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DIVISION II

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COA No. 46771-2-II

STATE OF WASHINGTON

BY _____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY

The Honorable Anne Hirsch

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. REPLY ARGUMENT

1. THE PHOTOMONTAGE IDENTIFICATIONS AND SUBSEQUENT IN-COURT IDENTIFICATIONS MADE BY THE BURGLARY COMPLAINANT WERE THE FRUIT OF AN ILLEGAL SEIZURE.

Prior to trial, Mr. Wilson moved by CrR 3.6 motion to suppress the fruits of his arrest, specifically the photomontage identifications, and the complainant's subsequent in-court identifications. CP 8-10, 11-19, 20-21, 22-25. The prosecutor argued that Mr. Wilson was not "seized" when Officer Jordan ran his name for warrants, and the court agreed, and denied Mr. Wilson's CrR 3.6 motion. CP 8-10, 11-19, 26-29 (State's memorandum in opposition to motion to suppress); CP 75-77 (Findings of fact and conclusions of law) .

Mr. Wilson was illegally seized under the totality of the circumstances. The Respondent's briefing fails to discuss or cite State v. Brown, 154 Wn.2d 787, 788-89, 796-98 and n. 7, 117 P.3d 336 (2005). Although Brown involved a police officer running a warrants check on a vehicle passenger, the Brown case makes clear that requesting a person's name – not necessarily their identification card -- in order to run a warrant check is an detention that runs afoul of the prohibition against seizures without

reasonable suspicion, if the same is lacking. Brown, 154 Wn.2d at 797–98.

Importantly, the State misdescribes the trial court’s CrR 3.6 findings. The State urges that the police did not do anything to make a reasonable person feel as if he was free to leave. BOR, at pp. 12-13. In support of this argument the Respondent states that the officer was writing Ms. Legendre a citation for pedestrian interference, and “[a]s he was doing so, he asked Wilson for his name as a witness[.]” BOR, at p. 7.

However, the trial court’s finding is that “when the defendant interjected himself into the conversation, he (Officer Jordan) asked the defendant for his name. CP 76(finding of Fact 8). As Mr. Wilson noted in his Appellant’s Opening Brief, he argues that he was subjected to a Terry seizure on the basis of the facts found by the trial court. AOB, at p. 9-10 (“Looking solely to the facts found by the trial court, a reasonable person in his position, as a result of the officer’s conduct and restrictions on Mr. Wilson’s behavior, would not feel free to walk away, even during the earlier junctures in the encounter.”) (citing State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996) (whether facts equal a “seizure” is question of law, reviewed de novo)). During that time Mr. Wilson would certainly

not feel free to leave the scene while the officer was performing an apparent duty. See State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (telling citizen to wait is a seizure). The arrival of Sergeant Renschler during that same time also contributed to a seizure. State v. Young, 135 Wn.2d at 512 (arrival and interaction by additional officers may ripen social contact into detention). Here, under all the circumstances, Mr. Wilson would feel that he could not walk away. A Fourth Amendment seizure was effected. U.S. Const. amend. 4. This Court should reverse as argued.

**2. THE COURT ERRONEOUSLY DENIED
THE DEFENSE JURY INSTRUCTION
ON EYEWITNESS IDENTIFICATION.**

Respondent contends that the jury instruction proposed by the defense was properly refused by the trial court as a comment on the evidence. BOR, at pp. 17-18. However, Mr. Wilson's argument was and is that, in light of recent caselaw noting the lessening of concern in Washington that instructions in this area are improper comments on the evidence, and in light of recent proposed instructions that indeed caution juries regarding the strong and careful examination they must give to claimed eyewitness identifications, the trial court ruled on an improper basis that the instruction in question was categorically objectionable

based on the sole consideration that it appeared (at first blush only) to entirely be a comment, and failed to exercise multi-factor discretion in the circumstances of the case.

In the case of State v. Allen, 176 Wn. 2d 611, 615 and n. 1, 294 P.3d 679 (2013), the Court concluded that there was, in that case, no Due Process violation in the trial court's refusal to give the proposed instruction(s), and the lead opinion determined that the instruction is not constitutionally required in most if not all trial circumstances. State v. Allen, 176 Wn. 2d at 621. However, the Court, although finding that there was also no abuse of discretion in refusing the defense's proposed instructions, made clear that a trial court has discretion to accept an instruction regarding factors pointing to the fallibility of identifications. Allen, 176 Wn. 2d at 615 n. 1. The lead opinion stated that although the case law did not support such an instruction as being constitutionally required,

Neither does it support a rigid prohibition against the giving of a cautionary cross-racial identification instruction. Indeed, such a prohibition would be inconsistent with the abuse of discretion standard[.]

Allen, 176 Wn.2d at 624. Given Allen, a court should consider the precise question of a defense instruction on eyewitness identifications in general, rather than the specific "cross-racial"

identification instruction at issue in Allen. Although the adoption occurred later, in December of 2014, the Washington State Supreme Court Committee on Jury Instructions adopted the following instruction predicated specifically on State v. Allen, and made clear that trial courts have discretion to reject -- or accept -- the instruction.

WPIC 6.52 Eyewitness Identification Testimony

Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:

- The witness's capacity for observation, recall, and identification;
- The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
- The emotional state of the witness at the time of the observation;
- The witness's ability, following the observation, to provide a description of the perpetrator of the act;
- [The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]
- The period of time between the alleged criminal act and the witness's identification;
- The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
- Any other factor relevant to this question.

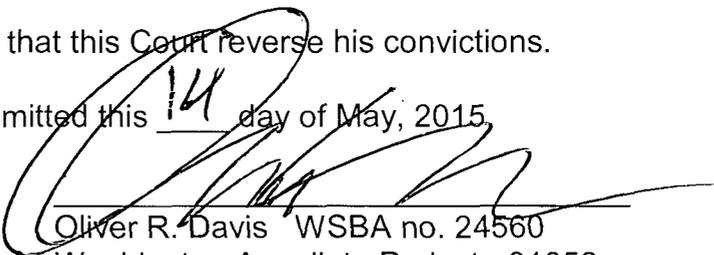
11 Washington Practice Pattern, Jury Instructions, Criminal - WPIC 6.52 (3d Ed) (adopted December 2014).

However, Allen had been decided and the Allen Court clearly rejected the bases upon which the trial court below concluded that the defense proposed instruction was impermissible. See also Allen, 176 Wn.2d at 624 (Chambers, J., concurring in result, joined by Fairhurst, J.) (writing in order to “stress that [the Court has] long rejected the contention that such instructions function as unconstitutional comments on the evidence) (citing State v. Carothers, 84 Wn.2d 256, 267–68, 525 P.2d 731 (1974)). In this case, Mr. Wilson was entitled that full and fair consideration be given to the instruction he proposed, and the error in failing to accord it consideration requires reversal. Mr. Wilson’s convictions on counts 1 and 2 should be overturned and a new trial held.

B. CONCLUSION

Based on the foregoing and on the Opening Brief, Nathaniel Forest Wilson requests that this Court reverse his convictions.

Respectfully submitted this 14 day of May, 2015,



Oliver R. Davis WSBA no. 24560
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 46771-2-II
v.)	
)	
NATHANIEL WILSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF MAY, 2015.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711