

NO. 36652-5-II  
Clark County No. 07-1-00282-1

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TRAVIS GLENN HUFFMAN**

**Appellant.**

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FILED  
COURT OF APPEALS  
DIVISION II  
08 MAR 12 11:11:55  
STATE OF WASHINGTON  
BY DENNY

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**BRIEF OF APPELLANT**

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P.M. 3-10-08

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**A. ASSIGNMENTS OF ERROR**

**I. MR. HUFFMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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**II. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT MR. HUFFMAN PERPETRATED THIS CRIME.**

**C. STATEMENT OF THE CASE**

**1. FACTUAL HISTORY**

On May 17<sup>th</sup>, 2006 Dustin Johnson was attacked inside his home by a man wielding a knife and a phony gun. RP Vol. VI, p. 92-98. He was stabbed several times and suffered great bodily harm. RP Vol. VI, 92-100. Dustin was a marijuana seller at the time and it was not uncommon for large numbers of people to frequent his home. RP Vol. VI, p. 119-121. The day before the stabbing, Dustin briefly met the Appellant, Travis Glenn Huffman, for the first time. RP Vol. VI, p. 102. Mr. Huffman was brought to Dustin's house by Chris Rogers, a friend of Dustin and his brother, Devin, so that they could buy marijuana from

Dustin. RP Vol. VI, p. 102-103. This encounter lasted for approximately fifteen minutes. RP Vol, VI, p.104. Devin, according to Dustin, was in the room at the time of the marijuana transaction. RP Vol. VI, p. 104. Dustin advanced Travis some marijuana, with the understanding that Travis would pay him back the next day. RP Vol. VI, 103. After the stabbing, Dustin had great difficulty describing his attacker because, "...it was someone I never knew, someone I never seen before." RP Vol. VI, p. 105.

Dustin testified he told the police that his attacker was the person he met the day before. RP Vol. VI, p. 106. He also described his attacker as having tattoos with lettering on his arms and a tan. RP Vol. VI, p. 106. Dustin tried to assist the police in creating a composite sketch, but he felt the end result did not accurately depict the attacker. RP Vol. VI, p. 115. Over the next seven months detectives showed Dustin several photo montages but Dustin was unable to make an identification until January 3<sup>rd</sup>, 2007, when he was shown a photo montage by Detective Smith of the Vancouver Police Department and he identified the picture depicting Travis Huffman. RP Vol. VI, 116. Dustin testified he was "almost 100 percent sure" of his identification, and then he testified "I'm 100 percent sure that was him compared to all the other pictures I've seen...I had a ...really good flashback when I seen the picture." RP Vol. VI, p. 117.

Dustin testified he told Detective Smith “that looks a lot like him.” RP Vol. VI, p. 117.

Dustin testified that when he met Travis on the day before the stabbing, he had a gold grille over his teeth, and further stated he had seen this type of grille before because “everyone” has them now. RP Vol. VI, p. 108. Dustin’s attacker did not have a gold grille over his teeth. RP Vol. VI, p. 109.

Devin, Dustin’s brother, testified that he was at home on the 17<sup>th</sup> when there was a knock on the door. RP Vol. VI, p. 151. Dustin answered the door and immediately went back to his room with the visitor. RP Vol. VI, p. 151. After about three minutes, he heard thumping against the wall and ran to Dustin’s room to investigate. RP Vol. VI, p. 153. When he opened the door he saw someone stabbing his brother in the stomach area. RP Vol. VI, p. 154. He grabbed a skateboard began hitting the attacker with it, successfully ending the assault. RP Vol. VI, p. 154. The attacker then ran out of the house. RP Vol. VI, p. 154.

Devin testified that he recognized his brother’s attacker as the person who had come over the day before with Chris Rogers. RP Vol. VI, p. 157. On the day before the stabbing, Devin had the opportunity to observe Mr. Huffman for two to two and a half minutes. RP Vol. VI, p. 161. When he was shown a photo montage with Mr. Huffman’s picture,

Devin did not recognize anyone in the montage. RP Vol. VI, p. 166-67. He also identified someone who was not Travis Huffman from a photo montage. RP Vol. VI, p. 167.

Chris Rogers was shown a photo montage by Detective Smith on February 13<sup>th</sup>, 2007, which included Travis Huffman, and he stated he did not recognize anyone in the montage. RP Vol. VII-A, p. 272-274. Not satisfied with this answer, Detective Smith pointed to Mr. Huffman's picture in the montage and told Rogers "You know this guy," and named him as well. RP Vol. VII-A, p. 275. Detective Smith testified that he did this because although Rogers was a witness, Smith was now interested in pursuing a case against him for hindering the investigation. RP Vol. VII-A, p. 276. At that point in the interview, Rogers got up to leave and Smith's partner told Rogers "You might want to rethink this." RP Vol. VII-A, p. 276. Rogers then came back and, after some further discussion with the detectives, said he did recognize somebody, and took the photo laydown and pointed to the same picture Smith had pointed to, which was Travis Huffman's picture. RP Vol. VII-A, p. 276-77.

James Wickwire and Katie Wallace are friends of Dustin and arrived at his house on May 17<sup>th</sup> just as the attacker was fleeing the residence. RP Vol. VI, p. 181-82. As James was stepping out of his car he saw the attacker open the door, take a few steps forward, and then run

away. RP Vol. VI, p. 182. James testified he had never seen the person before. RP Vol. VI, P. 182. James was about ten to twelve feet away from the attacker when he opened the door. RP Vol. VI, p. 186. Although James only saw the attacker for a matter of seconds and had never seen him before, he nevertheless testified fourteen months after the incident that he was sure that the defendant sitting in the courtroom was the same person he saw running away from Dustin's house. RP Vol. VI, p. 187. He testified, however, that Mr. Huffman looked different now than he did then. RP Vol. VI, p. 187. Katie Wallace did not testify at the trial. Report of Proceedings.

Detective Smith testified he showed Dustin between six and eight photo laydowns before Dustin identified Travis Huffman on January 3<sup>rd</sup>, 2007. RP Vol. VII-A, p. 278. The week before the trial Detective Smith also showed a photo laydown containing Mr. Huffman's picture to Katie Wallace and James Wickwire. RP Vol. VII-A, p. 314. James was unable to identify anyone in the photo laydown. RP Vol. VII-A, p. 314. Katie made an identification, but it was not Travis Huffman. RP Vol. VII-A, p. 314.

There was no physical evidence linking Travis Huffman to this crime. Report of Proceedings.

## **2. PROCEDURAL HISTORY**

The Clark County Prosecuting Attorney charged Travis Glenn Huffman with one count of Assault in the First Degree while armed with a deadly weapon and one count of Attempted Robbery in the First Degree while armed with a deadly weapon. CP 1-2. He was convicted by the jury of Assault in the First Degree while armed with a deadly weapon, and acquitted of Attempted Robbery in the First Degree. CP 39-41. He was given a standard range sentence. CP 48. This timely appeal followed. CP 59.

**D. ARGUMENT**

**I. MR. HUFFMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE IN-COURT IDENTIFICATIONS OF MR. HUFFMAN BY DEVIN JOHNSON, CHRIS ROGERS, AND JAMES WICKWIRE.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance

was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Mr. Huffman was denied effective assistance of counsel where his attorney failed to object, on the grounds of relevancy, to the in-court identification of Mr. Huffman by Dustin Johnson, Devin Johnson, and James Wickwire; and to the out-of-court identification of Mr. Huffman by Chris Rogers on the ground that it was impermissibly suggestive and unreliable.

Regarding the out-of-court identification of Mr. Huffman by Chris Rogers, even the State agreed that the out-of-court identification was suggestive and unreliable. RP Vol. V, p. 47, Vol. VI, p. 53. Initially, counsel for Mr. Huffman moved to suppress the identification, but inexplicably withdrew the motion prior to trial. RP Vol. VI, p. 54. The out-of-court identification was by far the strongest piece of evidence the State presented against Mr. Huffman because, unlike Devin, Dustin, and James Wickwire, Chris Rogers knew Mr. Huffman. His tainted identification of Mr. Huffman from the photo laydown lent substantial weight to the very shaky identifications of Dustin, Devin, and Wickwire. It appears that defense counsel dropped his motion to suppress Chris

Rogers' out-of-court identification, a motion that would certainly have been granted in light of the State's concession, because he believed there was some probative value in eliciting testimony from Detective Smith about his faulty interrogation technique that outweighed the overwhelming prejudice of the jury hearing about the out-of-court identification. If so, this thinking was pure folly and does not rise to the level of a legitimate tactical decision. It was totally illegitimate. Defense counsel's acquiescence in allowing this testimony to be presented to the jury constituted ineffective assistance of counsel. For the reasons stated below, but for this error the result of the trial would likely have been different.

Further, defense counsel should have objected to the in-court identifications by Devin Johnson and James Wickwire because they were not reliable. To be clear, Mr. Huffman is not asserting that the pre-trial, out-of-court identification procedures used with these two witnesses were unduly suggestive. The problem in this case is that each of these two witnesses was unable to identify Mr. Huffman after having been shown a photo montage with his picture, and Devin even identified someone else.

ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.” The rule, as explained by the commentators, contemplates a balancing process. Although a witnesses’ in-court identification of a defendant is arguably relevant in the traditional use of the term, in this case that relevance was outweighed by the substantial prejudice to Mr. Huffman because the in-court identifications were inherently unreliable. When a defendant is sitting at a table with his attorney it is obvious to the witness that he is the one the State believes perpetrated the crime. Here, where the trial occurred *fourteen months* after the incident, where both witnesses were unable to identify Mr. Huffman from a photo laydown, where Devin Johnson actually identified someone else and where James Wickwire only saw the attacker for a matter of seconds and had never seen him before (or after), any in-court identification was fatally tainted. Counsel’s failure to object to these in-court identifications was ineffective.

Counsel’s failure to make these necessary objections rendered this trial fundamentally unfair. But for counsel’s unprofessional errors, the result of this trial would likely have been different. The sole issue in this case was the identity of the perpetrator. There was no physical evidence linking Mr. Huffman to the crime. The only witness to the crime who successfully identified Mr. Huffman in a photo laydown was Dustin Johnson, and that was after as many as eight attempts and after seven

months. Further, his identification was shaky, and Dustin was candid about his ambivalence. He agreed that his composite sketch was useless. Further, the in-court identification by James Wickwire strains credulity. He saw the attacker for a matter of seconds, failed to identify him in a montage the week before trial, and then positively identified him at trial, some fourteen months later? This evidence was patently unreliable. Had defense counsel aggressively challenged these questionable identifications, the result of the trial would likely have been different. Mr. Huffman should be granted a new trial.

**II. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT MR. HUFFMAN PERPETRATED THIS CRIME.**

For the reasons stated in section I above, the evidence is insufficient to sustain Mr. Huffman's conviction. Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628

(1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

For the reasons stated in section I above, the evidence is insufficient to sustain Mr. Huffman's conviction. Because the sole issue in this case was the identity of the perpetrator, the evidence of eye witness identifications should be subjected to the strictest scrutiny by this court. As argued above, these identifications were highly unreliable. In one instance, the Chris Rogers identification, the identification was irretrievably tainted by the State's own admission. Further, this identification carried substantial weight in its ability to corroborate the identification by Dustin Johnson. The evidence, consisting of unreliable eyewitness identifications, is insufficient to sustain Mr. Huffman's conviction.

#### **E. CONCLUSION**

Mr. Huffman's conviction should be reversed and dismissed due to insufficiency of the evidence. Alternatively, Mr. Huffman should be granted a new trial due to ineffective assistance of counsel.

  
ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Huffman

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	Court of Appeals No. 36652-5-II
	)	Clark County No. 07-1-00282-1
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
TRAVIS GLENN HUFFMAN,	)	
	)	
Appellant.	)	

ANNE M. CRUSER, being sworn on oath, states that on the 10<sup>th</sup> day of March 2008, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

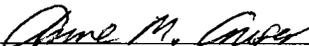
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4 Mr. Travis Glenn Huffman  
5 DOC #309380  
6 Monroe Correctional Complex  
7 P.O. Box 777  
8 Monroe, WA 98272-0777

9 and that said envelope contained the following:

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- (1) BRIEF OF APPELLANT
  - (2) RAP 10.10 (TO MR. HUFFMAN)
  - (3) AFFIDAVIT OF MAILING

Dated this 10<sup>th</sup> day of March, 2008

  
ANNE M. CRUSER, WSBA #27944  
Attorney for Appellant

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

Date and Place: March 10<sup>th</sup>, 2008, Kalama, Washington

Signature: Anne M. Cruser