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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ALFRED JOSEPH SANCHEZ, Petitioner

From the Court of Appeals, Division II for the State of Washington
No. 42964-1-II

PETITION FOR DISCRETIONARY REVIEW

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 ORIGINAL

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A. IDENTITY OF PETITIONER.

Alfred Joseph Sanchez, petitioner and appellant below, asks this court to accept discretionary review of the Court of Appeals ruling affirming Mr. Sanchez's convictions in the unpublished opinion filed July 15, 2014.

B. CITATION OF THE COURT OF APPEALS DECISION.

The Court of Appeals – Division II affirmed Mr. Sanchez's convictions in its unpublished opinion COA No. 42964-1-II, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW.

1. This Court should accept review of this case of first impression where this case satisfies the criteria of RAP 13.4 [1] where the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; and [3] where the case involves a significant question of law under the Constitution of the State of Washington or of the United States is involved.

This case raises issues addresses the voluntariness of a statements of an active duty Ranger in the United States Army who was awakened at his barracks in Joint Base Lewis McChord [JBLM] and ordered by his commanding officer to cooperate fully, including making a statement, to Olympia Police Detectives who were investigating a stabbing. He was

ordered to dress in his full uniform and to wait in the barracks until he could cooperate fully, including making a statement, to police.

Because he was under orders from his commanding officer, Private Sanchez followed those orders. When police arrived, he did as commanded. Although police advised him of his Miranda¹ rights, Private Sanchez followed orders, obeyed his commanding officer, and made a statement.

Private Sanchez was in the custody of the United State Army which had ordered him to have contact with police and to give a statement. Any advisement of rights was meaningless and consent was not knowing, intelligent, and voluntary under the totality of facts of this case.

The Court of Appeals erred by when it held admissible Mr. Sanchez' statement to police.

2. The Court of Appeals' decision is contrary to well-established Washington case law from this court, including *See State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008); Thus, the decision satisfies the criteria of RAP 3.4[1]; *State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997)

3. The Court of Appeals' decision also failed to consider the constitutional consequences the complicit actions of Olympia Police and

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966)

Mr. Sanchez' commanding officer in maintaining his custodial status, denying him his Fifth Amendment rights against self-incrimination and identical rights under Wash. Const., art. 1, sec. 9, as well as and Sixth Amendment right to counsel and identical right under Wash. Const. art. 1, sec.22. Thus the Court of Appeals' decision satisfies the RAP 13.4[3]. *Lego v. Twomey*, 404 U.S. 477, 486-87, 30 L. Ed. 2d 618, 92 S. Ct. 619 (1972); *Edwards v. Arizona*, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938).

Did the Court of Appeals err when it ruled admissible a statement made by the defendant, an active duty soldier in the United States Army, ordered by his commanding officer to appear before local police authorities and fully cooperate with them, including making a statement where:

a. the defendant had been ordered to dress in his full uniform prior to the interview with local police authorities;

b. the defendant's contact with local police authorities occurred in the Ranger barracks where the defendant resided and where he had been ordered to stay to fully cooperate, including making a statement, to local police authorities.

2. Does the court of appeals decision finding that the defendant was not in custody for purposes of his statement to police raise

D. STATEMENT OF THE CASE.

On April 3, 2009, the State of Washington filed an information in Thurston County Superior Court, cause number 09-1-00591-9, charging Mr. Sanchez with the crimes of first degree assault while armed with a deadly weapon or did by any force or means likely to produce great bodily harm assault another and thereby inflict great bodily harm, alleging also that the crimes were committed with a special deadly weapon enhancement, count 1; first degree burglary while armed with a deadly weapon with a special deadly weapon enhancement, count 2; and first degree assault. CP 7 At that time, Alfred Joseph Sanchez, petitioner herein, was a soldier at Fort Lewis and resided in barracks there. RP² 84-85. Alfred Joseph Sanchez was convicted of assault in the first degree This statement of the case incorporates by reference herein the appellant's opening brief, the appellant's supplemental brief, the appellant's proposed findings of fact and conclusions of law for the CrR 3.5 hearing submitted as required by Division Two on April 17, 2014.

² RP refers to the Reports of Proceedings from the evidentiary hearing at the first trial when the CrR 3.5 hearing was held.

On March 28, 2009, Detectives Fayette and Costello from the Olympia Police Department were investigating that stabbing. Detective Costello contacted commanding officers at Joint Base Lewis McChord (JBLM) to arrange interviews of several service members believed to be army rangers and identified as potential witnesses in the investigation. These individuals included Mr. Sanchez.

Police first spoke to First Sergeant Bernard Folino who was Mr. Sanchez' commanding officer on March 28, 2009. Because Folino was out of state at a military training academy at the time of the CrR 3.5 hearing, he provided an affidavit in lieu of testimony. In that affidavit which was admitted without objection from the State:

1. Folino swore that he commanded Mr. Sanchez and the other individuals with whom police wanted to speak about a bar fight in Olympia. Folino instructed the Staff NCO to have the man dressed in their uniforms, present, and ready to speak to police when they arrived. Folino spoke directly to his men, including Mr. Sanchez. He ordered each men to appear before the police and relate the events of the evening, which included the events including and surrounding the bar fight. Folino expected the men to comply fully with his orders. Mr. Sanchez had never failed to follow a single order issued by Sgt. Folino. The soldiers, including Mr. Sanchez, had no choice but to follow these orders and fully

cooperate in the investigation. Folino had never known a single man in his command to fail to follow his orders. His men are trained to follow his orders exactly as given without question or hesitation because such training may save lives. This training is so ingrained that it is second nature to them. Folino ordered his men to do whatever the police wanted them to do, including giving a statement. Folino never advised the men of their rights under the United States Constitution, including the Fifth Amendment "Miranda" rights. Folino did not do this because he never considered that the men would ever even have the option of not cooperating with law enforcement. Folino believed that the military is obligated to follow command structures and to facilitate and cooperate with law enforcement.

After receiving orders from Folino and dressing in his uniform, Mr. Sanchez waited for his turn with the detectives. Immediately prior to the interview, he was ordered by a superior to go into the interview room and to "cooperate." The interview occurred in a private room in the ranger barracks.

Mr. Sanchez, a soldier who lived in the barracks, had been ordered to stay in the barracks and give a statement to detectives, was under orders from his commanding officers and was not free to go.

Mr. Sanchez thereafter went into an interview with Dets. Costello and Fayette of the Olympia Police Department. Costello “probably” identified himself as a police officer. Mr. Sanchez was not in custody. Costello orally advised Mr. Sanchez of his constitutional rights. He made a statement that was not taped recorded because the police were trying “to figure our what they [subjects of the interviews] were going to say before we record it.”

When that pre-interview was completed, the detectives asked the defendant if he would be willing to provide a taped statement. The defendant agreed.

At the beginning of the taped statement, the defendant was again advised of his constitutional rights. Mr. Sanchez acknowledged that he understood the rights he was given, waived those incomplete rights, and made a taped statement.

Following the interview, the defendant left the room. He was not arrested at that time.

After March 28, 2009, Mr. Sanchez learned that he could have an attorney when he spoke to the police. He did so.

When he went to Olympia Police Department at the request of Costello on March 31, 2009, Mr. Sanchez informed police that he had talked to an attorney and decided not to talk to police.

Mr. Sanchez's contact with Olympia Police Detectives Costello and Fayette was involuntary on March 28, 2009 and occurred at the order of his commanding officer.

Because Folino had trained his men to follow without question every command he issued, Mr. Sanchez had never disobeyed a single command. Thus, on March 28, 2009, because of the command structure in the military, the location of the interviews, and the commander's insistence that his men cooperate fully with the police, Mr. Sanchez obeyed his commander.

Mr. Sanchez had no option but to enter the interview room in the barracks when police summoned him in for their interviews.

E. GROUNDS FOR RELIEF AND ARGUMENT

RAP 13.4[b] provides that a petition for discretionary review will be accepted by the Supreme Court only: [1] if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or [3] If a significant question of law under the Constitution of the State of Washington or of the United States is involved.

This case raises a first impression for Washington law. In this State, where there is a substantial presence of military personnel and deployment, the laws of local police authorities and military command may collide. This is one of those cases.

As a result of a request from local police authorities to speak to certain soldiers, their commanding officers cooperated with police and ordered the soldiers to cooperate fully, including providing statements, to local police authorities. Sgt. Folino believed that the military had a duty to cooperate with civilian authorities and he conveyed this duty to his soldiers by ordering them to cooperate fully. The soldiers, Rangers residing in the barracks at JBLM, were in the custody of the military when the police arrived at their barracks to speak to them and take their statements. They were not free to leave the barracks. Although Mr. Sanchez, one of this group of Rangers, received advisement of Miranda from local police authorities, he believed that he had already been ordered by his commanding officer to fully cooperate and give a statement. He could not disobey his commanding officer.

The Court of Appeals' analysis of the CrR 3.5 issue failed to address the substantive issues presented by the totality of facts in this case.

Before the State can admit a defendant's statement at trial, the State must prove by a preponderance of the evidence that the person being interrogated validly waived the right to counsel and the rights against self-incrimination. *Miranda*, at 475. If the interrogation takes place without an attorney present, the State has the heavy burden of establishing the defendant's waiver of his privilege against self-incrimination and his

right to retained or appointed counsel. *Miranda*, at 475. This burden is met if the State can prove the voluntariness of the statement by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 486-87, 30 L. Ed. 2d 618, 92 S. Ct. 619 (1972). To be valid, the waiver must be a voluntary, knowing, and intelligent relinquishment of a known right. *Edwards v. Arizona*, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). The determination of whether or not a valid waiver was made depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards*, at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938))

In this case, the Court of Appeals glossed over the unique facts presented, ignored that orders given to Private Sanchez, who resided in barracks and had been directed to dress out in his uniform, to fully cooperate with police and provide a statement to Olympia police. None of the contact that Private Sanchez had with Olympia police was voluntary. It was all coerced by the agreement with Olympia Police and the commanding officer.

Ignoring the facts of the case, the Court of Appeals dealt with the issue this entire relevant portion of the opinion provides:

A private party's conduct generally cannot render a statement inadmissible under the Fifth Amendment. *See State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008) (holding that police coercion is a “crucial element” when determining voluntariness) (quoting *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)).

Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary; rather, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’”. *Unga*, 165 Wn.2d at 100-101 (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). As a result, even outrageous behavior by a private party to force a statement does not make that statement inadmissible. *Connelly*, 479 U.S. at 166.

Here, there is no allegation that the detectives interviewing Sanchez engaged in coercive conduct to obtain Sanchez's statement. The only alleged coercive conduct came from a party unrelated to the detectives' investigation — Sanchez's military superior. Because there was no coercive police activity, Sanchez's waiver of his *Miranda* rights was voluntary even though his superior ordered him to cooperate. Accordingly, we affirm the trial court's denial of Sanchez's motion to suppress his statements.

State v. Sanchez, 2014 Wash. App, LEXIS 1703, pg. 5

The Court of Appeals' reliance on *State v. Unga*, *supra*, is misplaced. In that case, this Court reiterated the rule that a police officer's promise of leniency that overcome a defendant's will and caused him to confess renders a confession inadmissible. That Court that a totality of the circumstances test must be applied to the case facts to make such determination. 165 Wn.2d at 106.

The instant case is easily distinguished from *Unga* because it concerns not a promise or inducement for a statement but rather a direct order from a commanding officer that a defendant made a statement.

The totality of the circumstances test specifically applies to determine whether a **confession** was coerced by any express or implied promise or by the exertion of any improper influence. *Unga*, 165 Wn.2d at 101. Police lies, promises, or misrepresentations during an investigation do not automatically render any resulting statements inadmissible. *Unga*, 165 Wn.2d at 101; *Broadaway*, 133 Wn.2d at 132. But if the police tactics manipulated or prevented a defendant from making a rational, independent decision about giving a statement, the statement is inadmissible. *Unga*, 165 Wn.2d at 102 (quoting *Miller*, 796 F.2d at 605); *Broadaway*, 133 Wn.2d at 132. Thus, the misstatement or promise must be sufficiently compelling to overbear the suspect's will in light of all the attendant circumstances.

Simply put, when a commanding officer in the United States Army has ordered a subordinate to fully cooperate with local police authorities, including making a statement, that officer's order overcomes a defendant's will and caused him to make a statement that is inadmissible. Moreover, where local police authorities have requested the contact and the commanding officer acts in direct response thereto, then local police authorities engaged in coercive conduct to secure their interview with Mr. Sanchez. They surely knew that he not only would be ordered to appear before them but also would be ordered to cooperate fully and to make a statement.

Applying the totality of circumstances test that this court has adopted, the answer must be in the affirmative. At the express request of Olympia Police Department detectives who asked to be given access to certain soldiers, including Private Sanchez, the commanding officer's order was given while local police authorities were en route to JBLM. The commanding officer awakened the men and had them dress out in their uniforms prior to the arrival of local police authorities. The commanding officer further ordered the men that they would cooperate fully with local police authorities and that this would include giving a statement. The soldiers then were held in their barracks and interviewed one-by-one after which they returned to their bunks. They were never free to leave their barracks.

Only days after this encounter with police did Mr. Sanchez learn that he in fact he could have had an attorney at the March 28, 2009, interview with police. Thus when he had contact with the police on March 31, 2009, he asserted his right to counsel.

Mr. Sanchez received bad advice from his commanding officer First Sgt. Folino, who did not think that it was possible not to cooperate with local authorities. Thus Folino never thought that Miranda played into these facts. When he ordered his men to fully cooperate, he expected them to do so without reservation. They obeyed him.

In this case, Mr. Sanchez has satisfied these considerations for discretionary review.

F. CONCLUSION

Because Mr. Sanchez has satisfied the criteria of RAP 13.4[b][1], and [3] and demonstrated meritorious grounds for discretionary reviews, he respectfully asks this court to accept his petition for discretionary review.

DATED this 14th day of August, 2014.

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CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: That on this date, I delivered via ABC-Legal Messengers a copy of the Appellant's Opening Brief to Thurston County Prosecutor's Office, 2000 Lakeridge Dr S.W., Building 2, Olympia, WA 98502 and to Appellant, via U.S. Mail, Postage prepaid, Alfred Joseph Sanchez at DOC#355172, Washington Corrections Center, P.O. Box 900 Shelton, WA 98584

8/14/14

/s/Kim Redford
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2014 Wash. App. LEXIS 1703, *

THE STATE OF WASHINGTON, Respondent, v. ALFRED JOSEPH SANCHEZ, Appellant.

No. 42964-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2014 Wash. App. LEXIS 1703

February 28, 2014, Oral Argument

July 15, 2014, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at State v. Sanchez, 2014 Wash. App. LEXIS 1762 (Wash. Ct. App., July 15, 2014)

PRIOR HISTORY: [*1]

Appeal from Thurston Superior Court. Docket No: 09-1-00591-9. Date filed: 01/11/2012. Judge signing: Honorable Christine a Pomeroy.

CORE TERMS: jury trial, fight, detective, knife, video, kitchen, waive, substantial evidence, ineffective, wound, stabbing, montage, deadly weapon, written waiver, cooperate, assault, jacket, waived, jury trial, bodily harm, military, conclusions of law, constitutional rights, defense counsel, suppression, assailant, suppress, admit, confirmed, trial counsel

COUNSEL: For Appellant(s): *Barbara L. Corey, Attorney at Law, Tacoma, WA.*

For Respondent(s): *Jon Tunheim* ✓✓, *Thurston County Prosecutor's Office, Olympia, WA.*

JUDGES: AUTHOR: *Bradley A. Maxa* ▼, J. We concur: *J. Robin Hunt* ▼, J., *Thomas R. Bjorgen*, A.C.J.

OPINION BY: *Bradley A. Maxa* ▼

OPINION

¶1 MAXA ▼, J. — Alfred Sanchez appeals his bench trial conviction for first degree assault with a deadly weapon for stabbing a person with a knife during a fight outside a bar in Olympia. He argues that (1) the trial court erred in denying his motion to suppress statements he made to investigating officers, (2) his waiver of his right to a jury trial was invalid, (3) the evidence was

insufficient to support his conviction, and (4) his counsel was ineffective for a number of reasons.

¶2 We hold that (1) the trial court properly denied Sanchez's suppression motion because his statements were voluntary even though his military superior ordered him to cooperate with investigating officers; (2) Sanchez's jury trial waiver was made knowingly, intelligently, and voluntarily because he submitted a written waiver and the trial court [*2] engaged in two colloquies with him regarding his rights; (3) the trial court's unchallenged findings and findings supported by substantial evidence are sufficient to sustain Sanchez's conviction; and (4) Sanchez fails to show how his counsel's performance was deficient. We affirm.

FACTS

Stabbing Incident

¶3 On the evening of March 27, 2009, a group of Fort Lewis soldiers, including Sanchez, went to Charlie's Tavern in downtown Olympia. Bradley Merten also was at the bar that night with a group of friends. Merten's friends had an argument with some of the soldiers outside the bar, and as Merten and his friends were walking to their car after leaving the bar, Merten's friends and the soldiers began fighting. Merten felt as though he had been punched in the back and, when he turned around to see who had punched him, he saw a man in a black hat and a black jacket standing on the other side of a car. When Merten asked the man if he had punched him, the man ran away. Merten later identified the man as Sanchez.

¶4 Merten realized he had actually been stabbed, not punched, and he was taken to the hospital. Merten's stab wound injuries included a partially collapsed lung, a fractured rib, and a laceration [*3] on his liver.

¶5 An Olympia police officer questioned Merten at the hospital. Merten stated that the person who had stabbed him was a white male wearing a black North Face jacket and black baseball cap. He said that he recognized the individual from seeing him talk to his friends outside the bar and he knew that the individual had been removed from the bar because he had kicked in the back door. The detective showed Merten a photomontage containing Sanchez's photo, but Merten could not identify the person he saw. On April 1, 2009, the detective showed Merten a second montage containing Sanchez's photo, and Merten identified Sanchez.

Sanchez's Statements to Detectives

¶6 Because many of the participants in the fight had left by the time detectives arrived, Olympia police detectives went to Fort Lewis to further investigate. The involved soldiers' commanding officer stated that he ordered them "to cooperate with and be interviewed by local law enforcement." Clerk's Papers (CP) at 40. The commanding officer further stated that he "made it very clear to them that they were being ordered to do whatever the police asked them to do, including giving a statement regarding participation in the events [*4] that had transpired earlier that morning." CP at 41. The detectives questioned each involved soldier individually in the barracks.

¶7 Before interviewing Sanchez, one of the detectives informed him of his *Miranda*¹ rights. Sanchez acknowledged that he understood his rights and agreed to waive them. The detective then asked Sanchez to give a recorded statement. On the recording, the detective stated that Sanchez had been informed of his rights earlier. The detective then asked Sanchez if he understood his rights, and he responded, "Yes." The detective asked if Sanchez was willing to speak to him, to which Sanchez also responded, "Yes." The detective then read Sanchez his *Miranda* rights again on the record, again asked if he understood those rights, and again asked whether he wanted to speak to the officers. Sanchez responded in the affirmative. Sanchez proceeded to give a recorded statement to the detective in which he expressly denied stabbing Merten. The State charged Sanchez with first degree assault while armed with a deadly weapon.²

FOOTNOTES

¹ *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² The State also charged Sanchez with first degree burglary. However, the trial [*5] court later granted Sanchez's motion for a directed verdict on this charge and it was dismissed.

Motion to Suppress and First Trial

¶8 Sanchez moved under CrR 3.5 to suppress statements he had made to the police officers arguing that they were involuntary because his superior military officer had ordered him to cooperate. The trial court denied the suppression motion. The court found that Sanchez was not in custody when the statement was made. The court further ruled that Sanchez was read his *Miranda* rights and that his superior officer's direct order to cooperate with the police did not render the questioning improper. At that time the trial court did not enter findings of fact or conclusions of law supporting its ruling.

¶9 Sanchez's first trial was before a jury, which was unable to reach a verdict. The trial court declared a mistrial. The State again charged Sanchez with first degree assault while armed with a deadly weapon. The case again was set for trial.

Motion to Waive Jury Trial

¶10 Sanchez moved to waive his right to a jury trial. In support of the motion, Sanchez's counsel argued that it had been two years since the original jury trial and none of the service members present on the night [*6] of the stabbing were available to testify. Therefore, she stated, "[I]n order to accurately portray this story . . . we'd be reading 10, 15 transcripts into the record, and it's my concern that we'd lose the jury." Report of Proceedings II (RPII) at 21. She further expressed concern that "the jury not having seen those witnesses . . . how they presented themselves, how they testified, it would be very difficult for them to judge the credibility of a reading." RPII at 21. Sanchez's counsel argued that because the trial judge had been there during the first trial and had the opportunity to observe the witnesses testifying in person, it would be more likely that Sanchez would receive a fair trial if his case were tried to the judge who had originally observed the witnesses. She further stated that a bench trial was appropriate because "[a] lot of what the Court is going to be considering now is going to be legally technical information anyway." RPII at 22.

¶11 Sanchez's counsel informed the trial court that she had reviewed Sanchez's constitutional rights with him and that her "client well understands that he's . . . putting his future in the hands of one person. I've explained to him that [*7] there's no such thing as a hung judge." RPII at 22. Defense counsel further stated, "I have gone over the constitutional rights that my client would give up today." RPII at 18. Sanchez also submitted a written waiver of his right to a jury trial, stating that he was represented by counsel and waived his right to a jury trial as well as his right to have the jury decide the deadly weapon sentencing enhancement.

¶12 The trial court then reviewed Sanchez's rights with him. When asked by the trial court whether he understood that it was very unusual to waive the right to a jury, whether he had gone over with defense counsel what it means to waive this right, and whether he was waiving his right to have a jury decide the deadly weapon aggravating factor, Sanchez responded in the affirmative. The court also asked Sanchez how long he had discussed the jury trial waiver with counsel before making the decision, to which Sanchez responded, "A month or two." RPII at 26.

¶13 After taking a recess to consider the jury trial waiver issue, the trial court again discussed the issue with Sanchez, confirming that Sanchez understood that he was waiving his constitutional right to have 12 disinterested jurors try [*8] him and that he was waiving his right to have a jury decide the deadly weapon enhancement issue. The trial court then confirmed with Sanchez

that he was not being coerced into waiving his right to a jury trial, that no one had made any promises in exchange for his waiver, and that he had discussed the matter multiple times with his attorney over the course of approximately one month. The trial court accepted Sanchez's motion to waive jury trial.

Bench Trial and Conviction

¶14 The case proceeded to trial before the court. The trial court found Sanchez guilty as charged. Sanchez appeals. We subsequently remanded to the trial court to enter findings of fact and conclusions of law from the CrR 3.5 hearing so that we could review the suppression issue on appeal.

ANALYSIS

A. FAILURE TO SUPPRESS SANCHEZ'S STATEMENTS

¶15 The trial court denied Sanchez's CrR 3.5 motion to suppress statements he made to investigating police detectives. Sanchez argues that the trial court erred in concluding that his waiver of his *Miranda* rights was knowing and voluntary. He argues that his statement was not voluntary because he was ordered by a military commanding officer to cooperate with the detectives. We disagree. [*9]

1. Standard of Review

¶16 In reviewing a trial court's denial of a suppression motion, we determine whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *State v. Ross*, 106 Wn. App 876, 880, 26 P.3d 298 (2001). We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

¶17 A defendant is deprived of due process of law under the Fifth Amendment to the United States Constitution if his conviction is founded, in whole or in part, upon an involuntary statement. *Jackson v. Denno*, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The inquiry is whether, under the totality of the circumstances, the defendant's confession was coerced. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

2. Challenged Findings of Fact

¶18 Sanchez challenges all but two of the trial court's eight findings of fact on his CrR 3.5 suppression motion. However, the evidence presented at the suppression hearing clearly supports the findings relevant to our analysis: that Sanchez twice waived his *Miranda* rights. The detectives testified, and Sanchez agreed on cross-examination, that Sanchez was advised of [*10] his *Miranda* rights and expressly waived those rights both before he gave an oral statement and before he gave a recorded statement. Accordingly, we reject Sanchez's challenge to the trial court's factual findings regarding waiver.³

FOOTNOTES

³ Sanchez also challenges the trial court's factual finding and legal conclusion that he was not physically restrained, in custody, or under arrest at the time he gave the statements. But whether or not Sanchez was in custody is immaterial because he was advised of his *Miranda* rights.

3. Valid Waiver

¶19 Sanchez challenges the trial court's legal conclusion that the waiver of his *Miranda* rights was

voluntary, arguing that his waiver could not be voluntary when his military superior ordered him to cooperate with the local civilian police. It is undisputed that a military superior ordered Sanchez to submit to an interview with Olympia Police Department detectives and to cooperate with them. But the trial court ruled that this fact did not mean that the waiver was involuntary. We agree with the trial court.

¶20 A private party's conduct generally cannot render a statement inadmissible under the Fifth Amendment. See *State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008) [*11] (holding that police coercion is a "crucial element" when determining voluntariness) (quoting *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)).

Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary; rather, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'".

Unga, 165 Wn.2d at 100-101 (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). As a result, even outrageous behavior by a private party to force a statement does not make that statement inadmissible. *Connelly*, 479 U.S. at 166.

¶21 Here, there is no allegation that the detectives interviewing Sanchez engaged in coercive conduct to obtain Sanchez's statement. The only alleged coercive conduct came from a party unrelated to the detectives' investigation — Sanchez's military superior. Because there was no coercive police activity, Sanchez's waiver of his *Miranda* rights was voluntary even though his superior [*12] ordered him to cooperate. Accordingly, we affirm the trial court's denial of Sanchez's motion to suppress his statements.

B. WAIVER OF JURY TRIAL

¶22 Sanchez argues that the trial court erred when it accepted his jury trial waiver. We disagree.

1. Legal Principles

¶23 A criminal defendant may waive his constitutional right to a jury trial. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). The State bears the burden of establishing the validity of such a waiver. *State v. Cham*, 165 Wn. App. 438, 447, 267 P.3d 528 (2011), *remanded on other grounds*, 175 Wn.2d 1022 (2012). In order to uphold a jury trial waiver, the record must adequately establish that the defendant waived his right knowingly, intelligently, and voluntarily. *State v. Benitez*, 175 Wn. App. 116, 128, 302 P.3d 877 (2013). We review the validity of a defendant's jury trial waiver de novo. *Benitez*, 175 Wn. App. at 128.

¶24 CrR 6.1(a) provides: "Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court." Although a written waiver is not dispositive as to a defendant's jury trial waiver, a written waiver "is strong evidence that the defendant validly [*13] waived the jury trial right." *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). An attorney's representation to the court that the defendant's waiver is knowing, intelligent, and voluntary also is relevant evidence supporting the validity of a jury trial waiver. *Benitez*, 175 Wn. App. at 128. Unlike the waiver of other constitutional rights, a valid waiver of the jury trial right does not require an extensive colloquy on the record. *Benitez*, 175 Wn. App. at 128-29. Rather, only a personal expression of waiver from the defendant is required. *Pierce*, 134 Wn. App. at 771.

2. Valid Waiver

¶25 Here, when Sanchez moved to waive jury trial, his counsel informed the trial court that she had reviewed Sanchez's constitutional rights with him and that Sanchez understood those rights. Sanchez also submitted a signed, written waiver of his right to a jury trial, stating that he was

represented by counsel and waived his right to a jury trial as well as his right to have the jury decide the deadly weapon sentencing enhancement. The trial court reviewed Sanchez's rights with him twice on the record and confirmed that Sanchez had discussed the matter extensively with defense counsel. Only after [*14] two independent colloquies with Sanchez did the trial court accept his motion to waive his jury trial right. Sanchez's written waiver and two colloquies with the trial court were more than sufficient to constitute a knowing, intelligent, and voluntary waiver of his right to a jury trial.

¶26 Sanchez nevertheless argues that his waiver was invalid because there was no record of what he discussed with counsel. However, defense counsel stated on the record that she had reviewed Sanchez's rights with him and that she had explained to Sanchez the effect of having his case tried to only one party, explaining, "[T]here's no such thing as a hung judge." RPII at 22. Further, the trial court confirmed with Sanchez on two occasions that he had discussed the matter with counsel for at least one month preceding trial. Sanchez cites no authority supporting his contention that more explanation of what counsel discussed with him was required, and we are aware of none.

¶27 Sanchez also argues that his written waiver was inadequate because the waiver did not inform him that he had the right to a unanimous jury. But Sanchez submitted a waiver in this case, and the waiver provided that Sanchez was represented by [*15] counsel and that he was waiving his right to a 12-person jury to decide both the underlying offense and the enhancement. Sanchez provides no authority supporting his claim that the waiver itself was required to provide him any additional information.

¶28 Sanchez next argues that his waiver was inadequate because he was not advised that he was giving up the right to participate in jury selection. However, we have explicitly held that a defendant is not required to be informed of the right to participate in juror selection in order for his jury trial waiver to be valid. *Pierce*, 134 Wn. App. at 773.

¶29 Finally, Sanchez argues that the waiver was invalid because he was not advised of his statutory right to have a different judge hear the case. But again Sanchez fails to cite any authority stating that this was required, and "we have not required that a defendant be apprised of every aspect of the jury trial right in order for the defendant's waiver to be valid." *Benitez*, 175 Wn. App. at 129.

¶30 We hold that the record supports Sanchez's knowing, intelligent, and voluntary jury trial waiver.

C. SUFFICIENCY OF THE EVIDENCE

¶31 Sanchez challenges many of the trial court's findings of fact and argues that the [*16] evidence was insufficient to support his conviction. We disagree.

1. Legal Principles

¶32 Evidence is sufficient to support a conviction if after viewing the evidence and all reasonable inferences from it in a light most favorable to the State, a rational trier of fact could find each element of the crime proved beyond a reasonable doubt. *State v. Higgs*, 177 Wn. App. 414, 436, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024 (2014). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

¶33 A challenge to the sufficiency of the evidence presented at a bench trial requires us to review the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. *State v. Homan*, 172 Wn. App. 488, 490, 290 P.3d 1041 (2012), *review granted*, 177 Wn.2d 1022 (2013).

Evidence **[*17]** is substantial if it is sufficient to convince a fair-minded, rational person of the finding's truth. *State v. McEnry*, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the trial court's conclusions of law de novo. *Homan*, 172 Wn. App. at 490.

2. Challenged Findings of Fact

¶34 Sanchez challenges many of the trial court's findings of fact in his assignments of error, but does not provide briefing supporting findings 5, 7, 8, 11, 12, 15, 16, 17, 18, 23, 26, 27. Accordingly, those assignments of error are waived. RAP 10.3(a)(6); *see also Thomas*, 150 Wn.2d at 874 (absent supporting argument or citations to relevant authority, an assignment of error is waived). Sanchez also challenges finding of fact 21 in his briefing but does not include that finding in his assignments of error. Accordingly, we also decline to review that challenge. RAP 10.3(g). We address each of Sanchez's remaining, properly challenged findings of fact to determine whether they are supported by substantial evidence.

a. Finding of Fact 3

¶35 Sanchez challenges the portion of the trial court's Finding of Fact 3 that provides **[*18]** that Merten's "injuries, without immediate medical intervention, were life-threatening." CP at 706. Sanchez argues that the physician who admitted Merten to the hospital "did not believe [Merten's] injuries created a probability of death." Br. of Appellant at 56. But Sanchez's contention is directly contradictory to the testimony. In response to the question whether Sanchez's injuries, if left untreated, were life-threatening, the physician answered, "Yes." The trial court's Finding of Fact 3 is almost a direct quote from this statement, and therefore it is clearly supported by the evidence.

b. Finding of Fact 6

¶36 A cook from Charlie's testified that one of the knives that normally was on a magnetic hanger in the kitchen was missing, but that he had seen it when he left the bar on the evening of March 27. Sanchez challenges Finding of Fact 6, which provides: "The missing knife appears consistent with the width of the stab wound received by Mr. Merten." CP at 707. Sanchez notes that the physician who treated Merten at the hospital testified that the length of the stab wound was approximately 1.9 inches across. The physician stated that he did not know the depth of the wound with certainty, **[*19]** but estimated that it would have been approximately 6 inches. The record shows that the knife taken from the kitchen had a 5-inch handle and a 5-inch blade and was approximately one and a half inches wide. Because the estimates of the width and depth of Merten's wound were approximations, the trial court reasonably could have concluded that the dimensions of the knife taken from the kitchen were consistent with Merten's wounds.

¶37 Sanchez also appears to argue that the finding was unsupported because although there was evidence that the knife taken from the bar was extremely sharp, the stab wound was "ragged." Br. of Appellant at 57. But the testimony Sanchez cites discusses the nature of the cuts in the fabric of Merten's T-shirt, not the nature of the body wound. Further, the witness explained that the nature of that cut likely was caused by fabric being pulled against the knife in a struggle. The testimony said nothing about the tears in the shirt being inconsistent with the type of knife used. Merten's treating physician testified that the nature of the wound gave reason to believe that it was caused by a sharp object, consistent with a knife wound. The finding was supported by substantial **[*20]** evidence.

c. Findings of Fact 9 and 10

¶38 The State introduced video surveillance footage into evidence that, according to the State's expert, depicted Sanchez walking through the kitchen. The expert testified that as Sanchez walked through the kitchen, he reached toward the area where the knives were kept and that his hand moved toward his rear pocket. Sanchez challenges Finding of Fact 9, which provides:

Surveillance video shows the defendant in the kitchen and his left hand going up to where the knives are stored and where the missing knife is described as being earlier in the evening. The video then shows a knife going into the defendant's back left pocket. The video further shows that as the defendant enters the tavern from the kitchen, he is pulling down the left side of his shirt.

CP at 707. He also challenges Finding of Fact 10, which provides: "The defendant did take the missing knife from the kitchen." CP at 707.

¶39 The video played to the trial court is not in the record before us on appeal. However, the State hired a video expert to examine the video and he testified about his findings at trial while playing the video for the trial court. The expert stated that he saw Sanchez's feet [*21] move into the kitchen area in front of where the knives were kept and that Sanchez moved forward and his jacket on his left side raised upwards. Sanchez's left hand then became visible and there was a thin reflective object in his hand as he moved his hand toward his rear left pocket. He then took hold of his jacket and pulled the jacket down over his rear left pocket. The expert identified Sanchez as the individual in the video by his clothing description and his position in the video. This testimony is consistent with the trial court's findings.

¶40 Sanchez states that the trial court's findings that he took the knife were unsupported because there was testimony that "some force was required to remove the knives from the magnetic strip" in Charlie's kitchen. Br. of Appellant at 60. However, he does not cite any evidence that the force allegedly required to take the knife from the magnetic strip would have affected his ability to take the knife as shown by the video. Sanchez also argues that the findings were unsupported because the knife was so sharp that it was unlikely that someone would place it in his pants pocket without "at a minimum some torn trousers and at a maximum some severe [*22] physical discomfort and injury. Mr. Sanchez did not evince either." Br. of Appellant at 60. But again, Sanchez provides no citations to the record supporting his claim.

¶41 Sanchez further argues that the findings were not supported by substantial evidence because the surveillance video shows only his lower leg and shoes as he walks in the kitchen. But without the aid of the video, we must rely on the expert's testimony which stated that he could conclude the actor in question was Sanchez by the clothes he was wearing and his position. Accordingly, the trial court's finding regarding what took place on the video was supported by substantial evidence, and this further supports the trial court's finding that Sanchez took the knife from the kitchen.

d. Finding of Fact 13

¶42 Sanchez challenges the trial court's Finding of Fact 13, which provides that Thomas Gallagher, a service member who was present at Charlie's, confirmed Sanchez's presence while a group of military service members were leaving the bar as the fight started. Sanchez claims that this finding "eludes appellate review" because it "cannot be determined at what time Mr. Gallagher confirmed Mr. Sanchez to be present." Br. of Appellant [*23] at 61.

¶43 Gallagher testified that he was with Sanchez at Charlie's on March 27, 2009. He testified that as he and a friend were leaving the bar, Sanchez and Melville were approximately 15 to 20 meters behind him. Gallagher stated that a crowd of people then came out of the bar and a fight broke out. He testified that the last time he saw Sanchez was when he was walking behind him leaving the bar with Melville. Contrary to Sanchez's assertion that it was unclear when Gallagher confirmed Sanchez to have been present, Gallagher clearly stated the last point at which he saw Sanchez and this testimony in turn supports the trial court's finding that Sanchez was outside the bar when the fight started. Accordingly, Finding of Fact 13 was supported by substantial evidence.

e. Finding of Fact 14

¶44 Sanchez challenges Finding of Fact 14, which provides, "The defendant was the only one not accounted for once the fight started. All of the other participants were either fighting or leaving."

CP at 707. Sanchez claims that the record shows that "Sanchez was trying to leave and making efforts to find a ride back to the base." Br. of Appellant at 61. In support of this contention, he cites testimony regarding [*24] repeated phone calls Sanchez made on his cellular phone after the fight broke out.

¶45 But the testimony supports the trial court's conclusion that the individuals present when the fight broke out were either participating in the fight or leaving the scene, and that no one could account for where Sanchez was at that time. Gallagher testified that he was on his way back to his car when the fight broke out, and that he saw Melville walking in the street after the fight but did not see Sanchez. He further testified that Jason Britt left the bar with him and was standing with him by his car when the fight took place. He testified that he waited by his car for his friends and Britt went back into the bar.

¶46 Wesley Sims, another service member at the bar that night, testified that the fight already had started when he and Justin Spangler left the bar. He testified that Abraham Zenker had pulled his car in front of the bar by that time and that he, Melville, Zenker, Andrew Thomas, and Jim Elmer rode away together. There was no testimony regarding Sanchez either being involved with the fight or leaving with the others. Accordingly, the finding was supported by substantial evidence. [*25]

f. Findings of Fact 19 and 20

¶47 Sanchez challenges the trial court's Findings of Fact 19 and 20, which provide:

19. Mr. Merten . . . describes his attacker as having a medium-build, being 5'8", weighing approximately 155 pounds, wearing a black hat and black jacket, and identifies him as the defendant. In August of 2009, in an interview with Mr. Fred Doughty, Mr. Merten described the stabber as having gelled hair.

20. The victim's testimony and identification of the defendant as his attacker was credible.

CP at 708.

¶48 As to Finding of Fact 19, Sanchez appears only to challenge the portion of the finding stating that Sanchez was wearing "a black hat and black jacket," arguing only that "[t]he trial court failed to resolve Merten's inconsistent descriptions of his assailant's clothing." Br. of Appellant at 61. But Merten did testify that Sanchez was wearing a black hat and black jacket on the night in question. This finding is supported by the record. We do not re-weigh evidence or assess witness credibility, and therefore we do not consider Sanchez's argument that the trial court should have considered any allegedly inconsistent testimony when the record clearly supports the finding. *Thomas*, 150 Wn.2d at 874-75. [*26] Similarly, because we do not evaluate witness credibility, we decline to address Sanchez's challenge to the trial court's finding that Merten was credible.

g. Finding of Fact 24

¶49 Sanchez challenges the trial court's Finding of Fact 24, which provides: "The entire fight from start to finish, including the stabbing and the chase, occurred within two to three minutes, from approximately 1:22 to 1:25 am." CP at 708. He argues that the record shows that Sanchez was on his telephone at 1:24 a.m. and therefore could not have been involved in the fight or resultant stabbing.

¶50 Sanchez is correct that his phone records showed that he made a call at 1:24 a.m. But Sanchez fails to show that this fact disproves the trial court's finding regarding the time at which the fight took place. Further, this fact does not mean that Sanchez was not involved in the fight, as Sanchez claims, because he could have engaged in the fight during the first two minutes of the fight and subsequently made a phone call. Accordingly, this finding was supported by substantial evidence.

h. Finding of Fact 25

¶51 Sanchez challenges the portion of the trial court's Finding of Fact 25 that provides that after the stabbing Sanchez "was [*27] picked up by a cab far away in a desolate place, a darkened alleyway in a residential neighborhood, approximately one mile away." CP at 708. He argues that the finding is not supported because the cab driver picked Sanchez up on a public street in a residential neighborhood in Olympia, and that there was insufficient evidence that he picked Sanchez up in an alleyway. The cab driver testified that he picked Sanchez up in a residential area east of downtown Olympia. He further testified that Sanchez came out of an alley when he picked him up. This finding was supported by substantial evidence.

3. Sufficiency of the Evidence

¶52 Sanchez argues that the evidence was insufficient to support the trial court's conclusions regarding (1) the assailant's identity, (2) intent, and (3) great bodily harm. We disagree.

¶53 The trial court found Sanchez guilty of first degree assault under RCW 9A.36.011, which provides:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or . . .

(c) [*28] Assaults another and inflicts great bodily harm.

¶54 Sanchez argues that the State failed to prove the assailant's identity because it did not provide evidence of a photo montage and because there were differing descriptions of the assailant at the hospital. But Sanchez does not provide any support for his assertion that the State was required to provide a photo montage and does not cite the portion of the record in which the allegedly differing descriptions are located. Further, the trial court's findings regarding Sanchez's identity were supported by substantial evidence.

¶55 Sanchez's argument regarding intent merely states, "No evidence of intent." Br. of Appellant at 65. He does not tie the argument in to his challenges to the findings of fact and does not provide any citation to legal authority regarding the State's requirement to prove intent.

¶56 Sanchez's argument on great bodily harm provides only that "medical testimony is dispositive here." Br. of Appellant at 65. He cites no legal authority and does not explain why the findings do not support this conclusion. "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, [*29] or which causes a significant permanent loss or impairment of the function of any bodily part or organ." Former RCW 9A.04.110(4)(c) (2007). The trial court's supported finding provides that Sanchez's injuries were life-threatening without immediate medical intervention. This finding supports the trial court's conclusion that Sanchez inflicted great bodily harm on Merten.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

¶57 Sanchez argues that his trial counsel was ineffective for a number of reasons, none of which have merit.

1. Legal Principles

¶58 We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d

870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both (1) that defense counsel's representation was "deficient," and (2) that the deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). The failure to show either element ends our inquiry. *Grier*, 171 Wn.2d at 33. Representation is deficient if, after considering all the circumstances, it falls below an objective standard [*30] of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

¶59 We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33. A claim that trial counsel provided ineffective assistance does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *Grier*, 171 Wn.2d at 33. To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42 (emphasis omitted) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

2. Failure to Admit Photo Montage

¶60 At the bench trial, defense counsel entered into evidence the first photo montage in which Merten could not identify Sanchez. At the jury trial, defense counsel successfully had moved to exclude the second photo montage in which Merten did identify Sanchez. Sanchez now argues [*31] that his counsel should have moved to *admit* the positive identification and photo montage into evidence at the bench trial. The trial court originally excluded the montage as too suggestive because it pictured Sanchez on a lighter background than all of the other photos. Sanchez argues that because the second montage was so suggestive, it would have shown that "Merten had no real independent recollection and had to [be] impermissibly reminded of the identity of his assailant." Br. of Appellant at 67 (internal quotation marks omitted).

¶61 We hold that Sanchez's argument fails because it was clearly a tactical decision for trial counsel to not have wanted to admit evidence of a positive identification of Sanchez as the assailant. See *Grier*, 171 Wn.2d at 33.

3. Advising Sanchez to Waive Jury Trial

¶62 Sanchez argues that his counsel was ineffective for advising Sanchez to waive his right to a jury trial because counsel incorrectly determined that the trial court could evaluate witness credibility based on the previous trial over which the same judge presided. Sanchez is correct that his counsel argued to the trial court that one of the reasons it should accept the jury trial waiver was because [*32] the trial court had already heard the witnesses' testimony from the first trial, had observed their demeanor, and the jury in the new trial would not have that benefit. However, defense counsel also stated that she was concerned that she would "lose the jury" by having to read the transcripts into the record. RPII at 21. We hold that this was a legitimate tactical concern and does not support a claim for ineffective assistance. See *Grier*, 171 Wn.2d at 33.

4. Failure to Request Limiting Instruction

¶63 Sanchez argues that his counsel was ineffective for failing to request a limiting instruction to limit the State's use of his statement to police only for impeachment. But Sanchez fails to cite any legal authority in support of his argument that a limiting instruction would have been appropriate. And even if the evidence supported a limiting instruction, we presume that defense counsel did not request one in order to avoid reemphasizing any damaging evidence. *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011). Further, Sanchez fails to show how a limiting instruction would have been useful in a bench trial. See *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991) (we presume that [*33] the trial court disregards inadmissible matters). Accordingly, because Sanchez has shown neither deficient performance nor prejudice, his argument fails.

5. Failure to Secure Witness for Trial and Failure to Admit Statements

¶64 Sanchez argues that his counsel was ineffective for failing to secure Andrew Thomas as a witness because he had sent text messages linking him to the assault. He argues that Thomas should have been called as a witness because of two potentially inculpatory text messages he sent to friends near the date of the incident. One message read: "I guess there's a point in every young man's life when he's a suspect in a stabbing incident." RPII at 1655 (internal quotation marks omitted). The other provided: "Apparently we were stabbing suspects. I dropped some big ass 'roid abuser with a huge left hand." RPII at 1656. Sanchez argues that because the case was one of general denial and misidentification, evidence of other suspects was particularly important to the case. Further, Sanchez argues that his counsel should have moved to admit the statements under ER 804(b)(3).

¶65 But Thomas's text messages were admitted at trial, over the State's objection. Moreover, defense counsel [*34] raised the possibility of Thomas as a suspect in closing arguments. Finally, there is no evidence supporting Sanchez's contention that counsel failed to investigate Thomas's whereabouts. Accordingly, Sanchez has failed to show how he was prejudiced and his claim fails.

¶66 We affirm Sanchez's conviction.

¶67 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J., and Hunt v, J., concur.

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