

NO. 37137-5-II

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

DAVID SMASAL,

Appellant.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to convict appellant of malicious injury to railroad property.

2. The trial court erred in defining the offense of malicious injury to railroad property for the jury. CP 42 (Instruction 20).

3. The evidence is insufficient to convict appellant of first degree malicious mischief.

4. The evidence is insufficient to convict appellant of attempted first degree theft.

5. The trial court erred in denying appellant's post-trial motion for arrest of judgment based on insufficient evidence.

6. Appellant was denied his constitutional right to effective assistance of counsel and a fair trial when defense counsel failed to seek suppression of an impermissibly suggestive and unreliable show-up identification and the subsequent in-court identification.

7. The trial court erred in failing to enter written findings of fact and conclusions of law under CrR 3.5.

Issues Pertaining to Assignments of Error

1. Under Instructions 20 and 21, the jury had to find appellant "endangered the safety of any engine, motor, car, or train, or any person

thereon" in order to convict him of malicious damage to railroad property. Was the evidence insufficient to convict when: 1) there was no evidence appellant damaged the signaling system; 2) even if appellant damaged the signaling system, the safety precautions inherent in the railroad's operation would have protected the trains and persons on the trains from any danger; and 3) there was no evidence such safety precautions failed or that any person or vehicle was endangered by appellant's conduct?

2. To convict appellant of first degree malicious mischief, the jury had to find he caused over \$1500 in damage. Similarly, to convict appellant of attempted first degree theft, the jury had to find he attempted to steal something worth more than \$1500. The only evidence of appellant's conduct, however, was that he hung by some unused overhead wires, about which there was no testimony regarding value. There was also no accomplice liability instruction or wording in the "to convict" instruction that would have permitted the jury to infer appellant was liable for the conduct of any other person. As such, is the evidence insufficient to convict appellant of either first degree malicious mischief or attempted first degree theft?

3. The only evidence linking appellant to the charged crimes was his identification by a single eyewitness. Shortly after the crime, the

eyewitness identified appellant during a show-up identification. At the show-up, appellant was shown in handcuffs either sitting in or standing next to a police car, with two police officers standing next to him. The only description given to the arresting officers of the suspect was that of a white male in a tan coat, and appellant was the only person wearing a tan coat at the show-up. The eyewitness witnessed the crime from no closer than 80 feet, and was 75 to 100 feet away from appellant at the show-up. In addition to other discrepancies, the eyewitness's initial description of the suspect was of a man between 20 and 30 years of age, while appellant is over 50 years old. Moreover, at the time of trial and when appellant was not present, the eyewitness identified someone else in the courthouse hallway as the suspect he had seen on the date of the offense. Under these circumstances was defense counsel ineffective for failing to set a CrR 3.6 hearing to suppress the show-up identification and subsequent in-court identification of appellant by the eyewitness?

4. CrR 3.5(c) requires entry of written findings of fact and conclusions of law. Here, the parties stipulated in writing to the admissibility of appellant's statements under CrR 3.5. Where the trial court failed to enter the legally required findings of fact and conclusions of law, must the case be remanded to the trial court for entry of such findings?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information, the Pierce County Prosecutor charged appellant David Smasal with one count of first degree malicious mischief, one count of attempted first degree theft, and one count of malicious injury to railroad property. CP 5-6; RCW 9A.48.070(1)(a); RCW 9A.56.030(1)-(a); RCW 9A.28.020, RCW 81.60.070. A jury trial was held October 1-9, 2007, before the Honorable Frank E. Cuthbertson. The jury convicted Smasal as charged. CP 51, 53-54.

At sentencing, defense counsel brought a motion for arrest of judgment, based in part on the argument that insufficient evidence supported the convictions. CP 56-61; 5RP 2-6.¹ The trial court denied the motion. 5RP 11. Smasal received concurrent standard range sentences. CP 166; 5RP 15. He appeals. CP 77.

2. Substantive Facts

a. The Offense and Arrests

On March 24, 2006, engineer Jeffrey Ford of the Union Pacific Railroad was building a freight train in the Fife Railyard in Fife,

¹ There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP - 10/1/07; 2RP - 10/2/07; 3RP - 10/3/07; 4RP - 10/4, 10/8, & 10/9 (three-volume, consecutively paginated set); and 5RP - 11/15/07 (sentencing).

Washington. 3RP 4, 10-13. Ford had just attached the first set of cars to his engine and pulled forward onto the main track when he saw a man lying face up and spread-eagle next to the tracks. 3RP 13. Several wires from the railroad's signaling system crossed over the man's body, and Ford assumed the man had electrocuted himself trying to steal copper wire. 3RP 13.²

Ford, a former firefighter, climbed down from the engine to check on the man's condition and render assistance if necessary. 3RP 4, 14-15. As he approached the man -- later identified as Bradley Johnson -- Ford shouted, "Hey, are you okay?" 3RP 15. The man immediately sat up and told Ford he was "just resting here." Id.

Ford realized the man was not in need of assistance, so he returned to his train and reported to the yardmaster that a trespasser on the property was stealing wire from the signaling system. 3RP 16. As Ford made this report, he noticed the overhead wires attached to utility poles swinging back and forth. 3RP 19. He scanned the area and saw a second man attempting to pull the overhead wires down by using another wire draped across them.

² Several witnesses testified the railroad was regularly victimized by the theft of the copper wire used for signaling and other purposes. 3RP 13, 18; 4RP 9-10, 93. Such wire was valuable and easily fenced at recycling yards in the area. 2RP 14; 3RP 22; 4RP 9, 12, 70, 75.

3RP 19-20. He updated the yardmaster that he now saw two men on the property. 3RP 20-22.

The second man, who was 80 to 100 feet away, glanced at Ford and made brief eye contact. 3RP 19, 23-24. Then the man turned and walked away, apparently heading for a small access road. 3RP 23-24. Ford noted the man walked slowly and with hunched shoulders, and was wearing a long tan jacket on a hot day. 3RP 22-23, 29.

The yardmaster called police. 2RP 11-12; 3RP 25. Officer Thomas Gow and Chief Blackburn of the Fife Police Department arrived and observed Bradley Johnson continuing to strip insulation off the wires on the ground; Officer Gow arrested Johnson without incident. 2RP 11-13, 15-16; 3RP 25, 70-71. Meanwhile, additional police were dispatched to locate the suspect who had walked away from the yard. 3RP 52; 4RP 25. The only description given of the suspect was "a white male in a tan jacket." 3RP 52, 57; 4RP 28.

Some time later, Puyallup Tribal Police Officer William Loescher saw a white man wearing a tan jacket jaywalking across Portland Avenue, approximately a half-mile to a mile from the incident at the railyard. 3RP 28; 4RP 24-25, 28. The man seemed to be looking around and over his

shoulder. 4RP 28-29. Officer Loescher contacted the man, David Smasal, as he entered the parking lot of an AM/PM store. 4RP 29.

Officer Loescher explained to Smasal that he met the description of someone who police were looking for. 4RP 29-30. Smasal was cooperative and told Officer Loescher he hadn't done anything wrong. 4RP 30, 34-35. Officer Loescher placed Smasal into handcuffs, and Officer Terry Worswick of the Fife Police Department arrived to take custody of Smasal. 3RP 52-53, 58-59; 4RP 30-31.

While Officers Loescher and Worswick stood with Smasal, another Fife police officer drove Ford by the AM/PM to see if he could identify Smasal as the person he had seen at the railyard. 3RP 27-28, 54-55. The officer driving Ford stopped his unmarked car at the roadside while Smasal was handcuffed on the far side of the parking lot, such that Ford and Smasal were approximately 75-100 feet apart. 3RP 28, 56, 58. Ford identified Smasal as the man he had seen tugging on the overhead wires. 3RP 28-29, 56. Both Smasal and Johnson were subsequently charged, but Johnson pled guilty prior to trial. CP 85.

On the day of trial, Mr. Ford identified someone in the courtroom hallway as the man he had seen walk away from the railyard. 3RP 45-46. Smasal, who was in custody, was not in the hallway at the time. 3RP 46.

During trial, Ford nevertheless identified Smasal from the witness stand and stated he was "very sure" Smasal was the man he had seen. 3RP 30, 49.

Former codefendant Bradley Johnson testified he met a light-skinned Hispanic man named Leonard in the parking lot of the Emerald Queen Casino. 4RP 43-44, 48, 55, 59. He and the man drove a short distance away to smoke some methamphetamine, and then the man suggested collecting some copper to sell so they could both go back into the casino with more money to gamble. 4RP 44-46, 57, 59-60. Johnson, who had been awake and using methamphetamine for several days, agreed. 4RP 45, 57-58. The two men went to the railyard, where Johnson was spotted by Ford and arrested. 4RP 47, 52-55. Johnson denied ever meeting Smasal. 4RP 55.

b. The Signaling System and Effect of Cut Wires.

Michael Espinosa, the signal maintenance foreman for the Union Pacific Railroad's Fife railyard, testified extensively regarding the wires affected by the attempted theft, and also generally regarding the impact any cutting of wires would have on the signaling system for the trains. See generally 4RP 80-116. Espinosa explained that the wires on the ground -- those that had been seen draped over Johnson and which police had

observed Johnson stripping of insulation -- were the live, working wires for the railroad's signaling system. 4RP 86-87, 102. The overhead wires attached to the utility poles were nonfunctional.³ 4RP 89-90, 97, 104.

In a prior, unrelated theft a few months before, vandals had cut the overhead wires in multiple places, and in order to get the signals up and running as quickly as possible, Espinosa had simply run the new wire along the ground, tying in to the overhead wire only at the beginning and end of the run. 4RP 50-54, 86-90, 102, 115-16. Espinosa left the dead overhead wire hanging; that wire was obviously damaged and cut in multiple places. 4RP 50-54, 90, 96-97, 99, 104-06, 107-08, 115-16. Espinoza intended to have a railroad crew dig a trench to bury the live wire, but this had not happened by the time of this incident. 4RP 87, 90, 102, 110-11, 115-16.

When live wire to a railroad signaling system is cut, all of the affected signals automatically "go to red." 3RP 21; 4RP 86, 88, 90-91, 103, 108. Here, because the cut wire was a local wire, this meant only two signals "went to red." 4RP 83-84, 88, 91.

Multiple railroad employees testified that when signals "go to red," an engineer cannot move the train until he receives specific verbal directions

³ The exception was a large communications cable, which was apparently not touched during this incident. 4RP 97.

from the dispatcher. 3RP 21, 33-34, 72-73; 4RP 91, 92-93. The dispatcher, meanwhile, must do all dispatching manually and through voice command and may not rely on the signaling system. 3RP 72-73; 4RP 91, 92-93, 95.

Additionally, the speed of all trains in the affected area must be reduced from 40 or 60 mph down to a maximum of 20 mph, and an individual conductor may only travel at a speed at which he can stop in half the distance he can see. 3RP 33, 72. All these precautions prevent two trains from either blockading each other on the same track or -- in the worst possible case -- colliding. 3RP 32-33, 73-75; 4RP 91, 92-93.

Here, because just two signals were down, Ford had to receive verbal commands from the dispatcher and maintain a reduced speed only until he passed the nearby Puyallup River Bridge, visible in the photos taken by police. 3RP 33-34, 36; 4RP 87, 100; Exs. 1, 2, 7. No testimony or other evidence established that any other trains were in the area during this incident. 3RP 73, 76-77; 4RP 92-93.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT SMASAL OF MALICIOUS DAMAGE TO RAILROAD PROPERTY.

- a. The State was required to prove Smasal "endangered the safety of any engine, motor, car, or train, or any person thereon."

Under the "law of the case" doctrine, jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). In criminal cases, the State assumes the burden of proving otherwise unnecessary elements when the Court includes such elements in the "to convict" instruction without objection from the State. Hickman, 135 Wn.2d at 102. On appeal, a defendant may therefore challenge the sufficiency of the evidence as regards one of the thereby added elements. Hickman, 135 Wn.2d at 102.

By statute, a person commits the crime of "malicious injury to railroad property" as follows:

Every person who, in such manner as might, if not discovered, endanger the safety of any engine, motor, car or train, or any person thereon, shall in any manner interfere or tamper with or obstruct any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure, or appliance pertaining to or connected with any railway, or any train, engine, motor, or car on such railway, and every person who shall discharge any firearm or throw any dangerous missile at any train, engine, motor, or car on any railway, is guilty of a class B felony and shall be

punished by imprisonment in a state correctional facility for not more than ten years.

RCW 81.60.070 (emphasis added).⁴

Here, defense counsel proposed the following "to convict" instruction:

To convict the defendant of the crime of malicious injury to railroad property, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 24th day of March, 2006, the defendant endangered the safety of any engine, motor, car, or train, or any person thereon; and

(2) Did interfere or tamper with or obstruct a switch, rail, roadbed, structure, or appliance pertaining to or connected with a railway, train, engine, motor, or car on such railway; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these three elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

⁴ As worded, this statute seems only to require proof that the damage caused could have endangered the safety of others if not discovered, but not actual endangerment to others.

CP 11 (emphasis added) (Defense Proposed Instruction 4). This instruction was accepted without objection by the State and was used to instruct the jury. CP 43 (Instruction 21); 4RP 133, 135.

Indeed, far from objecting, the State had proposed an identical "to convict" instruction on two separate occasions, except that in both the date of the crime was incorrect, which was why the trial court used the defense instruction instead. 4RP 127-28, 133; CP 113 (State's Proposed Instruction 22); CP 148 (State's Proposed Instruction 21). Under the "to convict" instruction given to the jury, the burden was clearly on the State to prove beyond a reasonable doubt Smasal actually "endangered the safety of any engine, motor, car, or train, or any person thereon."

- b. The State's failure to prove Smasal damaged the signaling system means the State failed to prove Smasal actually "endangered the safety of any engine, motor, car, or train, or any person thereon."

In determining whether there is sufficient evidence to prove the added element, the reviewing court inquires "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Hickman, 135 Wn.2d at 103 (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); and Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), rehearing denied,

444 U.S. 890 (1979)). Even under this lenient standard, the State cannot prevail here because it produced no evidence Smasal actually damaged the signaling system.

Although both Officer Thomas Gow and Engineer Jeffrey Ford saw Bradley Johnson manipulating the live wires on the ground, Ford only saw Smasal hanging off the overhead wires. 2RP 15-16; 3RP 13-16, 19-20.⁵ As signal maintenance foreman Espinosa exhaustively testified, the overhead wire had been bypassed because of damage from a previous theft. 4RP 86-90, 97, 102, 104. See also 4RP 50-54 (Johnson testimony about state of the wires). The overhead wires Smasal pulled on were thus not connected to the signals used by the railroad.

Importantly, the "to convict" instruction did not use the language "the defendant or an accomplice." CP 43. It merely used the words "the defendant." Id.

In State v. Teal, a defendant appealed his first degree robbery conviction, arguing the lack of the words "or an accomplice" in the to-convict instruction meant the State had to prove he committed every element of the crime himself. 152 Wn.2d 333, 335-36, 96 P.2d 974 (2004).

⁵ Because a sufficiency argument assumes the truth of the State's evidence, we assume for purposes of this section that Smasal was correctly identified as the second suspect.

Because the State had not proved Teal had used any force during the robbery, Teal argued the State failed to prove its case. Id. at 336-38.

The Supreme Court disagreed, but it did so because there was an accomplice liability instruction explaining the theory of accomplice liability to the jury. Id. at 336, 339. The Court held:

Here, the Court of Appeals correctly determined that jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case. In reading the jury instructions as a whole, including the court's erroneous accomplice liability instruction,^[6] the jury could decide Teal's guilt or innocence as an accomplice to first degree robbery.

Id. at 339.

Here, however, there was not only no reference to an accomplice in the "to convict" instruction, but there was no accomplice liability instruction at all. See CP 20-50 (Court's Instructions to the Jury).⁷ Here,

⁶ The accomplice liability instruction in Teal referred to "a crime" instead of "the crime," but was otherwise the standard WPIC. 152 Wn.2d at 336.

⁷ The State proposed an accomplice liability instruction in its first set of instructions, but it did not include an accomplice liability instruction in the second set. CP 97 (State's Proposed Instruction 6); CP 124-59 (State's proposed instructions). The trial court used the second set of State's proposed instructions as a template for jury instructions, only resorting to Defense instructions where the State's instructions were lacking or inaccurate as to the date of the offense. See generally 4RP 126-36. Accomplice liability went completely unmentioned during the discussion of jury instructions.

the law of the case would require the jury to find Smasal guilty as a principle, or not at all.

But there was no evidence Smasal damaged the signaling system, only that he might have damaged an already offline system -- the old, broken wires on the poles. Because the State failed to prove Smasal damaged any functional system, he could not have "endangered the safety of any engine, motor, car, or train, or any person thereon."

- c. Even if there was evidence Smasal damaged the signaling system, the State still failed to prove he "endangered the safety of any engine, motor, car, or train, or any person thereon" because there was no evidence of endangerment to anyone as a result.

The State produced copious evidence of the workings of the signal system. Each and every railroad employee testified that when live wires in the signaling system are cut, all the signals "go to red." 3RP 21; 4RP 86, 88, 90-91, 103, 108. This means the engineers operating trains in the area must stop moving until they are "talked through" the affected area by the dispatchers. 3RP 21, 33-34, 72-73; 4RP 91, 92-93. They also must travel at a reduced speed -- a speed at which they can stop in half the distance they can see, up to a maximum of 20 mph. 3RP 33, 72.

The dispatchers, for their part, must operate the system manually, must talk with any of their counterparts who may be operating trains in the

area, and may not rely upon the damaged signals. 3RP 72-73; 4RP 91, 92-93, 95. All of these safety precautions ensure no accidents occur if the signaling system is ever damaged. Espinosa further testified the two affected signals went red when the live lines were cut, so the safety system worked as planned. 3RP 88, 91.

Ford noted the signals were working fine only three to five minutes before he spotted Johnson on the ground. 3RP 42-43. The yardmaster agreed the signals were functioning just prior to Ford's verbal report about the men in the yard. 3RP 76.

Ford further testified he was affected by the damaged signals only until he left the Fife Railyard and passed over the Puyallup River, which was right next to the railyard and is visible on the photographs taken of the scene. 3RP 33-34, 36; 4RP 87, 100; Exs. 1, 2, 7. After he passed the bridge, he reached a signaling system operated by the Burlington Northern Railroad, which was not affected by the incident. 3RP 34, 76-77.

Ford said the delay to his train would have likely backed up other trains because he was occupying the main track. 3RP 31-32. But he did claim any knowledge of actual trains in the area or of any danger to him or his train that occurred because of the damage to the signals. Other witnesses were asked about trains in the area being affected by the signal

outage, but none discussed specific trains being in any actual danger. 3RP 73, 77; 4RP 91-93.

Here, where the State was required to prove Smasal endangered someone or something on the railroad, the State produced absolutely no evidence. To the contrary, the State's evidence shows the system worked exactly how it was supposed to and that because of the precautions inherent in the system, even a hypothetical second train would have been safe in the area. But since the State did not show any other train was in the area during the affected period, and did not show Ford's train or any other train was in any actual danger, the State failed to prove this element of the charge.

- d. The definitional instructional only compounded any jury confusion.

In addition to the "to convict" instruction, the trial court gave an instruction defining the crime of malicious injury to railroad property. CP 42. However, the instruction -- proposed by the State -- inadvertently failed to include some word or words, and the instruction therefore did not make sense. CP 42, 112, 147 (Jury Instruction and State's Proposed Instructions). Neither attorney took exception to the instruction. 4RP 133. The trial court therefore defined the offense as follows:

A person commits the crime of malicious injury to railroad property when he endangers the safety of any engine, motor, car, or train, or any person thereon, interfere or tamper with or obstruct a switch, rail, roadbed, structure, or appliance pertaining to or connected with a railway, or a train, engine, motor, or car on such railway.

CP 42 (Instruction 20).

It appears the instruction is lacking the word "and" between the words "thereon" and "interfere," but this is not inherently clear, as "interfere or tamper" is not a verb form matching the original subject "a person" or the clause's subject "he."⁸ This error might not require reversal in itself, but could only compound any jury confusion when deliberating on this charge.

e. The only cure for insufficient evidence is dismissal.

Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. Hickman, 135 Wn.2d at 103. In Hickman, the venue of Snohomish County was inadvertently included as surplusage in the "to convict" instruction. 135 Wn.2d at 101. The evidence, however, did not establish the crime occurred in that county. 135 Wn.2d at 105-06. Accordingly, the Supreme Court reversed and dismissed the charge. 135 Wn.2d at 106.

⁸ The appropriate verb form would be "interferes or tampers," paralleling the previous verb forms "commits" and "endangers."

Here, the State failed to prove Smasal actually "endangered the safety of any engine, motor, car, or train, or any person thereon." For this reason, Smasal's conviction for Malicious Injury to Railroad Property must be reversed and dismissed with prejudice.

2. THE EVIDENCE IS INSUFFICIENT TO CONVICT SMASAL OF FIRST DEGREE MALICIOUS MISCHIEF AND ATTEMPTED FIRST DEGREE THEFT.

- a. The State had to prove Smasal caused \$1500 worth of damage to railroad property and also that he attempted to steal property worth more than \$1500.

Smasal was convicted of both first degree malicious mischief and attempted first degree theft. A person commits first degree malicious mischief when he "knowingly and maliciously . . . [c]auses physical damage to the property of another in an amount exceeding one thousand five hundred dollars." RCW 9A.48.070(1)(a); CP 28-29 (Jury Instructions 6 and 7). Damage includes any breaking and also diminution in the value of the victim's property. CP 32-33 (Jury Instructions 10 and 11).

A person commits first degree theft when he commits theft of "[p]roperty . . . which exceed(s) one thousand five hundred dollars in value. . . ." RCW 9A.56.030(1)(a); CP 35 (Jury Instruction 13). Attempted first degree theft requires a person attempt to steal property exceeding \$1500 in value. RCW 9A.28.020; CP 36 (Jury Instruction 14).

- b. The State only proved Smasal interacted with the dead, bypassed wires, which had no new damage and about which there was no testimony regarding value.

Evidence is sufficient to support a conviction if when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Hickman, 135 Wn.2d at 103. A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

Here, the State failed to prove beyond a reasonable doubt Smasal either caused more than \$1500 in damage to the wire or tried to steal something worth more than \$1500. As noted in section C(1)(b), supra, there was no accomplice liability instruction in this case, nor was the language "the defendant or an accomplice" included in any of the "to convict" instructions. CP 29, 36 (Jury Instructions 7 and 14). The State was therefore required to prove Smasal caused \$1500 in damage and tried to steal something worth \$1500; it could not rely on evidence that Bradley Johnson did so. Contrast Teal, 152 Wn.2d at 336, 339 (specifically because jury was instructed on the theory of accomplice liability, the failure to include the words "or an accomplice" in the "to convict" instructions did not mean the State was required to prove the defendant was a principal).

Here, as discussed in Section C(1)(b), supra, Ford only saw Smasal hanging on the overhead wires. 3RP 19-20.⁹ As signal maintenance foreman, Espinosa said the overhead wire had been bypassed because of damage from a previous theft. 4RP 86-87, 90, 97, 102, 104-05, 115-16. Espinosa also said the overhead wires had been cut over about a quarter-mile, or about ten utility poles, in the previous theft, and he did not notice any new damage from the current incident. 4RP 96-97, 104, 107-08.

Although Espinosa testified about both the value of the live wires on the ground and the cost of replacing those wires, he never estimated the value of the damaged, dead wires overhead. 4RP 94-95, 101. He only mentioned the same crew that would dig the trench for the new live wire would have ordinarily taken the old, dead wires down. 4RP 111-12; 115-16. Some of the damage to the overhead wires might have even been older; at one point, Espinosa directed attention to the hanging overhead wires seen in one photograph and noted some of the dead copper wiring had the insulation removed and afterwards oxidized in the weather -- a process he noted might take "years." 4RP 99, 105-06; Ex. 5.

⁹ As before, because a sufficiency argument assumes the truth of the State's evidence, we assume for purposes of argument that Smasal was the second suspect in this case.

Indeed, the testimony seemed to establish the previously cut, overhead wires were valueless for the railroad. Espinosa said it was not efficient to attempt to splice the wires on the ground back together to reuse them because of the cost of the splice kits; the amount of time the re-splicing would take; and the possibility of causing increased resistance in the wire. 4RP 108-10, 113, 114-15. For these reasons, he simply brought in 2000 feet of cable to replace the two live cables on the ground. 4RP 94, 108-10, 113, 114-15. If anything, this testimony shows the dead overhead wires -- cut repeatedly over about ten utility poles -- would have been worthless to the railroad.

While the jury might be permitted to infer some criminal intent by Smasal's presence at the scene with Johnson, it could not wildly speculate about how much damage Smasal might have done or on the value of what he was seen trying to take. See, i.e., State v. Morley, 119 Wn. App. 939, 942-45, 83 P.3d 1023 (2004) (where defendant attempted to steal an older, used generator, use of the retail price for the generator was inappropriate and therefore attempted first-degree theft not proven); State v. Skorpen, 57 Wn. App. 144, 150, 787 P.2d 54 (1990) (where theft is proven but the value of the property is speculative, defendant only proven guilty of theft in the third degree).

The only testimony the jury had about Smasal's actions was that Smasal interacted with the overhead wires. The only testimony about damage to the overhead wires was that there was no new damage. As far as the value of the wires, the testimony seemed to establish the wires would be useless to the railroad. Perhaps the railroad could have obtained some salvage value for the wires, but there was no testimony as to what that salvage value might have been. Thus, the State did not establish either \$1500 in damage to the wires, nor an attempted theft of property valued at over \$1500.

c. The appropriate remedy is dismissal.

As previously noted, retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. Hickman, 135 Wn.2d at 103. In State v. Lee, a case involving second degree theft, the State failed to prove the necessary value element. 128 Wn.2d 151, 163-64, 904 P.2d 1143 (1995). The Supreme Court therefore reversed the theft conviction and remanded for dismissal of the information with prejudice. Id. at 164. See also State v. Greathouse, 113 Wn. App. 889, 913, 56 P.3d 569 (2002) (this Court agrees the Supreme Court's holding in Lee is "not that there was no theft . . . [but rather] that the prosecution failed to establish second degree theft because it presented no

evidence that the defendant wrongfully obtained property from the . . . victim worth more than \$250"), review denied, 149 Wn.2d 1014 (2003).

Here, the State failed to prove the cost of Smasal's damage to the overhead wiring as required for the malicious mischief conviction, or the value of the overhead wiring as required for the theft conviction. Based on Lee, the appropriate remedy is not reduction of the conviction to a lesser charge; instead, as in Lee, both convictions should be reversed and dismissed with prejudice.

In the alternative, this Court has found:

When the evidence is insufficient to convict of the crime charged, but sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree.

State v. Atterton, 81 Wn.App. 470, 473, 915 P.2d 535 (1996). Although this position appears to conflict with Lee, under Atterton this Court might choose to remand for entry of judgment on the crimes of third degree malicious mischief, which does not require proof of the amount of damages, and attempted third degree theft, which does not require proof of the value of the property the defendant attempted to steal.

3. SMASAL WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO SEEK SUPPRESSION OF THE SHOW-UP IDENTIFICATION AND THE SUBSEQUENT IN-COURT IDENTIFICATION.

When defense counsel fails to set and argue a CrR 3.6 motion, the right to such a motion is waived and cannot be brought in a direct appeal. See State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65 (1994), affirmed on other grounds, 127 Wn.2d 460, 901 P.2d 286 (1995); State v. Tarica, 59 Wn.App. 368, 373, 798 P.2d 296 (1990), overruled on other grounds by State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The issue may, however, be raised in the context of whether an appellant received effective assistance of counsel. Mierz, 72 Wn. App. at 789; McFarland, 127 Wn.2d at 334-35.

Every criminal defendant has the constitutional right to effective assistance of counsel at trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Because an ineffective assistance claim is a mixed question of law and fact, this Court reviews such a claim de novo. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

To prove ineffective assistance of counsel, a defendant must show: 1) that trial counsel's performance was deficient, "i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;" and 2) that the deficiency prejudiced the defense, "i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 334-35.

Reviewing courts presume counsel's representation was effective. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). To rebut that presumption, the defendant must show that counsel had no legitimate strategic or tactical reason for the challenged conduct. McFarland, 127 Wn.2d at 336.

Prior to McFarland, this Court had repeatedly held that any failure to bring a motion to suppress evidence met the first prong of the test for ineffective assistance of counsel because:

[a]s a normal rule, defense counsel brings such a motion anytime there may be a question as to the validity of a search and subsequent seizure. Because the motion is made pretrial and not in front of the jury, there does not appear to be any way to characterize the failure to bring the motion to suppress as a legitimate trial tactic. Therefore, [the defendant's] counsel's performance was deficient.

Tarica, 59 Wn.App. at 374; Mierz, 72 Wn.App. at 790.

In McFarland, however, the Supreme Court held that failure to bring such a motion should not be deemed per se deficient representation, because of the presumption of effective representation. 127 Wn.2d at 335-36 (specifically overruling Tarica on this point). Instead, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Id. at 336.

The McFarland Court examined the separate cases of two defendants, Fisher and McFarland. In each case, there was an indication the trial attorney had considered making the suppression motion at issue:

. . . McFarland's trial counsel unsuccessfully moved to suppress the physical evidence on the ground there was not probable cause to suspect McFarland committed the crime, as well as on other grounds. This fact undermines McFarland's claim of deficient representation, suggesting counsel made a reasoned decision not to move for suppression based on the warrantless arrest. Fisher's trial counsel apparently considered making a motion to suppress based on the warrantless arrest, but chose not to do so.

127 Wn.2d at 337 n.3.

Moreover, the Court doubted whether suppression was likely in either case. In McFarland's case, the defendant was arrested without a warrant after a botched home invasion left one of the robbers dead at the scene. 127 Wn.2d at 327-329. From McFarland's arrest, the State obtained inculpatory statements and also some physical evidence. Id. at

328-29. On appeal, McFarland belatedly challenged the probable cause for his arrest. Id. at 329.

In response, the Supreme Court noted the police knew: (1) McFarland drove a car that leaked oil, as had the person who invaded the home; (2) McFarland matched the rough witness description in height, weight, and age; and (3) McFarland had been seen with the other, now-dead robber on the night of the home invasion. Id. at 328-29. In this context, the Court noted that probable cause for McFarland's arrest would likely have been found by the trial court, and therefore any motion would have likely been denied. Id. at 334 n.2; 337 n.3 and n.4.

Fisher conceded there was probable cause for his arrest, which occurred immediately after a buy-bust operation. 127 Wn.2d at 330-32. Fisher argued, however, that there were no exigent circumstances to justify arrest without a warrant. Id. at 332, 334 n.2. The Court did not specify what exigent circumstances occurred in Fisher's case, but it did note "several of the exigencies" listed in previous caselaw would have justified the arrest. Id. at 334 n.2. Because a CrR 3.6 motion was therefore likely to be denied, defense counsel might have strategically chosen not to make the motion. Id. at 334 n.2, 337 n.3.

Because neither McFarland nor Fisher could make a credible argument that suppression would have been successful, the Court found neither defendant had made either a showing of deficient representation or a showing of prejudice. 127 Wn.2d at 336-38. The claim of ineffective representation therefore failed.

- a. There was no tactical reason for Smasal's trial counsel to refrain from moving to suppress the identification, and also no evidence she ever considered doing so.

Unlike McFarland and Fisher's cases, there is no indication Smasal's counsel ever thought about suppression of the show-up or in-court identification. 127 Wn.2d at 336-37. In the omnibus order of May 9, 2007, defense counsel simply checked the box marked, "No motion to suppress physical evidence or identification will be filed." CP 83.

On the day of trial, the only motion made by defense counsel was to exclude witnesses under ER 615. 1RP 5. The State and Smasal agreed to the admissibility of Smasal's statements for purposes of CrR 3.5 and to the inadmissibility of Smasal's prior convictions and bad acts unless Smasal opened the door while testifying. 1RP 5-7. As a consequence, there was no actual argument on any motion. See generally 1RP 5-8.

Moreover, although defense counsel repeatedly attacked the accuracy of Ford's identification of Smasal as the second suspect, there was never

any mention -- in or out of the hearing of the jury -- of the standard of proof for admission of a show-up or in-court identification. See 2RP 43-47 (defense counsel's cross-examination of Ford regarding the identification); 154-56, 158-61, 164 (defense counsel's attack on the identification in closing argument). Unlike McFarland -- and especially given defense counsel's obvious trial strategy of undermining the identification -- there was no tactical reason to explain trial counsel's failure to make a CrR 3.6 motion to suppress the identification, and no indication trial counsel considered, then rejected, the possibility of such a motion on tactical grounds.

b. A motion to suppress was likely to succeed.

Here, unlike McFarland, the record shows a motion to exclude the identification would have been successful. A claimed violation of due process conducting a show-up identification depends on the totality of the circumstances. See, e.g., Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) (while noting show-ups are "widely condemned," the Supreme Court found the particular show-up "imperative" because the only eyewitness was in the hospital and dying); State v. King, 31 Wn. App. 56, 60-62, 639 P.2d 809 (1982) (because show-up procedures involve a single suspect, Court acknowledged procedure is "inherently

suggestive;" but in the instant case, identification of a piece of defendant's clothing was permissible).

The due process requirement contemplates a two-step inquiry: (1) the Court must decide whether the show-up procedure was "unnecessarily suggestive;" and then, if the defendant does show the identification procedure was unnecessarily suggestive, (2) the Court must decide whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 107-114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Maupin, 63 Wn. App. 887, 896-97, 822 P.2d 355 (1992), review denied, 119 Wn.2d 1003 (1992), appeal after remand, 128 Wn.2d 918, 913 P.2d 808 (1996). If a court reaches the second inquiry, then factors which bear upon the reliability of an eyewitness' identification include: (1) the opportunity to view the suspect; (2) the witness' degree of attention; (3) the accuracy of the description; (4) the witness' level of certainty; and (5) the time between the crime and the confrontation. Brathwaite, 432 U.S. at 114; Maupin, 63 Wn.App. at 897.

i. The show-up was impermissibly suggestive.

One-person show-ups have been "widely condemned" and called "inherently suggestive." Stovall, 388 U.S. at 302; King, 31 Wn. App. at 60; see also State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986)

(show-ups "widely condemned"). The fact that a show-up is held -- particularly with a defendant in handcuffs -- certainly conveys the suggestion to the eyewitness that the police believe the person is guilty. United States v. Wade, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) ("And the vice of suggestion created by the identification . . . was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police").

Nonetheless, show-up identifications are not per se impermissibly suggestive, and the presence of a suspect in handcuffs surrounded by police is not enough, by itself, to demonstrate unnecessary suggestiveness. State v. Guzman-Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987); State v. Shea, 85 Wn. App. 56, 930 P.2d 1232 (1997), abrogated on other grounds by State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001), affirmed, 148 Wn.2d 91, 118, 59 P.2d 58 (2002).

Here, however, there is more evidence of suggestiveness than Smasal merely being handcuffed in the presence of officers, although that is present as well. There is also (1) suggestive communication to Ford that the second suspect has been detained and is merely awaiting his identification; and (2)

the fact that Smasal was the only individual wearing a tan jacket in the vicinity of the show-up, and therefore the only person present who met the extremely vague description of "a white male in a tan jacket" that had been broadcast over the police radio.

Specifically, Ford said that while he was writing his police report at the railyard, the "police officer received communication . . . that a second suspect was being detained and I was requested to identify that person." 3RP 27. The yardmaster to the Fife railyard agreed: "Jeff had gone with another police car and went over to the Am/Pm [sic] on the other side of the river to identify the guy that he said that he saw running." 4RP 71.

Moreover, the only description the arresting officers had of the second suspect was of a "white male in a tan jacket." 3RP 52, 57; 4RP 28. As noted, Smasal was handcuffed and standing in the presence of two police officers either in or next to a police car. 3RP 54-55, 58-59; 4RP 30-32. Moreover, as far as the record reflects, he was the only person present wearing a tan jacket.

In these circumstances, where Ford was primed to believe the person he had seen in the rail yard would be present at the AM/PM, where Smasal was wearing handcuffs and in the presence of police officers, and where

Smasal was the only one present wearing a tan jacket -- a critical piece of clothing for Ford's identification¹⁰ -- Smasal would have been able to make the initial showing that the show-up was unduly suggestive, had his trial attorney made the motion to exclude the show-up identification under CrR 3.6.

ii. The Brathwaite factors indicate Ford's identification was unreliable.

If the identification is shown to be "unnecessarily suggestive," then the Brathwaite factors must be considered to determine if the eyewitness's identification is nonetheless reliable. Those factors are: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty of the identification; and (5) the length of time between the crime and the confrontation. Brathwaite, 432 U.S. at 114; Maupin, 63 Wn.App. at 897.

As an example, in State v. Rogers, the witness had a conversation with the suspect and gave the suspect two cigarettes and a beer before the suspect attacked him. 44 Wn.App. at 512-13. The witness testified he "got a very good look" at his assailant before his glasses were knocked off, and

¹⁰ Ford mentioned the coat as critical to his identification of Smasal at least twice. 3RP 29, 46-47.

then he was in a room with his assailant for 20 to 25 minutes, during which the suspect was "never out of [his] sight." 44 Wn.App. at 513. The witness therefore had ample opportunity to observe the suspect, and in addition, witness's description of the suspect was accurate, and his degree of certainty was high. Id. at 513, 516.

In State v. Shea, the witness similarly had ample opportunity to observe the suspects during the crime for about five minutes, and he devoted his full attention to watching them break into his truck. 85 Wn.App. at 60-61. Although the area was not well lit, there was at least a porch light to the side of the residence, and the truck's dome light was on, and moreover, the truck was parked only 15 feet from the witness's window. Id. at 57-58, 60-61. One of the suspects was even known by sight by the witness, although the witness did not know the suspect's name until after his arrest. Id. at 61. At the time of the show-up, the Shea witness also indicated he was "absolutely positive" about his identification. Id.

And in State v. Hebert, a case where a man entered a schoolroom and departed with a teacher's wallet, two witnesses met the following criteria: (1) one of the two witnesses saw the suspect three times, and the other witness saw him twice; (2) each witness was very alert on at least

two occasions of spotting the suspect; (3) each witness gave an accurate description to police prior to the showup; and (4) each witness was confident in the identification. 33 Wn. App. 512, 514, 656 P.2d 1106 (1982). See also State v. Kinard, 109 Wn. App. 428, 430, 433-34, 36 P.3d 573 (2001) (confidential informant/witness in buy-bust operation sat six feet from defendant and gave him her full attention for two minutes while making drug buy; gave detailed, accurate description of suspect; and was confident in identification), review denied, 146 Wn.2d 1022 (2002); State v. Bockman, 37 Wn. App. 474, 482, 682 P.2d 925 (1984) ("About the time of the burglary, the witness saw the Bockmans from about 10 feet[;] . . . the witness was attentive at the time of the crime and at the showup. At the showup the witness saw the suspects from a reasonable distance. The porch on which the [witnesses] stood was well lighted. From the record, it appears the witness was confident as to the accuracy of his identification"), review denied, 102 Wn.2d 1002 (1984).

Here, however, other four out of the five factors show the showup was unreliable.

(1) The witness' opportunity to view the criminal at the time of the crime -- Ford first said he saw the suspect from a distance of 80 to 100 feet; he then changed his testimony to say he never saw the suspect from

closer than 100 feet. 3RP 19, 24. Even later, he testified the suspects were "approximately 200 feet" apart from each other. 3RP 26. As Johnson was at least some distance ahead of Ford's train, this testimony would logically put the second suspect more than 200 feet away from Ford when Ford was observing the crime.

Moreover, at the time of the showup, the police car carrying Ford never got closer than 75 to 100 feet from Smasal. 3RP 28, 56. The distance was so great that the officer standing next to Smasal did not know Ford had arrived and completed the identification until he was told by radio to take Smasal into custody. 3RP 55-56.

Finally, according to Ford's testimony, the second suspect made only brief eye contact with him and then turned and walked away from the railyard. 3RP 23-25. These facts do not compare to the cases previously discussed where witnesses saw suspects from much closer distances and for relatively lengthy periods of time. This factor cannot favor reliability.

(2) The witness' degree of attention -- Although Ford was alert and attentive at the time of the incident, he was dividing his attention between Johnson and the second suspect. Ford estimated Johnson and the second suspect were about 200 feet apart. 3RP 26.

Although in both Shea and Bockman, witnesses were dividing their attention between suspects, in both those cases the witnesses had much greater opportunity to see the suspects, and the suspects were not as distant from each other as in the instant case. In Shea, for example, the two suspects were observed both next to the victim/witness's truck, which was parked only 15 feet away from the witness's window. 85 Wn.App. at 57-58, 60-61. In Bockman, the witness observed both defendants from a distance of only about 10 feet. 37 Wn.App. at 482. Thus, in those cases, the witnesses were not dividing their attention between widely-spaced suspects, as Ford was here. This factor does not favor reliability.

(3) The accuracy of the witness' prior description of the criminal
-- Ford's description of the second suspect was very dissimilar from Smasal except, presumably, for the tan jacket, which was not entered into evidence.¹¹ During a pretrial interview, Ford stated he was "very sure" the person he saw was in his "late 20s to early 30's." 3RP 44. He was also "very sure" the person was "at least six feet tall," because Ford himself is six feet tall. 3RP 44. He also described the suspect as "average to medium build, a little bulky, not that heavy." 3RP 44-45. Smasal,

¹¹ Ford also described the suspect as walking slowly, with hunched shoulders, but nothing in the record indicates that this was accurate as to Smasal. 3RP 22-23, 30, 44-45.

however, is 5'10", 200 pounds, and was 53 years of age on the date of the incident. CP 82 (Warrant for Smasal's Arrest showing birthday and description).

Ford also thought the man he had seen wore a baseball cap, although Officer Gow testified Smasal did not wear a hat. 3RP 29, 57-58; see also 4RP 35 (Officer Loescher testifies he does not remember if Smasal wore a hat). Given all these dissimilarities between Ford's description of the second suspect and Smasal's actual appearance, this factor cannot be said to favor reliability.

(4) The level of certainty of the identification -- Ford testified he was "very sure" Smasal was the second suspect. This apparent certainty is contradicted, however, by the fact that Ford identified an entirely different person in the courthouse as the second suspect at the time of trial. 3RP 45-49. Because of the obvious and embarrassing error, this factor cannot favor reliability of the identification.

Four out of the five Brathwaite factors therefore indicate the showup identification was unreliable, or at least significantly less reliable than other admissible identifications. Combined with the showing of the suggestiveness of the identification in Section C(3)(b)(i), supra, the factors indicate

the trial court would have likely suppressed the identification had trial counsel made a motion to do so.

- c. The in-court identification was presumptively a product of the earlier, impermissibly suggestive showup identification.

An in-court identification made after an improperly suggestive pretrial identification procedure must be suppressed unless the in-court identification is proven to have had an independent origin. See United States v. Wade, 388 U.S. at 234 ("The lineup is most often used . . . to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identifications, and not mention the pretrial identification as part of the State's case at trial"). For this reason, if a pretrial identification created "a very substantial likelihood of irreparable misidentification," an in-court eyewitness identification is likewise suppressible. State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 110 (1980) (citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)), aff'd, 96 Wn.2d 215, 634 P.2d 868 (1981).

Here, the circumstances of the showup were suggestive, and the Brathwaite factors indicated the showup identification was unreliable.

Moreover, the fact that Ford misidentified another person in the courthouse as the suspect from the railyard shows his identification of Smasal while on the stand was likely based on either Smasal's specific position at the defendant's table or on the impermissibly suggestive showup. For these reasons, had defense counsel moved to suppress the in-court identification of Smasal, such suppression would likely have also been granted.

- d. Prejudice is manifest, as the identifications by Ford are the only evidence tying Smasal to the crime.

The only evidence linking Smasal to the crime was Ford's eyewitness identification. No physical evidence was found on Smasal, and he made no incriminating statements. Nor did co-defendant Bradley Johnson incriminate Smasal either to the arresting officer or on the witness stand. 2RP 17, 24; 4RP 55.

For both Fisher and McFarland,¹² there was significant evidence against them other than the hypothetically excludable evidence. Fisher had been involved in a buy-bust operation conducted by police. 127 Wn.2d at 330-31. A police officer had carefully observed the entire crime being committed, and there was no question whether Fisher was the correct party. Id.

¹² These unrelated cases were consolidated in McFarland, supra, 127 Wn.2d at 326.

Similarly, there was significant additional evidence implicating McFarland in the robbery/home invasion he was charged with. The evidence included: blood-typing and blood-enzyme analysis; McFarland's association with the robber who had been killed while committing the crime; the witnesses' description of the robber matching his general description; the fact that his car leaked oil, as did the car of the robber; and a bloodstain on a mask and a recent injury that matched up to the spot on the mask; and so on. 127 Wn.2d at 327-29. The Supreme Court therefore pointed out that, even had Fisher's and McFarland's hypothetical motions for exclusion succeeded, it was not clear such exclusion would have changed the outcome of either case. *Id.* at 337-38.

Here, in contrast, the only evidence linking Smasal to the crime was his showup and in-court identification by Ford. Had both of Ford's identifications been excluded, then Smasal would have been entitled to a dismissal of charges as a matter of law. Moreover, had merely the showup identification been excluded, it would have significantly weakened the State's case against Smasal, especially given Ford's day-of-trial inaccurate identification of another party in the courthouse as the second suspect from the railyard.

For this reason, there is "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 334-35; Strickland, 466 U.S. at 693-94 (defining "reasonable probability" as "sufficient to undermine confidence in the outcome"). Thus Smasal has made the required showing that he was prejudiced by his counsel's deficient representation in failing to bring the CrR 3.6 motion.

e. The remedy is reversal for retrial.

When a criminal defendant is denied effective assistance, the appropriate remedy is reversal and remand for a new trial. In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Here, Smasal's convictions should be reversed and his case remanded for a new trial, at which he should receive effective assistance.

4. THE COURT FAILURE TO FILE CrR 3.5 FINDINGS AND CONCLUSIONS REQUIRES REMANDED.

CrR 3.5(c) provides:

(c) Duty of Court to Make a Record.

After [a CrR 3.5] 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 therefor.

Here, the parties stipulated to the admissibility of Smasal's statements to Officer Loescher. CP 86-87. However, CrR 3.5 makes no exception for a case in which a stipulation is filed.

The trial court failed to enter any findings as required by CrR 3.5. The proper remedy is remand for entry of findings and conclusions. State v. Head, 136 Wn.2d 619, 623-24, 964 P.2d 1187 (1998).

D. CONCLUSION

This Court should reverse and dismiss David Smasal's convictions because the State failed to prove any of the charges beyond a reasonable doubt. In the alternative, this Court should reverse Smasal's convictions and remand for a new trial because he received ineffective assistance of

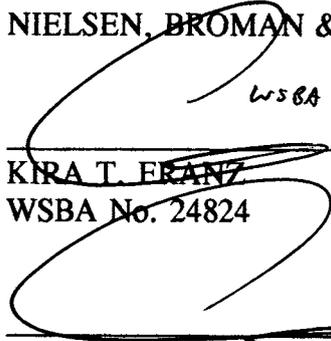
counsel. In either event, this Court should remand for entry of CrR 3.5 findings and conclusions.

DATED this 12th day of ^{August}~~July~~, 2008.

Respectfully Submitted,

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

STATE OF WASHINGTON)

Respondent,)

vs.)

DAVID SMASAL,)

Appellant.)

COA NO. 37137-5-II

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COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF AUGUST 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KATHLEEN PROCTOR
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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF AUGUST 2008.

x Patrick Mayovsky

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STATE OF WASHINGTON
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