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Court of Appeals  
Division III  
State of Washington

No. 34350-2-III,  
consolidated with No. 34351-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT,

v.

DESHAWN DARNELLE GRAY,  
JOSE LUIS MIRANDA CANDIDO, APPELLANTS.

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BRIEF OF RESPONDENT

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Tamara A. Hanlon, WSBA #28345  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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**I. ASSIGNMENTS OF ERROR**

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. DID THE JUVENILE COURT PROPERLY ADMIT EVIDENCE OF SHOWUP IDENTIFICATIONS?
- B. ASSUMING FOR SAKE OF ARGUMENT THAT THE SHOWUP IDENTIFICATIONS WERE ADMITTED IN ERROR, WAS ANY SUGGESTIVENESS OF THE IDENTIFICATIONS HARMLESS?
- C. HAVE THE DEFENDANTS IDENTIFIED A MANIFEST CONSTITUTIONAL ERROR IN THE JUVENILE COURT'S DECISION TO COMBINE A SUPPRESSION HEARING WITH A BENCH TRIAL?
- D. IS THE STATE SEEKING APPELLATE COSTS IN THESE CASES?

**II. STATEMENT OF THE CASE**

Appellants Deshawn Darnelle Gray and Jose Miranda Candido were charged in juvenile court with second degree robbery and felony harassment. CP 1.<sup>1</sup> The charges stemmed from the following facts:

On February 7, 2016, Cody Zeller was walking with his girlfriend, Magdalena Rodriguez, from her brother's house after watching the Super Bowl. RP 24, 63. It was pretty dark out and Mr. Zeller was walking her home. RP 64. While they were walking, Ms. Rodriguez separated from Mr. Zeller because she got upset he was walking her home. RP 25, 64. He continued to follow her home. RP 65.

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<sup>1</sup> "CP" will refer to the Clerk's Papers for Deshawn Gray. "Candido CP" will refer to the Clerk's Papers for Jose Candido.

She was about 20 to 25 feet ahead of him when he saw a small group of individuals cross the street right behind him. RP 26-7, 65, 67-8. One male in the group asked him for cigarettes. RP 41-2, 59. Mr. Zeller told him that he had nothing on him. RP 41-2. Ms. Rodriguez saw and heard this and called 911 because she had a feeling that something was wrong. RP 28-9. The male then asked if Mr. Zeller had any marijuana on him and Mr. Zeller said no. RP 69. The male next asked for a dollar and Mr. Zeller replied no. RP 69. Mr. Zeller pulled out his wallet and then saw a gun pointed at him. RP 70. As cars passed by them, the gun was shifted up and down and transferred between the two males. RP 73. Mr. Zeller heard them say, “just pull the trigger, get it over with, get his money, let’s go.” RP 140-1. Mr. Zeller handed over all the money he had in his wallet – a \$20 bill and a wad of ones. RP 73, 79, 140. One male ran off with a bunch of girls who were present and laughing during the robbery. RP 73, 82-4. He had the gun with him. *Id.* The other male tried to grab Mr. Zeller’s wallet but gave up and ended up running away. *Id.*

Mr. Zeller ran about one or one-and-a-half blocks to find Ms. Rodriguez. RP 81, 130. He called her while she was on the phone with the 911 operator. RP 33, SE-1. Ms. Rodriguez then saw Mr. Zeller coming out of the shadows. RP 33-4. He was crying and collapsed on the ground. RP 31, 34, 37. In less than a minute or two, he jumped up and

said that he knew where they were going – to Hy’s Store. RP 34-5, 45. He and his girlfriend followed the suspects but did not catch up with them. RP 35, 105.

Mr. Zeller and his girlfriend waited outside of Hy’s store for the police to arrive. RP 106. When officers arrived, they both gave statements as to what had happened and described the suspects. SE-4. Mr. Zeller was still shook-up from the robbery at the time. *Id.*

While Officer Garza was speaking to the victim and his girlfriend, other officers detained three suspects: one female, Jocelyn Lee, and two males, Gray and Candido. RP 152-4, 201; SE-2. When officers first saw the group, Candido ran from the officers but eventually came back to the area and was detained by Officer Huizar. RP 152-3, 192-201; SE-2.

After Officer Garza gave showup instructions, Mr. Zeller was transported a short distance away from Hy’s to look at the individuals who had been detained by the police. RP 107. Mr. Zeller made statements of identification at that time. SE-3.

Candido and Gray were transported by patrol car from the location of the showup. SE-5. While in custody, they each made incriminating statements, which were audio- and video-recorded on the police car’s COBAN recording system. SE-5. They were subsequently charged in juvenile court. CP 1.

Prior to trial, Gray and Candido filed motions to suppress Mr. Zeller's out-of-court identifications. CP 3; Candido CP 3-20. Gray argued that Mr. Zeller only saw the suspect for a short period of time and was focused on the gun rather than the suspects. CP 5. The State responded that the showup procedure was not impermissibly suggestive and that even if the respondents had proven that it was, there was sufficient indicia of reliability. CP 19-25, Candido CP 30-60.

Both Gray and Candido wanted the suppression hearing held at the same time as the bench trial, with arguments on the suppression motion to be heard at the end of the State's case-in-chief. RP 7-9. The trial judge agreed to proceed in this fashion. RP 10-11.

At the joint suppression hearing and trial, the State called six witnesses: Mr. Zeller, his girlfriend, and four officers. After the State rested, arguments were heard on the suppression motion. RP 314-52. Ultimately, the trial court denied the motions to suppress identifications made during the showup procedure.<sup>2</sup> RP 364, CP 83. The defense then rested without calling any witnesses, RP 365-7, and all parties agreed to proceed to closing arguments. RP 367-8.

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<sup>2</sup> Written finding of fact and conclusions of law were subsequently filed. CP 73-84, Candido CP 111-122.

Gray and Candido were both found guilty of second degree robbery, and found not guilty of felony harassment.<sup>3</sup> CP 46, Candido CP 75. They were sentenced to a standard range sentence of 15 to 36 weeks. CP 47-9, Candido CP 76-83.

Both respondents appealed. Their appeals were consolidated.

### **III. ARGUMENT**

#### **A. THE JUVENILE COURT PROPERLY ADMITTED EVIDENCE OF SHOWUP IDENTIFICATIONS.**

Appellate courts review a trial court's decision to admit evidence of a victim's out-of-court identification of the defendant for an abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *State v. Birch*, 151 Wn.App. 504, 513, 213 P.3d 63 (2009).

An out-of-court identification procedure satisfies due process if it is not so impermissible as to give rise to a "substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wash.2d 91, 118, 59 P.3d 58 (2002). The defendant has the burden to show that an

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<sup>3</sup> Findings of fact and conclusions of law as to the verdict were filed. CP 56-69, Candido CP 96-110.

identification procedure was unnecessarily suggestive. *See State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).

A two-part test is applied to determine whether a trial court abused its discretion by admitting evidence that the defendant was identified out-of-court. *Id.* First, a defendant must establish that the identification procedure was impermissibly suggestive. *Id.* If the defendants fail to show that the identification procedure used here was impermissibly suggestive, the inquiry ends, and the court need not analyze the second part of the test. *Id.*; *State v. Eacret*, 94 Wn. App. 282, 285, 971 P.2d 109 (1999) (citing *State v. Vaughn*, 101 Wn.2d 604, 610-11, 682 P.2d 878 (1984)). Second, if the defendants demonstrate that the identifications were impermissibly suggestive, the court must determine if the identifications were reliable despite the suggestive procedure used. *Neil v. Biggers*, 409 U.S. 188, 198-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)).

Here, the prior out-of-court identification took place at a showup. A showup is when police show a suspect to a witness or victim and typically occurs not long after a crime occurs. *See State v. Birch*, 151 Wn.App. 504, 513, 213 P.3d 63 (2009). Generally, a showup identification held shortly after a crime and in the course of a prompt

search for the suspect is permissible. *State v. Springfield*, 28 Wn.App. 446, 447, 624 P.2d 208 (1981), *overruled in part on other grounds* by *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). Importantly, a showup conducted shortly after the commission of a crime to determine whether eye-witnesses can identify a suspect as the perpetrator permits the witnesses to make the determination while the image of the perpetrator is still fresh in their minds and may lead to the expeditious release of innocent suspects. *United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977).

#### *Suggestiveness of Procedure*

A show-up identification is not *per se* impermissibly suggestive. *Guzman-Cuellar*, 47 Wash. App. at 335; *State v. Rogers*, 44 Wash. App. 510, 515-16, 722 P.2d 1349 (1986). A defendant asserting that a police identification procedure denied him due process must show that the procedure was *unnecessarily* suggestive. *Guzman-Cuellar*, 47 Wash. App. at 335. A showup is not necessarily suggestive just because a suspect is handcuffed and standing near a patrol car or surrounded by police officers. *State v. Shea*, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997); *Guzman-Cuellar*, 47 Wn. App. at 336.

In this case, the best record of the showup in this case is the COBAN video that recorded the entire procedure. SE-4. Prior to the

showup, the only thing relayed to Mr. Zeller by Officer Garza was that his partners had stopped some people, set up a perimeter, and had some people detained. SE-4. During trial, on cross-examination, Mr. Zeller was asked, “who told you that, that the people that were, were being brought to you were running away from the cops?” RP 127. The victim, answered as follows,

No one said, I just assumed they were.  
When they were running towards Hy’s I  
remember the first thing we check was no  
Hy’s (sic), they weren’t there, so I  
remember the officer saying that they were  
surrounding a perimeter around – they saw  
people running towards down Lincoln the  
opposite way when the mugging was  
happening, so that’s where I assumed it.

RP 127.

On the COBAN, Officer Garza is heard giving very detailed instructions to the victim regarding the showup. *See* SE-4. He also told the girlfriend not to talk or say anything and that the show-up was just for Mr. Zeller. SE-4. Officer Garza told Mr. Zeller that all he wanted was the truth. SE-4. He gave such directions as, “Don’t tell me what you think I want to hear or know,” “If you see the person, they may or not be involved,” “It’s ok to tell the truth,” and “It’s just as important to say no as it is to say yes.” SE-4. Officer Garza told Mr. Zeller to take his time and think about his answer. SE-4.

Here, the appellants contend that the showup procedure was impermissibly suggestive but give little specifics about how the procedure was impermissibly suggestive. Their only arguments are that 1) Mr. Zeller knew that officers were chasing or pursuing people, and 2) the suspects were in handcuffs next to a patrol car with a spotlight illuminating them. *See* Gray Brief at 7-8, Candida Brief at 9. Neither fact, alone or combined, means that the procedure itself was impermissibly suggestive. As indicated earlier, the presence of a suspect in handcuffs is not enough to demonstrate that the showup procedure was unduly suggestive. *State v. Fortun-Cebada*, 158 Wn. App. 158, 170, 241 P.3d 800 (2010).

In this case, as evidence from the COBAN video, very little information was given to Mr. Zeller about the people detained. *See* SE-4. It cannot be said that the little information relayed created an impermissibly suggestive showup. Even though Mr. Zeller knew that the officers had stopped some individuals, Officer Garza cautioned the victim and gave him detailed instructions prior to the showup. Officer Garza did not make any suggestive statements at the time of the showup, such as, “That’s him, isn’t it?” *See* SE-4. Furthermore, there are no claims in this case that the officers made any statements after the showup that may have reinforced Mr. Zeller’s identifications.

Based on these facts, the defendants have failed to show that the procedure used was *unnecessarily* suggestive. As such, they fail to meet their burden under the first prong of the test and the court need not go further with its analysis. “The inquiry ends if no suggestiveness is present, and, in such a case, the uncertainty or inconsistency in identification testimony goes only to its weight, not its admissibility.” *State v. Hendrix*, 50 Wn. App. 510, 513, 749 P.2d 210 (1988) (citing *Vaughn*, 101 Wn.2d at 610-11).

The State would note that the trial court’s reasoning why the showup was impermissibly suggestive would essentially deem most, if not all, showups impermissibly suggestive by their very nature. The trial court’s conclusion of law was as follows:

The Court concludes that the very nature of a show-up/field identification is suggestive. Based upon the fact that the police officers pulled a handcuffed Deshawn Gray out of the patrol car and shown a spotlight on him during the show up, along with statements made by Officer Garza to Cody Zeller regarding the fact that officers were chasing suspects, the police did use an impermissibly suggestive procedure in obtaining the out of court identification and the first prong of the analysis is satisfied.

CP 82. As explained earlier, the presence of handcuffs is not enough to deem the show-up impermissibly suggestive. The presence of a spotlight

would not be as well. The light was needed at night so that Mr. Zeller could get a good look at the individuals detained. Being next to a police car also does not render a showup *impermissibly* suggestive. *See, e.g. Guzman-Cuellar*, 47 Wn. App. 326, 336 (1987) (being handcuffed and standing approximately 15 feet from the police car during the showup is not enough to demonstrate unnecessary suggestiveness).

In *State v. Bockman*, 37 Wn.App. 474, 481, 682 P.2d 925 (1984), a defendant claimed that a showup procedure was impermissibly suggestive because “the witness knew he was going to see a person the police had tracked from the crime scene, that the suspects were all crowded together on the front porch, and that lights were directed at the suspects from the car in which the witness sat.” The court held that the identification procedure was sufficiently reliable. *Id.* at 481. The court noted that “a prompt identification procedure frequently demonstrates good police procedure. A prompt identification procedure best guarantees freedom for innocent suspects.” *Id.* at 482-3 (citing *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 87 S. Ct. 1967 (1967)).

In most cases where a showup is done close in place to the crime itself, the witness is not going to travel very far for the showup. The witness may assume that the person is a suspect because of their proximity

to the crime scene. This does not mean that the showup procedure used was *impermissibly* suggestive, however.

*Substantial Likelihood of Irreparable Misidentification*

Assuming *arguendo* that the defendants established that the identification procedure was *impermissibly* suggestive, the court then determines whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. *Id.* The key inquiry in determining admissibility is whether the identification is reliable despite any suggestiveness. *State v. Rogers*, 44 Wn. App. 510, 515-16, 722 P.2d 1349 (1986) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977)). As our Supreme Court has recognized, the development of these reliability factors was intended “to facilitate the admission of identification testimony, not hamper it.” *State v. Vaughn*, 101 Wn.2d 604, 609, 682 P.2d 878 (1984) (discussing *Brathwaite*).

Factors to be considered in determining reliability of the identification include (1) the opportunity of the witness to observe the suspect at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the suspect; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the confrontation. *Brathwaite*, 432 U.S. at 114.

Even if an identification appears weak after consideration of the factors, it may nonetheless be admissible; the weight to be given an identification presents a question for the trier of fact to resolve. *Brathwaite*, 432 U.S. at 117. Judgment regarding the credibility of witnesses and the weight of evidence is the exclusive function of the trier of fact. *Rogers*, 44 Wn. App. at 517 (citing *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982)).

Here, after considering the reliability factors, the juvenile court found that the circumstances surrounding the identifications show that they were sufficiently reliable. With respect to the first three factors, the juvenile court's findings are supported by substantial evidence. The court found that:

Mr. Zeller had an opportunity to observe both defendants at the time of the crime. The gun was held 3-5 inches away from his person. The respondents were in close proximity to him. However, the robbery took place on a dark corner, there were no porch light or street lights to illuminate the area. The only light source came from passing cars. The respondents were wearing dark clothing. Zeller did provide a consistent description that both of the individuals who robbed him had dark hair and were wearing dark clothing, but could not describe features.

CP 79. Mr. Zeller also remembered that one of the males who robbed him had long dark hair, and the other had dark curly hair. CP 79; SE-4. This

description is consistent with the appearance of Gray, who has dark curly hair, and Candido, who has long, dark hair. CP 79; SE-4. In addition, both respondents had dark clothing, consistent with Mr. Zeller's description. CP 79; SE-4.

With respect to the fourth factor, the certainty of the identifications, Mr. Zeller was uncertain of his identification of Gray. When he saw Gray, he stated, "it looks like him. I'm not sure. I remember the curly hair." SE-4. He was able to identify a female who was not participating in the robbery but was present. SE-4. And as for Candido, when Mr. Zeller saw him, he said "yeah, yeah, that's him," and then Mr. Zeller began crying. CP 80; SE-4. He later said to his girlfriend, "I hope it's him." CP 80; SE-4.

Finally, as to the fifth factor, only approximately 40 minutes elapsed between the 911 call at 8:36 P.M., SE-1, and the showup identification at 9:20 P.M., SE-4. This is well within the permissible range for show-up identifications. *See State v. Rogers*, 44 Wn.App. at 516 (six hours within permissible range); *Springfield*, 28 Wn.App. at 448, *overruled on other grounds* by *Freeman*, 153 Wn.2d 765 (2005) (17 hours permissible).

On these facts, and considering all of the reliability factors, the trial court properly admitted the showup identifications. Even if the

procedure was *impermissibly* suggestive, reliability was demonstrated by the opportunity of the victim to observe the suspects, the accuracy in his description of the suspects, and the short time between the crime and confrontation. As such, the court did not err.

**B. ASSUMING FOR SAKE OF ARGUMENT THAT THE SHOWUP IDENTIFICATIONS WERE ADMITTED IN ERROR, ANY SUGGESTIVENESS OF THE IDENTIFICATIONS WAS COMPLETELY HARMLESS.**

Assuming for sake of argument that the showup identifications were admitted in error, any suggestiveness of the identifications was completely harmless. *See, e.g., United States v. Archibald*, 734 F.2d 938, 943 (2nd Cir. 1984) (impermissibly suggestive identification harmless when other evidence supports conviction), holding modified, 756 F.2d 223; *Boyd v. Henderson*, 555 F.2d 56, 62 (2nd Cir.) (same), *cert. denied*, 434 U.S. 927, 54 L. Ed. 2d 286, 98 S. Ct. 410 (1977).

The 911 call came in at 8:35 P.M. CP 66. Officer Gillette was at the police station when he heard on the radio there was a robbery at gunpoint and he ran to his patrol car. RP 151. When he got to the area, he saw three individuals wearing all black walking away from his patrol car in an alley. CP 66. The three were only about three and a half blocks from the scene of the robbery. CP 66. Upon seeing his patrol car, one of the individuals, Candido, immediately ran. CP 67. He looked for Candido

but lost sight of him. CP 67. Officer Gillette took the other two individuals into custody. CP 67. They were Gray and the female, Lee. CP 67. There was no other foot traffic in the area where the suspects were detained or the area searched by law enforcement on that night. CP 67.

When Candido was searched after his arrest, three one-dollar bills were found in his possession. CP 67; RP 254. When Gray was searched, a twenty dollar bill was located in his shorts under his jeans. CP 68; RP 258. The victim told Officer Garza that a twenty and one-dollar bills were taken from him during the robbery. SE 4. He testified that it was between \$23 and \$26. CP 63. Shortly after the robbery, he had told Officer Garza about \$30. SE-4. As such, Candido and Gray were caught a short distance from the robbery with currency that matched the type and amount taken from the victim.

In addition, Candido's flight from officers evidenced a consciousness that he committed the robbery. Evidence of flight is admissible if the trier of fact can reasonably infer the defendant's consciousness of guilt of the charged crime. *State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001)). Here, very little time had elapsed between the crime and when officers tried to stop Candido. The COBAN

video indicates that officers were stopping people at 8:48, 13 minutes after the 911 call came in. SE-1, SE-4.

On top of all this evidence, both defendants made incriminating statements in the back of Officer Garza's patrol car on the way to the police department. All the statements are on the COBAN recording that was admitted at trial, SE-5. On the video you can see Gray, with curly hair, on the left and Candido, with long hair, on the right. SE-5. When Candido gets in the car, they both start laughing. SE-5. Candido talks about how they were about to go to McDonald's and says to the officer, "Take us to McDonalds. We got \$23 dollars." SE-5. Candido tells Gray about running after seeing some cops and hiding in a tree. SE-5. Gray tells Candido, "They are trying to get us on armed robbery." SE-5. Candido replies, "It was a stick" and adds, "They didn't find anything." SE-5. Candido asks the officer, "How long are they going to give us?" and the officer tells them that a judge makes that decision. SE-5. Candido tells Gray, "We should have just left" and Gray says, "We should have." SE-5. At one point, Candido is looking out the window of the patrol car and tells Gray, "Those two were with us." SE-5.

In sum, in light of the identifications, the trial outcome would have been the same absent any errors -- the remaining evidence of guilt was

overwhelming. As such, the trial court's errors were harmless beyond a reasonable doubt.

**C. THE DEFENDANTS HAVE NOT IDENTIFIED A MANIFEST CONSTITUTIONAL ERROR IN THE JUVENILE COURT'S DECISION TO COMBINE A SUPPRESSION HEARING WITH A BENCH TRIAL.**

Here, the prosecutor expressed concerns about having the suppression hearing consolidated with the trial. RP 4-7. The defense, however, wanted the suppression hearing and trial heard all at once, with arguments made after the State's case-in-chief. RP 7-9. When asked about the manner of presentation, Gray's attorney, Ms. Dalan, stated the following:

“...I thought that the Court on Monday said this is all going to be done one time, we'd have testimony one time. My understanding of how that would work, or my proposal to the Court is we bring everyone in, we hear testimony, Counsel takes the lead, we cross, to the extent that there's, you know, leeway needed for any issue that would just be a suppression on cross, that's deal[t] with. I mean, this is a Bench trial so I have no doubt Your Honor can keep accurate notes and, you know, track of things. And, then, essentially as, as though it was a halftime motion, at halftime, which the burden is on the defense then, we hear arguments either about halftime and/or about the suppression issues, and if the Court, you know, at that point in time if the Court gives the greenlight denying either of those, we just continue with the trial...If it was like a

dismissal based on halftime, it'd be a dismissal, you know, if it was a suppression, you know, we can craft the appropriate ruling. I, I just think that's the most efficient way to use the time. We have two Respondents' Counsel... We have a significant amount of videos, we have several officers who are going to testify. That, that would be my proposal. And I think it's consistent because at halftime the burden's on the defense, and so I think that works.

RP 7-8. Counsel for Candido made similar statements to the trial court about how he wanted the case to proceed:

Your Honor, I'm in favor of whatever is the most efficient and quickest way forward simply because, I'll let the Court know, on Tuesday I am responsible for the entire docket down in Grandview... So I'm hoping we can get this done in two days because the likelihood of me being able to find coverage for the entire day down there is slim to none, so I'd hate to have this pushed out next week Friday, so any—I have complete faith in the Court to be able to distinguish between the issues, the suppression issues and the things that are supposed to be just for trial, so I'm going to agree with Ms. Dalan.

RP 8-9. The trial court summarized the defense proposal as follows:

“So...with the proposal that Ms. Dalan sets forth, essentially that at, at the end of the State's case in chief that we go through and, you know, obviously we can sort through the suppression issues as to what the defense would have the burden of proof on as

opposed to the State's burden of proof, to sort that out through argument with the testimony being the same."

RP 9. The prosecutor still expressed concerns with the proposal. RP 10. The trial court, however, went with the respondents' joint proposal for how the suppression issue should be heard. RP 10-11. The State noted its objection for the record. RP 11.

The case proceeded with opening statements and testimony from six State witnesses. RP 13-292. After the State rested, the trial judge then inquired whether any defendant wanted to testify or call witnesses if the State survived any halftime motions. RP 293. Counsel for Candido answered, "no" and Counsel for Gray indicated that she did not foresee Gray testifying. RP 293. There was some discussion about exhibits and the court suggested taking up argument on the pretrial issues. RP 294-300. Everyone agreed that argument would be set for the next Friday, April 8, 2016, in the afternoon. RP 302. The court indicated that they would start out with the motions on Friday and see what "survives or doesn't survive at that point." RP 304. There were no objections to the plan to argue the motions on Friday afternoon. RP 305.

When Friday came around, the court summarized again the plan, indicated that the parties were "going to argue the the pretrial motions as well as halftime motions." RP 309. Again, no party objected to this

manner of proceeding. RP 309. The court suggested starting first with the pretrial issues raised by both respondents, including the suppression of the victim's identifications. RP 311. The respondents first argued a *Terry* stop issue, RP 314-323, and the court ruled on that issue. RP 323. They then proceeded to argue the issue of Mr. Zeller's identifications. RP 333-352. Neither counsel for Gray or Candido sought to call their clients or any other witness prior to arguing the issue of identification. RP 309-333. After arguments, the court ruled on the motion to suppress. RP 352- 364. The court then addressed each defendant and whether they had discussed the issue of testifying with their attorneys, including the pros and cons of testifying. RP 366-7. Each defendant indicated that they had discussed that issue with their attorney. RP 366-7. The parties then agreed that they wanted to go to closing arguments and made their respective arguments. RP 368.

The court should refuse to review this claim because it is being raised for the first time on appeal. RAP 2.5(a). Neither defendant has identified a manifest constitutional error. Without an affirmative showing of actual prejudice, the asserted error is not 'manifest' and thus is not reviewable under RAP 2.5(a)(3). *State v. McFarland*, 127 Wash. 2d 322, 334, 899 P.2d 1251 (1995).

Criminal Rule 3.6 govern motions in Superior Court criminal cases. CrR 8.2. This rule also apply to motions in Juvenile Court. JuCR 1.4(b). Nothing in CrR 3.6 or the juvenile court rules require a suppression motion to be heard separately from the bench trial or adjudicatory hearing. The defendants concede this point. Candido Brief at 6. The rules simply require a hearing. As explained in *State v. Wolfer*, 39 Wn. App. 287, 693 P.2d 154 (1984)

Accordingly, most courts have held that there is no need for a separate voluntariness hearing in the case of a bench trial, reasoning that a judge is presumed to rely only upon admissible evidence in reaching a decision. The Washington courts also presume that evidence is considered by a trial judge only for its proper purpose.

(citations omitted).

Here, the court took all the testimony at one time for purposes of judicial economy, with no objection from either defendant. In fact, both defendants wanted to proceed in this fashion. Neither counsel for Gray or Candido sought to call their clients or any other witness prior to arguing the issue of identification. RP 309-333. The logical conclusion that can be made from the record is that the defendants chose not to present any evidence.

Now, for the first time on appeal, the defendants argue that they were not guaranteed their right to present testimony in one's defense. Candido Brief at 7. Specifically, they alleged that the "record fails to accurately disclose whether the defendant was aware of his right to present evidence." *Id.* In essence, their claim is that the record is silent. On appeal, there is no claim that either defendant would have presented specific evidence and that as a result of the court refusing them that right, they were actually prejudiced.

Gray and Candido also argue that because of the combined hearings it was unclear what evidence the court relied on in making factual determinations. However, the court made a very thorough record of the testimony and evidence relied upon. The suppression arguments and court's verbal ruling, RP 352-364, were made prior to the defense resting, closing arguments, and the court's verdicts. In addition, two sets of findings of fact and conclusions of law were filed, one pertaining to the verdict, CP 56-69, Candido CP 96-110, and one pertaining to the suppression motion, CP 73-84, Candido CP 111-122.

On appeal, Gray and Candido imply that the verdicts somehow conflict with the court's ruling that there were no in-court identifications made. Candido Brief at 7. The trial judge, however, during the ruling, made it very clear that she was not considering the in-court testimony of

Mr. Zeller about the defendants an “in-court identification.” RP 363-4.

This was also made clear in the findings of fact for the verdict, specifically Finding 1.13. That finding states, “On cross-examination, Zeller admitted that he only identified the two respondents because they were in the courtroom at the trial. And because they each had black hair.” CP 105.

This is entirely consistent with the court’s early ruling that there was no identification. It was abundantly clear from the record that Mr. Zeller was only identifying them because they were the two defendants in court. RP 130. This is not a valid basis for an identification.

It is clear from the record that the court did not consider Mr. Zeller’s in-court identifications when the court stated that there were no in-court identifications made:

...quite frankly, Cody Zeller didn’t identify these two gentlemen in Court during the trial...he said, “Yeah, those are the two that mugged me,” but immediately, you know, concedes on, on cross examination that he identifies them as the responsible party (sic) because they’re sitting in, in Court.

RP 363-4.

In sum, there was no constitutional error created by consolidating the suppression hearing with the trial in this case. There is also no argument of actual prejudice made on appeal, and therefore, no manifest

constitutional error has been identified. As such, review should be denied under RAP 2.5 (a).

**D. THE STATE IS NOT SEEKING APPELLATE COSTS IN THESE CASES.**

The State is not seeking appellate costs in these cases.

**IV. CONCLUSION**

In sum, for the foregoing reasons, the State asks that the court affirm the convictions.

Respectfully submitted this 24th day of April, 2017,

s/Tamara A. Hanlon  
TAMARA A. HANLON, WSBA 28345  
Senior Deputy Prosecuting Attorney

## DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on today's date, April 24, 2017, by agreement of the parties, I emailed a copy of the Brief of Respondent to Janet G. Gemberling at admin@gemberlaw.com and Jodi R. Backlund at backlundmistry@gmail.com. I also mailed via US Mail a copy of the Brief of Respondent to Jose L.M. Candido at the following address:

Jose L. M. Candido  
808 S. 2nd Ave., Apt. A  
Yakima, WA 98902

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

DATED this 24th day of April, 2017 at Yakima, Washington.

s/ Tamara A. Hanlon  
TAMARA A. HANLON, WSBA #28345  
Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
Yakima, WA 98901  
Telephone: (509) 574-1210  
Fax: (509) 574-1211  
tamara.hanlon@co.yakima.wa.us