

69439-1

69439-1

NO. 69439-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC PULEGA,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Eric Pulega was convicted only after the jury received several pieces of evidence that were improperly admitted. Because Mr. Pulega was identified as a result of law enforcement singling him out to the victim and the identification bears other indicia of unreliability, the identification should have been suppressed. In addition to the show-up identification, the jury improperly heard testimony that robberies are inherently violent and Mr. Pulega is a “bad guy,” listened to prejudicial hearsay that did not fall within an exception, and viewed a prejudicial five minute video of Mr. Pulega being detained and searched. The trial was tainted by these improper admissions, and the matter should be remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pulega’s right to due process by admitting the witness’s on-street identification of him because it was the result of impermissibly suggestive procedures and was not otherwise reliable.

2. The trial court erred in entering conclusion of law 3 with regard to Mr. Pulega’s Criminal Rule (CrR) 3.6 suppression motion to the extent it provides, “the victim, Neil Spencer, unprompted, identified

Pulega as the robber when Spencer was sitting in the back of McDonald's patrol car and before Pulega was detained by the police."

CP 135.

3. The trial court erred in entering conclusion of law 4 with regard to Mr. Pulega's CrR 3.6 suppression motion, which concludes,

that there was no impermissibly suggestive identification procedure regarding Spencer's identification of Pulega. Spencer spontaneously said, "That's the guy" or "That's him" when he saw Pulega on the sidewalk after Officer McDonald turned left on Pine Street. Spencer's identification of Pulega was certain and was not even in response to a question. Moreover, the court concludes that Spencer's identification was not tainted by any conduct of Officer Miller or Officer McDonald prior to the identification.

CP 135.

4. The trial court abused its discretion and violated ER 802 and ER 803 by admitting an out-of-court call to 9-1-1 as an excited utterance.

5. The trial court abused its discretion and violated ER 403 by admitting video of Mr. Pulega detained and being searched by law enforcement.

6. The trial court abused its discretion and violated ER 402 and ER 403 by admitting Officer Shawn Hilton's testimony that "apprehending bad guys" is his professional duty.

7. The trial court abused its discretion and violated ER 402 and 403 by admitting Officer Hilton's testimony that robberies are "inherently violent."

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An identification procedure violates constitutional due process if it is so impermissibly suggestive that it creates a substantial risk of misidentification. A suggestive procedure is one that unduly directs the witness's attention to one individual over another. Was the procedure that resulted in the identification of Mr. Pulega unconstitutional where law enforcement told the witness the probable suspect had been located and pointed to a particular individual that the witness then identified as the suspect?

2. To determine whether a suggestive identification procedure created a likelihood of misidentification, Washington courts consider the totality of the circumstances, which includes at least five factors: (1) the opportunity of the witness to view the suspect at the time of the offense, (2) the witness's degree of attention, (3) the accuracy of the witness's description, (4) the level of certainty at confrontation, and (5) the time between the offense and the confrontation. Moreover, cross-racial identification has been found to be unreliable, contributing to a

substantial likelihood of misidentification. Did a suggestive identification procedure create a serious likelihood of misidentification when the witness only viewed the suspect for a short period of time, the witness described the suspect as a different race and having a different hairstyle than Mr. Pulega, the witness was under stress during the offense and received an injury to the head, and the witness and Mr. Pulega were of different races?

3. The rules of evidence bar the admission of hearsay statements unless the court finds an exception applies. An out-of-court statement may be admitted if the proponent demonstrates the statement relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. Did the trial court abuse its discretion in admitting a robbery victim's 9-1-1 call where the declarant does not appear to be under the stress of excitement caused by a startling event that he is describing?

4. ER 403 prohibits the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Over Mr. Pulega's objection, the State presented a five minute video of Mr. Pulega restrained and being searched in front of a patrol car. Did the trial court abuse its discretion in admitting the evidence where its

probative value was minimal but the chance of prejudice was substantial?

5. ER 402 prohibits the admission of irrelevant evidence and, as stated, ER 403 prohibits the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Over Mr. Pulega's objections, the trial court admitted Officer Hilton's testimony that his job is to apprehend "bad guys" and robberies are "inherently violent." Where the offense at issue in the trial was robbery, did the trial court abuse its discretion in admitting the testimony?

D. STATEMENT OF THE CASE

Around 7:30 on a Saturday morning, Neil Spencer entered an ATM vestibule at Fifth Avenue and Union Street in Seattle. III RP 300-03, 353-59; IV RP 426. Another gentleman was already in the ATM area and took up the ATM next to Mr. Spencer. III RP 303-04. Mr. Spencer checked his balance and then proceeded to withdraw 20 dollars from his account. III RP 313-15. Meanwhile, the man next to Mr. Spencer was using his Washington EBT card in the adjoining

ATM. III RP 306-07.¹ Before Mr. Spencer could collect the 20 dollar bill from the ATM machine, the man next to him came behind him and made some sort of contact with Mr. Spencer that knocked him to the ground. III RP 317; Exhibit 33 (clip 3) at 10:50 to 11:01. The man grabbed the 20 dollar bill and exited the vestibule. *Id.*

Mr. Spencer chased the man through the neighboring Red Lion hotel, but was unable to catch up with him. III RP 329-35. Mr. Spencer returned to the area in front of the ATMs and called 9-1-1. Though he was out of breath from the chase and angry, Mr. Spencer relayed the event in detail to the 9-1-1 operator and described the assailant as a “black or Hispanic male with kinky hair and black clothing. In early twenties.” I RP 21; III RP 339-42. When asked by the operator, Mr. Spencer reported the suspect did not have a ponytail. Exhibit 37 (track 2) at 2:04-12. Mr. Spencer admitted the whole event “happened real fast” and told the operator it should be captured on the security camera inside the bank. *See id.* at 00:27-29, 02:04-12, 03:18-20.

¹ Trial testimony indicated that an EBT card is part of the “food stamp” program. III RP 267, 306-07.

A witness from across the street had also called 9-1-1. I RP 22-24. She described the suspect as a “black male, early 20s, black, long frizzy ponytail, mustache, black jacket.” *Id.*

Officer Michael McDonald responded to the bank where he encountered Mr. Spencer. III RP 212-17. When another officer, Renee Miller, heard the report from dispatch, she attempted to locate the suspect. IV RP 496-99. She eventually noticed a male that she thought matched the description and started to follow him. IV RP 501-3. Over the radio, she relayed her location (Fourth Avenue between Pike and Pine streets) and that she was following a possible suspect. I RP 25; IV RP 504-05. Hearing Officer Miller’s update, Officer McDonald asked Mr. Spencer whether he thought he could identify the suspect. I RP 25; III RP 222. When Mr. Spencer responded affirmatively, Officer McDonald took him to Officer Miller’s location on Fourth Avenue and pointed to an individual Officer McDonald believed matched the description. I RP 25-30; III RP 226. Mr. Spencer denied that was the man who robbed him. III RP 226.

At that point, Officer McDonald pulled up to Officer Miller, who was surprised that the victim had not identified the individual she had been following. III RP 245-47. When Officer Miller learned

Officer McDonald had pointed to a different individual, Officer Miller made clear that that individual was not the suspect and pointed north along Fourth Avenue at Mr. Pulega, indicating he was the probable suspect. III RP 244-47, 289-91; IV RP 505-09. This all took place while Mr. Spencer was in Officer McDonald's patrol car in a position to see the officers' interaction. III RP 289-91.

Officer McDonald drove Mr. Spencer north on Fourth Avenue and turned left onto Pine Street in the direction Officer Miller had pointed and where Mr. Pulega was walking. III RP 248-51. Mr. Spencer identified Mr. Pulega as the suspect. III RP 251.

Mr. Pulega was pursued by law enforcement while entering the bus tunnel on Pine Street. III RP 248, 254. After Officer McDonald detained Mr. Pulega, he was brought to the hood of the patrol car and searched. III RP 254-57; Exhibit 32. The police recovered a 20 dollar bill and EBT card from Mr. Pulega, among other items. III RP 266-67; IV RP 455-61.

Mr. Spencer reported he was 99 percent sure Mr. Pulega was the same man even though he had identified a man of a different race, reported the robber did not have a ponytail, which Mr. Pulega did, and the whole event "happened real fast." III RP 269; Exhibit 37 (track 2)

at 02:04-12; *compare* I RP 21 (Spencer describes robber as black or Hispanic) *with* CP 98 (Pulega identified as Asian); Exhibit 32 (video of Pulega).

After watching the bank surveillance video, the hotel surveillance video, and the dashboard camera video that detailed the police detaining and searching Mr. Pulega, the jury acquitted on robbery in the first degree. *E.g.*, IV RP 523-25; CP 1, 91-92. However, Mr. Pulega was found guilty of second-degree robbery. CP 61, 93.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. The trial court erred by failing to suppress the impermissibly suggestive and unreliable show-up identification.

- a. An out-of-court identification procedure violates due process when it is so suggestive it creates a substantial likelihood of misidentification.

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Manson v. Brathwaite*, 432 U.S. 98, 144, 97 S. Ct. 2243, 53 L. Ed. 2d

140 (1977); *see* U.S. Const. amend. XIV. A two-step inquiry is involved: first, a court must determine whether the identification procedure is suggestive. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A suggestive identification procedure is one that unduly calls attention to one individual over others. *Id.* If that test is satisfied, the court decides whether the suggestiveness created a substantial likelihood of misidentification. *Id.* There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972).

Against this standard, the show-up procedure conducted in Mr. Pulega's case was so suggestive as to create a substantial likelihood of misidentification.

- b. The identification procedure was impermissibly suggestive because it singled out Mr. Pulega.

A show-up process is inherently suggestive because the eyewitness views only one individual. *State v. Herrera*, 902 A.2d 177,

183 (N.J. 2006); Patrick M. Wall, Eye-Witness Identification in Criminal Cases 27-40 (Charles C. Thomas 1965) (explaining that courts and experts are in agreement that show-ups are “grossly suggestive”). As this Court has noted, “the practice of showing suspects singly to persons for the purpose of identification has been widely condemned.” *State v. Rogers*, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986). Thus, in the context of a photo identification, the display of a single individual to a witness is impermissibly suggestive as a matter of law. *State v. Maupin*, 63 Wn. App. 887, 896, 822 P.2d 355 (1992) (citing *Brathwaite*, 432 U.S. at 116).

Likewise, the U.S. Department of Justice (DOJ) has recognized the inherent suggestiveness of a show-up. U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement 27 (1999) (instructing law enforcement to employ procedures that avoid prejudicing the witness) *available at* <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf>. Among other procedural safeguards, DOJ instructs law enforcement that when multiple witnesses are involved and a positive identification is obtained from one witness, other identification procedures (e.g., a lineup, photo array) should be considered for remaining witnesses. *Id.*

A verbal affirmation from the police that the subject could be the crime suspect also weighs in favor of suggestiveness. *See State v. McDonald*, 40 Wn. App. 743, 746, 700 P.2d 327 (1985). In fact, rates of misidentification increase when police tell a witness that they have found a suspect. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later*, 33 *Law & Hum. Behav.* 1, 6-7 (Feb. 2009).

Here, the police pointed Mr. Spencer to a single individual: Mr. Pulega. While Mr. Spencer was speaking with Officer McDonald, a broadcast came over the officer's radio that Officer Miller had spotted a possible suspect in the area. I RP 24-25, 79-80. Officer McDonald asked Mr. Spencer if he thought he would be able to identify the suspect, to which Mr. Spencer replied affirmatively. I RP 25. Officer McDonald put Mr. Spencer in the back of his patrol car and they drove toward the area of Officer Miller. I RP 26. Thus Mr. Spencer was aware the police believed they had found the suspect, and the trial court's conclusions of law to the contrary are in error. *See* CP 135 (conclusions 3 and 4).

Even more suggestively, after Officer McDonald believed the wrong individual on the street was the possible suspect, Officers McDonald and Miller exchanged gestures indicating her disbelief with his choice of individuals. I RP 29, 81-82. Officer Miller shook her head “no” and then pointed down the street at Mr. Pulega. I RP 29-30, 81-82. Officer McDonald pulled forward down the street toward Mr. Pulega. I RP 30-31. Again, this all occurred while Mr. Spencer was seated in Officer McDonald’s patrol car. Once Officer McDonald pulled up next to the suspect Officer Miller had pointed at, Mr. Spencer indicated “that’s him.” I RP 30-33. Though Officer McDonald provided no additional prompting, Mr. Pulega had already been singled out as the person the police believed was the suspect. *See* I RP 30, 32-33. The trial court’s conclusions are in error in light of this additional evidence. *See* CP 135.

Further, although law enforcement received two 9-1-1 calls related to this incident, the prosecution made no effort to obtain additional identifications from the non-victim witness. *See* I RP 17, 21-22.

Pointing to a particular individual after informing the victim that law enforcement has identified a suspect, as occurred here, is an impermissibly suggestive identification procedure.

- c. The suggestive show-up procedure created a substantial likelihood of misidentification.

Because the show-up procedure used with Mr. Pulega was unduly suggestive, the court must evaluate the five *Biggers* factors to determine the likelihood of misidentification. *Barker*, 103 Wn. App. at 905.

The first factor is the opportunity that the witness had to view the suspect at the time of the crime. *Barker*, 103 Wn. App. at 905. Courts consider the amount of time that a witness had to view the perpetrator and the circumstances under which the observation took place. For example, in *Rogers*, the court explained that the witness had a good opportunity to view the witness when they were both in the same room for 20 minutes, and the suspect was “never out of [the witness’s] sight.” *Rogers*, 44 Wn. App. at 516. In contrast, the court in *McDonald* stated that the witness’s opportunity to view the suspect was “limited” when the criminal incident took five to six minutes, and two to three of those minutes the suspect was not directly in the witness’s

view. 40 Wn. App. at 747. The court weighed the other factors and explained that the identification was unreliable. *Id.*

Here, Mr. Spencer was in the ATM with Mr. Pulega for less than two minutes. Exhibit 33 (clip 3) at 09:28 to 11:01. During most of that time, Mr. Pulega was off to Mr. Spencer's right, visible only through peripheral vision. *Id.* Mr. Spencer was conducting banking transactions and thus was not singularly focused on Mr. Pulega. III RP 314-15, 317. Toward the end of the interaction, Mr. Pulega came from behind Mr. Spencer, Mr. Spencer received a head injury, and he was on the ground briefly. *E.g.*, I RP 24; III RP 317, 323. These factors also weigh against a favorable opportunity to view the suspect.

The second factor that courts consider is the degree of attention the witness paid to the perpetrator at the time of the crime. *Barker*, 103 Wn. App. at 905. In *State v. Traweek*, the witness stated that she "watched the two men closely from the moment they entered the store." 43 Wn. App. 99, 104, 715 P.2d 1148 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). In *State v. Fortun-Cebada*, the witness spoke with the offender, walked down the street with him, and hugged him before parting. 158 Wn. App. 158, 171, 241 P.3d 800 (2010). The court stated that these

circumstances did not create a substantial likelihood of mis-identification. *Id.*

In contrast to both of those cases, Mr. Spencer admitted the whole incident “happened real fast.” Exhibit 37 (track 2) at 2:04-12. Even when prompted by the 9-1-1 operator, Mr. Spencer did not recall the suspect as having a ponytail. Exhibit 37 (track 2 at 2:04-12); *see, e.g.*, I RP 17-18 (bystander witness identified suspect as having a ponytail). As discussed, Mr. Spencer was primarily occupied with banking transactions, he did not interact with his assailant, who was generally only off to the side of Mr. Spencer. This limited attention contributes to the likelihood of misidentification.

The third factor is the accuracy of the witness’s description. *Barker*, 103 Wn. App. at 905. Descriptions need not be perfect to be accurate in satisfaction of the third prong. *See, e.g., Rogers*, 44 Wn. App. at 516 (“Baker’s description of Rogers was essentially accurate.”); *State v. Cook*, 31 Wn. App. 165, 172-73, 639 P.3d 863 (1982) (all witnesses gave “fairly accurate” descriptions).

But some minor differences between a witness’s description and the identified suspect’s appearance have lead courts to weigh this factor against admissibility. For instance, in *McDonald*, the witness had

stated that the suspect wore a blue short-sleeved shirt and jeans. 40 Wn. App. at 747. When the identified suspect was arrested, he was wearing khaki pants and a long-sleeved shirt. *Id.* In this case, Mr. Spencer identified his assailant as black or Hispanic when Mr. Pulega is of Asian (Pacific Islander) descent. *Compare* I RP 21 with CP 98; Exhibit 32. Mr. Spencer also denied the suspect had a ponytail, but Mr. Pulega wore a ponytail and a bystander reported a ponytail on the assailant. *Compare* Exhibit 37 (track 2 at 2:04-12) with I RP 17-18 (bystander identified suspect as having a ponytail); Exhibit 33 (track 3) at 04:48, 09:33. Though Mr. Spencer’s description matched some general characteristics of Mr. Pulega, it missed the mark in these other ways.

The fourth factor is the witness’s level of certainty. Mr. Spencer did not hesitate in identifying Mr. Pulega as a result of the suggestive procedure. I RP 32. Mr. Spencer later told Officer McDonald he was “99% sure” Mr. Pulega was the man who robbed him. I RP 269. But many courts and scientists have noted that there is no correlation between an eyewitness’s level of certainty and the accuracy of the identification. *E.g., Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005) (“In the 32 years since the decision in *Neil v. Biggers*, the idea

that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies.” (internal quotation marks omitted)); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001).

Courts are required to look to the totality of the circumstances to determine whether the identification procedure violated due process. Here, additional factors support the likelihood of misidentification. One of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, __ Wn.2d __, 294 P.2d 679, 693 (2013) (Wiggins, J., dissenting) (citing James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 Psychol. Pub. Pol’y & L. 253 (2001)); accord e.g., *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) (citing Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification*, 35 New Eng. L. Rev. 835 (2001)); Innocence Project, *200 Exonerated: Too Many Wrongfully Convicted* 20-21, available at http://www.innocenceproject.org/200/ip_200.pdf (last visited Mar. 28, 2013). “The cross-race effect (CRE), also known as the own-race bias or other-race-effect, refers to the consistent finding

that adults are able to recognize individuals of their own race better than faces of another, less familiar race.” John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, in 2 Handbook of Eyewitness Psychology: Memory for People, 257, 257-58 (Rod C. L. Lindsay et al. eds., 2006).

Mr. Spencer is Caucasian, but Mr. Pulega is of Asian (Pacific Islander) descent. *See* Exhibit 33 (track 3) at 09:28-11:02; Exhibits 23, 32; CP 98. Mr. Spencer misidentified Mr. Pulega’s race, identifying him as either black or Hispanic. I RP 21. He further identified Mr. Pulega by his hair, describing it as “frizzy.” I RP 21; *see Allen*, 294 P.2d at 690 (Madesen, J., concurring) (description of suspect by hair or other physical characteristics implicating race causes concern for cross-racial nature of identification). The cross-racial nature of the identification here further indicates the likelihood of misidentification.

In light of the totality of the circumstances, including a review of the *Biggers* and other factors, there was substantial likelihood of misidentification here.

- d. The conviction must be reversed because there was insufficient evidence to convict Mr. Pulega absent the out-of-court identification.

A constitutional error, such as the admission of an impermissibly suggestive identification, is presumed prejudicial. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). Thus, the State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

The State cannot meet its burden here. Absent Mr. Spencer's identification of Mr. Pulega shortly after the robbery occurred, it cannot be said beyond a reasonable doubt that the jury would have reached the same result. The items recovered from Mr. Pulega were commonplace—a twenty dollar bill, and EBT card, and a lighter. IV RP 456-60. As discussed, Mr. Spencer's description of the robbery suspect identified a different race and hairstyle than Mr. Pulega. Further, the jury demonstrated doubt that the State had met its burden even with the improperly admitted identification by posing two

questions during deliberations and acquitting Mr. Pulega of the crime charged, first-degree robbery. CP 61-64, 91.

Moreover, this Court can be certain that the jury relied on Mr. Spencer's identification in reaching its verdict. Although eyewitness identification evidence is among the least reliable forms of evidence, it is persuasive to juries. In fact, jurors believe cross-racial identifications are even more reliable than same-race identifications. *Allen*, 294 P.3d at 693 (Wiggins, J. dissenting). "As one leading researcher said: '[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, 1109 (2009) (quoting Elizabeth F. Loftus, *Eyewitness Testimony* 19 (2d. ed. 1996)). Studies show that jurors rely strongly on the confidence of the eyewitness but confidence is not correlated with accuracy. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 469 (2012).

Because the State cannot show beyond a reasonable doubt that erroneous admission of the out-of-court identification did not prejudice the result, Mr. Pulega is entitled to a new trial where the identification is suppressed.

2. Multiple evidentiary errors prejudiced Mr. Pulega, requiring reversal and remand for a new trial.

- a. Mr. Spencer's 9-1-1 call was not an excited utterance and thus was inadmissible hearsay.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

Hearsay is admissible at trial if it is a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). The proponent of hearsay under this exception must satisfy three closely connected requirements: “that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition.” *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

The underlying rationale behind admitting this hearsay evidence is that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *State v. Chapin*, 118 Wn.2d 681,

686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)). “[T]he key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’” *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).

To admit the evidence, the trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); *State v. Ramirez*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). ER 803(a)(2) must be interpreted in a restrictive manner, so as to “not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.” *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

A review of Mr. Spencer’s 9-1-1 call makes clear that he did not remain under the influence of a startling event, even assuming the robbery was such an event. *See generally* Exhibit 37 (track 2); I RP

139-45 (denying Pulega's pretrial objection and admitting call as excited utterance); III RP 341-42 (admission at trial over objection). Though Mr. Spencer was out of breath for approximately the first minute of the call, he does not appear startled, excited or upset. *Id.* After Mr. Spencer caught his breath, which resulted from his chase of the suspect and not from the robbery, the lack of excitement is abundantly clear. *Id.* at 01:29-3:44. Mr. Spencer calmly provides detail, including that there should be video footage from the surveillance cameras and that there were witnesses to the event. *E.g., id.* at 00:27-29, 00:45-57, 01:07-09, 03:18-20. He accurately describes his location without exhibiting stress or concern. *Id.* at 03:20-30. When the operator asked Mr. Spencer for his telephone number, he calmly and collectedly asked the operator to clarify whether she was referring to his home or cellular number and then provided it without incident. *Id.* at 02:35-53. He willingly ended the call before the police arrived and courteously said goodbye to the operator. *Id.* at 3:30-44.

Viewed in light of the restrictive reading provided the exception under ER 803(a)(2), a preponderance of the evidence does not show that the declarant remained continuously under the influence of the event at the time the 9-1-1 call was made.

- b. The dashboard camera video was only minimally relevant and should have been excluded under ER 403.

Mr. Pulega objected to the State's use of law enforcement dashboard camera video showing several police officers restraining and searching him on the hood of a patrol car. III RP 189. He argued the evidence's probative value was substantially outweighed by the prejudice it would cause him. III RP 189-98. The court abused its discretion when it admitted the video over his objection. III RP 198-205.

Even relevant evidence is inadmissible if it is substantially more prejudicial than probative. ER 403. The State argued the video was relevant to show angles of Mr. Pulega's face and person that matched the ATM surveillance video and also to show the evidence recovered from Mr. Pulega. III RP 194-96. However, defense counsel offered to stipulate that a 20 dollar bill was found on Mr. Pulega² and suggested that the State could introduce still photographs produced from the video to show the angles of Mr. Pulega it was interested in comparing to the ATM surveillance video. III RP 192-96. Additionally, officers could

² Though the State argued the video was necessary to show other evidence seized from Mr. Pulega, such as his EBT card, defense counsel was likely to have stipulated to those items as well if provided the opportunity. *See* III RP 192-93.

(and did) testify as to what they removed from Mr. Pulega. III RP 197; IV RP 455-65, 474-79. In fact, the State admitted some of the items it seized from Mr. Pulega. Exhibits 65 (EBT card recovered from Pulega) & 69 (photocopy of 20 dollar bill recovered from Pulega).

The State further argued, and the court ultimately agreed, that the video was relevant to rebut any accusation that the police planted the evidence on Mr. Pulega. III RP 190, 192-93, 199. Yet Mr. Pulega did not accuse the police of planting evidence, and had not done so prior to trial. Further, as defense counsel pointed out, if Mr. Pulega did so at trial, the video could be admitted in rebuttal. III RP 190-91, 198. Because there was strong alternative forms of evidence to show what was recovered from Mr. Pulega and his resemblance to the figure in the ATM surveillance video and because the video could be admitted in rebuttal if Mr. Pulega opened the door, the probative value of the dashboard video was slight.

On the other hand, the prejudicial value was substantial. In the video, Mr. Pulega is detained on the hood of a patrol car, surrounded by several police officers, and repeatedly, physically reprimanded to return to a secured position with both hands on the front of the car. Exhibit 32. The police officers appear annoyed with Mr. Pulega, who appears

to be yelling even without the audio. *Id.* The duration of the video enhances each of these concerns. *See id.* (portion with Pulega exceeds five minutes); III RP 256-58.

The trial court abused its discretion by admitting the video of Mr. Pulega restrained and being searched at the hood of a patrol car because the slight probative value was substantially outweighed by the likelihood of prejudice.

- c. Officer Hilton's testimony that "apprehending bad guys" is his professional duty and robberies are "inherently violent" should have been excluded under ER 402 and ER 403.

Evidence that is not relevant is inadmissible in the first instance. ER 402. Moreover, as set forth above, even if relevant, evidence is inadmissible if it is substantially more prejudicial than probative. ER 403. The trial court abused its discretion in overruling Mr. Pulega's objections to parts of Officer Shawn Hilton's testimony.

First, Officer Hilton, a backing officer for the apprehension of Mr. Pulega, testified that his professional duties include "apprehending bad guys." IV RP 448-49, 452-53. If this comment bears any relevance, its probative value is slight. Through non-prejudicial testimony, Officer Hilton established his patrol duties to include responding to 9-1-1 calls, calls for service and quality of life issues. IV

RP 449. In this case, Officer Hilton was involved because he responded to a 9-1-1 call. IV RP 451. When he arrived, Mr. Pulega was already apprehended. *Id.* Thus, Officer's Hilton's relevant duty is responding to 9-1-1 calls. His apprehension of "bad guys" is irrelevant.

The testimony was prejudicial because it equates Mr. Pulega with "bad guys," asserting a moral judgment and likening Mr. Pulega to unspecified criminals. It also presumes that the police never falsely apprehend a suspect.

Second, Officer Hilton testified that robberies are "inherently violent." IV RP 451. When the trial court overruled defense counsel's objection, Officer Hilton repeated that "robberies are inherently violent." IV RP 451-52. Again, this testimony was not relevant because the jury's role is to determine whether the State proved the elements of robbery in the first degree beyond a reasonable doubt, and not to assess whether the alleged robbery was violent. Officer Hilton's opinion of the offense generally is irrelevant. On the other hand, ascribing the descriptor "violent" to the offense with which Mr. Pulega was charged is prejudicial. *Cf. United States v. Cortinas*, 142 F.3d 242, 248 (5th Cir. 1998) (vacating convictions because limiting instructions were inadequate "to mitigate the prejudicial effect of the overwhelming

testimony regarding the violent, criminal activities of the Bandidos” gang).

Consequently, the trial court abused its discretion by overruling Mr. Pulega’s objections to irrelevant and substantially prejudicial testimony.

- d. Because the outcome of the trial would have been different had these errors not occurred, reversal and remand for a new trial is required.

Evidentiary errors require reversal “if the error, within reasonable probability, materially affected the outcome” *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

In light of the evidence adduced at trial and the jury’s verdict, there is a significant chance that the jury considered this erroneously admitted evidence. There is no way to know precisely what value the jury placed on the erroneously admitted evidence. Nonetheless, it is clear that the jury carefully considered all the admitted evidence, posing inquiries, before it returned a verdict that made a fine distinction

by acquitting Mr. Pulega of robbery in the first degree but finding him guilty of the lesser-included offense. *See* CP 61-64. Despite the evidence admitted, the jury acquitted Mr. Pulega of the most serious offense. It is reasonably probable that the result of the trial was affected by the admission of the 9-1-1 call, which showed Mr. Spencer describing the event shortly after it occurred and providing corroborating details that he had trouble matching on cross-examination;³ the dashboard video that portrayed Mr. Pulega for five minutes restrained, detained, and defensive on the hood of the patrol car; and the prejudicial comments by Officer Hilton suggesting Mr. Pulega was a violent “bad guy.”

The individual and cumulative effect of these errors requires reversal of Mr. Pulega’s conviction and remand for a new trial.

F. CONCLUSION

Because the suggestiveness of the State’s identification procedure created a substantial likelihood of misidentification, Mr. Pulega’s conviction should be reversed. In the alternative, the conviction should be reversed because he was prejudiced by the multiple evidentiary errors.

³ Defense counsel substantially discredited Mr. Spencer’s in-court testimony. III RP 353-68; IV RP 382-86, 401-19.

DATED this 28th day of March, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'MZ', written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

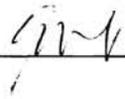
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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 69439-1-I |
| v. |) | |
| |) | |
| ERIC PULEGA, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] ERIC PULEGA 347486 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584-0974</p> | <p>(X) () ()</p> | <p>U.S. MAIL HAND DELIVERY _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MARCH, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710