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COURT OF APPEALS  
DIVISION II

NO. 37137-5

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVID SMASAL, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson, Judge

No. 07-1-01247-0

**BRIEF OF RESPONDENT**

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

1a. Was there sufficient evidence to find defendant guilty of malicious injury to railroad property where defendant interfered or tampered with or obstructed railroad property and his action's endangered railroad property and personnel?

1b. Was there sufficient evidence to find defendant guilty of malicious mischief in the first degree and attempted theft in the first degree when there was evidence defendant has damaged railroad property and was attempting to take cable worth over \$1500?

2. Did defendant receive constitutionally effective assistance of counsel?

3. Where no CrR 3.5 hearing was held as a result of a valid, written stipulation are findings of fact still required?

B. STATEMENT OF THE CASE.

1. Procedure

On March 7, 2007, the State charged defendant, David Smasal, with one count of malicious mischief in the first degree, one count of theft in the third degree, and one count of reckless endangerment. CP 1-2. On July 25, 2007, the State filed an amended information which retained the

malicious mischief count, but changed the other two counts to one count of attempted theft in the first degree, and one count of malicious injury to railroad property. CP 5-6, 1RP 3.<sup>1</sup>

On October 1, 2007, the case was assigned to the Honorable Frank Cuthbertson for jury trial. 1RP 3. Defendant waived a CrR 3.5 hearing, and instead entered into a written stipulation as to the admissibility of his statements. 1RP 5, CP 86-7.

The jury found defendant guilty of all three counts. 4RP 178, CP 51-55.

The court held sentencing on November 15, 2007. 5RP 2. At that time, defense counsel made a motion for a new trial based on insufficient evidence. 5RP 3-10, CP 56-61. The court denied the defense's motion, finding that a rational jury could find beyond a reasonable doubt that defendant was guilty of the crimes charged. 5RP 11. The court found that there was sufficient evidence. 5RP 11.

Defendant's offender score was calculated as a 9+ and his standard range on the malicious mischief count was 43-57 months, 32.35 -42 months on the attempted theft count, and 51-68 months on the malicious

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<sup>1</sup> The State will adopt the same cites to the Verbatim Report of Proceedings as appellant: 1RP -10/1/07; 2RP 10/2/07; 3RP 10/3/07; 4RP 10/4/07, 10/8/07, 10/9/07 (consecutively paginated volumes); and 5RP 11/15/07 (Sentencing). See Appellant's Brief page 4.

injury to railroad property. 5RP 11, CP 65-76. The court sentenced defendant to 51 months on the malicious injury to railroad property, 42.75 months on the attempted theft, and 51 months on the malicious mischief; all to run concurrently. 5RP 15, CP 65-76. Defendant filed this timely appeal. CP 77.

## 2. Facts

Engineer Jeffrey Ford was picking up a train at the Fife rail yard on March 24, 2006. 3RP 10. It was a very warm day. 3RP 12. Ford was assigned to put together a train and transport it to Portland, Oregon. 3RP 11. As Ford was putting together his train, he noticed a man spread eagle on the ground next to the tracks. 3RP 12. The man was not moving. 3RP 12. Ford thought the man has been electrocuted as there were electrical wires across his body and lying next to him. 3RP 13. The man sat up as Ford approached and indicated he was just lying in the sun. 3RP 15. Ford realized the man was not a railroad employee. 3RP 15. The man was later identified as Bradley Johnson. 2RP 16. Ford backed off from Johnson as he had been trained not to confront a trespasser, and only to observe and report. 3RP 16.

Ford continued to monitor the situation from the cab of his train. 3RP 19. He then noticed that the electrical lines were bouncing in the air. 3RP 19. He realized that a second person was trespassing on the property

and causing the lines to bounce. 3RP 19. The second person, later identified as defendant David Smasal, was using a piece of line that had already been cut and was wrapping it over the lines still on the pole attempting to pull them down by breaking them. 3RP 19. Defendant walked slowly with shoulders slouched and his head down. 3RP 22-3. Defendant was wearing a tan jacket. 3RP 23. Ford observed defendant walk towards the bridge that crosses the river and then turn onto a levy road. 3RP 24, 36.

Ford was asked to write out a statement, and as he was writing his statement, the police apprehended defendant. 3RP 27. Defendant was apprehended at a gas station less than a mile away from the scene. 3RP 28, 53. Defendant had been jaywalking and dodging traffic. 4RP 28. Ford was able to positively identify defendant as the second suspect. 3RP 29-30.

C. ARGUMENT.

1. THE EVIDENCE AGAINST DEFENDANT WAS SUFFICIENT FOR A JURY TO FIND HIM GUILTY OF MALICIOUS INJURY TO RAILROAD PROPERTY, MALICIOUS MISCHIEF IN THE FIRST DEGREE, AND ATTEMPTED THEFT IN THE FIRST DEGREE.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Defendant raises two challenges to the sufficiency of the evidence. Defendant contends the evidence was insufficient to find that he endangered any railroad personnel or equipment or that he damaged the railroad signaling system. Defendant also contends that there was insufficient evidence to find that he had damaged any property that was valued at \$1,500 or more. The evidence was sufficient for the jury to find defendant guilty of all three crimes.

- a. There was sufficient evidence to find defendant guilty of malicious injury to railroad property where the evidence showed defendant interfered with railroad property and his actions created a dangerous situation.
  - i. **The "to convict" instruction for malicious injury to railroad property contained the essential elements of the crime.**

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is

the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), *citing*, *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

Defendant claims that there are errors in two jury instructions: both the to-convict and definitional instructions for malicious injury to railroad property. CP 20-50 (Instructions 20 & 21). However, defendant did not object to these instructions in the trial court. Defendant has not preserved any objection to the definitional instruction.

The "to convict" instruction for the malicious injury to railroad property still contains all the essential elements of the statute. *See* RCW 81.60.070. The words that are left out are, "in such a manner as might, if not discovered." In this case, defendant was discovered engaging in the actions contemplated by the statute. The words that were not contained in the "to convict" instruction were not part of an essential element. The jury was properly instructed.

**ii. Defendant's actions meet the essential elements of the statute.**

The jury was instructed in the “to convict” instruction that in order to find defendant guilty of the crime of malicious injury to railroad property, they had to find, “(1) That on or about the 24<sup>th</sup> 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...”

There was sufficient evidence for the jury to find that defendant interfered, tampered with or obstructed a switch, rail, roadbed, structure or appliance pertaining to or connected to the railway, train, motor, or car on such a railway. The State did not have to prove damage to convict defendant of injuring railroad property. In the instant case, defendant was observed with a piece of cut wire in his hands. 3RP 19. Defendant was using that piece of cut wire to try and get more wires down by breaking them. 3RP 19. This wire, both the cut piece and the wire hanging on the poles, belonged to the railroad. 3RP 17, 4RP 86-7, 90, 98, 104. The utility poles in the area are dedicated to the railroad. 3RP 17. The other wire on the ground, that had been cut, was live wire used to run the signals. 4RP 86-8, 90, 100, 108-9. Defendant's actions interfered with the rail as well as Ford and his train. Ford had to stop building the train he

was working on to observe and report what defendant was doing. 3RP 31-2. Ford's train then could not move because of the police activity that was caused by defendant's actions. 3RP 32. Ford's train was delayed for at least two hours. 3RP 31, 73.

Further, the disruption in the railway system was not just limited to Ford's train. His train was blocking the tracks which did not allow other trains to pass. 3RP 32, 4RP 103. A dispatcher had to be used to manually navigate trains through the area since the signals had turned to red and could not be used to navigate trains. 4RP 91. It took 52 hours to get everything fully functional again. 4RP 95. Defendant's actions clearly interfered with appliances pertaining to the railroad and to a train.

Further, defendant's actions created a dangerous situation. Endanger is defined as, "to create a dangerous situation." *Webster's Third New International Dictionary*.

Defendant's actions created a dangerous situation for the train driven by Mr. Ford as well as Mr. Ford himself. Defendant was seen tampering with the main communication line for the railroad. 3RP 19, 4RP 104. In addition, live wires have the potential for electrocution. 3RP 12, 22, 4RP 89. Both electrocution and the potential to lose the main communication wire created a dangerous situation that endangered Mr. Ford and his train.

In addition, there was evidence defendant tampered with the wires and a reasonable inference that defendant's tampering with the wires caused the signals at the rail yard to go red. 3RP 21, 72, 4RP 88, 108. Once the signals went red, all trains have to be manually talked through the area since the signals aren't working. 3RP 21, 72-3, 4RP 91 . The signals are the "life line" that tell the engineers when they can go and when they can't. 3RP 18. Trains have to travel slower so that they can stop within half the stopping distance. 3RP 33. The potential for a railway collision was a very real possibility which is why the trains have to move slowly. 3RP 33. Ford also testified that often his train contains hazardous materials. 3RP 27. Defendant's actions endangered the engineer and the train itself.

- b. There was sufficient evidence to find defendant guilty of malicious mischief in the first degree and attempted theft in the first degree where there was evidence that defendant has damaged railroad property and was attempting to take property valued over \$1500 that belonged to the railroad.

Under RCW 9A.48.070, a person commits malicious mischief in the first degree when "he knowingly and maliciously....causes physical damage to the property of another in an amount exceeding one thousand five hundred dollars."

Under RCW 9A.56.030, a person commits theft in the first degree when, "he or she commits theft of property or services which exceed(s)

one thousand five hundred dollars in value other than a firearm.” As the State charged the theft in the first degree as an attempted crime, the State had to prove that defendant had taken a substantial step toward committing that crime. *See* RCW 9A.28.020.

Defendant contests the sufficiency of both of these charges as to defendant’s connection to anything of value.

There was sufficient evidence for the jury to find defendant had committed the crimes of malicious mischief and attempted theft. The evidence, and reasonable inferences, showed that defendant had caused damage to property. Defendant was seen with a piece of cut wire in his hands. 3RP 19. There was evidence that the live wire had been cut in several places during this incident. 4RP 88, 100, 109. The wires that were across Johnson were the wires defendant was pulling on. 3RP 26-7. Defendant was observed pulling on wires and trying to pull them down by breaking them. 3RP 19. There was sufficient evidence for the jury to find defendant had caused damage to the railroad wire and the railroad property.

Further, there were wires that had been bundled up during this incident. 4RP 96, 99. The reasonable inference is that wire in bundles would be easier to steal. There was testimony that thieves steal copper wire because it is untraceable, easy money, and salvage yards will take

copper from anyone. 2RP 14, 3RP 22, 4RP 11-12. The logical inference is that defendant had damaged the wires to make it easier to transport for sale.

The cable alone was valued at \$2,640. 4RP 95. That is well above the amount the State was required to prove for attempted theft. Further, in order to fix the cable that had been damaged, it cost \$8,000 in labor. 4RP 95. Both figures satisfy the value amounts required by statute. As the evidence is sufficient for the jury to find defendant committed both malicious mischief in the first degree and attempted theft in the first degree, and the value well exceeded \$1500, this court should uphold defendant's convictions.

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court

has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* See also, *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v.*

*McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

*State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*Citing Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the

reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

In terms of pre-trial motions, defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336. The failure to move for suppression is no per se deficient representation. *Id.* Without an affirmative showing that a motion to suppress would have been granted there is no showing of actual prejudice. *Id.* at 337.

In the instant case, defendant has not met his burden in showing that counsel was ineffective. Defendant cannot meet the prongs of the *Strickland* test. First, defendant cannot show that defense counsel's performance was deficient. Defense counsel's theory of the case was that defendant was in the wrong place at the wrong time. 4RP 152. Defense counsel was not denying that defendant was the one arrested on the incident date, their theory of the case was that he was not the one at the railroad site. 4RP 155-9. Defense counsel used the encounter at the gas

station to argue how her client was just a victim of circumstance and how he had done nothing wrong. 4RP 161. Defense counsel performed extensive cross-examination trying to discredit the reliability of Ford. 3RP 43-7. Whether the strategy worked or not is not the test. Defendant cannot meet his burden under the first *Strickland* prong.

Second, defendant cannot show actual prejudice from defense counsel's decision. Defendant alleges that trial counsel should have moved to suppress Mr. Ford's identification and that such a motion would have likely succeeded. However, the record shows a basis for the court to deny such a motion.

The defendant bears the burden of showing that an identification procedure was impermissibly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)). When a defendant fails to show impermissible suggestiveness, the inquiry ends. *Vaughn*, 101 Wn.2d at 609-10. Only after the defendant first shows impermissible suggestiveness does the inquiry turn to whether the identification was nevertheless reliable. *Id.* 610-11. The court then reviews the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Taylor*, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). To determine reliability, the court must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy

of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (concluding that "reliability is the linchpin" for determining the admissibility of identification testimony). The trial court's admission of evidence regarding identification procedures is reviewed by this Court for an abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002).

- a. The show-up identification was not impermissibly suggestive.

Show-up identifications are not per se impermissibly suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). A suspect in handcuffs surrounded by police is not enough by itself to demonstrate that the identification procedure was flawed. *State v. Shea*, 85 Wn. App. 56, 930 P.2d 1232 (1997) *overruled on other grounds by State v. Vickers*, 107 Wn. App. 960, 967, 29 P.3d 752 (2001). A show-up identification held shortly after the crime and in the course of a prompt search for the suspect is permissible. *State v. Springfield*, 28 Wn. App. 446, 447, 624 P.2d 208.

The identification of defendant made by Mr. Ford was not impermissibly suggestive. Defendant was detained by the police in handcuffs. 3RP 29. Defendant was sitting on the edge of a police cruiser.

3RP 29. None of that is impermissibly suggestive. Mr. Ford was only told that the police had detained a second suspect and that he was being taken to identify the person. 3RP 27. Mr. Ford was instructed to look out the window and see if the person being detained was the person he saw departing from the scene. 3RP 28. Mr. Ford was able to identify defendant as the person he saw depart from the scene, not just from the tan jacket defendant was wearing, but also by the length of this hair and condition of defendant's hair, his slouching shoulder and his slow gait. 3RP 22-3, 29-30. All of this took place within the immediate search for a suspect as Mr. Ford testified he was filling out his statement when the call came in that a second suspect has been detained. 3RP 27. Mr. Ford's identification of defendant was within the bounds of case law. It was not impermissibly suggestive. Defendant cannot show that, looking at the totality of the circumstance, that the identification process denied him due process.

- b. Even if the court could have found the show-up impermissibly suggestive, the court would have been within its discretion in finding the identification reliable.

Mr. Ford's identification would have been deemed reliable under the *Manson* factors. First, Mr. Ford has ample opportunity to view defendant at the time of the crime. Mr. Ford observed defendant 80 -100 feet in front of his train. 3RP 19. Mr. Ford was in the cab of his train at the time and was able to describe where defendant was standing, what he

was doing, and what he looked like. 3RP 19. Defendant only started to walk away after Mr. Ford made eye contact with him. 3RP 24. Defendant also left the area slowly. 3RP 22-3.

Second, Mr. Ford was able to describe the scene and defendant in detail, showing a great deal of attention. 3RP 19, 22-3. Ford focused on defendant until he left the scene and then turned back to Johnson. 3RP 25.

Third, Mr. Ford's descriptions of defendant were consistent. He could describe defendant's slow gait, slouched shoulders, and long, unkempt hair. 3RP 22-3. While Mr. Ford did not get the age of defendant exactly correct, he was clear that defendant was older than the first suspect, which was true. 3RP 22-3,

Fourth, Mr. Ford was certain defendant was the second suspect after he stood up and Mr. Ford was able to observe his slouched shoulders and slow gait. 3RP 29-30.

Finally, the time between the incident and identification was very short. 3RP 27. Mr. Ford's identification would have been deemed reliable and admissible. Defendant cannot show prejudice under the second prong of *Strickland*.

3. AS A 3.5 HEARING WAS VALIDLY WAIVED, THERE IS NO REQUIREMENT FOR WRITTEN FINDINGS OF FACT.

CrR 3.5 does require written findings to be entered after a CrR 3.5 hearing has been held. A pretrial CrR 3.5 hearing allows the court to rule on the admissibility of sensitive evidence. *State v. Taylor*, 30 Wn. App. 89, 92, 632 P.2d 892 (1981). A hearing under CrR 3.5 is mandatory to see if the statements made by defendant were a product of coercion. *State v. Joseph*, 10 Wn. App. 827, 520 P.2d 635 (1974). CrR 3.5 hearings are procedural and the right to one is not itself of constitutional magnitude. *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). However, if the defendant acts knowingly and intentionally, he may waive this right to a CrR 3.5 hearing. *State v. Myers*, 86 Wn.2d 419, 545 P.2d 538 (1976). If a hearing is waived, then it would logically follow that no written findings would be required since no hearing was held.

In the instant case, the CrR 3.5 hearing was waived. 1RP 5. However, the parties did put forward a written stipulation to the admissibility of defendant's statements. CP 86-87. The stipulation stated that the admissible statements were "defendant's oral statements regarding identity and his denial of any wrongdoing." 1RP 5, CP 86-87. Defendant himself signed the stipulation. CP 86-87. The stipulation was addressed in open court. 1RP 5. The CrR 3.5 hearing was waived and the waiver was valid. There is no error and no reason to remand for findings.

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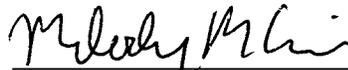
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D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to affirm the convictions and sentence below.

DATED: October 27, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

Certificate of Service:

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

10.27.08   
Date Signature