

NO. 45400-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MAKSIM BURICH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-03809-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's findings of fact support its legal conclusion that police had a reasonable, articulable suspicion to stop defendant pursuant to *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968)?

B. STATEMENT OF THE CASE.

1. Procedure

On October 9, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with burglary in the first degree (Count I), unlawful possession of a firearm in the second degree (Count II), theft of a firearm (Count III), residential burglary (Count IV), and attempted residential burglary (Count V). CP 4–6.

On August 15, 2013, the case proceeded to a bench trial before the Honorable Stanley J. Rumbaugh. Trial began with a CrR 3.5/3.6 hearing in which the court concluded that statements defendant made to police were admissible at trial. 4 RP 58–65¹; CP 189–96 (Conclusion #1).

On September 6, 2013, the court found defendant guilty as charged as to Counts I–IV; and guilty of the lesser included 'criminal trespass in

¹ The verbatim report of proceedings contains eight non-consecutively paginated volumes of transcript. The State will refer to each by volume number followed by RP.

the second degree' as to Count V. 7 RP 2–4; CP 159–177 ("Findings of Fact And Conclusions of Law RE: Bench Trial").

On September 20, 2013, the court sentenced defendant to 70 months total confinement. 8 RP 11–12; CP 137–149.

Defendant timely filed his notice of appeal on September 25, 2013, challenging the trial court's CrR 3.5/3.6 conclusion that his *Terry* stop was justified at its inception. CP 155.

2. Facts

Three Homes Burglarized on October 8, 2012

At approximately 2:20 AM on October 8, 2012, Mr. Martin Blackmer awoke to a stranger leaning through the sliding door of his Fife townhouse. CP 189–96 (F:2); CP 159–77 (F:14).² Mr. Blackmer yelled at the individual who then ran out of the sliding door. 1 RP 68.³ Mr. Blackmer immediately called 911, describing the intruder to police dispatch as a "[s]lender, white male, younger, with a light-colored hooded sweatshirt[.]" 1 RP 68, 4 RP 4.

Shortly after 3:00 AM on October 8, 2012, Ms. Katherine Evans awoke to her dog growling and a slight ticking sound coming from her

² The State will refer to the Findings of Fact and Conclusions of Law by citing to the clerks papers (CP) followed by (F:[# of finding]) and (C:[# of conclusion]). The findings and conclusions for the CrR 3.5/3.6 hearing have been designated as CP 189–96, and the findings and conclusions for the bench trial have been designated as CP 159–77.

³ Because defendant is challenging the outcome of the suppression motion, the State notes that testimony and argument for the CrR 3.5/3.6 hearing ends at 4 RP 58.

backyard. CP 159–77 (F:21); 5 RP 34. Ms. Evans looked out her bedroom window and saw a stranger in her backyard next to the living room window. CP 189–96 (F:3); CP 159–77 (F:22). Ms. Evans made eye contact with the individual, whom she described to police dispatch as a slender, white male with a light gray hoodie and light-colored pants." 1 RP 71; CP 189–96 (F:3). The suspected burglar ran from the house, and Ms. Evans called the police. 5 RP 35.

Mr. Jason Dashnow returned from his October 7, 2012–October 8, 2012 graveyard shift to find that his apartment has been burglarized. CP 189–96 (F:6–8); 5 RP 16. Dr. Dashnow called the police. 5 RP 19. Mr. Dashnow's apartment is located across the street from Mr. Blackmer's townhouse, and 1.5 miles from Ms. Evans residence. CP 159–77 (F: 10, 19).

Police Involvement

Fife Police Officer Jacob Stringfellow responded to the Blackmer residence at 2:26 AM on October 8, 2012. CP 189–96 (F:3).⁴ Mr. Blackmer told Officer Stringfellow that he had fallen asleep on his couch watching television, and woke up to see a "slender, white male, younger, with a light-colored hooded sweatshirt or hoodie" in his living room. 1 RP 68. Officer Stringfellow looked outside and saw a set of footprints going through a grassy area, and observed that the grass was dewy. 1 RP 69.

⁴ There are two separate findings, one following the other, labeled as "Finding of Fact 3." Officer Stringfellow's response occurs in the first of such findings.

At approximately 3:05 AM, Fife Officer Patrick Gilbert was notified of an attempted intrusion into Ms. Evan's residence. 1 RP 10; CP 189-96 (F:5). Police dispatch described the intruder as "an unknown race male, possibly a teen-ager, wearing a light colored hoodie and some jeans" and indicated that the intruder had fled in a westbound direction. 1 RP 11; CP 189-96 (F: 3). Officer Gilbert drove one-half mile Southwest of the reported burglary location and began looking for the intruder in an area known as "Saddle Creek." 1 RP 11, 16.

When Officer Gilbert arrived in Saddle Creek, he added his white take-down lights and alley lights to his headlights to illuminate the scene as much as possible. 1 RP 15. He drove between three and five miles per hour. 1 RP 15; CP 189-96 (F:8). There was no traffic in Saddle Creek when Officer Gilbert arrived, at approximately 3:11 AM. 1 RP 14, 17. As Officer Gilbert rounded a corner in his police vehicle at 3:17 AM, he "saw a red car, lights completely off, headed directly towards [him], and then there was a male inside of the car that matched the individual [he] was looking for." 1 RP 17; CP 189-96 (F:7-10). The red car was driving at less than five miles per hour. 1 RP 18; CP 189-96 (F:7). Officer Gilbert directed his spotlight into the car and observed a "white male, short, brown hair and he was wearing a light-colored hoodie." 1 RP 18; CP 189-96 (F:9). The driver "appeared to be youthful in appearance." 1 RP 18; CP 189-96 (F:9).

The car stopped approximately 30 feet from Officer Gilbert's patrol car, and Officer Gilbert (now outside of his patrol car) ordered the driver to display his hands. 1 RP 19; CP 189-96 (F:11). Officer Gilbert asked for identification, which the driver was unable to provide. 1 RP 20. Officer Gilbert asked the driver to step from the vehicle and placed him in handcuffs for officer safety.⁵ 1 RP 21; CP 189-96 (F:13) Officer Gilbert informed the driver that he was "just being detained, that he was not under arrest; and that [Officer Gilbert] was investigating a crime." 1 RP 21; CP 189-96 (F:13). Officer Gilbert told the driver that he was a burglary suspect. 1 RP 21; CP 189-96 (F:13). The driver identified himself as "Maksim V. Burich," the defendant in the present case. 1 RP 21; CP 189-96 (F:14).

Defendant told Officer Gilbert that his headlights were off because he was lost. 1 RP 23; CP 189-96 (F:16). Defendant allegedly went to a gas station to get a drink and couldn't find his way back to the Motel 6 to meet his friend "Brian." 1 RP 23; CP 189-96 (F:16). From outside the vehicle, Officer Gilbert observed a stereo unit on the front seat passenger floorboard and a rifle behind the driver's seat on the rear passenger floorboard. 1 RP 25; CP 189-96 (F:15). Officer Gilbert performed a records check on defendant's name and learned that he was a convicted

⁵ The amount of time between Officer Gilbert's initial observation of the red vehicle and when he detained defendant in handcuffs was "about one minute." CP 189-96 (F:13).

felon restricted from possessing firearms.⁶ 1 RP 28; CP 189–96 (F:18). Officer Gilbert placed defendant under arrest and read him his *Miranda* rights. 1 RP 28; CP 189–96 (F:18). The defendant was not questioned further by either Officer Gilbert or Officer Stringfellow after being advised of his *Miranda* rights. CP 189–96 (F:18).

C. ARGUMENT.

1. THE TRIAL COURT'S FINDINGS OF FACT SUPPORT ITS LEGAL CONCLUSION THAT OFFICER GILBERT HAD A REASONABLE, ARTICULABLE SUSPICION TO STOP DEFENDANT PURSUANT TO *TERRY v. OHIO*.⁷

- a. Unchallenged findings of fact are verities on appeal.

Unchallenged findings of fact are verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002); *see also* RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.").

Defendant assigns error to only two of the 28 findings of fact at the CrR 3.5/3.6 hearing.⁸ All unchallenged findings of fact are verities on

⁶ Officer Stringfellow arrived on scene at 3:22 AM. CP 189–96 (F:18).

⁷ *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968).

⁸ A complete copy of the court's Findings and Conclusions at the suppression hearing is attached to the end of the State's brief as "Appendix A."

appeal. Included in the unchallenged findings of fact are:

Finding of Fact 1:

That on October 8, 2012, at 2:24 a.m., the Fife Police Department received a phone call from Martin Blackmer of an attempted residential burglary at his residence, which is a townhouse located at 6826 20th Street East in Fife, Washington."

Finding of Fact 7:

That at 3:17 a.m. on October 8, 2012, Officer Gilbert saw a red Mazda driving very slowly with the headlights off at 46th Street East and 67th Avenue East in Fife, Washington.

Finding of Fact 9:

That the driver of the red Mazda was a young white male and he was the only occupant of the car.

And Finding of Fact 10:

That the defendant was the driver of the red Mazda and he was wearing a light grey hoodie.

CP 189-96 (F: 1, 7, 9-10).

- b. Challenged findings of fact are reviewed for substantial evidence.

A trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014); *In re Sego*, 82 Wn.2d 736, 743, 513 P.2d 831 (1973). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the

truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." *Lewis v. State Dept. of Licensing*, 157 Wn.2d 446, 139 P.3d 1078 (2006). "[A]n erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal." *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

Defendant assigns error to Finding of Fact 2 and Finding of Fact 3 of the CrR 3.5/3.6 hearing. Br. App.⁹ at 1. Whether each is supported by substantial evidence is addressed separately below.

i. The only unsupported component of Finding of Fact 2 does not materially affect the conclusion of law defendant challenges on appeal.

Finding of Fact 2 states as follows:

That Mr. Blackmer had seen a young white male wearing a light grey hoodie and a [sic] light grey pants enter his residence through a sliding glass door.

CP 189–96 (F:2).

Finding of Fact 2 contains the following six types of information regarding the burglary suspect's identity: age, race, gender, upper clothing type, upper clothing color, and lower clothing. Substantial evidence

⁹ Brief of Appellant.

supports Finding of Fact 2 in every category except lower clothing. Officer Stringfellow testified that Mr. Blackmer "gave a description of a slender, white male, younger, with a light-colored hooded sweatshirt or what's referred to as a hoodie." 1 RP 68. Officer Stringfellow's testimony confirms Finding of Fact 2 regarding age ("younger" cf. "young"); race ("white" cf. "white"); gender ("male" cf. "male"); upper clothing type ("a hooded sweatshirt" cf. "hoodie"); and upper clothing color ("light grey" cf. "light gray"). *See also* 4 RP 4 (Mr. Blackmer's testimony at suppression hearing).

There is no evidence in the record, however, that Mr. Blackmer saw the suspect's lower clothing.¹⁰ Finding of Fact 2 is thus erroneous as to its claim that Mr. Blackmer "had seen a young white male wearing [...] *light grey pants* [...]." CP 189–96 (F:2) (emphasis added). Nevertheless, this error is insignificant because it does not materially affect the Conclusion of Law defendant challenges on appeal.¹¹ That is, the suspect's lower clothing was never used as a basis for the *Terry* stop. When Officer Gilbert initiated the *Terry* stop, defendant was sitting down in the vehicle and Officer Gilbert was unable to see his pants. 1 RP 40, 51. Because the erroneous component of Finding of Fact 2 does not

¹⁰ Mr. Blackmer testified at trial that "I did not see anything [...] below the chest level." 5 RP 61.

¹¹ Defendant challenges Conclusion of Law 1: "That there were sufficient suspicious circumstances which supported reasonable suspicion to stop the defendant pursuant to a *Terry* or investigatory stop." CP 189–96 (C:1).

materially affect Conclusion of Law 1, the finding is not prejudicial and does not warrant reversal. *See Caldera*, 66 Wn. App. at 551.

ii. The only unsupported component of Finding of Fact 3 does not materially affect the conclusion of law defendant challenges on appeal.

Finding of Fact 3¹² states as follows:

That on October 8, 2012, at approximately 3:00 a.m., Katherine Evans looked out her upstairs bedroom window and saw a young white male with short light brown hair wearing a light grey hoodie and jeans in her back yard next to the living room window. The living room window was below Mrs. Evans' bedroom window.

CP 189–96 (F:3).

Finding of Fact 3 contains the same six categories of identification information as Finding of Fact 2 but adds a seventh: hair color.

Substantial evidence supports Finding of Fact 3 in every category except hair color.

Officer Stringfellow testified that Ms. Evans gave dispatch the following description of the suspect: "a slender, white male with a light gray hoodie and light-colored pants."¹³ 1 RP 71. This testimony supports

¹² There are two separate findings, one following the other, labeled as "Finding of Fact 3." Defendant challenges the second finding.

¹³ Ms. Evans did not testify at the suppression hearing. Ms. Evans' observations exist on the record (of the suppression hearing) in terms of what dispatch reported to the officers, and what the officers remember dispatch reporting.

four of the six parts of identification evidence contained in Finding of Fact 3: race ("white" cf. "white")¹⁴; gender ("male" cf. "male"); upper clothing type: ("hoodie" cf. "hoodie"); and upper clothing color: ("light gray" cf. "light grey").

Officer Stringfellow's written report supports the "age" component of the finding: ("teen-age" cf. "young"). 1 RP 71. And Officer Gilbert's testimony supports the "lower clothing" component of the finding: ("jeans" cf. "jeans"). 1 RP 11.

There was no evidence presented at the suppression hearing, however, that Ms. Evans saw the suspect's hair color.¹⁵ Finding of Fact 3 is thus erroneous as to its claim that Ms. Evans "looked [...] and saw a young white male *with short light brown hair* [...]." CP 189–96 (F:3) (emphasis added). This error does not materially affect the Conclusion of Law defendant challenges on appeal. Officer Gilbert did not rely on the suspect's hair color to initiate his investigatory detention of defendant.

¹⁴ Officer Stringfellow's report did not indicate that Ms. Evans reported the suspect's race. 1 RP 71. The police dispatch notes did not include the suspect's race. 1 RP 72. But the record does not establish that Officer Stringfellow's report or police dispatch would have necessarily included race if Ms. Evans had reported it. Viewing the evidence and inferences in the light most favorable to the State as the prevailing party of the suppression hearing, Officer Stringfellow's independent recollection that Ms. Evans had reported the suspect's race to police dispatch, and that dispatch had then conveyed that information to Officer Stringfellow, is sufficient to support the race component of Finding of Fact 3.

¹⁵ Ms. Evans testified as to the suspect's hair color at trial. 5 RP 34.

Officer Gilbert was not looking for a suspect with any particular hair color but, was looking for "an unknown race male, possibly a teen-ager, wearing a light colored hoodie and some jeans." 1 RP 11. Because the suspect's hair color was not a consideration in Officer Gilbert's decision to initiate a *Terry* stop, the erroneous component of Finding of Fact 3 is not prejudicial and does not warrant reversal. *See Caldera*, 66 Wn. App. at 551.

c. Whether the trial court's findings support its legal conclusions is reviewed *de novo*.

A trial court's denial of a suppression motion is reviewed for whether its findings support its conclusions of law. *State v. Bonds*, 174 Wn. App. 553, 299 P.3d 663, 667 (2013); *see also State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Whether the trial court's findings support its conclusions of law is reviewed *de novo*. *State v. Dancer*, 174 Wn. App. 666, 300 P.3d (2013); *see also State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). "Conclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court." *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993).

- i. **Findings of Fact 1, 2, 3, 7, 9, and 10 support the court's conclusion that there were sufficient suspicious circumstances for Officer Gilbert to stop defendant pursuant to *Terry*.**¹⁶

"[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968). "When a seizure has been effected, it may amount to a custodial arrest, an investigative (*Terry* stop), or an arrest for some other purpose." *State v. Almanza-Guzman*, 94 Wn. App. 563, 566, 972 P.2d 468 (1999). "A brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). A "reasonable" suspicion exists if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Pressley*, 64 Wn. App. 591, 595, 825 P.2d 749 (1992) *quoting Terry* 392 U.S. at 21. "While an inchoate hunch is

¹⁶ Defendant limits his appeal to whether Officer Gilbert had a reasonable articulable suspicion that defendant was involved in criminal activity sufficient to justify a *Terry* stop. Br. App. at 1 (Issues related to assignment of error #1). Defendant does not challenge the reasonableness of the stop or whether the scope of the stop improperly expanded beyond a *Terry* stop. The court addressed the reasonableness of the stop in Conclusions of Law 2 and 3, which defendant does not challenge on appeal. CP 189-96 (C: 2, 3).

insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience." *State v. Sansel*, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). "The officer is not required to ignore that experience." *Id.* at 570–571.

In cases in which an investigatory stop has been found to be unlawful, the circumstances known to officers at the time they initiated an investigatory stop amounted to nothing more substantial than an inarticulate hunch. For example, in *State v. Young*, 167 Wn. App. 922, 275 P.3d 1150 (2012), defendant Young was observed "suspicious[ly]" leaving a Safeway supermarket at 10:45 p.m. without making a purchase. *Id.* at 925. The officer asked Young for identification, which she did not have, and ultimately told Young that she was free to leave. *Id.* at 925. The officer then met with another officer and both decided to confront Young once again—this time behind a closed laundromat business. *Id.* at 926. The officers believed Young was lying about her identity because "the totality of everything was very awkward, very suspicious," "most people don't walk behind a closed business and stand up against the wall," and "[s]he could have been planning on breaking into the place for all I know." *Id.* at 926. The officers ultimately learned that Young had an arrest warrant for a narcotics-related crime and placed her under arrest. *Id.* at 926–27. Division Two held that the investigatory stop was invalid because "there [was] no evidence in the record before us that the officers had any reason to suspect that Young was or would be engaged in criminal

wrongdoing." *Id.* at 931. Moreover, "the State could not articulate a basis for such suspicion during oral argument." *Id.* at 931. And, the court found "no authority holding that 'awkward' behavior, alone, is sufficient to establish reasonable suspicion, let alone probable cause." *Id.* at 932.

Similarly, in *State v. Almanza-Guzman*, 94 Wn. App. 563, 566 972 P.2d 468 (1999), defendant Juan Almanza-Guzman showed his pistol to a "firearms dealer" at a gun show unaware that the dealers were also U.S. border patrol agents. The agents suspected that Guzman was an alien without an alien firearm license, followed him to the parking lot, and commenced an investigatory stop. The agents claimed that the stop was justified because: (1) Guzman's pistol had not been disabled by a procedure required by the gun show's entrance; (2) they believed Guzman was a Mexican national rather than a U.S. citizen because Guzman spoke Spanish; and (3) they knew that Washington State rarely issues permits allowing aliens to carry weapons. *Id.* at 469. Division One found that "these facts alone, without anything more, are insufficient to provide a basis for reasonable suspicion of criminal activity." *Id.* at 567–68. The alleged reasons to detain Guzman consisted of nothing more substantial than an inarticulate hunch.

And, in *State v. Martinez*, 135 Wn. App. 174, 143 P.3d 855 (2006), an officer performed an investigatory stop on defendant Jeremiah Martinez where Martinez was spotted walking "briskly and look[ing] around nervously" in the shadows near parked cars in front of an

apartment building. *Id.* at 177. There were several reports of vehicle prowls in the area but none on the night that defendant was stopped. Division Three held that the stop was unlawful because the officer only had "general suspicions that Mr. Martinez may have been up to no good." *Id.* at 182.

In cases in which an investigatory stop has been found to be lawful, officers have been able to articulate a series of observations which amount to more than an inarticulable hunch. For example, in *State v. Moreno*, 173 Wn. App. 479, 294 P.3d 812 (2013), officers responded to a call of shots fired and a "male wearing [a] white jacket with [a] dark jacket" seen running in a nearby alley. *Id.* at 815–16. After the initial calls of shots fired, information was added that a vehicle was observed leaving the scene. *Id.* at 816. One officer observed a vehicle "moving hurriedly" from a nearby alley and blocked the vehicle with his patrol car to investigate. *Id.* at 816. The officer then shone his spotlight onto the vehicle and observed that the driver was wearing a red shirt in a neighborhood of gang members who claim blue as their gang color. *Id.* at 816. Division Three found that, considering the totality of the circumstances, the investigative stop was permissible:

"[H]ere, officers were essentially responding to a crime in progress. Multiple reports of gunfire had been reported one block away just moments before the stop. [The officer] had considerable experience with gangs in this specific area. He knew the shots came in a Sureño

neighborhood. He saw [the driver] was wearing a red shirt, associated with the rival Norteño gang. He knew people would not be expected to wear red in a Sureño neighborhood. He saw the car hurriedly leaving the alley given the poor alleyway conditions. Given all, [the officer] reasonably believed 'this car is somehow involved or ... they can tell me more about what's happened.' *Id.* at 820.

Similarly, in *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992), an officer articulated observations that amounted to more than a hunch where he observed defendant Carsha Pressley standing next to another young female in an area known for its narcotics transactions and gang activity. Pressley's hands were "chest high" and she "appeared to be pointing to an object in her hand or counting objects in her hand." *Id.* at 593. "The other female was intently looking at the objects in [Pressley's] hand." *Id.* at 593–94. When the officer approached Pressley she exclaimed, "Oh Shit," and immediately closed the hand that contained the objects. *Id.* at 594. Pressley separated from her companion and they walked in different directions. *Id.* at 594. Division One held that the investigative stop was permissible because "while the officer's basis for the stop hovers near the line between sufficient and insufficient grounds for a *Terry* stop, it did amount to more than simply an 'inarticulable hunch.'" *Id.* at 597.

The trial court in the present case entered Conclusion of Law 1, which states as follows:

That there were sufficient suspicious circumstances which supported reasonable suspicion to stop the defendant pursuant to a Terry or investigatory stop.

CP 189–96 (C:1).

Six separate Findings of Fact, when viewed together and in light of the above case law, support Conclusion of Law 1. CP 189–96 (F: 1–3, 7, 9–10). Each is analyzed independently, and then viewed in light of each other, below.

First, according to Finding of Fact 1, the Fife Police Department was notified that someone tried to unlawfully enter Mr. Blackmer's residence:

That on October 8, 2012, at 2:24 a.m., the Fife Police Department received a phone call from Martin Blackmer of an attempted residential burglary at his residence, which is a townhouse located at [...]."

CP 189–96 (F:1). This fact alone distinguishes the present case from those cited by defendant: *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010), and *State v. Diluzio*, 162 Wn. App. 585, 254 P.3d 218 (2011). In *Doughty* and *Diluzio*, officers initiated a *Terry* stop primarily based upon the suspect's presence in a high-crime area. Officers in *Doughty* and *Diluzio* were not responding to a specific crime called in by an identified person; whereas here, Officer Gilbert was responding to a reported burglary by Mr. Blackmer and Ms. Evans.

Second, according to Finding of Fact 2 and Finding of Fact 3, Mr. Blackmer and Ms. Evans were both able to describe the suspect.¹⁷ Mr. Blackmer described the suspect as follows:

That Mr. Blackmer had seen a young white male wearing a light grey hoodie and a [sic] light grey pants enter his residence through a sliding glass door."

CP 189–96 (F:2). Ms. Evans described the subject as follows:

That on October 8, 2012, at approximately 3:00 a.m., Katherine Evans looked out her upstairs bedroom window and saw a young white male with short light brown hair wearing a light grey hoodie and jeans in her back yard next to the living room window. The living room window was below Mrs. Evans' bedroom window.

CP 189–96 (F:3). Police dispatch relayed most of that information to Officer Gilbert, who was not looking for *any* person, but was specifically looking for "an unknown race male, possibly a teen-ager, wearing a light colored hoodie and some jeans." 1 RP 11. Like the officers in *Moreno* (discussed *supra* at p. 16), who responded to a specific description of a suspected shooter, Officer Gilbert responded to a specific description of a suspected burglar. 173 Wn. App. 479.

Third, according to Finding of Fact 7, Officer Gilbert saw a red Mazda driving slowly, with its headlights off, at 3:17 AM, near the scene of the reported burglaries:

That at 3:17 a.m. on October 8, 2012, Officer Gilbert saw a red Mazda driving very slowly with the headlights off at

¹⁷ As discussed *supra*, the unsupported components of these findings were not used by Officer Gilbert as a basis for stopping defendant.

46th Street East and 67th Avenue East in Fife, Washington.

CP 189–96 (F:7). The fact that a vehicle was driving with no headlights on at 3:17 AM is both unusual and unlawful.¹⁸ 1 RP 16. The slow speed of the vehicle—here described as moving "very slowly"—and at the suppression hearing described as less than five miles per hour, is also unusual. Defendant does not rebut the illegality or suspiciousness associated with the vehicle's presentation. Rather, defendant notes that "the State presented no evidence that Mr. Burich was cited for driving without his lights on." Br. App. at 11. The failure to issue a citation, however, does not make lawful that which is not. *See State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007).

Fourth, according to Finding of Fact 9 and Finding of Fact 10, Officer Gilbert saw what the driver of the red Mazda looked like. Finding of Fact 9 states as follows:

That the driver of the red Mazda was a young white male and he was the only occupant of the car.

CP 189–96 (F:9). And Finding of Fact 10 states as follows:

That the defendant was the driver of the red Mazda and he was wearing a light grey hoodie.

CP 189–96 (F:10). Like the suspected burglar, the driver of the red Mazda was also young. The driver was the same gender (male). The driver wore

¹⁸ RCW 46.37.020 requires headlights to be displayed from a half hour after sunset to a half hour before sunrise. Driving at 3:17 AM with no headlights is a traffic violation.

the same upper clothing (a hooded sweatshirt). The driver wore the same *color* of upper clothing as the suspected burglar (gray). Even the shading of the upper clothing was the same (*light gray*).

Viewed together, the above Findings of Fact support that Officer Gilbert had a reasonable suspicion, grounded in specific and articulable facts, that the defendant had been involved in a crime. Unlike the officers in *Young* (discussed *supra* at p. 13), who were unable to articulate a basis for stopping the suspect and instead relied upon the fact that "everything was very awkward [and] suspicious;" here, Officer Gilbert articulated the basis for his *Terry* stop. 167 Wn. App. 922. Officer Gilbert was responding to burglaries that were reported at 2:26 AM and 3:05 AM. At 3:17 AM, Officer Gilbert found someone who was the same gender, age, and wore the same type, color, and shade of upper clothing as the suspect. He observed this, just 12 minutes after the Evans' burglary was reported, and in close proximity to their home. For similar reasons, Officer Gilbert's observations are more substantial than those used improperly in both *Almanza-Guzman* and *Martinez* (discussed *supra* at pp. 14–15) to effectuate investigatory stops. 4 Wn. App. 563; 135 Wn. App. 174. The totality of the circumstances and the facts known to Officer Gilbert gave him a reasonable and articulable suspicion to stop defendant.

ii. Conclusion of Law 1 is supported independently of the decision indicated by the trial judge.

The Findings of Fact and Conclusions of Law were supported by ample evidence, as detailed above. The Court of Appeals can affirm the ruling below based upon the record as a whole. *See State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) *quoting Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985) ("It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge.").

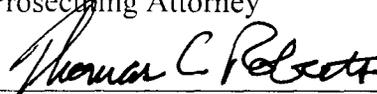
D. CONCLUSION.

The record is clear that Officer Gilbert based his investigatory stop of defendant on specific and articulable facts rather than an inarticulate hunch. Considering these facts, and taking note that Officer Gilbert was

responding to multiple reported burglaries, this Court should affirm the trial court's denial of defendant's motion to suppress.

DATED: July 1, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



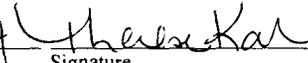
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Chris Bateman
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~ES~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-2-14 
Date Signature

APPENDIX “A”

Findings of Fact and Conclusions of Law

1 2. That Mr. Blackmer had seen a young white male wearing a light grey hoodie and
2 a light grey pants enter his residence through a sliding glass door.

3 3. That at 2:26 a.m. on October 8, 2012, Officer Jake Stringfellow of the Fife Police
4 Department ^{was} dispatched to Mr. Blackmer's townhouse where the ^{officer} office spoke to Mr. Blackmer
5 and then conducted an area check, without success, for the suspect.

6 3. That on October 8, 2012, at approximately 3:00 a.m., Katherine Evans looked out
7 her upstairs bedroom window and saw a young white male with short light brown hair wearing a
8 light grey hoodie and jeans in her back yard next to the living room window. The living room
9 window was below Mrs. Evans' bedroom window.

10 4. That Mrs. Evans' house is located at 6932 42nd Street Court East in Fife,
11 Washington and is 1.5 miles from Mr. Blackmer's townhouse.

12 5. That at 3:05 a.m. on October 8, 2012, Officers Pat Gilbert and Stringfellow went
13 to investigate the possible burglary at the Evans' residence.

14 6. That ^{Gilbert and Stringfellow} the officers drove in the area and conducted an area check for the suspect.
15 ^{near the Evans residence}

16 7. That at 3:17 a.m. on October 8, 2012, Officer Gilbert saw a red Mazda driving
17 very slowly with the headlights off at 46th Street East and 67th Avenue East in Fife, Washington.

18 8. That Officer Gilbert was in a fully marked patrol car and had on his headlights,
19 his alley lights and an overhead spotlight. Upon seeing the red Mazda, Officer Gilbert turned his
20 side spotlight on and used it to highlight the inside of the car.

21 9. That the driver of the red Mazda was a young white male and he was the only
22 occupant of the car.

23 10. That the defendant was the driver of the red Mazda and he was wearing a light
24 grey hoodie.

1 11. That Officer Gilbert verbally ordered the defendant to put his hands out of the
2 driver's window and the defendant did so.

3 12. That the defendant was asked to exit the car by the officer and the defendant did
4 so through the driver's door. The driver's door was left open after the defendant exited the car.

5 13. That about one minute after initially seeing the defendant at 3:17 a.m., Officer
6 Gilbert had handcuffed the defendant, advised the defendant that the officer was investigating a
7 burglary complaint and informed the defendant that he matched the description of the burglary
8 suspect.

9 14. That the defendant gave his name to Officer Gilbert and spelled it for the officer
10 because the defendant did not have a driver's license with him.

11 15. That Officer Gilbert, while he and the defendant were standing next to the red
12 Mazda talking about why the defendant was in the area, looked into the Mazda from outside of
13 the car and saw a stereo unit on the front seat passenger floorboard and a rifle behind the driver's
14 seat on the rear passenger floorboard.

15 16. That the defendant initially told Officer Gilbert, and then later Officer
16 Stringfellow, that he was lost, had gotten a drink, specifically Gatorade, at a Shell station in Fife,
17 Washington, and got lost as he returned to Motel 6 to meet "Brian".

18 17. That Officer Stringfellow arrived at the location of the stop at 3:22 a.m. on
19 October 8, 2012. Officer Stringfellow talked to the defendant while Officer Gilbert ran a
20 record's check on the defendant

21 18. That at 3:25 a.m. on October 8, 2012, Officer Gilbert was informed that the
22 defendant was a convicted felon, based upon a prior burglary conviction. Officer Gilbert then
23 informed the defendant that he was under arrest for unlawful possession of a firearm and he was
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1 advised of his Miranda Rights. The defendant was not questioned further by either Officer
2 Gilbert or Officer Stringfellow after he was advised of his Miranda Rights.

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4 19. That at 3:30 a.m. on October 8, 2012, a ^{truck} tow was requested by the officers in order
5 to tow the car to the Fife Police Department impound in order to obtain a search warrant for the
6 car.

7 20. That at 3:45 a.m. on October 8, 2012, Officer Quinto with the Fife Police
8 Department brought Mrs. Evans to the scene of the stop. Mrs. Evans identified the defendant as
9 the person who had earlier been in her backyard by the living window.

10 21. That at 3:50 a.m. on October 8, 2012, the tow truck driver arrived and removed
11 the keys which were still in the ignition of the red Mazda. The tow truck driver gave the keys to
12 Officer Stringfellow. The Mazda was then towed to the Fife Police Department impound, where
13 it was secured by Officer Stringfellow.

14 22. That at 3:54 a.m. Office Gilbert transported the defendant to the Fife Police
15 Department Jail, where he was placed into a holding cell.

16 23. That at 7:56 a.m. on October 8, 2012, Detective Jeff Nolta of the Fife Police
17 Department started his interview of the defendant which took place at the Fife Police Station.

18 24 That the interview conducted by Detective Nolta was recorded and, on the
19 recording, the defendant was advised of his Miranda Rights. The defendant acknowledged his
20 rights verbally and by signing the rights form. The defendant was then advised of the waiver.
21 The defendant signed the waiver section of the form agreeing to talk to the detective.

22 25. That during the interview with Detective Nolta, the defendant never asked to
23 speak to an attorney. He never exhibited confusion as to who he was talking to and what he was
24 being asked.
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26. That during the interview with Detective Nolta, the defendant was never coerced, induced to make a statement, threatened or promised anything in return for his statement. The defendant's waiver of his Miranda Rights was made knowingly, voluntarily and intelligently.

27. That on October 8, 2012, Detective Nolta obtained a search warrant to search the red Mazda which he did at 2:30 p.m. on October 8, 2012

28. That the defendant did not question the validity of the search warrant during the suppression hearing.

DISPUTED FACTS

1. That the defendant did not present any testimony either from himself or witnesses called on his behalf and thus are no disputed facts.

LEGAL ISSUES

1. Whether the stop of the defendant by Officer Gilbert was an arrest for which there was no probable cause.

2. In the event that the stop of the defendant by Officer Gilbert was an arrest, whether the items viewed by the officers inside the Mazda should be suppressed because the officers were not lawfully in a place where they could view the inside of the Mazda because there was no probable cause to arrest the defendant.

3. In the event that the stop was an arrest, are the statements made by the defendant to Officers Gilbert and Stringfellow inadmissible because the defendant was not advised of his Miranda Rights.

4. Whether the description of the alleged burglar given by Mr. Blackmer and Mrs. Evans supported a reasonable suspicion that the defendant was the burglar.

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5. Whether the suspicions relied on by the officer ~~arise to~~ reasonable suspicion for purposes of a Terry stop. The suspicions relied on by the officer are that the defendant matched the description of the alleged burglary suspect given by Mr Blackmer and Mrs. Evans in that the defendant had light brown hair, was a young white male and was wearing a light grey hoodie; that the headlights were not on when the Mazda was being driven at 3:00 a.m. on October 8, 2012; and that the Mazda was the sole moving car in the residential area where the two burglaries were alleged to have occurred.

6. Whether handcuffing the defendant was a reasonable action on the part of Officer Gilbert.

7. Whether the statements obtained by Detective Nolta from the defendant were admissible pursuant to the attenuation doctrine of the fruit of the poisonous tree.

RESOLUTION OF LEGAL ISSUES

1. That there were sufficient suspicious circumstances which supported reasonable suspicion to stop the defendant pursuant to a Terry or investigatory stop.

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2. That ~~the~~ handcuffing the defendant was a reasonable action on the part of Officer Gilbert and was done pursuant to a Terry stop. The officer was alone with no backup when he came into contact with defendant who was an unknown man at 3:17 a.m. and the officer was investigating an alleged burglary which had occurred at approximately 3:00 a.m. The officer was isolated in a poorly lit area. The officer had reasonable officer safety concerns to support handcuffing the defendant.

3. That the defendant was detained for a reasonable period of time, in this instance 10 minutes or less, in order for the officer to verify the defendant's identification and to allay any concerns that the defendant was involved in the alleged burglaries

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4. That the officers' view of the rifle on the floorboard behind the driver's seat was legally ~~conducted~~ ^{obtained} pursuant to open view.

5. That there was probable cause to arrest the defendant for unlawful possession of a firearm.

6. That there is no reason to decide whether the attenuation doctrine applies in this case because the issues that would trigger the application of the attenuation doctrine do not apply

7. That the statements made by the defendant to Officers Gilbert and Stringfellow are admissible at trial pursuant to CrR 3.5 because they were made while he was legally detained pursuant to an investigatory/Terry stop

8. That the statements made by the defendant to Detective Nolta are admissible at trial pursuant to CrR 3.5 because he was correctly advised of his Miranda Rights which the defendant then knowingly, voluntarily and intelligently waived.

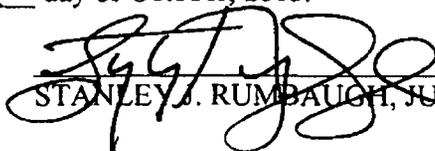
CONCLUSIONS AS TO ADMISSIBILITY

1. That the statements made by the defendant to Officers Gilbert and Stringfellow are admissible at trial pursuant to CrR 3.5

2. That the statements made by the defendant to Detective Nolta are admissible at trial pursuant to CrR 3.5.

3. That the evidence seized from the red Mazda pursuant to the search warrant is
admissible at trial pursuant to CrR 3.6.

DONE IN OPEN COURT this 21 day of October, 2013.


STANLEY J. RUMBAUGH, JUDGE

Presented by.


APRIL D MCCOMB
Deputy Prosecuting Attorney
WSB# 11570



Approved as to Form:


LAURA S CARNELL
Attorney for Defendant
WSB# 27860

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PIERCE COUNTY PROSECUTOR

July 02, 2014 - 4:02 PM

Transmittal Letter

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