RECEIVED
COURT OF APPEALS
DIVISION ONE
MAR 13 2012

12 MAR 15 PM 12:26
STATE OF WASHINGTON
BY

NO. 41902-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

MARTIN ARTHUR JONES,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 13 PM 4:49

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

John Hillman, WSBA #25071
Melanie Tratnik, WSBA #25576
Criminal Justice Division
Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

ORIGINAL

TABLE OF CONTENTS

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE.....2

A. Facts.....2

B. Procedure.....8

III. ARGUMENT.....11

A. The Trial Court Properly Denied The Motion For New Trial Because The Trial Court Did Not Violate Jones' Right To Be Present Or His Right To A Public Trial.....11

1. The Trial Court Properly Denied The Motion For New Trial Because (a) Jones Waived A Claim Of Error, (b) Jones Had No Constitutional Right To Be Present For The Clerk's Ministerial Act Of Drawing Numbers, and (c) Any Error Was Harmless Error.....12

a. Jones waived a claim of error by declining to object, and through his conduct.....12

(1) Jones waived a claim of error by declining to object below.....13

(2) Jones impliedly waived his right to be present when the clerk randomly drew numbers.....15

b. Jones did not have the right to be present for the ministerial task of randomly drawing numbers.....16

c. Any error was harmless because Jones was tried by a fair and impartial jury and he cannot show prejudice.....21

2. The Trial Court Properly Denied The Motion For New Trial Because Jones Had A Public Trial, And Any Error Was Harmless.....23

a. The clerk's act of randomly pulling numbers from a container was a ministerial task that did not implicate Jones' right to public trial. 24

b. Any error was non-structural and too trivial to warrant relief on appeal.....26

B. The Trial Court Properly Ruled That Trooper Johnson's Identification Of Martin Jones Was Admissible Because (1) Substantial Evidence Supported The Trial Court's Findings Of Fact, And (2) Admission Of The Evidence Did Not Violate Due Process.....28

1. Substantial evidence in the record supports the trial court's findings.....29

a. Trooper Johnson had sufficient opportunity to view the suspect at the time of the crime. 29

b. Trooper Johnson was sufficiently attentive during the events surrounding the shooting. 30

c. Trooper Johnson's description of the suspect was sufficiently accurate and reliable. 30

d. Trooper Johnson's level of certainty in identifying the defendant's photograph was high.....31

e. The time between Trooper Johnson's observation of the shooter and his identification of a photograph of Jones was short. 32

2. Admission Of Trooper Johnson's Photographic Identification Did Not Violate Due Process Because (a) The Procedure Used Was Not Impermissibly Suggestive, (b) The Identification Was Reliable

Independent Of Any Suggestiveness In The Presentation Of The Photograph, and (c) Exigent Circumstances Necessitated The Procedure Used.....32

a. The procedure used to show Trooper Johnson a photograph of Martin Jones was not impermissibly suggestive.....33

b. There was no "very substantial likelihood of irreparable misidentification" because Trooper Johnson's identification of Jones was independently reliable.....35

c. Exigent circumstances necessitated showing Trooper Johnson photographs as expeditiously as possible.....38

C. The Trial Court Properly Excluded Evidence Of "Other Suspects" Because Jones Failed To Establish The Necessary Evidentiary Foundation For Admissibility.....40

D. The Trial Court Properly Precluded Jones From Attempting To Impeach A State's Witnes On A Collateral Matter Through Use Of Hearsay And Inadmissible Lay Opinion.....43

1. The Trial Court Properly Declined to Allow Witness Sara Trejo To Be Impeached With Hearsay And Lay Opinion On A Collateral Issue.....44

a. Sewell's e-mail was inadmissible hearsay and opinion testimony.....45

b. Jones' proffered evidence was impeachment on a collateral matter.....46

2. The Trial Court Properly Excluded The Lay Opinion of Chris Sewell Because It Was Irrelevant And Unduly Prejudicial; Any Error Was Also Harmless.....46

a. The trial court properly excluded Sewell's opinion. 46

b. Any error was harmless error. 49

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Commonwealth v. Cavitt,
953 N.E.2d 216, (Mass. 2011) 33, 34

Illinois v. Allen,
397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) 17

In re Detention of Ticeson,
159 Wn. App. 374, 246 P.3d 550 (2011) 25

In re Pers. Restraint of Orange,
152 Wn.2d 795, 100 P.3d 291 (2004) 25

In re Personal Restraint of Lord,
123 Wn.2d 296, 868 P.2d 835, 870 P.2d 964, *cert. denied,* 513 U.S. 849 (1994) 19, 20, 22

Kentucky v. Stincer,
482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) 18

Manson v. Brathwaite,
432 U.S. 98, 97 S.Ct. 2243 (1977) ..... passim

People v. Peterson,
81 N.Y. 2d 824, 595 N.Y.S. 2d 383, 611 N.E.2d 284, 285, (1993) 28

Peterson v. Williams,
85 F.3d 39 (2nd Cir. 1996) 27

Press Press-Enterprise Co. v. Superior Court of California,
464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) 24

Rushen v. Spain,
464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) 22

Snyder v. Coiner,
510 F.2d 224, (4th Cir. 1975) 27

Snyder v. Massachusetts,
291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) 17, 18, 19

State v. Aguirre,
168 Wn.2d 350, 229 P.3d 669 (2010) 46

State v. Aherns,
64 Wn. App. 731, 826 P.2d 1086 (1992) 22

State v. Bone-Club,
128 Wn.2d 254, 906 P.2d 325 (1995) 23, 24

State v. Bruggerman,
263 N.W.2d 870 (N.D. 1978) 38

State v. Caliguri,
99 Wn.2d 501, 664 P.2d 466 (1983) 22

State v. Castro,
159 Wn. App. 340, 246 P.3d 228 (2011) 25

State v. Darden,
145 Wn.2d 612, 41 P.3d 1189 (2002) 47

State v. Downs,
168 Wn. 664, 13 P.2d 1 (1932) 41

State v. Eacret,
94 Wn. App. 282, 971 P.2d 109 (1999) 33

State v. Gentry,
125 Wn.2d 570, 888 P.2d 1105 (1995) 22, 23

State v. Hayes,
___ Wn. App. ___, 265 P.3d 982 (2011) 49

State v. Irby,
170 Wn.2d 874, 246 P.3d 796 (2011) 20, 21

State v. Irby,
170 Wn.2d 874, 246 P.3d 796 (2011)
(quoting *State v. Shutzler,* 82 Wn. 365, 144 P. 284 (1914)) 19

State v. Irby,
170 Wn.2d 874, 246 P.3d 796 (2011),
(citing *Commonwealth v. Barnoski,* 638 N.E.2d 9 (1994) 21

State v. Irby,
170 Wn.2d 874, 246 P.3d 796 (2011),
(quoting *Snyder,* 291 U.S. at 106, 54 S.Ct. 330) 21

State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010) 46

State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010)
(citing *State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009)) 47

State v. Kendrick,
47 Wn. App. 620, 736 P.2d 1079 (1987)
(quoting State v. Bebb, 44 Wn. App. 803, 723 P.2d 512 (1986)) 13

State v. Kinard,
109 Wn. App. 428, 36 P.3d 573 (2001),
review denied, 146 Wn.2d 1022 (2002) 29

State v. Koss,
158 Wn. App. 8, 241 P.3d 415 (2010) 25

State v. Lormor,
172 Wn.2d 85, 257 P.3d 624 (2011) 27

State v. Mak,
105 Wn.2d 692, 718 P.2d 407 (1986)
(quoting *State v. Downs*, 168 Wn. 664, 13 P.2d 1 (1932)) 40

State v. Maupin,
128 Wn.2d 918, 913 P.2d 808 (1996) 40, 42, 43

State v. Maupin,
63 Wn. App. 887, 822 P2.d 355 (1992) 33

State v. Momah,
167 Wn.2d 140, 217 P.3d 321 (2009) 26, 27

State v. Perez-Valdez,
172 Wn.2d 808, 265 P.3d 853 (2011) 44

State v. Posey,
161 Wn.2d 638, 167 P.3d 560 (2007) 47

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) 44

State v. Pruitt,
145 Wn. App. 784, 187 P.3d 326 (2008) 17

State v. Rehak,
67 Wn. App. 157, 834 P.2d 651 (1992),
review denied, 120 Wn.2d 1022, *cert.denied*, 508 U.S. 953 (1993) 41

State v. Rice,
110 Wn.2d 577, 757 P.2d 889 (1988) 15

State v. Rivera,
108 Wn. App. 645, 32 P.3d 292 (2001),
review denied, 146 Wn.2d 1006, 45 P.3d 551 (2001) 24

State v. Rivera,
108 Wn. App. 645, 32 P.3d 292 (2001),
review denied, 146 Wn.2d 1006, 45 P.3d 551 (2001)
(citing *Ayala v. Speckard*, 131 F.3d 62, (2nd Cir. 1997)) 24

State v. Smith,
148 Wn.2d 122, 59 P.3d 74 (2002) 49

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 12

State v. Thomas,
128 Wn.2d 553, 910 P.2d 475 (1996) 15

State v. Thomson,
123 Wn.2d 877, 872 P.2d 1097 (1994) 15

State v. Thorpe,
51 Wn. App. 582, 754 P.2d 1050 (1988) 18

State v. Vickers,
148 Wn.2d 91, 59 P.3d 58 (2002) 29, 32, 33, 35

State v. Williams,
96 Wn.2d 215, 634 P.2d 868 (1981) 12, 13, 14, 15

Stovall v. Denno,
388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)
(*overruled on other grounds by Griffith v. Kentucky,*
479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) 38, 39, 40

Taylor v. U.S.,
451 A.2d 859, (D.C. Circuit, 1982) 38

U.S. v. Bustamante,
456 F.2d 269, (9th Cir., 1972)
(*citing Snyder,* 291 U.S. at 116, 54 S.Ct. at 336 (1934)) 18

U.S. v. Gagnon,
470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) 15, 16, 18

U.S. v. Gagnon,
470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985),
(citing *Snyder,* 291 U.S. at 105-06, 54 S.Ct. 330) 18

United States v. Gomez,
490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed 923 (1989) 19

United States ex rel. Robinson v. Vincent,
371 F.Supp. 409 (S.D.N.Y.1974), *affirmed* 506 F.2d 923,
cert. denied sub nom. Robinson v. Vincent,
421 U.S. 969, 95 S.Ct. 1962, 44 L.Ed.2d 458 (1975) 38

United States v. Al-Smadi,
15 F.3d 153, (10th Cir. 1994) 27, 28

United States v. Ivester,
316 F.3d 955 (9th Cir. 2003) 27

Wright v. State,
688 So.2d 298, (Fla. 1996) 21

Rules

CrR 3.4 16

ER 403 ..... 47, 48

ER 701 45

ER 801(c) 45

ER 803 45

Federal Rule 43 16

Constitutional Provisions

Const. art. I, § 10 23

Const. art. I, § 22 ..... 17, 19, 23

U.S. Const. amend. VI 23

U.S. Const. amend. XIV 17

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Were Jones's rights to be present in court, and right to public attendance violated when Jones and the public were not advised that the court clerk was performing the ministerial task of drawing random numbers to designate alternate jurors?

B. Did the trial court properly admit evidence that the victim identified Jones as his assailant by viewing a photograph of Jones where (1) the trial court's findings of fact were supported by substantial evidence in the record, and (2) the findings of fact supported the trial court's conclusions that (a) the identification procedure was not impermissibly suggestive, (b) the identification was reliable independent of any suggestive identification procedure, and (c) the procedure used to show a photograph of Jones to the victim was necessitated by exigent circumstances?

C. Did the trial court properly exclude evidence of "other suspects" where Jones failed to establish the necessary train of facts connecting an "other suspect" to the charged crime?

D. Did the trial court properly preclude Jones from attempting to impeach a witness on a collateral matter by use of an out-of-court statement that was both hearsay and inadmissible lay opinion?

E. Did the trial court properly exclude a witness' lay opinion on the quality of the police investigation where the opinion was irrelevant and unduly prejudicial?

////

////

////

////

II. STATEMENT OF THE CASE

A. Facts

Appellant Martin Jones shot Washington State Patrol ("WSP") Trooper Scott Johnson in the back of the head while Trooper Johnson was impounding Jones' vehicle. Trooper Johnson survived the shooting and identified Jones as his attacker.

The attack resulted from an earlier traffic stop and arrest for DUI of Jones's wife, Susan Jones. After being stopped by Trooper Jesse Green while driving on the main street of Long Beach (SR 103), Mrs. Jones sent a text message to Jones advising that she had been pulled over. RP 2627, 3238. Jones received and read the text message at midnight. RP 2630.

Jones knew his wife was driving to a bar in downtown Long Beach and knew she was likely stopped on SR 103. RP 3405, 3455. Jones had no vehicles available to use. RP 3690. The Jones residence was approximately one mile south of the stop of Mrs. Jones' van. RP 880.

Mrs. Jones was arrested for DUI at 12:13 a.m. RP 886. Trooper Scott Johnson responded to the scene to provide back-up. RP 886, 2788. Trooper Johnson spoke briefly with Mrs. Jones, who told him that she wanted "Marty" to retrieve the van and gave "Marty's" phone number. RP 987, 2794-95. Trooper Johnson wrote the info on his hand. *Id.* Mrs. Jones did not say who "Marty" was or what his relationship was. RP 987.

Trooper Greene transported Mrs. Jones to the police station at 12:16 a.m., leaving Trooper Johnson alone with the Jones' minivan. RP 887.

Upon receiving his wife's text message, Jones called his friend Charlotte Wanke and asked for help. RP 1620. Wanke drove to Long Beach and located the Jones' van. RP 1620-27. Wanke called Jones on his cell phone after learning the location of the van. RP 2631, 2803-04.

A tow truck arrived to tow Jones' van. RP 1306, 2807. While the tow operator was preparing the van for tow, Jones approached on foot from the south. RP 1308, 1345, 2812. Jones walked past Trooper Johnson towards the tow truck with an angry look on his face. RP 2811. Jones walked up to the tow operator and asked what he was doing. RP 1310, 1346. The tow operator said he was impounding the van. RP 1310.

Trooper Johnson was concerned about Jones' behavior and his interest in the vehicle. RP 2813-15. Trooper Johnson intercepted Jones on the sidewalk, standing so close to Jones that he "could have reached out and touched him." RP 2816. Trooper Johnson asked, "Sir, is there anything that I can help you with?" RP 2815. Jones angrily replied "no" and walked away. RP 2816-17.

After Jones walked away, Trooper Johnson inventoried the van's contents with the tow operator. RP 1313-14, 2818. Trooper Johnson was

counting money from Mrs. Jones' wallet when Jones returned unnoticed. RP 1315, 2825. At 12:40 a.m., Jones appeared suddenly behind Trooper Johnson, put a gun to the back of his head, and fired. RP 1315, 2826-27.

Trooper Johnson removed himself to the street side of the tow truck after he was shot. RP 2829. Trooper Johnson gathered himself in the street, stood, and saw Jones standing at the same spot on the sidewalk where he had shot Trooper Johnson. RP 1319, 2830, 2902. Trooper Johnson expected to die from the gunshot wound to his head, but he drew his service weapon and made eye contact with Jones. RP 2827-30. Trooper Johnson shot at Jones twice as Jones fled south in the direction of his home. RP 1319, 2830-31. Trooper Johnson did not know Jones' name or that he was the registered owner of the van. RP 2828, 2851.

Trooper Johnson told the tow operator, "I got a good look at him." RP 2858. The tow operator called WSP dispatch on his cell phone and gave the phone to Trooper Johnson. RP 998, 1320. Trooper Johnson provided a description of Jones and his direction of travel. RP 1005, 1320.

Police arrived within minutes. RP 1038-38, 2858. Trooper Johnson told the officers that he "got a good look at the shooter" and gave a physical description and direction of travel. RP 1038-39, 2858. Police transported Trooper Johnson to nearby Ocean Beach Hospital (OBH). RP 1041, 2841. Trooper Johnson declined pain medication so that he

would be lucid when he spoke with investigators. RP 2843. WSP Sgt. Jodi Metz met Trooper Johnson at OBH approximately 20 minutes after the shooting. RP 2958-59. Trooper Johnson described the shooter and said he would recognize him if he saw him again. RP 2959.

Trooper Johnson was moved to a hospital in Portland, OR. RP 937-38, 2844. Trooper Johnson survived the shooting, but the bullet fragmented against his skull and left bullet fragments resting against his skull and embedded in his neck muscles, where they remain today. RP 936, 1795-1801, 2856.

At the scene, police found a fired .22 short cartridge casing on the sidewalk where Trooper Johnson had been shot. RP 2231. The .22 short casing was stamped with a "C," which is the logo for ammunition manufacturer CCI (Cascade Cartridge, Inc.). RP 2299, 2445.

A K9 tracking team tracked Jones' scent from the shooting scene to the Jones residence.[1] RP 1048-1053, 1128-38. Police surrounded the home, which was adjacent to the ocean beach. RP 1215, 1272, 1469, 1478, 1966, 2001-03. Jones surreptitiously exited his home but was spotted by police. RP 1279-80, 1470, 2004. Police followed Jones and attempted to detain him at gunpoint. RP 1280-82. Jones refused to

[1] The police dog tracked to the block where the Jones residence is located. Police realized that the dog was approaching the home of the DUI suspect, Susan Jones. The dog's handler stopped the track for officer safety as it was unknown if the shooter was associated with the DUI suspect and could ambush the K9 team. RP 1137-38.

comply several times. RP 1280-82. Jones finally stopped, smirked, and told police, "What, I'm just going for my morning beach walk." RP 1285, 1294. Jones said he was home and asleep all night. RP 1884, 1897-1900.

Police released Jones pending further investigation. RP 1922. During the next several days, police investigated numerous persons of interest. RP 1448-50, 1497, 1512-13, 1972, 2729-33. Communications were extremely poor in Pacific County, a "communications black hole." RP 1498-99, 1507-08, 1516, 1546. Investigators in Long Beach e-mailed photographs to the hospital in Oregon, where Trooper Johnson viewed them from his hospital bed. RP 2849.

Trooper Johnson viewed approximately twenty single photos of white males who matched the general physical description of the shooter; but after viewing each one Trooper Johnson stated that it was not the shooter. RP 1263, 1546-48, 1578-79, 1684-85. Trooper Johnson became curious about the name and phone number written on his hand. RP 2850.

Trooper Johnson requested to see a photograph of Mrs. Jones' husband. RP 1548. Police were not revealing details of the investigation to Trooper Johnson, but it was mentioned that Jones "had been cleared"[2] as a suspect. RP 1553, 2984. Trooper Johnson maintained his request to

[2] The tow operator viewed Jones in person after Jones was detained, but he could not identify Jones as the shooter because he never got a good look at the shooter. RP 1311-1316, 1324, 1347-48, 1437.

see a photo. RP 1553. On February 14, 2010, the day after the shooting, Trooper Johnson was shown a color copy of Jones' driver's license photograph. RP 1551. Trooper Johnson noted that some of Jones' facial characteristics on the night of the shooting were different[3] than those in the year-old DOL photograph he viewed, but he had "no doubt" that Jones was the shooter. RP 2856.

Police arrested Jones, who again claimed to be home asleep at the time of the shooting. RP 3763. Police obtained Jones' and Wanke's cell phone records, which contradicted Jones' claim that he was asleep at the time of the shooting. Exhibits 123, 125. The records showed that between 12:01 and 1:21 a.m. (the shooting occurred at 12:40 a.m.), Jones and Wanke exchanged numerous cell phone calls. Exhibit 123, 125. Jones used his home phone to talk to Wanke at 12:01 a.m., but did not use his home phone again until 1:21 a.m. Exhibit 125.

Police obtained a search warrant for Jones' residence. In a dresser drawer in Jones' bedroom, police found a 100-count box of CCI .22 short ammunition, all with the "C" head stamp. RP 2122-23, 2445. Three bullets were missing. RP 2460. The ammunition from the box in Jones'

[3] Trooper Johnson stated that the shooter had shorter, cropped hair; a faded widow's peak; and light facial stubble on the night of the shooting. RP 1751-1752. These features were not present in Jones' DOL photograph (Exhibit 92), but Trooper Johnson never wavered from these descriptors despite not having a current photo of Jones. When Jones was apprehended less than 48 hours after the shooting, he had shorter, cropped hair; a faded widow's peak; and light facial stubble. Exhibit 53.

bedroom was manufactured in 1999. RP 2304. A forensic scientist compared the .22 short fired cartridge casing from the crime scene to the unfired .22 short cartridges in the ammunition box seized from Jones' bedroom. RP 2462. The scientist concluded that the fired .22 short cartridge casing from the crime scene was stamped during manufacturing by the same machine that stamped the unfired .22 short cartridges found in Jones' bedroom. RP 2475.

B. Procedure

Jones was charged with attempted murder in the first degree. CP 1184-85; RP 95. The State moved pretrial to exclude evidence of "other suspects." CP 527-36; RP 396-400, 405-06. Included in the State's summary of evidence to be excluded was evidence that Trooper Greene had observed an unknown white male walk past the traffic stop some 40 minutes prior to the shooting of Trooper Johnson. RP 399-400. The trial court granted the State's motion. CP 1242-43; RP 410, 928.

Jones moved pretrial to suppress Trooper Johnson's identification of the photo of Jones. CP 845-67; RP 410-19. The trial court denied the motion. CP 1238-1241; RP 433-34.

The trial court seated twelve jurors plus four alternate jurors due to the anticipated length of the trial. RP 125. The trial court advised that at the end of the trial, four alternate juror numbers would be randomly drawn

by the clerk from a "rotating cylinder." RP 35, 127.

Trooper Johnson testified at trial and identified Jones as the person who shot him. RP 2812. Jones' counsel thoroughly cross-examined Trooper Johnson, as well as the people who presented photographs to Trooper Johnson. RP 2861-2935; 1286, 1554, 1581, 1686. Jones presented an expert who testified that the procedures used to show photos to Trooper Johnson were flawed and suggestive. RP 3567-3605.

During the testimony of a fingerprint analyst, Sara Trejo, Jones sought to elicit an out-of-court statement and lay opinion within an e-mail authored by another employee of the crime laboratory, Chris Sewell. RP 2535-37. The court found that Jones was attempting to impeach Trejo on a collateral matter and sustained the State's objection. RP 2536.

In the defense case, Jones attempted to introduce Sewell's personal lay opinion that the police investigation was "haphazard." RP 3034. The trial court excluded Sewell's opinion on grounds that it was irrelevant and unduly prejudicial. RP 3044-45.

Jones testified in his own defense. RP 3656-3798. Jones testified that he was home asleep during the shooting and he did not shoot Trooper Johnson. RP 3693.

At the conclusion of evidence, the court advised that "after all of the closing arguments, [the clerk] will tell me which four numbers have

been selected at random" to serve as alternates. RP 3803. Closing arguments occurred on February 17, 2011. RP 3864. The court again reminded the parties that four alternate jurors would be revealed following the conclusion of closing arguments, which was anticipated to be in the late afternoon. RP 3865.

During defense counsel's closing argument, the court took an 8-minute break from 2:55-3:03 p.m. CP (Clerk's Minute Entries); RP 4108. There is no record that the courtroom was closed or that the defendant was absent. During the break, in the open courtroom, the clerk randomly drew four juror numbers from the rotating cylinder. RP 4061.

At the conclusion of closing arguments, the trial judge announced that the judicial assistant had randomly drawn four juror numbers during the 8-minute recess. CP (Clerk's Minute Entries); RP 4061. In open court and in the presence of Jones and his counsel, the trial court announced the alternate jurors. RP 4061-62. Jones did not object. RP 4062.

In open court and in the presence of Jones and his counsel, the trial court excused the four alternate jurors from deliberations. RP 4062. Jones did not object to the manner in which the court designated the four alternates or to the composition of the deliberating jury. RP 4061-63. After excusing the jurors, the trial court inquired "[a]nything from the defense?" RP 4071. Jones raised no objections. *Id.*

The jury deliberated February 17-23.[4] RP 4063-91. During deliberations, and throughout four court appearances from the time the alternates were identified to the return of the verdict, Jones never objected to the composition of the jury. RP 4079-91. The court specifically inquired if the defense had any issues to raise with the court during these appearances, but Jones had no complaints or objections. RP 4071, 4082, 4091. The jury returned a verdict of "guilty." CP 1283-85; RP 4091-92.

After receiving the adverse verdict, Jones moved for a new trial on grounds that the trial court violated his right to be present and right to a public trial by randomly drawing the numbers of the alternate jurors during the short break in closing arguments. CP 1286-1300. The trial court denied the motion. RP 4116. This appeal follows. CP 1390.

III. ARGUMENT

A. The Trial Court Properly Denied The Motion For New Trial Because The Trial Court Did Not Violate Jones' Right To Be Present Or His Right To A Public Trial.

Jones erroneously asserts he was not present, and the courtroom was closed, when the clerk drew numbers to identify the alternates. The record does not support either of these assertions.[5] Jones' issue on appeal is more accurately described as whether his rights were violated when the

---

[4] There was a three-day holiday weekend February 19-21.

[5] Jones erroneously asserts that the judicial assistant drew the numbers over the hour and a half lunch break. App. Br. at 12. The record clearly reflects that the numbers were drawn during the short mid-afternoon break. CP (Clerk's Minutes); RP 4061.

clerk did not announce to Jones or the public that she was randomly drawing numbers in the open courtroom.

Jones first asserted these claims as part of a motion for new trial. CP 1286-1300. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion. *State v. Williams,* 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court abuses its discretion when its ruling is unreasonable or based upon untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

1. The Trial Court Properly Denied The Motion For New Trial Because (a) Jones Waived A Claim Of Error, (b) Jones Had No Constitutional Right To Be Present For The Clerk's Ministerial Act Of Drawing Numbers, and (c) Any Error Was Harmless Error.

Jones moved for a new trial in part on grounds that he was deprived of his right to be present. The trial court did not abuse its discretion in denying the motion for new trial.

a. Jones waived a claim of error by declining to object, and through his conduct.

Jones failed to preserve error by failing to object to the alternates who were excused, or to the composition of the deliberating jury. To the extent Jones had any right to be present, he also impliedly waived his right to be present through his conduct and the conduct of his counsel.

(1) Jones waived a claim of error by declining to object below.

Counsel may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Kendrick,* 47 Wn. App. 620, 636, 736 P.2d 1079 (1987) *(quoting State v. Bebb*, 44 Wn. App. 803, 723 P.2d 512 (1986)). This principle applies even to constitutional claims.

In *State v. Williams,* the State disclosed exculpatory discovery to the defense mid-trial. The defense did not ask for a mistrial. After receiving an adverse verdict, the defendant moved for a new trial on grounds of late discovery. *State v. Williams,* 96 Wn.2d 215, 634 P.2d 868 (1981). The Washington Supreme Court held that the defendant forfeited a claim of error:

> Petitioner had many opportunities to request a mistrial and never did so. ... *It is obvious the defense did not feel greatly prejudiced by the late revelation of the incident until after the adverse verdict. The defense made a tactical decision to proceed, "gambled on the verdict," lost, and thereafter asserted the previously available ground as reason for a new trial. This is impermissible.* [citations omitted]

Id. at 225 (emphasis added).

Here, Jones and his counsel were present when the trial court announced that the alternate juror numbers were drawn during the mid-afternoon break, and who they were. RP 4061-62. Jones and his counsel

were present when the trial court excused those same jurors from deliberations. RP 4062-63.

Like *Williams,* Jones had multiple opportunities to object from the time the alternates were excused to the return of the verdict six days later. The defense was acutely aware of Jones' right to be present, as evidenced by Jones affirmatively waiving his right to be present when prospective jurors were excused for hardship (RP 1857-69); and when he waived his presence in court for other jury matters. RP 3856 (excusing jurors), 4082-83 (jury questions).

Had Jones voiced an objection, the alternates were on-call throughout deliberations. RP 4061. An objection, if sustained, would have simply required the court to redraw numbers from the box, reconstitute the jury if necessary, and order the reconstituted jury to begin deliberations anew. Instead, Jones chose to wait and see what the verdict was in hopes that he had gambled correctly and the jury would return a verdict of "not guilty." Like *Williams,* Jones gambled on the verdict and lost.

Jones waived the right to claim error after the verdict. The trial court did not abuse its discretion by denying the motion for new trial.

////

////

(2) Jones impliedly waived his right to be present when the clerk randomly drew numbers.

A defendant may waive his constitutional right to be present at trial. *State v. Thomson,* 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). The waiver of a constitutional right must be knowing and voluntary, but can be either express or implied. *State v. Rice*, 110 Wn.2d 577, 619, 757 P.2d 889 (1988). The court "may assume a knowing waiver of the right from the defendant's conduct." *State v. Thomas,* 128 Wn.2d 553, 559, 910 P.2d 475 (1996).

In *U.S. v. Gagnon,* the trial judge met with a juror in chambers to address the juror's concern that one of the codefendants was sketching portraits of the jury. *U.S. v. Gagnon,* 470 U.S. 522, 523-24, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The judge allayed the juror's concerns and then allowed the juror to remain on the jury. *Id.* Both defendants argued for the first time on appeal that their due process right to be present for the in-chambers conference was violated. *Id.* at 524-25. The Court held that the defendants did not have a due process right to be present, and also that any procedural right to be present was waived by their conduct. *Gagnon,* 470 U.S. at 529. The Court emphasized that the defendants not only failed to object prior to the in-chambers conference, but also afterwards. *Id.* at 528. The Court held that the "respondents' total failure to assert their

rights to attend the conference with the juror sufficed to waive their rights."[6] *Id.* at 525 and 529.

While *Gagnon* primarily addressed waiver in the context of the right to be present pursuant to court rule, *Gagnon* illustrates how Jones' conduct in the present case constituted a waiver of his claimed due process right to be present for the clerk's drawing of numbers. Like *Gagnon,* Jones was acutely aware of his right to be present but made a deliberate, strategic decision not to object until after he received a negative verdict. Jones impliedly waived any right to be present through his conduct and the conduct of his counsel. The trial court did not abuse its discretion in denying the motion for new trial.

b. Jones did not have the right to be present for the ministerial task of randomly drawing numbers.

The record is that because Jones <u>was</u> present in court when the clerk drew the alternate juror numbers, the pertinent question is whether he had a right to have the clerk announce that she was drawing numbers. He did not.

The due process guaranteed by the Fourteenth Amendment[7]

---

[6] The Court held that the right to be present guaranteed by Federal Rule 43, which is almost identical to Washington's CrR 3.4, was waived by the defendants' conduct.

[7] The Sixth Amendment right to be present is rooted in the Confrontation Clause and relates to confronting the State's evidence. *E.g., Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Here, there is no Sixth Amendment claim because

affords a criminal defendant the right to be present during all critical stages of a state criminal proceeding. *State v. Pruitt,* 145 Wn. App. 784, 798, 187 P.3d 326 (2008). Article I, Section § 22 of the Washington Constitution provides that a criminal defendant "shall have the right to appear and defend in person, or by counsel." Washington State Constitution, article I, section 22. The right to due process may, in some instances, give the accused the right to be present for proceedings where the defendant is not confronting the State's evidence. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

In *Snyder v. Massachusetts*, the U.S. Supreme Court held that the accused's right to be present exists only when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." 291 U.S. 97, 105-06, 54 S.Ct. 330, 575 L.Ed.674 (1934). As such, the defendant did not have the right to be present during a jury crime scene viewing because "[t]here is nothing he could do if he were there, and almost nothing he could gain." *Id.* at 108.

The principle that the accused does not have the right to be present when his presence would be useless has been repeatedly affirmed by both federal and Washington State courts. *Gagnon,* 470 U.S. at 527, 105 S.Ct. 1482; *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 2667, 96

Jones does not argue that his right to confront the State's evidence was violated when the clerk drew numbers without his knowledge.

L.Ed.2d 631 (1987) (no right to be present at child competency hearing that did not include testimony that would be admitted at trial); *State v. Thorpe,* 51 Wn. App. 582, 590, 754 P.2d 1050 (1988) (no right to be present for closing arguments).

The federal Constitution does not guarantee the accused the right to "be present every second or minute or even every hour of the trial." *U.S. v. Bustamante*, 456 F.2d 269, 277 (9th Cir., 1972) (*citing Snyder,* 291 U.S. at 116, 54 S.Ct. at 336 (1934)). In *Gagnon,* the Court held that the presence of co-defendants to address the juror safety issue "was not required to ensure fundamental fairness or a 'reasonably substantial ... opportunity to defend against the charge.'" *Gagnon*, 470 U.S. at 527, (citing *Snyder,* 291 U.S. at 105-06, 54 S.Ct. 330). *Gagnon* applied *Snyder*'s rule that "the exclusion of a defendant from a trial proceeding should be considered in light of the whole record," and characterized defendants' absence from the meeting as "a short interlude in a complex trial." *Id.* at 527, 105 S.Ct. 1482 (citing *Snyder*, 291 U.S. at 115-16).

The U.S. Supreme Court also recognizes that the jury *voir dire* and selection process is distinct from the mere "administrative impaneling process." *United States v. Gomez,* 490 U.S. 858, 875 109 S.Ct. 2237, 104 L.Ed 923 (1989). Here, the clerk's random drawing of juror numbers was simply part of the "administrative impaneling process" and did not require

the presence of Jones or counsel. The random drawing of numbers did not implicate a reasonably substantial opportunity for Jones to defend against the charge of attempted murder. That Jones may not have been aware that the clerk was drawing numbers during the short recess was merely "a short interlude in a complex trial." *Snyder, supra.*

Nor did Jones have a right to be present under the Washington Constitution. The Washington Supreme Court interprets Article I, section 22 to mean that a criminal defendant has the right to "appear and defend ... at every stage of the trial when his *substantial rights* may be affected." *State v. Irby*, 170 Wn.2d 874, 855, 246 P.3d 796 (2011) (quoting *State v. Shutzler,* 82 Wn. 365, 367, 144 P. 284 (1914)) (emphasis added).

In *Personal Restraint of Lord*, the Court held that a defendant does not have the right to be present during in-chambers or sidebar conferences that address legal matters which "do not require a resolution of disputed facts." *In re Lord,* 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964, *cert. denied,* 513 U.S. 849 (1994). Like *Snyder, Lord* concluded that the touchstone of the analysis was whether the defendant's presence could have meaningfully impacted the proceedings:

> Lord had no constitutional right to be present during any of these proceedings. Prejudice to the defendant will not simply be presumed. Lord does not explain how his absence affected the outcome of any of the challenged proceedings or conference, nor can we find any prejudice.

Id. at 306-07.

Likewise, Jones had no "substantial right" to defend when the clerk randomly drew numbered tiles from a container. Jones baldly asserts that the drawing of numbers "affected . . . substantial rights" (App. Br. at 17), but he does not identify any "substantial right" that was supposedly at stake. The sixteen jurors who heard evidence had already been randomly selected for jury duty and approved by Jones during the *voir dire* and jury selection process. The clerk simply performed a rote administrative task. The end result was 12 fair and impartial jurors that Jones had pre-approved to deliberate the case. There was no "substantial right" affected.

Jones nonetheless contends that *State v. Irby* mandates a different result. In *Irby*, the Court reaffirmed that the federal and state constitutions afford a criminal defendant the right to be present during the jury selection process because his presence allows him to assist counsel in testing the jurors' "fitness to serve as jurors." *Irby,* 170 Wn.2d at 882-86. The Court explained that the accused has a right to be present during jury selection because it "'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *Id.* at 883 (quoting *Snyder,* 291 U.S. at 106, 54 S.Ct. 330).

Irby recognized, however, that an accused does not have the right to be present during those portions of jury selection that involve only the general qualifications of potential jurors. *Irby*, 170 Wn.2d at 882 (citing with approval, *Commonwealth v. Barnoski,* 638 N.E.2d 9 (1994) (no right to be present when trial judge excused jurors for hardship because a preliminary hardship colloquy is distinguished from substantive voir dire) and *Wright v. State,* 688 So.2d 298, 300 (Fla. 1996) (no right to be present for excusing of jurors for hardship because the general juror qualification process is not "a critical stage of the proceedings")).

Jones misconstrues *Irby* by comparing a defendant's right to be present for *voir dire* and selection of jurors with the clerk's random drawing of alternate jurors who were already vetted and accepted during the jury selection process. Jones' substantial right to give advice or suggestion to his lawyers regarding the selection of jurors was not present when the clerk randomly drew alternate juror numbers.

c. Any error was harmless because Jones was tried by a fair and impartial jury and he cannot show prejudice.

A violation of the right to be present may be harmless error. *Rushen v. Spain,* 464 U.S. 114, 117-18, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *In re PRP of Lord*, 123 Wn.2d at 306-07. While the State has the burden of proving harmless error beyond a reasonable doubt, the

defendant must first raise at least the possibility of actual prejudice before the State is required to meet its burden. *State v. Caliguri,* 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Speculation is insufficient to establish the prejudice necessary to obtain relief from an alleged violation of due process. *State v. Aherns*, 64 Wn. App. 731, 735, 826 P.2d 1086 (1992); *State v. Haga,* 8 Wn. App. 481, 489, 507 P.2d 159 1973) (citing *U.S. v. Marion,* 404 U.S. 307, 325-26, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)).

In *State v. Gentry,* the defendant sought reversal of his murder conviction and death sentence because the court mistakenly allowed an alternate juror to deliberate in place of the juror who was supposed to deliberate. *State v. Gentry,* 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). The Court rejected Gentry's claim that his right to due process was violated. *Id.* The Court noted that Gentry participated in the selection of the entire jury panel and accepted the panel, including the alternates. *Id. at 616.* Gentry could not show that he was prejudiced by the composition of the jury because he had accepted all of the jurors as fair and impartial. *Id.* at 615.

The accused has the right to an impartial jury of randomly selected citizens, but does <u>not</u> have the right to a particular juror or group of jurors. *Gentry* at 615. Like *Gentry*, Jones was tried by twelve fair and impartial jurors he helped select and he cannot show how that he was prejudiced by

the jury that decided his case. Any error was harmless.

2. The Trial Court Properly Denied The Motion For New Trial Because Jones Had A Public Trial, And Any Error Was Harmless.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused the right to a "public trial." The Washington Constitution, article 1, section § 10, further guarantees that "Justice in all cases shall be administered openly."

If the court determines to exclude the public from a court proceeding, the court must generally conduct a five-step procedure before closing the courtroom. *State v. Bone-Club,* 128 Wn.2d 254, 256-59, 906 P.2d 325 (1995). It is error to fail to conduct the *Bone-Club* analysis before closing the courtroom during a proceeding where the accused has the right to public attendance. *Id.*

Jones' claim that his right to public trial was violated is predicated on his assertion that the trial court "closed" the courtroom. There is no record that the courtroom was closed or that the clerk did not draw numbers in view of persons present in the open courtroom, including Jones. CP (Clerk's Minutes); RP 4061. Jones' contention appears to be that the trial court effectively closed the courtroom by drawing alternate juror numbers without informing Jones and spectators that she was doing

so during the short afternoon recess. Jones asserts that the court should have considered the *Bone-Club* factors before allowing the clerk to draw the numbers without his knowledge, and he deserves a new trial as a result.

Jones is not entitled to relief because (a) he had no right to have the public attend the performance of a ministerial court task, and (b) any error was non-structural and too trivial to warrant a new trial.

a. The clerk's act of randomly pulling numbers from a container was a ministerial task that did not implicate Jones' right to public trial.

An accused does not have the right to a public hearing on ministerial matters because such matters do not require the resolution of disputed facts. *State v. Rivera,* 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006, 45 P.3d 551 (2001). Instead, the right to a public trial applies to "the evidentiary phases of a trial and to other adversary proceedings," and to the questioning of jurors. *Id.* at 653 (citing *Ayala v. Speckard*, 131 F.3d 62, 69 (2nd Cir. 1997)); *Press Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

Trial courts may utilize "off-the-record" procedures to resolve purely legal or non-disputed matters because doing so improves efficiency

without implicating public trial rights or diminishing the right to a fair trial. *In re Detention of Ticeson,* 159 Wn. App. 374, 246 P.3d 550 (2011) (in-chambers discussion of legal matters; *State v. Castro,* 159 Wn. App. 340, 246 P.3d 228 (2011) (in-chambers conference in which court ruled on motions in limine and in which voir dire process was discussed); *State v. Koss,* 158 Wn. App. 8, 17, 241 P.3d 415 (2010) (in-chambers jury instruction conference). Courts have viewed with favor the procedure of placing such discussions or actions on the record after the fact, and recognize that such procedures involve the trial court's essential duty to ensure efficient and fair trials. *Ticeson, supra; Castro, supra; Koss, supra.*

Jones appears to contend that if court staff performs any function that is even remotely related to the trial, the court must announce the procedure prior to commencing it. Jones' contention presumably applies when the clerk marks exhibits, drafts clerk's minutes, draws random juror numbers, and makes phone calls to jurors regarding scheduling. Jones fails to differentiate between the legitimate and efficient use of off-the-record functions that occur while the courtroom is open (or even closed), and court functions where the defendant has need to participate.

The random selection of alternate jurors was not a judicial proceeding. It was a ministerial task performed by court staff. No evidence was taken, no disputed facts were addressed, and no adversarial

proceeding occurred. The trial judge made a public record of the clerk's ministerial task afterwards so that Jones had the opportunity to object. The ministerial task involved was far less substantial than those at issue in the cases cited above. Jones had a public trial.

b. Any error was non-structural and too trivial to warrant relief on appeal.

Even if there was error in failing to announce that the random identification of alternate jurors would occur during the short break in closing arguments, "being able to raise an issue on appeal does not automatically mean reversal is required." *State v. Momah,* 167 Wn.2d 140, 155, 217 P.3d 321 (2009). An error is structural and requires reversal only when it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 149.

In *Momah,* the Court departed from prior rulings which held that a public trial violation is structural error requiring automatic reversal. The Court acknowledged that not all courtroom closures are structural error because some closures do not render a trial fundamentally unfair. *Momah,* 167 Wn. App. at 150. The Court held that the admitted courtroom closure in *Momah* was not structural error requiring a new trial. *Id* at. 156.

Similarly, federal courts recognize that minor courtroom closure

errors can be "too trivial to implicate one's constitutional rights."[8] *See United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003) (no public trial violation where courtroom was closed for mid-trial questioning of entire jury panel to determine if jurors felt safe); *Peterson v. Williams,* 85 F.3d 39 (2nd Cir. 1996) (no public trial violation where court inadvertently left courtroom closed for additional 15-20 minutes after legitimate closure ended); *United States v. Al-Smadi,* 15 F.3d 153, 154 (10th Cir. 1994) (no public trial violation where court security officers closed federal courthouse doors 20 minutes before the close of trial proceedings); *Snyder v. Coiner,* 510 F.2d 224, 230 (4th Cir. 1975) (no public trial violation when bailiff refused to allow people to enter or leave the courtroom during closing arguments). Further, a Sixth Amendment public trial violation only occurs if the trial court makes an affirmative act to exclude people from the courtroom. *People v. Peterson,* 81 N.Y. 2d 824, 595 N.Y.S. 2d 383, 611 N.E.2d 284, 285, (1993).

Closures too trivial to be subject to remedy are those which are "brief and inadvertent." *U.S. v. Al-Smadi,* 15 F.3d at 154-55. Here, the

---

[8] Washington courts have not yet addressed whether to adopt the federal court's analysis that some closures are to trivial to warrant relief. *See State v. Lormor*, 172 Wn.2d 85, 87, 257 P.3d 624 (2011) (reserving a discussion of trivial closures "for another day"). However, the recent decision in *Momah* that not all courtroom closures constitute structural error demonstrates the Court's openness to recognizing that some closures are too trivial to warrant a remedy. *See State v. Momah,* 167 Wn.2d at 155 (noting that not all courtroom closures errors are structural and that "[i]n each case the remedy must be appropriate to the violation.").

brief and inadvertent "closure," if there was one, involved a sworn officer of the court randomly drawing numbers from a box and neglecting to announce it to the parties beforehand. The alleged violation occurred on the last day of Jones' trial for the attempted murder of a police officer, a trial that required months of preparation; 7 weeks of trial for the court staff and lawyers; weeks of the jurors' time; the marking of 497 exhibits; the testimony of over 60 witnesses; which followed Jones' prior statement to the court that he wished to "proceed with this jury." RP 1864. The end result of the alleged "closure" was that twelve jurors that Jones had already accepted as fair and impartial retired to deliberate the case.

Considering the record as a whole, the alleged violation was non-structural and too trivial to warrant relief. The trial court properly denied the motion for new trial.

B. The Trial Court Properly Ruled That Trooper Johnson's Identification Of Martin Jones Was Admissible Because (1) Substantial Evidence Supported The Trial Court's Findings Of Fact, And (2) Admission Of The Evidence Did Not Violate Due Process.

A trial court's ruling on the admissibility of a photographic identification is reviewed for abuse of discretion. *State v. Kinard,* 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002). The appellate court reviews the decision only to determine whether there were tenable grounds for the trial court's ruling. *Id.*

Here, the trial court denied the motion to suppress based upon stipulated facts presented by the parties. The trial court's ruling should be affirmed because (a) the trial court's factual findings were supported by substantial evidence in the record, and (b) the factual findings supported the conclusion that no violation of due process occurred.

1. Substantial evidence in the record supports the trial court's findings.

An appellate court's review of factual findings from a motion to suppress a photographic identification is limited to whether the trial court's findings were supported by substantial evidence. *State v. Kinard,* 109 Wn. App. 428, 434, 36 P.3d 573 (2001), *review denied,* 146 Wn.2d 1022 (2002). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Vickers,* 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

Here, the trial court's findings were set forth in a written order. CP 1238-1241. The findings and conclusions were based upon stipulated facts agreed to by Jones. CP (Stipulated Facts). The stipulated facts were substantial evidence of each finding, as set forth below.

a. Trooper Johnson had sufficient opportunity to view the suspect at the time of the crime.

The parties stipulated that (a) the crime scene was lit despite the fact that it was evening, (b) Trooper Johnson observed the shooter at

close distance, and (c) Trooper Johnson interacted with the shooter both before and after the shooting. CP (Stipulated Facts #4).

b. Trooper Johnson was sufficiently attentive during the events surrounding the shooting.

The parties stipulated that Trooper Johnson (a) observed the shooter approach him, (b) observed that the shooter was "agitated" when he first arrived, (c) observed the shooter converse with the tow operator, (d) intercepted the shooter and conversed with him, (e) observed the shooter and made eye contact with him from a short distance after the shooting, (f) shot at the shooter as he fled, (g) noted the shooter's direction of travel away from the crime scene, (h) gave a description of the shooter's physical characteristics and clothing immediately after the shooting, (i) gave the shooter's last known direction of travel immediately after the shooting, (j) gave the same descriptions of appearance and direction of travel to responding police officers within minutes of the shooting, (k) gave the same description of appearance to Sgt. Metz at the hospital 18 minutes after the shooting, and (l) told Sgt. Metz several hours after the shooting that he paid "diligent attention" to the shooter. CP (Stipulated Facts 5 and 11).

c. Trooper Johnson's description of the suspect was sufficiently accurate and reliable.

The parties stipulated that (a) at the time of the shooting Martin

Jones was a white male, 45-years-old, 5'10", with short brown hair[9] and light stubble on his face, and (b) after the shooting, Trooper Johnson described the shooter as a white male, approximately 40-years-old, 5'10"-5'11", with short brown hair and stubble on his face. CP (Stipulated Facts 6, 10, 16).

d. Trooper Johnson's level of certainty in identifying the defendant's photograph was high.

The parties stipulated that (a) immediately after the shooting Trooper Johnson told responding officers, "I got a good look at him," (b) only 18 minutes after the shooting, Trooper Johnson told his sergeant that he saw the shooter "and would be able to recognize him again," (c) Trooper Johnson told Sgt. Metz that he paid "diligent attention" to the shooter, (d) on February 13-14, 2010, Trooper Johnson viewed 13-14 single photographs of white males (as well as a sketch) who were potential suspects, but Trooper Johnson stated that none of them were the shooter, (e) upon looking at a photograph of Martin Jones on February 14, 2010, Trooper Johnson was certain that Jones was the man who shot him, (f) Trooper Johnson provided accurate physical characteristics of Jones that were present the night of the shooting but not present in the photograph of Jones that he viewed, and (g) Trooper Johnson had "no

[9] The stipulated facts included a color photo of Jones as he appeared two days after the shooting. CP (Stipulated Facts); Exhibit 53.

doubt" that Jones was the person who shot him. CP (Stipulated Facts 8, 10-11, 15-16, 18, 20, 22, 24-25, 28).

e. The time between Trooper Johnson's observation of the shooter and his identification of a photograph of Jones was short.

The parties stipulated that (a) the shooting occurred at 12:40 a.m. on February 13, 2010, and (b) Trooper Johnson first viewed a photograph of Jones at approximately 3:45 p.m. on February 14, 2010. CP (Stipulated Facts 1 and 25).

2. Admission Of Trooper Johnson's Photographic Identification Did Not Violate Due Process Because (a) The Procedure Used Was Not Impermissibly Suggestive, (b) The Identification Was Reliable Independent Of Any Suggestiveness In The Presentation Of The Photograph, and (c) Exigent Circumstances Necessitated The Procedure Used.

A criminal defendant who challenges an out-of-court photographic identification bears the burden of first showing that the procedure used was impermissibly suggestive. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If the defendant fails to carry this burden, the inquiry ends. *Id.* If the defendant proves that the procedure was impermissibly suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification. *Id.*

a. The procedure used to show Trooper Johnson a photograph of Martin Jones was not impermissibly suggestive.

A suggestive photographic identification procedure is one that directs undue attention to a particular photo. *State v. Eacret*, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). Jones argues that "presentation of a single photograph is, as a matter of law, impermissibly suggestive." App. Br. at 28 (citing *State v. Maupin,* 63 Wn. App. 887, 896, 822 P2.d 355 (1992)). While this quotation from *Maupin* is accurate, *Maupin* is distinguished from the present case.

The police investigation in *Maupin* involved the presentation of a *single* photograph to the witness. *Maupin,* 63 Wn. App. at 896. Here, Trooper Johnson was shown numerous single photographs of white males over a period of time less than 48 hours. This was not a "single photograph" case like *Maupin.*

Jones' case is more like *Commonwealth v. Cavitt,* where an eyewitness to a crime viewed numerous photographs and was unable to identify any. As he was leaving the police station, the victim saw a computer screen of the defendant's face. The victim identified the defendant's photo as the criminal. The defendant argued that this was an "impermissibly suggestive" presentation of a single photograph. *Commonwealth v. Cavitt,* 953 N.E.2d 216, 228-230 (Mass. 2011). The

Supreme Court of Massachusetts concluded that the identification "was not a one-on-one show up identification. It was more akin to a display of a series of photographs." *Id.* at 230. The court concluded that the identification was not the product of unnecessarily suggestive police procedures that were conducive to a mistaken identification. *Id.*

Like *Cavitt,* the procedure used here was akin to showing Trooper Johnson a series of single photographs over a short period of time. The procedure used was not "impermissibly suggestive" or conducive to a mistaken identification.

The fact that a driver's license photo with Jones' name on it was used adds little to the analysis. Jones' driver's license photo with name on it was the same type of photo that Trooper Johnson had looked at "ten[s] of thousands" of times during his career. RP 2851. Trooper Johnson knew that he was looking at a photograph of Martin Jones because he had specifically requested it. RP 2851.

The police did not suggest to Trooper Johnson that he choose a photograph of Martin Jones. It was stated in Trooper Johnson's presence that Jones "had been cleared" as a suspect. RP 1553. Trooper Johnson identified Jones' photograph because he recognized him as the man who shot him. RP 2856. Jones argues that Trooper Johnson was "predisposed" to identify Jones, but offers no evidence to support this

assertion. The record supports the trial court's conclusion that the procedure used was not impermissibly suggestive.

b. There was no "very substantial likelihood of irreparable misidentification" because Trooper Johnson's identification of Jones was independently reliable.

Even if the procedure used to show Trooper Johnson a photograph of Jones is considered "suggestive," the United States Supreme Court has said of suggestive identification procedures:

> such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Manson v. Brathwaite, 432 U.S. 98, 116, 97 S.Ct. 2243 (1977).

Courts review the totality of the circumstances to determine whether a suggestive procedure created a substantial likelihood of irreparable misidentification. *State v. Vickers,* 148 Wn.2d 91, 120, 59 P.3d 58 (2002). In determining whether there is a basis to find that the identification was reliable independent of the suggestive identification procedure, courts 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 the witness' 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, 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The "linchpin" of this inquiry is the reliability of the identification. *Brathwaite*, 432 U.S. at 114.

In *Brathwaite*, a trained undercover police officer, Trooper Glover, purchased heroin from a seller. 432 U.S. at 100. A few minutes later, Trooper Glover described the seller in detail to another police officer. *Id.* at 101. The other police officer, suspecting from the description that the defendant might be the seller, left a law enforcement photograph of the defendant at Trooper Glover's office. *Id.* Two days later, Trooper Glover viewed the photograph and identified the defendant's photo as the seller of the heroin. *Id.* The defendant was charged and convicted of possession and sale of heroin. *Id.* At trial, Trooper Glover testified that he had "no doubt whatsoever" that the person in the photograph was the seller of the heroin. *Id.* The defendant argued that the admission of the identification testimony deprived him of due process of law in violation of the Fourteenth Amendment. *Id.* at 103.

The State admitted in *Brathwaite* that the procedure used to show Trooper Glover the photo was suggestive and not necessitated by exigent circumstances. *Id.* at 109. But the Court agreed with the State that the

totality of the circumstances surrounding the identification did not establish a "substantial likelihood of irreparable misidentification." The court noted that the identification was made by a trained police officer who had sufficient opportunity to view the suspect, accurately described him, positively identified his photograph, and made the photographic identification only two days after the crime. *Id.* at 115-16. The court held that *"the defect, if there be one, goes to weight and not to substance."* *Id.* at 117 (emphasis added).

The Supreme Court also explained the importance of identifications made by law enforcement eyewitnesses:

> Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty and specialized in dangerous duty when he called at the third floor of 201 Westland in Hartford.

Id., 432 U.S. at 115, 97 S.Ct. at 2243. *Brathwaite* is one of many cases which accept that police officers have a heightened degree of attention, especially in dangerous situations. *E.g., Taylor v. U.S.*, 451 A.2d 859, 863 (D.C. Circuit, 1982); *State v. Bruggerman*, 263 N.W.2d 870 (N.D. 1978); *United States ex rel. Robinson v. Vincent*, 371 F.Supp. 409 (S.D.N.Y.1974), *affirmed* 506 F.2d 923, *cert. denied sub nom, Robinson v. Vincent*, 421 U.S. 969, 95 S.Ct. 1962, 44 L.Ed.2d 458 (1975).

The trial court's findings of fact in this case included the five *Brathwaite* factors, and all weighed in favor of an identification that was reliable independent of the procedure used to show the photograph to Trooper Johnson. CP 1238-41. Like Trooper Glover, Trooper Johnson was also an experienced police officer with a high degree of attention while on duty and faced with an armed suspect. The trial court properly concluded that there was no "very substantial likelihood of misidentification" based upon the stipulated facts.

c. Exigent circumstances necessitated showing Trooper Johnson photographs as expeditiously as possible.

Whether a suggestive identification procedure violates due process "depends on the circumstances surrounding it." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (*overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). An emergency or exigent circumstance may necessitate the need for police to employ a suggestive identification procedure due to logistical or time constraints. *Id.* Courts review the totality of the circumstances to determine whether emergent circumstances justify the use of identification procedures that are more suggestive than procedures normally available. *Id.*

In *Stovall v. Denno*, a man broke into the home of a husband and wife. The intruder, who was black, murdered the husband and stabbed the wife 11 times. The wife was transported to a hospital, where her survival was uncertain. The police apprehended the defendant and brought him to the wife's hospital room. The defendant was the only black person in the room, was handcuffed, and was surrounded by five police officers. Police asked the wife if the defendant "was the man." The wife identified the defendant as the attacker. The defendant was convicted after the identification was admitted at trial. *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

On appeal, the U.S. Supreme Court acknowledged that the procedure used was highly suggestive, but noted that the police did not know whether the victim would survive and therefore they conducted a show-up the quickest, easiest way that they could. *Id.* at 302. The court held that the totality of the circumstances warranted use of an admittedly suggestive identification procedure and due process was not violated. *Id.*

Here, an emergency situation and logistical barriers required the police to use the quickest procedure available to present potential suspects to Trooper Johnson. A person who committed an unprovoked attempted murder of a police officer was loose in the community and posed a tremendous threat to both the public and law enforcement.

Trooper Johnson was in a hospital bed in another state. Communications from investigators in Pacific County, whether by cell phone or computer, were hampered by a "communication[s] black hole." RP 1498.

The exigent circumstances absent in *Brathwaite* were prominently present in this case, as they were in *Stovall*. Police did what they could as fast as they could, which was to show Trooper Johnson a series of single photographs of potential suspects as the photographs became available, including Martin Jones. Like *Stovall*, there was no due process violation.

C. The Trial Court Properly Excluded Evidence Of "Other Suspects" Because Jones Failed To Establish The Necessary Evidentiary Foundation For Admissibility.

In order to establish the admissibility of "other suspect" evidence, the defendant bears the burden of showing:

> such proof of connection with the crime, such a train of facts or circumstances as tend to clearly point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 407 (1986) (quoting *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932)). Motive, ability, and opportunity to commit a crime are not sufficient to establish the necessary train of facts. *State v. Maupin*, 128 Wn.2d 918, 927, 913 P.2d 808 (1996); *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert.denied*, 508 U.S. 953 (1993); *State v. Downs*, 168 Wn. 664, 667-68, 13 P.2d 1 (1932). Only when the evidence

would establish a "step taken by the third party that indicates an intention to act" on the motive or opportunity does the trial court abuse its discretion in refusing to allow the evidence. *Rehak*, 67 Wn. App. at 163, 834 P.2d 651.

Trooper Greene stopped Mrs. Jones' van on a Friday night on the main street of Long Beach (SR 103). Foot traffic is common along SR 103. RP 971-72. Sometime between 11:57 p.m. and midnight, more than 40 minutes prior to the shooting, Trooper Greene observed a white male walk past the traffic stop without stopping or showing any interest in what Trooper Greene was doing.[10] Exhibits 22, 25. The defense sought to elicit this testimony from Trooper Greene in order to argue to the jury that this person shot Trooper Johnson. CP 1218-28. The trial court properly granted the State's motion to exclude this evidence because Jones could not present facts connecting the person to the shooting. CP 1242-43.

Jones argues on appeal, as he did at trial, that he did not offer the evidence to show that the person observed by Trooper Greene was the "real" shooter; rather, Jones argues that the evidence was relevant and admissible because it "tested the State's theory that Mr. Jones, and Mr. Jones alone, shot the trooper." App. Br. at 40.

---

[10] The man was walking north and continued *north*. Exhibit 25 (pp. 2-3). Trooper Johnson and the tow operator both testified that 35-40 minutes later, they saw the shooter approach from the *south*. RP 1308, 2808.

No matter how Jones continues to re-word this argument, the end result is the same. Jones wanted to present evidence that this person was the "real" shooter. Jones' offer was classic "other suspect" evidence. Jones failed to establish the necessary connection between this person and the crime, other than mere opportunity (if walking past the crime scene 40 minutes prior can even constitute "opportunity").

Jones cites *State v. Maupin* as an analogous case. In *Maupin,* the defendant was accused of kidnapping and murdering a six-year-old girl. *State v. Maupin,* 128 Wn.2d 918, 913 P.2d 808 (1996). The child was abducted from her home and found buried in a gravel pit six months later. *Id.* at 921. The State accused Maupin of killing the child on the same day she was abducted. *Id.* at 926. The defense offered an eyewitness who would testify that he saw the child in the company of another man, McIntosh, the day <u>after</u> the abduction occurred and <u>after</u> the girl was supposed to be dead according to the State's charge of murder. *Id.* at 922. The trial court excluded the evidence on grounds that it was "other suspect" evidence under the theory that the offered testimony did not prove that McIntosh abducted and/or killed the girl. *Id.* at 922-23. The trial court's ruling was reversed on appeal. The appellate court found that "the evidence Maupin sought to introduce was not for the purpose of inducing speculation about another's opportunity to commit the crime, but

instead involved an eyewitness who placed the abducted child with other persons at a time after Maupin was supposed to have kidnapped and murdered her." *Id.* at 926-27.

Jones tries to liken his case to *Maupin* by asserting that the State presented evidence that "Jones was . . . the only person who could have shot Trooper Johnson" (App. Br. at 44). Contrary to this assertion, the State never presented evidence that Jones was the only person present in Long Beach the night of the shooting; rather, the State simply presented evidence that Jones was the person who committed the crime.

Jones further argues that he "wished to use Trooper Greene's observation of this other person simply to question the reliability of Trooper Johnson's identification." App. Br. at 42. This argument fails because it is undisputed that Trooper Greene never saw the shooter. Trooper Greene left the scene 25 minutes prior and was at Long Beach PD at the time of the shooting (RP 887, 895), and he could not "question the reliability of Trooper Johnson's identification."

The necessary evidentiary foundation to admit the evidence was severely lacking. The trial court did not abuse its discretion.

D. The Trial Court Properly Precluded Jones From Attempting To Impeach A State's Witnes On A Collateral Matter Through Use Of Hearsay And Inadmissible Lay Opinion.

A trial court's ruling on the admission of evidence is reviewed for

abuse of discretion. *State v. Perez-Valdez,* 172 Wn.2d 808, 814, 265 P.3d 853 (2011). A trial court abuses its discretion when its exercise of that discretion is manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Jones argues that the trial court abused its discretion by declining to allow him to (a) "impeach" State's witness Sara Trejo on a collateral matter by asking her about another witness's lay opinion, or (b) present the lay opinion of Chris Sewell that the police investigation in this case was "haphazard." The trial court properly denied Jones' requests.

1. The Trial Court Properly Declined to Allow Witness Sara Trejo To Be Impeached With Hearsay And Lay Opinion On A Collateral Issue.

Witness Sara Trejo was a fingerprint analyst for the Tacoma branch of the State Crime Lab. RP 2542. Trejo was called by the State. RP 2541. Trejo testified on direct for only 10 minutes. CP (Clerk's Minutes); RP 2541-47. Trejo testified that she examined a fired cartridge casing for fingerprints, but she did not find any fingerprints. RP 2542-47.

Jones sought to "impeach" Trejo with an e-mail authored by Chris Sewell, another Crime Lab employee. RP 2536-37. Sewell's e-mail did not address Trejo's qualifications or her fingerprint analysis, but amorphously referred to the police investigation as a whole as "haphazard." Exhibit 402. Jones did not present Sewell to explain the use

of the word. The State argued that Sewell's opinion was hearsay, irrelevant opinion testimony, and pertained to an issue which was collateral to Trejo's testimony. RP 2535.

a. Sewell's e-mail was inadmissible hearsay and opinion testimony.

An out-of-court statement is "hearsay" if it is offered for the truth of the matter asserted. ER 801(c). Hearsay is inadmissible. ER 803. Sewell's e-mail was an out-of-court statement that Jones offered for "proof of the matter asserted," i.e., that the police investigation was "haphazard." The trial court properly excluded the e-mail from Trejo's testimony because it was rank hearsay.

Sewell's e-mail also contained inadmissible lay opinion. A lay opinion is admissible if the opinion is rationally based upon the perception of the witness and "helpful to . . . the determination of a fact in issue." ER 701. Here, the defense sought to offer Sewell's apparent opinion that the police investigation was "haphazard" without making any offer of proof that Sewell's opinion was "rationally based upon the perception of the witness." ER 701. Jones did not present any offer of proof or other evidence that Sewell, a lab scientist, had any knowledge of the police investigation such that he was qualified to label it "haphazard." The "opinion," such that it was, was properly excluded.

b. Jones' proffered evidence was impeachment on a collateral matter.

Parties may not impeach a witness on a collateral matter. *State v. Aguirre*, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). A matter is collateral if it is not directly relevant to an issue at trial. *Id.*

Here, Trejo testified that she examined a fired cartridge casing for fingerprints and did not find any. RP 2541-47. Jones sought to "impeach" her testimony with Sewell's supposed opinion that the police investigation was "haphazard." Sewell's opinion was not relevant to impeach Trejo's testimony because it did not relate to Trejo's fingerprint analysis; and Trejo never offered an opinion on the quality of the police investigation. There was no opinion from Trejo to impeach with Sewell's lay opinion.

2. The Trial Court Properly Excluded The Lay Opinion of Chris Sewell Because It Was Irrelevant And Unduly Prejudicial; Any Error Was Also Harmless.

a. The trial court properly excluded Sewell's opinion.

A criminal defendant has the constitutional right to present a defense, but this right does not encompass the presentation of irrelevant evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Further, even relevant evidence is inadmissible if it is unfairly prejudicial, may confuse the issues, or mislead the jury. ER 403; *State v. Darden*, 145 Wn.2d 612, 625, 41 P.3d 1189 (2002).

A claimed denial of the Sixth Amendment right to present a defense is reviewed *de novo*. *Jones*, 168 Wn.2d at 719 (citing *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009)). Here, Jones was not precluded from presenting a defense. The State's motion was a simple evidentiary motion to exclude Sewell's lay opinion about the quality of the investigation. RP 3034-36.

An evidentiary ruling is reviewed for abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). The trial court's balancing of the danger of prejudice against the probative value of evidence will be overturned "only if no reasonable person could take the view adopted by the trial court." *Posey*, 161 Wn.2d at 648. A trial judge is in the best position to evaluate the prejudicial effect and relevancy of evidence. *Posey*, 161 Wn.2d at 648.

The trial court had tenable grounds to exclude Sewell's alleged personal opinion that the police investigation was "haphazard." In response to a request from the Vancouver Crime Lab that Sewell send Trooper Johnson's uniform shirt to Vancouver for DNA analysis, Sewell sent an e-mail to several lab employees that included a suggestion that the police investigation of the case was "haphazard." Exhibit 402; RP 3042. Sewell is a DNA lab scientist, not a police investigator. Exhibit 402. There was no record that Sewell examined any evidence in this case or

was privy to any details of the police investigation. Presenting Sewell's unfounded lay opinion had the significant potential to mislead the jury. The trial court properly excluded pursuant to ER 403. RP 3044-45.

Jones argues that his inability to present Sewell's opinion "created the false impression with the jury that the investigation was flawless," prohibited him from "casting doubt upon the opinion of the lab employees that Mr. Jones was the assailant of Trooper Johnson," and "eviscerated his defense." App. Br. at 45. These arguments fail.

First, the proper method for Jones to establish that the police investigation was "haphazard" was to confront and cross-examine the police investigators and scientists who actually participated in the investigation. Jones' counsel did this throughout the trial.

Second, Jones' defense was alibi. Jones presented evidence and argued that he was at home and asleep at the time of the shooting. Sewell's irrelevant lay opinion had no affect on Jones' defense of alibi.

Finally, no lab employee offered any opinion that Jones was the assailant such that Jones was entitled to rebut the opinion. There was no such opinion to "cast doubt upon." The only lab employee who offered any opinion of consequence was a firearms expert who gave opinions about the shell casings found in Jones' house and the fired shell casing found at the crime scene. RP 2417-2525. But neither he nor any other

Crime Lab employee gave an opinion that "Jones was the assailant" or that "the police investigation was flawless." There was no opinion to rebut.

b. Any error was harmless error.

A violation of an accused's rights to confront witnesses or present a defense is subject to harmless error analysis. *State v. Hayes,* ___ Wn. App. ___, 265 P.3d 982, 990 (2011). Error is harmless if the court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith,* 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The error claimed here was harmless beyond a reasonable doubt. Contrary to Jones' claim on appeal, the State's case was far from "circumstantial." Jones had motive to shoot Trooper Johnson—WSP had arrested his wife, was impounding his vehicle, and was counting the money from his wife's purse. Jones had no vehicles available to drive to the location of the shooting. Jones' residence was a 20-30 minute walk from the south of the crime scene. The shooter appeared on foot from the south. The victim eyewitness, an experienced police officer, identified Jones as the shooter and had "no doubt" about it. A K9 tracked Jones from the shooting to his house. Jones tried to flee when police surrounded his home. Jones had the same brand and caliber of ammunition, manufactured in 1999 and stamped by the same machine, as the bullet

used to shoot Trooper Johnson. Jones lied to police and told them he was asleep when his cell phone records showed that he was constantly on his cell phone during the relevant time period.

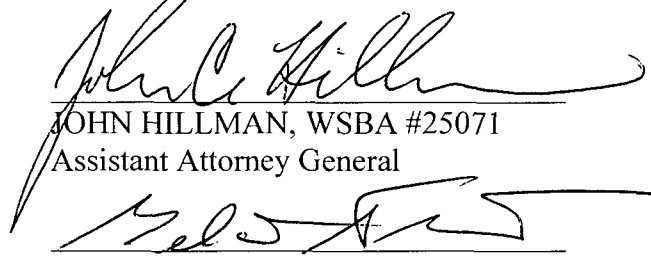
Testimony from Sewell would not have affected or changed any of these facts. If allowed to testify, Sewell would have supposedly testified that even though he wasn't involved in the case, he thought the police investigation was "haphazard." Sewell's testimony would not have affected the case. Any error was harmless beyond a reasonable doubt.

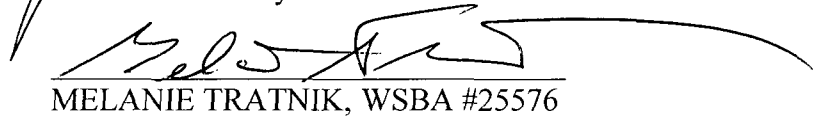
IV. CONCLUSION

Jones received a fair and public trial. The judgment and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 13TH day of March, 2012.

ROBERT M. MCKENNA
Attorney General

By: 
JOHN HILLMAN, WSBA #25071
Assistant Attorney General


MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

RECEIVED
COURT OF APPEALS
DIVISION ONE

MAR 19 2012

NO. 41902-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MARTIN ARTHUR JONES, Appellant.	DECLARATION OF SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 13 PM 4:51
12 MAR 15 PM 12:26
STATE OF WASHINGTON
BY

VICTORIA L. ROBBEN declares as follows:

On Tuesday, March 13, 2012, I deposited into the United States Mail, first-class postage prepaid and addressed as follows:

David L. Donnan
Thomas Kummerow
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

Copies of the following documents:

1) BRIEF OF RESPONDENT
2) DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 13th day of March, 2012.

Victoria L. Robben
VICTORIA L. ROBBEN

ORIGINAL