COPY

No. 91254-8

Court of Appeals No.45132-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID TALYNN PECK,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

- PRV -

DAVID TALYNN PECK

DOC# 326808, Unit H2
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

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Table of Cases

A. IDENTITY OF PETITIONER

David T. Peck, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of appeals in case:

It stated: See Attachment 2 'Unpublished Decision, page 6 through 9:

Other Suspect Evidence & Alibi Defense, Ineffective Assistance of Counsel.

a copy of that decision is attached to this motion Attachment 2.

C. ISSUES PRESENTED FOR REVIEW

To justify review, a COA decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another COA, (b)(2), present a significant question of law under a constitution, (b)(3), or involve an issue of substantial public interest, (b)(4).

(1) See Part B above

(2)

(3)

D. STATEMENT OF THE CASE

See Attachment 2, pages 1-4
Unpublished Decision

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

The Appellant Court in determining that the trial court judge properly excluded 'other suspect evidence' is in conflict with State and Federal law, and their respected Constitutions. The appellant court panel ignored the fact that the trial court based it decision by considering the strength of the states case against Mr. Peck.

ARGUMENTS

First, the United State's Constitution and Washington's bars the trial court from considering the strength or weakness of the state's case in deciding whether to exclude defense 'proffered other suspect evidence.' The United States Supreme Court expressely reiterated this rule in **Homes v. South Carolina**, 547 U.S. 319, 126 S. Ct. 1727, 164 L.Ed. 503 (2006). Second, Washington law reinforces this Constitutional mandate. **State v. Franklin**, 180 Wn.371, 325 P.3d 159 (May 18, 2014).

It is clear that the COA only considered part of the 'evidentiary hearing record' for if they had not ignored where the trail court most certainly based it's decision on the strength and weaknesses of the state's case which violates Mr. Peck't's due process and equal protections under both Constitutions to a fair trial... **See Evidentiary Hearing Transcript Attachment 1. Arguments Continued A, B, and C.**

From The Evidentiary Hearing Transcript-Attachment 1 .
Line 24 page 12- **The Court:** The issue of admitting testimony regarding Mr. Stallman as being an alternative suspect in this case, I've reviewed the case law very extensively, starting with **Rehak**, which was actually a 1992 Clark County case, **Mack**, and then **State v. Clark**, which is kind of case that I think went a little further , out of Division 2, in talking about the admissibility of evidence of another perpetrator.

There's a couple of --well, several facts that the Court finds **very important** in making this ruling. First of all, I don't think it's disputed that the wig was recovered in an area in essentially the opposite direction of where Mr. Stallman was stopped, he did not have cash on him to the extent that would have been stolen in the robbery just moments before. He did provide to the police an alibi, which they confirmed. And I think most importantly, at the show up, these two people, Pizza Hut employees, didn't say that they weren't sure if he was the person or not. They said he wasn't and went through a number of factors as to why that was.

It is a circumstantial case to some extent, but there's also some direct evidence in terms of the DNA and the hat found very close to the scene -- or excuse me, the wig. That coupled with some of the statements that Mr. Peck made and then looking at the evidence of the alibi, the show-up, the fact that the clothing was differant, the Court is just finding at this point that there is not the train of evidence that's necessary to meet the threshold for admissibility and that this would simply be misleading to the jury.

So I am excluding the evidence related to Mr. Stallman at this time.

Mr. Dumm: **You honor, there was -- in Anderson's report, the officer's actually, in their police reports, described that the -- Mr. Stallman's clothing matched the discreption provided to them.**

The Court: I think it was close, but again, there were items missing and things -- this is really close to just to just having a person on the side of the road, blaming them for the crime... So I'm finding that the threshold is not met in this case. And that will be the court's ruling.

Few rights are more fundamental than an accused to present witnesses in his defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973). It is a right of Constitutional magnitude for that reason, the U.S. Supreme Court has ruled that a trial court cannot exclude defense-proffered other suspect evidence because of the preceived strength of the state's case. Homes 547 U.S. at 327-29, 126 S. Ct 1727. The Homes court explained that the exclusion of other suspect evidence is a "specific application" of a general evidence rule permitting a judge "to exclude evidence if it's probative value outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Id. at 327, 326, 126 S. Ct 1727. But when a rule that is intended to be of this type" instead strays into evaluating the strength of the states case, like here, then it does not rationally serve the end that [it was] designed to promote.

The trial court's reasoning in this case herein suffers from the same flaw as did the South Carolina rule rejected by Homes. Although not a rule in the sense where it is state law, but the court had considered that the evidence against Mr. Peck. That reasoning was inconsistent with Washington law and the error was not harmless as the trial court **excluded evidence showing that another person had the opportunity to commit the robbery. More than that, the excluded evidence taken together to a chain of circumstances that tends to create reasonable doubt as to Peck's guilt.**

The court heard arguments first from the state first and then Mr. Peck's attorney, Mr. Dumm. It is important for this court to review the transcript of Mr. Pecks attorney's argument to the trial court, starting on page 6,line 20, on through to the end.It is important how the court justified it's reasoning where the court simply sides with the prosecution. It is saying that Mr. Stallman cannot be the person as the wig was found in an area in opposite direction of where the police stopped him; that he did not have cash on him; that he provided an alibi with his uncle.

With that being said, Mr. Stallman simply could have robbed the pizza hut, went to his uncle's place, droped the money off for drugs backtracked with his girlfriend to make it look like he was not the person. With the gun on him. the same one where he almost got shot.

There was no opportunity for Mr. Peck to get his alibi witness together because of his attorney's ineffective assistance. What the petitioner is trying to show is that Mr. Stallman could have robbed that pizza place and he should have been able to have the evidence in. It was for the jury to decide whether Mr. Stallman could have been the robber. This was not for the Judge to decide the question. Mr. Peck did not get a fair trial. The jury would not have been confused. But it could be determined that there would have been a reasonable doubt in their minds. It is the wig that stopped the court. The judge decision was based upon the the strength of the state's case.

F. CONCLUSION

This Court should grant review because the Court of Appeals failed in it's responsibility to consider the trial court's reasoning as outlined herein and the court here should allow Mr. Peck to argue the ineffectiveness of his counsel here as the two issues are related to each other regardless that some of the evidence (matters) are outside the record, but there is other evidence that is part of the record.

Based upon the the record as attached hereto in support of the motion, the Court of Appeals unreasonable application and determination of the record, this case should be remanded back to the trial court for a new trial with instruction.

Respectfully submitted this 12 day of February, 2015.

X David Peck

Print name: David T. Peck

DOC # 326808

Stafford Creek Correction Center, Unit: H2
191 Constantine Way
Aberdeen, Washington 98520

ATTACHMENT 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

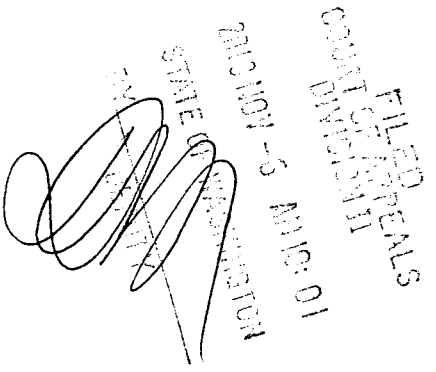
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	
Plaintiff,	)	Cause No. 12-1-01633-0
v.	)	COA No. 45132-8-II
DAVID PECK,	)	
Defendant.	)	ORIGINAL

EVIDENTIARY HEARING

The Honorable Suzan L. Clark Presiding

JUNE 28, 2013



TRANSCRIBED BY: Reed Jackson Watkins

Court-Approved Transcription

206.624.3005

A P P E A R A N C E S

ON BEHALF OF PLAINTIFF:	ANNA MARIE KLEIN Children's Justice Center P.O. Box 61992 Vancouver, Washington 98104-3188
ON BEHALF OF DEFENDANT:	GEORGE ALBERT MARLTON P.O. Box 513 Walla Walla, Washington 98101-2992
	CHRISTOPHER JESSE DUMM Christopher J. Dumm, Attorney, PC 710 West Evergreen Boulevard Vancouver, Washington 98660-3033
ALSO PRESENT:	DAVID PECK, Defendant

-o0o-

EVIDENTIARY HEARING

JUNE 28, 2013

THE COURT: This is the time set for the pretrial motions in State versus David Talynn Peck, Cause Number 12-1-016330.

Counsel, you've filed a number of motions as part of the trial brief?

MS. KLEIN: Yes, Your Honor.

THE COURT: Do you want to -- I briefly reviewed the response of defense. I think the main thing in contention is the evidence of the other perpetrator?

MR. DUMM: That's correct.

MR. MARLTON: Yes.

THE COURT: Additional argument, Ms. Klein?

MS. KLEIN: Just a couple of things, Your Honor. First, I -- since we were last in court, I received the defense transcript of the interview of Moe Jones, which occurred without any state representative there. And she was asked about the age of the perpetrator, and she said: "I don't know if he's 20, 30, 40."

And then she indicated that the person that was stopped, who could be Ryan Stallman, looked young. She -- the question was asked: "So did that strike you as he's young, so he could be the guy, or he's young, so he's not the guy, or just, I guess, what were your thoughts?"

She says: "He's young. What is he doing out so late was my first inclination. I mean, he -- he didn't -- he had a jacket on, but it was hanging off of his shoulders, like a white T-shirt with some sort of decoration on the front. There was no sunglasses, no hat and no hood. And he was, God, like, 100 yards away outside at night."

So there's just a few other differences in the appearance that she noted that I don't think that I had in my memorandum.

I would also, just in response to the defendant's argument, I disagree that our case is entirely circumstantial in this particular case. Eyewitnesses indicated that the suspect was wearing a wig and the defendant's DNA in the wig links him directly to that wig and to the robbery.

Even if the Court does find that the case is circumstantial -- I'm not conceding that, but accepting that the defense must show evidence that points directly to the other suspect as the guilty party. And all the evidence in this case seems to point to Stallman as not being guilty. There's zero evidence linking him to this case. The victims did not identify him. He was not in the area the suspects ran from. I -- I hope that this is clear from the briefing, but the victims indicated that the suspect ran from behind the Pizza Hut through a trail leading through some trees, up to an apartment complex. And Mr. Stallman was stopped on Highway 99, which is in the other direction. And it's not consistent with him being the suspect that it was -- that seven

minutes after the fact that he would still be in the area, given that the suspect ran off and in the opposite direction.

Mr. Stallman has an alibi. Police contacted his uncle and he confirmed that Mr. Stallman had been with them at the Kay's Motel during the time of the robbery. The description was not matching the suspect. He had a -- the jacket was different, in that it did not have a hood. He was younger than the suspect. He didn't have a wig on, no glasses, no hat. And I would submit that there's really nothing to support the inclination that he's the suspect, in addition to the fact that his DNA was not found on the wig, but yet, the defendant's was.

And going into Mr. Stallman, I think the defense has about 12 witnesses on that fact. We could probably extend this to a two-week trial. I think it would be a waste of the Court's time because they have not laid the proper foundation for it to be admissible.

Thank you, Your Honor.

THE COURT: Which of you are arguing on behalf of the defense?

MR. DUMM: I am, Your Honor.

THE COURT: Okay. Mr. Dumm.

MR. DUMM: Thank you, Your Honor.

For the record for this hearing, we would like to offer our copies of our defense DNA expert's letter that's been provided to the State.

THE COURT: So no objection to it being admitted strictly for

purposes of this hearing?

MR. DUMM: Strictly for purpose of this hearing.

MS. KLEIN: No, Your Honor. Although I do have a comment on that, which I guess I didn't address in my argument.

THE COURT: I can let you --

MS. KLEIN: Later?

THE COURT: Your rebuttal remarks, once they've made their argument. And I don't know the extent of it. I've read their motion, but I don't -- I haven't seen the report, so --

MS. KLEIN: Thank you, Your Honor.

THE COURT: Okay. I've reviewed Dr. Grimsbo's report.

MR. DUMM: Shall I proceed?

THE COURT: Yes.

MR. DUMM: Okay. Thank you, Your Honor.

Our position is -- well, I sent it out in our reply brief, that it is true that the defense needs to come forth with a significant chain of circumstances and facts -- admissible facts showing that someone other than the defendant, as charged in this case, was responsible for the crime.

And I'd submit, Your Honor, that in this case, the other suspect evidence doesn't really get too much stronger. The evidence against him is not a -- it's not a speculative who done it or the butler did it kind of scenario. There's a specific person who was found in the area, largely matching the description provided by the witnesses, by the victims. His proximity in time and in place

where he was located is less than 300 yards I believe we would adduce at trial -- within 300 years of the location of the robbery, and it was only minutes afterwards. He had no explanation for his presence there that would pass any rational sniff test.

He did, in fact, even have a gun on him, a black gun with a hole in the muzzle of the gun, that was consistent with the small hole and the muzzle that was described by the witnesses in our interview. The gun was described as being -- it was seized from Mr. Stallman. It was described as being a black replica of a Colt Model 1911. That's a .45 caliber or occasionally a 9mm handgun. And the Airsoft pistol has a muzzled caliber of somewhere around .25 caliber. It's substantially smaller. It's more like a BB gun, although it's a little bit bigger than a BB gun.

And that's what this fellow had on him in the middle of the night. This all adds to the after-the-fact suspiciousness of his location. His clothing largely matched the description given. His accomplice gave apparently two different -- she was identified variously as Brittany Stringfellow, although Mr. Stallman referred to her as Katie, or some -- some other name. Even the officers didn't believe the woman who let herself into someone else's house to get away from police. Or she -- I guess she knocked at the door and was let in.

There were -- there were so many facts connecting Mr. Stallman to the crime at the time that he was actually arrested at

gunpoint. And his actions continued to be so suspicious that they almost got him killed. Deputy Brett Anderson, I believe it was, had his service shotgun pointed at him because he kept reaching towards the pocket of his pants where they eventually found the gun -- the pocket of his jacket where they eventually found the gun.

Their story about going to feed the ducks at 1:30 or so in the morning on a cold, rainy March night is beyond virtuality.

And there was -- there was just so much evidence in this case. They -- they arrested him and they questioned him for a couple of hours. And they did obtain an alibi, that's true. But an alibi is not a -- an alibi doesn't neutralize everything else. If the person -- if the existence of an alibi meant that evidence couldn't be presented against a client, somehow, I suspect that just about everybody -- every defendant would have an alibi. It doesn't make everything else go away. That's a factor for the jury to consider. It goes to the weight of the evidence, suggesting that Mr. Stallman is actually the perpetrator. It doesn't exclude it.

And none of the cases that are cited, none of the cases in the case law, starting with pretty much State versus Mack, although it goes back to the territorial cases, like State versus Leonard, none of these require such a mountain of evidence that another suspect has to be tried and convicted in absentia before presenting this other suspect evidence. You just need to make a

good prima facie case, although no case law actually use that term. You need to make a good prima facie case. And I would submit that where probable cause exists to make custodial arrest for this crime of Mr. Stallman, I don't think we're ever going to see much more convincing evidence. All the officers that were at the scene were convinced at the time that this guy could be a suspect.

And it wasn't until quite a while later -- it wasn't until his DNA was excluded as the major component contributor to the DNA on the wig, and after they'd run down an alibi, which came from an uncle and family -- and there was no opportunity to cross-examine the uncle. We couldn't even locate Mr. Stallman and -- or his accomplice.

So there is just so much evidence suggesting that the police -- even the police thought Mr. Stallman was the guy. We're not picking a name out of the crowd or an unnamed suspicious street presence. This is a particular person who was arrested for particular reasons. And in my experience as a defense lawyer, I've had people -- I've had -- I know that charges are brought against people on less evidence that exists than -- than existed at the time against Mr. Stallman. I think that if this case doesn't let us -- well, if these facts don't allow us to present other suspects' evidence, I don't think anything ever would.

We also wanted to point out what the Court's aware of, that our expert was not able to exclude Mr. Stallman as a source of

contributing DNA of the 16 indicator locations on the DNA comparison chart. Mr. Stallman had DNA -- had base pairs, I think, which matched 11 of those 16. And he was clearly not as much of a provider as the defendant. The defendant was the contributor of the major DNA. But DNA doesn't prove where the DNA was transferred from the defendant to that wig, and it doesn't show when. And it -- in this case, the evidence that we would bringing -- will be bringing about the DNA shows that it's not -- it cannot exclude Mr. Stallman as a DNA contributor to that wig.

As to the State's point that Mr. Stallman didn't match the description of the suspect because he wasn't wearing a wig and a bandana or a hat and glasses, well, of course, the wig was in the dumpster and the glasses or the hat were somewhere else. He did have a gun, which is much more -- much more significant than any of that. If we're going to be talking -- I -- I think that I've addressed that, so I'll stop running my mouth.

On the other issue of self-serving hearsay, I made our position on the brief. There is no categorical bar to the admission of self-serving hearsay. The out-of-court statements of the defendant should be analyzed for admissibility based on whether they fall within one of the exceptions to the hearsay rule, not whether they come to the defendant and they would tend to help the defense. In a recent case, I think State versus Pavlik, makes that pretty clear. State versus Finch, which is the State the case cites [sic] was based on pre-rule -- or pre-evidence rule of

law and so really it can't be considered as law.

Thank you.

THE COURT: Okay. Anything additional?

MS. KLEIN: Yes, Your Honor.

I think that the facts have been wildly mischaracterized and I wanted to contest some of them.

First of all, Your Honor, I'm looking at the police reports right now, and I sat through all the interviews and never did any of the officers indicate that Mr. Stallman was arrested. He was detained briefly.

THE COURT: He was detained briefly.

MS. KLEIN: Correct. And he was shown -- there was a field show-up to the two alleged victims, but he was never arrested. He was not booked into jail. They did not charge him. They did not recommend that he be charged to the State. After they confirmed his alibi that night, right after talking to him, they released him at the scene.

Further, I don't know where they get this statement that he was detained for two hours. It's not mentioned in the police report exactly how long he was detained, but they had him out there at the scene. They spoke to the two alleged victims and brought them to the scene and showed them -- or vice versa, and then released him.

Further, the -- the so-called gun that he had in his possession was an Airsoft pistol.

And then further, in regard to Dr. Grimsbo's report, I've just received this, I think, maybe Wednesday. And I haven't had a chance to interview him, but -- so I'm not entirely sure what he's saying in this report -- but the Washington State patrol DNA forensic scientist, she's indicating that there was a mixed profile in the wig, that the major component matched the DNA profile of David Peck. And the odds of getting a mismatch are one in 2.2 quintillion. And that there was a trace amount of DNA from a second person, such a small amount of DNA that it could not be compared with anybody at all, and so no one in the world could be excluded from that trace amount of DNA. So Ryan Stallman could not be excluded from that trace amount of DNA.

I'm not sure if that's what Dr. Grimsbo is saying, or if it's something different, but that's the evidence that the State would present.

Thank you, Your Honor.

THE COURT: Well, as to the issue on the admissibility of Mr. Peck's statements, you're simply reserving at this time?

MR. DUMM: That's correct. And we would ask the Court to reserve until --

THE COURT: So I think we can take up any further argument if you intend to offer those at trial.

MR. DUMM: That's our request. Thanks.

THE COURT: The issue of admitting testimony regarding Mr. Stallman as being an alternative suspect in this case, I've

reviewed the case law very extensively, starting with Rehak, which was actually a 1992 Clark County case, Mack, and then State versus Clark, which is kind of a case that I think went a little further, out of Division 2, in talking about the admissibility of evidence of another perpetrator.

There's a couple of -- well, several facts that the Court finds very important in making this ruling. First of all, I don't think it's disputed that the wig was recovered in an area in essentially the opposite direction of where Mr. Stallman was stopped. And my understanding is that the time Mr. Stallman was stopped, he did not have cash on him to the extent that would have been stolen in the robbery just moments before. He did provide to the police an alibi, which they confirmed. And I think most importantly, at the show-up, these two people, Pizza Hut employees, didn't say that they weren't sure if he was the person or not. They said he wasn't and kind of went through a number of factors as to why that was.

It is a circumstantial case to some extent, but there's also some direct evidence in terms of the DNA and the hat found very close to the scene -- or excuse me, the wig. That, coupled with some of the statements that Mr. Peck made and then looking at the evidence of the alibi, the show-up, the fact that the clothing was different, the Court is just finding at this point that there is not the train of evidence that's necessary to meet the threshold for admissibility and that this would simply be misleading to the

jury.

So I am excluding the evidence related to Mr. Stallman at this time.

MR. DUMM: Your Honor, there was a -- in Anderson's report, the officers, actually, in their police reports, described that the -- Mr. Stallman's clothing matched the description provided to them.

THE COURT: I think it was close, but again, there were items missing and things -- this is really pretty close to just having a person on the side of the road, blaming them for the crime.

So I'm finding that the threshold is not met in this case. And that would be the Court's ruling.

Is there additional motions we needed to take up?

MS. KLEIN: Your Honor, I filed other motions in limine in my motion. I don't know if any of the other ones were contested. They didn't respond to any of the other ones. They're pretty standard.

I guess one of the main ones that I was concerned about is whether or not they intend to go into Moe Jones' termination from Pizza Hut. I reviewed the transcript of her interview. She indicated that the reason given for her termination was because after this robbery, she was unable to work nightshifts and that they felt that was too difficult to keep her on. And then there were some questions asked about -- about whether or not she spoke negatively of the corporation or something along those lines. But there was nothing to indicate there's any sort of dishonesty or

anything along those lines. So I don't see how that would be relevant, and I'm moving to exclude that.

THE COURT: Is defense intending to offer any --

MR. MARLTON: No.

THE COURT: -- evidence?

MR. MARLTON: She's not --

THE COURT: So --

MR. MARLTON: She's not working there anymore, Your Honor. That's all we're interested in.

THE COURT: I will grant the motion in limine. If it becomes relevant or you develop some relevance, you can certainly make an offer of proof outside the presence of the jury.

MS. KLEIN: And, Your Honor, the other thing I wanted to bring up is that at our last hearing, you indicated that defense was required to provide me with any transcripts of any interviews of State's witnesses that they had and that they intended to possibly use at trial, and I just received the one from Moe Jones and not from any other witnesses. So I just wanted to confirm that they don't have any.

THE COURT: Do you have other transcripts completed?

MR. MARLTON: I don't. I don't. You mean written transcripts?

THE COURT: Yes.

MR. MARLTON: No.

THE COURT: Okay. So that's the only testimony that's been transcribed?

MR. MARLTON: Yeah. Other than the State's, we have some of the officers. Well, her -- her witnesses, we have some of that, but that's her stuff.

MS. KLEIN: Well, that's what the Court ordered --

THE COURT: If you have transcripts, those need to be provided if you're intending to use them at trial.

MR. MARLTON: No.

THE COURT: But you interviewed witnesses and had it transcribed?

MR. MARLTON: Yeah. And I think she has them all.

MS. KLEIN: I do not have anything besides --

MR. MARLTON: Of your -- of your police officers?

MS. KLEIN: No, I do not have any transcripts from --

THE COURT: So --

MS. KLEIN: I think -- I'll have them if Mr. Visser give them to -- I -- we have no reason -- they were her witnesses. She was there. She interviewed. I was even there on some of them.

THE COURT: I realize she was present, but if you're --

MR. MARLTON: I wasn't even present in some of them, so --

THE COURT: If you have transcripts, you need to provide them.

MR. MARLTON: Okay. Well, I -- does she have any transcripts or notes from other witnesses that we didn't talk to, for example, talking to Moe Jones or McMurray before we had a chance to talk to them?

MS. KLEIN: No, Your Honor.

THE COURT: If she did, she'd be required to provide those.

MR. MARLTON: Okay. So if she talks to them beforehand, she has to tell us what she --

THE COURT: If she takes notes, yes, she's required to disclose those.

MR. MARLTON: Okay.

THE COURT: Any further issues we need to take up today?

MR. MARLTON: No, ma'am.

MS. KLEIN: No, Your Honor.

MR. MARLTON: Just I think you're wrong on that two witness things, but --

THE COURT: Well, you have the right to disagree with me.

MR. MARLTON: Well, in order to try our objection for the record, and we do have the police reports in the record already, so -- on the motion.

THE COURT: The police reports are part of the record on the Knapstad motion.

MR. MARLTON: Okay.

MS. KLEIN: Thank you, Your Honor.

MR. DUMM: I've got copies right here of the transcripts from Officer Stevens and Spainhower and the two victims.

MS. KLEIN: Thank you.

MR. DUMM: And I'll go through those --

MR. MARLTON: You have a copy? She does now?

MR. DUMM: Yes.

MR. MARLTON: Okay.

MR. DUMM: And I have a printer and I have them on my computer, so --

MS. KLEIN: Thank you, Your Honor.

THE COURT: In recess.

(Hearing Adjourned)

C E R T I F I C A T E

STATE OF WASHINGTON)

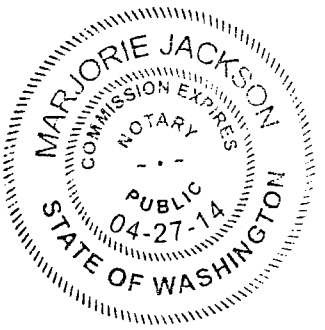
)

COUNTY OF SNOHOMISH)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of 2013.

NOTARY PUBLIC in and for
the State of Washington,
residing at Lynnwood.
My commission expires 4-27-14.



ATTACHMENT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID TALYNN PECK, Appellant.	No. 45132-8-II UNPUBLISHED OPINION

MAXA, J. — David Peck appeals his first degree robbery conviction, claiming that the trial court erred in denying his motion to suppress DNA (deoxyribonucleic acid) evidence and in excluding his "other suspect" evidence. In a statement of additional grounds (SAG), Peck claims ineffective assistance of counsel for defense counsel's failure to pursue an alibi defense and failure to challenge the seizure of a wig containing DNA evidence introduced at trial. He also claims that the State improperly showed a photograph of the wig to several witnesses and improperly introduced evidence of his criminal history. We affirm.

FACTS

On March 11, 2012, Moe Jones closed a Clark County Pizza Hut restaurant at 1:25 AM. One of her tasks was to take the evening deposit to the bank. Elisabeth McMurray, who worked that evening as a delivery person, was to follow Jones to the bank where Jones could make the deposit. As Jones was getting into her car with the deposit, a man grabbed the door, stuck a gun

in her face, and said, "Give me the money." Report of Proceedings (RP) (July 1, 2013) at 40. Jones handed him the money.

McMurray, noticing that Jones was in trouble, took the Pizza Hut magnetic sign off her car and hit the man over the head with it. When Jones yelled at her that the man had a gun, McMurray ran to her car and the man ran through the bushes down a trail leading to an adjacent apartment complex.

Both Jones and McMurray described the man as a five-foot seven, 140 pound, white male wearing a black wig, sunglasses and bulky dark clothing, and carrying a black handgun. Deputies searched the area and recovered a wig in a recycling bin at the adjacent apartment complex. They also detained Ryan Stallman, who was walking in the vicinity of the Pizza Hut with his girlfriend. When the deputies took Jones and McMurray to see Stallman, they both said that Stallman was not the robber. The deputies released Stallman after verifying his alibi, taking his statement, and obtaining a DNA sample.

DNA testing of the wig revealed the presence of Peck's DNA. It also excluded Stallman as a contributor to the major DNA component on the wig. Detective Jared Stevens interviewed Peck in the Clark County Jail, where Peck was being held on an unrelated charge. Detective Stevens read Peck his *Miranda*[1] rights, asked Peck about the robbery, and requested a DNA sample to compare to the DNA found in the wig. He told Peck that submitting his DNA would be a good way to prove he was innocent. Detective Stevens also told Peck that if Peck did not

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

consent to the DNA swabbing, he would request a search warrant to obtain the sample. Peck consented.

When Detective Stevens asked Peck about the robbery, Peck denied robbing the Pizza Hut and did not know why his DNA was on the wig. Peck then said that sometimes he "[h]as too much to drink and does crazy stuff." RP (June, 21, 2013) at 21. Peck added that he had dressed up as a woman the previous Halloween and had worn a wig.

A forensic scientist with the Washington State Patrol tested the DNA samples and testified that the DNA from the wig was a mixed profile with Peck as the major contributor. She testified that because there were only trace amounts of the other contributor insufficient to profile, it was very unlikely that the other contributor was the robber, and that only one person in 2.2 quintillion would match Peck's DNA.

The State charged Peck with first degree robbery and third degree theft. In a pretrial hearing, Peck moved to suppress his statements to Detective Stevens and the DNA test results. The trial court denied both motions, finding that Peck gave his statements voluntarily and had freely consented to giving a DNA sample.

Peck sought to introduce as other suspect evidence that the deputies had stopped Stallman shortly after the robbery near the Pizza Hut restaurant. The trial court denied Peck's request.

To undermine Peck's statement to Detective Stevens that he had dressed up as a woman on Halloween, a jail records supervisor testified that Peck was in custody from 8/24/2011 to 1/4/2012 and from 10/28/2010 to 11/16/2010. And a member of the identifications unit testified that the fingerprints and photograph taken from Peck during the 8/24/2011 booking matched those taken during his current booking.

A jury found Peck guilty of both charged counts. At sentencing, Peck sought a new trial because defense counsel failed to present an alibi defense. The trial court denied the motion as untimely. Peck appeals.

ANALYSIS

A. MOTION TO SUPPRESS DNA EVIDENCE

Peck argues that the trial court erred in denying his motion to suppress the DNA evidence taken during his custodial interrogation with Detective Stevens. He claims that the State failed to prove that he voluntarily consented to the search. We disagree.

1. Legal Principles

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Such a search must be supported by a warrant unless the search meets one of the exceptions to the warrant requirement. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Consent is an exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004).

The State has the burden of demonstrating that a defendant's consent was voluntary. *State v. Russell*, 180 Wn.2d 860, 871, 330 P.3d 151 (2014). We consider the totality of the circumstances in evaluating the voluntariness of the consent. *Id.* In making this evaluation, we consider (1) whether *Miranda* warnings had been given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person had been advised of his right not to consent. *Id.* No one factor is dispositive. *Id.* at 872.

We review a trial court's findings of fact following a suppression hearing for substantial evidence in the record to support them. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. *Id.* We treat unchallenged findings of fact as verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). We review de novo the trial court's conclusions of law pertaining to the suppression of evidence. *Garvin*, 166 Wn.2d at 249.

2. Finding of Voluntary Consent

Peck assigns error only to finding of fact 22, which provides: "Based on the totality of the circumstances the court finds that the DNA reference sample was provided voluntarily by the Defendant." Clerk's Papers (CP) at 124. But there is substantial evidence supporting this finding. First, unchallenged finding of fact 20 provides: "Deputy Stevens asked the Defendant to provide a DNA reference sample and he agreed." CP at 124. This finding supports the finding that Peck's consent was voluntary.

Second, Detective Stevens interviewed Peck in a secure room in the jail, visible to jail staff. He gave Peck the *Miranda* warnings, which Peck waived. Detective Stevens testified that he did not tell Peck that he had to give a DNA sample or make any threats or promises to get him to give a DNA sample, and that Peck agreed to give a DNA sample without any reluctance. This testimony clearly supports the trial court's finding that Peck's consent was voluntary.

Third, Detective Stevens' statement that he would seek a warrant if Peck did not agree was not coercive. *State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990). In fact, his statement implied that Peck did not have to agree.

Peck argues that his case is akin to that in *State v. Munoz Garcia*, 140 Wn. App. 609, 166 P.3d 848 (2007). In that case, Garcia signed a written consent for officers to search his car, but the police had not read him *Miranda* warnings, he had had no sleep, and he was in custody. *Id.* at 617. The trial court relied solely on the signed consent form in finding that consent was voluntary. *Id.* at 626. Division Three of this court held that under these facts, the trial court should have reviewed the totality of the circumstances and suppressed the evidence. *Id.*

Munoz Garcia is inapplicable here. Peck was given *Miranda* warnings, and therefore could have invoked those rights. The trial court could have implied that he knew that he could refuse consent because he had extensive experience in the criminal justice system.

The facts show that Peck's consent was voluntary. Peck agreed to give a DNA sample without resistance when Detective Stevens requested it. Under the totality of the circumstances presented here, we hold that the trial court did not err in concluding that Peck's consent was voluntary and in denying the motion to suppress.

B. OTHER SUSPECT EVIDENCE

Peck claims that the trial court denied him his constitutional right to present a complete defense when it excluded evidence that the deputies suspected Stallman. He argues that the evidence against Stallman was equally inculpatory as that against him. We disagree.

Before the trial court may admit "other suspect" evidence, "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). The proper inquiry is whether the proffered evidence creates a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third person beyond a reasonable doubt. *Id.* at 381. We

review the exclusion of other suspect evidence under an abuse of discretion standard. *Id.* at 377 n.2.

There initially was some indication that Stallman could be connected with the robbery. Shortly after the robbery, the deputies stopped Stallman who was walking nearby with his girlfriend. Stallman was not cooperative and the deputies were forced to draw their weapons before he complied. Stallman was wearing dark clothing, carrying a black replica Officer's Model air pistol, and generally fit the description Jones and McMurray had given. The deputies took Stallman into custody, gave him *Miranda* warnings, questioned him about the robbery, and obtained a DNA sample.

But further investigation essentially eliminated Stallman as a suspect. The deputies recovered the wig in the opposite direction of where they had stopped Stallman. Stallman did not have any money even though the robbery had taken place only a few minutes earlier. The deputies brought Jones and McMurray to Stallman's location and both women said that Stallman was not the robber. Deputies confirmed Stallman and his girlfriend's alibi that they were visiting Stallman's uncle at a nearby motel when the robbery took place. And the DNA testing of the wig excluded Stallman.

We agree with the trial court that admission of this nonprobative evidence would have served only to confuse the jury because there was no nonspeculative link between Stallman and the charged crime. Evidence of the deputies' suspicions about Stallman were not enough to raise doubt about whether Peck committed the robbery. Accordingly, we hold that the trial court did not err in excluding evidence that Stallman was a suspect.

C. SAG ISSUES

1. Ineffective Assistance of Counsel

Peck argues that he was denied his right to effective assistance of counsel because his attorney failed to present his alibi defense and failed to challenge the lawfulness of the deputies' seizure of the wig. We disagree.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 34. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id.*

a. Alibi Defense

Peck claims that he had a sworn affidavit from an alibi witness that he was with her at the time of the robbery. He argues that his attorney should have called her as a witness but did not even put her on the witness list.

Generally, the decision to call a witness or to present a particular defense is a tactical decision and cannot be the basis of an ineffective assistance claim. *Grier*, 171 Wn.2d at 33. But if the defendant can show that counsel's choice was not a legitimate tactical decision, he may prevail as long as he can show prejudice. Here, the record is insufficient to appraise defense counsel's decision not to call this witness as it involves matters outside the record. Therefore,

we cannot evaluate this ineffective assistance of counsel claim.[2] *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (reviewing court will not consider matters outside the record on appeal).

b. Seizure of Wig

Peck next claims that defense counsel should have challenged the unlawful seizure of the wig. He claims that there was no nexus between the crime and the wig and therefore the deputies unlawfully seized it.

But defense counsel could not challenge the deputies' seizure of the wig because Peck did not have a personal privacy interest in the recycling bin where the officers found the wig. Therefore, he did not having standing to raise such a challenge. *See State v. Ague-Masters*, 138 Wn. App. 86, 99, 156 P.3d 265 (2007) (defendant lacked standing to challenge search of co-defendant). Therefore, Peck's ineffective assistance of counsel claim on this basis fails.

2. Photograph of Wig

Peck argues that the trial court erred in not allowing defense counsel to introduce a lineup of wigs to test the witnesses' ability to identify the wig used during the robbery. He argues that none of the witnesses identified the wig before trial and to do so with a photograph during trial denied him his right to properly impeach the witnesses. We disagree.

The admissibility of evidence rests within the trial court's sound discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). We will not reverse a trial court's

[2] Peck states that there was a colloquy on July 1, 2013 about presenting Dana Brixey as an alibi witness. Our review of the trial transcripts does not find any such discussion. *See* RAP 10.10(c) (defendant must identify error so that court may review it without having to search entire trial record).

decision to exclude evidence absent an abuse of discretion. *State v. Cuthbert*, 154 Wn. App. 318, 337, 225 P.3d 407 (2010).

The trial record shows that defense counsel sought to show Jones and McMurray other wigs to impeach them should they identify the wig in the photograph as the same one as the robber had worn. The State did not show Jones the photograph. During the State's examination of McMurray, it asked her if the wig shown in a photograph was similar to the one the robber had worn. McMurray said that it was because of the color and length but that she did not know if it was the same wig. Because neither witness identified the wig in the photograph as that worn during the robbery, there was no impeachment purpose to be served by introducing additional wigs. We hold that the trial court did not err in refusing to allow a lineup of wigs.

3. Criminal History

Peck argues that the State improperly introduced evidence of his criminal history even though he did not testify at trial. He claims that this propensity evidence unfairly prejudiced him and denied him his right to a fair trial. We disagree.

Peck did not object at trial to the State's evidence that Peck was in custody during Halloween of both 2010 and 2011. Absent an objection, a party waives any claim of error involving the admission of evidence. RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). Nonetheless, the trial court would have overruled any such objection because the State introduced this evidence to rebut Peck's statement to Detective Stevens that he had dressed up as a woman and worn a wig the previous Halloween. Further, the State did not introduce why Peck was in custody, nor did it argue that his being in custody made it more likely that he committed the robbery. Peck's claim fails.

We affirm.

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.

MAXA, J.

We concur:

JOHANSON, C.J.

SUTTON, J.