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NO. 35362-1-III
(consolidated with NO. 35363-0-III)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

STATE OF WASHINGTON, RESPONDENT

v.

BRADLEY LEITH MERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. ISSUE PRESENTED FOR REVIEW

1. K.F. and her parents extensively cooperated with law enforcement as part of the investigation concerning Merson's criminal activity—signing consent forms authorizing a search of an iPhone, expressing no concern, hesitation, or objection about the police searching either the iPhone or a Samsung Galaxy smartphone, and using the Galaxy to undertake a voluntary recorded one-party consent telephone call with Merson. Given this background, was the trial court's finding that K.F. and her family consented to a search of the Samsung Galaxy smartphone outside the realm of decisions that a fair-minded, reasonable person could reach under the circumstances?

II. STATEMENT OF THE CASE

In addition to the original Statement of the Case, Respondent offers the following supplement:

K.F. and her parents provided two cell phones to law enforcement: an iPhone and a Samsung Galaxy. VRP 3/15/17 at 29. When meeting with K.F. and her parents, both parents signed consent to search forms pertaining to the iPhone. *Id.* at 30. On both forms, K.F.'s parents indicated that they were not limiting the search. *Id.* at 31. When discussing the

investigation with Sergeant Janis, neither parent expressed any concern about searching either phone. *Id.* at 32. K.F., knowing that law enforcement wanted to search the Samsung Galaxy, also expressed no hesitation or reluctance about examining either phone. *Id.* After Sergeant Janis explained that both phones would be forensically examined, no party objected to law enforcement searching the two phones. *Id.* at 55.

Later, K.F. voluntarily participated in three one-party consent telephone calls with Merson. *Id.* at 41. K.F. testified that she assisted law enforcement because she wanted to. *Id.* at 147. These telephone calls were made by K.F. using the Samsung Galaxy smartphone. *Id.* at 52–53.

III. ARGUMENT

A. The trial court's finding was supported by substantial evidence as a fair-minded, reasonable person could conclude that K.F. and her parents consented to the forensic examination of the Samsung Galaxy smartphone

Findings of fact are reviewed for substantial evidence. *State v. C.B.*, 195 Wn. App. 528, 535, 380 P.3d 626 (2016). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). "The party challenging a factual finding bears the burden of proving that it is not supported by substantial evidence in the record." *In re Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004).

Merson has failed to demonstrate that finding of fact eleven is not supported by substantial evidence. Finding of fact eleven states that "K.F. and her parents consented to a Yakima Police Department forensic examination of both phones." Supplemental CP at 440.

Here, K.F. and her parents extensively cooperated with law enforcement, with K.F. going so far as to voluntarily communicate with Merson telephonically after reporting Merson to law enforcement. VRP 3/15/17 at 147. After providing both phones to the police, K.F.'s parents signed formal consent-to-search documents regarding the iPhone. *Id.* at 30. Additionally, K.F. and her parents expressed no hesitation or objection concerning allowing law enforcement to forensically examine the Samsung Galaxy device. *Id.* at 32, 55.

Given the extensive cooperation K.F. and her parents provided to law enforcement, the trial court's conclusion that K.F. and her parents consented to the search of the Samsung Galaxy is supported by substantial evidence. Unlike *State v. Russell*, 180 Wn.2d 860, 330 P.3d 151 (2014), the trial court had a solid evidentiary foundation to conclude that K.F. and her parents consented to the searches described by Sergeant Janis. *Compare Russell*, 180 Wn.2d at 872 ("In fact, the record does not show that Russell consented at all."). Further, this is not a case of "silent acquiescence." *See State v. Schultz*, 170 Wn.2d 746, 757, 248 P.3d 484

(2011) (clarifying that law enforcement "just stepp[ing] into the house" after an occupant retreated from an open door does not constitute consent). It is not plausible that K.F. and her parents were "too afraid or too dumbfounded by the brazenness of [police action] to speak up"—all three persons voluntarily participated in the investigation against Merson. *See id.* The concerns present in these cases—built upon the colonial fear of "representatives of the King . . . with muskets in hand, entering homes at will"—are simply not relevant to the detailed conversation that took place between Sergeant Janis and K.F.'s family. *See id.*

Accordingly, Merson has not satisfied his burden to demonstrate that no fair-minded person could have been persuaded that K.F. and her parents consented to the forensic examination of the Samsung Galaxy as one aspect of their extensive cooperation with the Yakima Police Department. *See Homan*, 181 Wn.2d at 106. Given the aid provided by K.F. and her parents, the trial court reached the reasonable conclusion that the family agreed to the search of the Samsung Galaxy as part of their larger involvement in the investigation.

IV. CONCLUSION

The trial court's conclusion that K.F. and her parents consented to forensic examinations of both smartphones is supported by substantial evidence. Accordingly, Merson lost any privacy interest in the text

messages when K.F. "betrayed" his confidence and voluntarily shared those messages with law enforcement. *See State v. Hinton*, 179 Wn.2d 862, 874, 319 P.3d 9 (2014).

Dated this 21st day of February, 2019.

STATE OF WASHINGTON

____/s/Michael J. Ellis_____
MICHAEL J. ELLIS, WSBA # 50393
Deputy Prosecuting Attorney
Attorney for Respondent

DECLARATION OF SERVICE

I, Michael J. Ellis, state that on February 21, 2019, by agreement of the parties, I emailed a copy of SUPPLEMENTAL BRIEF OF RESPONDENT to Ms. Andrea Burkhart at Andrea@2arrows.net.

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

DATED this 21st day of February, 2019, at Yakima, Washington.

____/s/Michael J. Ellis_____

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