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Court of Appeals
Division III
State of Washington

NO. 33777-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN PALACIOS-FARIAS, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in concluding Palacios-Farias was detained pursuant to a *Terry* stop and his statements to police were admissible?

2. Whether the trial court erred in concluding the backpack was lawfully searched as voluntarily abandoned property?

B. ANSWERS TO THE ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

1. The trial court properly concluded Palacios-Farias was lawfully detained pursuant to a *Terry* stop and his statements to police were admissible.

2. The trial court properly concluded the backpack was lawfully searched as voluntarily abandoned property.

II. STATEMENT OF THE CASE

The Appellant, Brian Palacios-Farias, moved to suppress statements he made to officers when he was 16 years old under CrR 3.5 and the search of a backpack under CrR 3.6. CP at 15-27. Palacios-Farias' codefendants[1] joined in his motions to suppress. VRP at 100-01, 260-61. The motions were argued on May 8, 2015 and May 15, 2015. *Id.* On May 18, 2015, the trial court issued written findings of fact and

[1] Jose Baron Herrera, case number 14-8-00792-3 and D.M., case number 14-8-00793-1 were codefendants of Palacios-Farias.

conclusions of law denying both of Palacios-Farias' motions to suppress. CP at 53-62.

With respect to the findings of fact, the State concurs with the findings set forth by Palacios-Farias in his brief with the exception of one. *See* Br. of Appellant at 1-8. The trial court also found:

> At the police station, officers took a recorded statement from Baron and Palacios. [D.M.] declined a recorded interview.

CP at 59; Finding of Fact (FF) 23. The other 22 findings cited by Palacios-Farias mirror the trial court's written findings. Additionally, the State concurs with the conclusions of law set forth by Palacios-Farias in his brief. *See* Br. of Appellant at 8-12.

Following the suppression hearing, the trial court conducted a stipulated bench trial on the police reports and found Palacios-Farias guilty of residential burglary and second degree theft. CP at 84. Palacios-Farias faced a sentence of 15 to 36 weeks of confinement for residential burglary and up to 30 days of confinement for second degree theft. CP at 97.[2] The trial court sentenced Palacios-Farias to 15 to 36 weeks for residential burglary, 14 days for second degree theft, and 80 hours of community service. The court also extended juvenile jurisdiction until

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[2] *See* RCW 13.40.0357 (juvenile sentencing guidelines) and RCW 13.40.020 (specifying that local sanctions would be 30 days for second degree theft).

Palacios-Farias turned 21 years old. *Id.* at 98. And, the court ordered Palacios-Farias to jointly pay $1,480 in restitution along with his codefendants. *Id.* at 100.

This timely appeal then followed.

III. ARGUMENT

A. THE STATEMENTS OF PALACIOS-FARIAS TO POLICE WERE PERMISSIBLY OBTAINED DURING THE COURSE OF A *TERRY* STOP AND NOT AS THE RESULT OF A CUSTODIAL INTERROGATION.

Palacios-Farias' argument that the trial court improperly denied his motion to suppress his statements to police is without merit. *See* Br. of Appellant at 12-13. The trial court's findings of fact in a suppression motion are reviewed for substantial evidence and its conclusions of law are reviewed de novo. *State v. Rubio*, 185 Wn. App. 387, 390, 340 P.3d 993 (2015), *rev. denied*, 183 Wn.2d 1004, 349 P.3d 857 (2015) (findings of fact are reviewed for substantial evidence); *State v. Carney*, 142 Wn. App. 197, 201, 174 P.3d 142 (2007) (conclusions of law are reviewed de novo). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2009); *see also State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The focus of this appeal is limited to the trial court's conclusions of law because Palacios-Farias does not challenge the trial court's findings of fact. *See* Br. of Appellant at 12-

18. Palacios-Farias first challenges the trial court's determination his statements to police were not made during the course of a custodial interrogation in which *Miranda* warnings would be required. *See id.* at 12-13. The record supports that the trial court properly concluded Palacios-Farias was detained pursuant to a *Terry* stop and his statements to officers were admissible. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

While it is true that warrantless searches and seizures are prohibited by both the Fourth Amendment of the U.S. Constitution and article 1, § 7 of the Washington Constitution, *Terry* stops are permitted. *Terry*, 392 U.S at 21-22; *see also State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003) (acknowledging that *Terry* stops are an exception to the warrant requirement). A *Terry* stop is a brief investigative detention in which police may seize an individual and question him or her based on specific, articulable, and objective facts giving rise to a reasonable suspicion the individual has been or is about to be involved in criminal activity. *Terry*, 392 U.S. at 21-22; *see also State v. Armenta,* 134 Wn.2d 1, 10, 948 P.2d 1280 (1994) (articulating that *Terry* stops must be reasonable in order to survive constitutional scrutiny). To determine whether a detention was justified under *Terry*, courts consider the totality of circumstances known to the officer at the time, the officer's training

and experience, the location of the stop, and the conduct of the person detained. *Acrey*, 148 Wn.2d at 738.

1. Police had a reasonable suspicion to detain Palacios-Farias and the detention of Palacios-Farias was reasonable.

Palacios-Farias was detained pursuant to a *Terry* stop and not under arrest when he was questioned by police. As explained above, a *Terry* stop is valid if it is based on specific, articulable, and objective facts giving rise to a reasonable suspicion an individual has committed or is about to commit a crime. *Terry*, 392 U.S. at 21-22. Grandview police officers responded to a report of suspicious circumstances at 400 West 5th Avenue in Grandview, Washington. VRP at 107; CP at 53; FF 1. The reporting party observed three males wearing dark clothing and face masks run through a trailer park lot at 10:00 in the morning. *Id.*

With respect to police's initial contact with Palacios-Farias, the trial court found that:

> Officer Martin ordered Palacios[3] to the ground. Officer Martin handcuffed Palacios for officer safety, informing Palacios that he was not under arrest at the time but he needed to investigate further. Officer Martin did not know at that time whether Palacios was armed, but felt that he might be. He also expressed concern that there

[3] The trial court refers to Palacios-Farias as Palacios throughout its findings of fact and conclusions of law.

> might be other suspects present, either outside or in the home.

CP at 55; FF 9. Shortly after Officer Martin detained Palacios-Farias, B.M. and Herrera were detained by Officer Ruvalcava and Officer Abarca at the front and back doors of the apartment. *Id.* at 230-31.

The trial court concluded as a matter of law that:

> 1. Officers Abarca, Rubalcava, and Martin had a reasonable and articulable suspicion based upon a totality of the circumstances known to them that there was a substantial possibility that a criminal trespass occurred on 12/5/14 at 400 West 5th [Avenue] in Grandview, Washington at trailer #41 and that individuals in the Vineyards apartment A-104 were involved. This is based on the foregoing facts, and in particular: that three suspects wearing dark clothes were seen running between trailers #41 and #40 one wearing a mask; that close in time and proximity, there was parked a 2000 model silver Mustang in the trailer park and one space to the east of #15; that the owner of #15 saw two males wearing black walk by his unit to the east and then immediately saw a silver mustang [sic] pulling westbound in front of his trailer; that the owner of #41 did not give anyone permission to be on his property that day; that Officer Abarca saw the same vehicle and an individual getting in the passenger side and the vehicle taking off immediately thereafter; that Officer Martin located the vehicle in the trailer park shortly thereafter and it appeared unoccupied, he noted the distinctive features of the

vehicle and ran the plate; that the vehicle within minutes thereafter disappeared without passing the officers and was shortly discovered at the Vineyards apartments; that the vehicle was parked near the entrance of apartment A-104 and that it was verified that the vehicle was associated with A-104 as belonging to a friend of the tenant's son; that the curtains in one of the windows of A-104 repeatedly opened and closed as it someone was looking out while Officer Martin was in the apartment building parking lot. This suspicion gave the officers the right to approach A-104, both in the front and back of the building and detain for investigative purposes anyone fitting the description of the suspects under Terry v. Ohio, 392 U.S. 1 (1968).

2. When Officer Martin heard the "thud" and saw Palacios running from the fence to the open door at the rear of the apartment he was entitled to lawfully detain Palacios under Terry as set forth above. Given the screen off the window, open door of the apartment, Palacios' statement that he did not live at the residence and attempt to leave, Officer Martin had an additional reasonable and articulable suspicion based upon the totality of the circumstances that Mr. Palacios could be committing a burglary. This detention was a Terry stop, even though Mr. Palacios was handcuffed. Mr. Palacios was told he was not under arrest, and the officer needed to restrict his freedom for officer safety as it was unknown if he was armed, how many others were in the vicinity, including

> outside or in the residence at that time. Officer Martin needed to get the situation under control for purposes of his safety and investigation. The detention of Palacios was lawful.

CP at 59-60; Conclusions of Law (CL) 1, 2. The record supports the trial court's conclusion that police had a reasonable, articulable, and objective suspicion Palacios-Farias committed or was in the process of committing the crime of criminal trespass[4] by running across the property of unit 41 when the owner did not give anyone permission to be on his property that day. *See id.* at 54; FF 4. Then after Palacios-Farias was detained, police developed a reasonable, articulable, and objective suspicion that Palacios-Farias had committed or was in the process of committing the crime of residential burglary of apartment A104. *See id.* at 60; CL 2.

2. The *Terry* stop was not converted into an arrest when Palacios-Farias was handcuffed.

Just because Palacios-Farias was handcuffed does not mean he was under arrest. There are circumstances where a *Terry* stop may develop into an arrest. Washington, however, does not have a bright line rule for determining when a *Terry* stop becomes an arrest. *State v. Belieu*, 112 Wn.2d 587, 599, 773 P.2d 46 (1989). Instead, courts consider the "intrusiveness" of the detention and whether the actions of police were

[4] Under RCW 9A.52.080, "a person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree."

reasonable under the circumstances. *State v. Wheeler*, 108 Wn.2d 230, 246-47, 737 P.2d 1005 (1987). The reasonableness of the intrusion is evaluated by considering the purpose of the stop, the amount of physical intrusion of the individual's liberty, and the duration of the stop. *Belieu*, 112 Wn.2d at 595-96.

Palacios-Farias alleges he was arrested, not detained pursuant to a *Terry* stop, and that his statements to police were inadmissible because he was not advised of his *Miranda* rights. *See* Br. of Appellant at 12-13. *Miranda* warnings were created to protect a defendant's constitutional right against self-incrimination while in the coercive environment of police custody. U.S. CONST. amend. X; *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966). Washington courts apply the *Berkemer* test to determine whether a person is in custody. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct 3138 (1984). The *Berkemer* test is an objective inquiry into "whether a reasonable person in the individual's position would believe he [or she] was in police custody

to a degree associated with a formal arrest." *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004).

Courts have recognized that in some situations it is appropriate for police to handcuff or draw weapons on a suspect in order to effectuate a *Terry* stop. *State v. Mitchell*, 80 Wn. App. 143, 145-46, 906 P.2d 1013 (1995); *see also Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (finding no arrest where police ordered suspect out of a truck at gunpoint, handcuffed him, and placed him in the back of a patrol car); *United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) (finding no arrest when defendants were forced from their car at gunpoint and ordered to lie down on the pavement); *United States v. Taylor*, 716 F.2d 701, 708-09 (9th Cir. 1983) (finding no arrest when suspect was stopped at gunpoint, ordered to lie down in a ditch, and then handcuffed); *United States v. Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982) (finding that handcuffing a suspect did not elevate a *Terry* stop into an arrest).

Similarly, in *Berkemer*, the United States Supreme Court held that although a suspect may not be free to leave during a *Terry* stop does not mean the detention is converted into a formal arrest for purposes of *Miranda*. 468 U.S. 439-40. In *State v. Walton*, 67 Wn. App. 127, 834 P.2d 624 (1992), the court explained why a *Terry* stop was treated differently than a formal arrest.

> The reason is that, unlike a formal arrest, a typical *Terry* stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less 'police dominated[,]' and does not easily lend itself to deceptive interrogation tactics.

67 Wn. App. at 130. Here, the trial court found that:

> An officer can handcuff a detainee stopped under Terry [sic] for officer safety reasons and to get the immediate situation under control. Given what the officers knew and believed, based upon their observations, training and experience, under a totality of the circumstances, it was reasonable to detain and restrain the freedom of each of the juveniles in the manner that they did pending investigation.

CP at 60-61; CL 5.

Applying the *Berkemer* test does not reveal that a reasonable person in Palacios-Farias' position would have believed he or she was under arrest. 468 U.S. at 440; *see also Lorenz*, 152 Wn.2d at 37. Police told Palacios-Farias more than one time that he was not under arrest and that he was being detained for officer safety and until police completed their investigation. CP at 55-56, 58; FF 9, 14, 19; VRP at 229-31. The trial court's reliance on officer safety concerns as a basis to handcuff Palacios-Farias during the *Terry* stop was not misplaced. *See Mitchell*, 135 Wn.2d at 145-46 (holding that handcuffing a suspect during a *Terry* stop is permitted when police have a reasonable fear of danger). At the

time Officer Martin handcuffed Palacios-Farias, he reasonably believed that there were two other suspects at large based on the information from the reporting party. CP at 53, 55; FF 1, 9. Police also clearly communicated to Palacios-Farias when he was under arrest and the crimes he was arrested for. VRP at 234. *Berkemer*, therefore, supports the trial court's conclusion that Palacios-Farias was detained during a *Terry* stop. It further supports that handcuffing Palacios-Farias did not convert the *Terry* stop into a formal arrest triggering the advisement of *Miranda* rights.

By the same accord, the detention of Palacios-Farias is consistent with a reasonable *Terry* stop under *Belieu*. 112 Wn.2d at 595-96. The extent of the physical intrusion of Palacios-Farias' liberty by police was minimal. Additionally, the length of the detention was not excessive. Palacios-Farias was detained in handcuffs for approximately five or ten minutes before he was arrested and placed in a patrol car for transport. CP at 58; FF 21. The purpose of the detention was initially to investigate the crime of criminal trespass and later the crimes of residential burglary and possession of stolen property. *Id.* at 59-60; CL 1, 2. These factors support that the detention of Palacios-Farias was sufficiently limited in scope and duration to be a reasonable *Terry* stop.

Both *Berkemer* and *Belieu* support the trial court's conclusion that Palacios-Farias was detained pursuant to a *Terry* stop and that he was not formally arrested until he was advised by police that he was under arrest.

3. The trial court properly admitted the statements Palacios-Farias made to police while he was detained.

Because Palacios-Farias was detained pursuant to a *Terry* stop and not an arrest, the trial court correctly concluded that Palacios-Farias' statements to police were not obtained as a result of a custodial interrogation. Accordingly, Palacios-Farias' statements to police pre-*Miranda* and post-*Miranda* were not admitted in error. Palacios-Farias' pre-*Miranda* statements to police consisted of him denying that he lived at the apartment and denying ownership of the backpack. CP at 55-56, 57; FF 10, 17. Meanwhile, Palacios-Farias' post-*Miranda* statements to police consisted of him admitting that the items in the backpack were stolen and that a person named "Caleb" had stolen the items and then threw the backpack over the fence. *Id.* at 58; FF 21.

4. Assuming for sake of argument this was a custodial interrogation, Palacios-Farias' post-*Miranda* statements would not have to be suppressed.

Palacios-Farias alleges all of his statements to police must be suppressed as fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963). *See* Br. of Appellant at 13-14. *Wong*

Sun is of little help to Palacios-Farias because he was not unlawfully detained. It is well-settled under *Wong Sun* that:

> a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'

Taylor v. Alabama, 457 U.S. 687, 690, 83 S. Ct. 407 (1982) (quoting *Brown v. Illinois*, 422 U.S. 590, 602, 95 S. Ct. 2254 (1975)). Assuming for sake of argument that Palacios-Farias was subjected to a custodial interrogation and his *Miranda* rights were violated, police had a reasonable and articulable suspicion to detain Palacios-Farias for the crime of criminal trespass. CP at 59-60; CL 1-2.

Palacios-Farias' statements to police were also not coerced. Non-coerced pre-*Miranda* statements of a suspect do not taint post-*Miranda* statements of a suspect. The United States Supreme Court recognized this concept in *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285 (1985). In *Elstad*, police arrested a suspect for burglary. *Id.* at 300. While one officer advised the suspect's mother of the reason for her son's arrest, the other officer joined the suspect in the living room. *Id.* at 300-02. While in the living room, the officer told the suspect he thought the suspect was involved in a burglary. *Id.* The suspect admitted he was. *Id.* The suspect

was then transported to the police department where he was advised of his *Miranda* rights and confessed to the crime. *Id.*

The *Elstad* Court acknowledged that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that court will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Id.* at 310. Moreover, a "careful and thorough administration of *Miranda* warnings serve to cure the condition that rendered the unwarned statement inadmissible." *Id.* at 311. A violation of *Miranda* does not require the suppression of all evidence pursuant to *Elstad.*

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his [or her] free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309.

In contrast to *Elstad* is *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct 2601 (2004). There, the Court was concerned about police withholding

Miranda warnings as part of a question first, then advise of *Miranda* warnings, and re-question practice. *Id.* at 613-16. The Court suppressed the post-*Miranda* statements and found that police intentionally violated the defendant's *Miranda* rights. *Id.* at 616-17. In contrast to *Seibert*, police in *Elstad* did not intentionally withhold *Miranda* warnings from the defendant.

The facts of this case are distinguishable from *Seibert* and similar to *Elstad*. Police did not deliberately withhold *Miranda* warnings from Palacios-Farias when they questioned him. Rather their pre-*Miranda* questioning of Palacios-Farias was limited to asking him whether he lived at the apartment and whether he owned the backpack. *See* CP at 55-57; FF 10, 17.

In the event that Palacios-Farias' pre-*Miranda* statements to police are suppressed because they are found to be the result of a custodial interrogation does not mean that his post-*Miranda* statements should be too. Rather, in accordance with *Seibert* and *Elstad*, Palacios-Farias' post-*Miranda* statements are admissible because they were voluntarily made after Palacios-Farias waived his rights. His post-*Miranda* statements were not the product of deceptive police tactics as was the case in *Seibert*.

5. Assuming for sake of argument that Palacios-Farias' statements to police were erroneously admitted, the error was harmless.

Palacios-Farias alleges the trial court erred when it admitted his pre-*Miranda* and post-*Miranda* statements to police in violation of *Miranda*. If this is the case, the error rises to the level of a constitutional error. *State v. Nysta*, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012). When there is a constitutional error, courts presume that the error was prejudicial and the State then bears the burden of proving that the error was harmless. *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *rev. denied*, 177 Wn.2d 1008, 302 P.3d 180 (2013)). Only when the "appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error" is the constitutional error considered harmless. *Nysta*, 168 Wn. App. at 43 (citing *Guloy*, 104 Wn.2d at 425). The error does not require reversal if the "untainted evidence . . . is so overwhelming that it necessarily leads to a finding of guilt[.]" *Guloy*, 104 Wn.2d at 426.

Entertaining Palacios-Farias' argument that the trial court erred when it admitted his statements to police is not compelling. *See* Br. of Appellant at 12. There is no indication the trial court relied on these statements when it found Palacios-Farias guilty of residential burglary and

second degree theft. CP at 83-84. At the stipulated trial on the police reports, the trial court found that:

> Alright. Alright. I've read Exhibit "1" the collection of reports from the Grandview Police Department, and based upon my review of that, uh, that uh, Exhibit, I do find that on December 5 of last year, that Mr. Palacios-Farias and others, entered or remained unlawfully in a trailer, 400 West Fifth, Unit 34, in Grandview, and that they had an intent to commit a crime against the personal property therein. Uh, and they did in fact commit the crime of Theft that same date, December 5 of last year, by taking various property including some computer equipment belonging to Maricella [sic] Cortez Vargas from the uh, from the uh residence. And, um, and uh, again it's, it's a residence and uh, and uh, so it is Residential Burglary. So, I find Mr. Palacios-Farias based upon Exhibit "1" guilty of the crime of Residential Burglary and guilty of the crime of Second Degree Theft. Alright.

Id. at 330-31. The State then inquired what the value amount of the property was. *Id.* at 331. The trial court clarified that it was in excess of $750.00. *Id.* at 332. Although the reports the trial court reviewed in the stipulated bench trial contained Palacios-Farias' statements to police, the reports also contained other "untainted evidence" supporting Palacios-Farias' guilt. *See* SE 1.

The "untainted evidence" supporting Palacios-Farias' culpability for residential burglary and second degree theft consisted of the following.

First, Palacios-Farias was detained at the back of apartment A104 where the window screen had been removed. SE 1 at 3. Second, the soles of Palacios-Farias' shoes were covered with duct tape, which officers surmised was to conceal his shoe prints. *Id.* at 8, 10. Third, the mother of Palacios-Farias' codefendant, B.M., told police that the backpack found in the third party's back yard belonged to her son B.M. *Id.* at 11. B.M.'s mother also told police that she did not know who the laptop, Xbox, cell phone, iPhone charger, duct tape, facemasks, gloves, and cap found in the backpack belonged to. *Id.* Fourth, Maricela Cortez-Vargas positively identified the laptop, Xbox Kinect, cell phone, and iPhone charger as her property. *Id.* at 5. Fifth, Cortez-Vargas told police the value of her property found in the backpack was $1,290.00. Sixth, a neighbor told police that he observed two males wearing black clothing walk past his residence, and then shortly afterward, he observed a silver Ford Mustang drive by. *Id.* at 9. B.M.'s mother told police that her son hung out with someone who drove a silver Ford Mustang. *Id.* at 7. The silver Ford Mustang was first located by officers in front of Cortez-Vargas' apartment. *Id.* at 9. Then, the Mustang was later located by officers in the parking lot of the Vineyard Apartments. *Id.* at 10. Seventh, Barron Herrera told police the Mustang belonged to him and that he drove it from the trailer park to the apartment complex. *Id.* at 12. The totality of this

evidence overwhelmingly supports Palacios-Farias' culpability for residential burglary and second degree theft. Therefore, assuming for sake of argument that the trial court erred when it admitted Palacios-Farias' statements to police, the error was harmless.

B. THE TRIAL COURT PROPERLY CONCLUDED THE SEARCH OF THE BACKPACK WAS LAWFUL PURSUANT TO THE VOLUNTARILY ABANDONED PROPERTY EXCEPTION TO THE WARRANT REQUIREMENT.

Palacios-Farias alleges the trial court improperly denied his motion to suppress the search of the backpack. The backpack was thrown over a fence and everyone questioned by police including Palacios-Farias himself denied ownership of it. CP at 58; FF 21. Palacios-Farias argues that "his tossing the backpack over the fence showed possession and an expectation of privacy rather than abandonment." *See* Br. of Appellant at 17-18. This argument is not persuasive.

Warrantless searches are unconstitutional under article 1, § 7 of the Washington Constitution unless the search falls within one of the narrowly carved out exceptions. *State v. MacDicken*, 179 Wn.2d 936, 940, 319 P.3d 31 (2014). Voluntarily abandoned property is an exception to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). *Evans* involved the warrantless search of a briefcase found in a truck in which the defendant disclaimed ownership. *Id.* at 408. The court

held that denial of ownership was not enough to trigger voluntary abandonment because the defendant had a privacy interest in the area where the briefcase was located. *Id.* at 413. The court further held that disclaimer of ownership alone was not sufficient to constitute voluntary abandonment. *Id.* at 412.

Here, it is undisputed the backpack was searched without a warrant. *See* Br. of Appellant at 15. Whether the backpack was voluntarily abandoned is disputed. *Evans* recognized that "[v]oluntary abandonment is an ultimate fact or conclusion based generally upon a combination of fact and intent." 159 Wn.2d at 408. Intent is something that "may be inferred from spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." *Id.* (quoting *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)). The primary focus is then whether the defendant relinquished his or her reasonable expectation of privacy when they discarded the property. *Evans*, 159 Wn.2d at 408. The defendant has the burden of proving he or she had an actual, subjective expectation of privacy and his or her expectation was objectively reasonable. *Id.* at 409.

Another important factor is the status of the area where the property was located. *State v. Hamilton*, 179 Wn. App. 870, 885, 320 P.3d 142 (2014). Courts have typically not found voluntary abandonment

in cases where the property was in an area where the defendant had a privacy interest. *Id.*

Courts have, however, found that property discarded during an encounter with police was voluntarily abandoned unless there was unlawful police conduct. *State v. Whitaker*, 58 Wn. App. 851, 856, 795 P.2d 182 (1990).

Recently, this Court addressed the issue of voluntarily abandoned property in *State v. Samalia*, 186 Wn. App. 224, 344 P.3d 722 (2015), *aff'd*, 375 P.3d 1082 (2016). In *Samalia*, police stopped a vehicle after the license plate came back as stolen. *Id.* at 226-27. During the traffic stop, the suspect fled the scene. *Id.* Police searched the vehicle to try to determine who the suspect was and discovered a cell phone in the console. *Id.* at 227. Police then called one of the contacts and identified the owner of the phone. *Id.* The trial court concluded the cell phone was voluntarily abandoned and the defendant no longer had an expectation of privacy in it. *Id.* at 228. This Court affirmed. *Id.* at 229.

Here, the trial court concluded the backpack was lawfully searched as voluntarily abandoned property. Specifically, the court concluded:

> The backpack was in Palacios' control and was voluntarily abandoned by him before even being encountered by the police thus not abandoned pursuant to illegal police activity. The backpack had been discarded

> on a third party's property over a fence on the other side of the apartment building's property. Palacios was running away from the fence and discarded backpack [sic] at the time he was first confronted by Officer Martin. Neither Palacios nor Baron expressed an ownership or privacy interest in the backpack. Each denied that it belonged to them. [B.M.] was not present when the backpack was opened and searched. Officers were conducting the search as a community safety function to determine whether there were drugs or weapons in the backpack. When [B.M.] was then brought to the back of the residence and asked if he was the owner of the backpack, he denied it by words and conduct. He had no reasonable expectation of privacy in the backpack or the property over the fence. Officers had a reasonable cause to believe the item was abandoned and were entitled to search the recently discarded backpack as voluntarily abandoned property.

CP at 61; CL 7. Palacios-Farias claims the court erred when it reached this conclusion because he did nothing to demonstrate he abandoned the backpack other than disclaim ownership. *See* Br. of Appellant at 17. This could not be more untrue. Palacios-Farias was observed running away from police officers in an area where he did not live. CP at 55; FF 8-9. During the same time that police officers saw Palacios-Farias running away from them, they heard a "thud" and a door close. *Id.* They later surmised the "thud" was caused by Palacios-Farias throwing the backpack over the fence. *Id.* at 57; FF 16. Palacios-Farias, however, maintained the

backpack belonged to "Caleb" and that "Caleb" threw it over the fence. *Id.* at 58; FF 21.

In order to prevail under *Evans*, Palacios-Farias must be able to demonstrate the backpack was located in an area where he had a privacy interest. 159 Wn.2d at 412. He is unable to do that. The backpack was located in a third party's backyard on the other side of the fence where Palacios-Farias was detained. CP at 57; FF 16. The ground was wet, but the backpack was dry, which suggested to police the backpack had been recently thrown there. *Id.* Palacios-Farias has not advanced any evidence demonstrating he had a privacy interest in the third party's backyard or that police acted unlawfully. Thus, under *Whittaker*, the fact that Palacios-Farias threw the backpack over the fence while he ran away from police is compelling evidence he voluntarily abandoned the backpack. 58 Wn. App. at 856. Accordingly, no warrant was required to seize or search the backpack.

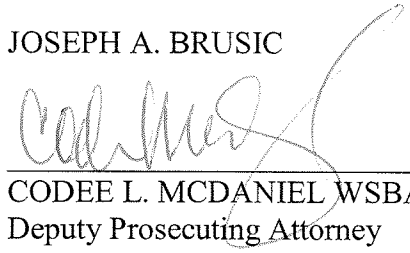
III. CONCLUSION

The trial court's denial of Palacios-Farias' motion to suppress his statements under CrR 3.5 and motion to suppress the search of the backpack under CrR 3.6 should be affirmed. Palacios-Farias has failed to prove the trial court improperly concluded he was lawfully detained pursuant to a *Terry* stop or that his statements to police were admitted in

error. Assuming for sake of argument that the trial court erroneously admitted Palacios-Farias' statements to police, the error was harmless because there is overwhelming evidence of his culpability for residential burglary and second degree theft. Additionally, Palacios-Farias has not shown the trial court misapplied the law when it found the search of the backpack was valid under the voluntarily abandoned property exception to the warrant requirement.

Respectfully submitted this 17th day of October, 2016

JOSEPH A. BRUSIC



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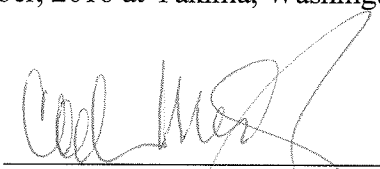
DECLARATION OF SERVICE

I, Codee L. McDaniel, state that on October 17, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. Kenneth H. Kato at khkato@comcast.net

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

DATED this 17th day of October, 2016 at Yakima, Washington.



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