

TABLE OF CONTENTS

	Page
I. IDENTITY OF THE MOVING PARTY	1
II. STATEMENT OF RELIEF SOUGHT.....	1
III. INTRODUCTION.....	1
IV. STATEMENT OF THE CASE	2
V. ISSUES ASSERTED ON APPEAL.....	3
1. The Trial Court Correctly Allowed Identification Testimony, As Maria Montes-Gomez Did Not Identify the Appellant’s Person but Instead Identified His Clothing.....	3
2. Trial Counsel Was Not Ineffective, as The Appellant Unequivocally Waived His Right to Jury Trial.....	5
3. Trial Counsel Was Not Ineffective, as the Appellant Chose Not to Testify at Trial.	6
VI. CONCLUSION	6

TABLE OF AUTHORITIES

Page

Cases

Johnson v. Sublett, 63 F.3d 926 (9th Cir. 1995)4
Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)..... 3, 4
State v. Johnson, 132 Wn.App. 454, 132 P.3d 767 (2006)..... 3, 4
State v. King, 31 Wn.App. 56, 369 P.2d 809 (1982)..... 4, 5
State v. McDonald, 40 Wn.App. 743, 700 P.2d 327 (1985)..... 5

Other Authorities

RAP 18.14(e)(1)..... 1, 5, 6

I. IDENTITY OF THE MOVING PARTY

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, hereafter respondent, is the moving party in this matter.

II. STATEMENT OF RELIEF SOUGHT

The respondent seeks an order, pursuant to RAP 18.14(e)(1), affirming Appellant's conviction and dismissing the appeal filed by appellate defense counsel Catherine Glinski. The issues presented by the Appellant and his attorney are clearly controlled by settled law and are without merit.

III. INTRODUCTION

Appellant was charged with residential burglary, unlawful possession of methamphetamine, and obstructing a law enforcement officer. Appellant was found guilty of residential burglary following a bench trial. The other counts are not at issue. In his appeal, Appellant asserts Maria Montes-Gomez, the victim, identified his clothing following an impermissibly suggestive showup procedure. *Pro se*, Appellant asserts his trial counsel was ineffective for advising him to waive a jury trial and not to testify on his own behalf. However, these issues are without merit, and should be dismissed by this Court.

IV. STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth by the Appellant. However, the State would draw the court's attention to the following testimony regarding Ms. Maria Montes-Gomez's identification of the defendant's clothing:

Prosecutor: Okay. So, the police take you outside to look at someone. Do you remember, when you got there to see the person, what did the person look like? Can you describe what the person the police had was wearing?

Ms. Montes-Gomez: Well, I saw him – and I saw him, could see what he looked like, and then I saw that he had a brown jacket. The officer asked me if that was him, and I said I think so, because he's wearing the same clothes he had once inside the house.”

Prosecutor: Okay. So, the man in the – that the police had, he was wearing the same jacket as the man in the house?

Ms. Montes-Gomez: Yes, the guy had the same jacket that he had that was inside the house.

RP 49-50.

Additionally, Officer Kevin Sawyer testified as follows:

Prosecutor: Do you recall—did you tell Maria, did you say that the Defendant, Mr. Anglin, had confessed to the burglary?

Officer Sawyer: I did not.

Prosecutor: Did you tell her anything along the lines of, “We've caught the guy,” or “We got the guy that was in your house”?

Officer Sawyer: I did not. I told her we had somebody in custody, and had – see if she could come out and identify if somebody – if this was the suspect that was in her house, or not.

Prosecutor: Okay. And did that occur—

Officer Sawyer: She did.

Prosecutor: -- Did she go out and look at the person? And what happened when she went out? Was she able to identify the person?

Officer Sawyer: She never – she said she never saw his face. When she came out, she was able to say that the stocking cap and the brown coat was identical to what the suspect was wearing, but she wasn't – she didn't – she told me she didn't see his face.

RP 39-40.

V. ISSUES ASSERTED ON APPEAL

1. **The Trial Court Correctly Allowed Identification Testimony, As Maria Montes-Gomez Did Not Identify the Appellant's Person but Instead Identified His Clothing.**

The Appellant argues that Ms. Montes-Gomez identified the defendant as the person who was inside her home. The Appellant further argues this identification was tainted by an impermissibly suggestive showup due to communication difficulties between Ms. Montes-Gomez and the police. However, Ms. Montes-Gomez did not in fact identify the defendant, but only the clothes he was wearing. As such, under State v. Johnson, 132 Wn.App. 454, 132 P.3d 767 (2006), an identification of clothing is not subject to the test established by Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

In Johnson, a witness identified a black jacket with patches that was worn by the defendant at the time of his arrest as the same jacket worn by one of the people that robbed him. 132 Wn.App. at 456-458. The court held this identification was not subject to the Biggers standard because:

We have no basis to believe that a witness's identification of clothing is either as susceptible to error or as persuasive to a jury as a witness's identification of a suspect. Indeed, a clothing identification is particularly in this day and age of mass-marketing often open to the argument that someone other than the perpetrator may have worn the same clothing. Thus, we find that identification of clothing is not a procedure so inherently "conducive to irreparable mistaken identification," as to provide the basis for a denial of due process.

Id. at 462. The court went on to note that Washington had adopted this distinction in State v. King, 31 Wn.App. 56, 369 P.2d 809 (1982), and that King had remained undisturbed by any subsequent case. Id. at 460. This holding is also in accord with the Ninth Circuit's rule that Biggers does not apply to a witnesses' identification of an automobile. See Johnson v. Sublett, 63 F.3d 926 (9th Cir. 1995).

The facts of the instant case are analogous to those in Johnson. Ms. Montes-Gomez testified that the Appellant was wearing the same clothing, specifically a jacket, as the man who was in her house. RP 50. Officer Sawyer confirmed this testimony, as he stated Ms. Montes-Gomez was unable to identify the defendant but *could* identify his clothing. RP 39-40.

Furthermore, Ms. Montes-Gomez's inability to identify the Appellant was consistent, as she did not identify him at trial. Thus, the Appellant is simply mistaken in his claim that Ms. Montes-Gomez identified him as the person who was inside her home.

Since the only identification testimony was regarding clothing, not the defendant himself, the Appellant's argument regarding Biggers and the factors listed in State v. McDonald, 40 Wn.App. 743, 700 P.2d 327 (1985), is simply misplaced. Instead, this claim is governed by the holdings of Johnson and King. As this issue is clearly controlled by long settled case law, the court should dismiss this portion of the defendant's appeal under RAP 18.14(e)(1).

2. Trial Counsel Was Not Ineffective, as The Appellant Unequivocally Waived His Right to Jury Trial.

On the morning of his trial, the appellant waived his right to a jury and chose to proceed with a bench trial. RP 4-6. The appellant now complains that his trial counsel was ineffective in advising him to waive his right a jury trial. However, the appellant personally stated to the trial court that "I believe that—I'd rather have your decision." RP 4-5. Since he agreed to this trial strategy, the Appellant cannot now complain his attorney was ineffective. This claim is wholly without merit.

3. Trial Counsel Was Not Ineffective, as the Appellant Chose Not to Testify at Trial.

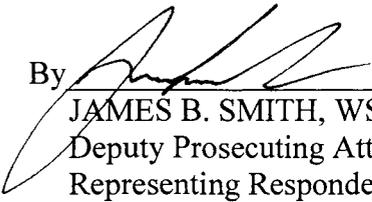
Similarly, the Appellant chose not to testify at his trial. RP 65. As with his decision to waive a jury, the Appellant cannot agree to a strategy at trial and then complain about it on appeal. There is no indication from the record that the Appellant attempted to testify or expressed in any way a desire to do so. This claim is also completely lacking in merit.

VI. CONCLUSION

Appellant's alleged errors are without basis in law or fact. As these claims are without merit, the Court should dismiss this appeal pursuant to RAP 18.14(e)(1).

Respectfully submitted this 20th day of October, 2006.

SUSAN I. BAUR
Prosecuting Attorney

By 

JAMES B. SMITH, WSBA #35537
Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS

OCT 23 AM 11:57

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 34640-1-II
)	Cowlitz County No.
Respondent,)	06-1-00087-8
)	
vs.)	CERTIFICATE OF
)	MAILING
JEREMIAH RAY ANGLIN)	
)	
Appellant.)	
_____)	

I, Audrey J. Gilliam, certify and declare:

That on the 23rd day of October, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Catherine E. Glinski
Attorney at Law
P. O. Box 761
Manchester, WA 98353

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

Dated this 23rd day of October, 2006.


Audrey J. Gilliam