

NO. 70253-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ORLEN GURZELLE DARDEN,

Appellant.

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FILED IN CASE NO. 70253-0-I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS.....	3
C. <u>ARGUMENT</u>	13
1. RAP 2.5(a) PRECLUDES REVIEW BECAUSE DARDEN FAILED TO MAKE A TIMELY AND SPECIFIC OBJECTION BELOW	13
a. Additional Facts	13
b. Standard Of Review.....	20
c. Darden’s Motion For A Mistrial Cannot Be Reviewed On Appeal Because He Failed To Make A Timely And Specific Objection Below....	21
d. Darden Has Not Demonstrated That A Constitutional Error Actually Prejudiced His Right To A Fair Trial	27
i. The record does not establish that a constitutional error occurred	28
ii. Even if a constitutional error occurred, the record does not establish actual prejudice.....	36
2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DARDEN’S MOTION FOR A MISTRIAL.....	43
a. Standard Of Review.....	43

b.	The Trial Court Properly Exercised Its Discretion In Denying Darden’s Motion For A Mistrial.....	44
D.	<u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Manson v. Brathwaite, 432 U.S. 98,
97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)..... 28, 37

Neil v. Biggers, 409 U.S. 188,
93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)..... 28

United States v. Emanuele, 51 F.3d 1123
(3d Cir. 1995)..... 31, 33, 41, 44

United States v. Rogers, 126 F.3d 655
(5th Cir. 1997)..... 42

United States v. Russell, 532 F.2d 1063
(6th Cir. 1976)..... 31, 33, 34, 40, 44

United States v. Wright, 215 F.3d 1020
(9th Cir. 2000)..... 22, 26

Washington State:

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004)..... 26

In re Stranger Creek & Tributaries in Stevens Cnty.,
77 Wn.2d 649, 466 P.2d 508 (1970)..... 30

State v. Avendano-Lopez, 79 Wn. App. 706,
904 P.2d 324 (1995)..... 20

State v. Birch, 151 Wn. App. 504,
213 P.3d 63 (2009)..... 30, 31

State v. Brandt, 99 Wn. App. 184,
992 P.2d 1034 (2000)..... 46

<i>State v. Carlson</i> , 61 Wn. App. 865, 812 P.2d 536 (1991).....	22, 27, 44
<i>State v. Conklin</i> , 37 Wn.2d 389, 223 P.2d 1065 (1950).....	22
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	43
<i>State v. Gray</i> , 134 Wn. App. 547, 138 P.3d 1123 (2006).....	22
<i>State v. Gutierrez</i> , 92 Wn. App. 343, 961 P.2d 974 (1998).....	43
<i>State v. Guzman-Cuellar</i> , 47 Wn. App. 326, 734 P.2d 966 (1987).....	30
<i>State v. Hanna</i> , 123 Wn.2d 704, 871 P.2d 135 (1994).....	44
<i>State v. Hardgrove</i> , 154 Wn. App. 182, 225 P.3d 357 (2010).....	46
<i>State v. Higgs</i> , 177 Wn. App. 414, 311 P.3d 1266 (2013), <i>review denied</i> , 179 Wn.2d 1024 (2014).....	26
<i>State v. Jones</i> , 70 Wn.2d 591, 424 P.2d 665 (1967).....	22
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	46
<i>State v. Kendrick</i> , 47 Wn. App. 620, 736 P.2d 1079 (1987).....	25, 26, 27
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	20, 21, 37, 42
<i>State v. Linares</i> , 98 Wn. App. 397, 989 P.2d 591 (1999).....	28, 36, 37

<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	26
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	21
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	20, 21, 37, 42
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	26
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	22, 26
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	28, 29, 36, 37

Other Jurisdictions:

<i>Lemberger v. Koehring Co.</i> , 63 Wis.2d 210, 216 N.W.2d 542 (1974)	24
<i>State v. Cornelius</i> , 293 N.W.2d 267 (Iowa 1980).....	24
<i>State v. Melton</i> , 112 Or. App. 648, 829 P.2d 1053 (1992).....	23
<i>Wilson v. State</i> , 651 So.2d 1119 (Ala. Crim. App. 1994).....	23
<i>Yeatts v. Commonwealth</i> , 242 Va. 121 410 S.E.2d 254 (1991)	24

Statutes

Washington State:

RCW 9A.56.200..... 2

Rules and Regulations

Washington State:

ER 403 15, 16, 19, 25
RAP 2.5..... 1, 13, 20, 21, 24, 27, 28, 42, 43

Other Authorities

Johnson, Sheri Lynn, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984)..... 42

A. ISSUES PRESENTED

1. A court's refusal to grant a mistrial is not reviewable on appeal unless the defendant made a timely and specific objection at trial. In this case, after most of the State's witnesses had already testified and identified him in court, Darden moved for a mistrial on the basis that some unidentified witnesses may have seen him in the hallway, in shackles. Counsel clarified that this had been occurring throughout the trial, and that he failed to object earlier because he believed that one of his pretrial motions—which did not concern shackling—was sufficient to preserve an objection. Does RAP 2.5(a) preclude this Court from considering whether the trial court erred in denying Darden's motion for a mistrial, where Darden has failed to show either constitutional error or practical and identifiable consequences for his trial?

2. A trial court's ruling denying a motion for a mistrial is reviewed for an abuse of discretion, and will be affirmed unless no reasonable judge would have ruled as did the trial court. The record below does not establish that any witnesses saw Darden in shackles, or that any such viewing had any impact on in-court identification testimony. Did the trial court properly exercise its discretion in denying Darden's motion? If an impermissibly suggestive viewing occurred, was any error harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged co-defendants Orlen Darden and Lamar Travis with two counts of Robbery in the First Degree, contrary to RCW 9A.56.200.¹ CP 1-3. The State alleged that Darden and Travis, acting together, first robbed a couple on Capitol Hill at gunpoint (“Capitol Hill robbery”), and subsequently robbed a pair of friends in West Seattle at gunpoint (“West Seattle robbery”). CP 1-2, 233.

Travis pleaded guilty to both robberies. 1RP 59; 6RP 77, 116-18; 7RP 49.² Darden proceeded separately to jury trial before The Honorable Judge Michael Hayden. 1RP-9RP.

The jury convicted Darden of both counts of first-degree robbery, as charged. CP 41, 43; 9RP 2-4. The jury also found that Darden or an accomplice committed each crime while armed with a firearm. CP 42, 44; 9RP 2.

¹ This section provides in pertinent part that “[a] person is guilty of robbery in the first degree if . . . [i]n the commission of a robbery or of immediate flight therefrom, he or she . . . [d]isplays what appears to be a firearm or other deadly weapon[.]” RCW 9A.56.200(1)(a)(ii).

² This brief refers to the verbatim report of proceedings in this case as follows: 1RP – Feb. 27, 2013; 2RP – Mar. 4, 2013 (voir dire); 3RP – Mar. 4, 2013 (trial); 4RP – Mar. 5, 2013 (morning); 5RP – Mar. 5, 2013 (afternoon); 6RP – Mar. 6, 2013; 7RP – Mar. 7, 2013; 8RP – Mar. 11, 2013; 9RP – Mar. 12, 2013; 10RP – Apr. 18, 2013.

Darden's standard sentence range, including the firearm enhancements, was 249 to 291 months. CP 213; 10RP 11. The trial court sentenced Darden to 291 months. CP 215; 10RP 15.

This appeal timely followed. CP 211.

2. SUBSTANTIVE FACTS.

Lamar Travis and defendant Orlen Darden have been friends for at least ten years, and grew up together. 3RP 21; 6RP 94. On the afternoon of July 28, 2012, Travis was home at the apartment of his grandmother, Gloria Travis.³ 3RP 18-20, 22; 7RP 30; Ex. 41 at 5. At 3:37 p.m., he used Gloria's phone to call Darden. 6RP 150; 7RP 5, 11,⁴ 30; Ex. 40 at 2; Ex. 41 at 5; Ex. 42 at 1. Darden called Travis back at 6:51 p.m. 3RP 22-23; 6RP 150; 7RP 30-31; Ex. 40 at 3; Ex. 41 at 5.

Sometime after 9:00 p.m., Travis asked his mother, Nikola Travis, if he could borrow her car for the evening. 6RP 97-98. Nikola gave him the keys and told him to be back in an hour. 6RP 97-98. Travis and Darden exchanged two more phone calls, at 9:43 p.m. and 9:46 p.m.

³ To avoid confusion, witnesses with the same last name as Travis or Darden will be referred to initially by full name and thereafter by first name only. No disrespect is intended.

⁴ The transcript here lists Darden's number as "(816) 900-7687." 7RP 11. This is an apparent transcription error. The actual number is "(206) 819-7687." 7RP 5. The witness testifying at the time of the transcription error, a detective, was reading from Exhibit 42, which contained excerpts from his interview with Darden. 7RP 7-11. When the detective read Darden's phone number in court, he read from a section of Exhibit 42 marked page eight, line eight. 7RP 10-11; Ex. 42 at 1 ("P8, L8"). The exhibit there clearly lists the number as "819-7687." Ex. 42 at 1.

7RP 30-31; Ex. 41 at 5-6. Travis left with Nikola's car, but did not return when expected. 6RP 98-99.

Around midnight, Travis and Darden robbed victims Lauren Acheson and her husband, Christopher Tanghe, at gunpoint.⁵ 3RP 29-34; 6RP 5-8. Acheson and Tanghe were walking home after eating a late dinner on Capitol Hill, in Seattle. 3RP 29-31; 6RP 5-6. Travis and Darden approached them from the front. 3RP 31-32; 6RP 6. Darden—the taller man—stopped abruptly in front of Acheson, blocking her path.⁶ 3RP 32, 34; 6RP 7, 9-10. Travis—the shorter man—stopped behind Tanghe, boxing in the couple. 3RP 32, 34; 6RP 7, 9-10.

Travis pulled out a semiautomatic handgun, chambered a round, and pointed it in Tanghe's face. 3RP 33; 6RP 7, 10. Travis said, "This is for real, give us all your stuff," and, "Don't make this a homicide." 3RP 32-33; 6RP 7.

Acheson took off her purse and threw it to the ground. 3RP 33. Tanghe handed Travis his laptop computer bag. 3RP 33; 6RP 7-8. Travis

⁵ The State cites here to those portions of the record establishing only the bare facts of the robberies. Darden and Travis are nevertheless referred to by name in order to aid in an understanding of the events. The eyewitness identification and other evidence establishing Darden's involvement is discussed in further detail, below. Travis's involvement was not contested; he pleaded guilty. 6RP 116-18; 7RP 59.

⁶ Both victims testified that the taller man (Darden) accosted Acheson, while the shorter man (Travis) accosted Tanghe. 3RP 32, 34; 6RP 7, 9-10. Darden is six feet, two inches tall and weighs 205 pounds. 7RP 52. Travis is three inches shorter, at five feet, eleven inches tall and weighs 203 pounds. 7RP 52.

then demanded Tanghe's wallet. 3RP 33-34; 6RP 8. Tanghe told him that he had forgotten his wallet at home. 3RP 34; 6RP 8. Acheson insisted that Tanghe was telling the truth and that she had just paid for their dinner. 3RP 34. As they argued over the wallet, other pedestrians approached the scene; Travis and Darden fled with Acheson's purse and Tanghe's computer bag. 3RP 34; 6RP 8.

At approximately 1:00 a.m., Darden and Travis robbed Lynn Matthyse and her friend, Allison Fulton, at gunpoint in West Seattle. 4RP 4-14, 51-58. As the two women walked along Delridge Way, they saw Darden and Travis approaching from an alleyway. 4RP 6, 54. Darden called out to them to ask what time it was, and for a cigarette. 4RP 6, 54. They told him it was about one o'clock. 4RP 6, 54. Darden then pulled out a handgun and said, "I'm sorry I have to do this," and demanded their purses. 4RP 6, 8, 54.⁷

Fulton said, "Please don't," but Darden kept the gun pointed at her, so she gave him her purse. 4RP 56. Matthyse, who was visiting Seattle on a family vacation, pleaded with Darden that she had a plane to catch and couldn't give up her camera with her family pictures. 4RP 9, 57. He tried to take her purse from her and they struggled over it. 4RP 9-11, 57.

⁷ Of the two men in the alleyway, one appeared taller than the other by up to four inches. 4RP 7, 55. The taller man (Darden) was the one who called out to Fulton and Matthyse, and then demanded their purses at gunpoint. 4RP 7-8, 55.

Matthysse backed into the street and tried unsuccessfully to flag down a passing motorist. 4RP 9, 57. Eventually, her camera fell out of her bag. 4RP 11, 57. She picked up her camera and Darden took off running with their purses. 4RP 11, 57.

Andrew Masters, a neighbor who had heard the commotion, came outside just as Darden was running away. 4RP 12-13, 42-43, 57-58. He chased Darden for a block or two before seeing him jump into the front passenger seat of a Buick with license plate 117WSB—the same car that Travis had borrowed from his mother, Nikola. 4RP 12-13, 43-45, 84-87; 6RP 97-100.

Matthysse called 911 and gave the police the license plate of the Buick and a description of Darden. 4RP 14, 44, 60; 6RP 42. Seattle Police Officer Christine Nichols ran the license plate and discovered that the car was registered to an address about 10 blocks away. 4RP 82. Nichols reached the home within minutes of Matthysse's 911 call; however, she did not see the Buick, so she continued looking for the suspect elsewhere. 4RP 83.

Meanwhile, Nikola was home when she heard a car squeak outside, and recognized it to be her Buick. 6RP 98-99. She realized that it was being driven to her mother Gloria's apartment, nearby. 6RP 98-99.

She decided to go outside to confront Travis about coming home so late with her car. 6RP 98-99.

Just then—approximately 10 minutes after Matthyse called 911—Officer Nichols returned to the registered address, to check again for the robbery suspect. 4RP 84. This time, she saw the Buick. 4RP 84. Travis was walking from the vehicle toward Gloria's home, with a computer bag over one shoulder. 4RP 84-85. Nichols detained Travis for further investigation. 4RP 85-86; 6RP 100. Darden was not present. 6RP 54.

Officers searched Travis's person and found credit cards and other property belonging to all four victims, from both robberies. 5RP 9, 18-23, 26; 6RP 44-45, 48-49. For example, the computer bag that Travis was carrying belonged to Tanghe. 6RP 48-49. Importantly, officers were unable to locate or recover Matthyse's Macy's credit card, taken during the robberies. 4RP 20.

Nikola consented to a search of the Buick. 4RP 87. In the trunk, officers found a black .380 caliber handgun and a right-handed glove, matching a left-handed glove found on Travis's person. 6RP 46-47.

Travis was taken to Seattle Police headquarters to be interviewed by detectives. 6RP 143. At 1:49 a.m., Darden called Gloria's house, looking for Travis. 3RP 22; 7RP 33. Travis was booked into the King

County Jail later that morning, on July 29, sometime before noon.

6RP 144.

Around the time that Travis was being booked into the King County Jail, Nikola went to Gloria's home, to tell her that Travis had been arrested. 3RP 24-25; 6RP 105-08. Gloria told Nikola that Darden had been calling, the night before. 3RP 24-25; 6RP 105-08. Nikola then called Darden at 12:11 p.m. 3RP 24-25; 6RP 107-08; 7RP 34-35. Nikola told Darden that she knew that he had been with her son the night before, and that they needed to talk. 6RP 109. He agreed to come over, but did not. 6RP 110-11. At 12:39 p.m., Darden called the public number for the King County Jail, a call that lasted for ten minutes. 7RP 35-36.

Nikola called Darden repeatedly throughout the remainder of July 29, and over the ensuing days. 7RP 37; 6RP 110-11. Darden kept saying that he would come speak to her, but didn't. 6RP 110-11. Finally, about a week after the robberies, he met Nikola in the hallway of Gloria's apartment. 6RP 111-12. Nikola asked Darden what had happened, and why they had used her car to commit these crimes. 6RP 112-13. Darden started crying and said that he was sorry, but that it had been all Travis's idea. 6RP 113. He also said that it would only be a matter of time before he, himself, was caught, because his fingerprints were in the car.

6RP 113. After this conversation, Nikola told Gloria what Darden had said, that it had been all Travis's idea. 6RP 141.

Nikola went to speak to the prosecutor, accompanied by Travis's defense attorney. 6RP 116-17. She wanted to tell the prosecutor about her son's good character, in the hope that it would assist his plea negotiations. 6RP 117. She also told the prosecutor about her conversation with Darden. 6RP 117. Despite Nikola's conversation with the prosecutor, Travis did not receive a more favorable plea deal from the State. 6RP 117-18. He pleaded guilty prior to Darden's trial. 6RP 117-18. Nikola nevertheless testified against Darden at trial because she didn't think it was fair that her son, Travis, take the sole blame for what happened; she believed that Darden needed to be held responsible, too.⁸ 6RP 118.

Seattle Police technicians processed Nikola's Buick. 5RP 41-75. Darden's fingerprints were located on the front passenger door. 5RP 48-49, 63-64. No fingerprints or DNA samples were located on the handgun.⁹ 5RP 76-78, 80-81.

⁸ At trial, Nikola acknowledged multiple convictions for shoplifting, a conviction for second-degree theft, and a conviction for making a false statement. 6RP 118-19, 125-27.

⁹ Because of a miscommunication between detectives and forensic examiners, the handgun was not processed for fingerprints in a way that would preserve DNA evidence. Any such evidence on the gun, if it existed, was destroyed. 5RP 81; 7RP 23-25.

After the fingerprint analysis from the Buick was completed, Seattle Police Detective David Clement arrested Darden on August 22—approximately three weeks after the robberies. 7RP 7. He showed Darden a picture of Travis and asked him if he knew him. 7RP 7. Darden said, “His face kind of looks familiar.” 7RP 9. Clement asked Darden, “I thought you guys grew up together?” 7RP 9. Darden admitted that they did, but added, “[H]e looks like—I think that’s the kid that went to West Seattle. I think he played on my basketball team.” 7RP 9.

Clement asked Darden when he last spoke to Travis. 7RP 9. Darden said that he hadn’t spoken with Travis since May or early June. 7RP 9.

Darden also told Clement that he had never ridden in a car with Travis and that Travis didn’t own a car. 7RP 12-13. When Clement asked Darden if he had ever seen Travis drive his mother’s (Nikola) car, Darden said, “No, I’ve never seen him drive at all.” 7RP 13.

Clement asked Darden, if he had never been in a car with Travis, why his fingerprints were found on Nikola’s car. 7RP 13. Darden explained that Nikola used to braid his hair. 7RP 14. He said that he had last seen Nikola in June. 7RP 14. At trial, Nikola testified that she had never seen Darden near her car and that she had never braided his hair. 6RP 96.

Clement asked Darden for the phone number of his mother, Porcia Green. 7RP 11-12. Clement called Green to ask about Darden's whereabouts. 7RP 171-72. Green told Clement about celebrating her birthday with family on August 4. 7RP 171. When asked if Darden had stayed home with her on the night of July 28, she said that he probably did, but she couldn't remember specifically about that night. 7RP 171-72.

At trial, Green testified that she had actually had two birthday parties—the one on August 4 that she mentioned to Clement, and then a smaller party on July 28. 7RP 124. The July 28 party started around 7:30 p.m. and lasted until 3:00 a.m. 7RP 126-27. Darden was home all night with her. 7RP 127. Darden's sister, Brittany, was there, too.¹⁰ 7RP 131. She just didn't think about the July 28 party when Detective Clement called her, because she assumed that he was inquiring about the other party.¹¹ 7RP 137-39.

Darden's cousin and a close neighbor also testified that Darden was home at the smaller party, on July 28. 7RP 142-43, 153-54. The alibi witnesses claimed that Darden never left the house. 7RP 127, 132, 144, 154-56. He purportedly went to bed sometime between midnight and

¹⁰ Darden's sister, Brittany, did not testify at trial. 7RP 119-65, 173.

¹¹ She explained that the July 28 celebration was only a birthday "get together." 7RP 138. Because the detective asked her about her birthday "*party*," she only mentioned August 4. 7RP 139 (emphasis added).

1:00 a.m., after becoming ill and vomiting from something he ate or from drinking too much. 7RP 128, 139, 155, 159. The witnesses said that they would have known if Darden had left at any point: Green testified that she can always hear if anyone leaves, and the neighbor testified that the house is tiny, so it is easy to see who is there at all times. 7RP 132, 156.

Cell phone records established that Darden called his mother three times that evening, July 28, at 7:48 p.m., 9:00 p.m., and 9:21 p.m. 7RP 167-68; Ex. 41 at 5. Just before midnight, his mother and sister placed a series of rapid phone calls to Darden's phone. At 11:54 p.m., Green called Darden three times in close succession. 7RP 169; Ex. 41 at 6. Brittany then called Darden five times, starting at 11:54 p.m. 7RP 169; Ex. 41 at 6. Green called Darden again at 1:20 a.m. 7RP 169; Ex. 41 at 6. All twelve of these phone calls occurred during a time when, according to Darden's alibi witnesses, they were all together in a tiny house. 7RP 126-28, 132, 142-44, 153-56.

Cell phone records also showed that Darden called Macy's account services at approximately 3:46 a.m.—long after his alibi witnesses claimed that he went to sleep, ill. 7RP 34, 128, 139, 155, 159; Ex. 41 at 7. Matthyse's Macy's credit card had been taken earlier that night in the robberies, and was never recovered. 4RP 20.

Additional facts and procedural history are set forth below as appropriate.

C. ARGUMENT

1. RAP 2.5(a) PRECLUDES REVIEW BECAUSE DARDEN FAILED TO MAKE A TIMELY AND SPECIFIC OBJECTION BELOW.

Darden claims that the trial court abused its discretion when it denied his motion for a mistrial. But Darden's motion was predicated on an asserted error that, according to defense counsel below, had been occurring throughout the trial. Darden's attorney did not object prior to bringing a motion for a mistrial, and never gave the trial court an opportunity to cure any prejudice. Because Darden failed to make a timely and specific objection below, this Court should hold that RAP 2.5(a) precludes review of his claim.

Because the record also does not establish that an error actually occurred, let alone an error of constitutional magnitude, this Court should also hold that Darden has failed to establish a manifest constitutional error that actually prejudiced his right to a fair trial.

a. Additional Facts.

In the immediate aftermath of the Capitol Hill robbery, victims Acheson and Tanghe were brought to a show-up identification procedure.

3RP 36; 6RP 12. Both victims told police that the suspects in custody were not the men who had robbed them. 3RP 36; 6RP 12.

Later, both victims were asked if they could identify a person from a photographic montage. 3RP 36-40; 6RP 14-15; Ex. 3; Ex. 32. One of the photographs was of Darden. 7RP 17, 74; Ex. 2, Photograph 2.

Tanghe, who had been stopped by Travis and interacted primarily with him, was not able conclusively to identify anyone from the montage, though Darden's photograph reminded him of the robber's "build."¹² 6RP 14-15; Ex. 32. But Acheson, who had been stopped by Darden, had a strong emotional reaction to seeing his picture. 3RP 36-37. She identified him with 70 percent confidence. 3RP 37; Ex. 3. She based her assessment not only on his complexion, but "a number of other reasons," including his apparent bulk. 3RP 48. However, after picking Darden, she began to second guess herself; not wanting to identify the wrong person, she emailed detectives and lowered her pick to 30 to 40 percent. 3RP 37-38, 48.

The victims of the West Seattle robbery, Matthyse and Fulton, were also asked in the immediate aftermath of that robbery to attend a show-up identification procedure. 4RP 14-15, 61-62. Neither victim

¹² Tanghe was also asked to attend a line-up of eight suspects. 6RP 13-14; 7RP 16-17. Travis was in the line-up but Darden was not. 7RP 16-17, 65. Tanghe was unable to positively identify any suspect from the lineup. 6RP 13-14; 7RP 17.

recognized a suspect in police custody.¹³ 4RP 15, 61-62. Later, when asked to view a photographic montage, Matthyse, who struggled with Darden for control of her purse, identified Darden with 65 percent confidence. 4RP 18; Ex. 6. Fulton said that she could not identify anyone, based on the photographs alone. 4RP 64-65; Ex. 13.

Prior to trial, Darden moved to suppress any out-of-court and in-court identification testimony. CP 21-25 (Defendant's Trial Brief); 1RP 88-97. He argued that the photographic montage was unduly suggestive, because Darden's complexion was the darkest of all of the African American males depicted.¹⁴ CP 23; 1RP 89-90. He also argued that any in-court identification would be tainted by the assertedly suggestive montage. CP 23-24. Finally, he argued that the trial court should suppress any in-court identification under ER 403, because Darden would be seated alone at counsel table—creating, in counsel's words, a "one person show-up." CP 24-25; 1RP 95-97.

The trial court denied Darden's motion, finding that the photographic montage was not unduly suggestive, and that there was no

¹³ Travis was one of the individuals detained for the show-up identification, but neither victim recognized him. 3RP 19; 4RP 15, 62. Because Darden accosted Matthyse and Fulton, while Travis remained in the alleyway or retrieved the Buick, it is unsurprising that neither victim recognized Travis. 4RP 7-8 (victims approached by taller male); 7RP 52 (relative heights of Darden and Travis).

¹⁴ The robbery victims had described the suspect as an African American male with an especially dark complexion. 3RP 46; 4RP 36; 5RP 31; 6RP 39; 7RP 74.

basis to suppress any out-of-court or in-court identification testimony, under either a due process or ER 403 analysis.¹⁵ 1RP 94-95, 97. Following the denial of his motion, Darden did not raise the issue of shackling or make any motions about his appearance in or out of court. 1RP 97-113.

Of the robbery victims, Acheson, from the Capitol Hill robbery, testified first. 3RP 29. Acheson, who was stopped by Darden during that incident, identified Darden in court with 80 percent certainty. 3RP 40. She stated that she was “very confident” about the identification. 3RP 40. The trial court recessed for the day. 3RP 49.

Matthysse, from the West Seattle robbery, testified first thing the next morning. 4RP 4. She testified that she recognized Darden as the man that she had picked from the montage. 4RP 18. She stated, “I still cannot say 100% that’s the man that robbed me, but I think I still hold true that I’m more sure that this is the man than anyone else I saw in that montage.” 4RP 19. She clarified that she believed so based on Darden’s facial structure, eyes, hair, and his large build. 4RP 19. She also testified that she had a strong, visceral reaction to seeing Darden in person, in court: “A memory. An identification in my mind of the emotions that I had that night, and the memory that I was feeling. You know, a connection with

¹⁵ Darden does not assign error on appeal to the trial court’s denial of his pretrial motion, either on constitutional or evidentiary grounds. Br. of Appellant, at 1.

seeing the person.” 4RP 40. She explained that the feeling was similar to the sensation of seeing someone and recognizing them from somewhere. 4RP 40.

Andrew Masters—the neighbor who had come outside to aid Matthyse and Fulton—testified next. 4RP 42. He testified that he had only been able to view the side of the robber’s face for a second or two and was never asked by the police to make a formal identification. 4RP 44-46. He could not immediately recognize anyone in the courtroom. 4RP 46. However, he thought that Darden had a similar height and build to the man that he had chased on the night of the robberies. 4RP 46. He said that he had observed Darden’s height, prior to testifying. 4RP 50. He clarified that he apparently had been in the courtroom earlier that day, during the testimony of another witness (which must have been Matthyse). 4RP 51.

Next, the other victim from the West Seattle robbery, Fulton, took the stand. 4RP 51. She identified Darden in court with 95 percent certainty. 4RP 58-59. She explained that seeing someone in person was completely different from looking only at a photograph, and that she was basing her in-court identification on both emotional and rational reactions to seeing him in person. 4RP 65, 77. She added that she had seen how tall he was, the general appearance of his body, and how he walked, and that it

all matched her memory of the night in question. 4RP 65-66. She did not testify regarding when or under what circumstances she had observed these characteristics.

After Fulton testified, the State called Officer Christine Nichols, who testified about detaining Travis. 4RP 79-88. Nichols did not testify to having any contact with Darden and was not asked to identify him in court. 4RP 79-88. Midway through Nichols's testimony, the trial court excused the jury for a lunch recess. 4RP 88.

Darden's attorney then moved for a mistrial, on the basis that some unidentified witnesses may have seen Darden in shackles throughout the proceedings:

My concern, Your Honor, is it seems—gathering that the witnesses have been in the hallway, and have been observing Mr. Darden coming to and from court while in shackles. I think it's been prejudicial for several reasons. I think the same reason why jurors are not to see Mr. Darden in shackles applies to witnesses as well. But it's prejudicial. Particularly in a case like this where it's based on identification. The other concern is I think they are getting evidence that is not in court. Discussions about his gait and walking. So I think that is prejudicial to Mr. Darden. I would ask that further witnesses be requested to stay on the west side of the elevators. I do think the witnesses observing Mr. Darden coming to and from court while in shackles has been prejudicial. I don't think there is any remedy at this point short of mistrial, but I want to make the record.

4RP 88-89.

The trial court indicated that it was unaware of any case law on point, and asked counsel if he had any authority for his motion. 4RP 89. Counsel stated that he was likewise unaware of any case law. 4RP 89. He clarified that his motion was based on ER 403. 4RP 91. He then indicated that the shackling issue apparently had been ongoing throughout the proceedings, but that he had refrained from objecting because he believed that his objection was preserved by his pretrial motion:

I want to make sure the record, my record, is clear as well as I want to make it clear I haven't been objecting as the inquiry has happened because I think that record is preserved from the pretrial motions.

4RP 91. The trial court then took the lunch recess, in order to give defense counsel an opportunity to conduct further legal research. 4RP 90-91.

After the recess, defense counsel did not cite any additional authority, but stated that he was continuing to rely on ER 403. 5RP 2. Defense counsel asked that the State's remaining eyewitness—Christopher Tanghe, from the Capitol Hill robbery—be directed to remain on the west side of the building, to avoid any accidental encounters with Darden. 5RP 3. “[J]ust to be cautious,” the trial court agreed to order Tanghe to stay away from Darden. 5RP 3. The trial court did not grant the mistrial. 5RP 2-4. However, the trial court also indicated that it would order

Darden to stand in the courtroom for Tanghe to observe his height, outside the presence of the jury, if the prosecutor requested. 5RP 4.

Tanghe testified the next morning. 6RP 4. Darden was ordered to stand for Tanghe to view, outside the presence of the jury. 6RP 4. Tanghe, who interacted primarily with Travis on the night of the robbery,¹⁶ then testified before the jury that there were similarities between Darden and one of the men involved in the robbery. 6RP 16. Those similarities included Darden's hair, height, and build. 6RP 16. However, he could not identify Darden with any certainty. 6RP 16.

b. Standard Of Review.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage the efficient use of judicial resources: where an objection would have given the trial court an opportunity to correct any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In order to properly to preserve an issue for appeal, an objection must be both timely and specific. *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

¹⁶ Tanghe was accosted by the shorter man. 3RP 32, 34; 6RP 7, 9-10. To reiterate, Darden is six feet two inches tall and Travis is five feet eleven inches tall. 7RP 52.

RAP 2.5(a)(3), however, permits the defendant to raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. *Kirkman*, 159 Wn.2d at 926. The purposes of this exception are to correct any “serious injustice to the accused” and to preserve the fairness and integrity of the judicial proceedings. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

To warrant review under RAP 2.5(a)(3), any alleged error must be truly of constitutional magnitude. *Id.*; *Kirkman*, 159 Wn.2d at 926. Moreover, the constitutional error must be manifest, meaning that the defendant must demonstrate actual prejudice to his rights at trial, and that prejudice must appear in the record. *Kirkman*, 159 Wn.2d at 926-27; *McFarland*, 127 Wn.2d at 334. Actual prejudice, in turn, means that the alleged error had practical and identifiable consequences in the trial. *O’Hara*, 167 Wn.2d at 99. This exception to the ordinary requirement that an error be preserved by a timely and specific objection must be construed narrowly. *Kirkman*, 159 Wn.2d at 935.

c. Darden’s Motion For A Mistrial Cannot Be Reviewed On Appeal Because He Failed To Make A Timely And Specific Objection Below.

An objection is timely only if it is made at the earliest possible opportunity after the basis for the objection becomes apparent, at a time when the trial court has an adequate opportunity to correct any error.

State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006) (citing *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967)).

An objection is specific only if it is sufficiently definite to allow the trial court to properly consider and rule upon it. *State v. Conklin*, 37 Wn.2d 389, 391, 223 P.2d 1065 (1950). An objection to the introduction of evidence on one ground does not make or preserve an objection on other grounds. *State v. Price*, 126 Wn. App. 617, 637, 109 P.3d 27 (2005). Similarly, a pretrial motion to suppress evidence on one ground does not preserve an objection, on other grounds, to the introduction of the evidence. *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000).

Improper testimony is grounds for a new trial only when the testimony at issue was timely and specifically objected to at trial. *State v. Carlson*, 61 Wn. App. 865, 869, 812 P.2d 536 (1991). In *Carlson*, a prosecution for sexual abuse of a child, the State questioned a witness about hearsay statements made by the child victim. 61 Wn. App. at 867-69. The defendant objected, but did not state the grounds. *Id.* at 869-70. The trial court overruled the objection. *Id.* at 869.

Later, the defendant moved for a new trial, arguing (for the first time) that the child hearsay statements were admitted without a reliability hearing. *Id.* The trial court agreed and granted a new trial. *Id.*

The State appealed. *Id.* at 867. In a unanimous opinion, the court reversed, because the defendant had failed to make a timely and specific objection prior to moving for a new trial:

The erroneous admission of evidence is grounds for a new trial only when the evidence at issue was timely and specifically objected to at trial. Unless these requirements are satisfied, there is no basis for a new trial and it is error to grant one.

[Defendant] never objected to the State's line of questioning on hearsay grounds, nor did he ever argue to the trial court that [the witness's] conversations with [the victim] should have been the subject of a . . . reliability hearing. Instead, [defendant's] only objection was nonspecific and general: "I'm going to object to this line of questioning." [Defendant] therefore waived any error in admitting [the] hearsay testimony and the court erred in granting a new trial on this basis.^[17]

Id. at 869-70, 880 (internal citations omitted).

While Washington courts do not appear to have addressed directly whether the same rule applies to a motion for a *mistrial*, other states' appellate courts routinely hold that it does. *See, e.g., Wilson v. State*, 651 So.2d 1119, 1122 (Ala. Crim. App. 1994) ("To be timely, a motion for a mistrial must be made immediately after the question or questions are asked that are the grounds made the basis of the motion for the mistrial.") (quotation marks omitted); *State v. Melton*, 112 Or. App. 648, 649, 829 P.2d 1053 (1992) ("A motion for mistrial must be timely. It is timely if it

¹⁷ In the instant case, Darden's failure to preserve a claim is even more pronounced, because he did not object *at all* during the in-court identification testimony—let alone on generic or unspecified grounds. *See* 3RP 29-49 (Acheson); 4RP 4-42 (Matthysse), 42-51 (Masters), 51-79 (Fulton).

is made when the objectionable conduct has just occurred.”); *Yeatts v. Commonwealth*, 242 Va. 121, 137, 410 S.E.2d 254 (1991) (“Making a timely motion for mistrial means making the motion when the objectionable words were spoken.”) (quotation marks omitted); *State v. Cornelius*, 293 N.W.2d 267, 269 (Iowa 1980) (“A mistrial motion must be made when the grounds therefor first became apparent.”); *Lemberger v. Koehring Co.*, 63 Wis.2d 210, 226, 216 N.W.2d 542 (1974) (“[W]hen there occurs in the course of trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.”).

The requirement of a timely and specific objection is well grounded. It is designed to prevent a party from making a tactical decision to remain silent in the face of a perceived error, gamble on a favorable outcome, and then move for a mistrial when the gamble fails to pay off— at a time when the trial court can no longer correct any error:

Counsel’s tactical choices may dictate that he remain silent to otherwise objectionable [sic] testimony. However, the decision to remain silent is not without consequence. By the failure to object at a point that will give the trial judge an opportunity to correct an alleged error, counsel waives the right to predicate an appeal thereon. RAP 2.5(a). Raising the issue in a motion for a new trial does not provide the trial court with the requisite opportunity to

correct error. Consequently, counsel may not remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.

State v. Kendrick, 47 Wn. App. 620, 636, 736 P.2d 1079 (1987) (quotation marks and some internal citations omitted).

In this case, Darden failed to make a timely and specific objection to the issue that he now raises on appeal. He did not object during the eyewitnesses' testimony, and in fact waited until the court took a recess during the testimony of a subsequent, non-identifying police witness before moving for a mistrial. *See* 3RP 29-49 (Acheson); 4RP 4-42 (Matthysse), 42-51 (Masters), 51-79 (Fulton), 79-88 (Officer Nichols), 88-91 (recess and motion for mistrial).

While Darden's pretrial motion to suppress in-court identifications was timely, it was not specific to the issue of being observed in the hallway in shackles, the basis for his motion for a mistrial. While his motion for a mistrial was specific to that issue, it was not timely. Further, the motion for a mistrial, though specific to the issue of hallway observations, was not specific to the legal basis of the asserted error that he now raises on appeal: Darden's motion for a mistrial was based on ER 403; he now claims error, for the first time, on due process grounds. *Compare* 4RP 91 and 5RP 2 (citing ER 403 as basis for motion), *with*

Brief of Appellant at 1 (assigning error on due process grounds). At no point did Darden make a timely and specific objection below.

Counsel explained his failure to make a timely objection to the alleged shackling scenario by stating his belief that his objection to that scenario—which had not yet occurred at the time of pretrial motions—was nevertheless preserved by his pretrial motion.¹⁸ 4RP 91.

To the extent that counsel believed so, that belief was mistaken. On balance, it appears that counsel was aware of the potential issue and simply made a tactical decision to remain silent.¹⁹ It is difficult otherwise to explain why counsel would have allowed his client to be allegedly transported in shackles before critical State’s eyewitnesses, without complaint, and only spoken up once the evidence at trial reached such an adverse quantity that he decided to move for a mistrial. While counsel apparently came to regret this strategic decision, his motion for a mistrial, made after three-quarters of the State’s eyewitnesses had already testified

¹⁸ A party who loses a motion *in limine* to suppress evidence does have a standing objection to the admission of the evidence on that basis. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). But this objection cannot be deemed to extend to other bases, unraised by the moving party and unaddressed by the trial court. Any such rule would be irreconcilable with the established principle that an objection to the admission of evidence on one ground does not preserve an objection on other grounds. *See State v. Higgs*, 177 Wn. App. 414, 423, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024 (2014); *Price*, 126 Wn. App. at 637; *Wright*, 215 F.3d at 1026.

¹⁹ “The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Courts will presume that a failure to object is motivated by tactical choices. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). However, such choices, even if legitimate, have consequences. *Kendrick*, 47 Wn. App. at 636.

and identified Darden in court, did not give the trial court an adequate opportunity to correct any alleged error.²⁰ This Court should hold that RAP 2.5(a) precludes review of Darden's claim.

d. Darden Has Not Demonstrated That A Constitutional Error Actually Prejudiced His Right To A Fair Trial.

By failing to make a timely and specific objection to the alleged error, Darden failed to preserve the issue for review. *See Carlson*, 61 Wn. App. at 869-70; *Kendrick*, 47 Wn. App. at 636; RAP 2.5(a). Thus, he bears the burden of demonstrating that the asserted observations by witnesses in the hallway amounted to an error of constitutional magnitude and that it had practical and identifiable consequences in the trial. He can do neither.

First, there was no error, let alone one of constitutional magnitude. As will be discussed in greater detail below, the record does not establish that any witnesses actually saw Darden in the hallway. Darden's motion was couched in speculative terms; at best, it was ambiguous. There was no testimony, nor any factual findings, that Darden was inappropriately observed.

Second, even if unidentified eyewitnesses saw Darden in shackles, review is not appropriate because it had no practical or identifiable

²⁰ This appears to have been the point. As Darden's attorney argued, "I don't think there is any remedy at this point short of a mistrial[.]" 4RP 89.

consequences in this case. To obtain review under RAP 2.5(a)(3), Darden must show actual prejudice. Because the record does not establish actual prejudice, this Court should decline to review Darden's claim.

- i. The record does not establish that a constitutional error occurred.

To satisfy due process requirements, an out-of-court viewing must not be "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (citing *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)); accord *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). A two-part test governs this inquiry. *Vickers*, 148 Wn.2d at 118. First, the defendant bears the burden of establishing that an impermissibly suggestive viewing occurred. *Id.* If the defendant fails to establish this, the inquiry ends. *Id.*

If the defendant proves that an impermissibly suggestive viewing occurred, then the court considers, based on the totality of the circumstances, whether the viewing created a substantial likelihood of irreparable misidentification. *Id.* (citing *Linares*, 98 Wn. App. at 401).

In this case, the record does not establish that any witnesses actually saw Darden in the hallway in shackles, let alone that the viewing,

if it occurred, was impermissibly suggestive. Darden therefore cannot satisfy the first prong of the *Vickers* test. The inquiry must end.

Taken in the order in which they testified, Acheson, who was stopped by Darden during the Capitol Hill robbery, identified Darden in court with 80 percent certainty. 3RP 40. She stated that she was “very confident” about the identification. 3RP 40. The record contains no indication that she saw Darden in the hallway.

Matthyse, who testified first the next morning, recognized Darden based on his facial structure, eyes, hair, and build. 4RP 18-19. She did not claim to have seen Darden in the hallway in shackles, nor is there any indication that she did.

Masters testified next, and said only that Darden had a similar height and build to the person that he chased on the night of the robberies. 4RP 46. Beyond that, he stated that he could not immediately identify him. 4RP 46. He did state that he had observed Darden’s height before testifying, but also said that he had been in the courtroom earlier, during the testimony of another witness. 4RP 50-51. He did not testify that he saw Darden in the hallway, nor in shackles.

Fulton then testified that she was 95 percent certain that Darden was the man who robbed her, based on “the way that he looks at me.” 4RP 58-59. She testified that seeing someone in person was completely

different from looking at a photograph. 4RP 65, 77. In particular, she recognized “his demeanor, and the way he moves,” as well as his height and the way that he walks. 4RP 65-66. However, she did not testify that any of these observations occurred in the hallway, or during a time when Darden was in shackles. It is impossible, on this record, to conclude that they did. It is just as likely that Fulton observed Darden stand when she entered the courtroom to testify, and move to retake his seat at counsel table—or stretch to get a glass of water. There are any number of scenarios under which Fulton might have observed Darden’s physical characteristics. The record does not establish that an error occurred.

Even assuming for the sake of argument that a witness observed Darden in shackles, Darden’s claim should still be rejected because the record does not establish that the hypothetical viewing was impermissibly suggestive. For a witness to see a defendant in shackles prior to giving an in-court identification is not, by itself, impermissibly suggestive. *State v. Birch*, 151 Wn. App. 504, 515, 213 P.3d 63 (2009) (citing *State v. Guzman-Cuellar*, 47 Wn. App. 326, 336, 734 P.2d 966 (1987)).²¹ Some additional facts are necessary to determine that the viewing was

²¹ Darden urges this Court to find that *Birch* was wrongly decided. Br. of Appellant, at 18. But Darden does not explain how *Birch* is incorrect and harmful, the standard necessary to overturn precedent. *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The burden is upon him to do so. *Id.*

impermissibly suggestive; in the absence of such additional facts, Darden's claim fails outright. *Birch*, 151 Wn. App. at 515.

The record contains no additional facts about the hypothetical viewing. Here, it is useful to contrast the record in this case with *United States v. Emanuele*, 51 F.3d 1123 (3d Cir. 1995) and *United States v. Russell*, 532 F.2d 1063 (6th Cir. 1976), the cases upon which Darden principally relies.

The defendant in *Emanuele* was charged with robbing two banks. 51 F.3d at 1126. A witness to the first robbery identified the defendant from a montage, but "wasn't one hundred percent sure." *Id.* When shown another montage, she identified someone other than the defendant as the bank robber. *Id.* at 1126-27. A witness to the second robbery was also shown a montage, but was unable to identify anyone. *Id.* at 1127.

At trial, the two witnesses waited in the courtroom hallway to testify. *Id.* There, they saw the defendant being led from the courtroom by federal police officers, in manacles. *Id.* They discussed seeing the defendant, telling each other, "It has to be him." *Id.*

The defendant timely moved to suppress any in-court identification, arguing that the accidental viewing violated his right to due process. *Id.* The government conceded that the viewing had occurred. *Id.* The trial court denied the motion as to the witness who had previously

identified the defendant, and held an evidentiary hearing with respect to the second witness; after the hearing, the court denied the motion with respect to that witness, as well. *Id.* Both witnesses then testified and identified the defendant at trial. *Id.*

The defendant was convicted and, having timely objected, moved for a new trial on the basis of, *inter alia*, the in-court identification testimony. *Id.* The trial court held a second evidentiary hearing. *Id.* Two receptionists from the prosecutor's office testified that they had instructed the witnesses to sit outside the courtroom, without any special instructions to avoid seeing the defendant. *Id.* The trial court denied the motion for a new trial. *Id.*

The Third Circuit Court of Appeals found that “the confrontation was caused by the government, albeit inadvertently, and that to walk a defendant—in shackles and with a U.S. Marshal at each side—before the key identification witnesses [was] impermissibly suggestive.” *Id.* at 1330. This was especially so because “in the courthouse the two tellers observed defendant together and immediately spoke to each other about his identity, prior to their testifying,” which “may well have overwhelmed any doubts [they] retained after observing defendant in the hallway[.]” *Id.* Further, “[t]he reaction ‘it *has* to be him’ greatly diminishe[d] the reliability of [the

second witness's] identification and *render[ed] manifest the impact of her viewing defendant.*" *Id.* at 1131 (final emphasis added).

Because the witness to the first robbery had previously identified the defendant in photographs, the court concluded that her in-court identification was still reliable. *Id.* at 1131. But because the witness to the second robbery had been previously unable to identify the defendant, and had likely been influenced by her discussion with the other witness, the court found that her in-court identification was admitted in error. *Id.* The court therefore affirmed the defendant's conviction for the first robbery, but reversed the second conviction, finding the error not harmless. *Id.* at 1132.

Unlike in *Emanuele*, the record in the case at bar contains no information about the witnesses' reaction to viewing Darden in shackles, if this in fact happened; thus, there is nothing to "render[] manifest the impact" of the viewing. *Id.* at 1131. Darden did not request an evidentiary hearing, so there were no factual findings, nor did the State admit to any viewing, accidental or otherwise. There is, in sum, no indication that an impermissibly suggestive viewing occurred. Darden's reliance on *Emanuele* is unavailing.

Similarly, in *Russell*, the record affirmatively established that a witness to a bank robbery saw the defendant in shackles outside the

courtroom. 532 F.2d at 1066, 1069. The witness had previously told police that he “didn’t remember too much of anything” from the robbery, and had failed to identify the defendant from photographs. *Id.* at 1066. But after seeing the defendant in shackles, he identified him at trial. *Id.*

The Sixth Circuit reversed the conviction and remanded for a new trial, on other grounds—because a different eyewitness had been shown a montage during a procedure that was impermissibly suggestive.²² *Id.* at 1068-69. But the court also noted that the viewing of the defendant in shackles by the first witness, under these circumstances, was suggestive, and directed the trial court, on remand, to determine whether there was an “independent basis” for that witness’s in-court identification. *Id.* at 1069.

Russell is distinguishable from the instant case in critical respects. First, the record in *Russell* actually established that a witness had observed the defendant in shackles. *Id.* at 1066, 1069. Second, the witness had told police that he didn’t remember any details from the robbery, and the record did not establish an independent basis for the in-court identification. *Id.* at 1066, 1069. In other words, the viewing in *Russell* appeared impermissibly suggestive because nothing else explained why the witness’s ability to identify the defendant had changed.

²² An FBI agent told a different witness that she had picked the wrong person out of a montage, and then told her which photograph depicted the actual suspect. *Id.* at 1068.

In contrast, there was an independent basis for the in-court identification of each witness in the case at bar.²³ In the Capitol Hill robbery, Acheson was in close proximity with Darden and remained focused on him for several minutes. 3RP 43-45. She observed that he was a larger African American male with a distinctly dark complexion, and she recalled his physical characteristics with enough confidence to be “very sure” that the police initially detained the wrong suspects. 3RP 34-36, 46.

In the West Seattle robbery, Matthyse struggled with Darden for control of her purse for about a minute, while looking at his face; she recalled his bone and facial structure, eyes, complexion, hair, build, and height.²⁴ 4RP 9-11, 17-19. She, too, declined to pick anyone in police custody during the show-up identification as the robbery suspect, demonstrating the independence of her assessment. 4RP 15.

The other victim from the West Seattle robbery, Fulton, was able to observe Darden’s face during the robbery. 4RP 58. She watched him struggle with Matthyse over her purse. 4RP 56-57. She interacted with him directly, in an attempt to reason with him, telling him, “Please don’t.” 4RP 56. She was only about three feet away from him during this time.

²³ Tanghe testified after Darden moved for a mistrial and is not discussed here. 4RP 88-91 (motion for mistrial); 6RP 4-29 (Tanghe).

²⁴ For example, she correctly estimated Darden’s height as six feet, two inches, and his weight as between 200 and 250 pounds. 4RP 19; 7RP 52.

4RP 77-78. She declined to identify anyone in police custody, at the show-up identification.²⁵ 4RP 61-62. At trial, she recognized Darden based on multiple characteristics, including his demeanor, height, the way that he moved and walked, and the way that he looked at her. 4RP 59, 65-66. These facts all demonstrate an independent basis for each witness's in-court identification.

Because the record does not establish that any witness actually saw Darden in shackles, or any basis on which to conclude that the viewing, if it occurred, was impermissibly suggestive, Darden has failed to satisfy the first prong of the *Vickers* test. Thus, the second prong need not be considered. Darden's convictions should be affirmed.

- ii. Even if a constitutional error occurred, the record does not establish actual prejudice.

Even if this Court reaches the second prong of the *Vickers* test, Darden's convictions should be affirmed because the totality of the circumstances do not demonstrate that any improper viewing created a "substantial likelihood of irreparable misidentification." *Vickers*, 148 Wn.2d at 118 (citing *Linares*, 98 Wn. App. at 401). That is, Darden has not shown that the error resulted in actual prejudice by having practical

²⁵ Travis was one of the detained individuals. 3RP 19 (identifying Exhibit 1 as a photograph of Lamar Travis); 4RP 62 (identifying Exhibit 1 as a photograph of a man from the West Seattle show-up). Travis, however, was not the man who robbed Fulton and Matthyse. 4RP 7-8, 62; 7RP 52

and identifiable consequences in the trial. *O'Hara*, 167 Wn.2d at 99; *Kirkman*, 159 Wn.2d at 926-27.

Under the second prong of the *Vickers* test, courts consider such factors as “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.” *Linares*, 98 Wn. App. at 401; *accord Brathwaite*, 432 U.S. at 114. Each witness is discussed in turn, below.

Acheson admitted that the lighting was poor when the robbery occurred on Capitol Hill, and that, because of a tree overhead, she was unable to get a very clear look at Darden’s face. 3RP 34, 43. However, Darden was in close proximity to her for quite some time—she believed that the incident lasted for five to ten minutes. 3RP 43-45. She distinctly remembered him being “larger, taller, broader,” and that he was an African American male with a dark complexion. 3RP 34, 46. She was not looking around for help, but was focused on him. 3RP 44.

Police arrived within 30 seconds of the robbery, and asked her if the people they detained, who met the robbers’ physical descriptions, were the correct suspects. 3RP 36. She told them that they were not. 3RP 36. However, one of the images in the montage that she viewed later “really

resonated” with her, because it implied the same bulk as the person who stopped her, and she became emotional just looking at it. 3RP 37. She told police that she was 70 percent confident that Darden’s photograph depicted the man who had robbed her. 3RP 37. She emailed the detective subsequently and lowered her pick to 30 to 40 percent because she didn’t want the wrong person to get in trouble; she wanted to be sure and she wanted the process to be fair. 3RP 37-38.

At trial, she said that she was “pretty confident,” “80 percent” sure that Darden was the man who robbed her. 3RP 40. She testified on direct examination, without prompting, that she was not completely certain and that there was still “room for error” in her in-court identification. 3RP 40. This testimony, like her willingness to tell the police that they had initially detained the wrong suspects, and the abundance of caution that she took with the photographic montage, was not the testimony of a witness responding to undue suggestion; it was the candid testimony of a person who felt viscerally that Darden was the individual who committed this crime, but wanted to allow for the inherent uncertainty of memory. Under the totality of the circumstances, there was no error.

Matthysse testified first the next morning. 4RP 4. The taller of the two men in the alleyway had approached her and Fulton in West Seattle. 4RP 7-8. When he demanded her purse, she argued with him while

looking at his face. 4RP 9. The argument and struggle over the purse lasted about a minute. 4RP 10. When he grabbed her purse, he was standing in front of her. 4RP 11.

The police responded and took Matthyse and Fulton to a show-up identification. 4RP 15. Matthyse looked closely at the taller man in custody, but wasn't able to identify him, even though he was wearing very similar clothing to the person who had robbed them. 4RP 15. When police sent her a photographic montage a couple of weeks later, one photograph really "stuck out to [her] as being very similar" to what she remembered, based on "[b]one structure, eyes, facial structure, [and] darkness of skin." 4RP 16-17. She chose Darden's picture with 65 percent confidence. 4RP 18. She chose 65 percent because she couldn't say for sure. 4RP 18.

When asked whether she recognized anyone in the courtroom, Matthyse said that she recognized Darden *as the person that she identified in the montage*. 4RP 18. She admitted that, "I still cannot say 100 percent that's the man that robbed me." 4RP 19. But she emphasized that he had a similar facial structure, eyes, hair, and build to the robber. 4RP 19. Once again, this was not the testimony of someone making an uncritical identification in response to impermissible suggestion, but the careful, measured testimony of an honest and discerning witness.

Masters testified next. 4RP 42. He had barely seen the robber on the night of the incident, only observing the side of his face for a second or two while chasing him. 4RP 44-46. He testified that he could not immediately identify Darden in court, but noted that he had a similar height and bulk to the person from the robbery. 4RP 46. Nothing about Masters's testimony indicates that he was influenced by any viewing in the hallway. If anything, Masters's testimony demonstrates that anything taking place in the hallway was *not* suggestive, as he declined to positively identify Darden in court.²⁶

Fulton was the last eyewitness to testify, prior to Darden's motion for a mistrial. 4RP 51. When she was walking with Matthyse in West Seattle, she initially saw two "shadows" in the alleyway. 4RP 55. Both men were wearing dark clothing. 4RP 55. One was taller than the other, by up to four inches. 4RP 55. When the robbery suspect came out of the alley and pulled the gun on her and Matthyse, she tried to reason with him by saying, "Please don't." 4RP 56. He was as close as three feet from her. 4RP 77-78. She watched his interaction with Matthyse, as they

²⁶ The contrast here with *Russell* is especially revealing. In that case, the witness who did not remember "too much of anything" from the robbery positively identified the defendant in court, after seeing him in shackles. 532 F.2d at 1066. In the instant case, Masters—who barely saw Darden on the night of the robbery—candidly stated that he could not really identify him in court. 4RP 44-46. Thus, unlike in *Russell*, there is no basis to conclude that an impermissibly suggestive viewing occurred.

struggled over the purse. 4RP 56-57. She was watching his face during this time. 4RP 58.

After the suspect fled, the police took her and Matthyse to a nearby gas station, for a show-up identification. 4RP 61. She did not recognize anyone in police custody. 4RP 61-62.

Later, she was asked to view a photographic montage. 4RP 63-64. She was unable to make a selection from the montage, because she was worried that her memory had changed over time, and so she didn't want to pick the wrong person. 4RP 64-65.

In court, Fulton identified Darden with 95 percent certainty. 4RP 58. While this was a dramatic change from the montage, she explained that "being in person is completely different than seeing a photograph." 4RP 65. She recognized Darden in person because of "[t]he way he look[ed] at [her]." 4RP 59. She recognized his "demeanor, and the way he moves[.]" 4RP 65. She also stressed that "[s]eeing his face in different ways is different than seeing it in one way in a photograph[.]" 4RP 65. These are all convincing explanations for the difference between her inability to choose Darden from a single photograph, and her ability to identify him while observing him in person, in court.²⁷

²⁷ Fulton's testimony also distinguishes this case from *Emanuele*, in which the court was especially concerned that the witness, who was previously unable to identify the defendant, had been talked into believing that the man in shackles was the robber, by

While Fulton also said that she was able to observe Darden's height and the way that he walked, "today" (the day of her testimony), and that it matched her memory of the incident, there is no indication that these observations occurred out of court, let alone during an encounter that was impermissibly suggestive. 4RP 65-66. Based on the totality of the circumstances, Fulton's identification testimony was likewise proper.

At the very least, the record does not establish that any constitutional error was truly manifest—i.e., that it had practical and identifiable consequences for Darden's right to a fair trial. Because Darden has not shown actual prejudice, his convictions should be affirmed.²⁸

another witness. 51 F.3d at 1130-31. Fulton's satisfactory explanation for the change in her ability to identify Darden presents no such concern.

²⁸ Darden also argues that, even if the asserted hallway viewing was not by itself impermissibly suggestive, his convictions should be reversed because any suggestiveness was compounded by the fact that he was the lone African American defendant in the courtroom. Br. of Appellant, at 20. Darden is correct that some authority recognizes heightened concerns for suggestiveness when a criminal defendant is the only African American in the courtroom, because of the potential inaccuracy of cross-racial identification. See *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) (citing Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984)). But the jury in this case was instructed on this specific issue, at Darden's behest, ameliorating any concern. CP 29-33 (Defense Motion to Instruct Jury on Cross-racial Identification), 57 (Instruction 8); 1RP 65-67; 3RP 3. Regardless, concerns do not equate to practical and identifiable consequences; because Darden still cannot demonstrate that an error actually occurred, and that it was actually prejudicial, his claim fails. *O'Hara*, 167 Wn.2d at 99; *Kirkman*, 159 Wn.2d at 926-27; RAP 2.5(a)(3).

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DARDEN'S MOTION FOR A MISTRIAL.

If this Court finds that Darden preserved his claim for review, Darden's convictions should be affirmed because the trial court properly exercised its discretion by denying his motion for a mistrial. As discussed, the record does not establish that any witness actually saw Darden in shackles. Even if it did, the record does not establish that the viewing was impermissibly suggestive. Darden's claim fails.

a. Standard Of Review.

A mistrial is appropriate only when the defendant has been so prejudiced that only a new trial can ensure that the defendant will be fairly tried. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. *Id.* Its ruling will be overturned only if no reasonable judge would have reached the same conclusion. *Id.*

An appellate court may affirm a trial court on any basis supported by the record, and is not limited to the reasoning stated by the trial court. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); RAP 2.5(a).

b. The Trial Court Properly Exercised Its Discretion In Denying Darden's Motion For A Mistrial.

For multiple reasons, the trial court properly exercised its discretion when it denied Darden's motion for a mistrial. First, as a threshold matter, Darden argues that the trial court *per se* abused its discretion, because it was unaware of federal circuit court decisions (which Darden himself did not cite below). Br. of Appellant, at 34. But the trial court was not bound to follow these cases, because decisions of the federal circuit courts of appeals are persuasive, not controlling, authority. *State v. Hanna*, 123 Wn.2d 704, 718, 871 P.2d 135 (1994). The trial court did not abuse its discretion by failing to follow nonbinding authority, uncited in the motion before it—especially when those authorities are distinguishable from the case at bar. If anything, *Emanuele* and *Russell* only emphasize, by contrast, why a mistrial was not appropriate in this case; had the trial court been aware of these authorities, it would have had an even stronger basis for denying Darden's motion. Because the trial court may be affirmed on any basis supported by the record, its ruling should not be disturbed.

Second, the trial court did not abuse its discretion because Darden's motion was untimely. In fact, it would have been error for the trial court to *grant* Darden's untimely motion. *See Carlson*, 61 Wn. App.

at 869 (“Unless these requirements [of a timely and specific objection] are satisfied, there is no basis for a new trial and it is error to grant one.”).

Third, the trial court did not abuse its discretion because the record simply does not establish that any error occurred. Darden’s motion was speculative and ambiguous. He argued that witnesses had “been in the hallway” and that Darden was led to and from court while in shackles. 4RP 88. He “gather[ed]” that the witnesses saw Darden in shackles. 4RP 88. But nothing in the record actually established this claim. Counsel did not identify which witnesses—if any—actually saw Darden in shackles, nor did he ask that the witnesses be questioned. 4RP 88-91; 5RP 2-4. Because it was not requested, no such factual inquiry was ever conducted. 4RP 88-91; 5RP 2-4. Whether any witnesses saw Darden in shackles, and whether the hypothetical viewing had any impact on their in-court identifications, is wholly unknown.

Darden may argue that the trial court never disputed whether he was viewed in the hallway. It is true that, after Darden made his motion for a mistrial, the trial court appeared concerned primarily with whether there was any case law on point. But the trial court’s discussion with counsel regarding the legal basis for his motion cannot be construed as a factual finding that improper observations actually occurred in the

hallway.²⁹ Neither can the trial court's precautionary measure of ordering the State's final eyewitness to wait on the other side of the courthouse.

Finally, the trial court should be affirmed because any error in the in-court identification testimony was harmless. A constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

Darden and Travis were childhood friends, and communicated with each other multiple times on the night of the robberies. 3RP 18-23; 6RP 94, 150; 7RP 5, 11, 30; Ex. 40 at 2-3; Ex. 41 at 5; Ex. 42 at 1. Travis took his mother's car and left for the evening, calling Darden one more time around the time that he left. 6RP 97-98; 7RP 30-31; Ex. 41 at 5.

Acheson and Tanghe were robbed by Travis and another African American male on Capitol Hill, around midnight. 3RP 29-34; 6RP 5-8. The other male, who was taller than Travis, stopped directly in front of Acheson. 3RP 32, 34; 6RP 7, 9-10. Darden is six feet, two inches tall; Travis is five feet, eleven inches tall. 7RP 52.

²⁹ Nor would any such findings be supported by substantial evidence. See *State v. Brandt*, 99 Wn. App. 184, 189, 992 P.2d 1034 (2000) (observing that a trial court's factual findings will be upheld if supported by "substantial evidence"). Substantial evidence is evidence sufficient to convince a fair-minded and rational person of the truth of the finding. *State v. Hardgrove*, 154 Wn. App. 182, 185, 225 P.3d 357 (2010). Here, counsel's inherently speculative motion amounted to, at best, an ambiguous offer of proof. Darden does not claim that the trial court found that improper viewings occurred, but should he make this argument in reply, the State asserts that any such findings are unsupported and erroneous, and therefore nonbinding on appeal.

At approximately 1:00 a.m., Travis and another African American male robbed Lynn Matthyse and Allison Fulton, in West Seattle. 4RP 4-13, 51-58. The women saw two men approach from an alleyway. 4RP 6, 54. The taller man called out to them and then demanded their purses at gunpoint. 4RP 7-8, 54-55. Matthyse struggled with the man over her purse, while focusing on his face. 4RP 9-11, 57.

Masters came outside to assist, and saw the man run to the front passenger seat of Travis's mother's Buick. 4RP 12-13, 42-45, 57-58, 84-86; 6RP 97-100.

Travis was arrested while leaving the Buick, about ten minutes later. 4RP 84-86. He had property from all four victims. 5RP 9, 18-23, 26; 6RP 44-45, 48-49.

Darden called Gloria's house later that night, looking for Travis. 3RP 22; 7RP 33; Ex. 41 at 7. After Nikola called Darden the next day to confront him, he called the King County Jail and spoke for 10 minutes. 6RP 105-08; 7RP 34-36; Ex. 41 at 7. When he finally agreed to meet with Nikola, he cried and confessed to his role in the robberies, but claimed that it was all Travis's idea. 6RP 110-13. He also said that he knew he would be caught, because his fingerprints would be found in the car. 6RP 113.

Darden's fingerprints were located on the front passenger door of the Buick—the same door through which Masters observed the man enter the vehicle on the night of the robberies. 4RP 45; 5RP 48-49, 63-64.

After being arrested, Darden made inconsistent and highly implausible statements to Detective Clement. He initially claimed that Travis only “kind of look[ed] familiar,” but then admitted that they grew up together. 7RP 9. He claimed to have not spoken with Travis since May or early June—a claim contradicted both by phone records and the testimony of Travis's grandmother, Gloria. 3RP 22-23; 6RP 150; 7RP 5, 9, 11, 30-31; Ex. 40 at 2-3; Ex. 41 at 5. He claimed to have never seen Travis drive or to have been in a car with Travis. 7RP 12-13. When confronted with the fact that his fingerprints were found on the vehicle, he explained, nonsensically, that Nikola used to braid his hair. 7RP 13-14. Nikola flatly denied ever braiding Darden's hair. 6RP 96. She had also never seen him in or near her car. 6RP 96-97. Nikola had no motive to lie about the actions of her son's childhood friend; Travis had already pleaded guilty—he received no favors in exchange for her testimony. 6RP 117-18.

The victims who interacted more closely with Darden (Acheson from the Capitol Hill robbery and Matthysse from the West Seattle robbery) both identified him from a photographic montage. 3RP 36-37; 4RP 16-18.

In contrast to the strength of the evidence against him, Darden's alibi defense was highly incredible. When Detective Clement called Darden's mother, she told him that she had celebrated her birthday on August 4. 7RP 171. When he asked her if Darden had been home with her on the night of July 28, she said that she wasn't sure. 7RP 171-72.

At trial, Darden's mother implausibly testified that she had actually had two birthday parties, but didn't think about that when Clement called to ask about Darden's whereabouts. 7RP 124, 138-39. Darden's mother, cousin, and a close neighbor claimed that Darden had been home all night with them at the other birthday party, in a tiny house, and that they would have noticed if he left. 7RP 126-28, 132, 142-44, 153-56. Yet cell phone records established that Darden and his family members exchanged more than 10 phone calls that night, while they were supposedly home together in the small house. 7RP 167-69; Ex. 41 at 5-6.

The alibi witnesses also testified that Darden went to bed sometime between midnight and 1:00 a.m., because he was vomiting from something that he ate or from drinking too much alcohol.³⁰ 7RP 128, 139, 155, 159. But Darden called Macy's account services at 3:46 a.m.

³⁰ The defense also called another witness who testified that Darden appeared to have a cold when she saw him, on August 1—several days after the robberies. 7RP 121. It is unclear how this testimony supported (rather than detracted from) Darden's defense that he vomited and retired on the night of July 28, after drinking too much.

7RP 34; Ex. 41 at 7. Matthysse's Macy's card was taken in the robbery earlier that night—the only card that was never returned to her. 4RP 20.

In light of the overwhelming, untainted evidence as a whole, and especially in light of the incredibility of Darden's defense, any reasonable jury would have convicted Darden beyond a reasonable doubt. Even if the in-court identification testimony was improper, any error was harmless, and the trial court did not abuse its discretion by denying Darden's motion for a mistrial.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Darden's convictions.

DATED this 20th day of January, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Orlen Gurzelle Darden, Jr., Cause No. 70253-0, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 20 day of January, 2015.



Name
Done in Seattle, Washington