NO. 45099-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN THOMPSON,

Appellant.

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

Before the Honorable Michael Evans, Judge

# OPENING BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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## A. ASSIGNMENTS OF ERROR

1. The trial court violated Brian Thompson's due process rights by admitting evidence of a show-up identification that was impermissibly suggestive and created a substantial likelihood of misidentification.

2. Mr. Thompson 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.

## 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 violates due process. Was the one-person show-up identification of the detained person, later identified as Brian Thompson, impermissibly suggestive where the witness had limited opportunity to observe the intruder into a storage unit in which the witness was sleeping, where he saw the detained person while he was handcuffed and was told by police that he had wire cutters, entitling Mr. Thompson to reversal of the convictions for a violation of due process? Assignment of Error 1.

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. Was Mr. Thompson's constitutional right to counsel violated when his attorney failed to move for suppression of the impermissibly suggestive show-up? Assignment of Error 2.

## C. STATEMENT OF THE CASE

### 1. Procedural facts:

The State charged appellant Brian Thompson with second degree burglary (Count 1), first degree criminal impersonation (Count 2), possession of a stolen vehicle (Count 3), and possession of burglary tools (Count 4), by second amended information filed in Cowlitz County Superior Court. Clerk's Papers [CP] 15-17; Report of Proceedings [RP] (June 12, 2013) at 3.[1] The State provided notice that multiple current offenses and a high offender score may result in some of the current crimes going unpunished and that the State would seek an exceptional sentence pursuant to RCW 9.94A.535(2)(c).

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[1]The Verbatim Report of Proceedings consists of three volumes: RP (June 12, June 14, 2013), jury trial; RP (June 13, 2013), jury trial; and RP (February 26, March 26, April

Following a pre-trial CrR 3.5 hearing, the court ruled that Mr. Thompson's statements at the time of arrest, although custodial, were voluntary and admissible. Supplemental CP 127-28; RP (June 12, 2013) at 47-61.

Jury trial in the matter started June 12, 2013, the Honorable Michael Evans presiding.

Neither exceptions nor objections to the jury instructions were taken by counsel. RP (June 13, 2013) at 199.

Defense counsel conceded his client's guilt regarding the issue of criminal impersonation as alleged in Count 2 during closing argument. RP (June 14, 2013) at 98, 112.

The jury found Mr. Thompson guilty of the counts as charged in the second amended information. RP (June 14, 2013) at 125; CP 83, 84, 85, 86. At sentencing, defense counsel requested a prison-based sentence pursuant to the Drug Offender Sentencing Alternative (DOSA). RP (June 20, 2013) at 26. The court denied the request for DOSA. RP (June 20, 2013) at 27, 30, 32. Mr. Thompson had an offender score of 20, giving him a standard range sentence of 51 to 68 months for Count 1 and 43 to 57 months for Count 3.

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18, May 14, June 6, 2013), hearings, (June 20, 2013), sentencing.

RP (June 20, 2013) at 23. The State requested an exceptional sentence of 120 months. RP (June 20, 2013) at 25.

The court found multiple current offenses and a high offender score would result in some of the current crimes going unpunished and sentenced Mr. Thompson to 51 months for Count 1 and 43 months for Count 2, and imposed an exceptional sentence by ordering that Counts 1, 2, and 3 be served consecutive to each other, for a total sentence of 100 months. RP (June 20, 2013) at 32; CP 94.

Timely notice of appeal was filed on July 10, 2013. CP 105. This appeal follows.

**2. Testimony at trial:**

Tim McCormack was staying in a storage unit located at Wood and Wood Storage in Longview, Cowlitz County, Washington on February 13, 2013. RP (June 13, 2013) at 19, 20. While sleeping in the storage unit, he was awakened at 2:00 a.m. by the unlocked door to the unit being opened. RP (June 13, 2013) at 22, 23. Mr. McCormack's dog barked and he saw a man outside the unit. RP (June 13, 2013) at 23. Mr. McCormack described the man as being 5' 10", skinny, and wearing a dark stocking cap. RP (June 13, 2013) at 23. He saw the man's face for four seconds before the man

turned and ran behind the storage units and out through a hole cut in the fence. RP (June 13, 2013) at 24, 25, 26. He stated that there was a hole cut in the six foot chain link fence that surrounds the property. RP (June 13, 2013) at 38, 159. Mr. McCormack called 911 and Officer Tory Shelton of the Longview Police Department made contact with a man found across the street and approximately forty feet the south of the entrance to Wood and Wood Storage. RP (June 13, 2013) at 114, 145. He placed the man in the back of his police vehicle and transported the man to Mr. McCormack's location, who remained at the storage facility. RP (June 13, 2013) at 119. Mr. McCormack was told that the police had detained a suspect and they wanted to see if Mr. McCormack could identify him. RP (June 13, 2013) at 36. Mr. McCormack identified the man as the person who had entered the storage unit. RP (June 13, 2013) at 27, 28, 36, 119. The man detained by Officer Shelton denied his involvement in the alleged burglary. RP (June 13, 2013) at 119. Shelton A backpack he was carrying contained saws and pliers, a full faced ski mask and a pair of gloves. RP (June 13, 2013) at 118.

Officer Shelton stated that when he initially asked the man for identification, he handed him a Washington identification card in the name of John S. Gehring. RP (June 13, 2013) at 116. Dispatch notified the officer

that John Gehring had a warrant for his arrest, and he was placed under arrest. RP (June 13, 2013) at 119. After being given his constitutional warnings, the man stated that his truck ran out of gas and that he was walking to a friend's house to get money for gas and then to go to a gas station for gas, and then back to the truck. RP (June 13, 2013) at 119, 120. When asked about pliers and hack saws from the backpack, Officer Shelton stated that the man said that when he left the pickup truck, he took several loose items from the truck and put them in the backpack to take with him. RP (June 13, 2013) at 121. Officer Shelton drove the man to the pickup truck, where he noticed that the ignition was hanging by wires. RP (June 13, 2013) at 133.

A 1972 GMC pickup truck owned by car dealer Monty Lewellen was taken on February 13, 2013 from a fenced area at his car lot in Longview. RP (June 13, 2013) at 81, 82. Later that morning police found the truck nearby with the ignition wiring hanging from beneath the dashboard. RP (June 13, 2013) at 88, 89, 91. Police found a flashlight on the floor on the driver's side of the truck. RP (June 13, 2013) at 106, 133.

After the man was transported to the jail, it was determined that the man was not John Gehring, but was Brian Thompson. RP (June 13, 2013) at 137.

Larry Wood, owner of Wood and Wood Storage, stated that he has a motion activated video recording system at the business, and that it recorded the man who entered the business on February 13. RP (June 13, 2013) at 49, 50. He stated that he viewed the recording and also showed it to Longview police. RP (June 13, 2013) at 50. He said that the police asked for the recording, but that the video was recorded over so he did not provide it. RP (June 13, 2013) at 51, 52. He testified that the recording showed a man entering the parking lot and then doing something near a unit belonging to Perry Kesler, and then, after a car went by, the man opened the door and entered the storage unit in which Mr. McCormack was staying, which did not have a lock on it. RP (June 13, 2013) at 53, 54. A lock on Mr. Kesler's storage unit was removed and found nearby on the ground by police. RP (June 13, 2013) at 72.

The defense rested without calling witnesses. RP (June 13, 2013) at 186.

## D. ARGUMENT

### 1. THE TRIAL COURT VIOLATED MR. THOMPSON'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE REGARDING AN UNNECESSARILY SUGGESTIVE SHOW-UP IDENTIFICATION.

Due process protections apply to pretrial

identification proceedings. U.S. Const., amends. 5 and 14; Const., art. 1, § 3; *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled on other grounds by, *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *State v. Burrell*, 28 Wn. App. 606, 609, 625 P.2d 726 (1981). Evidence of a show-up identification violates due process when the procedure was "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977) (quoting *Simmons v. United States,* 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1983)). Show-up identifications are not necessarily constitutionally impermissible if held shortly after the crime is committed, as is the case here, 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 complies with due process requirements. First, the defendant must show that the identification procedure was suggestive. *State v. Vaughn,* 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). If the defendant does show that 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). 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). If 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 criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Biggers,* 409 U.S. at 193. Here, Mr. McCormack's description to police was vague; he described the intruder as 5' 10" but omitted mention of facial hair, despite having seen his face. He was in a dark storage unit and was woken up at approximately 2:00 a.m. He was distracted by his dog, which he was trying to control to keep from attacking the intruder. RP (June 13, 2013) at 23, 24. Moreover, Mr. McCormack stated that he saw the man while handcuffed, saw that he was being searched by police, and told that he had wire snips. RP (June 13, 2013) at 36. Under the *Biggers* standard, Mr. McCormack's identification of Mr. Thompson was not otherwise reliable.

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). Mr. McCormack's pretrial identification of Mr. Thompson created a substantial likelihood of

misidentification based upon the impermissibly suggestive show-up. This show-up influenced his identification of Mr. Thompson 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.

A constitutional error is presumed prejudicial. *State v. Maupin,* 128 Wn.2d. 918, 924, 913 P.3d 808 (1996). 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.C824, 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.* The error in admitting Mr. McCormack's show-up identification was not a harmless error and Mr. Thompson is entitled to reversal of his convictions.

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

The Sixth Amendment to the United States Constitution and art. 1, § 22 (amend. 10) of the Washington Constitution guarantee an accused the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S.

668, 104 S. Ct. 2052, 80 L. Ed. 2d 2052 (1984); *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.3d 237 (2001). An accused received ineffective assistance of counsel when (1) counsel's performance was deficient and (2) the deficient performance prejudiced the accused. *Strickland,* 466 U.S. at 687-89; *Lopez*, 107 Wn. App. at 275. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *Lopez*, 107 Wn. App. at 275. Where counsel's conduct cannot be characterized as legitimate tactics, counsel has rendered ineffective assistance. *Strickland*, 466 U.S. at 687-89; *Lopez*, 107 Wn. App. at 277.

There was no legitimate tactic for defense counsel's failure to specifically object to the show up identification process utilized by law enforcement. The testimony of Mr. McCormack and undermines confidence in the outcome of the trial.

Mr. Thompson was charged with a burglary that occurred on February 13, 2012; the show-up took place within a few minutes hour of the burglary. RP (June 13, 2013) at 27.

Mr. McCormack gave an vague description of the man he saw, and

said that he was able to see his face for four seconds and that the lights were off in his storage unit. RP (June 13, 2013) at 31. Moreover, he stated that when the man was brought by police for the show-up, Mr. McCormack noted that he was taken out of the police vehicle, that he was in handcuffs, observed that he was being searched by police, and told by police that he had wire snips. RP (June 13, 2013) at 36. 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 motion to suppress an identification procedure that was impermissibly suggestive. As discussed above, under the *Biggers* factors, Mr. McCormack's description of the suspect was not sufficiently reliable to overcome the suggestive identification procedure employed by the police.

Thus, defense counsel's failure to specifically object to the testimony prejudiced him and denied his constitutional right to effective

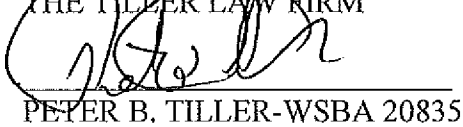
assistance of counsel. Mr. Thompson's attorney's failure to challenge the show-up constitutes constitutionally deficient performance. *Strickland*, 466 U.S. at 687-88. *Thomas*, 109 Wn.2d at 226. Mr. Thompson did not receive a fair trial because his attorney did not move to suppress the impermissibly 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. *Thomas*, 109 Wn.2d at 229, 232

## E. CONCLUSION

For the foregoing reasons, Mr. Thompson respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED: February 11, 2014.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on February 11, 2014, that this Appellant's Opening Brief was sent via JIS Link, to (1) Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, (2) and was sent by first class mail, postage pre-paid to the following:

Mr. Eric Bentson
Cowlitz County Prosecutor
312 SW 1st Ave.
Kelso, WA 98626
bentsone@co.cowlitz.wa.us

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Mr. Brian Thompson
DOC #911912
Airway Heights Correction Center
PO Box 1899
Airway Heights, WA 99001
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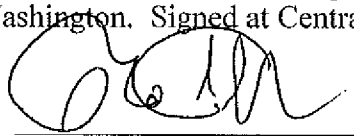

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