WASHINGTON STATE COURT OF APPEALS
DIVISION II

AZIAS D. ROSS, Appellant,	)	No. 46425-0-II
v.	)	STATEMENT OF ADDITIONAL GROUNDS (S.A.G.)
STATE OF WASHINGTON, Respondent.	)	--RAP 10.10--

COMES NOW AZIAS D. ROSS (hereinafter denoted "Appellant"), Pro Se, and submits this RAP 10.10 S.A.G. Brief.

A. S.A.G. ASSIGNMENTS OF ERRORS

1) The State committed governmental misconduct when it impermissibly suggested out-of-court identification to an eyewitness, effectively denying Appellant due process of law.

2) The trial court erred when it entered Firearm Sentence Enhancements (FASE) on counts I, II, III, IV, V, and VI based upon insufficient evidence.

3) The trial court erred when it exceeded its statutory authority in imposing sentence under Counts I and XI.

B. S.A.G. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.

1) Whether the State committed governmental misconduct when it literally told the victim that they picked the wrong suspect during an out-of-court identification?

2) Whether the State presented sufficient evidence to support the imposition of FASEs on counts I, II, III, IV, V, and VI?

3) Whether the trial court exceeded its statutory authority in imposing sentence under Counts I and XI?

C. STATEMENT OF THE CASE

Appellant accepts, adopts, and incorporates herein by reference the Statement of the Case as set forth in Part B of Appellant Counsel's Brief of Appellant.

D. ISSUES RAISED FOR THE FIRST TIME ON APPEAL

Generally, an Appellant may not raise an issue for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

In order to show that the error is "manifest," there must be a sufficient record for the court to review. See State v. Kirkpatrick, 160 Wn. 2d 873, 880-81, 161 P. 3d 990 (2007), overruled on other grounds by State v. Jasper, 174 Wn. 2d 96, 271 P. 3d 876 (2012).

"Manifest" error is error that resulted in actual prejudice. State v. O'Hara, 167 Wn. 2d 91, 99, 217 P. 3d 756 (2009)(quoting State v. Kirkman, 159 Wn. 2d 918, 935, 155 P. 3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. O'Hara, supra at 99, To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." Id, at 99-100.

Appellant asserts that, as set forth below, the Assignment of Errors numbered 1 and 2, and the concommitant Issues pertaining thereto, as raised in this S.A.G. are a manifest error affecting his constitutional right to due process; and further

asserts that there is a sufficient record for this court to review such errors; and further asserts that he has been actually prejudiced; and further asserts that the errors are so obvious on the record that the errors warrant appellate review.

E. AUTHORITY AND ARGUMENT

1) The State Committed Governmental Misconduct And Violated Due Process When Its Impermissibly Suggestive Behavior During An Out Of Court Identification Resulted In Unreliable Identification.

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. State v. Blackwell, 120 Wn. 2d 822, 831, 845 P. 2d 1017 (1993)(citing State v. Lewis, 115 Wn. 2d 294, 298, 797 P. 2d 1141 (1990)). Governmental misconduct, however, "need not be of an evil or dishonest nature; simple mismanagement suffices." Blackwell, supra at 831. Absent a showing of arbitrary action or governmental misconduct, a court cannot dismiss charges under CrR 8.3(b).

The second necessary element a defendant must show before a court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. See State v. Cannon, 130 Wn. 2d 313, 328, 922 P. 2d 1293 (1996).

No person shall be deprived of life, liberty or property without due process of law. Washington State Constitution, Article I, §3; Fifth and Fourteenth Articles in Amendment, U.S. Constitution. A defendant is denied due process of law where the investigating detective's statement to a robbery victim during an

out-of-court identification was impermissibly suggestive. State v. McDonald, 40 Wn. App. 743, 746-47, 700 P. 2d 327 (1985). The test by which out-of-court identifications must be measured is given in Simmons v. United States, 390 U.S. 377 (1968). Each case must be considered on its own facts. An out-of-court identification is inadmissible if the identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons, supra at 384. The inquiry ends if suggestiveness is present, but even the use of suggestive procedure does not necessarily compel exclusion of the identification. Exclusion is required only where the suggestiveness results in a very substantial likelihood of misidentification. Id. Paramount in determining the likelihood of misidentification is the relaiblility of the witness' identification. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

When impermissibly suggestive government behavior results in a substantial likelihood of the misidentification of a suspect, due process of law requires the court to exclude the identification. Simmons, supra at 384; State v. Vickers, 148 Wn. 2d 91, 118, 59 P. 3d 58 (2002). Where a detective informs a victim that they have picked the wrong suspect in an out-of-court identification, Washington Courts have concluded that such a statement was tantamount to telling the witness that "this is the man." McDonald, supra at 746.

Here, when the investigating officer conducted an out-of-court identification with Bora Kuch--the victim under counts VIII, IX, XI, XII, and XIII--at her residence, Ms. Kuch was shown a photomontage and asked if she could identify any of the individuals who had robbed her. RP 673. Ms. Kuch identified a person whom she believed looked similar to the person that had robbed her. RP 674. The investigating officer then told Ms. Kuch that the person she had identified was not the right person. RP 674. Such testimony was elicited on direct examination by Deputy Prosecutor Greg Greer.

Indubitably, such testimony--that the investigating officer told Ms. Kuch that she had identified the wrong person--cannot be attributed to mistake or being lost in translation (Ms. Kuch is Cambodian): on cross examination the day after Mr. Greer's aforesaid elicitation, co-defendant's defense counsel Phil Thornton clarified Ms. Kuch's statement.

> "Q: Yesterday, you told us that the officer told you the person you picked out wasn't the person.
> A: Yes, but the officer went to my house two times to show the pictures.
> Q: Okay. And on one of those occasions, you picked out an individual, and the officer said no, that's not the guy?
> A: Yes.
> Q: Yes, that happened?
> A: Yes."

RP 706 at 6-14. This is not an instance where the victim equivocates between two suspects, one of whom is the accused; rather, the victim initially identified a person whom was not any of the suspects in the robbery, and the investigating officer

plainly told Ms. Kuch that she had picked the wrong person. RP 674; 706. It is only the investigating officer's impermissibly suggestive behavior which gives rise to Ms. Kuch's subsequent identification of Appellant's co-defendant in the second out-of-court identification. By telling Ms. Kuch that she had picked the wrong person in the first out-of-court identification, it was tantamount to telling Ms. Kuch that "this is the guy." McDonald, supra at 746.

Because the impermissibly suggestive government behavior resulted in the substantial likelihood that Ms. Kuch's second indentification was indeed a misidentification, due process of law requires the court to exclude the identification. Simmons, supra at 384; Vickers, supra at 118. Because this same impermissibly suggestive government behavior constitutes "simple mismanagement" at the least, and of which deprived Appellant of his due process rights in the course of his trial, said impermissibly suggestive government behavior additionally meets both requisite prongs of "governmental misconduct" under CrR 8.3(b). Blackwell, supra at 831; Cannon, supra at 328. Because this governmental misconduct resulted in prejudice to Appellant's right to a fair trial by depriving him of due process of law, this matter should be dismissed with prejudice in accordance with the Blackwell and Cannon holdings under CrR 8.3(b). Appellant respectfully requests so.

2) Appellant's FASE Imposed on Counts I, II, III, IV, V, And VI Were Based Upon Insufficient Evidence, Violating Due Process.

No person shall be deprived of life, liberty or property without due process of law. Wash. Const., Art. I, §3; Fifth and Fourteenth Articles in Amendment, U.S. Constitution. Under clearly established Supreme Court precedence, due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 434 U.S. 307, 316 (1979)(explaining In re Winship, 397 U.S. 358, 364 (1970)). Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn. 2d 484, 488, 656 P. 2d 1064 (1983); Seattle v. Gellein, 112 Wn. 2d 58, 61, 768 P. 2d 470 (1989).

In conducting a Jackson analysis, "'[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.'" Walters v. Maass, 45 F. 3d 1355, 1358 (9th Cir. 1995)(quoting United States v. Lewis, 787 F. 2d 1318, 1323 (9th Cir.), amended on denial of reh'g, 798 F. 2d 1250 (9th Cir. 1986), cert. denied 489 U.S. 1032 (1989)). While the finding of an element of a charge can be inferred, it can only be inferred from "conduct where it is plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn. 2d 634, 638, 618 P. 3d 99 (1980); State v. Goodwin, 150 Wn. 2d 774, 781, 83 P. 3d 410 (2004). "'[M]ere suspicion or speculation cannot be the basis for creation of logical inference.'" Walters, supra at

1358.

The Jackson standard "must be applied with explicit reference to the substantive elements of the criminal offenses as defined under State law." Chein v. Shumsky, 373 F. 3d. 978, 983 (9th Cir. 2004)(en banc). Under Washington law, a defendant is guilty based upon an accomplice liability theory if he "acted with knowledge that his conduct would promote or facilitate the [underlying use of a firearm]." State v. Cronin, 142 Wn. 2d 568, 578-79, 14 P. 3d 752 (2000); State v. Roberts, 142 Wn. 2d 471, 509-13, 14 P. 3d 713, 736 (2001)(as amended); see RCW 9A.08.020(3)(a)(ii). As such, in order for the jury to be able to infer that there was a firearm used in the commission of the offenses for which Appellant has been convicted as an accomplice, there must be evidence of "conduct where it [use of a firearm] is plainly indicated as a matter of logical probability." Delmarter, supra at 638.

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. State v. Hickman, 135 Wn. 2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. Id.

Here, eyewitness testimony from Seoung Lem evinces that there is insufficient evidence for the jury to have returned a verdict for the FASE on counts I, II, III, IV, V, and VI. That is to say, Ms. Lem tesitfied that she never actually saw a gun. RP (AR 799 ff. Specifically, Ms. Lem testified as follows:

"Q: Did you see the gun right away?

A. I--when he point the gun to my head, I was scared to look at it, but I knew it was a gun.

...

Q: Were you able to look at him at that time?
A: No. No, I was scared. I was screaming.

...

Q: Could you still see the gun at that time?
A: No."

(AR) 799

RP ~~800~~-802, in pertinant parts. At no time did this eyewitness testify that she actually saw a gun during the commission of the robbery; rather, she relayed that the perpetrator approached her from behind, placed what she inferred to be a gun to the back of her head, placed her facedown on the kitchen floor, then transported her to the sofa and placed a jacket over her head, thus obscuring her vision at all times relevant. Id. The testimony is clear: Ms. Lem did not see a gun. It is merely the prosecutor's repeated reference to "the gun" which gives rise to the inference that there was a gun upon which the jury's verdict rests.

Except that specific elements may only be inferred from conduct where such element is plainly indicated as a matter of logical probability. Delmarter, supra at 638; Goodwin, supra at 781. Mere suspicion or speculation cannot be the basis for the creation of logical inference. Walters, supra at 1358. Because here Ms. Lem infers there was a gun, and that inference is then compounded by the prosecutor to further infer to the jury that there is evidence sufficient to find that a gun was used in the

underlying robbery, such a double inference is based upon "mere suspicion or speculation," which "cannot be the basis for creation of logical inference." Walters, supra at 1358. Because the evidence is insufficient to find the presence of a firearm during the commission of the underlying robbery, Appellant's FASE imposed on counts I, II, III, IV, V, and VI must be vacated, and this matter must be remanded back to the trial court for resentencing. Appellant respectfully requests so.

3) Appellant's Sentence Under Counts I and XI Are Each In Excess Of Statutory Authority As Each Exceeds The Statutory Maximum.

When a court exercises its authority in sentencing, it must do so within the bounds of the sentencing laws. State v. Manussier, 129 Wn. 2d 652, 667-68, 921 P. 2d 473 (1996)(citing State v. Ammons, 105 Wn. 2d 175, 181, 718 P. 2d 796 (1986)). If a trial court has erred in its sentencing of a defendant, the appropriate procedure would be to return him to the trial court for re-sentencing. In re Carle, 93 Wn. 2d 876, 877, 602 P. 2d 356 (1979).

Under RCW 9.94A.533(3)(g), when the trial court imposes a sentence which is to include a FASE, the entire sentence must not exceed the statutory maximum for the underlying offense. If the FASE together with the standard range sentence would exceed the statutory maximum, the court must not reduce the enhancement portion of the sentence, but instead must adjust the base sentence itself so that the said entire sentence does not exceed the statutory maximum.

For sentences imposed after July 26, 2009, RCW 9.94A.701(9) provides that "[t]he term of community custody ... shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." See State v. Franklin, 172 Wn. 2d 831, 840, 263 P. 3d 585 (2011); In re Personal Restraint of Brooks, 166 Wn. 2d 664, 671-73, 211 P. 3d 1023 (2009).

Here, count I is a Class B felony, whereas count XI is a Class C felony. RCW 9A.20.021 delineates that Class B felonies are governed by a ten (10) year (120 month) statutory maximum, and that Class C felonies are governed by a five (5) year (60 month) statutory maximum. See CP 743. As such, the court would be statutorily bound to impose a sentence of no more than 120 months on count I, and of no more than 60 months on Count XI--FASEs and community custody included. Accord RCW 9.94A.533(3)(g); RCW 9.94A.701(9).

However, in imposing sentence under count I, the court imposed 96.75 months of confinement, plus 36 months as a FASE, plus 18 months of community custody, totalling 150.75 months--30.75 months in excess of the statutory maximum for Class B felonies. CP 746-47; accord RCW 9A.20.021. The correct base sentence should have been no more than 84 months which--when coupled together with the 36 month FASE--equals 120 months. If the court were to impose any community custody on this count, then whatever length of community custody it were to impose must

be deducted from said 84 month base sentence so that the entire sentence in totality does not exceed the statutory maximum.

The same argument applies for count XI: the trial court imposed 43 months of confinement, plus 18 months as a FASE, plus 12 months of community custody, totalling 73 months--13 months in excess of the statutory maximum for a Class C felony. CP 746-47; accord RCW 9A.20.021. The correct base sentence should have been no more than 42 months which--when added together with the 18 month FASE--equals 60 months. If the court were to impose any community custody, then whatever length of community custody it were to impose must be deducted from said 42 month base sentence so that the entire sentence in totality does not exceed the statutory maximum.

Because Appellant's sentence under counts I and XI each exceed the statutory maximum for the respective underlying offenses, the trial court exceeded its statutory authority. This is so because when a court exercises its discretion in sentencing it must do so within the bounds of the sentencing laws. Manussier, supra at 667-68; Ammons, supra at 181. As such, the trial court was bound to have imposed a sentence as demonstrated in the preceding two paragraphs. By imposing sentences which exceed statutory authority, Appellant's sentences under counts I and XI are each invalid on their face, and this matter must be remanded to the trial court for resentencing in order to correct such invalid sentences. Appellant respectfully requests so.

F. CONCLUSION

Based upon the foregoing, this court should find that the State committed governmental misconduct when it told Bora Kuch that she had picked the wrong suspect in the initial out-of-court identification; supress the subsequent impermissibly suggestive identification; and dismiss counts VIII, IX, XI, XII, and XIII.

In addition, this court should find that there is insufficient evidence to support the imposition of the FASEs for counts I, II, III, IV, V, and VI, and remand the matter back to the trial court for vacation of said FASEs and resentencing..

Further, this court should find that the trial court exceeded its statutory authority in imposing sentence under counts I and XI, and remand the matter back to the trial court for resentencing in accordance therewith. Appellant respectfully requests so.

Respectfully submitted this ___ day of April, 2015.

AZIAS D. ROSS, Pro Se

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I, Azias Ross, declare and say:

That on the 9th day of April, 2015, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 46425-0-II:

_____;

_____;

_____;

_____.

addressed to the following:

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

DATED THIS 9th day of April, 2015, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Azias Ross
Print Name

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