

NO. 40940-2

FILED  
COURT OF APPEALS  
DIVISION II

11 JUL 26 PM 3:30

STATE OF WASHINGTON

BY

DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS WHITE, APPELLANT  
TERRELL NATHAN, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 09-1-01696-0

No. 09-1-01695-1

**BRIEF OF RESPONDENT**

MARK LINDQUIST  
Prosecuting Attorney

By

MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

1. Did the trial court abuse its discretion when it properly admitted evidence of identification absent an objection and properly denied defendants motion for mistrial?..... 1

2. Did the State present sufficient evidence tying defendants to the crimes, especially where there was evidence to corroborate the dog track? ..... 1

3. Was defendant denied the right to a fair trial where the State did not commit prosecutorial misconduct and defendant cannot show prejudice from any prosecutorial error? ..... 1

4. Have defendants failed to meet their burden of showing deficient performance and resulting prejudice necessary to succeed on their claims of ineffective assistance of counsel? ..... 1

5. Did the trial court error in sentencing defendant White when it added a sentencing provision authorized by statute? ..... 2

B. STATEMENT OF THE CASE..... 2

1. Procedure ..... 2

2. Facts..... 3

C. ARGUMENT..... 8

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE ON SCENE IDENTIFICATION WHEN DEFENDANTS DID NOT TIMELY OBJECT AND IT WAS NOT IMPERMISSIBLY SUGGESTIVE OR IN DENYING DEFENDANTS' MOTION FOR MISTRIAL. .... 8

2.	THE STATE PRESENTED SUFFICIENT EVIDENCE TYING DEFENDANTS TO THE CRIMES COMMITTED AND THE DOG TRACK EVIDENCE WAS CORROBORATED BY OTHER EVIDENCE.....	14
3.	DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT. ....	19
4.	DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.....	25
5.	THE TRIAL COURT DID NOT ERROR IN SENTENCING DEFENDANT WHITE WHEN IT ORDERED A SENTENCING PROVISION AUTHORIZED BY STATUTE. ....	30
D.	<u>CONCLUSION</u> .....	34

## Table of Authorities

### State Cases

<i>In re Personal Restraint Petition of Brett</i> , 142 Wn.2d 868, 873, 16 P.3d 601 (2001).....	29-30
<i>In re Rainey</i> , 168 Wn.2d 367, 374, 229 P.3d 686 (2010) .....	31
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993), <i>cert. denied</i> , 510 U.S. 944 (1993).....	28
<i>State v. Binkin</i> , 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), <i>overruled on other grounds by State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002).....	20
<i>State v. Bruton</i> , 66 Wn.2d 111, 112, 401 P.2d 340 (1965) .....	16
<i>State v. C.J.</i> , 148 Wn.2d 672, 686, 63 P.3d 765 (2003) .....	11
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	14
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	15
<i>State v. Crane</i> , 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991), <i>superseded on other grounds by statute as stated in</i> , <i>In re Pers. Restraint of Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	12
<i>State v. Denison</i> , 78 Wn. App. 566, 897 P.2d 437, <i>review denied</i> , 128 Wn.2d 1006 (1995) .....	27
<i>State v. Dennison</i> , 72 Wn. 2d 842, 849, 435 P.2d 526 (1967).....	21
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 577, 79 P.3d 432 (2003).....	21
<i>State v. Ellis</i> , 48 Wn. App. 333, 335, 738 P.2d 1085 (1987) .....	15-16
<i>State v. Escalona</i> , 49 Wn. App. 251, 254, 742 P.2d 190 (1987).....	12
<i>State v. Foster</i> , 81 Wn. App. 508, 915 P.2d 567 (1996), <i>review denied</i> , 130 Wn.2d 100 (1996) .....	27

<i>State v. Gentry</i> , 125 Wn.2d 570, 640, 888 P.2d 570 (1995) .....	19-20
<i>State v. Gerber</i> , 28 Wn. App. 214, 217, 622 P.2d 888 (1981) .....	14
<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990) .....	20
<i>State v. Green</i> , 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).....	20
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	14
<i>State v. Gregory</i> , 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006).....	21
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	8
<i>State v. Guzman-Cuellar</i> , 47 Wn. App. 326, 335, 734 P.2d 966 (1987).....	9
<i>State v. Hayes</i> , 81 Wn. App. 425, 442, 914 P.2d 788, <i>review denied</i> , 130 Wn.2d 1013, 928 P.2d 413 (1996).....	28
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991).....	20
<i>State v. Hopson</i> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).....	12
<i>State v. Jefferson</i> , 11 Wn. App. 566, 571, 524 P.2d 248 (1974) .....	16
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 (1986).....	26
<i>State v. Johnston</i> , 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).....	30
<i>State v. Jones</i> , 118 Wn. App. 199, 204, 76 P.3d 258 (2003) .....	31
<i>State v. Julian</i> , 102 Wn. App. 296, 304, 9 P.3d 831 (2000) .....	31
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 56 (1992).....	27, 28
<i>State v. Loucks</i> , 98 Wn.2d 563, 567, 656 P.2d 480 (1983).....	15, 16
<i>State v. Lough</i> , 125 Wn.2d 847, 864, 889 P.2d 487 (1995).....	21
<i>State v. Lubers</i> , 81 Wn. App. 614, 619, 915 P.2d 1157 (1996) .....	14

<i>State v. Luvene</i> , 127 Wn.2d 690, 701, 903 P.2d 960 (1995).....	12
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662, <i>review denied</i> , 113 Wn.2d 1002 (1989) .....	30
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	27, 28
<i>State v. Rangel-Reyes</i> , 119 Wn. App. 494, 499, 81 P.3d 157 (2003) .....	14
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, 834 P.2d 651, <i>review denied</i> , 120 Wn.2d 1022 (1992) .....	8
<i>State v. Rodriguez</i> , 146 Wn.2d 260, 269, 45 P.3d 541 (2002).....	11
<i>State v. Russell</i> , 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) .....	20, 21
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	14
<i>State v. Shea</i> , 85 Wn. App. 56, 930 P.2d 1232 (1997) <i>overruled on other grounds by State v. Vickers</i> , 107 Wn. App. 960, 967, 29 P.3d 752 (2001).....	9
<i>State v. Smith</i> , 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).....	21
<i>State v. Springfield</i> , 28 Wn. App. 446, 447, 624 P.2d 208 .....	9
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	19, 20
<i>State v. Stith</i> , 71 Wn. App. 14, 18, 856 P.2d 415 (1993).....	21
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990).....	8
<i>State v. Theroff</i> , 25 Wn. App. 590, 593, 608 P.2d 1254 (1980) .....	14
<i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987) .....	8
<i>State v. Walton</i> , 76 Wn. App. 364, 884 P.2d 1348 (1994), <i>review denied</i> , 126 Wn.2d 1024 (1995) .....	27
<i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983) .....	12

*State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)..... 19

*State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)..... 28

**Federal and Other Jurisdictions**

*Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582,  
91 L. Ed. 2d 305 (1986)..... 26

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052,  
80 L. Ed. 2d 674 (1984)..... 26, 27, 28

*United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045,  
80 L. Ed. 2d 657 (1984)..... 25

**Constitutional Provisions**

Article 1, Sec. 22, Washington State Constitution..... 25

Sixth Amendment, United States Constitution ..... 25, 26

**Statutes**

RCW 9.94A.700(5)(e) ..... 32

RCW 9.94A.703..... 30, 31

RCW 9.94A.703(1)..... 30

RCW 9.94A.703(1)(b) ..... 31

RCW 9.94A.703(2)..... 31

RCW 9.94A.703(3)..... 31

RCW 9.94A.704..... 31, 32

RCW 9.94A.704(2)(a) ..... 31

RCW 9.94A.704(4)..... 31

RCW 9.94A.704(6)..... 33

RCW 9.94A.704(7)(a) ..... 32

RCW 9.94B.050..... 32

RCW 9.94B.050(5)(e)..... 32

**Rules and Regulations**

CrR 3.6..... 9

ER 103 ..... 8

ER 401 ..... 8, 9

ER 403 ..... 9

**Other Authorities**

WPIC 1.01..... 25

WPIC 1.02..... 22

WPIC 4.01..... 22

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

1. Did the trial court abuse its discretion when it properly admitted evidence of identification absent an objection and properly denied defendants motion for mistrial? (Pertains to Nathan's assignment of error #2 and #4, adopted by White and White assignment of error #2)
2. Did the State present sufficient evidence tying defendants to the crimes, especially where there was evidence to corroborate the dog track? (Pertains to Nathan's assignment of error #1 and #3, adopted by White and White's assignment of error #1)
3. Was defendant denied the right to a fair trial where the State did not commit prosecutorial misconduct and defendant cannot show prejudice from any prosecutorial error? (Pertains to White's assignments of error #3, adopted by Nathan)
4. Have defendants failed to meet their burden of showing deficient performance and resulting prejudice necessary to succeed on their claims of ineffective assistance of counsel? (Pertains to White's assignments of error #2 and #4, assignment of error #4 adopted by Nathan)

5. Did the trial court error in sentencing defendant White when it added a sentencing provision authorized by statute? (Pertains to White's assignment of error #5)

B. STATEMENT OF THE CASE.

1. Procedure

On March 9, 2009, the State charged defendant Terrell Nathan and defendant Marcus White with one count each of attempted robbery in the first degree, and one count each of burglary in the first degree. NCP 1-2, WCP 54-55.<sup>1</sup> All charges also had a deadly weapon enhancement. *Id.*

On June 10, 2010, trial commenced in front of the Honorable Bryan Chushcoff. 6/10/10RP 4.<sup>2</sup> Defendant White moved for a mistrial late in trial based on the identification of defendants made by witness Shauna Ward. 6/16/10RP 50-52. Defendant Nathan joined in the motion. 6/16/10RP 53. The trial court denied the motion for mistrial. 6/16/10RP 56.

On June 24, 2010, the jury found both defendant's guilty as charged. 6/24/10RP 4-5. The jury answered no to all four special verdict forms as to the deadly weapon enhancements. 6/24/10RP 5.

---

<sup>1</sup> The State will refer to the clerk's papers for defendant Nathan as NCP and the clerk's papers for defendant White as WCP.

<sup>2</sup> Since none of the volumes of the verbatim report of proceedings are sequentially paginated, the State will refer to each VRP with the date prior to RP.

The court held sentencing on July 9, 2010. 7/9/10RP 4. Both defendants had an offender score of 2. 7/9/10RP 7, NCP 36-48, WCP 179-191. The trial court sentenced both defendants to the low end of the standard range of 30.75 months. 7/9/10RP 23. Defendants both filed timely notices of appeal. NCP 49, WCP 170.

## 2. Facts

Shauna Wood lived at the Spanish Hill apartment with her boyfriend Tim Smith, his brother Benjamin Wheeler, his sister Jill Foster and Wood's two children. 6/16/10RP 5. On March 27, 2009, a man came to the door asking for Jill. 6/16/10RP 7. Ms. Wood only knew the man as Eric. 6/16/10RP 10. When he was told that Jill wasn't there, the man started to walk out and six men rushed through the door. 6/16/10RP 7. The men were black. 6/16/10RP 19. Ms. Wood was unsure of the actual number of men. 6/16/10RP 19. One of the men put a hammer over her head and said, "Give it to me, bitch," referring to her laptop. 6/16/10RP 7. Another man said, "We are taking this shit." 6/16/10RP 7. The man standing over her with the hammer said he was going to hit her. 6/16/10RP 15. He had black gloves on. 6/16/10RP 18. Ms. Wood dropped her computer and grabbed the phone. 6/16/10RP 16. She said she was calling police and then men tried to leave. 6/16/10RP 16.

Benjamin Wheeler was at his brother's house on March 27, 2009. 6/14/10RP 5. While he was there, a guy knocked on the door and asked

for Jill. 6/14/10RP 6. When the man was told that Jill was not there, he began to walk out the door. 6/14/10RP 6. When the man got to the door four guys ran in the door. 6/14/10RP 7. All of men were black. 6/14/10RP 20, 35. One of them had a bandana over his face. Another was wearing a light teal shirt. 6/14/10RP 7. The person wearing a bandana had a hammer in their hand. 6/14/10RP 7. Mr. Wheeler's brother grabbed one of the men in a headlock. 6/14/10RP 7. Another man tried to grab his brother's girlfriend's laptop. 6/14/10RP 8. He heard the man say, "Give me it, Bitch." 6/14/10RP 8. Mr. Wheeler punched one of the men, and the man punched him back and hit Mr. Wheeler in the jaw. 6/14/10RP 8. The whole incident lasted 3-4 minutes and then the men ran out the front door. 6/14/10RP 9. Mr. Wheeler saw the men then walk across the parking lot. 6/14/10RP 9. The man in the teal shirt was trying to crouch down in front of some bushes. 6/14/10RP 10.

One of the men lost their shoe in the apartment during the scuffle. 6/14/10RP 10-11, 6/21/10RP 9-10. The man with the hammer dropped it and left it in the apartment. 6/14/10RP 10-11.

Sergeant Stark was dispatched to the incident. 6/14/10RP 38. He was only a block and half away when the call came in. 6/14/10RP 19. While on his way to the call, he saw a group of three males at the apartments between him and the victim's address. 6/14/10RP 39. While the original dispatch has indicated that there were 8-10 males, these are just the dispatch notes. 6/14/10RP 52, 62-63. Sgt. Stark also indicated

that it is common for large groups to break up. 6/14/10RP 59. Less than ten minutes elapsed between the time Sgt. Stark got the call and the time he saw the three men. 6/14/10RP 42, 44. The males saw his patrol car and then vanished. 6/14/10RP 39. Sgt. Stark testified that the males ducked down and then he saw them again in Vassault Street. 6/14/10RP 40. Sgt. Stark drove up to the men and asked them to wait and they complied. 6/14/10RP 40. Sgt. Stark observed that none of the men were wearing clothing that was appropriate for the temperature. 6/14/10RP 47. Sgt. Stark himself was wearing a thicker outfit and coat that night because of the colder weather. 6/14/10RP 47.

Sgt. Stark testified that the victims were brought to the scene. 6/14/10RP 48. The three men were cooperative and as such were not in handcuffs and were not in patrol vehicles when the victims were brought to the scene. 6/14/10RP 48, 51. Streetlights illuminated the area so there was no problem seeing the individuals. 6/14/10RP 48.

Mr. Wheeler and Ms. Ward were taken by law enforcement to see if they could identify the people that broke into the house. 6/14/10RP 11, 19, 6/16/10RP 22. Officer Logan told them that were being to taken to see if they could recognize anyone or eliminate anyone. 6/21/10RP 29. Officer Logan said that both Ms. Ward and Mr. Wheeler stated at the same time something to the effect of, "that's them, we recognize those people." 6/21/10RP 54, 62. Wheeler recognized the man in the teal shirt. 6/14/10RP 12. Ms. Wood saw the one with the black gloves that had held

the hammer. 6/16/10RP 22, 37, 38. The other men were sitting around out of breath and looked sweaty and scared. 6/14/10RP 12, 6/16/10RP 39. They had switched out of their jeans and were now in shorts and tank tops. 6/14/10RP 12, 6/16/10RP 22. Ms. Wood indicated that it was cold out and the men they went to identify were hardly wearing any clothes. 6/16/10RP 47. In court, Mr. Wheeler identified defendant White as the man with the teal shirt. 6/14/10RP 12. Defendant Nathan and defendant White were two of the three men. 6/14/10RP 46-47, 6/21/10RP 30, 50, 51. The identification procedure took place before the K-9 track. 6/21/10RP 53.

Officer Haddow and her K-9 partner Garrow were dispatched to Sgt. Stark's location. 6/15/10RP 5, 6, 14. Their job was to back up Sgt. Stark. 6/15/10RP 14. She explained to the suspects why they were being detained. 6/15/10RP 16. The suspects were wearing t-shirts and shorts which struck her as odd since it was very cold that night. 6/15/10RP 18. Officer Haddow remained at the scene until the suspects were identified as participants in the crime. 6/15/10RP 17. She then left the scene and went to the original crime scene. 6/15/10RP 17-18.

At the original crime scene, Officer Haddow obtained descriptions of the individuals and then began her track where they were last seen running. 6/15/10RP 19-20. The track was started just outside the apartment complex. 6/15/10RP 22. Garrow followed a scent pattern and had a strong indication that he was on to something. 6/15/10RP 25. The

dog follows and enhanced scent picture that contains adrenaline and is indicative of a flight or fight instinct. 6/15/10RP 46-47. Garrow found a pile of clothing of the bottom of a stairwell. 6/15/10RP 25. The clothes were in good condition and were not dirty, worn or wet like which would be indication that the clothes had been there a while. 6/15/10RP 28. Garrow continued the track after they found the clothing and the track ended back where Sgt. Stark had detained the three suspects. 6/15/10RP 31.

No latent fingerprints were able to be recovered from the crime scene. 6/15/10RP 72. DNA samples were collected from both defendants. 6/15/10RP 116-117. Marion Clark, a forensic scientist with the Washington State Patrol analyzed the DNA and compared it with the clothes and hammer found at the scene. 6/16/10RP 58, 66. No DNA comparison was able to be made on the hammer. 6/16/10RP 71. She was not able to exclude defendants as contributors to several pieces of the clothing that was recovered. 6/16/10RP 90-91, 92, 99. A semen stain was found on a pair of Reebok pants. 6/16/10RP 92-93. The semen matched defendant White to one in 7.5 quintillion. 6/16/10RP 93-94. Defendant White was excluded from the hat found but defendant Nathan was not. 6/16/10RP 94. On the Ekho Unlimited sweatshirt, defendant Nathan was a major profile match. 6/16/10RP 97-98. On a jacket that was found,

defendant Nathan matched the DNA to one in 35 quadrillion. 6/16/10RP  
100.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE ON SCENE IDENTIFICATION WHEN DEFENDANTS DID NOT TIMELY OBJECT AND IT WAS NOT IMPERMISSIBLY SUGGESTIVE OR IN DENYING DEFENDANTS' MOTION FOR MISTRIAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

- a. The trial court did not abuse its discretion in admitting identification evidence.

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.

First, defendants did not make a timely objection to any kind of identification procedure so the issue should be deemed waived. CrR 3.6 requires motions to suppress to be in writing and a chance for opposing counsel to respond. These are pre-trial hearings. Neither defendant in this matter filed any written motion to suppress the identification procedure nor raised any type of pre-trial motion related to the identification

procedure. Defendants did not object to the identification testimony until after all of the testimony was on the record and in front of the jury. *See* 6/16/10RP 50-56. Second, even when they did object, defendants only objected to Ms. Ward's identification as being unfair and prejudicial since she claimed she watched the dog track and then saw a dog at the scene of the identification. 6/16/10RP 51. Defendants on appeal seek to expand this late and untimely objection to the entire show up procedure including Mr. Wheeler's identification. Defendant's objection below was not timely as the evidence had already been admitted before they objected. Further, defendants argue on appeal on a different basis than the objection in the trial court. This court should decline to address this issue.

However, should this court decide to address the issue, the trial court did not abuse its discretion in admitting the evidence as the show up procedure was not impermissibly suggestive. The suspects, including defendants, were not even in handcuffs though that would have been permissible according to case law. 6/14/10RP 48. The suspects were also not in patrol cars though they were surrounded by police and that too is permissible. 6/14/10RP 51. They were illuminated by streetlights. 6/14/10RP 48. Officer Logan, who took Ms. Ward and Mr. Wheeler to see the three suspects, told them he was taking them to see if they could recognize anyone or eliminate anyone. 6/21/10RP 29. While Ms. Ward testified that she saw the canine track and then when they were taken to the location of the suspects there was dog there, that does not make the

show up impermissibly suggestive. First, Ms. Ward testified that she knew the dog had been tracking but did not know if it had tracked the three suspects. 6/16/10RP 48. Second, Ms. Ward testified that no one told her the three men were the right guys and no one pressured her into making an identification. 6/16/10RP 45. Third, Officer Haddow testified that she went to Sgt. Stark's location first to back him up. 6/15/10RP 5, 6, 14. She only went to the original crime scene and began the dog track after the identification procedure. 6/15/10RP 17-20. The CAD log and testimony from Officer Logan confirmed this. 6/21/10RP 53. There was nothing impermissibly suggestive about the show up procedure. The fact that Ms. Ward was mistaken about the timeline would go to the weight of the evidence and not its admissibility. The trial court did not error.

b. The trial court did not abuse its discretion in denying defendants' motion for mistrial.

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *See State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a

motion for a mistrial unless “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court’s ruling when examining the conduct for prejudice because “the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See *State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991), *superseded on other grounds by statute as stated in, In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In the instant case, the trial court did not abuse its discretion in denying defendants' motion for a mistrial based on Ms. Ward's testimony. Ms. Ward testified that the dog track happened prior to the identification. 6/16/10RP 41. However, Officer Haddow was clear, and the dispatch log was able to back her up, that she went to the identification first and then commenced the dog track. 6/15/10RP 17-18. The trial court correctly recalled the two competing testimonies and that the jury had the whole picture of the situation. 6/16/10RP 56. Contrary to defendant Nathan's claim, the trial court did not find that the identification had no evidentiary value. Brief of Appellant Nathan, page 11. The court felt the identification was not a strong one, but then noted that the identification was based not just on the gloves, but also on race and that the person was the same size. 6/16/10RP 56. The trial court found that the testimony did not rise to the level of a mistrial and denied defendants' motion. The trial court properly evaluated the evidence before it and found that while there was competing testimony, there was nothing that rose to the level of a mistrial. Given that the jury is the sole judge of credibility and that further testimony would corroborate that the K-9 track happened after the identification procedure, it cannot be said that the trial court abused its discretion in denying the motion for mistrial. There is no error.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TYING DEFENDANTS TO THE CRIMES COMMITTED AND THE DOG TRACK EVIDENCE WAS CORROBORATED BY OTHER EVIDENCE.

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).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendants only contest sufficiency of the evidence as it relates to the identification of defendants. They do not dispute any of the elements of either crime, only that there is sufficient evidence linking defendants to the crime. Specifically, defendants claim that the dog tracking evidence alone is insufficient. However, as the State presented more than just dog tracking evidence, defendants' claims fail.

Dog tracking evidence can be used at trial only if there is corroborating evidence that identifies defendant as the perpetrator of the crime. *State v. Loucks*, 98 Wn.2d 563, 567, 656 P.2d 480 (1983). "Corroborating evidence is not 'other evidence which *clearly connects* the accused with the commission of the offense.'" *State v. Ellis*, 48 Wn. App.

333, 335, 738 P.2d 1085 (1987) (emphasis in the original).

“Corroborating evidence is defined as ‘evidence supplementary to that already given and tending to strengthen or confirm it.’ *Id.* (Emphasis in the original). The court in *Ellis* specifically rejected the notion that the other evidence referred to in *Loucks* had to be sufficient by itself to convict the accused. *Id.*

“Evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence.” *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

“Flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution.” *Id.* The law does not define what circumstances constitute flight and as such, what may be shown as evidence of flight is broad. *State v. Jefferson*, 11 Wn. App. 566, 571, 524 P.2d 248 (1974).

In the instant case, the State produced sufficient evidence to link defendants to the crimes. Defendants were located by Sgt. Stark in close proximity to the incident and less than ten minutes after the 911 call was received. 6/14/10RP 39, 42, 44. In addition, Sgt. Stark observed that defendants ducked down out of sight when they saw his patrol car. 6/14/10RP 39, 40. Someone who is just walking down the street would have no reason to duck out of sight when a patrol car comes into view. The victims were brought to the scene to identify or exclude defendants.

6/21/10RP 29. Both Mr. Wheeler and Ms. Ward stated to Officer Logan that defendants were involved in the incident. 6/21/10RP 54, 62. Ms. Ward noted that the one who had stood over her with hammer wore black gloves and she recognized one of the men as that person, still wearing black gloves. 6/16/10RP 22, 37, 38. Mr. Wheeler and Ms. Ward also observed that defendants were out of breath and looked sweaty and scared. 6/14/10RP 12, 6/16/10RP 39. All of this information was gathered prior to the dog track taking place.

The dog track in this case did not lead to defendants but did lead to a pile of clothes close to the scene. Officer Haddow testified that her dog tracks scent but it is an enhanced scent picture. 6/15/10RP 46-47. The dog tracks the flight or fight instinct and tracks the burst of adrenaline which is why the dog would not be attracted to the scent of a pizza delivery man who was not exhibiting an enhanced scent picture. 6/15/10RP 46-47. In other words, the dog is not going to track just anyone. The dog started the track at the last place the victims had seen defendants as they ran from the scene. 6/15/10RP 20, 22. The clothes were found in a stairwell that lead to a crawl space. 6/15/10RP 25. The stairwell was used for maintenance and was described as a good hiding place. 6/15/10RP 28. The clothes did not show evidence of having been out in the elements for a long period of time. 6/15/10RP 28. When defendants were located after the incident, they were dressed in very light clothing despite the cold weather which seemed odd to Sgt. Stark, Officer

Haddow and Ms. Ward. 6/14/10RP 47, 6/15/10RP 18, 6/16/10RP 47. Case law directs that all reasonable inference be drawn in favor of the State and against defendants. It is a reasonable inference that the clothes were shed by defendants and hidden as they fled the scene. The dog track evidence is corroborated by the other evidence presented.

Further, the State obtained a DNA sample from both defendants and compared that to the clothes. 6/15/10RP 116-117. The DNA results could not exclude defendants as contributors to several pieces of the clothing that was recovered. 6/16/10RP 90-91, 92, 99. A semen stain was found on a pair of pants found matched defendant White to one in 7.5 quintillion. 6/16/10RP 92-94. Defendant White was excluded from the hat found but defendant Nathan was not. 6/16/10RP 94. On a sweatshirt that was found, defendant Nathan was a major profile match. 6/16/10RP 97-98. On a jacket that was found, defendant Nathan matched the DNA to one in 35 quadrillion. 6/16/10RP 100. The DNA evidence supported the inference that defendants had removed and hidden the clothes they were wearing during the incident and then tried to flee the scene. There was sufficient corroborating evidence that defendant had participated in the incident. The dog tracking evidence was not the only evidence presented by the State and defendants proximity to the crime, their state of dress, the victims' identification and the DNA evidence on the clothes all tended to

straighten and confirm the dog track. The State presented sufficient evidence that defendants committed the crimes.

3. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d

570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.

2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

A jury is presumed to follow the court's instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006). In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). It is improper to make comments "calculated to appeal to the jury's passion and prejudice," thereby encouraging a verdict based on facts not in evidence. *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). A jury is presumed to follow the trial court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

NCP 3-33, WCP 133-163, Instruction 2, *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions

NCP 3-33, WCP 133-163, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

Defendants claim that the State in closing argument misstated and minimized the burden of proof, incited the passion and prejudice of the jury and gave a personal opinion. Defendants did not object to a single thing in either the State's initial closing or rebuttal closing. As such, defendants must show that the State's remarks are flagrant and ill-intentioned. Defendants cannot meet this burden and so have waived any error.

First, the State did not misstate the burden of proof. The State was very clear on their burden of proof. The State used the reasonable doubt

instruction as given to the jury in their PowerPoint presentation. *See* CP 171-176. The State did not add any language to the instruction or minimize their burden; they correctly stated what their burden was. The State also correctly talked about abiding belief, again quoting directly from the instruction. “After you consider all of these things, if you have an abiding belief, if you have a lasting belief in the truth of the charges, then you are satisfied beyond a reasonable doubt.” 6/21/10RP 108. Contrary to defendants’ allegations, there is nothing in the State’s argument that talks about abiding belief to acquit. Indeed, the State specifically cites the jury instruction and argues accordingly relating it back to being convinced beyond a reasonable doubt. 6/21/10RP 108-109. It is hard to see how the State’s argument could be flagrant and ill-intentioned when the State is quoting the jury instructions directly from the packet.

Further, the State is entitled to argue about the evidence and any reasonable inferences from that evidence. Just because the State uses the word reasonable in its argument does not mean they are talking about or misstating the burden of proof. The State, in giving the jury an overview of the evidence, discussed what had been presented and the reasonable inferences from such evidence. *See* 6/21/10RP 106. In addition, in rebuttal closing, the State again talked about reasonable inferences and that the jury was allowed to make those reasonable inferences from the

evidence in context. *See* 6/22/10RP 52. This is proper argument and there is no error.

The State did not shift the burden or misstate the presumption of innocence. The State's argument again echoes the jury instruction about reasonable doubt. If the jury did have a reasonable doubt, then they have not been satisfied beyond a reasonable doubt and a proper verdict would be not guilty. *See* 6/22/10RP 52-54. The State did not set up the scenario that the jury must assume defendants are guilty and seek out a reasonable doubt in order to acquit. Further, the jury was properly instructed on the burden of proof and they are presumed to follow the court's instructions. The argument was not flagrant and ill-intentioned and there is no error.

Finally, the State did not make an improper opinion argument or incite the passions and prejudices of the jury. The State appears to have inserted the words, "I believe" into one sentence at the end of rebuttal closing but then the State corrects itself and changes to "we—the State has shown that the evidence against Mr. White and Mr. Nathan is more than enough to convict them of this crime and hold them responsible for their actions that night, and that's what I'm asking you to do." 6/22/10RP 54. There is nothing that shows any type of improper opinion argument. Further, the State told the jury that a correct verdict was justice for the case. The court's instructions tell the jury about reaching a proper verdict.

See NCP 3-33, WCP 133-163, Instruction 1.<sup>3</sup> The State's argument is in line with the court's instructions. The State's position is that the proper verdict is guilty and the State based that on the evidence it presented to the jury. The State acknowledges that if they have not met their burden, then the correct verdict is not guilty. See 6/21/10RP 53-54. Again, these arguments are not flagrant and ill-intentioned as they are based on the jury instructions and do not misstate the State's burden or seek incite the passions or prejudices of the jury. Defendants have not met their burden and cannot show error.

4. DEFENDANTS HAVE FAILED TO  
DEMONSTRATE THAT THEY RECEIVED  
INEFFECTIVE ASSISTANCE OF 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).

---

<sup>3</sup> These closing instructions harken back to the pattern opening instructions as set forth in the Washington Pattern Jury Instructions, WPIC 1.01:

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

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

Defendants claim their trial counsel were ineffective for failing to move to suppress the show up identification, failing to investigate and failing to object during closing. However, a review of the entire record shows that counsel were advocates for their clients. Both attorneys made objections during the trial and conducted vigorous cross-examinations. They pointed out the holes in the State's case and sought to show how the police procedures were unreliable. A motion to suppress would have been

unlikely to succeed as noted above since show ups are not per se inadmissible, especially under the conditions in the instant case that complied with case law. Counsel's theory of the case was to poke holes in the identification process. Defendants cannot show deficient performance or prejudice.

Further, while counsel's objections to Ms. Ward's identification were untimely, it appears from the record that no one knew she would testify that she saw the dog track first and then went to the identification. This information did not appear in her statement and was inconsistent with the other evidence in the case. When she did testify to this information on the stand, counsel objected and made a motion for a mistrial. However, because the testimony of the officers involved as well as the CAD log showed a different timeline of events, there was no error in allowing such testimony in, as noted above. Defendants' motion did not succeed and it is not clear that this information would have been elicited prior to trial. The fact that this witness testified to a timeline inconsistent with other witnesses does not show a lack of investigation on the part of defense counsel, it just shows an inconsistency that counsel could then use to challenge the State's procedure with the jury. Defense counsel, "must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." *In re Personal Restraint Petition of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601

(2001). However, “counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (citing *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989)). There was no reason to investigate something that appears to have been unapparent prior to trial. Once defendants saw an irregularity, they made an objection. However, conflicting testimony is not a basis for a mistrial. Defendants cannot meet their burden of showing deficient performance or prejudice.

Finally, defendants argue that their attorneys should have objected during the State’s closing arguments. However, as noted above, the State’s arguments were taken directly from the jury instructions. Any objections would have been unlikely to have been sustained. There was no reason for defense counsel to object to proper arguments. Defendants cannot meet their burden of showing deficient performance or prejudice.

5. THE TRIAL COURT DID NOT ERROR IN SENTENCING DEFENDANT WHITE WHEN IT ORDERED A SENTENCING PROVISION AUTHORIZED BY STATUTE.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1).

RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose. Further discretionary elements appear in RCW 9.94A.703(3).

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The authority for the court to sentence a convicted person to community custody comes from RCW 9.94A.703. Amongst the mandatory conditions, the court will “[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). “The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a). Further, “The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4).

Defendant White takes issue with the provision in Appendix F of his judgment and sentence which states, “The offender shall comply with any crime related prohibitions.” WCP 179-191. Defendant White claims

that this unconstitutionally vague and a violation of due process.

However, this provision comes directly from RCW 9.94B.050(5)(e). “As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

... (e) The offender shall comply with any crime-related prohibitions.”

RCW 9.94B.050(5)(e).<sup>4</sup> The trial court added a provision that it was expressly authorized to add per the statute. It is difficult to see how the court abdicated its authority or abused its discretion when it used language directly from the statute.

Further, conditions of community custody that are imposed by the Department of Corrections have to follow certain procedures. Again, RCW 9.94A.704 provides guidance.

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.

RCW 9.94A.704(7)(a). In addition, “The department may not impose conditions that are contrary to those ordered by the court and may not

---

<sup>4</sup> This same language appeared in RCW 9.94A.700(5)(e) which was recodified to RCW 9.94B.050 effective August 1, 2009.

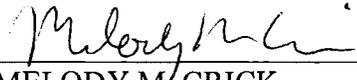
contravene or decrease court-imposed conditions.” RCW 9.94A.704(6). The Department of Corrections has been given the power to add or modify conditions to a defendant’s sentence but these powers are governed by specific procedures as set out in the RCWs. There are due process protections in place so that any conditions that are added or modified require notice to the offender and a chance for the offender to request administrative review. Part of that review is to make sure that the condition is reasonably related to the crime of conviction. The trial court imposed a condition that it had the authority to do per statute. There are provisions in place to protect defendant’s due process rights. As this condition was within the trial court’s power and did not exceed its statutory authority, defendant had waived any challenge to this provision on appeal. Even so, the provision is clear, the Department of Corrections has the power to add or modify conditions per the statute and there are due process protections in place. The trial court did not error.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

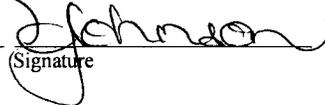
DATED: JULY 26, 2011

MARK LINDQUIST  
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.

7/26/11   
Date (Signature)

*to Sell + Borchey*

FILED  
COURT OF APPEALS  
DIVISION II  
11 JUL 26 PM 3:30  
STATE OF WASHINGTON  
BY  DEPUTY