No. 48175-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cameron Chudy,

Appellant.

Pierce County Superior Court Cause No. 15-1-01683-2

The Honorable Judge James Orlando

Appellant's Opening Brief

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2. Mr. Chudy was unlawfully seized without reasonable suspicion in violation of Wash. Const. art. I, § 7.

3. Mr. Chudy's statements to the police were inadmissible as fruit of his unlawful seizure.

> **ISSUE 1:** A person's presence in an area where the police expect to find a crime suspect is insufficient to justify a *Terry* stop when the person does not also sufficiently match the description of the suspect. Did the police violate Mr. Chudy's constitutional rights by handcuffing him (a black man) when they were looking for two white men alleged to have driven a stolen car?

4. Mr. Chudy was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

5. Mr. Chudy's defense attorney provided ineffective assistance of counsel by failing to argue for the suppression of his statements based on his unlawful seizure.

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ISSUE 5: Even relevant evidence is inadmissible if its probative value is outweighed by the risk of unfair prejudice or confusion of the issues. Did the court err by admitting a video of the theft of the car when Mr. Chudy was not accused of stealing it and the video encouraged the inference that he had committed the theft?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tacoma Police Officer Antush was driving through a residential area, looking for two white men whom another officer had seen in a stolen car. RP 228, 354, 367-368.

Instead, she approached Cameron Chudy – a black man – who was walking with a white friend. RP 357-358, 360; CP 66. Antush asked Mr. Chudy to talk to her and he walked in her direction. RP 358-359. She asked where Mr. Chudy was coming from and he said a friend's house. RP 359.

Then Mr. Chudy turned to leave. RP 362. But he ran into another officer who was approaching him from behind. RP 362. The officers placed Mr. Chudy in handcuffs. RP 40.

Later, Mr. Chudy was interrogated and said that he had been in the stolen car. RP 32-24. He made other statements implying that he had been the driver. RP 32-24, 52.

The state charged Mr. Chudy with possession of a stolen vehicle and attempting to elude (for driving that had taken place when the police tried to stop the car). CP 1-2.

The court held a hearing on the admissibility of Mr. Chudy's statements to the police. CP 18-100. His defense attorney argued that

because thirty minutes passed between his first and second interrogations, the officers should have *Mirandized* Mr. Chudy twice. RP 94.

Defense counsel did not argue that Mr. Chudy had been unlawfully seized. RP 93-94. The court admitted the incriminating statements. RP 96-99.

On the first day of trial, the court noticed that juror number 8 had been sleeping during testimony. RP 282. The judge said that the juror's eyes were closed and her head was down for an extended period of time. RP 282. She was not taking notes. RP 282. When the court announced recess, juror 8 did not respond for about fifteen seconds. RP 282.

The court questioned juror 8, who said that she was anemic and on medication that made her tired. RP 284. The court did not give the parties the opportunity to ask her questions or to move for her dismissal before calling the rest of the jury in. RP 285.

Later that day, defense counsel pointed out that juror 8 had fallen asleep again. RP 342. Mr. Chudy moved to excuse the juror and to replace her with one of the two alternates. RP 342. The court did not conduct any further inquiry and refused to remove the juror. RP 343.

Over Mr. Chudy's objection, the state sought to introduce a surveillance video of the alleged theft of the car. RP 102.

Mr. Chudy pointed out that he was not accused of actually stealing the car and that its owner could testify that it had been stolen. RP 103, 106, 109-111. Mr. Chudy argued that the video would confuse the jury because it was difficult to see but showed a black man stealing the car. RP 106. He pointed out that Mr. Chudy was a black man but that the description of the individuals in the car on the day he was arrested had been of two white men. RP 106. He argued that the video was of very low probative value, would confuse the jury, and would encourage the inference that he had stolen the car. RP 106, 109-111.

The court admitted the video over the defense objection. RP 111.

The state relied heavily at trial on Mr. Chudy's statements on the night of his arrest. RP 384-385, 423, 425-426. The prosecution did not call any witnesses who claimed to have seen Mr. Chudy in the stolen car. There was no other evidence linking Mr. Chudy to the car.

At the close of evidence, the court's instruction on the state's burden of proof differed from the pattern instruction. CP 16. The instruction the jury received did not include the sentence providing that "The defendant has no burden of proving that a reasonable doubt exists." CP 16.

The court did not give Mr. Chudy's proposed instruction, which did include the sentence informing the jury that he did not have the burden of raising a reasonable doubt. CP 9.

The jury convicted Mr. Chudy of both counts. CP 40-41. This timely appeal follows. CP 67.

ARGUMENT

I. MR. CHUDY'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE FOR THE SUPPRESSION OF HIS STATEMENTS BASED ON HIS UNLAWFUL SEIZURE.

A. Mr. Chudy's statements to the police should have been suppressed because they were the fruit of his unlawful seizure.

Officer Antush was looking for two white males who were reported to have occupied the stolen car. RP 367-368. But instead she approached Mr. Chudy – a black male – who was walking through the residential area with a white friend. RP 357-358, 360; CP 66.

Mr. Chudy told her that he was coming from a friend's house and then turned to leave. RP 359, 362. But he walked into another officer who handcuffed him. RP 40, 362.

When the officers handcuffed him, Mr. Chudy was seized for constitutional purposes. *State v. Young*, 167 Wn. App. 922, 928, 275 P.3d 1150 (2012). But the officers did not have reasonable suspicion to justify

the seizure. Mr. Chudy did not match the description of the suspects and he had every right to end the conversation and leave when he chose to walk away.

Mr. Chudy's later statements – made pursuant to his unlawful seizure – should have been suppressed. *Young*, 167 Wn. App. at 928.

The Fourth Amendment to the U.S. Constitution protects against unlawful search and seizure. U.S. Const. Amends. IV; XIV. Art. I, § 7 of the state constitution protects against unlawful intrusion into private affairs. Wash. Const. art. I, § 7. Art. I, § 7 provides greater protection than the Fourth Amendment because it focuses on "the disturbance of private affairs" rather than the reasonableness of police conduct. *State v. Gantt*, 163 Wn. App. 133, 138, 257 P.3d 682 (2011) *review denied,* 173 Wn.2d 1011, 268 P.3d 943 (2012).

If the state seeks to justify seizure of a person under an exception to the probable cause requirement, the state must establish that exception by clear and convincing evidence. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011), *review denied,* 272 P.3d 850 (2011). If the state fails to meet its burden of establishing an exception, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Young*, 167 Wn. App. at 928.

Police may briefly seize a person for questioning based on reasonable suspicion alone. *Young*, 167 Wn. App. at 929. Reasonable suspicion exists if there are specific, articulable facts indicating that a person has been or is about to be involved in a crime. *Id.* A *Terry* stop must be justified at its inception. *Diluzio*, 162 Wn. App. at 590-91. A mere hunch on the part of law enforcement does not give rise to reasonable suspicion. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). Neither does a startled reaction to seeing law enforcement on the part of an individual. *Young*, 167 Wn. App. at 929. A reviewing court must look to the totality of the circumstances surrounding the stop to evaluate its reasonableness. *Id.*

An encounter that begins as consensual interaction between an individual and law enforcement becomes a seizure if the officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Young*, 167 Wn. App. at 930 (*citing Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)).

A person's presence in an area where the police expect to find a crime suspect is insufficient to justify a *Terry* stop when the person does not also sufficiently match the description of the suspect or when the description is too vague. *See e.g. United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006).

The officer in Mr. Chudy's case had a description of two white males. RP 367-368. Still, she initiated contact with Mr. Chudy – a black man. RP 357-358, 360; CP 66. Mr. Chudy spoke to the officer willingly and then turned to leave.[1] RP 358-359, 362.

At that point, the officers did not have reasonable suspicion that Mr. Chudy had done anything wrong. He did not match the description of the suspects and there were no other articulable facts indicating that he had committed any crime. The constitution required the officers to let Mr. Chudy end the consensual contact whenever he wanted. *See Young*, 167 Wn. App. at 931.

Instead, the officers escalated the contact into a seizure by placing Mr. Chudy in handcuffs. *Young*, 167 Wn. App. at 930

Mr. Chudy's attorney should have moved to suppress his statements pursuant to his unlawful seizure without reasonable suspicion. *Id.*

[1] The officer testified that Mr. Chudy turned to run away, rather than walk. RP 362. But the method with which he ended the consensual contact is irrelevant to the analysis.

B. Mr. Chudy's defense attorney provided ineffective assistance of counsel by failing to argue that his statements should have been suppressed as fruit of his unlawful seizure.

Failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).[2]

Mr. Chudy's defense attorney argued for the suppression the statements he made pursuant to his arrest. RP 93-94. But counsel did not argue that the officers had unlawfully seized Mr. Chudy without reasonable suspicion. RP 93-95. Instead, he "deferred to the court" about the initial incriminating statements and argued only that the officers should have *Mirandized* him again before asking more questions approximately thirty minutes later. RP 94.

Counsel had no valid strategic reason for making that argument but failing to point out that Mr. Chudy had been unlawfully seized. Defense counsel's performance was deficient. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

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[2] The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a).

Mr. Chudy was prejudiced by his attorney's deficient performance. The statements Mr. Chudy made after his unlawful seizure were key to his conviction. None of the state's witnesses claimed to have actually seen Mr. Chudy driving the car. He did not match the description the officers gave upon actually seeing the driver. RP 367-368. There is a reasonable probability that defense counsel's error affected the outcome of Mr. Chudy's trial. *Id.*

Mr. Chudy's defense attorney provided ineffective assistance of counsel by failing to move for suppression of his statements based on his unlawful arrest. *Reichenbach*, 153 Wn.2d at 137. Mr. Chudy's convictions must be reversed. *Id.*

II. THE TRIAL COURT ERRED BY REFUSING TO EXCUSE A JUROR WHO WAS SLEEPING DURING MR. CHUDY'S TRIAL.

The trial judge noticed that juror number 8 had been sleeping during the first day of Mr. Chudy's trial. RP 282. The judge said that the juror's eyes had been closed, that she wasn't taking notes, and that she did not respond for about fifteen seconds after the court announced recess. RP 282-283.

The judge spoke to the juror who said that she was anemic and was on medication that made her drowsy. RP 284.

Later that day, Mr. Chudy's defense attorney informed the court that the juror had been sleeping again. RP 342. Mr. Chudy moved to have the juror removed and replaced with one of the two alternates. RP 342.

The court refused to excuse the juror. RP 343.

The prosecutor and judge both said that they had not seen the juror sleeping again. RP 343. The court did not question the juror further or conduct any kind of inquiry. RP 343.

The court abused its discretion by failing to excuse the juror who manifested an inability to listen to the evidence. RCW 2.36.011.

A trial judge has the duty

> to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. This provision places "a continuous obligation on the trial court to excuse any juror who is unfit to perform the duties of a juror." *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).

At Mr. Chudy's trial, juror 8 was plainly unfit to perform the duties of a juror. *Id.* But the court denied Mr. Chudy's request to remove her without giving any justification and without inquiring whether she was still having trouble staying awake.

The court abused its discretion. *Id.* The court broke its "continuous obligation" to excuse unfit jurors by refusing to excuse a juror who was sleeping during Mr. Chudy's trial. *Id.* Mr. Chudy's convictions must be reversed. *Id.*

III. THE COURT'S INSTRUCTIONS IMPROPERLY RELIEVED THE STATE OF ITS BURDEN OF PROOF.

The jury instruction defining reasonable doubt at Mr. Chudy's trial deviated from the pattern instruction. It did not specify that Mr. Chudy had no burden of proving the existence of a reasonable doubt. CP 26; *cf.* WPIC 4.01.

Mr. Chudy did not present any defense evidence. A fair trial in his case hinged on the jury's proper application of the burden of proof and the presumption of innocence. But the court's instructions permitted the jury to convict if it felt that Mr. Chudy should have testified or called witnesses to raise a reasonable doubt.

The court erred by failing to give the reasonable doubt instruction mandated by the Supreme Court. *See State v. Bennett,* 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is

"the bedrock upon which the criminal justice system stands." *Bennett*, 161 Wn.2d at 315.

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give a reasonable doubt instruction that differs from the WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011).

The court at Mr. Chudy's trial gave an instruction omitting the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 16. This instruction presents the same error at issue in *Castillo*.[3]

Divisions I and II approach the issue of harmlessness differently. Division I does not evaluate *Bennett* errors for harmlessness. *Castillo*, 150 Wn. App. at 473. Division I has noted that "the [*Bennett*] court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt." *Id.*

By contrast, Division II applies the harmless error standard for constitutional error. *Lundy*, 162 Wn. App. at 870-871.

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[3] Mr. Chudy did not object to the court's instruction, but he did propose an instruction that included the language clarifying that he had no burden of proving that a reasonable doubt exists. CP 9. This issue is preserved for appeal.

In the alternative, the court's instructional error presents manifest error affecting a constitutional right, which may be raised for the first time on appeal RAP 2.5(a)(3).

Even under Division II's approach, the error here requires reversal. In *Lundy*, the trial court used a modified instruction, which differed only slightly from the pattern instruction. *Lundy*, 162 Wn. App. at 870-71. The instruction unequivocally informed jurors "that the defendant has no burden of proving that a reasonable doubt exists." *Id, at* 873. Because the instruction correctly communicated the burden of proof and the reasonable doubt standard, the *Lundy* court found the error harmless beyond a reasonable doubt. *Id., at* 872-873.

Here, the court omitted the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 16. This instruction presents the same error at issue in *Castillo.* It differs significantly from the instruction addressed by the *Lundy* court.

Unlike the instructions in *Bennett* and *Lundy*, the instruction in Mr. Chudy's case provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Mr. Chudy had no burden. In other words, Instruction 2 did not make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. The instruction left open the possibility that Mr. Chudy had the

burden of raising a reasonable doubt. The same error persuaded Division I to reverse.[4] *Castillo,* 150 Wn. App. at 473.

The trial court erred when it failed to instruct the jury that Mr. Chudy had no burden of proving that a reasonable doubt existed. *Castillo,* 150 Wn. App. at 473. This instructional error requires reversal of Mr. Chudy's convictions. *Id.*

IV. THE COURT ERRED BY ADMITTING A VIDEO OF THE THEFT OF THE CAR OVER MR. CHUDY'S OBJECTION.

The officers who saw the stolen car on the night of Mr. Chudy's arrest described its occupants as two white men. RP 228, 354, 367-368. Mr. Chudy is a black man. CP 66.

In this context, the state sought to show the jury a video of a black man stealing the vehicle from its parking place. RP 102. The quality of the video was too poor to discern who the black man was. RP 106; Ex. 1.

But Mr. Chudy was not charged with the theft of the car. CP 1-2. The state did not claim that he had been involved in stealing the car in any way. As such, Mr. Chudy pointed out that the video had almost no probative value. RP 103, 106, 109-111. Indeed, the car's owner could (and did) provide the evidence necessary to establish that it had been stolen. RP 110.

[4] The instruction in *Castillo* suffered from other flaws as well.

Mr. Chudy argued that the video would confuse the jury and encourage them to infer that he – the only black suspect indicated at trial – had actually stolen the car. RP 106, 109-111.

The court erred by admitting the video over Mr. Chudy's objection. ER 403.

ER 403 provides that relevant evidence

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The video of the theft of the car should have been excluded under ER 403 in Mr. Chudy's case.

The state was not required to prove who stole the car, only that Mr. Chudy later possessed it. RCW 9A.56.068. The owner of the car testified that it had been stolen and to the details of the theft. RP 165-190. The video of the actual theft had virtually no probative value.

As Mr. Chudy pointed out, however, the video carried a significant risk of unfair prejudice and confusion of the issues.

The video showed a black man stealing the car, but it was of too poor a quality to clearly demonstrate that the man was not Mr. Chudy. RP 106. While looking for two white men alleged to have driven the vehicle, the police stopped Mr. Chudy (who is black) while he was walking with a

white friend. RP 228, 354, 357-358, 360, 367-368; CP 66. The racial makeup of the other players in the case encouraged the inference that the black man in the video was Mr. Chudy.

The fact that the video was unnecessary to prove the elements of the charges at issue also encouraged the jury to assume that Mr. Chudy was the man shown in the video. A rational jury could have concluded that there was no other reason the video would have been admitted as evidence.

The video was inadmissible under ER 403.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

Mr. Chudy was prejudiced by the improper admission of the video exhibit in his case. *Id.* The only evidence connecting Mr. Chudy to the stolen car were his statements. A video possibly showing him actually steal the car, however, would have been incontrovertible evidence that he had possessed it and knew it was stolen. There is a reasonable probability that the improper admission of the video materially affected the outcome of Mr. Chudy's trial. *Id.*

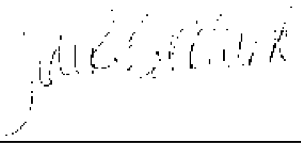
The court erred by admitting a video whose probative value was far outweighed by the risk of unfair prejudice and confusion. ER 403. Mr. Chudy's convictions must be reversed.

CONCLUSION

Mr. Chudy's defense attorney provided ineffective assistance of counsel by failing to argue the proper reasons for suppression of his incriminating statements. The court's reasonable doubt instruction improperly relieved the state of its burden of proof and failed to inform the jury that Mr. Chudy had no burden of proving that a reasonable doubt existed. The court erred by permitting a juror who had slept during part of Mr. Chudy's trial to decide his guilt. The court erred by admitting a video of the theft of the car whose probative value was far outweighed by the risk of unfair prejudice and confusion of the jury. Mr. Chudy's convictions must be reversed.

Respectfully submitted on February 18, 2016,

BACKLUND AND MISTRY



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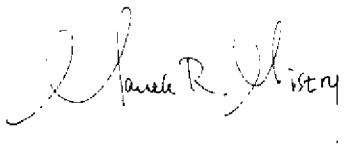

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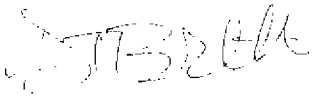

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
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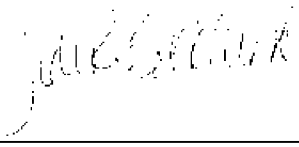
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 18, 2016.



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