69912-1

69912-1

NO. 69912-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CRUZ BLACKSHEAR,

Appellant.

---

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

---

# OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Cruz Blackshear's right to due process by admitting the complaining witness's identification of him because it was the result of an impermissibly suggestive show-up and was not otherwise reliable.

2. Mr. Blackshear did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not move to suppress the show-up identification procedure as impermissibly suggestive.

3. The trial court erred in failing to enter written findings of fact and conclusions of law following the CrR 3.5 hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive show-up procedure violates due process. Was the show-up in this case impermissibly suggestive and the complainant's subsequent identification of Mr. Blackshear unreliable, entitling Mr. Blackshear to reversal of the conviction for a violation of due process?

2. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective

assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case and moving to suppress inadmissible evidence. Where the complainant's description of his assailant differed significantly from Mr. Blackshear's actual appearance, was Mr. Blackshear's constitutional right to counsel violated when his attorney failed to move for suppression of the impermissibly suggestive show-up?

3. A trial court's failure to enter written findings of fact and conclusions of law following a CrR 3.5 hearing requires remand for entry of written findings. Where the trial court failed to enter written findings following the CrR 3.5 hearing, must the case be remanded?

C. STATEMENT OF THE CASE

On October 15, 2012, Cruz Blackshear was spending time with his friend, Heather Ray, near the Wait's Motel in Everett. 12/26/12 RP 50-52.[1]

A few blocks away, near Providence Hospital, John Couldry was walking on Colby Street, after visiting his wife, who was recovering from a surgical procedure. 12/27/12 RP 3-6. Before he

[1] The verbatim report of proceedings consists of three volumes, which will be referred to by date, such as 12/26/12 RP ___.

reached his car, Mr. Couldry was accosted by a young man who demanded his money. Id. Mr. Couldry, who was, himself, recovering from surgery, stated at trial that his assailant was a young man in blue jeans and a brown or tan t-shirt. Id. He also stated that he was colorblind, and that after he gave the man his cell phone, he closed his eyes, bracing to be punched. Id. at 7-10. The suspect hit Mr. Couldry in the side of the head and ran off; Mr. Couldry went back to the hospital to report the incident to security guards, who called the police. Id. at 8-11.

About an hour later, Everett Police Officer Christopher Reid stopped and detained Mr. Blackshear, who was near the Wait's Motel. 12/27/12 RP 117-20. Telling him that he fit the description of an individual involved in a robbery nearby, Mr. Blackshear and Ms. Ray were both detained. Id.[2] Mr. Couldry was brought to the area in a police car and told that officers had detained a suspect and they wanted to see if Mr. Couldry could identify him. Id. at 13. Mr. Couldry was also told that a canine unit had been brought in to track the suspect. Id. When Mr. Couldry was brought directly to the area

[2] Mr. Blackshear did not actually fit the description that Mr. Couldry had given, which was: blue jeans, light brown or tan t-shirt. 12/27/12 RP 3-6. Mr. Blackshear was wearing dark pants, a white t-shirt, and a black jacket. Id. at 17, 129-31. Mr. Couldry also estimated the suspect's weight at around 115 pounds, and Mr. Blackshear weighed 160 at the time of his arrest. Id. at 131.

in which Mr. Blackshear was being detained by uniformed police officers, Mr. Couldry identified Mr. Blackshear as the person who had taken his cell phone. Id.[3]

Mr. Blackshear was charged with robbery in the second degree. CP 72-73. At trial, defense counsel indicated in an oral motion in limine that he was making a "defense request to suppress the identification by Mr. Couldry as essentially an impermissible one-person show-up." 12/26/12 RP 23-35. However, defense counsel conceded that he neglected to brief the suppression issue in his trial brief or to provide authority to the court. Id. at 23-29. The trial court denied the motion with leave to renew, but defense counsel never provided authority, and failed to object to the admission of the in-court identification during trial. 12/27/12 RP 3-6, 11-14.

Mr. Blackshear was convicted of robbery in the second degree. CP 50; RP 128-31.

Mr. Blackshear timely appeals. CP 2-13.

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[3] A woman standing at a nearby bus stop, Sonia Rundle, testified that she saw a person resembling Mr. Blackshear approach an older man, but she only saw him ask the man for a cigarette. 12/27/12 RP 29-33. When she saw the younger man with the cell phone, she thought he was borrowing it; she never saw a physical altercation. Id. at 32-33.

D. ARGUMENT

1. MR. BLACKSHEAR'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COMPLAINANT'S IDENTIFICATION WAS ADMITTED, SINCE IT WAS THE PRODUCT OF AN IMPERMISSIBLY SUGGESTIVE SHOW-UP.

a. An out-of-court court show-up identification violates due process when it is so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. An accused person has a due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. Chambers v. Mississippi, 410 U.S. 284, 310, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). "[R]eliability [is] the lynchpin in determining admissibility of identification testimony" under a standard of fairness that is required under the Due Process Clause of the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The United States Supreme Court has noted the due process concerns surrounding eyewitness identifications. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d

1149 (1967). Courts have long condemned the police practice of using single-defendant show-up identifications because the very act of showing only one suspect infers that the police have already narrowed their attention to that particular person. Stovall, 388 U.S. at 302; State v. Hanson, 46 Wn. App. 656, 666, 731 P.2d 1140 (1987). Show-up identifications are not necessarily constitutionally impermissible if held shortly after the crime is committed and in the course of a prompt search for the suspect. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208 (1981). However, evidence of a show-up identification violates due process, if the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

A two-step test is used to determine whether the identification procedure passes constitutional muster. First, the defendant must show the identification procedure was suggestive. State v. Vaughn, 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). If the defendant shows the identification procedure was suggestive, the court must decide whether the suggestiveness created a

substantial likelihood of irreparable misidentification. State v. Maupin, 128 Wn.2d. 918, 924, 913 P.3d 808 (1996).

b. The single person show-up here was impermissibly suggestive. To establish a due process violation, a defendant must show the identification procedure was unduly suggestive. Vickers, 148 Wn.2d at 118; State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999).

While the courts of this state have repeatedly held that a show-up involving a suspect displayed in handcuffs near a police car was not impermissibly suggestive as a matter of law, State v. Guzman-Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966, review denied, 108 Wn.2d 1027 (1987), commentators have criticized this belief in light of the modern evidence questioning the reliability of eyewitness evidence.

> Unfortunately, the convenience of a show-up comes at a high price: the increased risk of a false identification. First, in a show-up, the risk of a false identification falls entirely on the sole suspect and is not spread out among six or eight individuals, as it would be in a lineup or photo array. Second, the way in which show-ups are necessarily conducted makes them incredibly suggestive. As one expert has stated, show-ups are "the most grossly suggestive identification procedure now or ever used by the police."

> Show-ups are grossly suggestive in part because the sole suspect is already in custody and is being presented by a police officer. Eyewitnesses often believe that when an officer presents a suspect for identification, the officer has caught the true perpetrator. Few people would think that an officer would show a suspect without truly believing that the suspect was, in fact, the criminal. Even one state's attorney general has conceded that show-ups "convey the impression to witnesses that the police think they have caught the perpetrator and want confirmation." Lineups and photo arrays, of course, are far less suggestive; if conducted properly, the witness will not know which person the officer believes to be the true perpetrator and, therefore, will not be influenced in the identification process.
>
> Other factors also make show-ups highly suggestive. For example, when show-ups are conducted immediately after a crime and near the crime scene, as is usually the case, the eyewitness may make a positive identification simply because the suspect was in the area at the time and not because he is actually the perpetrator. Police can also consciously or subconsciously influence an eyewitness's identification by what they say and do and the manner in which they present the suspect during the show-up procedure.

Michael D. Cicchini and Joseph G. Easton, 100 J. Crim. L. & Criminology 381, 389-91(Spring 2010) (footnotes omitted), quoting Jessica Lee, Note, No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups, 36 Columbia Human Rights. L. Rev. 755, 769, 770 (2005) (discussing Gregory v. State, No. 93-SC-878-MR (Ky. Nov. 23, 1993) in which

the defendant was falsely identified, wrongfully convicted, sentenced to seventy years of incarceration, and then exonerated seven years later). See also Margery Malkin Koosed, Reforming Eyewitness Identification Law And Practices To Protect The Innocent, 42 Creighton L. Rev. 595, 615 (2009) ("Indeed, improving eyewitness identification procedures may be more critical than improving other evidentiary procedures. When a forensic test is poorly administered, there is usually evidentiary material remaining that can be retested. Comparatively, when eyewitness identification procedures are suggestively and unreliably conducted, the procedure may so taint the eyewitness's memory that there is no ability to reliably retest the eyewitness's memory.").

In light of the modern view that single person show-ups are intrinsically impermissibly suggestive and have resulted in scores of wrongful convictions, this Court should reexamine its case law and conclude the show-up of Mr. Blackshear here was impermissibly suggestive.

c. The *Biggers* factors required suppression of the complaining witness's identification of Mr. Blackshear. Once the court determines the show-up was impermissibly suggestive, the court must then determine whether, under the totality of the

circumstances, the identification was nevertheless reliable. Vickers, 148 Wn.2d at 118.

In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reaffirmed that a conviction based upon eyewitness identification will be set aside if the "identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." Id. at 197 (citation omitted). But the Court found that an identification can nonetheless be admissible if it is otherwise reliable. Id. The Court identified a test to ascertain whether, under the "totality of the circumstances," an identification is reliable despite the suggestive procedures. Id. at 199-200.

The factors to be considered include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the suspect, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Biggers, 409 U.S. at 193. See also Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Washington utilizes the Biggers test to determine the admissibility of an identification. Vickers, 148 Wn.2d at 118.

Here, Mr. Couldry's identification was not particularly reliable or accurate. Mr. Couldry's initial description to Everett police officers was a white man, approximately five-feet, seven-inches tall, and 115 pounds, wearing a light brown or tan shirt and Levi's; Mr. Couldry qualified this bare-bones description with the notable caveat that he is colorblind. 12/26/12 RP 58-59; 12/27/12 RP 11-13, 17-21, 96-99, 138-40, 153-55. Mr. Couldry stated that he only saw his assailant for a short period of time -- he did not see the suspect approach him while he walked to his car; the suspect demanded his money; he gave the young man his cell phone; he immediately closed his eyes and braced to receive a slap to the head. 12/27/12 RP 7, 17-21.

Mr. Couldry's ability to view the suspect was very short and occurred during a traumatic incident; he stated that he was quite focused on protecting his abdomen, due to his health condition, which distracted his attention from the suspect. Id. at 7. Mr. Couldry even testified that when the show-up was conducted, "it was hard for me to make a positive identification." 12/27/12 RP 24. Under the Biggers factors, Mr. Couldry's description of the suspect was not sufficiently reliable to overcome the suggestive identification procedure employed by the police.

The entire show-up procedure was designed to direct him to choose Mr. Blackshear, since Mr. Blackshear was the only person presented at the show-up, standing on the street with police officers. Mr. Couldry had been informed by officers that he was being taken to view the person who had been apprehended, in order to make an identification. 12/27/12 RP 13. Lastly, Mr. Blackshear did not even match the description given by Mr. Couldry, outweighing the description by 60 pounds, and even without the black jacket, wearing entirely different clothing (white shirt and black pants, rather than brown shirt and blue jeans). Under the Biggers standard, Mr. Couldry's identification of Mr. Blackshear was not otherwise reliable.

d. Mr. Couldry's in court identification of Mr. Blackshear was tainted by the impermissibly suggestive identification. If a pretrial identification created a substantial likelihood of misidentification, an in-court eyewitness identification is likewise inadmissible and must be suppressed. State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 110 (1980), aff'd, 96 Wn.2d 215, 634 P.2d 868 (1981), quoting Simmons, 390 U.S. at 384.

As argued, Mr.Couldry's pretrial identification of Mr. Blackshear created a substantial likelihood of misidentification based upon the impermissibly suggestive show-up. This show-up influenced his identification of Mr. Blackshear as the perpetrator, thus tainting the identification. As a consequence, the in-court identification was tainted by the pretrial identification and should have been suppressed.

e. The error in admitting the unreliable identification requires reversal. A constitutional error is presumed prejudicial. Maupin, 128 Wn.2d. at 924. The State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. Id.

Absent the identification by the complaining witness of Mr. Blackshear as his assailant, there was insufficient independent evidence proving that Mr. Blackshear was the person who robbed Mr. Couldry. Ms. Ray, Mr. Blackshear's companion, received substantial benefit from testifying against him at trial, as was

discussed at trial. 12/26/12 RP 57, 63.[4] Ms. Rundle, the woman at the bus stop, only saw the incident from across the street, and even if she accurately identified Mr. Blackshear, she testified that she only heard Mr. Blackshear asking the complaining witness for a cigarette or possibly saw him borrow the man's phone to make a call. Id. at 29-33. Ms. Rundle denied seeing a robbery or an assault, although she stated she was standing near the site of the incident the entire time. Id. at 29-33, 40-41.

Thus, without the show-up identification, there was insufficient evidence that Mr. Blackshear was the person who robbed Mr. Couldry. The error in admitting the show-up identification, as well as each of the references to the show-up, was not harmless, and Mr. Blackshear is entitled to reversal of his conviction.

2. MR. BLACKSHEAR DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

a. Mr. Blackshear had the constitutional right to the effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const.

[4] Heather Ray testified against Mr. Blackshear at trial, explaining that she was pressured by police to write a statement on the day of the incident, under

amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance

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threat of criminal charges as an accomplice. 12/26/12 RP 63.

prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

In reviewing the first prong of the Strickland test, appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to move for suppression of the impermissibly suggestive show-up. Mr. Blackshear was charged with a robbery that occurred on October 15, 2012; the show-up took place within an hour of the robbery on the same date. CP 70-71. The identification procedure was described in the affidavit of probable cause, dated November 2, 2012. Id. The complaining witness, Mr. Couldry, gave an incomplete and inaccurate description of his assailant, which did not match Mr. Blackshear -- the individual who was later picked in

the show-up and charged with the robbery. 12/26/12 RP 58-59; 12/27/12 RP 11-14, 17-21, 96-99, 117-20, 153-55. Nevertheless, despite receiving notice of the show-up, defense counsel failed to file a CrR 3.6 motion to suppress the identification procedure.

Generally, appellate courts give deference to the performance of a trial attorney before finding it deficient, as there are countless decisions that may appear unreasonable in hindsight, but at the time were based upon a legitimate trial strategy or tactical reason. Strickland, 466 U.S. at 689. There can be no legitimate tactical explanation, however, for counsel's failure to bring a plausible motion to suppress an identification procedure that was impermissibly suggestive. See Reichenbach, 153 Wn.2d at 130-31 (no conceivable tactical reason to fail to move to suppress critical evidence in search warrant case); State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006) (no tactical reason to fail to move to suppress evidence obtained as result of pretextual stop).

Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. Reichenbach, 153 Wn.2d at 130-31; Meckelson, 133 Wn. App. at 436. Here, the complaining witness,

Mr. Couldry, testified that when he was driven to the location where Mr. Blackshear had been detained, "it was hard for me to make a positive identification." 12/27/12 RP 24. As discussed above, under the Biggers factors, Mr. Couldry's description of the suspect was not sufficiently reliable to overcome the suggestive identification procedure employed by the police. 409 U.S. at 193. Under these circumstances, the trial judge likely would have suppressed the show-up identification in this case, had defense counsel brought a proper suppression motion.

Further, it is clear from the record that defense counsel's attention was drawn to the suppression issue, and that his decision not to brief the issue or to litigate suppression was not tactical. See, e.g., State v. McFarland, 127 Wn.2d 322, 336-37, 899 P.2d 1251(1995) (because of the presumption of effective representation, defense must show in the record the absence of tactical reasons supporting the challenged conduct by counsel). Here, defense counsel made an oral motion to suppress the show-up on the day of trial. 12/26/12 RP 23-25, 27-29. When the court inquired why defense counsel had not briefed the issue, he apologized and stated only that he had not had the opportunity to interview the complaining witness until after he had already drafted

his trial brief. 12/26/12 RP 23-25, 27-29. Then defense counsel stated that he "apologize[d] for not having been able to brief" the issue, and promised to provide case law supporting his position to the court, since "I don't have authority for the Court [today]." Id. at 28. The defense requested "leave to address this" before the show-up was introduced; however, authority was never provided, and a motion to suppress was never filed on behalf of Mr. Blackshear. Id. During trial, when the complaining witness testified about the show-up procedure, defense counsel failed to object. 12/27/12 RP 11-14, 25.[5]

Accordingly, Mr. Blackshear's attorney's failure to challenge the show-up constitutes constitutionally deficient performance. Strickland, 466 U.S. at 687-88; Reichenbach, 153 Wn.2d at 130-31; Thomas, 109 Wn.2d at 226.

c. The conviction must be reversed. Mr. Blackshear did not receive a fair trial because his attorney did not move to suppress the impermissibly suggestive show-up, despite the fact that he was aware of its occurrence and aware of its import. This Court should reverse his conviction and remand for a new trial.

[5] Defense counsel also failed to object to several witnesses' hearsay accounts of Mr. Couldry's identification of Mr. Blackshear. 12/16/12 RP 53-55; 12/27/12 RP 123-24, 141-43

Thomas, 109 Wn.2d at 229, 232; Reichenbach, 153 Wn.2d at 130-31.

3. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE CrR 3.5 HEARING.

The trial court is required to enter written findings of fact and conclusions of law following a hearing to determine the admissibility of a defendant's statements. CrR 3.5(c); State v. Miller, 92 Wn. App. 693, 703-04, 964 P.2d 1196 (1998). CrR 3.5(c) provides: "After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore." It is the duty of the prevailing party to submit written findings of fact and conclusions of law following such a hearing. See State v. Wilks, 70 Wn.2d 626, 628, 424 P.2d 663 (1967). In this case, written findings and conclusions supporting the court's ruling on the admissibility of Mr. Blackshear's statements to police have not been entered.

Denial of a suppression motion is reviewed by independently evaluating the record to determine whether substantial evidence supports the findings and whether those findings support the conclusions. State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d

363 (1997); State v. Graffius, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Failure to enter the findings required by CrR 3.5 is harmless error where the trial court's oral findings are sufficient to permit appellate review. State v. Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325 (2003); State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992).

The State's failure to ensure entry of the written findings of fact and conclusions of law required by CrR 3.5(c) complicates appellate review and results in "additional work on the part of appellant's counsel, and on the part of personnel of this court." State v. Bennett, 62 Wn. App. 702, 712, 814 P.2d 1171 (1991); see State v. McKinlay, 87 Wn. App. 394, 399, 942 P.2d 999 (1997). The lack of written findings precludes the customary assignment of error to specific findings and the resulting focus on those portions of the record relating to those findings.

Remand is appropriate in cases where the trial court has failed to enter written findings. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). At the hearing on remand, no additional evidence may be taken. Id. at 625. But this procedure creates a potential for prejudicial error if the record reflects that the resulting findings and conclusions were tailored to address the assignments

of error raised in the appellant's brief. State v. Litts, 64 Wn. App. 831, 837, 827 P.2d 304 (1992).

Therefore this Court must remand this matter for the entry of the CrR 3.5 findings.

## E. CONCLUSION

For the foregoing reasons, Mr. Blackshear respectfully requests this Court reverse his conviction and remand the case for further proceedings. In the alternative, this matter must be remanded for the entry of the CrR 3.5 findings.

DATED this 5th day of August, 2013.

Respectfully submitted,

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Attorney for Appellant

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

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| STATE OF WASHINGTON, | ) | |
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| Respondent, | ) | |
| | ) | NO. 69912-1-I |
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| CRUZ BLACKSHEAR, | ) | |
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| Appellant. | ) | |



## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | CRUZ BLACKSHEAR<br>339991<br>WASHINGTON CORRECTIONS CENTER<br>PO BOX 900<br>SHELTON, WA 98584-0974 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 5TH DAY OF AUGUST, 2013.

X_____

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