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NO. 34835-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TED JENSEN,

Appellant.

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STATE OF WASHINGTON

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Warme

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State's failure to provide a record of sufficient completeness violated appellant's constitutional rights to appeal and effective assistance of counsel on appeal.

2. The State's failure to provide a record of sufficient completeness violated appellant's right to due process.

3. The trial court erred in admitting inadmissible hearsay.

4. The trial court's admission of inadmissible hearsay violated appellant's constitutional right to confrontation.

5. The trial court failed to enter written findings of fact and conclusions of law after a 3.5 hearing in violation of CrR 3.5 (c).

6. The trial court's oral findings and conclusions are insufficient to allow effective appellate review.

Issues Pertaining to Assignments of Error

1. Has the State failed to provide a record of sufficient completeness, in violation of appellant's rights to appeal, effective assistance of counsel on appeal, and to due process, when there is no verbatim report of proceedings or an equivalent report of proceedings of the testimony of a material witness?

2. Did the trial court err in admitting inadmissible hearsay prejudicial to appellant's defense in violation of appellant's constitutional right to confrontation?

3. Is reversal required because the trial court failed to enter written findings of fact and conclusions of law after a 3.5 hearing and its oral findings and conclusions are insufficient to allow effective appellate review?

B. Statement of the Case

1. Procedural Facts

On November 4, 2005, the State charged appellant, Ted Jensen, with count one, assault in the first degree with deadly weapon; count two, felony harassment with a deadly weapon enhancement, and count three, vehicle prowling in the first degree with a deadly weapon enhancement. CP 5-7; RCW 9A.36.011(1)(a), RCW 9A.46.020(1)(a)(i),(1)(b),(2)(b), RCW 9A.52.095(1), RCW 9.94A.602, RCW 9.94A.533(4). Following a trial before the Honorable James E. Warne on February 1-3, 2006, a jury found Jensen guilty as charged. CP 101-06. On May 12, 2006, the court sentenced Jensen to 240 months in confinement. CP 115. Jensen filed this timely appeal. CP 120.

2. Substantive Facts

a. CrR 3.5 Hearing

The trial court held a 3.5 hearing and heard testimony from detectives who testified that they interviewed Jensen at the police department following a reported stabbing at a Wal-Mart in Longview. 1RP 31-32, 42. The detectives testified that Jensen first said he did not want to talk, then changed his mind and agreed to a recorded interview after he was advised of his rights. 1RP 35-38, 44-45.

Defense counsel argued that the detectives' testimonies conflicted with the plain language of the transcript of Jensen's recorded statements. Counsel argued that Jensen's waiver of his rights was ambiguous. 1RP 58-59. The State conceded that it "does appear that there was a little bit of confusion," but argued that after being advised of his rights a second time, Jensen agreed to speak with the detectives. 1RP 59-60. The court concluded that Jensen "clearly wanted to tell the officers a story, and that the statements are voluntary, and, therefore, admissible." 1RP 61. The court did not enter written findings or conclusions after the CrR3.5 hearing.

Defense counsel also moved to exclude statements Jensen allegedly made to an officer after the altercation, but the court found that the statements were admissible under the state of mind exception to hearsay. 1RP 62-63.

b. Trial Testimony

The complaining witness, Gery Snapp, testified that in November 2005, he was living in his motor home parked in a Wal-Mart parking lot in Longview. 1RP<sup>1</sup> 99-101. Snapp had met Jensen who was living in his car in the same parking lot. They went to eat at the Salvation Army one night and "picked up" Susan Meyer on the way back from dinner. 1RP 103-04. Snapp let Meyer stay with him for a couple of days and she slept on a sofa bed in the front of the motor home. 1RP 104-07. During that time, Snapp and Jensen had a disagreement and Jensen was not allowed in the motor home. 1RP 105.

On the night of October 31, 2005, Trudi and Charles Wade were visiting with Snapp and Meyer in the motor home. Snapp denied that they were all taking methamphetamine. 1RP 133. On the early morning of November 1, 2005, Snapp was awakened from his sleep by loud music. Snapp took his flashlight and looked out the window and then opened the door but did not go outside. 1RP 105, 110-12, 116. As he stood on the lower step inside the entrance of the motor home and turned around to put on his shoes, Jensen attacked him and stabbed him in the back. 1RP 115-16. They fell onto the sofa bed and Jensen stabbed him several times,

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<sup>1</sup> 1RP - 11/2/05, 11/8/05, 12/06/05, 12/20/05, 1/03/06, 1/05/06, 1/31/06, 2/01/06; 2RP - 2/02/06; 3RP - 2/03/06, 4/13/06, 5/05/06, 5/12/06; 4RP - 2/02/06 (jury instructions).

saying "you'll always remember Monk 'cause I'm gonna kill ya." 1RP 116-18. Snapp hit Jensen in the head numerous times with his flashlight. 1RP 118. He never saw a knife during the struggle. 1RP 119. The altercation ended when Jensen "got up and left." 1RP 120. When asked whether Meyers was on the sofa bed when Jensen attacked him, Snapp replied, "She couldn't have been because that's where he stabbed me at right where she was sleeping." 1RP 117.

Susan Meyer testified that in November 2005, she was living in Snapp's motor home where she had stayed for approximately two weeks after meeting Snapp and Jensen. 2RP 238-41. At about four o'clock on the morning of November 1, 2005, Snapp woke her up because Jensen was parked in front of the motor home playing loud music. 2RP 244-45. Snapp grabbed a flashlight and went outside and she heard Jensen asking him if she was there. 2RP 245-47. Snapp said she was not there but then Jensen saw her and when Snapp turned to go back in the motor home Jensen followed him. 2RP 250-51.

Snapp and Jensen kept arguing and then all of a sudden "[t]hey were going at each other. . . [w]ith a knife, and with the flashlight; they were both doing it." 2RP 253. Snapp fell back on the sofa bed and was laying across her feet when Jensen was "plunging in with him" and Snapp was "also plunging with the flashlight." 2RP 255-56. Jensen said, "I'm

going to kill you. Do you want me to kill you, something like that.” 2RP 257. Snapp and Jensen were threatening each other, “There was threats comin’ from both of them against their lives.” 2RP 267. Snapp finally told Meyer to go with Jensen, but Meyer refused and Jensen left. 2RP 257-58.

Trudi Wade testified that she and her husband were living in their van parked in the Wal-Mart parking lot for three weeks in November 2005. 2RP 145. During that time, they met Snapp, Jensen, and Meyer and their van was parked in the back of Snapp’s motor home. 2RP 146, 153. Over defense counsel’s objection, Wade stated that Meyer told her that Jensen “had feelings for her but she didn’t share them back.” 2RP 147. The night before November 1, 2005, she and her husband used heroin and fell asleep in the van. She woke up around 4 a.m. because she heard screaming in the motor home. 2RP 147-48.

Wade claimed that she heard Jensen say, “something to the effect of, it’s time to die or how do you feel about dying.” 2RP 149. Her husband was also awakened and he ran outside to get help. 2RP 148-49. She saw her husband run toward Wal-Mart and saw Jensen run in between the van and the motor home, “I heard Ted say that -- to my husband, that he was next.” 2RP 149, 154. She went outside to help Snapp who was

bleeding. She wrapped a blanket around him and ran to McDonald's to call 911. 2RP 150-51.

Charles Wade testified that he and his wife were living in their van parked in the Wal-Mart parking lot where they met Snapp, Jensen, and Meyer. 2RP 156-58. On the night before November 1, 2005, he and his wife used heroin and were sleeping when they heard yelling and fighting in the motor home, "somebody said, now you did it, you're going to die." 2RP 159-60. He went outside and saw Snapp who said he was stabbed then he heard someone say "you're next," but he could not see who said it. 2RP 160-61. He took off running and called 911 from the A&P across the street. 2RP 162-63.

Officer Michael Watts testified that on the early morning of November 1, 2005, he reported to the scene of a stabbing in front of Wal-Mart. When he arrived he saw a man sitting next to a motor home who was bleeding. People were yelling that "the guy ran over to the front of Wal-Mart." 2RP 286-85. Watts drove over to Wal-Mart and saw Jensen who said, "I'm the one you're looking for." 2RP 286. Jensen said he acted in self-defense, explaining that he was sleeping in his car parked in front of the motor home and a man came out and dumped urine on him through a window. He got out of the car and the man hit him several times with a big flashlight. When Jensen kicked the flashlight out of the

man's hand, he grabbed a knife out of his back pocket and lunged at him. Jensen got the knife away from the man and stabbed him with it. 2RP 286-88.

Watts called for medical aid because Jensen "was bleeding pretty good, had a pretty nasty gash on his head." 2RP 289. An ambulance transported Jensen to St. John's Hospital and Watts followed in his patrol car to continue his investigation. 2RP 289. While being treated at the hospital, Jensen told Watts that Snapp was the man who assaulted him and he was parked in front of the motor home because Meyer was staying there and he felt that something bad was going to happen to her. 2RP 290-91.

Officer Mike Rabideau testified that at about 6:30 a.m. on November 1, 2005, he relieved Officer Watts at St. Johns Hospital. 2RP 299-300. While escorting Jensen to the x-ray room, Jensen said, "the methies had messed with the wrong man" and "after 35 years, I'm finally getting some respect." 2RP 301. Jensen was subsequently released and when Rabideau was walking him out of the hospital, Jensen repeated that "the methies had messed with the wrong old man." 2RP 302.

Officer Alan Buchholz testified that he was called to the scene of a reported stabbing at Wal-Mart on November 1, 2005. 2RP 303-04. When he arrived, a number of people were standing near a motor home in the

parking lot. He saw a man sitting on the curb holding his arm and noticed what looked like blood on the ground around him. 2RP 304. During his investigation, Buchholz obtained a statement from Ed Nelson, a security guard for Wal-Mart. 2RP 305. Over defense counsel's objection, Buchholz stated, "Someone had said during the time that I was there that the front door to the motor home had been ripped open, so I went over and tested the lock on the door." 2RP 306.

Detective Deisher testified that he interviewed Jensen at the Longview Police Department at about 10 a.m. on November 1, 2005. 2RP 193, 198. Jensen said he was playing his music loudly outside the motor home and was yelling for Meyer. Snapp came out and threw urine inside his car and when he got out of the car Snapp hit him in the head with a flashlight. Jensen kicked the flashlight out of Snapp's hand and then Snapp pulled out a knife but Jensen took it away from him. 2RP 200. Jensen used his martial arts expertise to stab Snapp multiple times. 2RP 210-11. Jensen said he acted in self-defense and "hoped that Mr. Snapp would survive." 2RP 218-19.

Dr. Dane Moseson testified that he treated Snapp in the emergency room at St. John's Hospital on the morning of November 1, 2005. 2RP 172-73. Snapp was bleeding heavily and required surgery for life threatening wounds. 2RP 181-83. Moseson described Snapp's injuries as

four deep wounds and other superficial wounds. Snapp was stable after the first day and discharged after eight days of hospitalization. 2RP 185.

C. ARGUMENT

1. THE STATE FAILED TO PROVIDE A RECORD OF SUFFICIENT COMPLETENESS IN VIOLATION OF JENSEN'S CONSTITUTIONAL RIGHTS TO APPEAL, EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, AND TO DUE PROCESS.

The State failed to provide a record of sufficient completeness because there is no verbatim report of proceedings or an equivalent report of proceedings of the testimony of a material witness. Reversal is required because the lack of a record of sufficient completeness violates Jensen's constitutional rights to appeal, effective assistance of counsel on appeal, and to due process.

A criminal defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993)(quoting Coppedge v. United States, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)). This right "inextricably entwines constitutional guarantees of due process, equal protection, effective assistance of counsel, and, under art. 1, sect. 22 of the Washington Constitution, a criminal defendant's right to appeal." Id. at 299. The State must provide a record of sufficient completeness to permit adequate and

effective appellate review. State v. Larson, 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963)(citing Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)); State v. Woods, 72 Wn. App. 544, 550, 865 P.2d 33 (1994).

The Washington Constitution provides, “[t]he superior courts shall be courts of record . . . .” Const. art. 4, sect. 11. Similarly, the Revised Code of Washington provides that the “superior courts are courts of record” and it is the duty of the county clerk “to record the proceedings of the court.” RCW 2.08.030, RCW 2.32.050(2).

A record of sufficient completeness does not translate automatically into a complete verbatim transcript. Other methods of reporting trial proceedings may be constitutionally permissible if they permit effective review. State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003)(citations omitted).

In Larson, the court reporter’s notes of the trial proceedings were lost and the State moved the trial court to provide a narrative statement of facts based on the court’s notes. 62 Wn.2d at 65. The court certified that its narrative report of proceedings provided an adequate record but the Washington Supreme Court found the reconstructed record inadequate. Id. at 65-67. The Court required a record of sufficient completeness and determined that “[s]ince counsel representing the defendant on appeal did

not represent the defendant at the trial, he was unable to determine satisfactorily what errors to assign for the purposes of obtaining an adequate review on appeal.” *Id.* at 67. The Court held that the verdict must be reversed if a verbatim record of proceedings was not provided within thirty days. *Id.*

In Tilton, most of Tilton’s trial testimony was not recorded because the court reporter forgot to turn on the tape recorder. 149 Wn.2d at 779. Prior to sentencing, the gap in the record was discovered and the State moved to reconstruct the record. The trial court directed the prosecutor and defense counsel to submit affidavits of their recollection of Tilton’s testimony. Defense counsel stated in his affidavit that he had no independent recollection of the testimony and objected to the reconstruction. *Id.* at 780-81. Nonetheless, the court found that “there were no conflicts of consequence in the affidavits” and granted the State’s motion to adopt the affidavits as the reconstructed record. *Id.* at 781. The Supreme Court vacated Tilton’s conviction and remanded for a new trial. The Court held that the record was not of sufficient completeness to permit effective review because appellate counsel was not present at trial and so was unable to judge the completeness of the reconstructed record. *Id.* 783-85.

Similarly, here, the trial testimony of Ed Nelson, a security guard for Wal-Mart, was not recorded due to clerk's error. See Appendix A (Declaration and Attached Events Log of Alice Millward, Court Services Assistant for Cowlitz County Superior Court). Millward's notations on the log indicate that Nelson testified for almost twelve minutes, and he was cross-examined and recross-examined by defense counsel.

In the absence of a verbatim report of proceedings, appellate counsel made an effort to obtain an agreed report of proceedings by contacting the trial court; defense counsel, Leonard Copeland; and the prosecutor, Michelle Shaffer. See Appendix B (Declaration of Valerie Marushige). The court requested that Shaffer prepare a proposed agreed report of proceedings with defense counsel and present it to the court. Copeland, who has relocated to Indiana, responded that he has no independent recollection of Nelson's testimony to enable him to reconstruct the record. Thereafter, Shaffer made a motion to supplement the record with a narrative report of Nelson's testimony which was granted by the trial court.<sup>2</sup> See Appendix C (Shaffer's Motion to

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<sup>2</sup> Under RAP 9.9, the "report of proceedings may be corrected or supplemented by the trial court on motion of a party, or on stipulation of the parties, at any time prior to the transmission of the report to the appellate court." Here, however, the Cowlitz County Superior Court Clerk transmitted the verbatim report of proceedings to this Court on September 21, 2006.

Supplement Record, Memorandum in Support, State's Proposed Narrative Report of Proceedings).

The State's narrative report of proceedings fails to permit effective review because appellate counsel was not present at trial and is therefore unable to judge the completeness of the reconstructed record. Nelson's testimony was material to the case because he was the only disinterested witness who testified to Jensen's actions immediately after the alleged stabbing of Snapp.

The record reflects that Copeland referenced Nelson's testimony during closing argument and sentencing. During closing, Copeland argued that Jensen "ran into the store to get help." 3RP 357. It is apparent that he was referring to Wal-Mart and Nelson's testimony because no one else provided such testimony. Copeland also argued that Trudi Wade's testimony that she saw Jensen running between the motor home and their van was contradicted by the testimony of "the security guard" and therefore unreliable. 3RP 369. Nelson was the only security guard who testified at trial. During sentencing, Copeland emphasized that Jensen was severely injured but "directly went to the front of Wal-Mart to summon help." 3RP 442. It is evident from the record that Copeland relied on Nelson's testimony to show that Jensen acted in self-defense and did not intend to seriously harm Snapp.

Furthermore, it appears from Shaffer's trial notes contained in her Memorandum in Support of State's Motion to Supplement Record, that Nelson provided some testimony about recognizing Jensen because he had permission to park in the Wal-Mart parking lot. However, this portion of his testimony is not included in the State's Proposed Narrative Report of Proceedings. Appendix C.

Confidence in the outcome of the trial is certainly compromised without a verbatim report of Nelson's testimony. Nelson's testimony as a disinterested witness was material to Jensen's defense, given the contradictory testimonies of Snapp, Meyer, and the Wades. Snapp, Meyer, and the Wades were socializing in Snapp's motor home the night before the early morning altercation. 1RP 133. The record reflects that their testimonies about what happened thereafter were significantly different.

Snapp testified that he never went outside of the motor home and that Meyer was not on the sofa bed during his struggle with Jensen. 1RP 116-17. In contrast, Meyer testified that Snapp grabbed a flashlight and went outside to confront Jensen. 2RP 245-47. She said that Snapp fell back on the sofa bed and was laying across her feet during the altercation and Snapp and Jensen were threatening each other, "There was threats comin' from both of them against their lives." 2RP 255-56, 267. Trudi and Charles Wade were asleep in their nearby van after using heroin. 2RP

147, 159. Trudi claimed that she heard Jensen threaten Snapp but Charles said he only heard somebody make a threat. 2RP 149, 159. Trudi also claimed that she heard Jensen tell Charles, “you’re next,” but Charles testified that although he heard someone say, “you’re next,” he did not see who said it. 2RP 149, 161-62.

The inconsistencies in their testimonies accentuate the importance of Nelson’s testimony describing Jensen’s immediate actions after the alleged stabbing. This is particularly so in light of Jensen’s defense that he acted in self-defense. The State’s narrative report is not a record of sufficient completeness to effectively determine whether Nelson’s testimony, substantively and procedurally, raises issues for appeal. Consequently, Jensen has been prejudiced by the defect in the record.

Reversal is required because the State has failed to provide a record of sufficient completeness, in violation of Jensen’s constitutional rights to appeal, effective assistance of counsel on appeal, and to due process. Thomas, 70 Wn. App. at 298-99, Larson, 62 Wn.2d at 67, Tilton, 149 Wn.2d at 785.

2. THE TRIAL COURT ERRED IN ADMITTING  
INADMISSIBLE HEARSAY PREJUDICIAL TO  
JENSEN'S DEFENSE.

Reversal is required because the trial court erred in admitting inadmissible hearsay prejudicial to Jensen's defense and the court's error was not harmless.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible at trial, except as provided by the rules of evidence, court rules, or statute. ER 802. Whether a statement is hearsay depends upon the intent or purpose for which the statement is offered. Out-of-court statements not offered to prove the truth asserted, but rather offered as a basis for inferring something else, do not qualify as hearsay. State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000).

Reversal is required if erroneous admission of hearsay was not harmless. State v. Edwards, 131 Wn. App. 611, 615-16, 128 P.3d 631 (2006). Whether a statement constitutes hearsay is a question of law which appellate courts review de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

a. Testimony of Officer Buchholz

Out-of-court statements made to a law enforcement officer, which are otherwise hearsay, may be admitted to demonstrate the officer's state of mind only if his state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay. State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991); State v. Aaron, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990); State v. Lowrie, 14 Wn. App. 408, 411-13, 542 P.2d 128 (1975), rev. denied, 86 Wn.2d 1010 (1976).

In Edwards, 131 Wn. App. at 613, this Court held the trial court's admission of a detective's testimony that a confidential informant told him that Edwards was dealing crack cocaine constituted reversible error. The State argued that the testimony was offered to explain why the detective started his investigation. This Court determined that his investigation was not an issue in controversy and the issue was who sold the cocaine. Id. at 614-15. Accordingly, this court concluded that the detective's "state of mind simply is not relevant to whether Mr. Edwards committed the crimes charged." Id. at 615.

Here, the trial court allowed inadmissible hearsay statements by Officer Buchholz who reported to the scene of the alleged stabbing and inspected Snapp's motor home:

Q. I'm handing you what's been marked as State's Exhibit 30, State's Exhibit 29. Regarding State's Exhibit 30, what is it?

A. It's a picture of the front entryway from outside of the door of the motor home.

Q. And then the other exhibit. Can you show me what that is? Or tell me what that is?

A. It is a close-up of the locking mechanism of that same door.

Q. All right. And while you were there at the scene, did you get a close look at the locking mechanism of that door?

A. Yes, I did.

Q. And what, if anything, did you notice that was unusual or significant?

A. During the conversations that were taking place, someone had mentioned that --

MR. COPELAND: Objection, hearsay.

MS. SHAFFER: It goes to show why he believed it was significant.

THE COURT: All right, ladies and gentlemen. I'm going to allow this testimony, not because it's true or not true. That's not the issue. It's simply to allow you to understand why the officer did what he did.

Q. And why was that significant to you?

A. Someone had said during the time that I was there that the front door to the motor home had been ripped open, so I went over and tested the lock on

the door, this lock right here. And the door was standing open, as it's seen in the picture, but the locking mechanism was locked.

MS. SHAFFER: Move to admit both of these exhibits, Your Honor.

2RP 305-06. (emphasis added).

Like in Edwards, the reason why Buchholz conducted an investigation and inspected the motor home was not in question and therefore his state of mind was not relevant to whether someone ripped open the door. Consequently, his statement that someone said the door had been ripped open was inadmissible hearsay. The hearsay statement was prejudicial because it clearly implicated Jensen who was accused of attacking Snapp inside the motor home. To Jensen's detriment, the State highlighted the significance of Buchholz' statement during closing argument, emphasizing that his testimony was consistent with Snapp's version of events and inconsistent with Jensen's version of events. 3RP 341-42.

Furthermore, without the declarant, Jensen was denied the opportunity to subject the out-of-court statement to the rigorous proof of cross-examination. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const.

amend VI; Washington Const., art. 1, sect 22 (amend. 10); Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The trial court erred in admitting Buchholz' statements and admitting evidence based on hearsay, in violation of Jensen's constitutional right to confrontation.

b. Testimony of Officer Rabideau

Out-of-court statements offered to show the defendant's state of mind are admissible so long as they are relevant. State v. Roberts, 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996); State v. Hamilton, 58 Wn. App. 229, 232, 792 P.2d 176 (1990).

In State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987), rev. denied, 108 Wn.2d 1033 (1987), this Court held that the trial court properly excluded hearsay statements proffered by Stubsjoen because they were not relevant. Stubsjoen was charged with kidnapping and moved to admit statements that she made to a friend who she had called to support her defense that she did not intend to abduct the baby. She argued that the testimony was not hearsay because it showed her state of mind. *Id.* at 143, 146. This Court acknowledged that ER 803(a)(3) allows "[a] statement of the declarant's then existing state of mind," as an exception to hearsay. *Id.* at 147. However, this Court concluded that Stubsjoen's state of mind

during the call made one and a half hours after she fled with the baby was not the relevant issue at trial. Id.

Here, the court allowed the hearsay testimony of Officer Rabideau who arrived at St. John's Hospital at about 6:30 a.m. on the morning following the altercation. 2RP 299-300. Rabideau testified that while he was escorting Jensen to the x-ray room, Jensen said, "the methies had messed with the wrong man" and "after 35 years, I'm finally getting some respect." 2RP 301. Rabideau stated that Jensen was eventually discharged that day and while transporting Jensen to the Longview Police Department, he repeated that "the methies had messed with the wrong old man." 2RP 302. Defense counsel did not object to the testimony because the court ruled during pre-trial motions that the statements were admissible to show Jensen's state of mind. 1RP 62-63.

As in Stubsjoen, Jensen's state of mind well over two and a half hours after the altercation was not the relevant issue in the case. Therefore, the statements were inadmissible hearsay and clearly prejudicial in light of the State's closing argument:

[T]he Defendant said, methies messed with the wrong old man. After 35 years, I'm finally getting some respect. Why is this important? It goes to the Defendant's intent. Sort of an aggressive statement. It goes to his intent. Not, whew, that was a close one and I barely made it out alive, but finally, I got some respect.

3RP 342.

The court erred in admitting Rabideau's statements.

c. Testimony of Trudi Wade

During the testimony of Trudi Wade, the State asked Wade if she was aware of the relationship between Meyer and Jensen:

Q. How would you characterize that relationship?

A. She had just met him, from what they both told me, she had -- they just each other, and he had --

MR. COPELAND: I'm going to object, Your Honor, to hearsay.

THE COURT: I don't think it's offered for the proof. I'm going to overrule the objection.

Q. So you said that he --

A. That they -- that he had feelings for her, but she didn't share them back.

2RP 147.

Contrary to the court's ruling, it is evident from the record that the statement was offered to bolster the State's theory that Jensen confronted Snapp in pursuit of Meyer with the intent to get Meyer out of the motor home. The statement was offered for no purpose other than its truth as argued by the State during closing argument, "Both Charles and Trudi Wade testified that, yeah, the Defendant seemed to have some issues with

Susan Meyer staying with Mr. Snapp in his motor home.” 3RP 329. The trial court erred in admitting Wade’s statement.

d. Testimony of William White

William White testified that Jensen had applied for a job at Schuck’s Automotive Parts located near the Wal-Mart and Jensen called him the day after the altercation inquiring whether his application was still under consideration. 2RP 167-69. The State asked White if Jensen told him what had happened the day before. Defense counsel objected and the State responded that it’s a “[s]tatement against interest.” 2RP 169. The court overruled defense counsel’s objection and allowed White to state that Jensen said “he was jumped in the Wal-Mart parking lot, and there was a stabbing, but he didn’t say who got stabbed.” 2RP 169-70.

A statement against interest is an exception to hearsay under ER 804(b)(3).<sup>3</sup> Clearly, the offered statement was not inconsistent with Jensen’s position at trial or contrary to Jensen’s interest for which the exception is intended. Consequently, the court erred in admitting White’s statement.

---

<sup>3</sup> **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. ER 804(b)(3).

Reversal is required because the trial court erred in admitting inadmissible hearsay and in light of the numerous statements erroneously admitted, the court's error was not harmless. Edwards, 131 Wn. App. at 615 (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

3. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A CrR 3.5 HEARING AND ITS ORAL FINDINGS ARE INSUFFICIENT FOR EFFECTIVE REVIEW.

Reversal is required because the trial court erred in failing to enter written findings of fact and conclusions of law after a CrR 3.5 hearing and its oral findings are insufficient for effective appellate review.

After a CrR 3.5 hearing, the trial court is required to "set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5 (c).

A trial court's failure to enter written findings and conclusions after a CrR 3.5 hearing is error but reversal is not required absent prejudice. There is no prejudice if the court's oral findings are detailed and sufficient to allow appellate review. State v. Thompson, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

Written findings and conclusions facilitate and expedite appellate review of the issues. State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d

1187 (1998). An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his conviction. *Id.* at 624.

Here, the court held a CrR 3.5 hearing and heard testimony on the admissibility of recorded statements Jensen made to detectives at the Longview Police Department after the altercation. Detective Tim Deisher testified that he read Jensen his rights and he said he did not want to talk so he put him in a holding cell. 1RP 34-36. A couple of minutes later, Jensen changed his mind and said he wanted to tell his side of the story. Deisher brought him into an interview room, reread his rights, and took a recorded statement. 1RP 37-39. Deisher admitted that “there was some confusion” about whether Jensen was waiving his right to remain silent. 1RP 39. Detective Doug Kazensky testified that he was in the interview room when Deisher questioned Jensen. 1RP 41, 47. Kazensky said that when Deisher tried to clarify whether Jensen was waiving his rights, it “seemed pretty clear” that Jensen wanted to talk to them. 1RP 47-48.

Defense counsel argued that the detectives’ testimonies were inconsistent with the transcript of Jensen’s recorded statements, “They just interpret it differently than what the plain language says.” 1RP 59. Counsel argued that contrary to the detectives’ testimonies, the transcript

substantiates that Jensen's waiver was ambiguous, "He has to be the one to basically break down the rights that he has, and waives his rights, and this just does not say that." 1RP 58.

The State conceded that "there was a little bit of confusion after the Defendant reinitiated the contact," but argued that Jensen's waiver was knowing and voluntary. 1RP 59-60. The State argued that the detective clarified that Jensen wanted to waive his rights and read him the Miranda rights a second time. 1RP 60.

The trial court summarily found that Jensen's statements were voluntary and therefore admissible:

All right. Considering this as a whole, these are the undisputed facts: He was in holding, he was advised of his rights, he told the officers he didn't want to talk, undisputed. They took him back to holding. He then re-contacted the officers because he apparently wanted to tell a story.

There's really still no dispute, as I understand it, about what was said. The officers were trying to clarify if he was exercising his Fifth Amendment Right or withdrawing his Fifth Amendment Right to remain silent, and there was -- he was changing his position. He was asked a question, are you changing your position -- essentially, I forgot the exact wording -- the intent was, I'm changing my position. The actual wording of the answer was less clear than that.

But overall, he wanted to tell the officers a story, that's why he re-initiated. He was advised of his rights again. He clearly understood. If there was any misunderstanding after he'd been advised of his rights the second time, clearly could have just said, no, I'm not waiving my right. He knows he can do that. He's already done it.

IRP 59-60.

Defense counsel moved to admit into evidence the portion of the transcript where Deisher questioned Jensen on whether he was waiving his rights. The State would not agree and consequently the court did not admit the transcript as evidence. IRP 61-62. The court did not enter written findings and conclusions as required under CrR 3.5 (c).

The court's oral findings are not sufficiently detailed nor comprehensive. In a cursory manner, the court found that there was no dispute about Jensen's waiver. To the contrary, defense counsel strongly disputed the testimony of the detectives based on the transcript of Jensen's recorded statements. IRP 58-62. Even the detectives and the State conceded that Jensen's statements were confusing. IRP 39, 47-48, 59-60. Moreover, the court admitted that it forgot what Jensen actually said but nonetheless concluded that his waiver was voluntary.<sup>4</sup> The court's oral findings are conclusory and insufficient for effective appellate review.

The court's failure to comply with the requirements of CrR 3.5 is yet another error by the court. "[T]he timely filing of findings and conclusions after a suppression hearing is not an empty formality. It is required by court rule." State v. Cunningham, 116 Wn. App. 219, 227, 65

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<sup>4</sup> A waiver of constitutional rights must be knowing, intelligent, and voluntary. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994).

P.3d 325 (2003). Reversal is required because any attempt to enter written findings and conclusions more than a year after the proceedings would be tailored to meet the issues raised on appeal and should be rejected by this Court. Head, 136 Wn.2d at 624-25.

D. CONCLUSION

For the reasons stated, and as justice requires, this Court should reverse Mr. Jensen's convictions.

DATED this 7<sup>th</sup> day of February, 2007.

Respectfully submitted,

  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Appellant

## **APPENDIX A**

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR COWLITZ COUNTY**

JUDGES' CHAMBERS

**James E. Warme**  
Department No. 1

**Stephen M. Warning**  
Department No. 2

**Jill M. Johanson**  
Department No. 3

**James J. Stonier**  
Department No. 4

Nancy Williamson  
Court Administrator  
Phone 360.577.3085

Gayle M. Engkraf  
Administrative Deputy  
Phone 360.577.3070

November 29, 2006

Ms. Valerie Marushige  
Attorney at Law  
2136 S. 260<sup>th</sup> St., Suite BB304  
Des Moines, WA 98198-9087

Re: State vs. Ted Jensen  
Cowlitz County Cause 05-1-01388-2

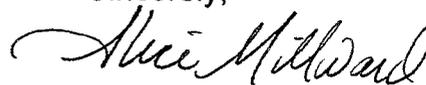
Dear Ms. Marushige,

Unfortunately, there is no recorded audio or video backup for an 18 ½ minute period on the second day of Ted Jensen's criminal trial held on February 2, 2006. Therefore, Louie Allred wasn't able to create a transcription for that portion of the trial for the above-referenced case. I believe that due to clerk error in the courtroom the audio - video was not recorded. The clerk's trial minutes clearly reflect the times the data was captured. Upon close examination, it is clear that the recording system was not turned on after court reconvened at 10:57:35am, but was turned on at 11:15:04. To verify if this true, I have exhausted all possibilities, including a search on the JAVS hard drives and both copies of the cd backups.

I declare under penalty of perjury that the audio - video record of this 18 ½ minutes during the three-day criminal trial for Ted Jensen does not exist.

If I can be of any further assistance, please call me at (360) 577-3155.

Sincerely,

  
Alice H. Millward  
Court Services Asst.

# Events Log

State: WA

County: Cowlitz

Court System: Superior

Department/Division: Courtroom 2

Judge: James E. Warne

Clerk: Staci Myklebust

Bailiff: Dewayne Flosie

Date: 2006-02-02

Log name suffix: St of WA vs Ted Jensen Day 2

Time	VCR Time	Digi. Time	Events
08:50:25	00:00:00	00:00:00	Start Cap:08h50m25s.asf on 2006-02-02
08:50:30	00:00:00	00:00:05	Case number: 05-1-01388-2 Case type: Criminal Jury Trial Party1: State of WA Party2: Ted Jensen Counsel1: M. Shaffer - P Counsel2: L. Copeland - P
08:50:32	00:00:00	00:00:07	Stop Cap
09:29:20	00:00:00	00:00:00	Start Cap:09h29m20s.asf on 2006-02-02
09:29:22	00:00:00	00:00:01	Tape start! Recording begins on 2006-02-02
09:29:31	00:00:08	00:00:10	Ct convenes.
09:30:17	00:00:54	00:00:56	Jury is seated.
09:34:25	00:05:01	00:05:04	PLAINTIFF WITNESS TRUDI L WADE
09:34:33	00:05:09	00:05:12	Sworn and testifies.
09:43:20	00:13:56	00:13:59	Mr Copeland cross exams.
09:49:46	00:20:22	00:20:25	Witness steps down.
09:50:59	00:21:35	00:21:38	PLAINTIFF WITNESS CHARLES W. WADE
09:51:06	00:21:42	00:21:45	Sworn and testifies.
09:58:48	00:29:25	00:29:27	Mr Copeland cross exam.
10:01:33	00:32:10	00:32:13	Witness steps down.
10:03:37	00:34:14	00:34:16	PLAINTIFF WITNESS WILLIAM WHITE
10:03:50	00:34:27	00:34:29	Sworn and testifies.
10:07:21	00:37:58	00:38:00	Witness steps down.
10:10:00	00:40:36	00:40:39	Hall Conference
10:11:46	00:42:22	00:42:25	PLAINTIFF WITNESS DR DANE MOSESON
10:11:53	00:42:29	00:42:32	Sworn and testifies.
10:27:52	00:58:29	00:58:31	Mr Copeland cross exam.
10:31:42	01:02:19	01:02:21	Ms Shaffer redirect.
10:32:46	01:03:23	01:03:25	Mr Copeland re-cross.
10:36:41	01:07:18	01:07:20	Witness steps down.
10:36:51	01:07:28	01:07:30	Ct recess.
10:37:02	01:07:39	01:07:41	Jury is excused.
10:37:06	01:07:43	01:07:45	Tape stop! Recording ends
10:37:09	01:07:43	01:07:48	Stop Cap
10:57:35	01:07:43	00:00:00	Ct reconvenes.
10:58:00	01:07:43	00:00:00	Ms Shaffer addresses Ct regarding schedule of witnesses.
10:58:09	01:07:43	00:00:00	Jury is seated.
10:59:21	01:07:43	00:00:00	PLAINTIFF WITNESS EDWARD A. NELSON
10:59:28	01:07:43	00:00:00	Sworn and testifies.
11:04:55	01:07:43	00:00:00	Mr Copeland cross exam.
11:09:34	01:07:43	00:00:00	Ms Shaffer redirect.
11:10:37	01:07:43	00:00:00	Mr Copeland re-cross.
11:10:49	01:07:43	00:00:00	Witness steps down.
11:12:58	01:07:43	00:00:00	PLAINTIFF WITNESS TIM DEISHER (LPD DETECTIVE)
11:13:05	01:07:43	00:00:00	Sworn and testifies.
11:14:33	01:07:43	00:00:00	Hall conference.
11:15:04	01:07:43	00:00:00	Tape start! Recording begins on 2006-02-02
11:15:04	01:07:43	00:00:00	Start Cap:11h15m04s.asf on 2006-02-02
11:15:36	01:08:15	00:00:31	Ms Shaffer continues with direct exam.
11:45:47	01:38:26	00:30:43	Mr Copeland cross exam.
11:50:32	01:43:10	00:35:27	Ms Shaffer redirect.

## **APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	CASE NO. 34835-7-II
	)	
vs.	)	DECLARATION OF
	)	VALERIE MARUSHIGE
TED JENSEN,	)	
	)	
Appellant.	)	
_____		

Valerie Marushige, attorney for appellant, declares that:

1. After discovering that the trial testimony of Ed Nelson was missing from the verbatim report of proceedings, I contacted the Cowlitz County Clerk's Office and was informed that due to clerk's error, Mr. Nelson's testimony was not recorded.
2. On November 28, 2006, I spoke with the Court Administrator and requested that she discuss the matter with the trial judge, the Honorable James Warne.
3. On November 29, 2006, I was informed that Judge Warne had no independent recollection of Mr. Nelson's testimony. Subsequently, I received a copy of a letter dated December 1, 2006, from Judge Warne to Deputy Prosecuting Attorney, Michelle Shaffer. The court requested a proposed agreed report of proceedings in the absence of a recording of Mr. Nelson's trial testimony.

4. Upon learning that the defense attorney, Leonard Copeland, had relocated to Indiana, I sent an e-mail and left a voice mail for Mr. Copeland to contact me regarding Ed Nelson's testimony. Mr. Copeland responded by e-mail and voice mail that he could not recall what Mr. Nelson testified about but may have some notes in his archives. Thereafter, I informed Mr. Copeland that he should expect to hear from Ms. Shaffer to prepare an agreed report of proceedings.

5. On December 22, 2006, I wrote a letter to Judge Warme, with a copy to Ms. Shaffer, inquiring about the agreed report of proceedings as I had not yet received a copy to prepare appellant's brief.

6. I received a letter from Ms. Shaffer, dated December 28, 2006, informing me that she sent an e-mail and left a voice mail for Mr. Copeland to contact her and that she expected to hear from him soon after the holidays.

7. On January 10, 2007, I followed up with Ms. Shaffer by e-mail and she responded that she was confident that she and Mr. Copeland could agree to the content of Mr. Nelson's testimony and anticipated completing a proposed report of proceedings by the end of the week.

8. Meanwhile, I received an e-mail from Mr. Copeland, informing me that he regrettably could not assist in reconstructing a report of the proceedings because he had no recollection of Mr. Nelson's testimony. I

requested that Mr. Copeland contact Ms. Shaffer as soon as possible to avoid any further delay in Mr. Jensen's appeal.

9. On January 24, 2007, I received an e-mail from Ms. Shaffer informing me that Mr. Copeland refuses to participate any further in the case. She stated that she would proceed to supplement the record and send me a copy.

10. On January 25, 2007, Ms. Shaffer sent me a facsimile of the State's Proposed Narrative Report of Proceedings and on January 29, 2007, she informed me that the trial court approved the narrative as proposed and it would be transmitted to the Court of Appeals.

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

DATED this 7<sup>th</sup> day of February, 2007.

  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851

## **APPENDIX C**

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**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 05-1-01388-2
	)	
TED JENSEN,	)	MOTION TO SUPPLEMENT
	)	RECORD
Defendant.	)	
_____	)	

COMES NOW the plaintiff, State of Washington, through the undersigned attorney of record, and moves the court for an order supplementing the report of proceedings of the jury trial in this matter with a narrative report of the testimony of witness Ed Nelson.

This motion is based upon the record herein, upon the attached affidavit or certificate and upon the memorandum in support of the motion.

Respectfully submitted this 25<sup>th</sup> day of January, 2007.

  
 MICHELLE L. SHAFFER/WSBA#29869  
 Chief Criminal Deputy Prosecuting Attorney



1  
2 Nelson was not recorded on the video hard drive. On December 1, 2006, counsel for the  
3 State received a letter from this court notifying the State of this issue regarding the record.  
4  
5 *See Appendix A (certificate of counsel representing State).* The letter referenced RAP 9.4,  
6 which allows for an agreed report of proceedings if the videotape of the proceedings is lost or  
7 damaged. *Id.*

8 Jensen's counsel for the trial, Mr. Copeland, moved to the state of Indiana in  
9 December 2006. *Id.* Since receiving Judge Warne's letter, counsel for the State has left  
10 several of telephone messages for Mr. Copeland at the Indiana phone number listed on the  
11 Washington State Bar Association's lawyer directory website (presumably his home phone  
12 number). *Id.* Counsel for the State also called the Indiana State Bar Association and was  
13 informed that membership in the Indiana State Bar Association was voluntary and was  
14 referred to the Clerk of the Indiana Supreme Court. *Id.* The Clerk provided the State with  
15 Mr. Copeland's current business address, and counsel for the State left dozens of messages  
16 for Mr. Copeland with the receptionist and on his business voicemail. *Id.* Counsel for the  
17 State also sent several emails to Mr. Copeland at the email addressed listed on the  
18 Washington State Bar Association's lawyer directory website. *Id.*

19  
20 Counsel for the State has received no response from Mr. Copeland regarding this  
21 matter until January 14. *Id.* On that date, he responded to one of the State's emails and  
22 essentially refused to have anything else to do with this case. *Id.*; *see also Appendix B (copy*  
23 *of email from Mr. Copeland).*

1  
2  
3 The State has as part of its file in this matter a copy of the one-page police report  
4 detailing the police interview of witness Ed Nelson and a one-page written statement by  
5 Nelson taken by police. *See Appendix A; see also Appendix C (copy of police report*  
6 *regarding interview of Mr. Nelson), Appendix D (copy of written statement of Mr. Nelson.*  
7 The State also has the handwritten notes by trial counsel representing the State of Mr.  
8 Nelson's testimony at trial. *See Appendix A; see also Appendix E (copy of counsel's notes).*

9 Furthermore, counsel for the State had asked Jensen's appellate counsel, Ms.  
10 Marushige, to search the computer disk of the trial transcripts to determine whether there  
11 were any motions in limine regarding Nelson's anticipated testimony or whether either  
12 attorney had mentioned Nelson during closing arguments. *See Appendix A.* According to  
13 Ms. Marushige, the only mention of Nelson in the remainder of the trial was during the direct  
14 examination of Officer Alan Buchholz who stated that he obtained a written statement from  
15 Nelson who was the security officer for Wal-Mart. *Id.* Based upon these facts and the  
16 authority argued *infra*, it is the State's position that this court should settle the trial record by  
17 supplementing it with a narrative report of Ed Nelson's testimony at trial.  
18  
19

## 20 II. ARGUMENT

21 The letter from this court to counsel for the State (with copies sent to the court clerk,  
22 Jensen's trial counsel and Jensen's appellate counsel) references RAP 9.4. RAP 9.4 reads as  
23 follows:

24 The parties may prepare and sign an agreed report of proceedings setting forth only so  
25

1  
2  
3 many of the facts averred and proved or sought to be proved as are essential to the  
4 decision of the issues presented for review. The agreed report of proceedings must  
5 include only matters which were actually before the trial court. An agreed report of  
6 proceedings should be in the same form as a verbatim report, as provided in rule  
7 9.2(e) and (f). An agreed report of proceedings may be prepared if either the court  
8 reporter's notes or the videotape of the proceeding being reviewed are lost or  
9 damaged.

10  
11 In Jensen's case, it appears that Jensen's trial attorney, Mr. Copeland, is refusing to  
12 participate in the remainder of these proceedings. As such, it does not appear that an agreed  
13 report of proceedings under this rule is appropriate.

14  
15 RAP 9.9 reads as follows:

16  
17 The report of proceedings may be corrected or supplemented by the trial court on  
18 motion of a party, or on stipulation of the parties, at any time prior to the transmission  
19 of the report to the appellate court. The trial court may impose the same kinds of  
20 sanctions provided in rule 18.9(a) as a condition to correcting or supplementing the  
21 report of proceedings after the time provided in rule 9.5.

22  
23 In Jensen's case, it does not appear that this court has yet transmitted the report of  
24 proceedings to the Court of Appeals.<sup>1</sup> As such, this court retains the authority to correct or  
25 supplement the report of proceedings. It is the State's position that the narrative report of  
26 Nelson's testimony should be added to the record of this trial.

### 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000III. CONCLUSION

For the reasons stated above, this court should supplement the record with the

<sup>1</sup> RAP 9.8 requires the trial court clerk to send the report of proceedings to the appellate court at the end of the objection period set forth in RAP 9.5. RAP 9.5(a)(1) requires the party seeking review to forward a copy of the prepared report of proceedings along with that party's brief to the responding party. The responding party (in this case, the State) may serve and file objections to, and propose amendments to, the report of proceedings within 10 days after receipt of the report of proceedings. Under the same rule, any such objections or proposed amendments must be heard by the trial court judge before whom the proceedings were held.

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narrative report of Ed Nelson's testimony as proposed by the State.

Respectfully submitted this 25<sup>th</sup> day of January, 2007.



MICHELLE L. SHAFFER/WSBA #29869  
Chief Criminal Deputy Prosecuting Attorney

1  
2 **CERTIFICATE**  
3

- 4 1. My name is Michelle L. Shaffer, deputy prosecuting attorney assigned to the case of State  
5 of Washington v. Ted Jensen. I certify that the following is true and correct to the best  
6 of my knowledge based upon the files and record therein.
- 7 2. On December 1, 2006, I received a letter from Hon. James Warne notifying me that the  
8 testimony of Ed Nelson was not recorded on the video hard drive. The letter references  
9 RAP 9.4, which allows for an agreed report of proceedings if the videotape of the  
10 proceedings is lost or damaged.
- 11 3. Jensen's counsel for the trial, Mr. Copeland, moved to the state of Indiana in December  
12 2006.
- 13 4. Since receiving Judge Warne's letter, I have several of telephone messages for Mr.  
14 Copeland at the Indiana phone number listed on the Washington State Bar Association's  
15 lawyer directory website (presumable his home phone number).
- 16 5. I also called the Indiana State Bar Association and was informed that membership in the  
17 Indiana State Bar Association was voluntary and was referred to the Clerk of the Indiana  
18 Supreme Court. The Clerk provided me with Mr. Copeland's current business address,  
19 and I left dozens of messages for Mr. Copeland with the receptionist and on his business  
20 voicemail.
- 21 6. I also sent several emails to Mr. Copeland at the email addressed listed on the  
22 Washington State Bar Association's lawyer directory website.
- 23 7. I received no response from Mr. Copeland regarding this matter until January 14. On that  
24 date, he responded to one of my emails and essentially refused to have anything else to  
25 do with this case. *See Appendix B (copy of email from Mr. Copeland)*.
- 26 8. As trial counsel representing the State in this matter, I have as part of the State's file in  
27 this matter a copy of the one-page police report detailing the police interview of witness  
Ed Nelson and I one-page written statement by Nelson taken by police. *See Appendix C;*  
*Appendix D*. I also have my handwritten notes of his testimony at trial. *See Appendix*  
*E*.
9. Furthermore, I had asked Jensen's appellate counsel, Ms. Marushige, to search the  
computer disk of the trial transcripts to determine whether there were any motions in  
limine regarding Nelson or whether either attorney had mentioned Nelson during closing  
arguments. According to Ms. Marushige, the only mention of Nelson in the remainder  
of the trial was during the direct examination of Officer Alan Buchholz who stated that  
he obtained a written statement from Nelson who was the security officer for Wal-Mart.

1  
2 10. I do not recall Ed Nelson testifying to anything beyond what is reflected in his statement,  
3 the police report or my notes. I am quite sure his testimony was insignificant in the  
4 realm of this trial.

5 

6 MICHELLE L. SHAFFER/WSBA#29869  
7 Deputy Prosecuting Attorney  
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**Shaffer, Michelle**

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**From:** Leonard Copeland [lwcopeland@comcast.net]  
**Sent:** Sunday, January 14, 2007 2:19 PM  
**To:** Shaffer, Michelle  
**Subject:** Re: Ted Jensen

Michelle,

I can't help you Michelle. Here are the reasons: I no longer practice in Cowlitz County, and I have no contract with Cowlitz County. I work full time for a law firm her and work plenty of hours to suit me. I am unwilling to work for Cowlitz County for free even a little bit. Anyway, I have no malpractice coverage for criminal work in Cowlitz County, and I'm going inactive with the WSBA. I've already paid inactive fees for 2007. Even if I were otherwise able to help you, my memory and/or records (if any) would not be a reliable basis on which to reconstruct a narrative record on appeal for such an important case. I'm sorry. Leonard.

11/02/05

LONGVIEW POLICE DEPARTMENT

1113

01:21

Officer Report

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Incident Number: L05-29519

8. NARRATIVE- RECONSTRUCT INCIDENT:

On 11-01-05 at approx. 0429 hrs. Myself and Officers Close, Angle, Buchholz and Sgt. Reeves responded to a stabbing that had just taken place in the Wal-Mart parking lot over near 38th ave. Dispatch advised the long haired white male suspect was standing in the middle of 38th ave. yelling. When I arrived on scene I pulled into the first driveway off 38th ave. There were several people standing around a motor home and a male sitting down bleeding from the stomach area. He was talking to a female who looked to be taking care of him. I was advised by everyone that the suspect who stabbed the male had ran over to the front of Wal-Mart. I proceeded to the front of Wal-Mart.

As I was heading to the front of Wal-Mart in my Patrol car Officer Angel arrived and meet me in the front of Wal-Mart. There we contacted Ted Jensen who was standing out behind his blue Dodge, license 959-TQN, WA. Ted advised me he was the guy we were looking for and he had acted in self defense. I noticed that Ted was bleeding from the head and nose. Looking closer I noticed that Ted had a large gash on the right side of his forehead. The bridge of Ted's nose appeared to be split open. I asked Ted if he could tell me what happened? Ted said he would want to let me know what happened.

Ted advised me that he was sleeping in his car with his cat and the window partially rolled down when male from the motor home came out and dumped piss in his window and onto to him. When Ted exited the vehicle he was assaulted by the guy in the motor home with a large flashlight. Ted advised he kicked the flashlight out the guys hand and then the guy from the motor home pulled a knife on him and lunged at him. Ted took the knife from the guy and stabbed him with it. Aid then arrived on scene and started to administer aid. During are contact with Ted Officer Angel searched Ted for any weapons and found a two bladed martial arts knife in his front pocket. Knife was logged into property. Officer Angel also located Ted's car keys in his in the same right front pant pocket. Officer Angel held onto the keys.

Ted was transported to ST. Johns and I followed behind so I could be with Ted and see if I get more detail on what had exactly happened. Ted advised me that he had been helping Susan Weber get on her feet. Susan had been being victimized by the guy in the motor home, Snapper. Snapper sells and does drug as well has having a lab in his motor home. Ted advises that Snapper and some other males exploit Susan by making her have sex with them. Ted advised tonight that he was feeling that Susan was in danger so he drove over and parked in car approx. 15ft in front of Snapper's motor home. Ted advised that he is a psychic and knows things. He advised me that he once worked at a psychic hotline and he was phone to be one of the top psychic's in the Northwest. So he knew that Susan possibly in danger.

Ted advised that after he parked his car he car he rolled his window down a little and turned on the radio to I believe 96.7. They play love type music and he knew that Susan needed to listen to that type of music to make her feel better. Ted was sitting in the car almost asleep when Snapper came up to the car and threw piss (urine) on him. I asked Ted what was the piss in? Ted advised a coffee can the same one they make Susan pee in while they watch inside the motor home. Snapper then told Ted to get out of here of I'm a dead man. Ted got out of the his car and confronted Snapper who shined the large flashlight in his eyes and then hit him 3 or 4 times with the large black flashlight. Ted had enough so he kicked the flashlight out of Snapper's hand, knocking it to the ground. Snapper them grabbed some type of possibly folding

**APPENDIX C**

11/02/05

LONGVIEW POLICE DEPARTMENT

1113

01:21

Officer Report

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Incident Number: L05-29519

knife out of his back pocket and attempted to stab Ted with it by lunging at him.

Ted advised he used his years of martial arts training. (some type of Kung-fu white crane martial arts) Ted said that Snapper didn't know how to use a knife so he was easily able to take it away from him. Ted said he lost his it for a second and when he got the knife away from Snapper he just went into his martial arts mode and went into a complete Kato (some type of offensive move) and before he knew it he probably used 18 different stab moves to stab Snapper. Ted advised he just kind of lost it and didn't mean to hurt Snapper so bad.

In looking over Ted I noticed he had a very large gash/cut in his upper forehead and a small gash on the bridge of his nose. Ted also had a little scratch near his left wrist and a couple of abrasions on is lower and upper left chin. Ted also removed a small metal case that he stores his reading glasses in from his left front shirt pocket. The case had a dent in it caused by being hit with the flashlight according to Ted. Sgt. Reeves took pictures of the above mentioned areas.

I asked Ted if he would willing to sign a medical release form from Peace Health so his medical information tonight could be used if needed in this criminal matter. Ted said that would be fine he has nothing to hide. See attached Medical release form, yellow copy given to Ted. Ted stated he would take a urine test or a blood test and you would find nothing in his system, unlike that of Snapper.

While in the Emergency Room I told Ted I would need his outside clothing. I took Ted's jacket, pants, belt, shirt, shoes, socks and sunglasses. I logged the shoes into evidence. I gave the rest of the items to Detective to Detective Deisher.

I waited in the Emergency room with Ted until Officer Rabideau arrived on scene and took my place. No further action taken.

WATTS32 11-01-05 0855 hrs.

Units were dispatched to a call, and the reporting parties were stating that someone was stabbing people in the parking lot of Wal Mart, 3715 Ocean Beach Highway. Apparently multiple calls were coming in. One of those calls advised that there was someone yelling for help in the middle of 38th Avenue.

I arrived on scene north bound on 38th from Industrial Way. I joined Ofc. Close and Sgt. Reeves. Sitting on the curb was an older male holding his left side and had his hand wrapped up as well. He was later identified to me as Gery Wayne Snapp. I looked and there was a pool of blood around him and on the cloth that was wrapped around his hand. I could see blood on the left side of his body on the t-shirt and coat that he was wearing.

I was observing when the aid crew cut off the upper clothing that the victim had on. I got a bio-hazard bag from Longview Fire and secured the items in that. There was a coat and a t-shirt. I put the bag in my trunk, and it stayed there until I turned it over to Detective Deisher. Snapp had multiple stab wounds that I saw, left arm, left chest and right shoulder blade. I only got a quick look as when the aid crew saw the wounds, they applied compresses and transported immediately.

I contacted a Edward A. Nelson, who does graveyard security for Wal Mart. I

11/02/05  
01:21

LONGVIEW POLICE DEPARTMENT  
Officer Report

1113  
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obtained from him a written statement. With the aid of binoculars he said he saw a man flashing his car headlights on and off. The car was parked directly in front of the motor home. The man was out of the view of security for 15 to 20 seconds and then got in his car and drove to Wal Mart main entrance. Nelson followed him there and observed that he had injuries to his head. The person contacted stated that the guy in the motor home hit him with a big flashlight, that he took a knife away from the guy in the motor home and that he stabbed him because he was being attacked.

I stayed on scene until after the victim was transported and Nelson completed his statement. Someone during the conversation Snapp said something about the suspect "ripping" the door open. I checked the door for the motor home, and it was locked, however the door was swinging open on it's hinges.

This ended my involvement.

Nothing further

Ofc. Alan Buchholz 3L39 Patrol/GRAVE  
11/02/2005 0120 hours

Officer Signature: \_\_\_\_\_

Supervisor: \_\_\_\_\_

# STATEMENT

(PLEASE PRINT CLEARLY)

LONGVIEW POLICE DEPARTMENT  
577-3157

Full Name: Nelson Edward A Birthdate: 02 / 03 / 62  
Last name First name Middle name month / day / year

Home Address: 1629 8<sup>th</sup> Ave Longview Home Phone: 360 577 1014  
No. and Street City

Work Address: Walmart 3715 O.B. Hwy Longview Work Phone: Walmart Graveyard 414-9656  
No. and Street City

The following statement is given to the Longview Police Department to aid an investigation. All facts given are true to the best of my knowledge.

I do graveyard security in Walmart parking lot. I was parked on East side of parking lot, when I seen car <sup>head</sup> lights flash on the west side of the parking lot. I used my Binoculars and seen a man from the brown car that was flashing headlights walk to the front of the motorhome parked ~~to~~ directly North of his car. the man was out of vision for 15-20 second. came back by his car, walked back to front of the motorhome. He then got in his car and drove to Walmar's main entrance door. when I drove over to him, his head was split open. He said guy in motorhome hit him with a big flashlight, he then <sup>said he</sup> took the motorhome man's knife away and stabbed him, because he was being attacked.

I Edward A Nelson have read the above statement and I certify and declare it to be true and correct under penalty of perjury under the laws of the state of Washington.

Dated on Nov 1, 2005 Time 04:55

Place given Walmart parking lot

Signature Edward A Nelson

Witness A Buckley 3L39

# APPENDIX D

Ed Nelson

577-1014

11/1 around 4 a.m. on E side of lot. Car ID  
aerial photo.

Browser

Saw headlights flash. (Car positioned backed in)

Saw  $\Delta$  walk behind MH for a few secs.

Then walked to car. Stood outside door.  
Flashed lights a couple times. Drove  
towards front entrance. Got out and  
was @ entrance.

W drove over. Bleeding from head.  
 $\Delta$  said he was attacked, guy threw  
w/ke on his car, then guy hit him  
in head w/flashlight. Man then  
pulled a knife so  $\Delta$  grabbed him  
and stabbed him with it. Needs  
police and ambulance.

Radioed management.

W seen him before a few times - slept  
for a few hrs. Always parked in  
front of schuch's. Asked permission.

lights by MH. Couldn't see it was  
same guy until he got up close

APPENDIX E

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**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

STATE OF WASHINGTON, )

Plaintiff, )

vs. )

TED JENSEN, )

Defendant. )

No. 05-1-01388-2

COA No. 34835-7-II

**STATE'S  
PROPOSED**

NARRATIVE REPORT OF PROCEEDINGS

February 2, 2006  
Hall of Justice  
312 S.W. First Avenue  
Kelso, Washington

BEFORE: THE HONORABLE JAMES WARME

APPEARANCES:

MICHELLE L. SHAFFER, Deputy Prosecuting Attorney, Representing the Plaintiff, and

LEONARD COPELAND, Attorney Representing the Defendant

TABLE OF CONTENTS

Page No.

Proceedings

None

Testimony

ED NELSON:

Direct and Any Redirect Examination by  
Ms. Shaffer and Any Cross-Examination and  
Recross Examination by Mr. Copeland

1

Exhibits

None

Argument

None

Instructions

None

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FEBRUARY 2, 2006; KELSO, WASHINGTON

(The following proceedings occurred  
in the presence of the jury)

THE NARRATIVE REPORT OF THE TESTIMONY OF EDWARD A. NELSON, BEING  
CALLED AS A WITNESS ON BEHALF OF THE PLAINTIFF, BEING DULY SWORN  
UNDER OATH, IS AS FOLLOWS:

My name is Edward A. Nelson, and I work as a security guard  
for Wal-Mart in Longview, Washington. On November 1, 2005, I  
was parked on the east side of the parking lot. I saw car  
headlights flash on the west side of the parking lot. I used  
my binoculars and saw a man from a brown car that was flashing  
the headlights walk to the front of the motor home. The  
motor home was parked directly north of his car. The man was  
out of vision for 15-20 seconds. The man came back by his  
car and then walked back to the front of the motor home. He  
then got in his car and drove to Wal-Mart's main entrance  
door. When I drove over to him, his head was split open.  
He said a guy in the motor home hit him with a big flashlight  
and threw urine on his car. He then said he took the man's  
knife away and stabbed him because he was being attacked. He  
asked me to call the police and an ambulance. The man I  
spoke to is the defendant seated in the courtroom today, Ted  
Jensen.

(Witness exits the stand.)