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

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH ANDREW SORTLAND, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 10-1-01145-7

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**BRIEF OF RESPONDENT**

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

1. Should this court refuse to review a claim that the trial court improperly denied a motion for mistrial when defendant never moved for a mistrial below?
2. Has defendant failed to show that the trial court abused its discretion in denying his motion to dismiss for a trial irregularity when he failed to show any government mismanagement or misconduct sufficient to warrant the extreme remedy of dismissal or to show that he was actually prejudiced by the claimed error?
3. Should this court uphold the jury's verdicts finding defendant guilty of three crimes when, looking at the evidence in the light most favorable to the State, a reasonable person would be convinced beyond a reasonable doubt that each element of each crime had been proved?

B. STATEMENT OF THE CASE.

1. Procedure

On March 15, 2010, the Pierce County Prosecuting Attorney charged appellant, Kenneth Sortland ("defendant"), with residential burglary, malicious mischief in the second degree, and theft in the first

degree. CP 1-2. The information was later amended to adjust the charging dates for these crimes. CP 5-6. All three charges arose out of incident where a house belonging to Susan Woodcock was broken into on or about June 15, 2009. CP 3-4, 5-6.

Prior to closing arguments, defendant asked permission to give the closing argument rather than his attorney. RP 190. Defendant articulated that he had presented witnesses showing an alibi defense, but that he thought his attorney was going to focus her argument on lesser included offenses- a focus he thought would undermine the credibility of his alibi defense. RP 196-87. Ultimately, his counsel gave the closing. RP 215.

After hearing the evidence the jury found defendant guilty of residential burglary, malicious mischief in the second degree and theft in the second degree. CP 72, 74, 76.

At a sentencing hearing on October 8, 2010, the defendant was before the court on two cause numbers: the case now on appeal and Pierce County Cause No. 10-1-01147-3. Defendant had pleaded guilty to theft in the second degree, vehicle prowl in the second degree and malicious mischief in the third degree in this second cause number after the jury returned its guilty verdict in the case now before the court. 10/8/10 RP 4. At the sentencing hearing, defendant asked the court to order a competency hearing asserting that he was not competent at trial or for his

guilty plea. 10/8/10 RP 2-3. There was some vague references to “an incident” in the jail, but no explanation provided as to why defendant considered his competency to be in doubt. *Id.* The court noted that it saw no signs during trial or the taking of the plea that gave it any concern about defendant’s competency and that it heard none raised by defendant’s counsel. 10/8/10 RP 4. The court denied the motion and proceeded to sentencing. *Id.* The court found defendant had an offender score of 17 on the burglary offense and an offender score of 13 on the other two convictions. CP 102-114; 10/8/10 RP 6-8. The court imposed high end standard range sentences of 84 months (burglary), 29 months (malicious mischief), and 29 months (theft) to be served concurrently for a total period of confinement of 84 months and various legal financial obligations. CP 102-114; 12-14. The court ordered that the sentence would run concurrently with the sentence imposed in Pierce County Cause No. 10-1-01147-3. CP 102-114.

Defendant filed a timely notice of appeal from entry of this judgment. CP 115.

## 2. Facts

Dan McCormack is a professional photographer who lived at 704 N. Warner Street in Tacoma, Washington, in June of 2009. RP 68. This is

next door to a rental house and he has a good view of that house from his bathroom. RP 60-70. The house was not currently occupied, but the owners had been working hard to fix it up. RP 70. Very early on the morning of June 15, 2009, sometime between 5:00 and 6:00 a.m., Mr. McCormack heard someone on the gravel alleyway that ran between his house and the neighbor's house; he looked out to see who it was. RP 68-69, 85. He saw a red truck parked near the rental house. RP 73. He could see one person -a white male, 40ish, thin, with reddish shorter hair – loading things into the truck; he saw the man load doors into the truck and that there was a Shop-Vac in the bed, as well. RP 73-74, 84. Mr. McCormack did not recognize this person as being any of the workers he had seen working on the house, and because those workers usually came much later in the day, the situation did not feel “right” to him. RP 74-75. Without making his presences known to the man, he decided to take some photographs of him. *Id.* He identified exhibits 14 through 17 and 20 through 23 as being his photographs and that they accurately depicted the man and red truck he saw that morning. RP 75. Exhibit 23 is an enlargement of a portion of one of the other photos showing the man. RP 77-78. Mr. McCormack watched this man for approximately five minutes; during that time no one else came into view or associated himself with the red truck. RP 74, 90. He watched the man get into the red truck and drive

away. RP 83-84, 90. Later in the day, while walking his dog, Mr. McCormack went over to his neighbor's house and saw the back door had been broken in. RP 78-79. He contacted other neighbors to see if any had a contact number for the owner of the house, then contacted the police. RP 79. Mr. McCormack provided copies of his photographs to the police. RP 80, 108.

Susan Woodstock testified that she has owned the home at 714 N. Warner, Tacoma, in Pierce County, Washington, since 1975. RP 33. While she used to live there she has used it as a rental property since 1985. RP 33. In June of 2008, she asked the renters who had lived there for ten years to move out because they were damaging her property; it took her approximately a year to repair the damage the renters had done and get it into a condition that would be rentable. RP 33-34. In June of 2009, she had posted a "For rent" sign in the front yard and the home was ready for occupancy. RP 36; EX 1. Ms. Woodstock still had some tools, including a shop vacuum, in the basement of the home. RP 36-37. A person could enter the basement from inside the home, through a solid wood door that had a dead bolt on it or from the outside down a set of exterior stairs leading to a solid wood door with a dead bolt latch that you had to open from the outside. RP 37-38, EX 2, 3, 4, 6, 9, 10.

Ms. Woodstock testified that she had been showing the house to prospective renters frequently and had been at the house within the week prior to June 15, 2009. RP 38-39. There was no damage to the doors or windows the last time she was there prior to June 15, 2009. RP 38. She got a call from a neighbor of this rental house about a possible break-in; she went over to the house and found that the back exterior door had been kicked in and was standing open. RP 39-40; EX 4, 5, 6.

When she went inside she noticed that all of the tools stored in the basement were gone, including a Shop-Vac, pickax, and all the hoses for her compressor. RP 42, 49-51. Upstairs in the main part of the house, the doors to the master bedroom and the bathroom were missing as well. RP 42. These were vintage doors with crystal knobs and brass hardware. RP 43. She informed the responding officer of the missing items. RP 104-105.

Ms. Woodstock testified that she did not know anyone by the name of Kenneth Sortland; she had not given him permission to be in her home or to remove anything from her home. RP 58. She also testified that she had never seen the person depicted in Exhibit 23 prior to June 15, 2009 and had never given him permission to be inside her home. RP 57-58. Exhibit 23 did not depict any of the people that Ms. Woodstock had hired to work on her house. RP 65-66. When asked whether she recognized the

person depicted in Exhibit 23 she responded “Yes. It’s the person sitting at the table.” RP 57.

Tacoma Police Officer Birge responding to the report of a burglary at 714 N. Warner on June 16, 2009. RP 96-100. He viewed the damage inside the house and took statements from both Mr. McCormack and Ms. Woodstock. RP 100-104. The description of the suspect he received from Mr. McCormack was that of a white male, 40 to 50 years old, approximately 5’8”, 150 pounds, brown hair. RP 102-03. Officer Birge requested that a forensic specialist come out to photograph the residence and dust for fingerprints. RP 105-106. A forensic specialist responded and took photographs and dusted for fingerprints, but was unable to locate any usable prints. RP 125-142.

Detective Calitis of the Tacoma Police Department was assigned to do follow up investigation on the burglary at 714 N. Warner. RP 118-19. He produced a bulletin using photographs taken by Mr. McCormack, as well as his description, of the suspect and his red truck. RP 120. He did not have a license plate number for the truck. RP 120. The bulletin was distributed to various law enforcement agencies in a three county area, including Crimestoppers. RP 120-121. Detective Calitis identified Exhibit 19-A as being a Crimestoppers bulletin that had been created

using his initial bulletin. RP 121-122. Detective Calitis did not receive any response regarding this bulletin until March of 2010. RP 122.

On March 13, 2010, Deputy Jerome Duray, a corrections deputy for the Pierce County Sheriff's department, came across a photograph of the defendant that had been taken that day. RP 111-12, 143. When he saw defendant's photo, he thought the face looked familiar- like a picture he had seen on the Crimestoppers website. He searched the Crimestoppers website until he found the photograph he recalled. RP 144. He put the defendant's photo on one half of his computer screen and the suspect photo from the bulletin on the other half to make a side by side comparison and thought there were many similarities of features. RP 144-45. He asked for another deputy's assessment of the two photos. RP 145. Deputy Centoni was at the Pierce County Jail when he was asked to view two photos shown side by side on a computer screen. RP 110-11. Deputy Centoni saw a picture of the defendant on one half of the screen and a Crimestoppers bulletin on the other half. RP 111. The pictures, when viewed on the computer screen by the deputies, were both in color, but otherwise were the same as the pictures depicted in Exhibits 19-A and 24. RP 111-12, 145. Deputy Centoni thought that the facial features of the suspect in the bulletin were very similar to those of the defendant. RP 113.

The name of "Kenneth Sortland" was relayed to Detective Calitis as a possible suspect in the burglary case. RP 122. Detective Calitis found identifying information regarding defendant and found that his height, weight, age, race, sex, and hair color all matched the suspect description given by Mr. McCormack. RP 122. He also compared defendant's photograph against the one taken of the suspect by Mr. McCormack and found there were many similarities. RP 123-24.

Ms. Woodstock testified that the exterior door to her basement was too damaged to be fixed and had to be replaced at a cost of over \$600.00. RP 41-42. She testified that the master and bathroom doors were very difficult to replace and that she could not rent the house until there were doors on these rooms; she ended up having to specially order the replacement doors. RP 43-45. Ms. Woodstock had to pay \$500 for the doors and \$895 to get them primed painted and installed. RP 44-46. At the time of trial, Ms. Woodstock had been unable to afford replacing any of the tools. RP 49-51.

The defense called three witnesses to the stand, but the defendant did not testify. Lori Kern testified that she was the defendant's girlfriend, having met him at the end of May, 2009. RP 154-55. Ms. Kern testified that defendant had very long hair for the first two months of their relationship. RP 155. She also stated that she drove defendant to work

everyday, Monday through Friday, in June, 2009, and that he was always at his worksite in Edgewood by 6:00 a.m. RP 155-56. Robert Kramer testified that he hired the defendant to help him at a work site in Edgewood starting in June, 2009, RP 162-163. He testified that the defendant got to work at 6:00 a.m. and that he got to work by getting a ride from his girlfriend or riding a bicycle. RP 164-65. Mr. Kremer thought the person in Exhibit 23 looked a lot like the defendant. RP 168. He testified that he had defendant help him remove a lot of doors from a house in West Seattle that was going to be demolished and that they used these doors in a job they had in Carson City. RP 167-68, 169-70. Shelli Carroll testified that she cut the defendant's long hair, which extended down his back, and that this occurred on July 3, 2009. RP 174-75. Although she did not state that the person depicted in Exhibit 23 was the defendant, Ms. Carroll did testify that it looked "a great deal like" him. RP 177.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR DISMISSAL ON THE BASIS OF A TRIAL IRREGULARITY; AS DEFENDANT DID NOT MOVE FOR A MISTRIAL IN THE TRIAL COURT, ANY CLAIM REGARDING AN IMPROPER DENIAL OF SUCH MOTION IS NOT PROPERLY BEFORE THE APPELLATE COURT.

An appellate court reviews a trial court's denial of a motion for a mistrial or a motion to dismiss under CrR 8.3(b)<sup>1</sup> for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

Dismissal under CrR 8.3(b) “is an extraordinary remedy, one to which a trial court should turn *only* as a last resort.” *City of Seattle v.*

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<sup>1</sup> CrR 8.3(b) provides in part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

*Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010), citing *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Trial courts are to consider “intermediate remedial steps” before ordering the extraordinary remedy of dismissal. *Wilson*, 149 Wn.2d at 12.

Before a court properly can dismiss charges under CrR 8.3(b), a defendant must show (1) arbitrary action or governmental misconduct and (2) prejudice materially affecting the defendant's right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). There must be more than the mere possibility of prejudice; the defendant must demonstrate *actual prejudice*. *State v. Rohrich*, 149 Wn.2d 647, 658, 71 P.3d 638 (2003). The governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). The cases discussing governmental misconduct have generally focused on the action of the prosecutor. *See State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990) (upholding dismissal where prosecution agreed to provide documents that were not in its control, then failed to produce the documents and did not seek reconsideration of the order until after the trial had begun); *State v. Dailey*, 93 Wn.2d at 456-60 (upholding trial court's ruling dismissing the case

under CrR 8.3(b) because the State violated court orders and discovery rules and negligently handled the case by failing to provide witness lists and laboratory reports in a timely manner and allowing evidence to be destroyed).

In contrast to a motion for dismissal, a trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court's ruling when examining the conduct for prejudice because "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3)

whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. *State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991), *superseded on other grounds by statute as stated in, In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

On appeal, defendant alleges that the court erred in denying his motion for mistrial. In fact, the record shows that he never made a motion for mistrial, but moved for a dismissal based upon a violation of the court's ruling in limine. RP 147-48. The progression of events in the trial court was as follows:

Prior to the taking of any evidence, the State sought a ruling as to how much it could adduce regarding the fact that the defendant was being booked into the Pierce County Jail on other charges when booking officers thought he looked familiar and located a Crimestoppers bulletin regarding the burglary on N. Warner that contained a picture of the suspect, who looked very much like the defendant. RP 5-8. Defense counsel responded to this by arguing that none of this evidence was relevant because neither of the officers had any prior contact with the defendant so their opinion of the identity of the person in the picture was not the result of any special knowledge. RP 8-9. The court ruled that the officer could testify:

[A]s long as he does not testify that it is his expert opinion that [the photographs] match but that...to him it seemed that there was a resemblance so that he went further...but ultimately, its going to be the jury's determination as to whether or not the photographs that were taken by the neighbor, ...actually matched Mr. Sortland.

RP 11. Prior to having any officer testify, the prosecutor sought clarification of the court's ruling, to make sure that she did not run afoul of it. RP 93. The Court provided this clarification:

Obviously, the officer was struck enough by the resemblance of the defendant to the individual in the photograph that he went further; and I think he can explain his thought processes in why he identified the defendant as the individual in the photo....

...

I think he can say, I noticed the similarities, and this is why I did A, B, C, or D; but, no, he can't say that it is, affirmatively, the defendant in the photo.

RP 95. The record indicates that the prosecutor informed her witnesses of the court's ruling and that the defendant does not dispute that fact. RP 148-49. Two of the States witnesses, Deputy Centoni and Deputy Duray, corrections officers in the Pierce County Jail, complied with the court's guidelines, when asked to describe the similarities and resemblances they noted in the two photographs. RP 113, 144. When the prosecutor asked essentially the same question of the detective assigned to the case the following occurred:

**Prosecutor:** And when you compared it to the photograph that you had used in the police bulletin, did you notice anything about the two photographs, any similarities, resemblances, anything that stood out to you?

**Detective:** To me, it looked like it was the same person.

**Defense Counsel:** Objection; move to strike.

**Court:** I'll sustain the objection.

**Prosecutor:** Anything in particular about the photographs that stood out to you as far as any characteristics, facial characteristics, that type of thing?

**Detective:** I compared, like, the shape of the ears, the nose, the mouth. The hair was, obviously, changing over time but very similar.

**Prosecutor:** I have no further questions. Thank you.

**Court:** Cross-examination, Counsel?

**Defense Counsel:** Your Honor, I don't have any questions....

RP 123-124. This witness was excused and the State called two more witnesses before resting its case-in-chief. RP 124-146. It was not until this point that defense counsel moved for a dismissal. RP 146-147. So while defendant challenges the denial of his motion for "mistrial" on appeal, the record does not reflect that he ever asked for a mistrial only for dismissal. RP 148-149. It was the court that used the term "mistrial" in denying the motion to dismiss:

**Court:** I'll deny the motion. I don't think it rises to the kind of error that would require the Court to dismiss this case or even to require the Court to declare a mistrial and start over again.

RP 149. The Court did indicate it would consider a limiting instruction, if the defense wanted to propose one. RP 149-50.

Generally, an appellate court does not review an issue that was not raised and addressed by the trial court unless it falls within the exception of RAP 2.5(a) for a manifest error affecting a constitutional right. *Gooldy v. Golden Grain Trucking Co.*, 69 Wn.2d 610, 419 P.2d 582 (1966); *State v. Weygandt*, 20 Wn. App. 599, 605, 581 P.2d 1376 (1978). Defendant makes no showing that he may challenge a denial of a motion for mistrial on appeal when there was no motion for mistrial made in the trial court. As can be seen from the case law cited above, there are considerable different legal standards applicable to a motion for dismissal as compared with a motion for mistrial. For a motion to dismiss, defendant must show that he was actually prejudiced by the error as opposed to showing a substantial probability that the error affected the jury's verdict to obtain a mistrial. A trial court has to consider the dismissal only as a last resort after considering lesser remedies. Defendant seeks the more favorable standards pertaining to mistrials by attempting to recast his action in the trial court. Defendant did not move for a mistrial in the trial court and the

court did not rule on a motion for mistrial; no record exists to assess whether that trial court properly denied a motion that was never made. Defendant did move for a dismissal, so this court can review whether the trial court properly denied his motion to dismiss.

First, the irregularity that occurred in defendant's case was unfortunate but did not rise to government misconduct or mismanagement. The record shows that the prosecutor took steps to properly understand the court's order in limine and that she took steps to convey the court's ruling to her witnesses. RP 93, 148-49. Two of the three witnesses affected by the court's ruling testified in compliance with its terms. RP 113, 144. Defense counsel acknowledged that the prosecutor took steps to ensure compliance with the court's order. RP 148. Thus, defendant did not show government misconduct or mismanagement of its case, but only the failure of a witness to comply with the prosecutor's directions.

Secondly, the nature of the irregularity did not seem so egregious that defense counsel immediately felt that the fairness of the trial had been irreparably harmed. Defense counsel objected promptly when the error occurred and the court promptly sustained the objection. RP 123. The motion for dismissal occurred much later, after two other witnesses had testified. RP 147. The error did not seem to be so egregious and prejudicial at the time it occurred so as to prompt defense counsel to bring

an immediate motion for dismissal or mistrial. See *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) ('The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'). *cert. denied*, 498 U.S. 1046 (1991). The trial court did not find the error to be so egregious as to warrant dismissal and noted that it was probably not even sufficient to warrant a mistrial. RP 149. This assessment of the prejudicial impact is to be given great deference by the appellate court.

Finally, defendant has failed to show that he was actually prejudiced by the error. His objection was promptly sustained, the prosecutor re -asked the question and received a response that complied with the court's ruling; the prosecutor never referenced the detective's improper response in her closing arguments. RP 123, 204. The jury did not convict defendant as charged on one count, so was clearly of a mind to hold the prosecution to its burden of proof. CP 72, 74, 76; RP 240. Defendant's claim of prejudice is not reasonable in that it assumes that the jury will ignore the court's instructions and not engage in its own assessment of the evidence. Essentially defendant argues that a jury will give greater weight to a witness's testimony that two different photographs depict the same person than it will to its *own* assessment of the same two

photographs even though the witness has no greater knowledge, exposure, or acquaintance with the person(s) in the photographs than the jury does. Such a contention is rendered less probable when the court sustains an objection to the testimony in question and both attorneys, during closing arguments, tell the jury members that it is their job to decide whether the person depicted in the photograph was, in fact, the defendant. RP 208, 217-19, 228-29, 230, 236. Defendant's argument as to actual prejudice requires the court to accept as true a contention that jury members will rely on testimony that tells them what they are seeing more than it will rely on their own eyesight and judgment. This court should reject such an improbable argument.

As defendant did not show that he met the standard for a dismissal under CrR 8.3(b), he has failed to show that the trial court abused its discretion in denying his motion for dismissal.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

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

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

In this case, defendant challenges the sufficiency of evidence to support his three convictions. Each of the three crimes will be addressed in a separate section below, followed by a section addressing proof of identity and that the crime occurred in Washington, elements relevant to all three convictions.

a. Residential Burglary

The jury found defendant guilty of residential burglary; it was instructed that the elements of that crime were:

- (1) That on or about the 15<sup>th</sup> day of June, 2009, the defendant entered or remained unlawfully in a dwelling;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

CP 39-71, Instruction 7. Ms. Woodstock testified that she found that the

back exterior basement door on her rental house had been kicked in and was standing open - its deadbolt lock had been destroyed. RP 39-40; EX 4, 5, 6. The reasonable inference from this evidence was that someone had forcibly entered a dwelling, because they did not have a key. Ms. Woodstock further testified that her rental home door was not in this condition the last time she had been at the property. RP 38-40. The reasonable inference from this is that no one was authorized to kick in the door or be in the house. She specifically testified that she had not given defendant – or the person depicted in Exhibit 23- permission to enter her rental home. RP 57-58. Additionally Ms. Woodstock testified that items that had been inside the rental home- a Shop-Vac, tools and two doors that had been installed – were missing. RP 42, 49-51. The reasonable inference from this evidence was that someone had unlawfully entered her dwelling intending to steal items of value from inside or that this person formulated the intent to steal while remaining inside the dwelling. Mr. McCormack testified that he heard noise and saw the man loading doors in to a red pickup truck on June 15, 2009, and that he took pictures of what he saw. It was reasonable to infer that the break in occurred in close proximity to the removal of the items from the rental home. This evidence along with the evidence regarding identity and jurisdiction - discussed below -is sufficient to support a conviction for residential burglary.

b. Malicious Mischief in the Second Degree

The jury found defendant guilty of malicious mischief in the second degree; it was instructed that the elements of that crime were:

- (1) That on or about the 15<sup>th</sup> day of June, 2009, the defendant caused physical damage to the property of another in an amount exceeding \$250; and
- (2) That the defendant acted knowingly and maliciously; and
- (3) That this act occurred in the State of Washington.

CP 39-71, Instruction No. 16. The jury was also instructed that “maliciously” meant that it was done with evil intent or design to vex, annoy or injure another person and that it can be inferred from an act done in “willful disregard of the rights of another.” CP 39-71, Instruction No. 18. As noted above, Ms. Woodstock testified that she found that the back exterior basement door on her rental house had been kicked in and was standing open - its deadbolt lock had been destroyed. RP 39-40; EX 4, 5, 6. The reasonable inference from this evidence was that someone had forcibly entered a dwelling, because they did not have a key. This door had to be replaced. RP 41-42. This evidence shows that the person who kicked in the door completely disregarded Ms Woodstock property rights to keep her property secure from unwanted persons entering her rental home. Ms. Woodstock spent over \$600.00 to repair this door that was

damaged. RP 41-42. Mr. McCormack testified that he heard noise and saw the man loading doors in to a red pickup truck on June 15, 2009, and that he took pictures of what he saw. RP 73-75, 84. It was reasonable to infer that the door was kicked in occurred in close proximity to the time items were removed from the rental home. This evidence along with the evidence regarding identity and jurisdiction - discussed below - is sufficient to support a conviction for malicious mischief in the second degree.

c. Theft in the Third Degree.

The jury found defendant guilty of theft in the second degree; it was instructed that the elements of that crime were:

- (1) That on or about the 15th day of June, 2009, the defendant wrongfully obtained or exerted unauthorized control over property of another; and
- (2) That the property exceeded \$250 in value but did not exceed \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington.

CP 39-71, Instruction No 23. Ms. Woodstock testified that when notified by her neighbor of the break in, that she went to her rental home and found that items that had been inside her rental home the last time she was there

- a Shop-Vac, tools, and two doors that had been installed – were missing. RP 42, 49-51. Mr. McCormack testified that he heard someone on the gravel alleyway that ran between his house and the neighbor's house on June 15, 2009, and when he looked out to see who it was, he saw a red truck parked near the rental house. RP 68-69, 73, 85. He could see one person -a white male, 40ish, thin, with reddish shorter hair –loading things into the truck; he saw the man load doors into the truck and that he had a Shop-Vac in the bed, as well. RP 73-74, 84; EX 14-17, 20-23. Mr. McCormack watched this man- and took photographs of him- for approximately five minutes; during that time no one else came into view or associated himself with the red truck. RP 74, 90. He watched the man get into the red truck and drive away. RP 83-84, 90. The testimony is direct evidence that this man stole the Shop-Vac and the doors from inside the rental home and creates a reasonable inference that he also took the tools that were missing. The items were never returned to the owner which creates a reasonable inference that this taking was done with the intent to permanently deprive the owner of this property. RP 49-51. The owner testified that the replacement value of the doors alone was over \$1,395. RP 44-46. This evidence along with the evidence regarding identity and jurisdiction - discussed below -is sufficient to support a conviction for theft in the second degree.

d. Identity and Jurisdiction

Identity presents “a question or fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.”

*State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618, 619 (1974).

In this case the jury was given photographs of the person whom Mr. McCormack saw coming from his neighbor’s house, carrying doors in his hands, then loading them into a red truck before driving away. EX 14, 16, 22, 23. Exhibit 23, a cropped portion of Exhibit 22, provided the jury with a clear photograph of the man’s face. The jury also had a photograph of the defendant face, also frontal view, taken on March 13, 2010, to compare against the photographs taken on June 15, 2009. RP 111-12, 143. The jury also had the ability to view defendant’s features during the course of the trial.

In addition to this evidence, the jury had two of defendant’s friends acknowledge that the photograph in evidence looked very much like the defendant. RP 168, 177. There was evidence that defendant had prior experience removing doors from an old house for salvage which were then installed in another home. RP 167-170. This evidence showed that defendant had the skills needed for the removal of the doors from inside

the victim's home and that he had knowledge of their value and a connection who might have a profitable use for such doors. *Id.* This was sufficient evidence from which the jury could conclude that the person in the photographs was the defendant. The verdicts should be upheld on the issue of identity.

Ms. Woodstock testified that her rental home was located at 714 N. Warner, Tacoma, in Pierce County, Washington. RP 33. There was sufficient evidence to support the element pertaining to the court's jurisdiction over the crime.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions below.

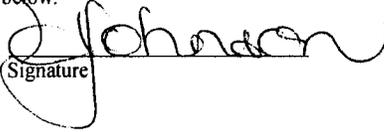
DATED: JUNE 22, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/22/11   
Date Signature

11 JUL 2011 PM 2:15  
STATE OF WASHINGTON  
BY 