Supreme Court No. 90621-1
(COA No. 70123-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

T.G.
(D.O.B. 3/12/97),

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

T.G., petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated below pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

T.G. seeks review of the Court of Appeals decision dated June 9, 2014, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A person may be seized only if police have individualized suspicion he was involved in criminal activity and he must be released when evidence dispels the accusation. T.G. was seized because he met a broad description of being a white teenage boy with brown hair and he was detained even after the complaining witness was unable to identify him. Did the police unlawfully seized and impermissibly detain a teenaged boy based on general description and unlawfully prolong the detention even after he was not identified as a perpetrator?

2. A teenager lawfully consents to a police search of his closed backpack during an investigative detention only if the consent is intelligent and voluntary. A police officer detained 15-year-old T.G., asked for identification, called a police officer stationed at his school,

and requested that T.G. let him search his backpack without telling him he had the right to refuse or informing him of any of his rights. Did the police search T.G.'s backpack without obtaining his informed and meaningful consent? When the trial court ruled his consent was validly obtained, may he challenge this ruling on appeal?

3. A show-up identification is inherently suggestive and will be inadmissible if obtained in an unreliable fashion. The complaining witness had a very quick glimpse of two boys outside her window, focused on the other boy, gave descriptions that did not match T.G. or D.G., and did not initially recognize either boy but changed her identification after seeing the police persistently interrogate both boys. Should this Court take review to address when a show-up identification is impermissibly suggestive in light of recent revelations about the unreliability of eyewitness identifications and to explain the factors a court should consider when deciding the reliability of an identification?

D. STATEMENT OF THE CASE

One morning, Erin Waldon heard knocking and her front doorbell ring. 1RP 35. Through slatted blinds, she noticed two boys standing outside her kitchen window and saw one boy's hand on the window. 1RP 36, 43; 1RP 48; *see* Ex. 3 (showing closed, narrow

blinds). She looked at them "for about three seconds," and then they ran away "really fast." 1RP 37, 55.

Ms. Waldon gave a description to the 911 operator, saying the boys were very thin, 14 to 15 years old, and of the same height.1RP 38, 39, 55; 2RP 170, 276; Pretrial Ex. 2. Both were "wearing t-shirts" and possibly "one had a backpack."1RP 38; Pretrial Ex. 2.

Ms. Waldon "focused in" on the boy closer to the window with darker hair and skin (who was not T.G.). 1RP 37, 39, 78. She said the boy near the window was Asian. 1RP 39, 71. She said the second boy was light skinned with "reddish" brown hair. 1RP 98. At trial she said she did not get a good enough look at the second boy's hair. 1RP 78.

Officer John Ross arrived at Ms. Waldon's house. 1RP 95. She directed the officer northbound. 1RP 97. But instead he headed south toward a nearby high school. 1RP 166-67. The first two teenagers Officer Ross saw were at a bus stop near the high school. 2RP 168. He noticed that the boys had hair that looked wetter than their shirts and it had been raining earlier. 1RP 101; 2RP 129.

One boy, D.G., "from a distance, he could have been possibly Southeast Asian. I wasn't sure, but there was some type of ethnicity in there." 1RP 170. Officer Ross thought that D.G. looked "Latino or

American" up close. 2RP 170. In his police report, D.G. was classified as Native American. CP 51; Ex. 8 (photographs of T.G. and D.G.).

T.G. was at the bus stop with brown hair, not reddish. 2RP 170, 171; Ex. 8. Neither boy looked "very thin" as the initial description stated. Pretrial Ex. 2; Ex. 8. Nor did T.G. have a dark t-shirt – he wore a white t-shirt with gray lettering. 2RP 171; Ex. 8. Contrary to Ms. Waldon's description, T.G. and D.G. were different heights and both boys had backpacks. 2RP 132, 171; Pretrial Ex. 2.

Officer Ross directed the boys to move about 25 feet away from the bus stop so he could talk to them. 2RP 127, 129. He questioned them about what they were doing and why they were not in school. 2RP 131. They denied any involvement in a burglary and said they had come straight to the bus stop after getting books from T.G.'s house. 2RP 246, 248. Officer Ross told them they had "pretty big bags" and "requested" that they open them "to make sure there's just school stuff in there." 2RP 132. The boys did as they were told. 2RP 133. Officer Ross saw that T.G. had a reversible jacket in his bag that was dark colored on the inside and that side was wet. 2RP 133, 173, 280. Ms. Waldon had not described either boy as wearing a jacket. The officer continued talking to both boys, asking for identification and checking with the police

officer stationed at their school to confirm their enrollment and dates of birth. 2RP 135.

Two more uniformed police officers, Nixon and Graff, arrived on the scene during this time period. 2RP 171, 245,253. Officer Ross testified the boys were not free to leave. 2RP 171-72.

Officer Jason Jones brought Ms. Waldon and her husband in his police car for a show-up identification. 2RP 135. Both boys stood together. 1RP 60. Ms. Waldon said she was unsure if the boys were the people she saw at her home. 1RP 61, 66; 2RP 136. Ms. Waldon said her vision is "better than 20/20" and she did not complain that any obstacles blocked her view at the time. 1RP 62; 2RP 291-92.

Afterward, Officer Jones left Ms. Waldon and her husband inside the police car while he and Officer Nixon questioned T.G. and D.G. 2RP 276. For another 10-20 minutes, the officers separated T.G. and D.G. from each other, read partial *Miranda* rights from police-issued books, and pressed them about the incident. 2RP 137, 246, 248. Officer Jones photographed each boy for police records. 2RP 278.

Officer Jones claimed he intended to drive Ms. Waldon home and he lacked grounds to arrest the boys. 2RP 276. But Ms. Waldon then asked for another chance at identification with the boys closer.

1RP 64; 2RP 146-47, 276. When T.G. and D.G. stood together at the front of the police car, Ms. Waldon then identified them as the people who had been at her home. 2RP 282, 301.

T.G. was charged with attempted residential burglary. The trial court refused to bifurcate the CrR 3.5 and 3.6 motions from the fact-finding adjudication. 1RP 9-11. The court denied T.G.'s CrR 3.6 motion to suppress the fruits of the illegal detention and unduly suggestive identification, but granted his motion to suppress statements T.G. made without *Miranda* warnings. 2RP 329, 331.

Dr. Jeffrey Loftus testified about factors affecting the reliability of show-up identifications following brief viewings of criminal activity, but the court concluded that Ms. Waldon's identification was not irreparably tainted by suggestive procedures and her limited opportunity to observe during the incident. 2RP 218-19, 223, 226, 240, 363-67. The court admitted Ms. Waldon's out-of-court and in-court identification of T.G. and adjudicated him guilty as an accomplice to attempted residential burglary. CP 82.

The facts are further set forth in the Court of Appeals opinion, pages 1-6, Appellant's Opening Brief, pages 4-10, and Appellant's

Reply Brief, passim. The facts outlined in these pleadings are incorporated by reference.

E. ARGUMENT

The arrest of a juvenile after an unreasonably extended detention and a highly suggestive identification is unlawful and merits review by this Court

1. *A seizure must be based on individualized suspicion of involvement in criminal activity, not a vague association with another person*

T.G.'s seizure is lawful only if the officer had specific and articulable facts giving rise to a reasonable suspicion that he was involved in criminal activity. *State v. Bray*, 143 Wn.App. 148, 150, 177 P.3d 154 (2008). "Merely associating with a person suspected of criminal activity 'does not strip away' individual constitutional protections" because constitutional protections are possessed individually. *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999) (quoting *State v. Broadnax,* 98 Wn.2d 289, 296, 654 P.2d 96 (1982) and *Ybarra v. Illinois,* 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)); U.S. Const. amend. 4; Const. art. I, § 7. "[A]n individual's mere proximity to others independently suspected of criminal activity" does not justify an investigative stop; "the suspicion must be

individualized." *State v. Richardson*, 64 Wn.App. 693, 697, 825 P.2d 754 (1992).

Officer Ross admitted he stopped the first two teenaged boys he saw. 2RP 168-69. They were standing at a bus stop with other people, not hiding. 2RP 169.

The boys did not meet Ms. Waldon's description *individual.* Ms. Waldon reported one of the perpetrators was Asian, but neither T.G. nor D.G. were Asian. 1RP 98, 2RP 170. Officer Ross thought. D.G. had "some type of ethnicity in there" and called D.G. Southeast Asian, American, or Latino. 2RP 170. The fact that D.G. was of some non-Caucasian race was not individualized and particularized suspicion as to him. *See State v. Almanza-Guzman*, 94 Wn.App. 563, 567, 972 P.2d 468 (1999) ("Race or color alone is not a sufficient basis for making an investigatory stop").

D.G.'s ambiguous "ethnicity" does not provide individualized suspicion to seize T.G. Ms. Waldon said the second boy who stood outside her window was wearing a dark t-shirt, but T.G. wore a white t-shirt. 1RP 55. She said the second boy had reddish hair while T.G. had brown hair. 2RP 171; Ex. 8. She said the boys were the same height and

only one had a possible backpack, but T.G. and D.G. were different heights and both had backpacks. 2RP 170; Pretrial Ex. 2.

T.G. was not out of breath or sweating, although Ms. Waldon said the two boys ran away "really fast" only minutes before the boys were stopped at the bus stop. 1RP 55, 95; 2RP 169. Officer Ross testified the boys appeared a "little nervous" when he approached, but he described the minor nervousness typical of a person skipping school and there was no question that T.G. and D.G. were supposed to be at school. 1RP 130; *State v. Henry*, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995) ("most persons stopped by law enforcement officers display some signs of nervousness").

T.G. was seized because he was in a public place during the day instead of in school, had wet hair on a day that it had been raining, and was standing near a person who might have some ethnicity. This does not rise to the level of reasonable articulable suspicion where the boys did not match Ms. Waldon's description. *See State v. Martinez*, 135 Wn.App. 174, 180-81, 143 P.3d 618 (2006) (presence in a public place after dark in area of recent vehicle prowls does not provide "particularized suspicion" of criminal activity). Officer Ross did not have authority to stop and hold T.G. for extended questioning.

2. *The seizure was unlawfully extended after the complainant failed to identify either boy in a show-up****Error! Bookmark not defined.***.

"If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594, 599 (2003); *Bray*, 143 Wn.App. at 154.

a. *The officers exceeded the permissible duration of the detention after the complainant did not identify T.G. as a possible burglar.*

Even if the initial detention was permitted based on the possibility that T.G. and D.G. were the people Ms. Waldon saw outside her home, they should have been released once Ms. Waldon did not identify them as the perpetrators. The officer had confirmed their identities, knew their contacted information, and learned that the complainant did not confirm that they committed a crime. 2RP 135.

Instead of releasing T.G. once Ms. Waldon could not identify him, the officers increased the custodial and intrusive nature of the detention. In full-view of Ms. Waldon, they separated T.G. and D.G.2RP 137, 176, 245. They read D.G. his *Miranda* warnings and discussed *Miranda* rights T.G., even though Miranda is required only for custodial arrests. 2RP 137, 246-47, 278. One officer photographed T.G. and D.G. as part of the investigation. 2RP 175, 292, 295.

As they separately questioned T.G. and D.G. at the scene after Ms. Waldon had not identified either boy, Officers Jones and Nixon pressed both boys to snitch on the other, telling each that the other one had already confessed to the burglary. 2RP 248, 292-93. At the same time, Officer Ross remained on the telephone with a police officer employed by T.G.'s school to further investigate T.G. and D.G. 2RP 135. This additional period of questioning lasted at least 10 minutes. 2RP 300-01. Mr. Waldon did not initially ask for a second chance to view the two boys or complain that she needed to see them closer, but did after this extended detention and investigation.

There was no reasonable basis to continue the seizure after the complainant did not identify either boy, particularly where no further evidence demonstrated their involvement in a burglary. By continuing to detain T.G., subjecting him to more aggressive questioning, photographing him as a suspect of a crime, and then requiring him to submit to a second identification procedure after the police had lost their authority to detain T.G., the officers violated T.G.'s right to be free from unjustified invasion of his private affairs.

b. *The seizure cannot be justified by the unlawful search of T.G.'s backpack.*

The Court of Appeals refused to address the improper search of T.G.'s backpack, claiming it was not challenged below and therefore not considered by the trial court. Slip op. at 11. But the record belies this conclusion. The trial court expressly, and incorrectly, entered a finding that Officer Ross's search of the backpack was voluntary and this finding may be challenged on appeal. CP 97 (Finding of Fact 17).

Officer Ross did not seek T.G.'s permission to search his backpack, he made a "request" that T.G. let him search the backpack, without giving him an option to refuse. 2RP 132; *see also* Appellant's Opening Brief at 20-23. Warrantless searches are per se unreasonable under our state constitution, subject to a limited set of carefully drawn exceptions. *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012). The State bears the burden of establishing that an exception to the warrant requirement applies. *Id.*

The only type of search permitted during a *Terry* stop is a brief frisk for weapons if the officer reasonably believes her safety or that of others is endangered. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The pat down may not be used as a pretext to search for

evidence of a crime. *Id.* at 254. Here, neither boy was suspected of being armed and dangerous; no one claimed the backpack was searched for safety reasons; and the search was not a "pat down" for potential weapons. Instead, the officers were looking for evidence connecting the boys with an attempted burglary. The backpack's search is not justified as a weapons frisk under *Terry*.

To satisfy the consent exception to the warrant requirement, the prosecution bears the burden of proving a person's consent was voluntarily obtained based on "informed and meaningful" understanding of the right to refuse consent. *State v. Schultz*, 170 Wn.2d 746, 757, 248 P.3d 484 (2011). The rights afforded by article I, section 7 may not be waived by "silent acquiescence" or by failing to object when they are too afraid or "too dumbfounded" to speak up. *Schultz*, 170 Wn.2d at 757. Just as a person's home may not be searched without a warrant or a legitimate exception to the warrant requirement, a person's backpack may not be searched by police without a warrant or applicable carefully drawn exception to the warrant requirement. *See State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986) ("validity of the initial stop does not justify the intrusion" into personal property).

Under the Fourth Amendment, whether consent was freely and voluntarily obtained depends on the court weighing the totality of circumstances, including balancing: (1) whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; (3) whether the consenting person had been advised of his right not to consent; and (4) whether the person whose consent was sought was in custody of the police at the time. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80, 85 (2004). Consent is not "freely and voluntarily given" when the State shows "no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1792, 20 L.Ed.2d 797 (1968).

Here, Officer Ross did not tell T.G. he had the right to refuse the "request" that he open up his backpack for the officer to search, which shows the search was not obtained by informed consent. 2RP 132; *see Ferrier*, 136 Wn.2d at 115. T.G. had not received *Miranda* warnings or other explanation of his right to remain silent or receive an attorney's aid. 2RP 330. T.G. was 15-years-old, receiving special education services in high school, and had an IQ of 80, thus lacking the education

and experience to know of his right to refuse absent a search warrant. CP 68.

T.G.'s age increases the likelihood that he did not know, understand, or believe he could say no to officer's request to search his bag. *J.D.B. v. North Carolina*, __ U.S. __, 131 S. Ct. 2394, 2406, 180 L.Ed.2d 310 (2011). A child's age has an objectively discernible relationship to his understanding of his freedom of action. *Id.* at 2404.

Having never been informed of his right to refuse consent, the prosecution did not prove that T.G., a 15 year-old boy with a limited IQ, rationally and meaningfully consented to the officer's request to search his backpack, contrary to the court's finding. CP 97. The information the police obtained from searching T.G.'s backpack cannot be used to support the lengthy detention. This Court should address the police officer's improper search of a youth's backpack without valid consent as an issue of substantial public importance, in light of the United States Supreme Court's ruling in *J.B.D.*

3. *The suggestiveness of the show-up identification undermines the lawfulness of the arrest and the basis for the adjudication of guilt.*

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Manson v. Brathwaite*, 432 U.S. 98, 144, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *see* U.S. Const. amend. 14; Const. art. I, § 3.

A suggestive identification procedure unduly calls attention to one individual. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). *Id.* Suggestiveness creating a substantial likelihood of misidentification is traditionally measured by five factors: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) her level of attention, (3) the accuracy of her description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn.App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972).

Show-up identifications are inherently suggestive because the eyewitness views only people the police have identified as suspects. *State v. Ramires*, 109 Wn.App. 749, 761, 37 P.3d 343, *rev. denied*, 146

Wn.2d 1022 (2002); *see State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006). "[T]he practice of showing suspects singly to persons for the purpose of identification has been widely condemned." *State v. Rogers*, 44 Wn.App. 510, 516, 722 P.2d 1349 (1986).

"[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and thus his susceptibility to suggestion is the greatest." *Wade*, 388 U.S. at 229. When a witness's memory of an event is initially hazy or incomplete, it is particularly susceptible to being inaccurate. 2RP 200. Post-event information supplants original memories but the witness is unaware that later-received information shapes her memory. 2RP 201.

When two suspects are displayed in a joint show-up, there is an increased chance of false identification of at least one person, because the witness may infer the second person was involved if the first person looks like a perpetrator. 2RP 214. Ms. Waldon admitted she focused on the boy with darker hair during the three-second long incident, and there is no dispute T.G. was not the boy with darker hair. This creates a substantial risk T.G. was identified based on his proximity to D.G.

Scholars have registered increased concern with misidentification since *Wade*, *Biggers*, and *Brathwaite*. "Eyewitness

misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases." Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 TxWLR 123, 129 (Winter 2011); *see* Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 118 n.83 (2002) ("Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be 'notoriously unreliable--in some circumstances more often wrong than right.'" (citation omitted)).

The identification procedure used in the case at bar was far more suggestive than typical. Ms. Waldon had only a few seconds to view two people through slatted blinds. 2RP 209. She focused on the Asian-looking boy who was closer to her. 1RP 39, 64. Her limited physical description of the second boy and her lack of certainty at the initial show-up demonstrate that flaws in her original memory. 2RP 200, 209

Post-event information colored her memory and perception. 2RP 201. After her initial failed identification, she sat nearby as police officers separated, questioned, searched, and photographed both detained boys, sending the message that the police believed the two

were involved. 2RP 246, 277-78. The police told her that the boys confessed once arrested. 1RP 90.

One of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, 176 Wn.2d 611, 637, 294 P.2d 679 (2013) (Wiggins, J., dissenting) (citing James M. Doyle, *Discounting the Error Costs: Cross–Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 Psychol. Pub. Pol'y & L. 253 (2001)). "The cross-race effect, also known as the own-race bias or other-race-effect, refers to the consistent finding that adults are able to recognize individuals of their own race better than faces of another, less familiar race." John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, in 2 Handbook of Eyewitness Psychology: Memory for People, 257, 257-58 (Rod C. L. Lindsay et al. eds., 2006).

Ms. Waldon is Caucasian, but D.G. is Latin-American. 2RP 170. Ms. Waldon misidentified D.G.'s race as Asian. Ms. Waldon said she got the best look at the Asian boy and was unsure in her limited description of the other person. 1RP 78. At the show-up, Ms. Waldon identified them collectively, making it more likely that the cross-racial risks of misidentifying D.G. carried over to T.G., who was picked due to his proximity to D.G. rather than his own features.

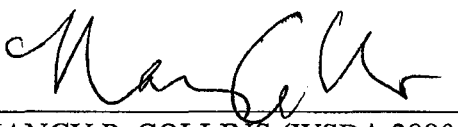
These factors undermine the validity of the identification and this Court should accept review to up-date its analysis for considering when a show-up identification is conducted in an impermissibly suggestive fashion in light of recent developments documenting the fallibility of eyewitness identification and the Court's concern with ensuring reliable evidence used as the basis for a conviction. *See State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) ("We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.").

F. CONCLUSION

Based on the foregoing, T.G. respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 8th day of July 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent v. T.G., DOB 3/12/97, Appellant.	)	No. 70123-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 9, 2014

LEACH, J. — T.G. appeals his juvenile court adjudication and disposition for attempted residential burglary. He contends that the court erred in refusing to suppress the fruits of an unlawful Terry[1] stop and that an impermissibly suggestive showup violated his right to due process. But the specific facts and circumstances known to the police officers who detained T.G. supported a reasonable suspicion that he was involved in a recent attempted burglary. The record also supports the court's determination that the showup procedure was reliable and did not create a substantial likelihood of misidentification. We affirm.

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

FACTS

Shortly before 9:50 a.m. on May 3, 2013, Erin Waldon heard "insistent doorbell ringing" and pounding on the front door of her Kent home. Waldon, who was home alone, thought her husband might have forgotten his key and walked toward the front door. Because she noticed the doorknob turning, she looked out the kitchen window. There she saw two teenaged boys standing outside the window and facing her. The window screen was gone, and one of the boys was trying to slide open the window.

Waldon stood about two feet from the window. Although the window blinds were down, the slats were turned horizontally, and Waldon had "an unobstructed view" of the boys' faces. Upon seeing Waldon, the boys appeared surprised, and their eyes widened. Waldon looked at the boys for "[a]t least a good three seconds, if not longer" before they turned and ran away.

At 9:50 a.m., Waldon called 911 and reported the incident. She described one of the suspects, later identified as T.G., as "5'8", approximately 14-15 years old, very thin, reddish brown hair, possibly wearing a backpack, wearing dark clothing." She described the other suspect, later identified as D.G., as "5'8", approximately 14-15 years old, very thin, dark black hair, and Asian." Waldon explained that she had described one of the boys as Asian in response to the 911 operator's suggestion of the "closest nationality." Waldon acknowledged that

she "got a better look" at the boy with the darker hair and complexion but maintained she had a "reasonable identifying look" at the other boy.

Kent Police Officer John Ross arrived at Waldon's home at 9:53 a.m. After speaking briefly with Waldon, Officer Ross left and searched the immediate area for the suspects. Waldon thought the boys had fled in a northerly direction, but Ross thought they might be high school students and drove south toward Kent-Meridian High School, which was about one-third of a mile from Waldon's house.

At 10:03 a.m., Ross drove by a bus stop shelter near the school and saw two teenaged boys who generally matched Waldon's description. One of the boys was tall and skinny with "possibly reddish hair." The other boy "had [an] olive type of complexion that could have . . . been an Asian male description." Both boys were wearing light-colored T-shirts and had backpacks. Ross radioed that he had found two possible suspects.

Ross parked his patrol car in a nearby parking lot and walked over to the boys. Because it was raining and cold, Ross thought it unusual that both boys were wearing only T-shirts. He also noticed that both boys had wet hair but that their T-shirts were dry. Based on his experience, Ross suspected that they had recently removed some clothing.

Ross asked the boys to move a short distance away from the other people in the bus shelter so that he could speak with them in private. They identified themselves as T.G. and D.G. and said they attended Kent-Meridian High School. Ross called the school resource officer and confirmed the information. The boys said they were on their way to school after retrieving a book that D.G. had left at a friend's house. Ross found the explanation odd because the boys had been standing in the bus shelter, even though the school was only a few hundred yards away.

Ross asked T.G. if he would "mind" opening his backpack "to make sure there's just school stuff in there." T.G. opened his backpack, revealing a dark jacket that was wet on one side.

At 10:07 a.m., Officer Jason Jones arrived at Ross's location with Waldon for a showup identification. Before transporting Waldon, Jones read her the standard instructions for field identification procedures:

> You'll be asked to look at the person or persons we have stopped. The fact that we have this person stopped and may be handcuffed, should not influence your judgment.
>
> You should not conclude or guess a person is the one who committed the crime. You are not obligated to identify anyone. It's just as important to free innocent persons from suspicion, as it is to identify guilty parties.

Waldon responded that she understood.

While sitting in the patrol car about 45 feet away, Waldon looked at T.G. and D.G. through the front passenger window. Waldon told Jones that "they kind of look like the boys," but she was not 100 percent sure. Waldon testified that her view was obscured by the distance and the rain on the window and that "I didn't want to identify someone if it wasn't the actual person that had tried to break in."

Without any further discussion, Officer Jones got out of the patrol car and joined the other officers. Jones and another officer spoke with T.G. and D.G. individually. Jones also photographed the boys.

After about 10 minutes, Jones returned to the patrol car and planned to transport Waldon back to her home. Waldon asked Jones if he "could bring the boys closer, so she could get a better look." Officer Ross then brought T.G. and D.G. to within 25 feet of the front windshield of the patrol car. Waldon immediately yelled, "That's them." She said that she had not gotten a good look at the suspects' clothing, but that she would never forget their faces. Waldon added that she was "100 percent sure."

At 10:25 a.m., Officer Jones informed the other officers of the identification. The officers then arrested T.G. and D.G.

The State charged T.G. in juvenile court with one count of attempted residential burglary. T.G. moved to suppress evidence seized following his initial

detention, including custodial statements. The juvenile court denied the motion, concluding that police officers lawfully detained T.G. prior to his arrest. The court admitted Waldon's out-of-court and in-court identifications of T.G. but excluded certain custodial statements. At the fact-finding hearing, Dr. Geoffrey Loftus testified about various factors that affect the reliability of eyewitness identifications.

The juvenile court found T.G. guilty as charged and imposed a disposition of 5 days in juvenile detention, 15 days of electronic home monitoring, 6 months of probation, and 16 hours of community service. T.G. appeals, challenging the court's denial of his suppression motion

STANDARD OF REVIEW

We review the trial court's decision on a motion to suppress to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law.[2] Here, the majority of the juvenile court's findings of fact are unchallenged and are therefore verities on appeal.[3] We review challenged conclusions of law de novo.[4]

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[2] State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).
[3] See State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).
[4] State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

ANALYSIS

T.G. contends that Officer Ross lacked an articulable suspicion that he was involved in the attempted burglary and that his detention was therefore unlawful from its inception. He further maintains that even if the initial stop was lawful, the officers exceeded its permissible scope when they continued to detain him after Waldon failed to identify him during the first showup.

Consistent with the Fourth Amendment and article I, section 7 of the Washington State Constitution, police officers may conduct an investigatory stop if the officers have a reasonable and articulable suspicion that an individual is involved in criminal activity.[5] The necessary level of articulable suspicion is "a substantial possibility that criminal conduct has occurred or is about to occur."[6]

We review the reasonableness of the officer's suspicions by considering the totality of the circumstances known to the officer at the time of the stop.[7] The determination of reasonable suspicion "'must be based on commonsense judgments and inferences about human behavior.'"[8]

Within 10 minutes of responding to Waldon's 911 call, Officer Ross noticed the two teenaged boys standing in the bus shelter. The shelter was

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[5] State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980); see also Terry, 392 U.S. at 21.

[6] State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

[7] State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008).

[8] Lee, 147 Wn. App. at 912 (quoting Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

about one-third of a mile from Waldon's home and within easy walking distance. The boys also matched several specific details of Waldon's description. T.G. was 15 with brown hair that Officer Ross thought might be reddish, about 5'10" tall, and skinny. D.G. was apparently somewhat shorter and, according to Ross, had an "olive type of complexion that could have, I thought, . . . been an Asian male description." Both boys were wearing backpacks.

Waldon told the 911 operator that the suspects were wearing dark clothing. Both T.G. and D.G. were wearing light-colored T-shirts in the bus shelter. Officer Ross noticed that both boys had wet hair, but their T-shirts were dry, even though it was raining. Based on his experience, Ross suspected that the boys had removed some outer clothing.

Considered together and in light of the officer's experience, the suspects' resemblance to the reported descriptions, the location and time of the encounter, and the discrepancies between the weather conditions and the suspects' clothing constituted specific and articulable facts supporting an inference that T.G. may have been involved in the attempted burglary. The officer's decision to detain the boys for further investigation was reasonable.

T.G. contends that even if the initial stop was lawful, the officers exceeded the permissible scope of an investigatory detention. The scope of a permissible investigatory stop necessarily depends on the specific facts of each case.[9]

> A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop. If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop. If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged.[10]

The investigative methods "must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[11] Relevant factors for determining the permissible scope of an investigatory detention include "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained."[12]

Here, the officers' detention of T.G. was directly related to their investigation of an attempted burglary. Although Officer Ross moved T.G. and D.G. away from the bus shelter to talk to them in private, he did not draw his weapon, conduct a pat-down, handcuff them, or physically confine them during the questioning. The investigation was relatively brief, lasting about 20-25

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[9] State v. Bray, 143 Wn. App. 148, 154, 177 P.3d 154 (2008).
[10] State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (footnote omitted).
[11] State v. Williams, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984).
[12] Williams, 102 Wn.2d at 740.

minutes from the initial detention until Waldon positively identified T.G. and D.G. during the second showup.

Significantly, Officer Ross's suspicion was aroused almost immediately when the boys confirmed they attended Kent-Meridian High School and claimed they were on their way to the nearby school, even though they had been standing in the bus shelter. Ross also suspected that the boys had recently changed their outer clothing because their hair was wet and their T-shirts were dry. Ross's suspicion was reinforced when T.G. opened his backpack to reveal a dark jacket that was wet on one side.

Finally, contrary to T.G.'s assertion, Waldon's response to the initial showup did not automatically require his release. Upon seeing the suspects initially from a greater distance, Waldon indicated a possible identification but acknowledged that she was not positive. Given the other circumstances, Waldon's reaction did not necessarily dispel the officers' suspicions, and the decision to continue the detention briefly to interview the two suspects separately was reasonable. That questioning lasted no more than 10 minutes before Waldon positively identified both suspects.

Under the circumstances, the brief detention was directly related to the investigation of the attempted burglary and used minimally intrusive means to

verify or dispel the officers' suspicions in a short period of time. The officers did not exceed the permissible scope of the investigatory detention.

T.G. contends that the discovery of the wet jacket in his backpack did not justify his detention because the evidence fails to support the juvenile court's finding that he voluntarily consented to the search. But T.G. failed to challenge the search of his backpack either in his written motion to suppress or in argument to the juvenile court.

Generally, this court will decline to consider a suppression argument that is raised for the first time on appeal.[13] T.G.'s challenge to the voluntariness of consent does not fall within the limited exceptions to the general rule.[14] Nor does he contend that the issue involved a manifest constitutional error warranting review for the first time on appeal under RAP 2.5(a).

The voluntariness of a consent to search is a highly fact-specific determination.[15] Because T.G. failed to raise the issue, the juvenile court had no opportunity to consider all of the relevant circumstances and enter the findings of fact necessary to permit meaningful appellate review. Accordingly, we decline to address the issue.

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[13] State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009) (declining to address alleged erroneous statement in search warrant affidavit).

[14] See State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011).

[15] See State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Moreover, even without the evidence in T.G.'s backpack, the circumstances known to the officers, including the boys' physical appearance, their explanation for their presence in the bus shelter, and the discrepancies between the weather and their clothing, justified a brief extension of the initial stop for further investigation. Consequently, even if the juvenile court had suppressed the contents of T.G.'s backpack, the investigatory detention did not exceed its lawful scope.

T.G. next contends that the showup procedures were impermissibly suggestive, making both Waldon's initial identification and later in-court identification unreliable and inadmissible. We disagree.

An out-of-court identification procedure violates due process if it is so impermissibly suggestive as to give rise to "a substantial likelihood of irreparable misidentification."[16] A defendant claiming a due process violation must first establish that the identification procedure was "unnecessarily suggestive."[17] If the defendant satisfies this threshold burden, the court then assesses whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.[18]

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[16] State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999).
[17] State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); see also State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).
[18] Vickers, 148 Wn.2d at 118.

The key factor in determining admissibility is whether sufficient indicia of reliability supported the identification despite any suggestiveness.[19] In making this determination, the court considers all relevant factors, including (1) the opportunity of the witness to view 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 confrontation, and (5) the time between the crime and the confrontation.[20]

T.G. asserts that the showup was impermissibly suggestive because officers told Waldon that they had two suspects in custody before the identification, Waldon viewed the two suspects together, and the officers continued their interrogation after Waldon failed initially to make a positive identification. But showup identifications are not per se impermissibly suggestive merely because the witness understands that the police are holding possible suspects.[21]

As the juvenile court noted, Waldon indicated her understanding of Officer Jones's detailed admonishment that she was not obligated to identify anyone and

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[19] 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, 53 L. Ed. 2d 140 (1977)).

[20] Linares, 98 Wn. App. at 401; Neil v. Biggers, 409 U.S. 188, 198-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

[21] Guzman-Cuellar, 47 Wn. App. at 336 (defendant standing handcuffed and about 15 feet from police car did not render showup unnecessarily suggestive).

that the showup procedures should not influence her judgment. Waldon emphasized that she did not want to make a positive identification until she was certain. Waldon paid no particular attention to Jones's actions after he left the car. Although she saw that the officers had contact with T.G. and D.G. after Jones left the car, that interaction was brief and noncoercive. Nothing in the record suggests that the officers or the circumstances of the investigation exerted any direct or indirect pressure on Waldon to make the identification.

The evidence also supports the court's determination that the identification procedure was reliable despite any suggestiveness. First, Waldon was only two feet away from the kitchen window, where the two suspects stood. The blinds were down, but the slats were positioned horizontally, giving her a relatively unobstructed view of both boys' faces.

Second, although Waldon estimated she saw the suspects for only about three seconds, an estimate that the court found credible, she was able to note their facial expressions, relative positions, and the attempt to slide open the window. Waldon acknowledged that she focused on the suspect later identified as D.G., but she insisted that she also "got a reasonable identifying look" at T.G.

Third, contrary to T.G.'s assertions, Waldon provided a reasonably accurate description of the suspects, including their age, height, general build, and complexion. Waldon also observed that at least one of the boys had a

backpack. Although she erroneously described D.G. as Asian, she explained that the 911 operator had suggested this as a possibility. Waldon emphasized that she was attempting to describe the slightly darker complexion of one of the suspects. Minor discrepancies do not negate the general accuracy of Waldon's description or preclude admissibility of her identification.[22]

Fourth, Waldon called 911 at 9:50 a.m., shortly after the boys fled. Officer Ross contacted T.G. and D.G. at 10:03 a.m. No more than 30-35 minutes elapsed between Waldon's view of the boys and her identification.[23]

Finally, when Waldon viewed the suspects at a closer distance through the cleared windshield, she recognized them immediately and stated that she was "100 percent sure."

Viewed together, the foregoing circumstances supported the juvenile court's determination that Waldon's identification was reliable and admissible.

T.G.'s reliance on the testimony of Dr. Loftus is misplaced. Loftus identified the general circumstances and situations that may render identifications unreliable, but he did not review or address the specific factors of Waldon's identification. The juvenile court carefully considered his testimony and noted that several circumstances here, including the relative safety of Waldon's

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[22] See Manson, 432 U.S. at 116-17 (weight to be given identifications with some questionable features is for the trier of fact).

[23] See Rogers, 44 Wn. App. at 516 (6-hour delay between incident and showup was within permissible range).

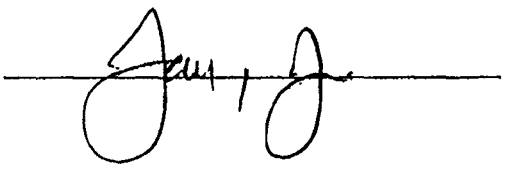
viewing point, the lack of direct physical contact with the suspects, and the absence of significant post-event memory contamination, differed from those that Loftus characterized as unreliable. Under the circumstances, the weight to be accorded his testimony was an issue of credibility that this court cannot review.[24]

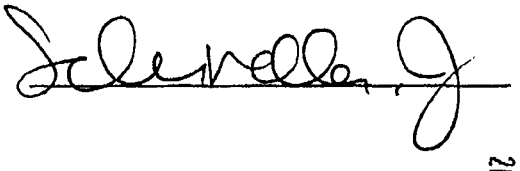
T.G. also suggests that the juvenile court failed to give proper consideration to the cross-racial aspects of Waldon's identification.[25] But Waldon's identification of T.G. was not a cross-racial identification. Nothing in the record supports T.G.'s claim that Waldon's view of both suspects together in the showup made it more "likely that the cross-racial risks of misidentifying D.G. carried over to T.G."

Affirmed.

Leach, J.

WE CONCUR:





[24] See State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (appellate court defers to trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence).

[25] See generally State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70123-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Jennifer Joseph, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Date: July 8, 2014