into the fact finding.

warehouse were damaged. RP, 222, 223. 85 to 100 firefighters responded to the fire at Arnold's, and their lives were placed in danger when they were putting the fire out. RP, 375. The fire at Arnold's was dangerous due to the enormous fuel load in the building and because of the lightweight truss construction which could cause the building to collapse with no warning. RP, 376.

A residential home belonging to Tobin Dodge and located next door to Arnold's was also damaged due to the fire. RP, 309, 312. Mr. Dodge, his wife, and his six children were sleeping at the time the fire started. RP, 310. A neighbor woke Mr. Dodge up at about 2:30 a.m., and he hurried to get the family out of the house and into their van. RP, 311.

The fire was first noticed by Selena McGovern at about 2:00 a.m. as she drove east on Kitsap Way in her red Toyota Celica. RP, 231, 232. The fire was in the southeast corner of the store and was two to three feet in diameter when she first saw it. RP, 233, 234, 247. She called 911, parked her car near Arnold's, and observed the fire through the east facing windows. RP, 235, 239. She did not recall seeing any holes in any of the south or east facing windows. RP, 248. As she spoke with the 911 operator, the fire grew larger and it appeared to be on or next to a couch. RP, 236, 238, 247. After watching one of the east facing windows break, she decided to move her car. RP, 239, 240. She did a U-turn and pulled back out onto Kitsap Way. RP,

250. She saw three figures with skateboards crossing the street up ahead of her from the area of Papa Murphy's toward the area of Burger King. RP, 241. She described them as "walking, but on a mission. They weren't running, but they weren't dilly-dallying either." RP, 242. The fire by then was engulfing the room, and flames were coming out where the window had broken. RP, 240. The figures with skateboards would have seen the fire, but they just kept walking, which Ms. McGovern thought was odd. RP, 242.

Bremerton Police Officer Billy Renfro responded to the fire at Arnold's and arrived before the fire trucks. RP, 254, 255. Bremerton Police Officer Frank Shaw had arrived on scene a minute or two earlier. RP, 255. Officer Renfro parked at the intersection of Kitsap Way and Adele. RP, 255. After he got out of his car, he observed three teenage males "just sort of meandering" by a nearby gas station, he made contact with them, and he directed them to go see Officer Shaw. RP, 256, 257.

Officer Shaw was the first police officer to respond to the Arnold's fire. RP, 265. The first people he made contact with were three teenage males that Officer Renfro had sent over to him. RP, 271. The males verbally identified themselves to Officer Shaw as Cameron LaCroix, Torey Tamaki, and Gage Goff. RP, 271.

Janet Bayly was working at the Maytag Laundry on July 27, 2009 starting at about midnight. RP, 284, 285. At about 1:00 a.m., three boys

showed up with skateboards. RP, 286, 287. All three began to skate back and forth on the sidewalk in front of the Maytag Laundry and the Papa Murphy's Pizza next door. RP, 288. Because of the equipment in the laundry and the wall between Maytag Laundry and Papa Murphy's, Ms. Bayly was not able to see if someone was outside of Papa Murphy's going west toward Arnold's Home Furnishings. RP 289, 290 292. She could not see the three skateboarding boys at all times due to the blocked view. RP, 292. She could see or hear the boys for about forty-five minutes, but she could not tell whether all three were always out in front. RP, 292. At one point, she saw the bald boy point in the direction of Arnold's and appear to say, "Oh my gosh." RP, 293, 294, 296. She could not see the other two boys. RP, 293. The boy then left. RP, 293. About ten minutes later, Ms. Bayly saw emergency vehicles. RP, 294.

Michael Six, Fire Marshall Captain with the City of Bremerton Fire Department, was one of the first fire fighters to respond to the fire at Arnold's on July 27, 2009. RP 348, 349, 350, 351. He actively participated in fighting the fire for about an hour before transitioning to the role of fire investigator. RP, 350. The first step in the investigation was to conduct an overview of the scene. RP, 351, 352. The next step was to secure the scene and come up with a game plan for the rest of the investigation. RP, 352, 353. Captain Six made calls to a regional investigation team, got the Fire Department's file for

the Arnold's building, and called the alarm company to get fire alarm times.

The day after the fire, an investigation team met and then split into two groups to go investigate the fire. RP, 356. There were two heavily burned areas the team considered primary target areas for investigation, the southeast corner and the middle of the building. RP, 356. The two teams excavated those areas looking for reasons for fire to start there. RP, 357. Essentially, they were trying to identify a heat source that came in contact with the first item ignited. RP, 360. While looking for heat sources, investigators went through and evaluated each heat source that came into particular areas of the store. RP, 367. They evaluated the electrical sources in the southeast corner and ruled them out as a heat source that would have caused the fire. RP, 368.

Investigators were able to pinpoint the origin of the fire in the southeast corner of the store. RP, 364. Burn patterns clearly brought investigators to the north wall of the southeast corner where a sofa had been. RP, 364. The burn patterns were consistent with where McGovern first saw the fire. RP, 365, 366. McGovern described the fire to Captain Six as being twice the size of a basketball when she first saw it. RP, 366.

Captain Six ultimately concluded that the fire had been intentionally set and had started on the sofa located on the north wall of the southeast corner. RP, 367. The sofa was about ten feet from the window on the south

side of the southeast corner. RP, 308.

Captain Six considered information he received from the Sonitrol Alarm Company in reaching his ultimate opinion. RP, 368. Sonitrol Pacific provided burglar and fire alarm systems to Arnold's. RP, 369. Captain Six reviewed the fire and burglar alarm reports which indicated to him that the fire alarm system went off 44 seconds after the sound of two loud glass breaks which set off the burglar alarm. RP, 369, 370. Captain Six testified that fires themselves can cause glass to break, but the fire at Arnold's did not cause the first glass breaks detected by the burglar alarm. RP, 371.

Captain Six explained that, in the fire investigations, an accelerant is typically gasoline, kerosene, diesel, or some variation of alcohol. RP, 373. In his opinion, there was no indication, outside of whatever open flame unit was used, that the fire was accelerated with one of these accelerants. RP, 373. Captain Six was asked some hypotheticals. He was asked if a person breaking a window at Arnold's, then putting an accelerant on pieces of note paper, then lighting the papers on fire, and throwing them into the building was consistent with his theory of how the fire started. RP, 373. He testified that this would be consistent. RP, 373. Also, if butane had been the accelerant used in this hypothetical, there would not have been any evidence of butane that would have been found during the investigation. RP, 384. The fire at Arnold's could also have been started by a person standing outside the

windows at the southeast corner spewing a flame from a butane canister onto the sofa. RP, 427.

Captain Six did not believe that a Molotov cocktail was used to start the fire at Arnold's. RP, 422. A Molotov cocktail is an incendiary device made from a bottle filled with an ignitable liquid and stuffed with a rag or paper towel to act as a wick. RP, 392. The Arnold's fire could not have been started with a Molotov cocktail because the fire was small when it was first observed. RP, 422. Had a Molotov cocktail been used, it would have been a much bigger fire, the fire alarm would have gone off almost immediately, glass from the Molotov would have been found either outside or inside, and there would have been fire right at the window. RP, 422.

During the fire investigation, a rock was discovered in the southeast corner of Arnold's, below the subfloor on top of a debris pile. RP, 157, 166, 385. Deputy Fire Marshall Hanson offered two opinions about how the rock could have ended up there including that the rock had been somewhere else on the floor and, as the roof collapsed and the building moved in, the rock was knocked to the location where it was found. RP, 167. Captain Six testified that he was familiar with the width of the windows at Arnold's, and the rock that was found was capable of breaking the window. RP, 388, 389.

On July 29, 2009, Detectives Davis and Harker interviewed LaCroix in Davis' car. RP, 458. LaCroix told the detectives the following: on the

night of the fire, he had spent some time at Ellsworth's house with a group of teens including Torey Tamaki and Gage Goff. RP, 463. At about 1:00 a.m., LaCroix, Tamaki, and Gage Goff left to go skateboarding, headed north on Adele, and stopped briefly to skate at a medical center. RP, 465. The boys then crossed Kitsap Way towards R & H Market, and LaCroix found a cigarette. RP, 466. The boys went across the street to the Arnold's parking lot where they skated about fifteen minutes. RP, 466. LaCroix thought he left the cigarette on a bench and none of the boys smoked it. RP, 467. From Arnold's the boys went east to the parking lot shared by Schuck's and Papa Murphy's and skated for about an hour. RP, 468. The distance from the southeast corner of Arnold's to the Papa Murphy's is about 387 feet, and, at a brisk walk, it takes about one minute and 8 seconds to walk between the two. RP, 517, 518. The boys left, and as they got ready to cross Kitsap Way, they noticed there was a fire at Arnold's. RP, 468. The boys saw a red car near Arnold's, and they saw the car leave and come towards them as they crossed Kitsap Way. RP, 469. The boys told a patrol officer about the red car, went to Kendra's house, and returned to watch the fire. RP, 470.

Detectives Davis and Rodney Harker arrested LaCroix on September 10, 2009, took him to the Bremerton Police Department, and interviewed him. RP, 431, 432. From 1:53 p.m. until 3:27 p.m., LaCroix did not make any incriminating statements. Between 3:27 p.m. and 6:10 p.m., LaCroix

participated in a CVSA. RP, 433. When Detectives Mike Davis and Rodney Harker resumed the interview at 6:10 p.m., LaCroix said he had fallen off of his skateboard and the skateboard broke a window at Arnold's. RP, 433. Detective David thanked LaCroix for being honest. RP, 433. LaCroix said that the three boys then left the Arnold's parking lot and ran to the Papa Murphy's where they skated for about one hour before noticing the fire. RP, 433, 434. Detective Davis told LaCroix he did not believe his story about how the window broke. RP, 434.

LaCroix then said that he had found a cigarette in the crosswalk as he approached R&H Market, and a male getting into a car lit the cigarette. RP, 435. LaCroix denied having a lighter and said that he, Goff, and Tamaki went to the Arnold's parking lot and started skating. RP, 435. While LaCroix was doing a trick, his skateboard flew into a window at Arnold's, his lit cigarette fell out of his mouth, and he didn't know where it went. RP, 436. Detective Davis asked LaCroix if the lit cigarette could have fallen inside the building, and LaCroix said yes. RP, 436.

Detective Davis showed LaCroix an aerial map of Arnold's and nearby businesses and asked about his general movements the night of the fire. RP, 437. LaCroix said that he, Goff, and Tamaki left Ellsworth's house at about 1:00 a.m., went down to the medical complex, skated about five minutes, and then went into the R&H Market parking lot. RP, 437, 438. The

group then crossed over to the Arnold's parking lot where they skated in the open parking lot and in the southeast corner. RP, 439. LaCroix pointed to the location where the skateboard broke the window and said Goff and Tamaki were standing in the open parking lot when the window broke. RP, 439, 440.

Detective Davis told LaCroix that Goff had implicated him in breaking the window, and Goff said he was no more than five feet from LaCroix at the time. RP, 441. Detective Davis then asked if the skateboard had gone completely through the window, and LaCroix said that it did not. RP, 441. LaCroix said that when he fell, his cigarette fell out of his mouth, and he then ran with Goff and Tamaki over towards Papa Murphy's. RP, 442. LaCroix told Detective Davis that he had said, "Oh shit I broke the window," and, "Run." RP, 442. He said he was the only one to break a window, and the three then skated at Papa Murphy's for 30 to 45 minutes before crossing Kitsap Way and noticing the fire. RP, 443. LaCroix said Goff first saw smoke and then they saw the red car making a U-Turn on Kitsap Way and pulling up close to Arnold's. RP, 443. They then crossed Kitsap Way and ran westbound on 11th Street towards Adele where they were contacted by a patrol officer, and they told him about the red car in the area. RP, 443.

Detective Harker told LaCroix the temperature in Arnold's had gone from 70 to 135 in 44 seconds and asked LaCroix to be honest about what happened after the window broke. RP, 444. LaCroix said after he fell off the

skateboard, he lit a butane can on fire, and he had a refillable lighter in his backpack. RP, 444. LaCroix wrapped paper on top of the butane can, lit the paper on fire, and put it on the ledge of the broken window. RP, 444, 445. He described a two to three foot flame and said the can fell in and exploded. RP, 445. LaCroix said Goff and Tamaki were in the open parking lot and had nothing to do with the fire. RP, 445. LaCroix ran to a grassy area, then back up to the area of the broken window, and he saw a couch on fire. RP, 445, 446. The three of them then took off running. RP, 446.

Detective Davis asked LaCroix about the can falling in and exploding, and LaCroix then referred to kicking the can into the southeast showroom. RP, 446. LaCroix also said that the man at R&H market did not exist, and he had lit his own cigarette. RP, 447. As the three boys ran from Burger King to 11th Street, LaCroix told Goff and Tamaki not to talk about what had happened. RP, 447.

LaCroix said he had found the butane can at his house, and it was the size of a spray paint can, but skinnier. RP, 448. LaCroix further described the can as yellow with blue or black writing, and it had a red three to four inch nozzle which was held on with a piece of scotch tape. RP, 448. LaCroix said that he kept the butane can in his backpack, and he described his lighter as a green lighter/light combination. RP, 449.

When Detectives Mike Davis and Harker returned from a break,

LaCroix was crying and said he did not want to go to jail. RP, 450. Detective Davis asked him about whether he felt like he got a heavy weight off his chest, and LaCroix agreed. RP, 450.

Detective Davis told LaCroix he wanted to clear up a few more issues, and he did not believe that the window broke while LaCroix was doing a trick on his skateboard. RP, 450. LaCroix said he did not break the window while doing a trick and, demonstrating a batter's swing, he said he broke the window with his skateboard. RP, 451. Detective Davis told LaCroix that he had listened to an audio recording and heard two glass breakages. RP, 451. LaCroix said there may have been a rock thrown through a second window, and he pointed on the aerial photograph to the location of the second window. RP, 451, 452. Up to that point, neither Detective Davis nor Detective Harker had said anything about a rock. RP, 452. LaCroix said Torey Tamaki had thrown the rock. RP, 452.

LaCroix said when he, Goff, and Tamaki were standing in the open area of the Arnold's parking lot, they began wadding up, endwise, 8 ½ by 11 inch notebook paper from LaCroix's backpack. RP, 453. Detective Davis questioned LaCroix's honesty regarding kicking the can into showroom, and LaCroix said he used the butane can to cause a blow-torch effect inside the window he broke. RP, 453. LaCroix was the first person to mention the use of a torch, and he described the flame as two to three feet. RP, 454. LaCroix

said the window Tamaki broke was two to three windows down from the window he broke, and LaCroix squirted butane on the notebook paper, placed the papers on top of the can, and threw the can towards a couch. RP, 454. LaCroix saw fire near a couch. RP, 454. LaCroix said Tamaki had not done anything except break a window. RP, 454.

Detective Davis asked LaCroix what caught on fire first, and LaCroix said he used the butane can to cause a blowtorch effect on a piece of furniture inside the window he broke. RP, 455. He said he threw the can into the showroom. RP, 455. LaCroix then said Tamaki broke a window, LaCroix put butane on two pieces of paper, Tamaki lit the paper on fire, and Tamaki threw the paper into the window he had broken. RP, 456. Using a diagram of the showroom, LaCroix pointed to the couch that Ms. McGovern saw on fire as the place where Tamaki threw the papers. RP, 456.

LaCroix later said he threw the butane can in a dumpster in Westpark, and Detective Davis told him he did not believe that story. RP, 457. LaCroix said he threw the can into an unknown dumpster, and then he said he threw it into a dumpster behind Jiffy Lube. RP, 457. LaCroix then said he wanted to tell the truth about the can and he had thrown it in some bushes somewhere on 11th Street. RP, 457. LaCroix finally said he retrieved the can the morning of the fire, took it home, refilled his lighter, and threw it away. RP, 458.

During the interview, the detectives did not suggest to LaCroix that a

butane canister, notebook paper, and a lighter could have started the fire. RP, 510, 512. The detectives did not tell LaCroix a rock was used to break a window. RP, 510, 512. LaCroix was the first person to talk about a butane canister being used as a torch. RP, 510.

Torey Tamaki's Testimony:

At trial, the defense called Torey Tamaki as its witness. RP, 533. Tamaki was represented by attorney Janeice LaCross, and he attempted to assert a blanket Fifth Amendment privilege. RP, 533, 534. Ms. LaCross told the Court that Tamaki had a valid Fifth Amendment right, and he was going to exercise it and not answer any questions. RP, 537. Ms. LaCross further explained to the Court that although Tamaki had not been charged, he had been arrested and was a suspect. RP, 538. Ms. LaCross was concerned that the state was looking to possibly charge Tamaki based in part on the state's offer of immunity to Tamaki, and testifying at the trial would place him in a precarious position. RP, 539. The Court allowed the defense attorney to ask Tamaki a series of questions instead of allowing a blanket assertion of Fifth Amendment Rights. RP, 540, 541, 544. Tamaki invoked his Fifth Amendment Right after each question asked. RP, 541, 542, 543, 545.

Gage Goff's Testimony:

On the evening of July 26, 2009, Goff had some friends over and at about 10:00 p.m., the group went to Ellsworth's house. RP, 555, 556.

LaCroix showed up at Goff's house just before they left for Ellsworth's. RP, 558. Goff, LaCroix, and Tamaki later left Ellsworth's house to go skateboarding. RP, 558. LaCroix had a backpack when he arrived at Kendra's, but he did not take it skateboarding. RP, 559.

The three went to an insurance office up the road and skated for 10 to 15 minutes. RP, 560. They then made their way to Arnold's and found a cigarette in the road. RP, 560. At Arnold's they skated about half an hour, and Goff threw the cigarette because they had nothing to light it with. RP, 561, 562. While Goff was at Arnold's he did not see Tamaki throw a rock through a window, did not see LaCroix use his skateboard to hit a window, did not see LaCroix with a can, did not see a fire, and did not discuss fire. RP, 562. From Arnold's, they went to Papa Murphy's, skated 45 minutes to an hour, then walked down the parking lot towards McDonald's and Goff noticed Arnold's was on fire. RP, 563, 564. Goff pointed at it and said, "Look at that," to Tamaki and LaCroix. RP, 564. They crossed the street, saw a red car in front of Arnold's, and the car did a U-turn and came towards them as they crossed. RP, 564. The three boys ran across the street towards Burger King and kept walking. RP, 565. A police officer stopped them, told them to go give a statement to another officer, and they did so. RP, 565, 566. They then went to Ellsworth's, got some people from there, and went to watch the fire. RP, 566.

Goff was interviewed by a detective, and he told the detective the same story as he was telling in court today. RP, 569. After taking a Voice Stress Analyzer, Goff told the detective LaCroix broke the window with a skateboard and LaCroix was holding a cigarette, but this was not the truth. RP, 570, 572, 573. After the interview, Goff was very upset. RP, 574.

Detective Mike Davis' Rebuttal Testimony:

Detective Davis interviewed Gage Goff on August 14, 2009. RP, 756. Goff told Detective Davis that LaCroix was doing a trick on his skateboard and it flew through the air into the window. RP, 758. Neither Detective Davis nor Harker had suggested to Goff that a skateboard may have shattered the window. RP, 758. During the interview, Goff expressed fear of retaliation or retribution and mentioned that LaCroix and Tamaki had friends who would take care of him. RP, 757. Goff also discussed with the detectives whether he could remain anonymous. RP, 577.

Testimony of Taiyou Tamaki, Kendra Ellsworth and Jennifer Kelley:

On the evening of July 26, 2009, Taiyou Tamaki, Kendra Ellsworth, and Jennifer Kelley were all present for a gathering of teenagers at Ellsworth's house. None of them saw LaCroix with a backpack. RP, 602, 603, 606, 613, 614, 619, 620.

Daniel Struble's Testimony:

Lacroix stayed with Struble for the week leading up to July 27, 2009.

RP, 634, 635. LaCroix had brought a backpack and a skateboard. RP, 635. On the evening of July 26, 2009, LaCroix and Struble went to Goff's house at about 8 or 9:00. LaCroix left his backpack at Struble's. RP, 636. Struble was not subpoenaed to testify, and he sat in the courtroom during significant portions of the trial and listened to the testimony of Ellsworth, Tamaki, Kelley, and Goff prior to being called as a witness. RP, 638, 639.

Cameron LaCroix's Testimony:

LaCroix was born on October 24, 1992 and was sixteen on July 26, 2009. RP, 646. He was in the 11th grade during the 2009/2009 school year. RP, 647. In the week leading up to July 26, 2009, LaCroix stayed with Struble and brought a backpack there. RP, 647, 648. LaCroix saw a butane can used to refill lighters at his house, but he did not carry that or a lighter with him. RP, 648, 649. On the evening of July 26, 2009, LaCroix and Struble went to Goff's house and then to Ellsworth's. RP, 649, 650. LaCroix did not bring his backpack with him. RP, 649, 650. LaCroix never told detectives that he had left his backpack at Struble's house. RP, 687.

LaCroix, Goff, and Torey Tamaki left to go skateboarding and stopped at the medical center. RP, 652, 653. RP, 653. They crossed the street, and LaCroix found a cigarette. RP, 653. They went to the Arnold's parking lot and skated for 10 to 15 minutes. RP, 654. While in the Arnold's parking lot, no window got broken, LaCroix's skateboard did not hit a

window, LaCroix did not use his skateboard like a bat to hit the window, Lacroix never saw Tamaki with a rock, Tamaki never threw a rock at a window, LaCroix did not see any fire, and he did not see any butane can. RP, 654, 655. LaCroix, Goff, and Tamaki went from Arnold's to Schucks and Papa Murphy's and skated for about an hour. RP, 655, 656, 657. The three decided to go back to Ellsworth's when Goff pointed and said, "Oh my God, look at that." RP, 657. LaCroix and Tamaki were close to Schucks at that time. RP, 658. They started walking towards Arnold's and saw a red car parked. RP, 659. They saw the red car make a U-Turn as they crossed the street. RP, 659. They ran around Burger King and started walking down a road. RP, 659. They saw a police officer who told them to come over, so they ran up and told him what happened. RP, 659. The officer told them to go to another officer, and they did. RP, 660. They went back to Ellsworth's, told people about the fire, and returned to watch. RP, 661.

Detective Davis contacted LaCroix about two days later at Struble's house. RP, 663. LaCroix was honest and told Davis where he had been the early morning hours of July 27, 2009, and LaCroix rode along with Detective Davis and pointed out all the places he had been. RP, 664, 665.

Detective Davis arrested LaCroix on September 10, 2009, and read him his Miranda rights. RP, 665. LaCroix told Detective Davis he had already told him everything, and Detective Davis told LaCroix he believed

LaCroix knew who did it. RP, 666. Detectives Davis and Harker took LaCroix to the police department and put him in a small room with a table and three chairs. RP, 666, 667.

Detective Davis told LaCroix that he had interviewed Goff, and Goff said LaCroix broke the window with his skateboard, and Tamaki was a pyro. RP, 667, 669. LaCroix told the detectives he had nothing to do with it. RP, 667. During a break, LaCroix laid his head down and slept. RP, 670.

When the detectives came back into the room, LaCroix woke up. RP, 670. The detectives asked LaCroix if he would take a truth verification test, and LaCroix agreed. RP, 670. Detective Robert Davis administered the test to LaCroix. RP, 671. LaCroix was brought back to the interview room to wait while the test was scored. RP, 671, 672. Detective Robert Davis and Sergeant Crane came into the room, and Sergeant Crane talked to LaCroix about telling the truth and about juvenile court and adult court. RP, 672. Detective Robert Davis told LaCroix he had lied on two questions, and LaCroix started to cry. RP, 673. LaCroix believed the results of the test could be used to prove his guilt and thought he was going to jail. RP, 674.

LaCroix thought about making up a story so he could stay in juvenile court. RP, 674, 675. Detectives Mike Davis and Harker returned, and LaCroix made up a story that he fell on his skateboard and broke the window. RP, 675. He said this because the detectives had said Goff told them this,

and he had not known before this that a window was broken. RP, 675. He also told them about having a lit cigarette, and he hoped they would then leave him alone. RP, 676. The detectives left, came back, and told LaCroix a cigarette could not have started the fire, so LaCroix made up the butane can. RP, 676, 677. He described the can he had seen at his house. RP, 677.

LaCroix then said the butane can had fallen off the ledge into the showroom, and he told the detectives where the broken window was. RP, 679, 680. The detectives showed him on a diagram the couch where McGovern had seen the fire, and LaCroix changed his story and said he kicked the can. RP, 679, 680. The detectives asked if it could have landed on the couch, and LaCroix told them “maybe”. RP, 681. LaCroix told the detectives he had a backpack with him, but this was not true. RP, 681.

After the pizza break, the detectives came in and told LaCroix they did not believe he kicked the can because no can had been found in the building. RP, 682. LaCroix decided to change his story again to make it more believable so he could stay in juvenile court. RP, 682.

The detectives told LaCroix there were two broken windows, and they kept asking LaCroix if Goff or Tamaki broke another window with a rock. RP, 683. LaCroix finally said, “I guess”. RP, 683.

LaCroix told the detectives he threw the butane canister into a dumpster. RP, 684. When the detectives told him he could not have gone

that far, he changed his story. RP, 684. LaCroix then told the detectives he threw it away in a dumpster at Jiffy Lube, but they said it couldn't have been there. RP, 685. LaCroix then said he threw it in the bushes at Burger King, and when they did not believe that, LaCroix told them he took it home in his backpack. RP, 685.

Dennis Brennan's Testimony:

Brennan teaches in a self enclosed program for emotionally, behaviorally disabled students at Bremerton High School, and Elijah Thomas was a student in his class. RP, 696, 697. Thomas came to class about 25 minutes late the morning of July 27, 2009, and he smelled like fire. RP, 698, 699, 705. When Thomas arrived, he talked loudly to the class about the fire going on at the furniture store, and he said he had started the fire by throwing a fire bomb through or at a window. RP, 705, 706, 709. Thomas said he made the fire bomb by taking a rag and putting it in some kind of bottle. RP, 707. Brennan told Thomas if he did not stop talking about it, he would have to leave, and Thomas then grabbed his backpack and ran out. RP, 707.

Ronald Roesch's Testimony:

Roesch is a professor of psychology at Simon Fraser University in British Columbia. RP, 718. Dr. Roesch is familiar with Dr. Gudjonsson, a psychologist who does research on the theory of suggestibility. RP, 723. Gudjonsson has developed an instrument that is used by psychologists to

assess how susceptible people are to suggestion. RP, 723.

Roesch interviewed and tested LaCroix for the purpose of assessing his intellectual functioning, his personality, and his suggestibility to questioning in an interrogation situation. RP, 724, 725. The personality testing indicated that LaCroix did not have any significant degree of psychopathology in any area. RP, 727. In terms of IQ, LaCroix scored at about 105 to 110. RP, 732.

One of the tests that Dr. Roesch used during the intelligence testing of LaCroix, was a memory test on which LaCroix scored in the high average range. RP, 733. About midway through the intelligence testing, Dr. Roesch administered the Gudjonsson test, which he presented also as a memory test. RP, 733. It was presented as a memory test because he did not want to disclose the true nature of the test. RP, 733. RP, 733.

The Gudjonsson test is administered by first reading a short story about a couple who viewed a boy fall off his bike. RP, 734. As soon as it is read, the person is asked to tell everything they remember from the story. RP, 734. Then there is a delay of 50 minutes during which, in LaCroix' case, Dr. Roesch continued with the intelligence testing. RP, 735. After 50 minutes, a series of 20 questions are asked about the story. RP, 735. Some questions are leading, some non-leading, some factual, some misleading. RP, 735. The psychologist then scores the test and tells the subject they have made a

number of errors. RP, 737. The same 20 questions are then asked again. RP, 737. On total suggestibility, the mean score for young men in the general population is 10.4, and the standard deviation for that score is 4.4. RP, 740. LaCroix's score was 18, putting him in the 85 percent range. RP, 740.

III. ARGUMENT

A. UNDER THE TOTALITY OF THE CIRCUMSTANCES, LACROIX'S DECISION TO MAKE A STATEMENT WAS A FREE AND UNCONSTRAINED CHOICE AND HIS STATEMENT WAS VOLUNTARY AND NOT COERCED

LaCroix argues that, under the totality of the circumstances, LaCroix's decision to make a statement was not a free and unconstrained choice, and that his statement was coerced and involuntary. App.s Br. At 39. This claim is without merit because the record is clear that under all of the facts presented at the CrR 3.5 hearing, Lacroix's statement was voluntary and not coerced by law enforcement.

Findings of fact which are entered following a CrR 3.5 hearing are verities on appeal if unchallenged. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). If challenged, they are verities if they are supported by substantial evidence in the record. Id. A finding is supported by substantial evidence where there is a sufficient quantity of evidence to persuade a rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644,

870 P.2d 313 (1994). Conclusions of law entered following a CrR 3.5 hearing are reviewed de novo. State v. Armenta, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997).

When the sufficiency of the evidence is challenged in a criminal case, the appellate court must draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to appellate court review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. See State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). On appeal, the trial court's findings of fact are reviewed and must be supported by substantial evidence. State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). Where there is conflicting evidence, the reviewing court determines only whether the challenged findings are supported by the evidence which was most favorable to the prevailing party. Id.

LaCroix assigns error to the trial court's admission of his confession and concedes the sufficiency of the evidence at trial, App.'s Br. At 1, 43. LaCroix specifically asks this court to focus on de novo review of the conclusions of law from the 3.5 hearing and argues that the trial court

incorrectly applied the law when it found Lacroix's statement to be voluntary. App.'s Br. At 43.

In this case, the trial court conducted a CrR 3.5 hearing at which four detectives testified on behalf of the state. RP, 13, 70, 112, 120. The defense did not call any witnesses. RP, 132. At the conclusion of the CrR 3.5 hearing, the trial court made a number of factual findings and concluded LaCroix's statement to the detectives on September 10, 2009 was voluntary. CP 26-30. LaCroix's statement was therefore admissible at the fact finding. See CrR 3.5, JuCR1.4(b).

At the fact finding, the defense called an expert witness, Dr. Roesch, to testify about LaCroix's "suggestibility", RP, 718, and LaCroix for the first time testified about the circumstances surrounding the confession that he provided to detectives on September 10, 2009. RP 646. LaCroix invites this Court to consider Roesch's testimony and LaCroix's testimony as well as other testimony from the fact finding hearing in its de novo review of the CrR 3.5 conclusions of law, but having failed to present this evidence to the court at the CrR 3.5 hearing, LaCroix cannot now allege that the court erred in failing to consider it. See State v. Benn, 120 Wash.2d 631, 656, 845 P.2d 289 (1993)(The trial court determines the voluntariness of a confession as a matter of law, and the fact finder can consider the question of voluntariness again only in determining the weight to give it.)

When reviewing the trial court's conclusions of law from the CrR 3.5 hearing, this Court should only consider the evidence presented at the CrR 3.5 hearing which the trial court had when it concluded that LaCroix's statement was voluntary and admissible. Specifically, this Court should not consider the following facts contained in LaCroix's brief which were not introduced at the CrR 3.5: That LaCroix at least once fell asleep, App.s Br. At 46, 47; that LaCroix broke out crying, App.s Br. At 46; that LaCroix had never been arrested before, had no prior experience with law enforcement, and had never been read his Miranda warnings, App.'s Br. At 47, 48; that LaCroix started making up stories to satisfy what he perceived the officers wanted, and that 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, App.'s Br. At 48; that LaCroix was told about the 44 second interval between the broken window and fire alarm, App.'s Br. At 48; that LaCroix was shown the exact location of the initial fire using a diagram of the showroom, App.'s Br. At 48; that LaCroix told seven stories describing the final resting place of the butane canister, App.'s Br. At 48; that having been shown where the fire started on the diagram and realizing he needed to get the fire from where he said the window broke to where the fire started, he offered that "maybe" he kicked the can, App.'s Br. At 49; both Goff and LaCroix described a broken window on

the southern side of the building and it was only when LaCroix was shown a diagram of the showroom including where McGovern first saw a small fire that LaCroix described breaking a window and starting a fire in that location, App.'s Br. At 49; that Goff steadfastly maintained the innocence of all three boys until confronted with the fact he was lying on the truth verification test, App.s Br. At 51; all of the information on p. 51 of Appellant's Brief ; that Goff was a cancer patient undergoing chemotherapy, that Goff was told the CVSA was a "truth verification test", that Goff was told he failed the CVSA and this caused him to make incriminating statements about LaCroix, App's Br. At 52; all of the Dr's Roesch's testimony, App's Br. At 52,53.

LaCroix challenges only one of the findings of fact from the CrR 3.5 hearing, and the remainder of the findings of fact from that hearing are therefore verities for purposes of this appeal. The challenged finding in relevant part states, "[t]he time that he was actually interviewed was approximately five hours. The remainder of the time was spent on breaks. He was not questioned outside normal waking hours." CP, 27; App's Br. At 1, 46.

This finding is supported by substantial evidence in the record and should be treated as a verity for purposes of this appeal. LaCroix was arrested at 12:45 p.m., and his Miranda rights were read to him at 12:56 p.m. RP, 24. He was then transported to the Bremerton Police Department and

arrived about thirty minutes later at 1:25 p.m. RP, 24. During the thirty minute transport, Detectives Harker and Mike Davis obtained background information from LaCroix but did not ask him direct questions about the fire. RP, 40. Once at the police department, an interview with Detectives Harker and Mike Davis started at 1:53 p.m. and continued until 3:27 p.m., about 1 ½ hours. RP, 25, 26. At 4:18 p.m., Sergeant Crane talked to LaCroix for about one minute. RP, 121. At 4:20 p.m., Detectives Mike Davis and Harker went back in and talked to LaCroix. From 4:45 p.m. to 5:48 p.m., about one hour, Detective Robert Davis interviewed LaCroix and administered a CVSA. RP, 114, 118. At 5:55 p.m., Detective Robbie Davis and Sergeant Crane spoke with LaCroix for about five minutes. RP, 116, 118. From 6:10 p.m. until 7:25 p.m., about one hour and fifteen minutes, Detectives Harker and Mike Davis interviewed LaCroix. RP, 27. Detectives Harker and Mike Davis then interviewed LaCroix again from 8:58 p.m. until 9:50 p.m., about 52 minutes. This makes the total interview time, not including the transport to the police station, about five hours and thirteen minutes. If the transport time is counted, the total is about five hours and forty-three minutes. The finding of fact that the actual interview time was approximately five hours is supported by substantial evidence. The finding that LaCroix was not questioned outside of normal waking hours is also supported by substantial evidence. LaCroix was interviewed during the hours of 12:56 p.m. and 9:50 p.m.

The trial court correctly applied the law when it concluded after the CrR 3.5 hearing the statement provided by LaCroix to detectives on September 10, 2009 was voluntary. In order to be considered voluntary for due process purposes, the voluntariness of a confession must be determined from a totality of the circumstances under which it was made. State v. Aken, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). The totality-of-the-circumstances analysis specifically applies in deciding the admissibility of a juvenile's confession. State v. Unga, 165 Wn.2d 95, 103, 196 P.3d 645 (2008). Circumstances to consider include the juvenile's age, experience, intelligence, education, background, and whether he has the capacity to understand any warnings given, his Fifth Amendment rights, and the consequences of waiving those rights. Id. Sixteen year olds can make statements intelligently and voluntarily without a friendly adult present, and many defendants of a similar age and younger have been found to have voluntarily confessed. Id. At 108. Confessions obtained during lengthy interrogations are not per se involuntary, and instead the interrogation's length is an additional factor for the court to consider in its totality-of-the-circumstances analysis. See State v. Acheson, 48 Wn.App. 630, 634, 740 P.2d 346 (Div. 3 1987), review denied, 110 Wn.2d 1004 (1988).

The Court must also consider whether the behavior of the law enforcement officers was "such as to overbear petitioner's will to resist and

bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.” State v. Braun, 82 Wn.2d 157, 161-2, 509 P.2d 742 (1973).

In addition to Unga, *supra*, LaCroix cites Doody v. Schriro, 596 F.3d 620 (9th Cir. 2010) and Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948) in support of his argument that LaCroix’s confession was coerced and involuntary and argues that the interrogation in this case is more similar to the interrogations in Doody and Haley than Unga. The interrogations in Doody and Haley are, however, clearly distinguishable from the interrogation in this case.

In Doody, a seventeen year old boy was questioned for nearly thirteen hours. The interrogation began at 9:25 p.m. and concluded at 10:00 a.m. the next day. Doody at 622. In the middle of the night, Doody became virtually nonresponsive as three detectives barraged him with questions. Id. at 625. The court described the confession as one obtained from an “extraordinarily lengthy interrogation of a sleep deprived and unresponsive juvenile under relentless questioning for nearly thirteen hours by a tag team of detectives, without the presence of an attorney, and without the protections of proper Miranda warnings.” Id. at 638. The court was clearly concerned with the length of the interrogation, the time at which it took place, the relentless nature of the questioning, the unresponsiveness of Doody in the face of

relentless questions, and the lack of proper Miranda warnings.

In contrast to Doody, LaCroix was in custody for just over nine hours and questioned during approximately five of those hours. He was provided with a number of breaks during the questioning. He was questioned between 12:56 p.m. and 9:50 p.m., not in the middle of the night. There is no evidence the detectives engaged in a relentless style of questioning like the detectives in Doody or that LaCroix was unresponsive.

In Haley, a fifteen year old boy was arrested at midnight and questioned until 5:00 a.m. by five to six police officers in relays of one or two at a time. Haley at 598. No friend or counsel for the boy was present, and he was never advised of his right to counsel. Id. There had also been some testimony that the boy had appeared "bruised and skinned." Id. at 597. In its discussion in support of its ultimate holding that the confession was involuntary, the Court described how the "15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition." Id. at 599. In addition to the circumstances surrounding the confession itself, the Court expressed concern over the fact that the boy was kept incommunicado for over three days, a lawyer who had been retained on his behalf was twice refused admission to see the boy, and that his mother was not allowed to see him for over five days after his arrest. Id. 598.

Just like the court in Doody, the Haley court focused on the fact that the juvenile suspect was interrogated in the middle of the night. LaCroix was questioned during normal waking hours, not the middle of the night. There was no suggestion that he was physically mistreated, and instead the evidence was that he was provided with a number of breaks during which he used the restroom and ate. LaCroix was interviewed primarily by Detectives Mike Davis and Rodney Harker, not relays of officers. Significantly, LaCroix was also properly advised of his Miranda rights unlike the juveniles in both Doody and Haley.

Although LaCroix argues otherwise, a number of courts have recognized the importance of breaks being provided during the course of an interrogation. See Unga, supra, at 111, citing Taylor v. Maddox, 366 F.3d 992 (9th Cir.2004), and Doody, supra, at 645. LaCroix was questioned a total of about five hours, but the longest that he was questioned continuously was one and a half hours.

In support of his argument, LaCroix makes a number of statements which are not supported by the record from the CrR 3.5 hearing. He asserts that “LaCroix fluctuated between extreme fatigue and emotionality.” Br. Of App. At 46. “During breaks he would lay his head on the table and at least once fell asleep.” Id. “Other times, when confronted with his ‘lies’, he would break out crying.” Id. “Detectives admitted at least 24 separate times in the

non-recorded interrogation that they accused LaCroix of lying.” Id. “... [P]rior to being arrested and interrogated, [LaCroix] was physically worn out.” Id. At 47.

When Detective Harker was asked whether LaCroix appeared tired or fatigued, he responded, “I’d say tired”, and he then further explained that “... in between breaks we’d go back into the interview room, he’d have his head down on the table.” RP, 85. Detective Harker further testified that LaCroix never actually said that he was tired, he was able to communicate with the detectives, and he did not have trouble staying awake. Id. Detective Robert Davis was asked whether LaCroix appeared tired or fatigued during the time he spent with him, and he responded, “[n]ot really. He was more bored than anything, I think.” RP, 116. Detective Kevin Crane was likewise asked about LaCroix appearing tired or fatigued. RP, 125. He did not think so, but did recall LaCroix putting his head down on the table. Id. There is no testimony from the CrR 3.5 hearing that LaCroix fell asleep or broke out crying. The trial court also found in an unchallenged finding of fact, now a verity on appeal, that “[a]lthough the Respondent was not clean, there was nothing to suggest that he was in poor physical condition or in any way disabled.” CP, 27.

The detectives did not accuse LaCroix of lying. The detectives told LaCroix a number of times that he needed to be honest and truthful. RP, 48,

57, 58, 62, 65, 66. Detective Davis advised LaCroix during transport to the police department that he did not believe LaCroix had been completely truthful in his first interview. RP, 47. Detectives Robert Davis and Kevin Crane told LaCroix after the Voice Stress Analyzer that he was not being truthful about his involvement in the fire. RP, 58. As LaCroix began to reveal the details of his involvement in the crime, Detectives told LaCroix they did not believe some of the things he was saying, RP, 60, 64, 66, they told him once that his story did not make sense, RP, 65, they challenged him about details or versions of events, RP, 61, 62, 67, they told him they wanted him to clear up issues or discrepancies, RP, 64, 65, they told him he was not being honest or truthful about a detail, RP, 65, 66, they asked him if the account he was giving was a true and honest account, RP, 63, they accused him of concealing information, RP, 66, and one time they told him to stop lying about the butane canister. RP, 67. The theme of honesty and truthfulness was certainly raised in a number of different ways during the interviews, but the detectives did not “accuse LaCroix of lying”.

“A police officer’s psychological ploys such as playing on the suspect’s sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect’s decision to confess, ‘but so long as that decision is a product of the suspect’s own balancing of competing

considerations, the confession is voluntary.” Unga, supra, at 102, quoting Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986). The issue to be determined is whether the officer’s “statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess.” Id.

The fact detectives raised the theme of honesty and truthfulness throughout the interview, discussed adult versus juvenile jurisdiction, and gave LaCroix details of the investigation during the questioning did not render LaCroix’s confession involuntary or coerced. The detectives’ statements were not so manipulative as to deprive LaCroix of his ability to make an unconstrained an autonomous decision to confess.

The use of a CVSA during LaCroix’ interview was also not so coercive as to render his confession involuntary. The U.S. Supreme Court has rejected a rule “that the use of polygraph ‘results’ in questioning ... is inherently coercive.” Contee v. U.S., 667 A.2d 103, 104 (D.C.,1995), citing Wyrick v. Fields, 459 U.S. 42, 47, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). Telling an accused person that their answers to questions during a CVSA test are untruthful without also explaining the test results are not conclusive does not require a finding the subsequent confession was involuntary unless there is some showing that the police deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could have

induced a false confession. Id.

In Contee, the seventeen year old appellant was in custody for about seven hours. Contee at 104. Early on, a police officer told the appellant that he believed the appellant was involved in the shooting. Id. The appellant openly confessed only after another police officer administered a CVSA and told the appellant that he had been deceptive when he denied being involved in the shooting. Id.

In support of its ultimate finding that the record revealed no circumstances of coercion or trickery that, in combination with the CVSA test, could fairly be said to have overborne appellant's free will and compelled his confession, the court mentioned a number of factors. The police had explained what the CVSA consisted of and that the appellant did not have to take it. Id. The appellant had made admissions, but no confession, prior to taking the CVSA. Id. “The police did not attempt to mislead appellant by suggesting the admissibility of the CVSA test results in any court proceeding.” Id. There was no indication that the officer who told the appellant that he believed he was involved in the shooting lacked any grounds for that belief. Id. Although the appellant had been in custody for seven hours, during part of that time he was questioned about another crime, and part of the time he was not questioned at all. Id.

LaCroix was one month shy of his seventeenth birthday at the time of the interrogation. RP, 23. Detective Mike Davis had a discussion with LaCroix about participating in a CVSA, and LaCroix agreed to do it. RP, 26, 27. There was no testimony presented at the CrR 3.5 hearing that the detectives attempted to mislead LaCroix by suggesting the CVSA results would be admissible in court. Detective Mike Davis told LaCroix he had probable cause to believe he was involved in the Arnold's arson case, and this was based on information Detective Davis had gotten from Gage Goff. LaCroix was in custody for approximately nine hours, but like the appellant in Contee, he was given breaks during that time. LaCroix was not coerced by use of a CVSA to make a confession in this case.

On September 10, 2009, LaCroix was about one month shy of his seventeenth birthday. He was properly advised of his Miranda rights prior to any questioning, and he agreed to waive his rights. He was interviewed for about five hours during normal waking hours and was provided with breaks, food, and opportunities to use the restroom. He never requested an attorney or parent and never asked for the interview to stop. He did not appear to have any intellectual difficulties. On September 10, 2009, LaCroix was about one month shy of his seventeenth birthday. He was properly advised of his Miranda rights prior to any questioning, and he agreed to waive his rights. He was interviewed for about five hours during normal waking hours and was

provided with breaks, food, and opportunities to use the restroom. He never requested an attorney or parent and never asked for the interview to stop. He did not appear to have any intellectual difficulties. The detectives who interviewed LaCroix engaged in interrogation techniques commonly accepted in the case law. See Unga, supra, at 102, quoting Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986) and State v. Furman, 122 Wn.2d 440, 451, 858 P.2d 1092 (1993)³. Their consistent theme of truth and honesty, discussion of adult versus juvenile jurisdiction, disclosure of certain facts to LaCroix as he began to confess, and use of a CVSA did not come close to the extreme levels of coercion cited in the cases where confessions were found to be involuntary. See Braun, supra.⁴

The totality of the circumstances surrounding LaCroix's statement to detectives on September 10, 2009 demonstrates his statement was voluntarily given and not coerced. LaCroix's decision to confess was a product of his

³ Furman cites examples of confessions which have been found to be voluntary including: when the suspect was falsely told his polygraph examination showed gross deceptive patterns; when the suspect was falsely told that a co-suspect had named him as the triggerman; and when the police concealed the fact that the victim had died. Id. (citing State v. Keiper, 8 Or. 354, 493 P.2d 750 (1972), Commonwealth v. Baity, 428 Pa. 306, 237 A.2d 172 (1968), and People v. Smith, 108 Ill.App.2d 172, 246 N.E.2d 689 (1969), cert. denied, 397 U.S. 1001, 90 S.Ct. 1150, 25 L.Ed.2d 412 (1970)).

⁴ Braun cites examples of confessions which have been held to be involuntary including: when the police have misrepresented that the accused's wife would be taken into custody if he did not confess; when police have misrepresented that a friend would lose his job if the accused did not confess; and when a confession was obtained while the accused was under hypnosis. Id. (citing Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) and Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954)).

own balancing of competing considerations. The trial court did not err by admitting LaCroix's confession.

B. THE TRIAL COURT'S DECISION TO SUSTAIN TOREY TAMAKI'S FIFTH AMENDMENT PRIVILEGE SHOULD BE UPHELD

LaCroix argues the trial court erred by sustaining Torey Tamaki's Fifth Amendment Privilege without a sufficient showing. This claim is without merit because the record is clear that the privilege was supported by facts which showed the risk of self incrimination.

The trial court exercises broad discretion when it decides whether a witness's testimony poses a genuine risk of self-incrimination. State v. Parker, 79 Wn.2d 326, 332, 485 P.2d 60 (1971). The trial court's decision to sustain a witness' assertion of his Fifth Amendment Right must be upheld unless the reviewing court determines that the trial court abused its discretion. Id. There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A defendant has a constitutional right to compel the attendance of a witness. State v. Lougin, 50 Wn.App. 376, 379, 749 P.2d 173 (1988). But that right is limited by the witness's Fifth Amendment privilege against self-incrimination. State v. Parker, 79 Wn.2d 326, 331-32, 485 P.2d 60 (1971).

The privilege is not absolute, however, where the witness is not on trial. Lougin, at 381. The privilege must be supported by facts which, aided by “use of reasonable judicial imagination”, show the risk of self-incrimination. Id., quoting Eastham v. Arndt, 28 Wn.App. 524, 532, 624 P.2d 1159 (1981). The hazard of self-incrimination must appear genuine and not fanciful or illusory. Parker at 332. The trial court must require the witness to answer if, based upon the particular facts of the case, it clearly appears that silence is not warranted. Lougin, at 382.

In this case, at the time that Tamaki invoked his Fifth Amendment rights, the trial court had already heard testimony about LaCroix’s confession in which he stated that Tamaki had broken the second window with a rock, RP, 452, and that after LaCroix squirted butane on pieces of paper, Tamaki lit the paper on fire and threw it into the window he had broken. RP, 456. Additionally, Tamaki’s attorney, Ms. LaCross, advised the trial court that Tamaki had been arrested, and that the state had made an offer of immunity from prosecution in exchange for his testimony. RP, 538, 539. Although Ms. LaCross believed the case against Tamaki was weak, she believed he was still a suspect in the case and that he would be put in a precarious situation if he testified. RP, 538, 539. The defense made offers of proof regarding non-incriminating statements that Tamaki allegedly made during defense interviews, but these were not made under oath. RP, 535, 536.

The trial court did not abuse its discretion by sustaining Tamaki's Fifth Amendment Privilege. The facts presented to the court, aided by the use of the court's "reasonable judicial imagination", certainly supported the decision to sustain the Privilege here.

C. THE TRIAL COURT'S VARIOUS FINDINGS OF FACT SHOULD BE UPHELD WHERE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THEM

LaCroix argues that the trial court's finding that LaCroix's confession was corroborated by Goff's confession was not supported by substantial evidence. This claim is without merit because the record is clear that this finding was supported by substantial evidence.

As stated above, the trial court's findings of fact must be supported by substantial evidence. Black, supra at 802. Where there is conflicting evidence, the reviewing court determines only whether the challenged findings are supported by the evidence which was most favorable to the prevailing party. Id.

The challenged finding states, "The Respondent's confession was corroborated by Gage Goff's statement to the police about the respondent breaking the window with his skateboard. It was Gage Goff who first implicated LaCroix as the person who broke the window and it was the first

time that the officers heard that the skateboard was the instrument that broke the windows. This was not a suggestion offered by the police. Adding credence to Goff's statement to the police were his concerns about maintaining anonymity and the revelation to the officers that he was concerned that Torey Tamaki and LaCroix had friends who would 'take care of him'. The Court finds that Goff was credible with the officers during his interview given his apparent concern about the repercussions from his friends. CP, 36-37. The court also found Goff's testimony at trial not credible and found the police detectives' testimony credible. CP, 39, 40.

The challenged finding is supported by substantial evidence and should be upheld. Detective Mike Davis testified that he interviewed Goff on August 14, 2009. RP, 756. Detective Davis believed Goff feared retaliation or retribution because he told Detective Davis LaCroix and Tamaki had friends that would take care of him. RP, 757. Goff also discussed with the detectives whether he could remain anonymous. RP, 577. Goff said LaCroix was doing a trick on his skateboard and it flew through the air into the window. RP, 758. Neither Detective Davis nor Harker had suggested to Goff that a skateboard might have broken the window. RP, 758.

IV. CONCLUSION

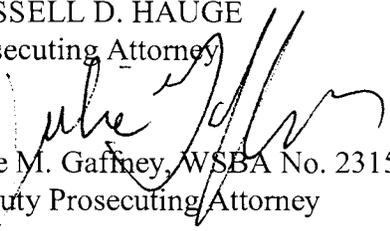
For the foregoing reasons Cameron LaCroix's conviction and

sentence should be affirmed.

DATED August 23, 2010.

Respectfully submitted,

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