

NO. 63253-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAID ALI,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

**BRIEF OF RESPONDENT**

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A. ISSUES

1. An appellate court will overturn a trial court's admittance of out-of-court identification evidence only if the identification violates the defendant's due process rights. Here, the line-up procedure used was not suggestive, and the identifications were reliable. Did the trial court properly admit this line-up evidence?

2. A defendant had ineffective assistance of counsel if his trial counsel lacked competence and this caused prejudice. Here, the defendant's trial counsel objected to a joinder of the counts, but the court ruled in favor of joinder and later held that severance of the counts was not necessary. Was the defendant's trial counsel ineffective for not further litigating this matter with a motion to sever the counts?

3. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could be satisfied of guilt beyond a reasonable doubt. Here, the victims identified the defendant as the ring leader who initiated and participated in the assault and robbery of the victims. Was there sufficient evidence that the defendant committed these crimes?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Said Ali was charged by second amended information with the following eight counts: (1) First Degree Robbery with a Deadly Weapon Enhancement; (2) First Degree Robbery with a Deadly Weapon Enhancement; (3) First Degree Assault with a Deadly Weapon Enhancement; (4) Attempted First Degree Robbery; (5) First Degree Robbery; (6) Attempted First Degree Robbery; (7) First Degree Robbery; and (8) First Degree Robbery. CP 49-55.

Defense counsel objected to the joinder of count seven prior to trial. RP 11-12. The trial court found that joinder was appropriate as to that count and as to all of the counts due to the case facts, and later entered written findings that severance was not necessary for a fair trial. RP 16; Supp. CP \_\_ (Sub 73, Findings of Fact / Conclusions of Law).

A CrR 3.6 pretrial hearing was held, where Ali moved to suppress the identification made by each victim in the case. RP 42-278. This motion to suppress was denied by the trial court. RP 321; Supp. CP \_\_ (Sub 73). A jury found the defendant guilty as charged at trial. RP 1400-01. The Honorable Laura Inveen

imposed a standard range sentence. CP 147-56. Ali now appeals his conviction. CP 157-68.

## 2. CrR 3.6 FACTS

Ali challenged out of court identifications made by the following victims: Martin (count 1); Halliburton (counts 2 and 3); Douglass (count 4); and Longbrake (count 5). CP 49-51; Supp. CP \_\_ (Sub 73). Each of these victims separately identified Ali in a line-up.<sup>1</sup> RP 162-67; CP 49-51; Supp. CP \_\_ (Sub 73).

Seattle Police Detective Brad Craig and Sergeant Kevin Aratani prepared the line-up, which included Ali and five other volunteers from the King County Jail. RP 137; Supp. CP \_\_ (Sub 73). During the line-up procedure, the police did not indicate that Ali was the suspect in the case. RP 188-89, 203-05; Supp. CP \_\_ (Sub 73). The identifying race and physical features of all participants, including Ali, were all similar. RP 137, 140-42, 203;

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<sup>1</sup> Victim Rollins (count 6), who was with Longbrake when they were robbed, could not identify a suspect from the line-up. RP 176-77; CP 51-52; Supp. CP \_\_ (Sub 73). Victim Terpstra (count 7) did not participate in the line-up identification, because she already identified Ali in a show-up procedure at the time and location of her robbery. CP 52; Supp. CP \_\_ (Sub 73). Victim Walker (count 8) was unavailable for the line-up procedure and had already identified Ali in a photographic montage. CP 53; Supp. CP \_\_ (Sub 73). Other, non-victim, witnesses also participated in the line-up, but were not able to identify anyone. RP 137-39.

Supp. CP \_\_ (Sub 73); Supp. CP \_\_ (Sub 54A, Pretrial Ex. 7). All of the participants had birth dates within three years of each other, except participant number one, who was six to nine years older than the other participants. RP 137, 140-42, 204-05; Supp. CP \_\_ (Sub 73); Supp. CP \_\_ (Sub 54A, Pretrial Ex. 7).

The victims had identified the suspect as having either an African-type foreign accent or an American accent. RP 180; Supp. CP \_\_ (Sub 73). Each participant spoke a phrase in the line-up. RP 147; Supp. CP \_\_ (Sub 73). Participant number one had a similar African-type foreign accent to Ali, and the others had American or Spanish-sounding dialects. RP 187; Supp. CP \_\_ (Sub 73). Ali's defense attorney, Leo Hamaji, was present at the line-up and observed some discrepancy in height, weight, and age, but noted nothing visually irregular with the line-up. RP 152, 169, 264-65, 271, 274; Supp. CP \_\_ (Sub 73). He testified that he observed Ali and participant number one as the only two with African-type foreign accents. RP 266; Supp. CP \_\_ (Sub 73). However, none of the victims indicated that their identifications were based on the suspects' accents or words spoken. RP 167; Supp. CP \_\_ (Sub 54, Pretrial Ex. 7); Supp. CP \_\_ (Sub 73). The court found that any variance in speech had little if any impact on

the victims in their identification. RP 319-20; Supp. CP \_\_\_\_  
(Sub 73).

### 3. TRIAL FACTS

In the late hours of April 23, 2008, Stephanie Martin was leaving her sorority at the University of Washington to visit her boyfriend. RP 331-32, 340. On the way, she was approached by a group of men from behind. RP 343-44. The men demanded money, and one brandished a knife. RP 344-45. Another man stole Martin's cell phone. RP 349-50. As the group of men left, she could see the man with the knife. RP 351-53. Martin later identified Ali as this armed man at both the line-up and in court, based on his facial features. RP 344-45, 352-55; Supp. CP \_\_\_\_ (Sub 54a, Ex. 13).

Later that night, in the nearby University District, Jonathan Douglass was leaving a bar with his friend, Carl Halliburton. RP 490-91. A group of men asked Douglass and Halliburton if they wanted to buy marijuana. RP 496, 980, 990-91. Douglass and Halliburton said no, but the men encircled them and punched Douglass, knocking him to the ground. RP 497, 499. The men attempted to take Douglass' wallet. RP 500, 503-04, 512, 990.

While coming in and out of consciousness, Douglass saw what looked like a semiautomatic pistol in the hands of one of the attackers. RP 505, 508. Douglass identified Ali at both the line-up and in court as one of the men who assaulted him and tried to rob him. RP 520-21; Supp. CP \_\_\_ (Sub 54a, Ex. 29).

As Douglass was being kicked and beaten on the ground, Halliburton tried to defend himself. RP 504-05, 982-83. Halliburton identified Ali at the line-up and in court as the "ring leader" who initiated the confrontation and began the assault. RP 1006; Supp. CP \_\_\_ (Sub 54a, Ex. 63). During the melee, one of the men stole Halliburton's cell phone and wallet. RP 980, 990. After taking Halliburton's property, one of the men stabbed Halliburton in the stomach with a knife. RP 986-90.

A week later, on the evening of April 30, Joshua Longbrake was walking with his girlfriend, Mackenzie Rollins, around Greenlake in Seattle. RP 721-22. Three men came from out of the bushes running toward Rollins and Longbrake. RP 725-26, 742-43, 727. One man was holding what looked like a gun. RP 725-26, 743-44, 747. The gunman demanded money from Longbrake and put the pistol to Longbrake's head. RP 725, 736. Longbrake later identified Ali as this gunman both at a line-up and in court, based

on Ali's facial features. RP 752, 755, 759; Supp. CP \_\_\_ (Sub 54a, Ex. 12). Longbrake gave the men his cell phone and wallet. RP 725-26. Rollins was terrified as they searched her pockets, and she did not want to make eye contact, fearing retaliation. RP 721, 740, 746.

The next day, on May 1, Katherine Terpstra was leaving her studies at the University of Washington and returning to her dorm. RP 579-80. She heard footsteps from behind and then was pushed to her knees onto the pavement. RP 588-89, 592. She saw the assailant and another man. RP 590. The assailant grabbed her purse and the two men ran away. RP 593-94. Terpstra called the police. RP 594-97. Terpstra identified Ali as the assailant in a show-up identification at the scene that evening, and also in court. RP 609-12, 617. When Ali was arrested that same night while driving, he was seated next to Terpstra's purse and an air pistol. RP 428, 438, 448, 505-06, 750. The pistol resembled the gun used in the robberies of Douglass and Longbrake. Id.

On the night of May 27, Colin Walker was walking to his aunt's house in the Fremont neighborhood of Seattle. RP 788, 791-92. Two men approached him, one asking to use Walker's cell phone. RP 804-05. Walker obliged. RP 805. As the man started

to use the phone, Walker was struck from behind, fell to the ground, and blacked out. RP 805-06. When Walker regained consciousness, he heard yelling and demands for money. RP 807-08. The man who had asked for the cell phone then stomped on Walker's head, again knocking him unconscious. RP 810-14. Walker identified Ali in a photo montage as the man who first contacted Walker for the cell phone and kicked him in the head before stealing his backpack. RP 819-25.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE VICTIMS' IDENTIFICATION OF ALI.

Ali claims that the admission of identification evidence based on an impermissibly suggestive line-up violated his due process rights. He argues that the line-up was overly suggestive because he was one of only two line-up participants with an East African accent, and he was the shortest, youngest, and thinnest line-up participant. This suggestiveness, he argues, allowed for a very substantial likelihood of irreparable misidentification. Because the trial court found that speech in the line-up had little, if any, impact in the line-up identification, and since there were few differences

noted in the physical characteristics of the participants, the line-up did not violate Ali's due process rights.

The validity of an identification procedure is generally left to the jury as a question of fact. State v. Smith, 37 Wn. App. 381, 385, 680 P.2d 768 (1984); State v. Lane, 4 Wn. App. 745, 750, 484 P.2d 432 (1971). A defendant is guaranteed a fair identification process; that is, identification evidence should be admitted and presented to the jury unless it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. State v. Ortiz, 34 Wn. App. 694, 699, 664 P.2d 1267 (1983); see State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985).

As a result, Washington courts apply a two-part test to determine whether the trial court abused its discretion in admitting identification evidence. See State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). First, the defendant has the burden of showing the identification procedure was impermissibly suggestive. Id. If the defendant fails to meet this burden, the inquiry ends. Id. If the court finds the procedure was impermissibly suggestive, the identification only violates due

process if the procedure created a substantial likelihood of misidentification. Id.

a. The Line-up Identification Was Not Suggestive.

Washington courts consider the totality of the circumstances to determine whether an identification procedure was impermissibly suggestive. See Vickers, 148 Wn.2d at 118-19; State v. Courtney, 137 Wn. App. 376, 385-86, 153 P.3d 238 (2007); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 966 (1987). Courts have considered various factors to determine suggestiveness, including: the showing of only one suspect, the statements made to the witness, and the appearance of the defendant. See e.g., State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992) (only one suspect); Courtney, 137 Wn. App. at 385-86 (statements to witness); Guzman-Cuellar, 47 Wn. App. at 336 (defendant in handcuffs). A defendant asserting that a police identification procedure denied him due process bears the burden of proving the procedure was unnecessarily suggestive. State v. Guzman-Cuellar, 47 Wn. App. at 335.

In this case, Ali has not challenged any of the trial court's written findings. Thus, they are verities on appeal. State v.

Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

The trial court here found that law enforcement did nothing to indicate which participant was the suspect in the case. Supp. CP \_\_ (Sub 73). Even Ali's defense attorney at the line-up noted that he observed nothing physically irregular about the line-up. Id. All six participants in the line-up were African-American men, between 5'7" and 6'0", who weighed between 140 to 180 pounds. Supp. CP \_\_ (Sub 54A, Pretrial Ex. 7). These physical characteristics matched those described by the victims about the suspect, who was believed to be an African-American man, between 5'7" to 6'1", and 150 to 180 pounds. Supp. CP \_\_ (Sub 73). In concluding that the line-up was not impermissibly suggestive, the trial court specifically referenced and considered these similar physical characteristics. Supp. CP \_\_ (Sub 73); Supp. CP \_\_ (Sub 54A, Pretrial Ex. 7).

Ali maintains that since he was the shortest, thinnest, and youngest member of the line-up, and he was one of only two participants who had an East African accent, the process was impermissibly suggestive. However, the victims gave various

descriptions of the suspect, ranging between 5'7" and 6'1", and between 150 to 180 pounds. Supp. CP \_\_\_ (Sub 73). The participants, including Ali, generally matched this description. (Sub 54A, Pretrial Ex. 7).

First, Ali's claim that he was the shortest participant in the line-up is incorrect; another was shorter. RP 140-42; Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 7). Moreover, a majority of the remaining panelists were within an inch of height of Ali, and all the participants were within the suspect's height range. Id. Thus, no line-up participant was more suggested than any other due to his height.

Second, while Ali weighed the lightest of the participants; two others were within 10 pounds of him. RP 140; Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 7); Supp. CP \_\_\_ (Sub 73). Furthermore, Ali weighed 140 pounds, less than the suspect's weight range, making it less suggested that he was indeed the suspect. Id.

Third, though Ali was the youngest of the participants, a majority of the remaining participants had birth dates within two years. RP 140-42; Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 7). One was only a week older. Id. Five of the six participants were within two and a half years of each other in age. Id. Such a tight age range would do little to suggest that Ali was the suspect.

Finally, Ali argues that his East African dialect singled him out in the line-up. The trial court found that Ali spoke English well and did not have much of an accent. RP 187; Supp. CP \_\_\_ (Sub 73). As a result of this fact and since the victims did not indicate their identifications were based on words or accents, the court found that "the variance in the line-up participants' speech had little, if any impact on the observers, given the variety of initial descriptions of their speech and their post-selection interviews." Supp. CP \_\_ (Sub 73). Thus, the line-up procedure either through speech or physical characteristics did not single out Ali, and thus was not suggestive.

Even a suggestive procedure such as a show-up identification is not per se impermissibly suggestive. Guzman-Cuellar, 47 Wn. App. at 336 (citing Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986)). A defendant asserting that a police identification procedure denied him due process must show that the procedure was *unnecessarily* suggestive. Foster v. California, 394 U.S. 440, 442, 89 S. Ct. 1127, 1128, 22 L. Ed. 2d 402 (1969); State v. Traweek, 43 Wn. App. 99,

103, 715 P.2d 1148 (1986); State v. Booth, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983).

In this case, there was nothing unnecessarily suggestive to the victims that Ali was the individual they should identify as the suspect. Ali is unable to prove that the line-up procedure was impermissibly suggestive. Thus, his claim fails.

b. There Is No Substantial Likelihood Of Irreparable Misidentification.

Even if this Court were to find that the line-up procedure was impermissibly suggestive, the identifications were still reliable. In order to determine the admissibility of the identifications, this Court examines each procedure to determine whether, under the totality of the circumstances, it was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968). Reliability is the linchpin in determining the admissibility of identifications. Manson, 432 U.S. at 114. The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the prior description of the criminal, the

level of certainty demonstrated at the confrontation, and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

The facts elicited at the CrR 3.6 hearing<sup>2</sup> indicate that Ali cannot satisfy his burden that there was a very substantial likelihood of irreparable misidentification. Ali robbed, assaulted, or attempted to rob each victim. Supp. CP \_\_ (Sub 54A, Pretrial Ex. 11-14). For example, in Halliburton's case, Ali initiated the confrontation and began the assault. CP 50; Supp. CP \_\_ (Sub 54A, Pretrial Ex. 11). Each victim was close enough to view Ali.

The attention of the victims was heightened during these crimes. Unlike a bystander or person otherwise disinterested in the event, each identifying witness was a victim of the offense. Supp. CP \_\_ (Sub 54A, Pretrial Ex. 11-14). Thus, as victims of the

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<sup>2</sup> In his appellate brief, Ali appears to rely on additional evidence presented to the jury at trial related to the weight of the identification evidence, instead of only addressing the pretrial evidence that the trial court considered at the CrR 3.6 hearing. See RP 1446. While these trial facts would not change the trial court's ruling in the CrR 3.6, our brief addresses only that evidence admitted at the CrR 3.6 hearing. See RP 42-278.

crimes, they would have been particularly attentive to the violent crimes that were being perpetrated against them.

The accuracy of the victims' descriptions during these events was high. The victims had identified the suspect as being an African-American man, ranging between 5'7" and 6'1", and between 150 to 180 pounds. Supp. CP \_\_\_ (Sub 73); see supra § C.1.a. Ali was an African-American man, 5'8", 140 pounds. Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 7).

The four victims who made line-up identifications only selected Ali from the six person line-up. In particular, Halliburton was 100% sure that Ali initiated the robbery and assault of him. RP 164; Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 11). Douglass was 90% sure that he was correct. RP 166; Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 14). The victims displayed certainty in their identification of Ali.

Finally, the length of time between each crime and the line-up identification was relatively short. The line-up was on June 11, 2008. Supp. CP \_\_\_ (Sub 54A, Pretrial Ex. 11-14). Each robbery and assault took place less than two months earlier. Id. Accordingly, the memory of the crime was still fresh in the mind of each victim during the line-up.

The totality of these circumstances makes the identification by each of these victims reliable. Accordingly, Ali cannot prove that there is a substantial likelihood of irreparable misidentification. As such, Ali's due process claim fails.<sup>3</sup>

## 2. ALI'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Ali claims that trial counsel was ineffective because he failed to sever the counts in this case. He contends that this failure to do so prejudiced him. However, Ali's defense counsel objected to and litigated about the joinder of some counts, and the trial court later found that the counts were properly joined and that severance was

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<sup>3</sup> The only claim raised in Ali's appellate brief is the suppression of the line-up identifications. However, in the last line of that section, without any previous analysis, Ali claims that the "show up and photo montage identifications [and] . . . in-court identifications should have been suppressed as well." Appellant's Brief at 24. Without factual basis or analysis, Ali is unable to satisfy his burden to prove that the show-up and photo montage out-of-court identifications violated Ali's due process. Moreover, the trial court factually found that "no evidence was elicited to support a finding that the show-up was impermissibly suggestive" and found that since the victim was properly admonished, there was insufficient proof to show a likelihood of irreparable misidentification. Supp. CP \_\_\_ (Sub 73). The trial court found that in addition to the line-up procedure, the show-up and montage identifications were not impermissibly suggestive and did not violate Ali's due process. *Id.* Ali has not assigned error to these findings or to the trial court's admittance of this evidence. Petitioner's Brief at 3. Thus, since the nature of these show-up and in court identification challenges are not "perfectly clear...where the challenged finding can be found in the text of the brief," these trial court findings are verities on appeal. RAP 10.3(g), 10.4(c); State v. Neeley, 113 Wn. App. 100, 104-05, 52 P.3d 539 (2002).

not necessary for a fair trial in this case. As such, Ali's claim of ineffective assistance fails.

Generally, failure to bring a motion to sever and renew it during trial renders the issue waived. CrR 4.4. But failure to bring a motion to sever can be raised and considered in a claim for ineffective assistance of counsel. In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004). To prove he was prejudiced by the joined counts, Ali must show that (1) a competent attorney would have moved for severance, (2) that the motion likely would have been granted, and (3) that if the counts were tried separately, there was a reasonable probability that he would have been acquitted. See State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

There is a strong presumption that a trial counsel was competent and not deficient at trial. State v. Sardinia, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). Deficient performance is performance that falls below an objective standard of reasonableness based on consideration of all the circumstances. McFarland, 127 Wn.2d at 334-35. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient

representation based on the record established in the proceedings below.” Id. at 335.

Under CrR 4.4(c)(2)(i), a trial court has broad discretion to grant severance when “it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant.” However, separate trials are not favored due to judicial economy concerns. In re Davis, 152 Wn.2d 647, 711, 101 P.3d 1 (2004). A defendant seeking severance must demonstrate that severance outweighs the concern for judicial economy. Id. at 711-12.

On appeal, Ali claims that his trial counsel was deficient for not moving to sever counts. However, Ali does not mention that his trial counsel objected to the State's motion to join. RP 11; Supp CP \_\_ (Sub 48, Trial Memorandum/State). The State also expressly opposed severance in its trial brief. Id. The matter of joinder of count seven was litigated by the parties before trial. RP 11-16. In response, the trial court ruled that the facts of all of the counts were of a similar character and scheme to justify joinder, though it did not expressly address severance in its oral findings. RP 16; Supp. CP \_\_ (Sub 73). Later, in the trial court's written findings, the court found that in this case "Severance is not

necessary to promote a fair determination of the defendant's guilt or innocence of each offense." Supp. CP \_\_ (Sub 73).

There is no merit to Ali's claim that counsel was deficient for not making a separate motion to sever after the matter was essentially resolved by the trial court in its joinder ruling. Such a motion would serve no value to Ali. Since the analysis would ultimately be the same, no competent counsel would expect that the court would reconsider its earlier joinder ruling. The court had already exercised its broad discretion on the matter. Later, in written findings, the court stated what was already known -- that severance of counts was not necessary in this case. Supp. CP \_\_ (Sub 73). A competent attorney would not have moved for severance after the court's ruling on joinder. Because Ali cannot prove that his trial counsel was deficient, Ali's claim of ineffective assistance fails.

Even if Ali's counsel had been deficient for failing to bring a separate severance motion, the record establishes that there would be no prejudice. This is because the court, in its written findings, expressed that severance was not necessary in this case. See Supp. CP \_\_ (Sub 73). Thus, Ali cannot establish that the motion

to sever would have been granted if made. Ali's claim fails as to this point, as well.

Finally, Ali cannot establish that he would have been acquitted if the counts were tried separately. Each count involved evidence equally strong, with victims individually and separately identifying Ali. See supra § B.3. Moreover, the court properly instructed the jury to consider each count separately.<sup>4</sup> CP 64. There was no prejudice and thus no ineffective assistance of counsel.

3. THERE IS SUFFICIENT EVIDENCE TO SUPPORT ALI'S CONVICTIONS.

Ali claims that there is insufficient evidence to convict him for counts two, three, and four. These are the convictions related to his assault and robbery of victims Douglass and Halliburton. There is no merit to this claim.

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<sup>4</sup> The Court instructed the jury through Jury Instruction No. 7 that:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 64.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” Id. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The appellate court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Douglass testified that he left a bar in Seattle's University District with his friend Halliburton when four men approached him. RP 490-91. The men first asked Douglass if he wanted to buy marijuana. RP 496. After Douglass said that he was not interested, four men formed a semi-circle around Douglass. RP 497, 499. One of the men on Douglass' right side punched Douglass, knocking him to the ground. RP 499.

All four of the men then began kicking Douglass in the head and side as he lay in a fetal position, while one of the men reached for Douglass' wallet. RP 500, 503-04, 512, 990. Douglass identified Ali in a line-up and in court as one of these four men who assaulted Douglass and tried to rob him. RP 520-21; Supp. CP \_\_\_ (Sub 54a, Ex. 29).

Douglass attempted to flee across the street, but was pushed to the ground again. RP 504-05, 536. When Douglass looked up, he saw four more men in the group, with one of them holding what appeared to be semiautomatic pistol. RP 505. Weeks later, police found a similar-looking pistol under a passenger car seat, where Ali was seated. RP 428, 438, 448, 505-06. The group of men beat Douglass into unconsciousness. RP 508. When he regained consciousness, he saw Halliburton covering his stomach with a napkin as Halliburton bled from a knife wound. RP 508-09.

Halliburton testified that after he and Douglass rebuffed the men's attempts to sell marijuana, the men came and encircled Douglass and him. RP 980, 990-91. One of the men hit Douglass in the head and Douglass fell to the ground, where the men continually kicked and punched Douglass. RP 980-82. Halliburton

identified Ali at the line-up and in court as the "ring leader" who initiated the confrontation and began the assault. RP 1006; Supp. CP \_\_ (Sub 54a, Ex. 63). Halliburton described Ali as "one of the lead combatants." RP 1006. Halliburton attempted to defend himself as Ali and others faced off with Halliburton in the assault and robbery. RP 982. Unlike Douglass, however, Halliburton did not fall to the ground, despite the attacks. RP 982-83. During the course of the assault, one of the men stole Halliburton's cell phone and wallet. RP 980, 990. After the robbery, one of the men stabbed Halliburton in the chest. RP 986.

Ali does not challenge that there is sufficient evidence of the crimes of Attempted First Degree Robbery, First Degree Robbery, and First Degree Assault. Instead, he argues that the evidence as to these counts is insufficient to prove that Ali was doing anything more than being "present on the crowded street where [the victims] were attacked and robbed. . ." Appellant's Brief at 30.

To the contrary, the evidence establishes that Ali was identified as the "ring leader," who initiated the assault, who began kicking Douglass at the start of the robbery, who faced off with Halliburton, and who was later in constructive possession of the pistol that was used in the robbery. Substantial evidence

established Ali's direct involvement in committing counts two, three, and four.

Ali alludes to the fact that since Halliburton and Douglass were drinking that night, the credibility of their testimony should be questioned. However, the credibility of witnesses and the persuasiveness of their testimony are left to the jury. Fiser, 99 Wn. App. at 714. Viewing the evidence in the light most favorable to the State, the jury could have found Halliburton and Douglass' testimony credible and persuasive. Ali's claim fails.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ali's conviction.

DATED this 17<sup>th</sup> day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

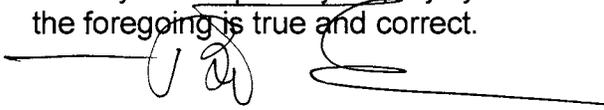
By: 

MICHAEL J. PELLICCIOTTI, WSBA #35554  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James Bible, the attorney for the appellant, 1130 NW Market St., Seattle, WA, 98107, containing a copy of the Brief of Respondent, in STATE V. SAID ALI, Cause No. 63253-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
Name \_\_\_\_\_ Date 05/18/10  
Done in Seattle, Washington