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NO. 37324-6-II

STATE OF WASHINGTON
BY  _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

AARON DUKES

Appellant.

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

The Honorable Kitty-Ann Van Doorninck, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	5
C. <u>ARGUMENTS</u>	9
1. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED MR. DUKES MOTION FOR A MISTRIAL FOLLOWING AN UNCURABLY PREJUDICIAL OUTBURST FROM A SPECTATOR	9
a. <u>Prejudicial Court Room Security</u>	11
2. MR. DUKES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL’S REPEATED FAILURES TO OBJECT TO PREJUDICIAL TESTIMONY THAT ULTIMATELY DEPRIVED MR DUKES OF HIS RIGHT TO A FAIR TRIAL	13
a. <u>The trial court erred by denying defense motion to suppress the prejudicial show-up identification</u> ...	14
b. <u>Cumulative Errors</u>	17

c. Ineffective Assistance of Counsel.....21

3. THE STATE FAILED TO PROVE BEYOND
A REASONABLE DOUBT THE IDENTITY
OF THE ASSAILANT, AN ESSENTIAL
ELEMENT OF ASSAULT IN THE SECOND
DEGREE.....24

D. CONCLUSION.....27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Personal restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835, <u>clarified</u> , 123 Wn.2d 737, 870 P.2d 964, <u>cert. denied</u> , 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).....	18
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	9
<u>State v. Allen</u> , 159 Wn.2d 1, 147 P.3d 581 (2006).....	25
<u>State v. Brown</u> , 128 Wn. App. 307, 1049 (2005) <u>review denied</u> , 160 Wn.2d 1001, 158 P.3d 614 (2007).....	17
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	21, 22
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	18
<u>State v. Dawkins</u> , 71 Wn. App. 902, 863 P.2d 124 (1993).....	23, 24
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	12-13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Con't.

<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	25
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	21
<u>State v. Hartzog</u> , 96 Wn.2d 383, 635 P.2d 694 (1981).	13
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	10
<u>State v. Hill</u> , 83 Wn.2d 558, 520 P.2d 618 (1974).....	25
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003), <u>review denied</u> , 151 Wn.2d 1013, 94 P.3d 960 (2004).....	18
<u>State v. Hopson</u> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).....	9
<u>State v. Horton</u> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	23, 24
<u>State v. Hundley</u> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	26, 27
<u>State v. Kwan Fai Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Con't.

<u>State v. Johnson,</u> 90 Wn. App. 54, 950 P.2d 981 (1998).....	27, 25
<u>State v. Linares,</u> 98 Wn. App. 397, 989 P.2d 591 (1999), review denied 140 Wn.2d 1029, 10 P.3d 406 (2000).....	15
<u>State v. Lord,</u> 161 Wn.2d 276, 165 P.3d 1251 (2007).....	13
<u>State v. O'Neal,</u> 159 Wn.2d 500, 150 P.3d 1121 (2007).....	25
<u>State v. Meckleson,</u> 133 Wn. App. 431, 135 P.3d 991 (2006).....	22, 23, 24
<u>State v. Mendoza-Solorio,</u> 108 Wn. App. 823, 33 P.3d 411 (2001).....	22
<u>State v. Perrett,</u> 86 Wn. App. 312, 936 P.2d 426, <u>rev. denied</u> , 133 Wn.2d 1019 (1997).....	17
<u>State v. Ross,</u> 106 Wn. App. 876, 26 P.3d 298 (2001), <u>review denied</u> , 145 Wn.2d 1016, 41 P.3d 483 (2002).....	14
<u>State v. Ramires,</u> 109 Wn. App. 749, 37 P.3d 343 (2002).....	15
<u>State v. Rich,</u> 63 Wn. App. 743, 821 P.2d 1269 (1992).....	25

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Con't.

State v. Rodriguez,
146 Wn.2d 260, 45 P.3d 541 (2002).....9, 10

State v. Ross,
106 Wn. App. 876, 26 P.3d 298 (2001,
review denied, 145 Wn.2d 1016, 41 P.3d 483 (2002).....14

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994).....9

State v. Shea,
85 Wn. App. 56, 930 P.2d 1232 (1997).....15

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987).....22

State v. Vickers,
107 Wn. App. 960, 29 P.3d 752 (2001).....14

State v. Vaughn,
101 Wn.2d 604, 682 P.2d 878 (1984).....14

FEDERAL CASES

Estelle v. Williams,
425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).....3

Fahy v. Connecticut,
375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).....17

Jackson v. Virginia,
443 U.S. 307, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979).....25, 26

TABLE OF AUTHORITIES

Page

FEDERAL CASES, CON'T.

Manson v. Brathwaite,
432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).....15

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....21,22, 23

OTHER STATE’S CASES

Willcocks v. State,
546 S.W.2d 819 (Tenn. Crim. App, 1976).....13

STATUTES, RULES AND OTHERS

RCW 9A.36.021(1)(a).....2

RCW 10.99.020.....2

RAP 2.5(a)

United States Constitution Sixth Amendment.....12

United States Constitution Fourteenth Amendment.....12

Washington State Constitution. article I, section 3.....12

Washington State Constitution. article I,
section 22 (amendment 10).....12

1 H. Underhill, Criminal Evidence § 125
(5th Ed. P. Herrico 1956, Supp. 1970).....25

1 Wharton’s Criminal Evidence § 16
(13th ed. C. Torica 1972).....25

A. ASSIGNMENTS OF ERROR

1. The trial court abused her discretion by denying defense motion for a mistrial following a spectator's prejudicial statements in front of the jury regarding appellant..

2. The show-up identification of Mr. Dukes was unreliable and prejudicial.

3. Cumulative error denied Mr. Dukes his right to a fair trial.

4. Defense counsel's failure to object to repeatedly prejudicial and inadmissible evidence denied Mr. Dukes his right to effective assistance of counsel and to a fair trial.

5. There was insufficient evidence to prove that Mr. Dukes was the assailant.

Issues Presented on Appeal

1. Did the trial court abuse her discretion by denying defense motion for a mistrial following a spectator's prejudicial statements in front of the jury regarding appellant.?

2. Was the show-up identification of Mr. Dukes unreliable and prejudicial?

3. Did cumulative error deny Mr. Dukes his right to a fair trial?

4. Did defense counsel's failure to object to repeatedly prejudicial and inadmissible evidence deny Mr. Dukes his right to effective assistance of counsel and to a fair trial?

5. Did the state prove all of the essential elements of the crime charged; specifically that Mr. Duke's was the assailant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Aaron Dukes was charged with assault in the second degree in violation of RCW 9A.36.021(1)(a), a domestic violence incident under RCW 10.99.020. CP 1. Mr. Dukes moved for a mistrial after a spectator named Shawn Garrett from the galley erupted in front of the jury in the court room with hostile and prejudicial words indicating that the complaining witness was not testifying truthfully out of fear. Mr. Garrett also intimidated Mr. Dukes by telling him he should plead guilty to be safe.. CP 9-11; RP 7-8 (January 14, 2008). The prosecutor observed the same inappropriate behavior. RP 7. (January 14, 2008). The Court denied the motion and told the jury to disregard the comments. RP 93, 96 (January 15, 2008); RP 7 (January 16, 2008).

Defense also objected to the presence of additional security in the

court room fearing that the jury would interpret this to mean that Mr. Aaron posed a threat rather than the spectator Mr. Garrett. RP 5-7 (January 16, 2008). Following a jury trial Mr. Dukes was convicted as charged. CP30. This timely appeal follows. CP 118-131.

a. Trial Errors

(1) During trial, without cross examination from the defense, officer Hall testified that both Mr. and Mrs. Williamson identified Mr. Dukes at a show-up identification. RP 67-68 (January 15, 2008). This was not true; Mr. Williamson testified that he could not identify Mr. Dukes. RP 40-41 (January 15, 2008).

(2) Again without objection from the defense on grounds that the testimony invaded the province of the jury, Officer Hall testified that he received a call and was told that Mr. Dukes was responsible for the crime. RP 67-68 (January 15, 2008).

(3) Without objection from defense, paramedic Travis Smith testified to hearsay that he wrote in his report that Mr. Wilson had experienced a history of similar incidents from her significant other, namely Mr. Dukes. RP 112-114.

(4) Officer Catlett was permitted to testify without objection that he

recognized Mr. Dukes in his car because he already had booking photos of Mr. Dukes. RP 10 (January 16, 2008).

(5) On cross examination defense again elicited this same objectionable information and further permitted Officer Catlett to state that he pulled Mr. Duke's photo up from the police LESA records file. RP 30-31 (January 16, 2008)

(6) Over defense objection, the court allowed the state to improperly offer impeachment testimony of Ms. Wilson through officer Parr. Ms. Wilson testified that she did not remember speaking to the police at the hospital or implicating Mr. Dukes. RP 43-49 (January 16, 2008).

(7) Over defense objection, the court allowed the state to improperly offer impeachment the testimony of Ms. Wilson through officer Parr regarding Ms. Wilson's alleged statement that Mr. Dukes had injured her before . RP 49 (January 16, 2008).

(8) Without objection from the defense, the prosecutor in closing argument told the jury that Mr. Dukes was observed beating Ms. Wilson. This was not supported by the evidence presented a trial. RP 107 (January 16, 2008).

2. SUBSTANTIVE FACTS

Lawanda Lee Wilson was beaten during the early morning hours of August 25, 2007. RP 19, 23 (January 15, 2008). Witness Angela Williamson looked out of her apartment window and saw the beating. She described the assailant as a person wearing black pants, a fluffy coat, and large diamond earring in the right ear with either curly hair or an afro. RP 19, 30 (January 15, 2008). After the police arrived at the scene, they interviewed Ms. Williamson and her husband Paul. RP 58 (January 15, 2008). The police obtained a description of the assailant from Ms. Williamson. Id.

The police searched the area using a K-9 unit. Id. The K-9 officer did not testify. Officer Timothy Borchardt, accompanied the K-9 unit and testified that he was not sure if the dog was actually tracking when they began the search. RP 17 (January 16, 2008). The dog apparently got lost and then appeared to track to a car. RP 20 (January 16, 2008). According to officer Borchardt, Mr. Dukes was asleep in the car. RP 21. (January 16, 2008).

Officer Jason Catlett also followed the K-9 unit during the search. RP 27. (January 16, 2008). Officer Catlett testified that the dog tracked to Mr. Duke's and Ms. Wilson's apartment and later to the car where Mr. Dukes was sitting awake, not asleep. RP 27-31. (January 16, 2008).

Mr. Dukes did not know why he was being arrested and asked to be taken to the hospital to see Ms. Wilson. RP 39 January 16, 2008). Mr. Dukes had blood on the front of his shirt which he said came from a cut on his hand acquired during a slap boxing match with some local boys. RP 32, 38 (January 16, 2008). The police did not analyze the blood to determine if it was Mr. Duke's blood or from another source.

Ms. Williamson reported that she woke to loud noises and saw a man walking with a woman and then beating the woman outside of her apartment window. RP 18-19. (January 15, 2008). Ms. Williamson yelled at the guy to stop and the man yelled back a profanity. RP 19 (January 15, 2008). Mr. Williamson told her husband that a guy was hitting a woman. Mr. Williamson jumped up when he heard the man curse at his wife. RP 35 (January 15, 2008). Mr. Williamson saw the man hitting the woman but could not identify him. RP 35, 40-41.

Mr. and Mrs. Wilson ran outside and saw the woman covered in blood. RP 23, 37-37 (January 15, 2008). When the police returned to the scene for a field show-up identification, two officers removed Mr. Dukes from a patrol car, shined a bright light on him while standing next to him and asked Ms. Williamson if she could identify him. RP 68 (January 15, 2008).

Ms. Williamson was not able to identify the man from looking at him because he had changed his shirt and removed the earring. However after Mr. Dukes spoke, Ms. Williamson, while hiding behind her husband, afraid, identified Mr. Dukes as the assailant. RP 30(January 15, 2008). Mr. Williamson could not identify Mr. Dukes but said “everything matched”. 35, 40-41. (January 15, 2008).

Medic Travis Joseph treated Ms. Wilson on the scene and determined that she had consumed a large quantity of alcohol. RP 112-113. (January 15, 2008). Mr. Travis determined that Ms. Wilson had facial injuries but no neck, head, back or abdominal pain. Id. Mr. Travis wrote in his report in quotation marks that the injuries were perpetrated by Ms. Wilson’s “significant other”. During the court proceedings, Mr. Travis conceded that Ms. Wilson did not use the words “significant other”. Id. Ms. Wilson was treated at St. Clair’s hospital for injuries to her face. RP 61-64 (January 16, 2008); RP 77 (January 15, 2008).

Ms. Wilson did not remember anything that happened after she returned home from that night of heaving drinking with a girlfriend and a friend of Mr. Dukes. RP 82, 84 (January 15, 2008). Ms. Wilson did not remember talking to the police or implicating Mr. Dukes in the assault. RP

86-87. (January 15, 2008). She did remember drinking too much: at least three beers and two double shots of Hennessy. RP 88 (January 15, 2008). According to Mr. Dukes Ms. Wilson drank a six-pack of beer before she went out. RP 74 (January 16, 2008). Wilson did not believe that Mr. Dukes would commit such an act against her. RP 89 (January 15, 2008).

Mr. Dukes was out at an acquaintance's house on August 24, 2008 playing video games. Ms. Wilson was with him during part of the day. RP 71 (January 16, 2008). Mr. Dukes went home and a friend Dazz went with him to continue playing Tournament of 2007 Madden Football. RP 72 (January 16, 2008). Ms. Wilson and Dazz's girlfriend went out bowling near midnight on August 25, 2008 and returned at 2:30 in the morning while Mr. Dukes and Dazz were still playing video games. RP 72-73. (January 16, 2008). Ms. Wilson was acting "spacey" and did not want Dazz and his girlfriend to leave. Id.

After Dazz and his girlfriend left, Mr. Dukes went outside and ran into Dazz again and they talked for 10 minutes. When Mr. Dukes returned home the door was wide open and Ms. Wilson was not home. Mr. Dukes received two hang-up phone calls. He went outside again and sat in his car. RP 75-78 (January 16, 2008). Mr. Dukes learned from the police that Ms

Wilson had been beaten up. RP 93 (January 16, 2008)

The only witness to provide any sort of identification of Mr. Dukes was Ms. Williamson who was certain that Mr. Dukes had a large diamond earring in his right ear. RP25, 30 (January 15, 2008). However, Lee White a private investigator examined Mr. Dukes ears and took photographs (admitted at trial as Exhibits 32-33) which indicated that Mr. Dukes did not have pierced ears. RP 101, 103 (January 16, 2008).

C. ARGUMENTS

1. THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED MR. DUKES MOTION FOR A MISTRIAL FOLLOWING AN UNCURABLY PREJUDICIAL OUTBURST FROM A SPECTATOR.

The Court's generally review the trial court's denial of a mistrial for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The trial court abuses its discretion if "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). Moreover, the Courts of Appeal will overturn a trial court's denial of a mistrial if "there is a 'substantial likelihood' that the error prompting the mistrial affected the jury's verdict," Rodriguez, 146

Wn.2d at 270 (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)), or if "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Rodriguez, 146 Wn.2d at 269-70 (quoting State v. Kwan Fai Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), overruled on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)).

In Mr. Duke's case, a spectator Shawn Garrett who knew Mr. Dukes and Ms. Wilson sat in the court room to intimidate Mr. Dukes. Mr. Garrett told the court that Mr. Duke's brother shot him in the face. RP 4. January 14, 2008). Mr. Garrett the told the court that he uttered to Mr. Duke that "it would be easier if people just pled guilty when they know they're guilty". RP 5. (January 14, 2008). Mr. Garrett continued to tell the court that Mr. Dukes was present when he was shot and Mr. Dukes and his brother are blaming the shooting on each other. Id.

Mr. Garrett continued to inform the court that someone had been threatening Ms. Wilson and that Mr. Garrett just wanted people to be able to testify in safety. RP 6 (January 14, 2008). Defense counsel informed the court that Mr. Garrett told Mr. Dukes "you better plead guilty now and be safe". RP

7 (January 14, 2008). Defense moved to have Mr. Garrett removed from the court room. Id. The court denied the motion. RP 8 (January 14, 2008).

The following day, immediately after Ms. Wilson told the jury that she did not believe that Aaron would hurt her, Mr. Garrett burst out in front of the jury “you don’t have to be scared”. RP 92. (January 15, 2008). The court acknowledged that the jury heard Mr. Garrett’s outburst. The court addressing Mr. Garrett stated:

What you have just done is cause a potential mistrial where we are going to have to start all over again because you interfered with the process. The jurors heard you. That’s a huge problem.

RP 93 (January 15, 2008). The court excused the jury and then removed Mr. Garrett from the court room after he told the court that Mr. Dukes and his CRIP gang scared Ms. Wilson. RP 93 (January 15, 2008). The court denied the defense motion for a mistrial. The court “apologize[d] to the jury for the interruptions this afternoon” and told the jury “to disregard any comments from the galley. You are to only determine the facts of this case based on the evidence that is produced in court.” RP 97 (January 15, 2008)

a. Prejudicial Court Room Security

Defense again moved for a mistrial and also objected to the prejudicial impact of the extra security in the court arguing that the jury would believe that the security was present to contain Mr. Dukes rather than to address Mr. Garrett's presence. RP 94-96 (January 15, 2008); RP 5-7 (January 16, 2008). Defense explained that Mr. Garrett wearing sunglasses was a large and threatening presence who had threatened Mr. Dukes in the court room. RP 6 (January 16, 2008).

Mr. Dukes was entitled to the "physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). The purpose is "to ensure that the defendant receives a fair and impartial trial as guaranteed by the *Sixth* and *Fourteenth Amendments of the United States Constitution* and article I, section 3, and *article I, section 22 (amendment 10) of the Washington State Constitution*." Finch, 137 Wn.2d at 843 (emphasis in original). It also preserves the defendant's presumption of innocence, and "is a basic component of a fair trial under our system of criminal justice" Finch, 137 Wn.2d at 844 (quoting Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)).

"Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial." Finch, 137 Wn.2d at 845. And there is a "substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled." Finch, 137 Wn.2d at 844. While a trial court has the discretion to determine the extent of necessary security measures in the court room. "[t]hat discretion must be founded upon a factual basis set forth in the record." State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). Moreover, the "activities of other persons, either unrelated or not imputable to an accused, may not be used as a basis for shackling a criminal defendant." Hartzog, 96 Wn.2d at 400, citing, Willcocks v. State, 546 S.W.2d 819, 821 (Tenn. Crim. App, 1976).

In Dukes' case, the court added an additional security guard to the court room based on Mr. Garrett's behavior. The addition of security undermined Mr. Duke's presumption of innocence, and the record did not establish that such an addition was necessary. This was error because it created an unacceptable threat to the fair outcome of the trial. State v. Lord, 161 Wn.2d 276, 285-86, 165 P.3d 1251 (2007); Hartzog, 96 Wn.2d at 400.

2. MR. DUKES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL

COUNSEL'S REPEATED FAILURES TO OBJECT TO PREJUDICIAL TESTIMONY, AND BY FAILURE TO OBJECT TO A PREJUDICIAL SHOW-UP IDENTIFICATION AND WHICH ULTIMATELY DEPRIVED MR DUKES OF HIS RIGHT TO A FAIR TRIAL.

- a. The trial court erred by denying defense motion to suppress the prejudicial show-up identification.

The Appellate Courts review the trial court's findings of fact on a motion to suppress to determine whether they are supported by substantial evidence, and if so, whether the findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). The trial court did not enter written findings and conclusions and defense counsel did not object to the prejudicial show-up identification.

To establish a due process violation, a defendant must first show that an identification procedure is suggestive. If this threshold is met, the court must determine whether, under the totality of the circumstances, the suggestiveness created a substantial likelihood of misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Linares, 98 Wn. App. 397, 40-03, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)) (rejects Division Two's

analysis in State v. Shea, 85 Wn. App. 56, 930 P.2d 1232 (1997), that merged the two-part test for determining the impermissibility of the identification procedure). Courts consider the following in making this determination: (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. Brathwaite, 432 U.S. at 114; State v. Linares, 98 Wn. App. 397, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1029, 10 P.3d 406 (2000)..

Generally, "courts have found lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." State v. Ramirez, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). In the instant case, Mr. Dukes was the only possible choice. The identification in the instant case was therefore suggestive under Ramirez, 109 Wn. App. at 761.

The next question is whether the suggestiveness created a substantial likelihood of misidentification. For the following reasons, the answer is yes. First, the witnesses' opportunity to view the assailant was obscured by the late night hour. Ms. Williamson was certain that the assailant had a large

diamond earring but the evidence demonstrated that Mr. Dukes did not have any ear piercings.

Neither Ms. Williamson nor Mr. Williamson could identify Mr. Dukes based on his appearance and Ms. Williamson only recognized Mr. Duke's voice while hiding behind her husband. Mr. Williamson could not identify Mr. Dukes but stated that "everything matched".

The second factor undermining the reliability of the show-up is the brevity of the encounter and the witnesses agitated condition. Ms. Williamson was scared and Mr. Williamson was angry that the assailant yelled profanities at his wife during their momentary viewing of an assault which occurred during the dark of night. Moreover, Ms. Williamson hid behind her husband during the show-up.

The third factor undermining the reliability of the show-up is the lack of accuracy of the witnesses' prior description of the assailant. In the instant case, Ms. Williamson was certain that the assailant had a large diamond earring but the evidence demonstrated that he had did not have pierced ears. Ms. Williamson also was not sure of the type of hair and thought that the assailant had changed his shirt because Ms. Williamson could not recognize the assailant or his clothing.

The fourth factor undermining the reliability of the show-up was the fact that the witnesses were only certain of their identification of the suspects due to their proximity to the police.

By contrast in State v. Brown, 128 Wn. App. 307, 313, 1049 (2005), review denied, 160 Wn.2d 1001, 158 P.3d 614 (2007), the witness was able to positively and accurately describe the height and weight of the suspect and describe with accuracy the color and length of his hair. In Mr. Dukes' case, due to the discrepancies in the description of the assailant, the minimal opportunity to observe the suspects and the poor lighting conditions, the testimony in the instant case was insufficient to overcome the irreparable probability of misidentification. Brown. 128 Wn. App. at 312.

The defense did not object to the identification procedure. Nor did counsel move to suppress the identification. Because these errors infringed Mr. Duke's constitutional right to a fair trial they may be raised for the first time on appeal. RAP 2.5. The remedy is remand for a new trial where the evidence may have impacted the verdict. Fahy v. Connecticut, 375 U.S. 85, 87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

b. Cumulative Errors

Where multiple errors occur during trial which deny the defendant his right to a fair trial, due process is violated and the defendant is entitled to a new trial. In re Personal restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). The cumulative error doctrine applies when there are multiple errors at trial, but none standing alone is sufficient to warrant reversal. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1013, 94 P.3d 960 (2004). State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

Under the cumulative error doctrine when multiple errors deny a defendant his right to a fair trial, he is entitled to a new trial. As argued hereunder, the errors at trial were so prevalent and prejudicial, that Mr. Dukes was denied his right to a fair trial. For these reasons, he is entitled to a new trial.

In sum, the errors were: (1) During trial, without cross examination from the defense, officer Hall testified that both Mr. and Mrs. Williamson identified Mr. Dukes at a show-up identification. RP 67-68 (January 15,

2008). This was not true; Mr. Williamson testified that he could not identify Mr. Dukes. RP 40-41(January 15, 2008).

(2) Again without objection from the defense on grounds that the testimony invaded the province of the jury, Officer Hall testified that he received a call and was told that Mr. Dukes was responsible for the crime. RP 67-68 (January 15, 2008).

(3) Without objection from defense, paramedic Travis Smith testified to hearsay that he wrote in his report that Mr. Wilson had experienced a history of similar incidents from her significant other, namely Mr. Dukes. RP 112-114. This violated ER 404(b) which prohibits the introduction of evidence of a person's propensity to commit a crime. The testimony improperly informed the jury that Mr. Dukes was a criminal and therefore more likely than not to be guilty again.

(4) Officer Catlett was permitted to testify without objection that he recognized Mr. Dukes in his car because he already had booking photos of Mr. Dukes. RP 10 (January 16, 2008). Again this violated ER 404(b) because it improperly informed the jury that Mr. Dukes was a criminal and therefore more likely than not to be guilty again.

(5) On cross examination defense again elicited this same

objectionable information and further permitted Officer Catlett to state that he pulled Mr. Duke's photo up from the police LESA records file. RP 30-31 (January 16, 2008)

(6) Over defense objection, the court allowed the state to improperly offer impeachment the testimony of Ms. Wilson through officer Parr. However, Ms. Wilson testified that she did not remember speaking to the police at the hospital or implicating Mr. Dukes. RP 43-49 (January 16, 2008). There was therefore no basis to permit impeachment testimony under ER 607.

(7) Over defense objection, the court allowed the state to improperly offer impeachment the testimony of Ms. Wilson through officer Parr regarding Ms. Wilson's alleged statement that Mr. Dukes had injured her before. RP 49 (January 16, 2008).

(8) Without objection from the defense, the prosecutor in closing argument told the jury that Mr. Dukes was observed beating Ms. Wilson. This was not supported by the evidence presented a trial. RP 107 (January 16, 2008).

Mr. Dukes was denied his right to a fair trial by the magnitude and volume of the cumulative errors at trial. As a result of these combined errors,

Mr. Dukes entire case was reduced to guilt by speculation and assumption. Had counsel objected or engaged in vigorous cross examination many of these errors would have been remedied. She did not however and the result was denial of due process.

c. Ineffective Assistance of Counsel

Washington applies the two-part); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) test in determining whether a defendant had effective assistance of counsel. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). To establish that counsel was ineffective, the defendant must first show that counsel's performance was deficient. Appellate courts generally presume the defendant was properly represented. Cienfuegos, 144 Wn.2d at 227. Second, the defendant must show that the deficient performance prejudiced the defense. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant, however, "need not show that counsel's deficient conduct more likely than not

altered the outcome in the case." Strickland, 466 U.S. at 693; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The appellate court looks to the facts of the individual case to see if the Strickland test has been met. Cienfuegos, 144 Wn.2d at 228-29.

As to the first *Strickland* prong, we will conclude that counsel's representation is ineffective if we can find no legitimate strategic or tactical reason for a particular trial decision. *Rainey*, 107 Wn. App. at 135-36; *McFarland*, 127 Wn.2d at 336. Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. *Rainey*, 107 Wn. App. at 136. [***6]

State v. Meckleson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

The reviewing Courts do not ordinarily consider evidentiary objections that were not presented to the trial court. RAP 2.5(a)(3); State v. Mendoza-Solorio, 108 Wn. App. 823, 834, 33 P.3d 411 (2001). However, the Courts make an exception, when as here, the appellant demonstrates manifest error that affects a constitutional right. RAP 2.5(a)(3); Mendoza-Solorio, 108 Wn. App. at 834. The right to effective counsel in criminal proceedings is a constitutional right. Strickland v. Washington, 466 U.S. at 687.

In Meckleson, 133 Wn. App. at 436-438 the Court of Appeals determined that trial counsel was ineffective for failing to move to argue that

a traffic stop was pretextual. Counsel did move to suppress but inexplicably failed to argue that the stop was pretextual. Under Strickland, the Court determined that counsel's performance was deficient and prejudicial. Meckleson, 133 Wn. App. at 436-438.

State v. Dawkins, 71 Wn. App. 902,; 863 P.2d 124 (1993), this Court upheld a trial court determination that trial counsel was ineffective for failing to object to prior similar criminal acts. Although the evidence was relevant it was not admissible and was unduly prejudicial. Dawkins, 71 Wn. App. at 11.

In State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006), the Court of appeals again reversed a conviction where defense counsel failed to move to suppress evidence that was improperly seized. Horton, 136 Wn. App. at Defense counsel failed to object to the prosecutor's erroneous description of the defendant as an accomplice to a crime he had nothing to do with. Horton, 136 Wn. App. at 34. The police searched Mr. Horton for drugs pursuant to a Terry stop but did not have reasonable articulable suspicion to support this search, did not arrest Mr. Horton and therefore could not legally search him without either an arrest or a search warrant. *Id.*. The evidence was therefore inadmissible and counsel's failure to move to suppress was deficient and prejudicial . *Id.*

Although in the instant case, the issue was not about search and seizure, the issue as in Meckleson, Dawkins and Horton was about trial counsel's failure to perform basic functions such as moving to suppress inadmissible evidence. In the instant case similar to in Meckelson , Dawkins and Horton, there was no legitimate or tactical reason to fail: (1) to move to suppress the field show-up; (2) to object to inadmissible testimony which undermined Mr. Dukes' presumption of innocence; (3) to fail to object to inaccurate testimony; (4) and to fail to object to the prosecutor' s mischaracterization of the evidence during closing argument..

These failures were of constitutional dimension because they denied Mr. Dukes' his fundamental right to a fair trial with the assistance of competent counsel. These failures cumulatively prejudiced Mr. Dukes right to a fair trial. For these reasons, reversal and remand for a new trial is required.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE IDENTITY OF THE ASSAILANT, AN ESSENTIAL ELEMENT OF ASSAULT IN THE SECOND DEGREE.

The standard of review for determining the sufficiency of the evidence is "whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); accord, State v Allen, 159 Wn.2d 1, 7, 147 P.3d 581 (2006); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

One of the essential elements of every crime is the identity of the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974) (citing, 1 H. Underhill, Criminal Evidence § 125 (5th Ed. P. Herrico 1956, Supp. 1970); 1 Wharton’s Criminal Evidence § 16 (13th ed. C. Torica 1972)). “[T]he identity of a defendant and his presence at the scene of the crime must be proven beyond a reasonable doubt” and are never presumed. State v. Johnson, 19 Wn. App. 200, 204, 574 P.2d 741 (1978); see also State v. Rich, 63 Wn. App. 743, 748, 821 P.2d 1269 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and accepts reasonable inferences that may be drawn therefrom. State v. O’Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). Circumstantial and direct evidence have equal weight. Varga, 151 Wn.2d 179, 201

In the instant case, Ms. Williamson was unable to recognize Mr. Dukes from looking at him. She did not see the huge diamond earring that she was certain that the assailant wore, she did not recognize his clothing, and she did not recognize his hair. Rather while hiding behind her husband, after listening to Mr. Dukes speak while he stood next to a police car surrounded by police officers, she was able to state that he was the assailant. Her husband, Mr. Williamson was not able to identify Mr. Dukes. This evidence of identity was minimal.

Minimal or “some” evidence is not however sufficient to sustain a conviction. The Supreme Court of the United States has emphasized that the standard for reviewing the sufficiency of the evidence requires that the conviction must be supported by more than some evidence. A conviction based on some evidence is “inadequate to protect against misapplication of the constitutional standard of reasonable doubt.” Jackson v. Virginia, 99 S. Ct. at 2789. In Duke’s case, the witnesses inability to visually identify Mr. Dukes does not satisfy this standard.

State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995) is illustrative of this principle. In Hundley, there was conflicting evidence regarding whether a substance contained cocaine. A state Toxicologist testified

to the jury that he performed two different tests on the substance and one revealed the presence of cocaine. A well-qualified defense expert performed the same tests on the same substance and his results did not detect the presence of any cocaine. The State advanced a theory in support of the conviction under a lesser standard that was rejected by the State Supreme Court.

While this could be true, “could” is not the relevant standard. Proof beyond a reasonable doubt is the standard, and this explanation of the possibility of inconsistent results using the same methods and procedures does not itself prove anything beyond a reasonable doubt.

Hundley, 126 Wn.2d at 421.

Similarly in Mr. Dukes’ case, the fact that he could have been the assailant does not itself prove that he was the assailant. Under the circumstances presented in Duke’s case, it is not possible for any rational trier of fact to find Mr. Dukes guilty beyond a reasonable doubt. His conviction should be vacated and the charges dismissed with prejudice.

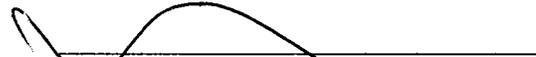
D. CONCLUSION

Mr. Dukes was denied his right to a fair trial when: (1) a spectator undermined Mr. Dukes presumption of innocence; (2) trial counsel failed to suppress an impermissibly suggestive photo montage; and (3) counsel failed

to object to inadmissible evidence. The remedy for these errors is reversal and remand for a new trial. The state also failed to prove the essential element of the crime charged; the remedy is reversal and dismissal with prejudice.

DATED this 20th day of June 2008.

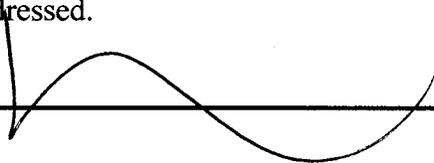
Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Aaron Duker DOC # 836418 Wash State Reform Unit P.O. Box #77 Monroe, WA 98272. Service was made on June 22, 2008 by depositing in the mails of the United States of America, properly stamped and addressed.

Signature



Signature

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DIVISION II