

NO. 68005-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAILONE BROOKS-HARRIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF RESPONDENT

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46
COURT OF APPEALS OF THE STATE OF WASHINGTON
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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL FACTS | 1 |
| 2. SUBSTANTIVE FACTS | 2 |
| C. <u>ARGUMENT</u> | 11 |
| 1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE GUN BECAUSE THE SEIZURE OF BROOKS-HARRIS WAS A LAWFUL INVESTIGATIVE DETENTION. | 11 |
| a. The Stop Was Justified At Its Inception Because Officer Walker, And By Extension, His Fellow Officers, Had Reasonable, Articulable Suspicion That Brooks-Harris Was Involved In Criminal Activity | 13 |
| b. The Scope Of The Investigative Detention Conducted By Detective Johnson Was Reasonable Given The Nature Of The Suspected Crime And The Significant Risk The Situation Posed To Officers And The Public | 20 |
| 2. CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, BROOKS-HARRIS' CONSENT TO SEARCH HIS POCKETS WAS GIVEN FREELY AND VOLUNTARILY | 28 |
| D. <u>CONCLUSION</u> | 35 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arkansas v. Sanders, 442 U.S. 753,
99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)..... 13

Brendlin v. California, 551 U.S. 249,
127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)..... 12

Gallegos v. City of Los Angeles, 308 F.3d 987
(9th Cir.2002) 20, 22

Graham v. Connor, 490 U.S. 386,
109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)..... 21

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)..... 13, 20, 22, 23

United States v. Bautista, 684 F.2d 1286
(9th Cir.1982) 23

United States v. Buffington, 815 F.2d 1292
(9th Cir.1987) 23

United States v. Cortez, 449 U.S. 411,
101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)..... 15

United States v. Holland, 510 F.2d 453
(9th Cir.1975), cert. denied,
422 U.S. 1010, 95 S. Ct. 2634,
45 L. Ed. 2d 674 (1975)..... 15

United States v. Jacob, 715 F.2d 1343
(9th Cir.1983) 23

United States v. Poitier, 818 F.2d 679,
(8th Cir.1987), cert. denied,
484 U.S. 1006, 108 S. Ct. 700,
98 L. Ed. 2d 651 (1988)..... 15

| | |
|--|--------------------|
| <u>United States v. Ramirez</u> , 473 F.3d 1026 (9th Cir. 2007) | 14 |
| <u>United States v. Sharpe</u> , 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) | 20 |
| <u>United States v. Taylor</u> , 716 F.2d 701 (9th Cir.1983) | 23 |
| <u>United States v. Watson</u> , 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976)..... | 30, 31 |
| <u>Washington v. Lambert</u> , 98 F.3d 1181 (9th Cir.1996) | 20 |
| <u>Washington State:</u> | |
| <u>In re Dependency of K.S.C.</u> , 137 Wn.2d 918, 976 P.2d 113 (1999)..... | 29 |
| <u>In re Personal Restraint of Tortorelli</u> , 149 Wn.2d 82, 66 P.3d 606 (2003) | 19 |
| <u>State v. Anderson</u> , 51 Wn. App. 775, 755 P.2d 191 (1988)..... | 15 |
| <u>State v. Belieu</u> , 112 Wn.2d 587, 773 P.2d 46 (1989)..... | 20, 21, 22, 23, 26 |
| <u>State v. Bustamante-Davila</u> , 138 Wn.2d 964, 983 P.2d 590 (1999)..... | 29 |
| <u>State v. Cole</u> , 31 Wn. App. 501, 643 P.2d 675 (1982)..... | 31 |
| <u>State v. Doughty</u> , 170 Wn.2d 57, 239 P.3d 573 (2010)..... | 13 |
| <u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002)..... | 21 |

| | |
|--|--------|
| <u>State v. Flowers</u> , 57 Wn. App. 636, 789 P.2d 333, <u>review denied</u> , 115 Wn.2d 1009 (1990)..... | 30 |
| <u>State v. Glover</u> , 116 Wn.2d 509, 806 P.2d 760 (1991)..... | 13, 14 |
| <u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)..... | 12, 13 |
| <u>State v. Johnson</u> , 16 Wn. App. 899, 559 P.2d 1380, <u>review denied</u> , 89 Wn.2d 1002 (1977)..... | 30 |
| <u>State v. Jordan</u> , 30 Wn. App. 335, 633 P.2d 890, <u>review denied</u> , 96 Wn.2d 1017 (1981)..... | 30 |
| <u>State v. Lee</u> , 147 Wn. App. 912, 199 P.3d 445 (2008), <u>review denied</u> , 166 Wn.2d 1016 (2009)..... | 14 |
| <u>State v. McCord</u> , 19 Wn. App. 250, 576 P.2d 892 (1978)..... | 21, 22 |
| <u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999)..... | 12, 13 |
| <u>State v. Mercer</u> , 45 Wn. App. 769, 727 P.2d 676 (1986)..... | 15 |
| <u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003)..... | 29, 31 |
| <u>State v. Pressley</u> , 64 Wn. App. 591, 825 P.2d 749 (1992)..... | 14, 15 |
| <u>State v. Randall</u> , 73 Wn. App. 225, 868 P.2d 207 (1994)..... | 22 |
| <u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004)..... | 12 |

| | |
|---|------------|
| <u>State v. Rodriguez</u> , 20 Wn. App. 876, 582 P.2d 904 (1978)..... | 31 |
| <u>State v. Shoemaker</u> , 85 Wn.2d 207, 533 P.2d 123 (1975)..... | 29 |
| <u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990)..... | 30, 31 |
| <u>State v. Sondergaard</u> , 86 Wn. App. 656, 938 P.2d 351 (1997), <u>review denied</u> , 133 Wn.2d 1030 (1998)..... | 30 |
| <u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999)..... | 19 |
| <u>State v. Thierry</u> , 60 Wn. App. 445, 803 P.2d 844 (1991)..... | 22 |
| <u>State v. Thornton</u> , 41 Wn. App. 506, 705 P.2d 271, <u>review denied</u> , 104 Wn.2d 1022 (1985)..... | 22 |
| <u>State v. Wakeley</u> , 29 Wn. App. 238, 628 P.2d 835, <u>review denied</u> , 95 Wn.2d 1032 (1981)..... | 23 |
| <u>State v. Wheeler</u> , 108 Wn.2d 230, 737 P.2d 1005 (1987)..... | 20, 21, 23 |
| <u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984)..... | 22 |

Constitutional Provisions

Federal:

U.S. Const. amend. IV 13

Washington State:

Const. art. I, § 7..... 13

Statutes

Washington State:

RCW 9.41.010..... 11

Rules and Regulations

Washington State:

CrR 3.5..... 2

CrR 3.6..... 2

A. ISSUES PRESENTED

1. Whether the trial court's decision admitting evidence obtained pursuant to the seizure of the defendant should be affirmed where the seizure was based on articulable suspicion that the defendant was involved in criminal activity, and the scope of the seizure was reasonable and justified given the nature of the suspected crime and the significant risk it posed to officers and the public.

2. Whether the trial court's decision admitting evidence obtained from a consensual search of the defendant's pockets should be affirmed where, considering the totality of the circumstances, there is clear and convincing evidence that the defendant's consent was given freely and voluntarily.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Juvenile Respondent Dailone Brooks-Harris was charged by Information with Unlawful Possession of a Firearm in the First Degree. CP 50-53. The case proceeded by way of a bench trial. The parties agreed that the State could present evidence relevant

for CrR 3.5 and 3.6 motions contemporaneously with the trial evidence.

In his CrR 3.6 motion, Brooks-Harris argued that King County Sheriff's deputies unlawfully detained him and that Brooks-Harris' subsequent consent to search his pockets was invalid. CP 2-22. The trial court denied Brooks-Harris' motion to suppress and found Brooks-Harris guilty as charged. RP 210. The court imposed a standard range disposition. RP 221.

2. SUBSTANTIVE FACTS

Christopher Walker is a Federal Way Police Officer. RP 9. He has been a law enforcement officer for nearly 20 years. RP 9-10. He has worked in multiple jurisdictions, including Washington and Alaska. RP 9-10. Walker has been assigned to the Special Investigations Unit at the Federal Way Police Department since 2005, where he is assigned to a pro-active unit that investigates narcotics and gang investigations. RP 10. Over the course of his career, Walker has regularly observed and contacted individuals who were illegally carrying concealed firearms. RP 11-12.

Walker is also a certified firearms instructor. RP 12. He has a concealed weapons permit and has carried a concealed firearm

while off-duty for the past 20 years. RP 11-18. Walker has carried concealed firearms in body holsters as well as loose inside the pockets of his clothing. RP 11. Walker is very familiar with how a firearm appears beneath clothing, and knows that firearms concealed in such a way generally leave tell-tale "prints" on the outside of clothing. RP 12-13.

The City of Kent hosts an annual summer street festival called Cornucopia Days. RP 14, 33-34, 70. Cornucopia Days attracts extremely large crowds and is popular with teens and young adults. RP 70, 112. It has also been the scene of significant gang violence, including fights, weapons offenses, and a gang-related homicide two years ago at a local Arby's restaurant located one block east of the Kent Transit Center. RP 15, 35, 112-13.

In the past, the violence associated with Cornucopia Days has spilled over into the Kent Transit Center. RP 15, 112-13. As a responsive measure, the City of Kent receives support and specialized assistance from King County law enforcement agencies during Cornucopia Days. RP 14, 35, 70-71.

On July 8, 2011, Walker was assisting the Kent Police Department during Cornucopia Days. RP 14-15. Walker was assigned to a team of other officers from various King County law

agencies. RP 15-16. The team patrolled an area in downtown Kent approximately the size of one city block. RP 16. All officers were in full uniform. RP 16. The weather was warm and Walker noted that people were wearing shorts and short sleeved shirts. RP 17.

At approximately 9:30 p.m., the festivities began to wind down and people migrated to the Kent Transit Center to take buses out of the area. RP 17. Walker and other officers proceeded to the transit center and conducted foot patrol there. RP 17. As he patrolled, Walker observed an unknown, juvenile male (later identified as Brooks-Harris) walking through the transit center. RP 18. Walker noticed that Brooks-Harris appeared well under the age of 21. RP 19. Brooks-Harris stood out because he was wearing a heavy black coat, despite the warm weather. RP 18.

When Brooks-Harris neared, Walker could see that his coat was unzipped. RP 18. As Brooks-Harris walked, Walker noted that his right arm swung freely while his left forearm was pressed against the left side of his coat, as if holding something heavy in place. RP 18-19. The pressure from Brooks-Harris' arm caused the fabric of the coat to press up against an object inside, leaving a distinct print on the outside of the pocket. RP 18-19. The print was

that of a rigid object, approximately six inches in length, lying at the bottom of the pocket, parallel to the ground. RP 18-19, 26. The print appeared to Walker to be that of a handgun carried loose inside the pocket. RP 18-19.

Before Walker could speak to him, Brooks-Harris joined a group of four or five other young males and they all began jaywalking across the street. RP 20. Brooks-Harris took one step off of the curb, but then turned and looked back at Walker and the other uniformed police officers. RP 20. Brooks-Harris stepped back onto the sidewalk, turned, and walked approximately 75 yards to the nearest crosswalk and lawfully crossed there. RP 20. When Brooks-Harris reached the other side of the street, he rejoined his friends who had illegally crossed and walked down the street and out of Walker's view. RP 20.

Approximately 20 minutes later, Walker saw Brooks-Harris return to the transit center. RP 21. He moved toward Brooks-Harris, to see if he could still see the object in Brooks-Harris' pocket. RP 21. However, when Brooks-Harris saw Walker, he turned and walked around the bus shelter in an apparent attempt to avoid contact. RP 21. Walker followed Brooks-Harris around the shelter in almost a full circle through the crowd. RP 21. Before

Walker could make contact, Brooks-Harris got in line and boarded the Metro route 169 bus destined for the Renton Transit Center. RP 21-22.

Walker observed an undercover King County Sheriff's Detective (Andrew Schwab) in line to board the same bus. RP 22. When Brooks-Harris boarded the bus, Walker saw that he sat down in the back, U-shaped seating area. Detective Schwab boarded and sat approximately five feet away from him in a center-facing seat on the passenger side of the coach. RP 22. Walker scanned the crowded transit center and located another King County Sheriff's deputy that he recognized. RP 22. He approached the deputy, described Brooks-Harris, and told her that he believed that he was illegally carrying a firearm. RP 22. The deputy indicated she would alert Schwab immediately so that Brooks-Harris could be contacted.

King County Sheriff's Detectives Andrew Schwab and Stephen Johnson testified that they were working at Kent Cornucopia Days on July 8, 2011. RP 33, 69. They were both assigned to undercover Metro duty. RP 33, 70. Throughout the day and into the evening the detectives boarded Metro buses in teams of two and rode the buses from the Kent Transit Center to

various locations. RP 35-36, 71-72. Their goal was to provide security for the Metro drivers, detect any problems or criminal activity on the buses, and safely resolve any such issues.

RP 32-33.

Around 9:45 p.m., Schwab, who was in plain clothes, boarded the route 169 bus destined for the Renton Transit Center. RP 37-38. He sat down in the back in a center-facing seat on the passenger side of the coach. RP 39. Johnson, who was also in plain clothes, boarded separately and sat near the front of the coach. RP 39. Their plan was to ride the coach partially down the Benson Highway before exiting. RP 73-74. The bus was followed by Deputy Paul Schwenn, who planned to pick up the detectives when they de-boarded and transport them back to the Kent Transit Center. RP 73.

Within minutes of boarding, Detective Schwab received a phone call from a fellow officer. RP 40. She told Schwab that the individual seated four seats to Schwab's left might be armed with a handgun. RP 40-41. She also described the individual based on what Officer Walker had told her. RP 40-41. Schwab noticed that Brooks-Harris was surrounded by multiple male associates including David Valentine, Master Lindsey, and Dwayne Walker

(identities unknown at the time). RP 145. Schwab also observed that the back of the coach was very crowded with people leaving Cornucopia Days. RP 41. In light of these circumstances, and in consideration of the fact that he was not wearing a bullet proof vest, Schwab determined that it would be unsafe for him to contact Brooks-Harris at that time to conduct an investigative detention. RP 44-45.

The route 169 bus left the Kent Transit Center. RP 74. At the top of East Hill in Kent, Detective Johnson stood and began to exit the bus as previously planned. RP 74. He looked over at Schwab, but Schwab remained seated. RP 74. Johnson exited alone and the bus pulled away. RP 74. He was picked up moments later by Deputy Schwenn and called Detective Schwab via Nextel radio. RP 76-77.

Back on the route 169 bus, Schwab spoke briefly to Johnson. RP 45. Using improvised code, he communicated with Johnson regarding the information that he had received. RP 43, 75. Johnson then devised a tactical plan to safely contact Brooks-Harris so that they could investigate further. RP 77. He, along with other deputies, determined that the safest approach would be to have officers board the bus and remove Brooks-Harris. RP 77-78.

At the next stop, Detective Jason Escobar, working in plainclothes capacity, boarded the route 169 bus. RP 79. Before sitting down, Detective Escobar briefly advised the Metro driver of the situation and asked that he stop at the next bus stop and open the rear doors only. RP 82, 122. At the next stop, Johnson, Flanagan, Detective Alan Garrison, and Schwenn boarded the bus wearing protective vests with King County Sheriff's Office identifiers. RP 47, 115, 81. Detective Johnson was the first on the bus and he had his weapon drawn. RP 82. He looked to Schwab who pointed to the defendant. RP 82. Johnson approached Brooks-Harris, re-holstered his gun, and placed him in handcuffs. RP 82-83. He then escorted Brooks-Harris off of the bus. Detective Escobar exited the bus. RP 82-84. The other deputies remained on the bus and detained a number of individuals who had been seated with Brooks-Harris. Those individuals had become unruly, and were yelling at officers and attempting to exit the bus. RP 48, 66, 85, 89, 116-18.

Once off the bus, Johnson introduced himself to Brooks-Harris and told him why he was being detained. RP 85. Johnson asked Brooks-Harris if he was carrying a gun. RP 85. Brooks-Harris replied that he did not have a gun. RP 85. Johnson asked

Brooks-Harris if he could search his pockets and Brooks-Harris stated "Sure go ahead." RP 85. Johnson went on to explain that he was not talking about patting Brooks-Harris down, but was asking for his consent to actually put his hands inside Brooks-Harris' pockets to check for a gun. RP 85. The defendant consented a second time, stating, "Go ahead." RP 85-86.

Johnson proceeded to pat down Brooks-Harris' arms and torso. RP 87. He then searched his jacket and pants pockets. RP 87. At the bottom of the pants pockets, Johnson felt a very distinct, hard object that was underneath the pocket. RP 87-88. Johnson asked if Brooks-Harris was wearing a second pair of pants and Brooks-Harris replied that he was wearing basketball shorts under his pants. RP 88. Detective Johnson reached into the pocket of the basketball shorts and located a semi-automatic handgun with a seated magazine. RP 88. Johnson pulled out the handgun and held it up in the air so that the deputies on the bus could see that a firearm had been located. RP 90. Brooks-Harris immediately stated "that's not my gun." RP 88.

Brooks-Harris was placed under arrest. RP 90. After being advised of his rights, he provided a taped statement to Detective Johnson. RP 90-93. In the statement he admitted to possessing

the gun. RP 95. Brooks-Harris also told Johnson that he had prior felony convictions and that he was not permitted to possess firearms. RP 95.

At the time of the incident, Brooks-Harris was 15 years old. RP 131, 145. The gun located in his pocket was determined to be a fully loaded and operable 9mm semi-automatic handgun. RP 52-57, 89. Brooks-Harris was previously convicted of attempted robbery in the second degree, a serious offense under RCW 9.41.010. RP 131, 144-45; Ex. 5-6.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE GUN BECAUSE THE SEIZURE OF BROOKS-HARRIS WAS A LAWFUL INVESTIGATIVE DETENTION.

Brooks-Harris contends that his motion to suppress should have been granted because officers exceeded the scope of an investigative detention and lacked probable cause to arrest him. This argument should be rejected. Walker, and by extension the deputies who seized Brooks-Harris, had reasonable, articulable suspicion that he was illegally carrying a firearm on a crowded Metro bus. CP 48 (Conclusions 1-3). Brooks-Harris was

accompanied onto the bus by at least four other male associates. Given the totality of the circumstances in this particular case, the officers were justified in boarding the bus, handcuffing Brooks-Harris, and removing him from the bus to conduct a brief investigation. The officers' actions were reasonable and did not exceed the scope of a lawful investigative detention.

Brooks-Harris assigns no error to the trial court's conclusion that Officer Walker, and by extension his fellow officers, had reasonable, articulable suspicion that Brooks-Harris was illegally carrying a concealed firearm. As a result, this conclusion of law should be accepted as true and this Court should assume that there was a valid, lawful basis for the investigative detention.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Evidence is substantial if a reasonable person would be convinced that the facts are true. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). Unchallenged findings are verities on appeal. State v. Hill, 123

Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. Mendez, at 214.

- a. The Stop Was Justified At Its Inception Because Officer Walker, And By Extension, His Fellow Officers, Had Reasonable, Articulate Suspicion That Brooks-Harris Was Involved In Criminal Activity.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). An investigative detention is one such exception. Doughty, 170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). It allows officers to briefly seize a person if specific articulable facts, in light of the officers' training and experience, give rise to reasonable suspicion that the person is involved in criminal activity. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

The "fellow officer" rule allows one police officer to conduct an investigative stop based upon another officer's direction. The

officer giving the direction must have facts sufficient to justify the intrusion, but need not convey these facts to the officer who is actually making the contact. United States v. Ramirez, 473 F.3d 1026 (9th Cir. 2007).

When a court evaluates the reasonableness of an investigative detention, it examines the totality of the circumstances known to the officer at the inception of the stop. Glover, 116 Wn.2d at 514. A reasonable suspicion can arise from information that is less reliable than that required to establish probable cause, but reasonable suspicion, like probable cause, is dependent on both the content of the information possessed by the officer and the degree of reliability of the information. Both factors, quantity and quality, are considered in the totality of the circumstances, i.e., the "whole picture" that must be taken into account when evaluating whether the police officer's suspicion of criminal activity is reasonable. State v. Lee, 147 Wn. App. 912, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009).

In addition to information known by officers, the court should consider factors such as an officer's training and experience, the location of the stop, and the conduct of the person detained. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); United

States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Based on an officer's experience and the surrounding circumstances, observation of behavior that could reasonably constitute a crime can be the basis for a legitimate investigative detention. See Pressley, 64 Wn. App. at 597 (officers saw behavior that could reasonably constitute a drug transaction). Although the observed activity must be more consistent with criminal activity than innocent activity, "reasonableness is measured not by exactitudes, but by probabilities." Pressley, at 596 (quoting State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986)). Moreover, an officer is not required to rule out all possibilities of innocent behavior before initiating a brief stop. United States v. Poitier, 818 F.2d 679, 683 n.2 (8th Cir.1987), cert. denied, 484 U.S. 1006, 108 S. Ct. 700, 98 L. Ed. 2d 651 (1988); United States v. Holland, 510 F.2d 453 (9th Cir.1975), cert. denied, 422 U.S. 1010, 95 S. Ct. 2634, 45 L. Ed. 2d 674 (1975); State v. Anderson, 51 Wn. App. 775, 755 P.2d 191 (1988).

Brooks-Harris contends that Officer Walker and his fellow officers lacked probable cause to arrest. He does not contest the trial court's conclusion that Walker, and by extension his fellow officers, had reasonable, articulable suspicion that Brooks-Harris

was illegally armed with a firearm. CP 43-49. Officer Walker, a seasoned law enforcement officer and firearms instructor, was patrolling a high-crime event when he initially observed the print of what appeared to be a firearm in Brooks-Harris' jacket pocket. He also observed that Brooks-Harris appeared young, and was wearing clothing that was inconsistent with the weather. In addition, Walker noted that Brooks-Harris was making substantial efforts to avoid contact with law enforcement. Considering the totality of the circumstances, Walker and his fellow officers had a sufficient basis to stop Brooks-Harris because they had articulable suspicion that he was unlawfully possessing a firearm.

Walker has been a law enforcement officer for almost 20 years. He is very familiar with the way firearms appear when partially concealed beneath various articles of clothing. In Walker's experience, people who are attempting to conceal firearms often wear heavy, bulky clothing and avoid contact with law enforcement. The trial court found Officer Walker's testimony to be credible. CP 48.

Based on his training and experience, Walker reasonably believed that the object in Brooks-Harris' pocket was a firearm. Moreover, Brooks-Harris' behavior was consistent with this

premise- the object appeared to be heavy so he pressed it to his side to hold it in place as he walked, and retreated each time Officer Walker (a law enforcement officer in full uniform) approached him. These specific and articulable facts, taken together with rational inferences and when considered in light of Walker's wealth of experience, provided a lawful basis for an investigative detention.

Brooks-Harris argues that the trial court erred by finding that the left, front pocket of Brooks-Harris' coat was sagging under the weight of a heavy object. CP 45 (Finding of Fact 10) and CP 48 (Conclusion of the law referring to "the sagging of the heavy object inside Respondent's jacket"). Brooks-Harris offers no support for this assignment of error other than the contention that Walker did not explicitly testify that the pocket was "sagging." Brief of Appellant 17. This finding is not only supported by substantial evidence, but Brooks-Harris waived any objection to the finding when he proposed it at a hearing for entry of findings following trial. Supp CP__ (sub 77B, Order Supplementing Clerk's Papers- Respondent's Proposed Findings of Fact).

Walker testified that he could see "a hard object" "in the bottom" of Brooks-Harris' left pocket. RP 18. He also testified that

the object was rigid and parallel to the ground, and that Brooks-Harris was holding his left arm against the coat because “if you don’t do that it will swing, the heavy object will swing...” RP 19, 26 (referring to the “heavy hard object” in Brooks-Harris’ pocket).

Additionally, multiple witnesses testified regarding the weight of firearms in general, as well as the particular handgun possessed by Brooks-Harris. Detective Schwab estimated that the firearm taken from Brooks-Harris weighed “a little over a pound” with an empty chamber. RP 50. Walker testified that a full magazine will contribute to the weight of a firearm. RP 11. Detective Escobar testified that the firearm was loaded with a full magazine. RP 123.

Based on the numerous references in the record to the heavy, hard object that caused the fabric of Brooks-Harris’ coat to print, and the testimony as to the actual weight of the handgun in question, a reasonable person could certainly conclude that sufficient evidence exists to support the contested findings.

Furthermore, even if the trial court erred by finding that Brooks-Harris’ coat was “sagging under the weight of a heavy object,” the defendant’s claim of error is precluded by the invited error doctrine.

The invited error doctrine prohibits a party from setting up an error in the trial court and then raising it on appeal. In re Personal Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); State v. Studd, 137 Wn.2d 533, 552, 973 P.2d 1049 (1999). After trial, the defendant and the State submitted proposed findings of fact. Those submitted by Brooks-Harris included a proposed finding which read, "Because Brooks-Harris's left arm was pressed up against the coat's left pocket, the left coat pocket appeared to sag from the weight of a heavy object inside the pocket," "the rigid object caused the pocket to sag and created a print on the outside of the coat." Supp CP__ (sub 77B, Order Supplementing Clerk's Papers- Respondent's Proposed Findings of Fact 29 and 33, pg 3). If this Court does not find that substantial evidence supports the finding, it should disregard the defendant's assignment of error under the invited error doctrine because the very finding that Brooks-Harris now contests is one that he himself proposed to the trial court.

- b. The Scope Of The Investigative Detention Conducted By Detective Johnson Was Reasonable Given The Nature Of The Suspected Crime And The Significant Risk The Situation Posed To Officers And The Public.

Brooks-Harris contends that the trial court erred by concluding that officers did not exceed the permissible scope of an investigative detention. He is mistaken. In light of the particular circumstances here, Johnson's actions were reasonable and within the scope of a lawful investigative detention.

There is no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest. Gallegos v. City of Los Angeles, 308 F.3d 987, 991 (9th Cir.2002); State v. Belieu, 112 Wn.2d 587, 599, 773 P.2d 46 (1989). Evaluating "whether the police action constituted a Terry stop or an arrest is a fact-specific inquiry based on the totality of the circumstances." United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir.1996). In particular, the court must consider the intrusiveness of the detention and "whether the method used by the police was reasonable given the particular circumstances." Gallegos, 308 F.3d at 991; State v. Wheeler, 108

Wn.2d 230, 737 P.2d 1005 (1987). Other factors in evaluating whether the intrusion is so unreasonable that it cannot be supported by reasonable suspicion are: (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the duration of the stop. Belieu, 112 Wn.2d at 595-96. Reasonableness is measured from the perspective of a reasonable officer at the time, and not with 20/20 hindsight. Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396, 397.

In addition, a higher level of police intrusion is allowed for a greater risk and a more violent crime than would be acceptable for a lesser crime. State v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002). "Courts are reluctant to substitute their judgment for that of police officers in the field." State v. Belieu, 112 Wn.2d at 601. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not. State v. McCord, 19 Wn. App. 250, 253, 576 P.2d 892 (1978). A violent felony crime or one

involving a firearm provides an officer with more leeway to act than does a gross misdemeanor. State v. Randall, 73 Wn. App. 225, 229-30, 868 P.2d 207 (1994); State v. Thierry, 60 Wn. App. 445, 803 P.2d 844 (1991); McCord, 19 Wn. App. at 253.

While not typically part of an investigative detention, drawn guns and felony stop procedures do not automatically convert a Terry stop into an arrest. State v. Belieu, 112 Wn.2d 598-99; State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). Rather, such actions will be upheld when the specific information known to officers reasonably makes them fear for their safety or the safety of others. Belieu, 112 Wn.2d at 597. The decision to draw a gun must be neither arbitrary nor for the purpose of harassment. Id. at 602. Among the circumstances that courts must look at are the nature of the crime under investigation and the location of the stop. State v. Thornton, 41 Wn. App. 506, 512, 705 P.2d 271, review denied, 104 Wn.2d 1022 (1985).

Similarly, handcuffing a defendant does not automatically transform an investigative detention into a custodial arrest. See Gallegos, 308 F.3d at 990 (detention did not exceed scope of investigatory stop where police ordered man out of truck at gunpoint, handcuffed him, and placed him on back of police car and

after 45 minutes learned he was not the right person); United States v. Buffington, 815 F.2d 1292, 1300 (9th Cir.1987) (no arrest when defendants were "forced from their car and made to lie down on wet pavement at gunpoint"); United States v. Taylor, 716 F.2d 701 (9th Cir.1983) (no arrest when suspect was stopped at gunpoint, ordered to lie face down in a ditch and handcuffed); United States v. Jacob, 715 F.2d 1343, 1345-46 (9th Cir.1983) (no arrest when suspect was removed from car at gunpoint and ordered to lie on ground); United States v. Bautista, 684 F.2d 1286, 1289-90 (9th Cir.1982) (handcuffing suspect did not convert valid Terry stop into an arrest); Belieu, 112 Wn.2d 587 (full felony stop procedure which included handcuffing); State v. Wheeler, 108 Wn.2d 230, 737 P.2d 1005 (1987) (police may handcuff a suspect detained pursuant to an investigative stop before transporting him in a police car); State v. Wakeley, 29 Wn. App. 238, 243 n.1, 628 P.2d 835, review denied, 95 Wn.2d 1032 (1981) (in appropriate cases handcuffing may be reasonable as a corollary of the lawful stop).

Here, officers did not exceed the permissible scope of a lawful investigative detention. On the contrary, the seizure was

reasonable and appropriate in light of the circumstances known to the deputies at the time the stop was conducted.

Metro detectives acted pursuant to a fellow law enforcement officer's suspicion that Brooks-Harris was unlawfully carrying a concealed firearm. Detective Schwab was the lone officer on the bus with Brooks-Harris when this information became available. Schwab saw that Brooks-Harris was accompanied by several male acquaintances and that the bus was crowded with festival-goers. Schwab was not wearing a protective vest and he quickly decided that it would be "a fool's errand" for him to attempt to contact Brooks-Harris alone. RP 44-45.

Working collectively, despite Schwab's inability to communicate freely, detectives evaluated what little information they had and swiftly developed a plan that was consistent with their training and experience as specialized Metro detectives. Their primary goal was their own safety, as well as the safety of the other bus passengers. RP 37, 44, 45-46, 79-82, 84-85, 114-15

In light of the significant public safety risk posed in this situation, Detective Johnson was justified in gathering additional officers, donning protective gear, and approaching Brooks-Harris with his weapon drawn. The use of a drawn weapon was

reasonable and necessary to protect officers and passengers in the event that the defendant reached for his firearm, and to avoid any potentially dangerous confrontations with other passengers.

The detention was extremely brief and Johnson was nothing but respectful throughout the interaction. Johnson kept his gun drawn only long enough to secure Brooks-Harris' hands and remove him from the bus. Once he and Brooks-Harris were safely off the bus, Johnson introduced himself, told Brooks-Harris why they were contacting him, and asked for his consent to search his pockets for a weapon. This was not a prolonged seizure. It was a brief and reasonable investigative detention that addressed the purpose for the stop while ensuring the safety of all involved.

Brooks-Harris suggests that Johnson's act of placing him in handcuffs converted the investigative detention into an arrest because he made no furtive movements during the brief bus ride and he was cooperative when contacted by police. Even if true, these two facts cannot be viewed in isolation. This was an investigative stop of a suspected armed juvenile on a crowded bus. Officers reasonably sensed potential danger and acted quickly, in the least intrusive way possible given the circumstances. There is no evidence that they acted arbitrarily or to harass Brooks-Harris.

Brooks-Harris points to State v. Belieu, 112 Wn.2d at 597-98, as instructive here. The State agrees. In that case, officers stopped a vehicle that they believed might have been connected to a string of burglaries where weapons had been stolen. The state supreme court held that officers had reason to believe that the suspects might be armed based on this fact, and were justified in conducting the investigative stop with their weapons drawn. Id. at 603. The court held that the police had a specific and reasonable fear that the suspects were armed and were justified in taking additional safety precautions. Id. at 605.

Brooks-Harris erroneously argues that no similar set of circumstances justified deputies' actions in the present case. He points to the fact that "Brooks-Harris was seated in the rear corner of a safe, well-lit Metro bus filled with passengers" in support of his argument. This argument is without merit primarily because Brooks-Harris has accepted the trial court's finding that officers had reasonable articulable suspicion that he was illegally carrying a firearm. Suspicion concerning an armed teenager would likely justify the use of drawn weapons and handcuffs under a number of conceivable circumstances, including those present here.

Moreover, Brooks-Harris' claim that the bus was made safer by virtue of the fact that it was filled with passengers is meritless. Detectives testified that the crowded bus actually escalated the danger, not only for themselves but also for everyone around them. Indeed, the chaos that ensued while detectives escorted Brooks-Harris off the bus is very telling. RP 66-67, 89, 117-18. A Metro bus is a confined space, and when multiple individuals become hostile and agitated in such a space, danger is elevated for everyone on board, regardless of whether the bus is well-lit, or not.

Undoubtedly, detectives may have taken a much different course of action if the suspected crime was a misdemeanor alcohol offense, or if Brooks-Harris had not been on a crowded Metro bus, with at least four other male associates. But given the circumstances, their actions were entirely reasonable. The scope of the investigative detention was reasonable and appropriate under the totality of circumstances and did not convert the seizure to an arrest.

2. CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, BROOKS-HARRIS' CONSENT TO SEARCH HIS POCKETS WAS GIVEN FREELY AND VOLUNTARILY.

Brooks-Harris next argues that, even if he was lawfully seized, he did not voluntarily consent to a search of his person. This argument must fail. Detective Johnson did not threaten or coerce Brooks-Harris into consenting to a search of his pockets. On the contrary, Johnson made every effort to ensure that Brooks-Harris understood the nature and scope of his request for consent and the defendant's words and actions indicated that this was indeed the case. Considering the totality of the circumstances, Brooks-Harris' consent to search inside of his pockets was given freely and voluntarily.

Brooks-Harris argues that his consent was involuntary because prior to the search he was not advised of Miranda rights or his right to refuse consent and because he was seized at the time when he gave consent. This argument must fail because it ignores the totality of circumstances surrounding Brooks-Harris' consent and instead asks this Court to make a determination based on particular factors viewed in total isolation. This is clearly an incorrect application of the law as cited by both parties. While the

facts cited by defense are certainly relevant, they do not necessarily preclude a finding of voluntariness. Instead all relevant factors must be viewed in light of the totality of the circumstances surrounding the consent. Under the totality of the circumstances present here, Brooks-Harris' consent was voluntary.

A warrantless search is constitutional when based on valid consent. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975). Consent to search will be upheld when it is given freely and voluntarily. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). When the character of the consent is challenged, the State must prove by clear and convincing evidence that the individual consented freely and voluntarily, not as a result of duress or coercion. Id. Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

Whether consent was voluntary is a question of fact to be determined from the totality of the circumstances. O'Neill, 148 Wn.2d at 588 (citing State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). Among the factors considered in a "totality of circumstances" analysis are whether Miranda warnings

were given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person had been advised of his or her right to refuse consent.

State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

The court may also consider any other relevant factors, such as whether the person had been cooperating or refusing prior to giving consent, express or implied claims of authority to search, police deception as to identity or purpose, whether the person was under the influence of drugs or intoxicants, any repeated and prolonged interrogation, physical or mental coercion like the deprivation of food or sleep, and whether law enforcement had to repeatedly ask for consent. State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333, review denied, 115 Wn.2d 1009 (1990); State v. Sondergaard, 86 Wn. App. 656, 660-61, 938 P.2d 351 (1997), review denied, 133 Wn.2d 1030 (1998); State v. Johnson, 16 Wn. App. 899, 903, 559 P.2d 1380, review denied, 89 Wn.2d 1002 (1977).

Although knowledge of the right to refuse consent is relevant, it is not necessary. State v. Jordan, 30 Wn. App. 335, 339, 633 P.2d 890, review denied, 96 Wn.2d 1017 (1981) (citing United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d

598 (1976)). Miranda warnings are not a prerequisite to a voluntary consent. State v. Rodriguez, 20 Wn. App. 876, 880, 582 P.2d 904 (1978). Similarly, the fact that an individual is in the custody of officers does not mean that consent was involuntary. State v. Cole, 31 Wn. App. 501, 504, 643 P.2d 675 (1982). The various factors must be weighed against each other and no single factor is dispositive. State v. Smith, 115 Wn.2d at 789. O'Neill, 148 Wn.2d at 591.

Here, the record provides ample support for the trial court's conclusion that Brooks-Harris voluntarily consented to Detective Johnson's request to search his pockets for weapons. After handcuffing and removing Brooks-Harris from the bus, Johnson, who was wearing plain clothes other than a protective vest, walked Brooks-Harris approximately ten feet away from the bus. The other detectives remained on the bus, save for Detective Escobar, who stood nearby in plain clothes. Neither deputy had their guns drawn or trained on Brooks-Harris nor was there any threat of force if Brooks-Harris did not consent.

Johnson was cordial and explicit in his brief interaction with the defendant. He introduced himself and told Brooks-Harris why he had been stopped. Johnson then asked for permission to

search inside of Brooks-Harris' pockets for a gun. Brooks-Harris responded "Sure go ahead." Rather than beginning his search, Johnson reiterated his request a second time, explaining to Brooks-Harris that he was not merely asking for permission to pat down the exterior of the defendant's clothing but rather that he was asking for permission to physically reach inside of Brooks-Harris' pockets to search for a gun. Brooks-Harris again consented, stating "Go ahead." During a hearing on the defendant's motion to suppress, Brooks-Harris testified. He confirmed that Johnson had asked him for permission to search inside his pockets and stated that his response to Johnson had been "Go ahead, you're going to do it anyways."

The circumstances here clearly indicated that Brooks-Harris was not threatened, explicitly or implicitly, into consenting to the search of his pockets. Johnson never deceived Brooks-Harris about the purpose for his request, nor did he threaten to arrest him or obtain a search warrant if Brooks-Harris withheld his consent to a search. There is no evidence that Johnson raised his voice or

pressured Brooks-Harris. In fact, quite the opposite is true.

Johnson was nothing but respectful, and in response Brooks-Harris was entirely cooperative. This was simply not the coercive "do this or else" interaction that is prohibited by law.

The defendant argues that Brooks-Harris' youth is a factor that "militates in favor of a finding of involuntariness." Brief of Appellant 20. Although Brooks-Harris is a juvenile, he is certainly not naïve. At the time this offense was committed, the defendant was on a deferred disposition for Attempted Robbery in the Second Degree, Assault in the Fourth Degree, and Criminal Trespass in the First Degree. Ex. 6. He was arrested in association with those crimes on February 11, 2011. Ex. 5 (Information). At that time, Brooks-Harris stated that he understood his Miranda rights and that he wanted to waive those rights and speak to officers. Ex. 5 (Certification for Determination of Probable Cause page 2). Brooks-Harris was not unfamiliar with his rights, therefore the fact that Johnson did not read him Miranda warnings prior to obtaining consent in this particular instance should not be afforded a great deal of weight.

Likewise, there is no indication that Brooks-Harris is anything but an intelligent, highly-functioning individual. He testified at trial that he had no idea why he was being stopped on the bus, but then moments later indicated that he lied about having a gun on him because he was "scared." RP 137, 139, 148. There can be no doubt that Brooks-Harris understood Johnson's request. The fact that he is sixteen years old should not alone be dispositive.

In sum, there is simply no evidence, including the defendant's own testimony, to suggest that Johnson threatened or coerced Brooks-Harris into consenting to a search of his pockets. On the contrary, the State demonstrated by clear and convincing evidence that, considering the totality of the circumstances, Brooks-Harris voluntarily consented to Johnson's request to search his pockets. Consequently, the trial court properly denied the defendant's motion to suppress the evidence obtained as a result of a valid consent search.

D. CONCLUSION

For all of the foregoing reasons, the State asks this court to affirm Brooks-Harris' convictions.

DATED this 29th day of August, 2012.

Respectfully submitted,

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