

NO. 66819-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHAWN CASEY,

Appellant.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly allow the victim to identify Casey in court when there was no showing that the prior show-up identification procedure was impermissibly suggestive and no showing that an in-court identification was impermissibly suggestive and the identification was reliable?

2. Does CrR 3.6(b) require the entry of findings when no factual hearing was conducted?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On February 14, 2011, the parties proceeded to trial in this case on the State's Amended Information, charging Shawn Casey with (Count I) Residential Burglary, (Count II) Attempted Residential Burglary, (Count III) Assault in the Fourth Degree, and (Count IV) Bail Jumping. CP 19-20. The trial was presided over by the Honorable John P. Erlick and spanned five days. 1RP-5RP<sup>1</sup>.

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<sup>1</sup> In accord with appellant's citations, the State refers to the verbatim report of proceedings as follows: 1RP (2/14/11); 2RP (2/15/11); 3RP (2/16/11); 4RP (2/17/11); 5RP (2/18/11); and 6RP (3/9/11 Sentencing).

Outside the presence of the jury, the court heard several pretrial motions. At a pretrial hearing, the defense moved to suppress any in-court identification of Casey by the victim named in Count I, Mari Iseman. 1RP 68. Initially, the trial court considered conducting an evidentiary hearing to determine whether Iseman was able to make an in-court identification of Casey and if so, whether that identification was tainted by the prior show-up identification the day of the incident. 1RP 74. The State objected to conducting such a hearing out of concern that it would in essence create evidence and thereby create an additional basis for defense to argue that any potential subsequent in-court identification in the presence of the jury was tainted. 1RP 77. Defense counsel also indicated that he believed an evidentiary hearing would taint any in-court identification that followed. 1RP 72. Thus, defense counsel would not agree to waive any argument of taint that might result from holding such an evidentiary hearing outside the jury's presence. 2RP 8.

After review of the case law and given both parties' opposition to the motion, the trial court ultimately decided not to hold an evidentiary hearing outside the jury's presence to determine whether Iseman was able to make an in-court identification of

Casey. 2RP 9. The trial court also denied Casey's motion to preclude Iseman entirely from making an in-court identification of the man she saw in her home (in the event she was able to do so). 2RP 10. The trial court found that an in-court identification would not be impermissibly suggestive given the facts. 2RP 10-11. The court also noted the defense's concerns regarding any identification of Casey, or lack thereof, would go to the weight of the evidence, not the admissibility of the evidence, and could be adequately addressed in cross-examination of the witnesses and closing argument. 2RP 9.

Therefore, Iseman was permitted to make an in-court identification of Casey during the State's case. 3RP 25. Casey was given full latitude by the trial court to cross examine witnesses regarding Iseman's prior inability to identify Casey at the show-up the day of the crime. 3RP 45-56.

The jury convicted Casey on counts I, III, and IV. Casey was acquitted on count II. He was sentenced March 9<sup>th</sup>, 2011. 6RP 1; CP 89-97; CP 98-100. This timely appeal followed.

## 2. SUBSTANTIVE FACTS

### Mari Iseman's Testimony

On May 30<sup>th</sup>, 2010, at around noon, Iseman was alone with her dogs at her home in Auburn, Washington. 3RP 5, 24. She was in her bedroom in the back of the house and had numerous windows open due to the warm weather. Iseman heard a thump coming from the living room area of her house. 3RP 13. She went to investigate the noise and saw a dark object on the couch, which then jumped or fell out of the window just behind the couch. 3RP 18. She walked over to the couch to look out the window and a man immediately "popped up" and stood just outside her window. 3RP 19-20. Iseman stood face to face with the man and recalled he was wearing dark clothes. Id. Once her memory was refreshed with her prior written statement, Iseman recalled specifically telling police later that the man was wearing a black shirt and jeans. 3RP 21.

Iseman testified that she was approximately two feet from the man as he stood outside her window and she stood in front of the couch. 3RP 22. She could see his face; the sun was shining brightly from behind them. 3RP 23. Iseman asked the man who he was, and he responded, "I need help." 3RP 24. At this point during

direct examination, Iseman identified Casey as the man at her window. Defense renewed their objection to the in-court identification by Iseman, and the objection was overruled. 3RP 25. Iseman then testified that she again asked Casey who he was, and he responded by saying, "I need money." Iseman then told Casey she was going to call the police, and Casey responded by asking, "Do the dogs bite?"<sup>2</sup> 3RP 26. She reiterated that she was going to call the police and Casey asked, "Why?" She then turned to call 911, and Casey began walking away from the house. Iseman went out the front door to keep visual contact with Casey and watched him walk in a northerly direction down the street and join up with two other individuals. 3RP 28, 31. Iseman described to the 911 operator Casey's clothing, direction of travel, and a description of the clothing of the two others Casey was with. 3RP 31. She followed them down the street at a distance of between 20 to 50 yards. 3RP 33. She stopped following them about two blocks north, when she knew police were responding, lost sight of them, and returned to her home. 3RP 35.

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<sup>2</sup> Iseman testified that she had three dogs at the time, which also responded to the "thump" in the living room and were in the room and barking during her conversation with Casey.

A short time later, police called and asked Iseman to respond to a Metro bus parked a few blocks away to see if she could identify anyone on the bus as the suspect. 3RP 36. Police had her board the bus and walk down the center aisle and look at all of the passengers seated on the bus. She testified that this made her "super" nervous and teary-eyed. Everyone on the bus was staring at her. She did not recognize anyone on the bus and returned home. 3RP 37-38. Approximately 15-30 minutes later, police came to Iseman's home, picked her up, and took her a few blocks away to see if she could identify the suspect from a group on the street. 3RP 39. She recalled there were approximately a dozen individuals out on the street trying to see what was going on. She sat in the back of the patrol car and looked out the window at the individuals surrounded by policemen. 3RP 40. She recalled there being at least two individuals with the police, and they were about a house-length away from where she sat. 3RP 41. She indicated that she recognized the clothing of two individuals with police as the same clothing worn by the two people that walked away with Casey after the confrontation at her window. 3RP 42. She also indicated that from where she was seated in the patrol car, she could not see

their faces clearly. The street was tree-lined, and there were shady areas at that time of day. 3RP 43.

Police then took Iseman back home and had her complete a written statement. She testified in trial that she had not seen Casey since that day, but that she was able to identify him because he had stood right next to her and she recognized his facial features. 3RP 44. She indicated that she was sure Casey was the same person she had encountered at her living room window. 3RP 45.

On cross-examination, Iseman testified that she observed what she believed to be a fresh wound on the suspect's hand. 3RP 51. She also indicated that her verbal exchange with Casey was, for all appearance's sake, calm. 3RP 52. She indicated that she told police that the suspect could have been "dark complected" and could have been Hispanic, but that the lighting at her window was a little different. Iseman indicated that she was not thinking so much about the skin as she was noting the facial features- a common thing for her as Iseman is employed in the medical field. 3RP 53.

On redirect, Iseman testified that Casey, as he appeared in court eight months later at trial, did not have what she would consider a dark complexion. She indicated that her definition of

"dark complected" would include someone with a tan. 3RP 54. She testified that Casey looked lighter skinned at the time of trial than he did on the day of the attempted burglary. 3RP 55.

On re-cross, Iseman admitted that the incident was fresher in her mind when she gave police her written statement than it was the day of trial, some eight months later. She also acknowledged that her written statement indicated that she was scared and confused when the man was inside her house. She also acknowledged that her written statement indicated that she did not get a good look at his face, but testified that she did not know why her statement said that, as she and Casey stood face to face. 3RP 56.

#### Cynthia Davis

Cynthia Davis testified that she was at her home in Auburn with her partner Judy<sup>3</sup> when she observed Casey in her fenced back yard, on her back patio, near her back door, talking on a cell phone. It was approximately 12:30 PM. 3RP 67-68. She confronted Casey, and he indicated that he got lost taking a shortcut. 3RP 69.

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<sup>3</sup> The last name of Davis' partner Judy is not mentioned anywhere in the record and therefore she will be referred to by her first name. No disrespect is intended.

She escorted him out of her fenced back yard<sup>4</sup>. 3RP 70. Davis watched as Casey loitered around for a while talking to two other individuals at the gas station across the street. 3RP 72. Judy called police while Davis kept an eye on Casey. 3RP 73. Casey walked back across the lawn towards Davis' neighbor's back yard. She asked what he was doing and he indicated that he needed his phone. She told him repeatedly he could not go in the neighbor's back yard. 3RP 75. Davis' neighbor, Bob Reynolds, came outside and blocked Casey's access to the Reynolds' back yard. Casey tried to punch Reynolds and a scuffle ensued. 3RP 76. Police arrived and took Casey into custody. 3RP 80.

#### Officer Matt

Officer Matt arrived at the location where Casey was struggling with Reynolds and placed him into custody. 3RP 125. He testified that Casey had scratches on his forearms when he placed him under arrest. 3RP 136.

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<sup>4</sup> Casey's actions in Davis' back yard was the basis for the Attempted Residential Burglary charge in count II. Casey was acquitted on this count.

Officer Postawa

Officer Postawa testified that he received a description of the suspects in the attempted burglary of Iseman's home through dispatch: a Hispanic or dark-complected male wearing a black shirt or jacket and dark jeans, two other males that were possibly "dark-complected," one wearing a plaid shirt and the other wearing a jacket, jeans and backpack. 3RP 164. Postawa testified that he found people he believed matched that description when he happened upon Casey, who was detained by other officers when he arrived, and Casey's two companions who were pointed out to him by witnesses as they sat across the street. 3RP 164.

Officer Christian

Officer Christian was on duty the day of this incident and responded to a 911 dispatch and began searching Iseman's area on foot for suspects matching the description she gave the 911 operator. 3RP 144. Eventually he responded a few blocks away to where other officers already had Casey in custody. Casey was seated in the back of a patrol car and was sweating profusely. 3RP 148. There were two other individuals near the patrol car and he heard another officer tell them that they were free to leave.

3RP 147. Officer Christian spoke with Casey and asked him what he was doing in the area. Casey indicated that he was intending to have lunch with his girlfriend. 3RP 149. Officer Christian asked Casey why he was in the Reynolds' back yard and he indicated that he had lost his cell phone. 3RP 150. Officer Christian asked Casey if he knew the difference between a felony and a misdemeanor- specifically Burglary and Trespass. Casey responded affirmatively, and told Officer Christian that he "didn't break into that lady's house. I just asked her if she had some money." He mentioned that he had just talked to her through the window. 3RP 152. Officer Christian also testified that Casey said he "never made it through the window" and he had "just talked to her from standing outside." Casey said he needed money for the bus. 3RP 153.

C. ARGUMENT

1. APPELLANT HAS FAILED TO MEET HIS BURDEN IN DEMONSTRATING THAT THE IDENTIFICATION PROCEDURE EITHER THE DAY OF THE INCIDENT OR IN TRIAL WAS IMPERMISSIBLY SUGGESTIVE, AND THEREFORE THE IN-COURT IDENTIFICATION WAS PERMISSIBLE.

A defendant bears the burden of demonstrating that an identification procedure was impermissibly suggestive. State v.

Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If he fails, the inquiry ends. State v. Vaughn, 101 Wn.2d at 609-10, 682 P.2d 878 (1984). If he proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984), review denied, 140 Wn.2d 1027, 10 P.3d 406 (2000)). The likelihood of misidentification, if present, violates Casey's right to due process of law. Neil v. Biggers, 409 U.S. 188, 197-98, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Appellate courts review alleged violations of due process de novo. In re Detention of Fair, 167 Wn.2d 357, 362, 219 P.3d 89 (2009).

Show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987) (citing Neil v. Biggers, 409 U.S. 188, 198; and State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986)).

Whether there is a due process violation depends on the totality of the circumstances. Rogers, 44 Wn. App. at 515, 722 P.2d 1349 (citing Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); State v. Kraus, 21 Wn. App. 388, 391-92,

584 P.2d 946 (1978)). “The key inquiry in determining admissibility of the identification is reliability.” Id. at 515–16, 584 P.2d 946, citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Factors probative of reliability 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 witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Neil, 409 U.S. at 199–200.

Here, the trial court found that there was no conduct on the part of either law enforcement or the State that would result in impermissible suggestibility therefore allowed Iseman to testify at trial, if she was able, regarding the identity of Casey. 2RP 10. There are no facts contained in the record to support any claims of impermissible suggestibility either at the initial show-up identification attempt, or at the time of the in-court identification at trial.

In order for defense to properly raise a constitutional challenge to Iseman's in-court identification, this court must first find that, “impermissibly suggestive identification procedures were used

in obtaining," the in-court identification testimony of Iseman. State v. Vaughn, 101 Wn.2d 604, 607-08, 682 P.2d 878 (1984); *see also* State v. Brown, 128 Wn. App. 307, 116 P.3d 400 (2005). In Vaughn, *supra*, our state Supreme Court clarified that the Brathwaite factors of reliability are not called into question unless and until appellant shows the existence of impermissibly suggestive identification procedures. Nonetheless, despite a failure to establish impermissibly suggestive procedures, or any taint whatsoever, Casey asks this Court to conduct a Brathwaite reliability analysis. 432 U.S. 98.

Defendant argues that State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985) is "instructive." It is not. In McDonald, the defendant appealed his conviction for first degree robbery, alleging that the trial court improperly allowed an in-court identification. 40 Wn. App. 743, 744, 700 P.2d 327. The victim in that case attended a line-up 22 hours after the crime. Id. The victim correctly chose person number six as one of the defendants, but incorrectly chose person number four as the co-defendant, and appellant. Id. Immediately after the victim chose numbers six and four, the case detective turned to the victim and told him that numbers six and three in the line-up were the persons arrested. Id. The victim then

responded that it was a "toss up" between three and four as the second defendant, but he chose four because of his nervous behavior during the line-up. Id. at 744-45. At trial, the victim was allowed to make an in-court identification of both defendants. Id. at 745. On appeal, the convictions were reversed because the in-court identification violated the appellant's due process rights. As the court held, "We agree with the trial court that [the detective's] statement to [the victim] after the lineup was impermissibly suggestive. He *literally* told [the victim], '*This is the man.*'" Id. at 746.

By contrast here, there is no evidence of suggestive behavior by the police at the time of the show-up identification attempt, or after, much less any behavior that rises to the level of suggestiveness that existed in McDonald. The fact that Iseman did not identify Casey at the show-up leads one to the obvious conclusion that it could not have been impermissibly suggestive. She only identified the two individuals whom she observed walking with Casey, and she testified that her identification of them was due to their clothing, not facial features. 3RP 42. Iseman also testified that she believed there to be "at least two" individuals with the police at the time of the show up. 3RP 41. No testimony was

elicited from any witness, by either party, as to where Casey was at the time of the show-up identification procedure- either in relation to the two individuals Iseman was able to see and positively identify, or in relation to the dozen or so other individuals on the street trying to see what was going on. In fact, no testimony was elicited from any witnesses, by either party, as to whether Casey was even a part of the show-up identification. There was no testimony as to whether Casey was handcuffed, standing, seated in the patrol car, or being restrained by police at the time of the show-up. Iseman merely testified that among the people with police, she did not see Casey. 3RP 42. She also testified that she did not think she had seen Casey at all since the incident. 3RP 44. Since it is Casey's burden to establish the identification procedure was impermissibly suggestive, the lack of evidence regarding the circumstances surrounding the show-up identification attempt and the lack of evidence regarding whether or not Iseman even had the opportunity to view Casey at the time of the show-up is fatal to Casey's claim.

Casey argues that the subsequent in-court identification was impermissibly suggestive as it was tainted by the show-up identification procedure. This argument fails. Again, there is no

evidence in the record to establish that Iseman even saw Casey at the time of the show-up identification and no evidence of any taint. Without evidence Iseman viewed Casey at the show-up there can be no claim of taint. None of the officers testified in direct examination or cross where Casey was standing or sitting in relation to Iseman or the other two suspects she identified (by their clothing) at the time of the show-up identification. She also testified that at the time of the show-up she was not close enough to clearly see faces. 3RP 42. Without any evidence in the record to indicate that Iseman had an opportunity to see Casey at the time of the show-up identification, defendant's claim that the in-court identification was tainted by the show-up fails.

Without evidence that the show-up identification tainted Iseman's in-court identification, there was no basis to suppress it. In-court identifications are not per se suggestive. Our state Supreme Court has held that the prosecution is not required to first insure that the courtroom has people in it whose appearance is similar to that of the defendant before a witness is asked to make an in-court identification. State v. Brown, 76 Wn.2d 352, 458 P.2d 165 (1969). In Brown, the defendant objected to a witness' in-court

identification because the defendant was the only black man in the courtroom. The Court held:

Defendant's racial attributes were a mere identifying characteristic. We can envision white defendants who could well be the only one in the room with red hair, a crew cut, or a beard. The prosecution is not required to pack the courtroom with blacks or people who resemble a defendant, in order to insure a proper identification.

Brown, 76 Wn.2d 352, 353, 458 P.2d 165. Brown has been quoted and cited with approval. See State v. Abernathy, 644 P.2d 691, 693, 31 Wn. App. 635 (1982); United States v. Bush, 749 F.2d 1227, 1231 (7th Cir. 1984), *cert. denied*, Bush v. United States, 470 U.S. 1058, 105 S. Ct. 1771, 84 L. Ed. 2d 831 (1985); United States ex rel. Clark v. Fike, 538 F.2d 750, 755 (7th Cir. 1976).

Even if this court were to view the in-court identification as tainted due to the possibility that Iseman saw Casey at the show-up, or tainted due to Casey being the only person seated at the defendant's table in the courtroom, it merely goes to the weight of the evidence and not its admissibility. The defense had ample opportunity to question Iseman regarding potential taint and challenge the weight that her in-court identification should be given during cross-examination. The same is true for the police officers who testified. Defense also had ample opportunity to argue that

Iseman's in-court identification was tainted in closing. The jury had the opportunity to reject Iseman's in-court identification.

Alternatively, should this court find that either the show-up identification on the day of the incident or in-court identification during trial were not just tainted, but impermissibly suggestive, the court must still weigh the Brathwaite reliability factors previously discussed. 432 U.S. 98.

The nature of the attempted show-up identification and the victim's testimony supports the trial court's denial of Casey's motion to suppress the in-court identification. There is no evidence that show-up identification attempt the day of the incident was impermissibly suggestive, there is no evidence that the show-up tainted the subsequent in-court identification, and the in-court identification in and of itself was not impermissibly suggestive. Thus, no further inquiry is required, and Casey's conviction should be affirmed.

2. EVEN IF THE INITIAL SHOW-UP IDENTIFICATION OR IN-COURT IDENTIFICATION WERE IMPERMISSIBLY SUGGESTIVE, THE VICTIM WAS PROPERLY ALLOWED TO MAKE AN IN-COURT IDENTIFICATION OF CASEY AS THE IN-COURT IDENTIFICATION WAS RELIABLE AND THERE WAS NOT A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

Should this court find that the attempted show-up viewing was impermissibly suggestive, it still did not create, "a very substantial likelihood of irreparable misidentification." State v. Burrell, 28 Wn. App. 606, 625 P.2d 726 (1981), quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968); Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977). The critical inquiry is whether there was proper indicia of witness reliability to overcome the "corrupting effect of the suggestive identification." McDonald, 40 Wn. App. 743, 746, 700 P.2d 327, quoting Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253.

As noted above, in considering the indicia of witness reliability, the following factors must be weighed: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated

by the witness at the confrontation; and (5) 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); Brathwaite at 114, 97 S. Ct. at 2253.

Iseman had an ample opportunity to view Casey at the time of the crime. Iseman testified that she stood face to face with Casey, approximately two feet away, and had an outwardly calm conversation with him. 3RP 52. She indicated that the sun was shining from behind them. Iseman admitted that the lighting at the time of the incident may have affected her perception of his skin tone, but that she recognized his facial features. 3RP 44.

Iseman's degree of attention supports the reliability of her identification as well. Iseman was admittedly confused and scared at the time she confronted Casey, but she testified that she works in the medical field and notices things like facial features. 3RP 53, 56. The fact that she was startled by Casey's presence and conversed with him suggests that her complete attention was devoted to him during the confrontation.

The prior description Iseman gave to police was a "darker-complected" male, possibly Hispanic, wearing a black shirt and blue jeans. There is little evidence in the record regarding

confirmation of Iseman's description of Casey's clothing aside from Officer Postawa's testimony. Postawa testified that he believed, based on the dispatched description, Casey and his companions to be the same individuals reported by Iseman. 3RP 164.

Iseman did not identify Casey in the initial show-up. As noted above, the record from the trial court lacks evidence regarding Iseman's opportunity to view Casey during the show-up. In trial, Iseman was asked repeatedly if she was certain that Casey was the individual she spoke with at her window, and she unequivocally indicated that she was certain he was. 3RP 25, 44, 45, 54.

There was approximately a span of eight months between the confrontation between Iseman and Casey and the time of her in-court identification. Although Iseman conceded that the incident was much fresher in her mind when she gave her written statement to police than it was in trial, there is no indication that her memory of events deteriorated to any significant extent. 3RP 56.

The above analysis of the Brathwaite factors demonstrates that even if the identification was impermissibly suggestive, there are enough indicia of reliability in Iseman's testimony and in-court identification to overcome any corrupting effect the suggestive identification may have had.

3. ANY ERROR IN ALLOWING THE IN-COURT IDENTIFICATION WAS HARMLESS SINCE OTHER EVIDENCE INDEPENDENTLY ESTABLISHED THAT CASEY WAS THE PERPETRATOR.

The crux of this case was whether Casey had the intent to commit a crime inside Iseman's home. Identity was not made the primary issue at trial by defense counsel, a sensible tactical decision considering the other evidence establishing identity aside from Iseman's in-court identification. Defense counsel's closing argument framed the issue succinctly:

Mr. Casey being someplace that he's not supposed to be, on someone else's property, that's called Criminal Trespass. And he should be held accountable for that. And you should hold him accountable for that. But before you can hold him accountable for Residential Burglary, the State has to prove to you that there was an intent. And they haven't done that.

4RP 95. The lack of evidence in the record- specifically the lack of cross examination of witnesses regarding the circumstances surrounding the show-up identification procedure illustrates that the issue of identity was not hotly contested, nor Casey's focus during trial. Should the court find that the in-court identification was obtained through impermissibly suggestive procedures, and should the court then also find that the Brathwaite reliability factors do not

overcome any corrupting effect of suggestive identification, this court should still affirm Casey's convictions.

Even assuming error, reversal is still not required if the error is harmless. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). The State bears the burden of showing that the error is harmless beyond a reasonable doubt. Id., citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431 (1986) (citations omitted). An error is harmless when there is no reasonable probability that the outcome would have been different had the error not occurred. Powell, 126 Wn.2d at 267, 893 P.2d 615 (citations omitted).

Here, the evidence against Casey in regards to identification as the suspect at Iseman's window was overwhelming. First, Casey himself admitted to police that he was the individual who was at Iseman's window. 3RP 152. In closing, defense did not quibble with that evidence, but used it to argue that it demonstrated Casey's forthcoming responses to police questioning, his claim that he had not actually entered Iseman's house, and ultimately that his conversation with Iseman showed Casey lacked any intent to commit a crime. Second, Casey was located a short time later, just a few blocks away from Iseman's home after having been found in

Davis' backyard and scuffling with Reynolds. 3RP 148. Third, Casey was seen by Davis with the same two individuals Iseman identified as the suspect's companions- and those two were still present when police arrived. 3RP 41, 72, 164. Finally, Casey had scratches on his forearm consistent with the injuries Iseman observed on the man outside her window. 3RP 136.

Given Casey's own admissions and all of the other evidence, it is clear that a jury could have given Iseman's in-court identification absolutely no weight at all, completely disregarded it, and still have been convinced beyond a reasonable doubt that Casey was the man who attempted to burglarize her home. Therefore any error in allowing Iseman's in-court identification of Casey was harmless beyond a reasonable doubt.

**4. THE TRIAL COURT DID NOT CONDUCT A FACTUAL HEARING UNDER CrR 3.6(b) AND THEREFORE NO FACTUAL FINDINGS WERE MADE AND NO WRITTEN FINDINGS AND CONCLUSIONS ARE REQUIRED.**

As noted above, the trial court ultimately chose not to conduct a factual hearing regarding the issues surrounding Iseman's potential in-court identification of Casey. 2RP 9. As cited by appellant, CrR 3.6(b) provides "if an evidentiary hearing is

conducted at its conclusion the court shall enter written findings of fact and conclusions of law." Since no evidentiary hearing was conducted in this trial, it logically follows that written findings of fact and conclusions of law are not warranted, or even possible. All of the cases cited by appellant are instances where evidentiary hearings were conducted and the court was required to resolve factual disputes prior to making legal rulings on motions to suppress. That is not this situation here.

CrR 3.6(a) does indicate that if a court determines that no evidentiary hearing is required, a written order setting forth its reasons shall be entered. That did not occur here, however, the court's reasons for its decision not to hold an evidentiary hearing are clearly set forth in the oral record. 2RP 9-11. Additionally, as the debate over whether or not to hold a hearing evolved, both Casey and the State agreed that holding a pretrial hearing had the potential to create or compound taint of the in-court identification before the jury.<sup>5</sup> 2RP 8-9. The oral findings made by the trial court

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<sup>5</sup> At the time of the debate, the State's position was that no taint presently existed whereas Casey's position was that a preliminary hearing would serve to compound already existing taint. Neither party knew whether Iseman would be able to identify Casey in court, but both agreed that a preliminary hearing could effect a subsequent in-court identification before the jury.

are sufficient for appellate review of the trial court's decision not to conduct an evidentiary hearing. Based on Casey's written motion to suppress and the State's representations regarding the underlying facts it is clear that there was no factual dispute, only a dispute as to whether or not the law dictated the suppression of the in-court identification based on those facts.

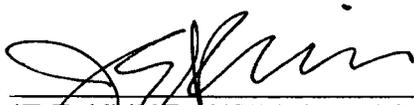
D. CONCLUSION

For the forgoing reasons, the State requests this Court affirm Casey's convictions for Residential Burglary, Assault in the Fourth Degree and Bail Jumping.

DATED this 23<sup>rd</sup> day of August, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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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 Christopher Gibson, the attorney for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 East Madison St, Seattle, WA 98122--2842 containing a copy of the Brief of Respondent and the Certificate of Mailing, in STATE V. SHAWN MICHAEL CASEY, Cause No. 66819-6-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.

Mary Heinzen  
Mary Heinzen/ Paralegal  
Done in Kent, Washington

8/24/11  
Date

*Filed*  
COURT OF APPEALS  
DIVISION ONE  
AUG 25 2011