IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TERRELL DAVON NATHAN, Appellant.	No. 40940-2-II consolidated with
STATE OF WASHINGTON, Respondent, v. MARCUS EARL WHITE, Appellant.	No. 40949-6-II UNPUBLISHED OPINION

Penoyar, J. — Terrell Nathan and Marcus White appeal their convictions for attempted first degree robbery[1] and first degree burglary.[2] Nathan and White argue that (1) the evidence was insufficient to support their convictions; (2) the police conducted an impermissibly suggestive showup lineup and, thus, the trial court erred by denying their motion for mistrial when the resulting identification evidence was admitted at trial; (3) the prosecutor committed misconduct; and (4) they received ineffective assistance of counsel when defense counsel failed to (a) move to suppress the identification evidence and (b) object to the prosecutor's comments. Finally, they contend that the sentencing court erred by failing to define with specificity the "crime-related

[1] In violation of RCW 9A.28.020, RCW 9A.56.190, and RCW 9A.56.200(1)(a)(ii).

[2] In violation of RCW 9A.52.020(1)(a).

prohibitions" with which they will have to comply. Because sufficient evidence supports Nathan's and White's convictions, the police conducted a permissible showup lineup shortly after the crime was committed and in the course of a prompt search for the suspects, the prosecutor did not commit misconduct, defense counsel's performance did not fall below an objective standard of reasonableness, the sentencing court acted within its statutory authority to order Nathan and White to comply with their community custody officers' (CCO) directives, and the sentencing court did not violate Nathan's and White's due process rights, we affirm.

FACTS

In March 2009 a group[3] of black men entered the living room of Shauna Ward's apartment and attempted to take her television and laptop. At the time, Ward; her boyfriend; and her boyfriend's brother, Benjamin Wheeler, were in the living room.

According to Wheeler, one of the men wore a "light teal shirt" and another man wore a black bandana over his face and held a hammer. Report of Proceedings (RP) (June 14, 2010) at 7. Ward observed that the men "seemed really tall" and wore "layers" of clothing. RP (June 16, 2010) at 15, 20. Some of the men wore hooded sweatshirts; some of the men wore "beanies;" and, according to Ward, "all had face-coverings on." RP (June 16, 2010) at 19-20. Wheeler noted that only one of the men wore something on his face.

The man with the hammer wore a black and white shirt, black gloves, "a beanie hat," and a bandana over his face. RP (June 16, 2010) at 18. He attempted to grab Ward's laptop from her; held the hammer over her head; and said, "Give it to me, b[*]tch." RP (June 16, 2010) at 15.

[3] At trial, Benjamin Wheeler testified that four men entered Ward's apartment, but Ward testified that "about six men" entered her apartment. RP (June 16, 2010) at 7. When Ward called the police, she reported eight to ten men.

Ward's boyfriend and Wheeler started to fight with two of the men. The group of men ran out of the residence, leaving behind a shoe and the hammer. The men were in Ward's residence for approximately four minutes.

Ward called the police. Tacoma Police Department Sergeant Robert Stark responded to the call. Stark conducted an area check and, about ten minutes after receiving the call, saw three black men who "ducked" out of his view. RP (June 14, 2010) at 42. Stark located and stopped the men, who identified themselves as Nathan, White, and Henry Law. Stark stopped them a few blocks away from a nearby YMCA. Nathan and White lived in Ward's apartment complex.

According to Tacoma Police Officer Wendy Haddow-Brunk, who responded to Stark's call for backup, the men wore t-shirts and shorts, which "struck [her] as unusual at the time as it was very cold." RP (June 15, 2010) at 18. Nathan wore a black and white jacket with white stripes down the sleeves. The weather was "cold" and Stark did not think "any of these young men were wearing appropriate attire for the temperature that evening." RP (June 14, 2010) at 47, 64.

A police officer brought Wheeler and Ward to the scene. There were about six police officers, five or six police vehicles, and flashing patrol car lights at the scene. Haddow-Brunk also had Garrow, her tracking dog, with her. When Wheeler and Ward arrived, the three men stood under the streetlights and were not handcuffed.

At the showup, Wheeler identified the man in the teal shirt, Law, as one of the burglars. He did not identify the other two men. But, at trial, Wheeler identified White as the man who had worn the teal shirt.

One of the men in the showup wore black gloves, and Ward identified that individual as the man "with the hammer." RP (June 16, 2010) at 22. She also made the identification based on his height and race and noted that he was "sweaty and scared." RP (June 16, 2010) at 39. Ward believed that the men were the same who entered her apartment because they appeared to have "stripped off their clothing, and one was wearing black gloves." RP (June 16, 2010) at 37. According to Tacoma Police Officer Benjamin Logan, Wheeler and Ward identified the men without hesitation.

After the identification procedure, Haddow-Brunk brought the tracking dog to Ward's apartment complex. The dog started the track outside Ward's apartment door. The dog led Haddow-Brunk northbound, through tennis courts, through the apartment complex, across a street, and then back to the apartment complex. The dog then led Haddow-Brunk to the bottom of a stairwell in the apartment complex. At the base of the stairwell lay a pile of clothing, including: a black and green jacket, a black baseball cap, a black and blue plaid jacket, blue running pants with a white stripe, blue jeans with a belt, a black hooded jacket, two black gloves, a black and white jacket with sparkles on it, a white piece of material in a bandanna shape, and two black tubes of material "in a similar style to what skiers use to cover their faces." RP (June 15, 2010) at 33. After locating the clothing, the dog tracked to a fence and eventually to the location where Stark had stopped the three suspects.

DNA samples were collected from Nathan and White. Forensic scientist Marion Clark conducted the DNA testing. She tested the hammer for a DNA sample, but she was unable to obtain a DNA profile. White's and Nathan's DNA matched DNA found on some of the clothing located in the stairwell. Law's DNA also matched DNA found on the pair of jeans found in the

stairwell.

The State charged both Nathan and White with one count of attempted first degree robbery with a deadly weapon enhancement and one count of first degree burglary with a deadly weapon enhancement.

At trial, Ward testified that she did not recognize anyone in the courtroom. She also testified that her identification was based, in part, on viewing the dog track toward the location where she identified the men. She testified that she first saw the dog from her apartment and then saw the dog at the identification scene.

Ward also testified that she did not feel pressured to identify the men. Wheeler testified that the officer who brought him to the scene told him, "[W]e are going to take you to where we have some people in custody, and you are going to see if you can identify the people that broke into your house." RP (June 14, 2010) at 19.

Nathan and White moved for a mistrial based on Ward's identification. The prosecutor opposed the motion, asserting that there was nothing that could not have been discovered before trial and stated that "[t]here has never been a request to interview any of these witnesses." RP (June 16, 2010) at 52. The trial court denied the motion.

The jury found Nathan and White guilty of first degree burglary and attempted first degree robbery; however, it did not find that Nathan and White were armed during the commission of the crimes. The sentencing court imposed the following condition for Nathan and White: "The offender shall comply with any crime-related prohibitions." Clerk's Papers (CP) at 47, 190. Nathan and White appeal.

ANALYSIS

I. Sufficiency of the Evidence

First, Nathan and White argue that the evidence was insufficient to establish that they committed the crimes. Specifically, they assert that the State did not produce corroborating evidence to support the police dog's tracking of Nathan and White. We disagree.

A. Standard of Review

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (quoting *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

B. Dog Tracking Evidence

Corroborating evidence must support dog tracking evidence for it to be admissible. *State v. Loucks*, 98 Wn.2d 563, 566, 656 P.2d 480 (1983). Corroborating evidence is not evidence that clearly connects the accused to the crime; rather, it is evidence that tends to strengthen the dog

tracking evidence. *State v. Ellis*, 48 Wn. App. 333, 335, 738 P.2d 1085 (1987).

In addition to the dog tracking evidence, the State presented evidence that (1) a forensic scientist found DNA matching Nathan and White on the clothing found in Ward's apartment complex's stairwell; (2) Nathan and White wore inappropriate attire for the weather at the time of their arrest and one of the men wore black gloves; (3) Nathan and White ducked out of view when Stark passed them in his patrol car; (4) ten minutes after Ward called the police, Nathan and White were located near the scene of the incident; and (5) at the identification procedure, Ward and Wheeler identified the men. This is sufficient to support the police dog's identification of Nathan and White and to satisfy the *Ellis* test. Viewed in the light most favorable to the State, this evidence is sufficient to place Nathan and White at the scene of the crime.

II. Showup Identification

Next, Nathan and White contend that the trial court erred by denying their motion for a mistrial because the police conducted an impermissibly suggestive showup lineup. We hold that (1) the trial court properly denied the motion for mistrial and (2) the showup identification procedure was not impermissibly suggestive.

A. Motion for Mistrial

We review the denial of a motion for mistrial by determining whether the trial court exercised its discretion in a manner that was manifestly unreasonable or based on untenable grounds or reasons. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006); *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). In determining whether the trial court erred by denying a motion for mistrial, we consider the seriousness of the testimony the jury heard; whether it was cumulative of admissible testimony; whether an instruction could have cured the

irregular testimony; and whether, despite a curative instruction, there is a substantial likelihood that the testimony prejudiced the defendant. *State v. Gamble*, 168 Wn.2d 161, 177-78, 225 P.3d 973 (2010); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court is to grant a mistrial "'only when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be tried fairly.'" *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)).

To the extent Nathan and White are asserting that the trial court erred by denying their motion for a mistrial, which was based on Ward's testimony that she identified Nathan and White, in part, because she saw the tracking dog outside her apartment and then at the scene of the identification, their claim fails. At trial, Nathan and White moved for a mistrial, arguing that Ward's identification should be excluded, because Ward's testimony that she saw the dog track from her apartment and then saw the dog at the identification scene revealed that an impermissibly suggestive showup procedure had occurred. The trial court denied the motion, reasoning:

> I don't think that it raises [sic] to a level that it would justify a mistrial. I think that the jury has the whole picture of the thing and that this identification is not a strong one, certainly. It may well be a conclusion based on the fact that this person had gloves on and so did this other person. There is not much more to it than that.
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> I guess there are some other things, too, with respect to race, or whatever. She said that I thought that it was the same-sized person and, I guess, presumably about the same age and some other things like that.

RP (June 16, 2010) at 56. The trial court also noted that Haddow-Brunk's testimony contradicted Ward's testimony.

We agree with the trial court. A mistrial was not justified: Haddow-Brunk testified that the dog tracking occurred after the identification procedure. Ward also testified that the police did not pressure her to make an identification. Ward's testimony regarding the dog tracking went to the weight of the evidence and the trial court properly denied Nathan and White's motion for a mistrial.

B. Showup Identification Procedure

With regard to Nathan and White's argument that the admission of the pretrial identification violated their due process rights, we conclude that the identification procedure was not impermissibly suggestive.[4]

If an identification caries a substantial likelihood of misidentification, it violates the defendant's right to due process of law. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). "Although showups are generally suspect, they are not per se unnecessarily suggestive. A showup that is held shortly after the crime was committed and in the course of a prompt search for the suspect is permissible." *State v. Kraus*, 21 Wn. App. 388, 391-92, 584 P.2d 946 (1978) (internal citations omitted). A showup conducted shortly after the commission of a crime to determine whether eye-witnesses can identify a suspect as the perpetrator permits the witnesses to make the determination while the image of the perpetrator is still fresh in their minds and may lead to the expeditious release of innocent suspects. *United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977).

[4] Nathan and White did not move to suppress this evidence before trial; however, we review this issue because it is advanced in the context of an ineffective assistance of counsel claim and allegedly a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3).

First, the defendant must show that the identification procedure was impermissibly suggestive. *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). "The inquiry ends if no suggestiveness is present, and, in such a case, the uncertainty or inconsistency in identification testimony goes only to its weight, not its admissibility." *State v. Hendrix*, 50 Wn. App. 510, 513, 749 P.2d 210 (1988) (citing *Vaughn*, 101 Wn.2d at 610-11). If the identification procedure is suggestive, then the defendant must show that the totality of the circumstances resulted in a substantial likelihood of irreparable misidentification. *State v. Maupin*, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). "The key inquiry in determining admissibility of the identification is reliability." *State v. Rogers*, 44 Wn. App. 510, 515-16, 722 P.2d 1349 (1986). The factors to be considered are:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Rogers, 44 Wn. App. at 516 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State v. Bockman*, 37 Wn. App. 474, 482, 682 P.2d 925 (1984)).

Nathan and White cite to *State v. Johnson*, 132 Wn. App. 454, 132 P.3d 767 (2006), as support for their assertion that the identification procedure was impermissibly suggestive. But in *Johnson*, the trial court's conclusion that the identification procedure was impermissibly suggestive was not at issue. Accordingly, *Johnson* does not apply here.

Kraus is helpful in resolving this issue. In *Kraus*, the defendant argued that the pretrial identification was the product of an impermissibly suggestive showup lineup. 21 Wn. App. at 389. Police responded to a call reporting an attempted robbery at a grocery store and observed

the defendant approximately two blocks from the store. *Kraus*, 21 Wn. App. at 389. The defendant matched the description of the suspect, except he wore a different colored jacket. *Kraus*, 21 Wn. App. at 389-90. An officer detained the defendant and conducted a pat-down search, which the victim observed. *Kraus*, 21 Wn. App. at 390. The officers then escorted the defendant into the grocery store and showed him to the victim. *Kraus*, 21 Wn. App. at 390. Division One of this court held that the police procedure was not impermissibly suggestive and reasoned that "[s]ince [the defendant] was wearing a light jacket while the robbery suspect had been described as wearing a dark jacket, the officers were justified in taking [the defendant] back to the victim of the robbery for an attempted identification." *Kraus*, 21 Wn. App. at 392.

Similarly, here the showup identification was held shortly after the commission of the crime and in the course of a prompt search for the suspects. Nathan and White were in a group of three men and, thus, did not match Ward's report of the eight to ten men who had entered her apartment. The officers were justified in promptly asking the victims of the robbery for an attempted identification. The officers did not pressure Ward or Wheeler to identify the suspects and Nathan and White were not handcuffed at the time of the identification. We conclude that the police procedure was not impermissibly suggestive.

III. Prosecutorial Misconduct

Nathan and White assert that the prosecutor committed misconduct in misstating the State's burden of proof and in inciting the passions and prejudices of the jury during closing and rebuttal arguments. We disagree.

To prevail on a claim of prosecutorial misconduct, Nathan and White must establish the impropriety of the State's comments and the comments' prejudicial effect. *See State v. McKenzie*,

157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Prejudice occurs when there is a substantial likelihood the misconduct affected the jury's verdict. *Brown*, 132 Wn.2d at 561. "A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 132 Wn.2d at 561. "In closing argument, counsel are given latitude to draw and express reasonable inferences from the evidence." *State v. Harvey*, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983).

Where there is no objection to the prosecutor's misconduct at trial, we determine whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "'enduring and resulting prejudice'" incurable by a jury instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). Under this standard, Nathan and White must establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Nathan and White argue that "the prosecutor repeatedly misstated and minimized his burden of proof" during closing argument. Appellant's Br. (White) at 29. They cite to the prosecutor's multiple references to reasonableness and assert that the arguments "misled the jury to believe that it should convict based on something far less than proof beyond a reasonable doubt." Appellant's Br. (White) at 28.

During closing and rebuttal arguments, the prosecutor argued, without objection, that circumstantial evidence supported a guilty verdict. The prosecutor stated, "If all there was was

[the victims] telling you what happened, and there was nothing else, it just wouldn't be enough; but when you put together all of the evidence in context, then it's reasonable to believe that all of the men that went in there committed that crime, split up afterwards." RP (June 21, 2010) at 106.

The prosecutor also argued the following:

> [S]o when you start taking away things that are not reasonable, you're left with a reasonable inference of what happened; and your instructions tell you that you're allowed to do that. You're allowed to look at all of the evidence in the context that it happened and make a reasonable inference; and if you believe in that reasonable inference, then you're satisfied beyond a reasonable doubt.
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> . . . .
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> [W]hat else could have happened? . . . So if Mr. Nathan and Mr. White just happened upon Henry Law after the other two people who were with him disappeared, and there were some questions asked about the YMCA which is fairly close, the more direct route would be to walk this way to go to the YMCA. (Indicating.) Now, if they wanted to cut this way and try to go back way into the YMCA, why not just keep going? Why come back down here and do that? I would submit to you that that is not reasonable. Mr. Nathan and Mr. White were with Henry Law, and those three men were three of the people that broke into that apartment and threatened Shauna Ward and Benjamin Wheeler.

RP (June 22, 2010) at 52. Finally, the prosecutor stated, "If you have a reasonable doubt as to the identity of Mr. Nathan and Mr. White being two of the men that were inside that apartment, then you should find them not guilty." RP (June 22, 2010) at 53.

Nathan and White contend that these arguments "minimized [the prosecutor's] burden of proof." Appellant's Br. (White) at 29. We disagree. The prosecutor did not, as they contend, "eviscerate[] the presumption of innocence." Appellant's Br. (White) at 31. The State's case relied on circumstantial evidence. The prosecutor properly argued that reasonable inferences from the evidence supported a guilty verdict. The prosecutor also properly argued that Nathan

and White's defense was not reasonable and, thus, not believable. The prosecutor argued that the jury should acquit if it did not believe that Nathan and White were in the apartment; this argument was not, as they argue, that the jury needed to have a reasonable doubt that Nathan and White were involved in order to acquit.

Nathan and White also contend that the prosecutor improperly argued that the jury needed to have an abiding belief in its verdict. But they mischaracterize the prosecutor's argument. The prosecutor stated,

> The question to focus on: Is there enough to satisfy you beyond a reasonable doubt as to the elements of the crime? If you have an abiding belief, then you're convinced beyond a reasonable doubt. If you believe you're right the next morning, you believe it two years or twenty years, after all that time you still say, I did the right thing, then you have an abiding belief in the truth of your verdict.

RP (June 21, 2010) at 108-09. The prosecutor's statement merely repeated the trial court's instruction to the jury. ("If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."). CP at 7 (Instr. 2).

Further, they assert that the prosecutor incited the jury's passions and prejudices when it asked the jury to seek justice. During closing and rebuttal argument, the prosecutor stated, "What you're doing when you reach a verdict is seeking justice. . . . A correct verdict is justice." RP (June 21, 2010) at 109. The prosecutor also argued,

> And in closing, [White's defense counsel] said that I co-opted the word "justice"; and if you'll remember, what I told you to do was that a correct verdict would be justice in this case. If you have a reasonable doubt as to the identity of Mr. Nathan and Mr. White being two of the men that were inside that apartment, then you should find them not guilty; and that would be a correct and just verdict; but I believe, and I believe that we—the State has shown that the evidence against Mr. White and Mr. Nathan is more than enough to convict them of this crime and hold them responsible for their actions that night, and that's what I'm asking you to do.

RP (June 22, 2010) at 53-54. During closing argument, the prosecutor also presented a PowerPoint slideshow to the jury. One of the slides read, "Verdict = Justice[.] When you fairly apply the law to the facts, you'll reach a correct verdict[.] What you're doing when you reach a verdict is seeking justice[.] Use your experiences, use your judgment, use your common sense, and do what is just[.] A correct verdict will be justice in this case[.]" CP at 176. The presentation's final slide read, "Bring justice to this case[.] **Guilty as charged[.]**" CP at 176. The prosecutor argued that a correct verdict was a just verdict.

> Urging the jury to render a just verdict that is supported by evidence is not misconduct. Moreover, courts frequently state that a criminal trial's purpose is a search for truth and justice. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (stating that an attorney's interest " 'in a criminal prosecution is not that it shall win a case, but that justice shall be done'" (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed 1314 (1935))); *State v. Gakin*, 24 Wn. App. 681, 686, 603 P.2d 380 (1979) (stating that the "search for the truth" is the "ultimate objective of a criminal trial").

State v. Curtiss, 161 Wn. App. 673, 701–02, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011). The prosecutor's references to "justice" were not improper.

Furthermore, the State's statement "I believe, and I believe" did not constitute improper opinion testimony necessitating reversal. RP (June 22, 2010) at 54. Defense counsel did not object, and the State immediately corrected itself and properly argued, "[T]he State has shown that the evidence against Mr. White and Mr. Nathan is more than enough to convict them of this crime." RP (June 22, 2010) at 54. The statement was not so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. Accordingly, Nathan and White's claim of prosecutorial misconduct fails.

IV. Ineffective Assistance of Counsel

Nathan and White next claim that defense counsel were ineffective when they failed to (1) move to suppress the showup identification, (2) interview Ward and Wheeler before trial, and (3) object during the prosecutor's closing and rebuttal arguments. We disagree.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, Nathan and White must show that their counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced their trial. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume that counsel was effective. *McFarland*, 127 Wn.2d at 335. "[L]egitimate trial strategy or tactics cannot be the basis for an ineffectiveness of counsel claim." *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome at trial would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 930, 158 P.3d 1282 (2007) (quoting *Strickland*, 466 U.S. at 694).

B. Showup Identification

Nathan and White assert that they received ineffective assistance when defense counsel failed to move to suppress evidence of the identification procedure. They contend that defense counsel failed to do so because "[they] failed to investigate sufficiently to know there were grounds for such a motion." Appellant's Br. (White) at 19. As discussed above, the showup

identification procedure was not impermissibly suggestive. Accordingly, their claim fails for lack of prejudice because the trial court would not have granted the motion.

C. Failure to Object to Prosecutor's Closing and Rebuttal Arguments

Nathan and White also contend that they received ineffective assistance of counsel when defense counsel failed to object to the prosecutor's closing and rebuttal arguments. As we discussed above, the prosecutor did not commit misconduct. Accordingly, neither Nathan's nor White's defense counsel performed deficiently by failing to object to the prosecutor's proper comments.

V. Crime-Related Prohibition

Finally, Nathan and White argue that the trial court erred when it imposed the community custody provision stating that they "shall comply with any crime-related prohibitions" but failed to define the prohibitions. Appellant's Br. (White) at 36. They contend that by ordering this condition, the trial court improperly abdicated its duties to the Department of Corrections (DOC) and violated their due process rights. We disagree.

A. Abdication of Duties

A sentence imposed without statutory authority may be addressed for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). We review a sentencing court's decision by determining whether the trial court's exercise of its discretion was manifestly unreasonable or based on untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

"As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." Former RCW 9.94A.703(3)(f) (2008). Further, "the court shall . . . [r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704." Former 9.94A.703(1)(b) (2008). "The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety." RCW 9.94A.704(2)(a). Here, the trial court did not abuse its discretion when it simply acted within its statutory authority and followed the statutory requirement that it order Nathan and White to comply with their CCOs' directives.

II. Vagueness Challenge

A defendant may assert a vagueness challenge to a condition of community custody for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008). "[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." *Bahl*, 164 Wn.2d at 752. A sentencing court has discretion to impose community custody conditions, but it is an improper exercise of this discretion to impose an unconstitutionally vague condition. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-93, 239 P.3d 1059 (2010).

The law requires the DOC to notify Nathan and White of any crime-related prohibitions imposed by their CCOs.

> The department shall notify the offender in writing of any additional conditions or modifications. . . . By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or

the safety of the community.
RCW 9.94A.704(7)(a),(b). Accordingly, in the event the DOC imposes additional conditions, Nathan and White will receive notice and may request administrative review. They have failed to show that the statutory scheme the sentencing court followed is unconstitutional.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Hunt, J.

Johanson, A.C.J.