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DIVISION II

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NO. 37331-9-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**FRANCISCO AMEZCUA-PICAZO,**

**Appellant.**

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**BRIEF OF APPELLANT**

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement of conviction against him for two counts of first degree assault because substantial evidence does not support either charge.

2. The trial court's admission of propensity for violence evidence to prove that the defendant acted in conformity with that violent propensity violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

3. The trial court's admission of unduly suggestive photo montage identification evidence violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

4. Trial counsel's failure to object when the state called upon one of the complaining witnesses to speculate as to the identify of the person who shot him and when the state elicited inadmissible hearsay evidence of identification violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement of conviction on charges unsupported by substantial evidence?

2. Does a trial court's admission of propensity for violence evidence to prove that a defendant acted in conformity with that violent propensity violate the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when no exception under ER 404(b) supports the admission of the evidence?

3. Does a trial court's admission of unduly suggestive photo montage identification evidence violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when the jury would have acquitted but for the admission of that evidence?

4. Does a trial counsel's failure to object when the state calls upon a complaining witness to speculate as to the identify of the person who shot him, and when the state elicits inadmissible hearsay evidence of identification violate a defendant's right to effective assistance of counsel when that failure falls below the standard of a reasonably prudent attorney and causes prejudice?

## STATEMENT OF THE CASE

### *Factual History*

On the evening of August 14, 2007, 20-year-old Joseph Haviland drove from his home in Toledo to his friend Aaron Malone's house in Centralia. RP II 15-16.<sup>1</sup> The two have known each other for a number of years, and neither are members of any type of a street gang, although Aaron does occasionally associate with friends that he believes to be members of the True Blood Crips (TBCs) or the Little Valley Loquitos (LGN). RP II 14-15, 153-154. The members of the latter gang are almost exclusively Hispanic. RP II 131-132. The defendant, Francisco Amezcua-Picazo is a member of that gang. RP II 156-157; RP III 76-79, 107. His nickname is "Cyclone." *Id.* Although Aaron Malone has never been formally introduced to the defendant, he has seen him on a number of occasions and they have mutual acquaintances. RP II 156-157. Joseph Haviland had never met nor seen the defendant. RP II 160.

Once Mr. Haviland drove to Centralia on the evening of August 14th, he asked Mr. Malone if he could get them some marijuana. RP II 15-16, 159-160. In response, Mr. Malone had Mr. Haviland drive them to the "slum"

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<sup>1</sup>The record herein includes four volumes of verbatim trial reports, numbered and referred to herein as I, II, III, and IV with the specific page number following the roman numeral volume designation.

part of town, where Mr. Malone thought he might be able to get some drugs. RP II 159-161. After driving around for a while, Mr. Malone saw an old friend by the name of Robert Huey and had Mr. Haviland stop and pick him up. *Id.* Mr. Huey agreed to help them purchase some marijuana and he made a number of telephone calls on his cell phone to that end. RP III 15-16. After the telephone calls, he told Mr. Haviland to drive them to a store parking lot to meet with someone who would sell them some marijuana. RP II 163-165. However, this person never arrived, and after a few more telephone calls, Mr. Huey told Mr. Haviland to drive to the corner of Kearny Street and Central Avenue. RP III 17. Once at that location, Mr. Huey got out of the car with two hundred dollars Mr. Haviland had given him. RP III 15-16. As he did, he told Mr. Haviland and Mr. Malone to circle around the block for a few minutes and then come back to this location to pick him up. RP III 20.

In fact, Mr. Huey thought that he would be able to purchase marijuana from his friend Brandon McDaniel, who lived a little way down the block with his parents, his sister Miranda, and Miranda's young child. RP III 17-18. Neither Brandon nor Miranda were gang members. RP II 164-165. The defendant did not live at this address, but he did visit quite often. RP III 13.

In fact, once Mr. Malone saw that they had dropped Mr. Huey off close to Brandon McDaniel's house, Mr. Malone became somewhat apprehensive because of an incident that had occurred a number of months previous. RP

II 173.

In that incident, Mr. Malone had been a backseat passenger in a car driven by a friend of his named Corey, who was member of the TBCs. RP II 166-170. A number of other people were in the car. *Id.* The group of them were just cruising around town when Corey stopped and got out. *Id.* At that point, Mr. Malone first noticed that Corey had stopped at Brandon McDaniel's house. *Id.* When Corey got out, he ran up to Miranda's car and started smashing out the windows. *Id.* Corey then ran back to the car and drove off as a number of people came out of the house. RP II 170. When Mr. Malone saw what was happening, he put his face down so no one coming out of the house could see who he was. *Id.* The whole incident was over in a couple of minutes, and Mr. Malone didn't know if anyone at Brandon's house saw that he had been in the back seat of the car. RP II 169-170. In any event, on the night of August 14th, Mr. Malone and Mr. Haviland continued to drive around the block by Brandon McDaniel's house while Mr. Huey tried to buy marijuana. RP III 17-18.

In fact, after Mr. Huey got out of Mr. Haviland's car, he walked up to Mr. McDaniel's house, and starting talking to Mr. McDaniel, who was in the front yard with a number of other people. RP III 23. There were also people inside the house. *Id.* As Mr. Huey spoke with Brandon about buying some marijuana, he saw Mr. Haviland and Mr. Malone drive by in front of the

house and then stop at the end of the block to let a person cross the street. RP III 26-27. This person was wearing a sweatshirt with the hood up and Mr. Malone could not tell who he was.<sup>2</sup> *Id.* As Mr. Huey turned back to talk to Mr. McDaniel, he heard a number of gunshots at the end of the block, and looked up to see Mr. Haviland driving away from the intersection at a high rate of speed. *Id.* Upon seeing this, Mr. Huey ran towards the end of the block and saw the person in the hooded sweatshirt run away. RP III 30. He could not see who the shooter was, although he thought it might have been the defendant because he was aware of the incident in which Corey had broken out the windows of Miranda's car. RP III 26-31.

At trial, Mr. Huey's testimony concerning his identification of the shooter went as follows on direct and cross:

Q. Was the hoody up or down?

A. The hoody was up. I couldn't tell who it was, but I could have been mistaken. If you didn't know him, I wouldn't guess who it was if I wouldn't have known the person, but I figured it was who it was.

Q. Are you afraid to say it? Can you just say it?

A. Yeah, it is Cyclone.

MR. MITCHELL: Thank you, your Honor, nothing further.

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<sup>2</sup>The witnesses refer to a sweatshirt with a hood has a "hoody."

THE COURT: Mr. Blair.

MR. BLAIR: Thank you, your Honor.

CROSS EXAMINATION

BY MR. BLAIR:

Q. Did you see my client that night?

A. Did I see him?

Q. Did you see my client the night of the 14<sup>th</sup>?

A. The night of the 14<sup>th</sup>, no.

Q. The night the shooting occurred, did you see my client?

A. No.

RP III 30-31.

Mr. Haviland and Mr. Malone were also unable to identify the shooter. RP II 20-23, 173-175. According to their version of the event, as Mr. Haviland pulled his car up to the intersection, he stopped to allow a male of medium build in a hooded sweatshirt walk to cross the street in front of his car. *Id.* As he did, the person walked up to the car with his face down and, in a hostile voice, asked Mr. Malone two or three times what his name was. *Id.* The person was so close to the car that Mr. Haviland could only see him from the nose down, and his impression was that the person spoke with a slight Hispanic accent. *Id.* While Mr. Haviland could not see the person's hands, Mr. Malone could see that the person was holding a gun. Upon seeing

this, Mr. Malone yelled “Oh shit! Go, Go, Go.” RP II 23.

In response to Mr. Malone’s statement, Mr. Haviland pushed the accelerator to the floor and drove away. RP II 30-31. As he did, the person in the sweatshirt raised the gun and fired a number of times at them. RP II 24-26, 174-175. One bullet hit the rear license plate and went into the gas tank and a second bullet ricocheted off of the trunk. RP I 120-122. A third bullet went through the rear window and a fourth went through the driver’s side seat and into Mr. Malone’s back. RP I 120-122; RP II 24-26, 174-176. Both Mr. Malone and Mr. Haviland remember five or six shots, and the police later recovered five spent .25 caliber cartridges from the scene. RP I 107-108; RP II 24-26, 174-175.

After fleeing the scene of the shooting, Mr. Malone told Mr. Haviland that he had been shot in the back. RP II 24-26. They then drove to a gas station, where they called Mr. Huey and made arrangements to get him. RP II 27-29. While at the station, Mr. Haviland tried to talk Mr. Malone into going the hospital but Mr. Malone refused. *Id.* After Mr. Haviland went into the station to get something for them to drink, he drove them to a second station, where they met Mr. Huey. RP II 53-54. Once they met with Mr. Huey, he returned Mr. Haviland’s money and told Mr. Malone that it was “Cyclone” who had shot him. RP II 178 Mr. Haviland then drove Mr. Malone to the police station and reported what had happened. RP II 27-29.

The police then summoned an ambulance to take Mr. Malone to the hospital. *Id.* While at the police station, and on a number of occasions, Mr. Malone told the police that it was “Cyclone” who had shot him. RP II 180. He did so because of what Mr. Huey told him, even though he could not identify the shooter himself. RP II 194, 198; RP III 81.

A few days later, the police went to Mr. Haviland’s house in Toledo to show him a photo montage that included the defendant’s picture. RP II 38-39. Upon reviewing the montage, Mr. Haviland told the police that he could not identify any of the people in it as the shooter, although he did point to one photograph and tell that the person in the photograph had the same build as the shooter. *Id.* The photograph Mr. Haviland identified was not the defendant. RP II 78-81. A number of days later, the police had Mr. Haviland and his mother come to the police station. RP II 40-42. At that time, they showed Mr. Haviland the same montage. RP III 92. According to the police, Mr. Haviland reluctantly identified the defendant as the shooter. RP II 91-95. According to Mr. Haviland, what he did was point at the picture of the defendant and state that the person in the picture was the same build as the shooter. RP III 92. Mr. Haviland’s testimony concerning his identification went as follows on direct when called as a witness for the defense:

Q. Well, did you pick different people each time?

A. I’m pretty sure I did, but they were basically the same body

build. I told each police officer I didn't see his face, all I seen was his – I saw about this much down from his face so I couldn't see his face.

Q. So why would you tell any police officer, or did you tell any police officer that's the guy, or was it always that's the build?

A. I told the police officer that that was his basic body build.

RP III 92.

Mr. Haviland reiterated this testimony on redirect when he made the following statements.

A. I said I thought that that was the guy, out of all the people on that lineup that looked closest to him.

Q. Based on what?

A. Based on what I did see.

Q. The body, the build of the person?

A. Yes.

Q. Was that the guy that did the shooting?

A. That's the closest to the guy that did the shooting that I seen. As I said, I didn't see his full face.

RP III 95-96.

#### ***Procedural History***

By information filed August 20, 2007, the Lewis County Prosecutor charged the defendant Francisco Amezcua-Picazo with two counts of first degree assault while armed with a firearm. CP 1-2. Although neither count

gave the name of the person assaulted, the “to convict” instructions the court used identified Aaron Malone as the person allegedly assaulted in Count I and Joseph Haviland as the person allegedly assaulted in Count II. CP 1-2, 53-54. The case eventually came on for trial before a jury, with the state calling 13 witnesses and the defense calling two. RP I 78, 104, 119; RP II 12, 59, 75, 83, 103, 125, 150; RP III 8, 37, 69, 91, 99.

Prior to the second day of trial, the defense moved to exclude any evidence concerning Joseph Haviland’s identification of the defendant from the photo montage the police prepared and showed to him. RP II 1-12. This photo montage and a copy were marked by the trial clerk as exhibits 54 and 55. *See* Exhibits 54 and 55. One was free of any marks, and the other had Joseph Haviland’s signature close to the defendant’s photograph. RP II 1-12. In support of this motion, the defense argued that the montage was overly suggestive, in that (1) only two persons shown in the montage were of the physical build that Joseph Haviland had identified (one of them being the defendant), and (2) the repeated use of this montage after Joseph Haviland had on the first date tentatively identified another person and failed to identify the defendant was itself an overly suggestive procedure. *Id.* The court denied the motion. *Id.*

One of the witnesses the state called in this case was Patrick Fitzgerald, a Centralia Police Officer whom the state qualified as an expert

on street gangs. RP II 125-126. Officer Fitzgerald told the jury that a gang “is a group of individuals who basically get together to commit crimes or commit acts that [are] in furtherance of the gang.” RP II 127. He also explained the following to the jury about how one becomes a gang member:

Q. What does that mean, how does one become a full-fledged gang member?

A. Well, first thing you have to do is just like in organized crime or in motorcycle gangs it is very much the same, you have to put in work.

Q. Put in –

A. Put in work, meaning going out and doing business for the gang, be that dope dealing, boosting car stereos, stealing cars, stealing purses, doing shoplifting, doing identity theft is the new big one. Most of the criminal street gangs in this area, or the two that have been prevalent for the most part, primarily crimes of opportunity and narcotics dealing.

Q. How about acts of violence?

A. Acts of violence are a way to work your way in, that’s actually putting in work. It is not uncommon at all for a younger associate or want-to-be gang member to be tasked with committing an act of violence in order to take a step in or take a step closer. Sometimes that’s the end of his probationary period, just depends on who is running – who’s calling the shots in that particular set.

RP II 135-136.

Officer Fitzgerald went on to explain to the jury that there are two gangs in Lewis County: the TBCs and the LVLs. 142-146. According to Officer Fitzgerald the former are really “crip wanna-bes” while the latter is

a real gang with 20 “hard core” members in Lewis County, all of whom are exclusively Hispanic.” *Id.* At no point during this testimony did the defense object that this evidence was irrelevant, that it constituted inadmissible propensity evidence, that it was more prejudicial than probative, or any other objection. RP 125-150. In fact, the defense did not ask this witness one question in cross-examination. RP 150.

In addition, during the state’s direct examination of Aaron Malone, the state called upon Mr. Malone to speculate that it was the defendant that had shot him. RP II 175. The defense made no objection to this testimony, which went as follows:

Q. So you didn’t know for sure if it was Cyclone at that point when you were shot?

A. No.

Q. Did you think it was anybody other than Cyclone?

A. I didn’t really think of anybody in particular. I thought, yes, there was a very good possibility because it was his girlfriend’s car this whole thing had revolved around. He would be the only one to be upset about the situation.

RP II 174-175.

Following the reception of evidence in this case, the court instructed the jury with the defense taking exception to the court’s refusal to give a missing witness instruction after the state failed to call a police officer who had been present when the defendant was arrested. RP IV 1-6. Both parties

then presented closing argument, with the state repeatedly referring to the defendant's status as a gang member as evidence of guilt. RP 7-27. These arguments included the following:

In the context of the gang culture it is all about retaliation. It is about making a name for yourself. If the top level gets cut off, new ones step up and want to take their places.

RP III 14.

Following argument, the jury retired for deliberation and eventually returned verdicts of guilty on both counts. CP 66, 68. The jury also returned special verdicts finding that the defendant was armed with a firearm during the commission of each offense. CP 67, 69. The court later sentenced the defendant to 180 months on each count, which constituted a sentence of 120 months on a range of 93 to 123 months on an offender score of zero points under RCW 9.94A.589(1)(b) with 60 months added to each count for the firearm enhancement. CP 73, 76. Under the same statutory provision, the court ordered the sentences to run consecutively for a total sentence of 360 months. *Id.* The defendant thereafter filed timely notice of appeal. CP 84.

## ARGUMENT

### I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT OF CONVICTION AGAINST HIM FOR TWO COUNTS OF FIRST DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT EITHER CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with

guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test 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, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the defendant argues that the evidence presented at trial fails to prove (1) that the defendant was the person who committed the offenses, and (2) that the defendant had an intent to assault Joseph Haviland. The following presents these two arguments.

***(1) Substantial Evidence Does Not Support the Conclusion That the Defendant Committed the Crimes.***

Identification of a defendant as the perpetrator of an offense, as with

almost any other fact at issue in a criminal or civil trial, may be proven by either direct or circumstantial evidence. *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Neither type of evidence is necessarily better than the other, and in many instances circumstantial evidence such as a fingerprint for example, can be much more reliable than direct evidence such as the eyewitness identification, depending on the many factors that can affect the reliability of eyewitness identification. *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). What is important to the defendant's argument in this case is that the record is devoid of any substantial circumstantial evidence that the defendant was the person who committed the offense.

In fact, the only circumstantial evidence supporting a conclusion that the defendant committed the shooting here at issue was the fact that the defendant might have somehow found out that a number of months previous Aaron Malone was hiding in the back seat of a vehicle out of which another person had exited in order to vandalize the defendant's girlfriend's car. This is far from substantial evidence that the defendant was the person who shot Aaron Malone in this case even when considered in the light most favorable to the state. Rather, in the case at bar, the state's claims that the defendant was the person who committed the crime either succeeds or fails upon the direct eyewitness testimony of three people: Joseph Haviland, Aaron

Malone, and Robert Huey. They were the only three witnesses to the shooting and their's was the only evidence that implicated the defendant as the perpetrator of the crime. However, as the following explains, their various identifications of the defendant both before and during the trial does not constitute substantial evidence.

At trial, Mr. Huey was unable to identify the defendant as the person who did the shooting. His testimony on this point went as follows on direct and cross:

Q. Was the hoody up or down?

A. The hoody was up. I couldn't tell who it was, but I could have been mistaken. If you didn't know him, I wouldn't guess who it was if I wouldn't have known the person, but I figured it was who it was.

Q. Are you afraid to say it? Can you just say it?

A. Yeah, it is Cyclone.

MR. MITCHELL: Thank you, your Honor, nothing further.

THE COURT: Mr. Blair.

MR. BLAIR: Thank you, your Honor.

#### CROSS EXAMINATION

BY MR. BLAIR:

Q. Did you see my client that night?

A. Did I see him?

Q. Did you see my client the night of the 14<sup>th</sup>?

A. The night of the 14<sup>th</sup>, no.

Q. The night the shooting occurred, did you see my client?

A. No.

RP 3 30-31.

Although somewhat confusing, Mr. Huey clarified on cross-examination that he was not identifying the defendant as the person who committed the shooting. In addition, as this evidence reveals, the state did not even ask Mr. Huey to look at the defendant in the courtroom and identify him as the shooter because he could not make this identification. Neither did the state ask Mr. Haviland or Mr. Malone to identify the defendant in the courtroom as the shooter. Their testimony also reveals that they did not get a good enough look at the person to identify who he was. RP II 20-23, 173-175, 194, 198. Thus, the state had no witness at trial who could point to the defendant in the courtroom and identify him as the shooter.

The fact that the three witnesses were not going to be able to make an in court identification was not lost upon the state prior to trial. In an attempt to overcome this critical deficit in its case, the state introduced the following out-of-court identifications of the defendant as the shooter: (1) the testimony of police officers who claimed that Joseph Haviland had identified the defendant out of a photo montage as the shooter, along with the testimony of

Joseph Haviland concerning his examinations of the photo montage, (2) the testimony of police officers that Aaron Malone stated that the defendant was the shooter, along with Aaron Malone's testimony that he had made the identification to the police, and (3) the testimony of Aaron Malone that Robert Huey had told him that the defendant was the shooter. The state argued, and the court ruled, that this evidence was admissible substantively under ER 801(d)(1)(iii). This rule states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if-

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1)(iii).

This rule allows a witness to testify to the substance of an "out-of-court" "identification of a person" that he or she or a third party made, provided that the person making the statement "of identification of a person" did so "after perceiving the person" identified. Thus, in the case at bar, a police officer or Mr. Haviland would be allowed to testify that Mr. Haviland identified the defendant out of a photo montage as the shooter if the state presented evidence that Mr. Haviland made the statements of identification after "perceiving" the defendant. Similarly, a police officer or Mr. Malone would be allowed to testify that Mr. Malone identified the defendant as the

shooter if the state presented evidence that Mr. Malone made the statements of identification after “perceiving” the defendant. Finally, Mr. Malone would be allowed to testify that Mr. Huey identified the defendant as the shooter if Mr. Huey made the statement of identification after “perceiving” the defendant.

The phrase “after perceiving the person” as it is used in ER 801(d)(1)(iii) does not carry a specific definition. However, Professor Tegland provides the following statement that bears upon this question:

A question has occasionally arisen about whether a prior identification is admissible when the identifier claims at trial to have forgotten the prior identification, or refuses to answer questions about it. Arguably, the identification is inadmissible because the identifier is not “subject to cross-examination concerning the statement,” as required by Rule 801(d)(1). The courts, however, have made it clear that the prior identification remains admissible, assuming the other requirements of the rule are satisfied.

Admissibility is subject to Rule 602, requiring that the statement by the declarant be based upon personal knowledge.

5b Karl B. Tegland, *Washington Practice: Evidence* § 343, at 61 (3rd Ed. 1989).

Under ER 602, no witness is competent to testify to matters outside the personal knowledge of the witness. The rule states:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This rule is subject to the provisions of rule 703, relating to opinion

testimony by expert witnesses.

ER 602.

For example, in *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984), a defendant convicted of robbery appealed his conviction, arguing that the trial court erred when it allowed the robbery victims to make an in-court identification of the defendant as the robber because the circumstances of their out-of-court identification made the in court identification unreliable. After addressing this argument, the court went on to point out that out-of-court identifications were subject to the requirement under ER 602 that the person making the identification had personal knowledge of the matter. The court held:

Under ER 602, a witness must testify concerning facts within his personal knowledge, that is, facts he has personally observed. 5 Teglund, Washington Practice § 218 (2d ed. 1982). The burden of laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies is upon the proponent of the testimony. However, the rule requires only that evidence "sufficient to support a finding" of personal knowledge be introduced. Thus, testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge. 5 Teglund, Washington Practice § 219 (2d ed. 1982).

*State v. Vaughn*, 101 Wn.2d at 611-612.

After reviewing this rule, the court then applied it to the facts of the case before it and found that the state had met this foundational requirement for the admission of the out-of-court statements of identification. The court

held:

In this case, witnesses Myers and Finn testified as to the identity of a youth who had beaten and robbed them. Each attack occurred during the daytime. Each victim described the attack against him in detail. Myers testified that he had five minutes during the robbery to observe the robber whom he later identified as Vaughn. Finn testified that he had a minute or two to observe the robber whom he later identified as Vaughn, with perhaps 30 seconds to concentrate upon the robber's identity. Under these circumstances, we cannot say that, as a matter of law, no trier of fact could reasonably find that Myers and Finn had personal knowledge of the robber's identity. Accordingly, we hold that the trial court did not err in admitting Myers' and Finn's in-court identifications of Vaughn.

*State v. Vaughn*, 101 Wn.2d at 612.

Under the decision in *Vaughn*, the issue arises in the case at bar whether the state met the foundational requirement under ER 602 and showed that Mr. Haviland, Mr. Malone, and Mr. Huey's out-of-court statements identifying the defendant as the shooter were made from personal knowledge. A review of the evidence presented at trial reveals that the state did not meet this requirement. In his testimony at trial, Mr. Haviland was very careful to explain that he only got a very limited view of the shooter during the incident, which occurred very quickly. In addition, his view of the shooter was from the nose down. During his testimony, he was careful to point out, as he did to the police during their repeated attempts to get him to identify the defendant out of the photo montage, that the persons shown in positions two and five in the montage generally matched the physique of the shooter, but

he could not say that either was the shooter. Unlike *Vaughn*, where the witnesses had five minutes in which to perceive the robber and then made a positive out-of-court identification, Mr. Haviland had a very short, constricted view of the shooter and denied the ability to identify him when shown the montages. Thus, under ER 602, Mr. Haviland's out-of-court identifications were not admissible under ER 801(d)(1)(iii) because he did not have sufficient personal knowledge upon which to make the identification.

Mr. Malone's out-of-court identifications of the defendant as the shooter suffered from the same infirmity as did Mr. Haviland's. In his testimony at trial, Mr. Malone also explained that he also did not get a good look at the shooter. In fact, he relates that he also did not get a good look at the shooter's face, that when he saw the gun as the person walked closer to the vehicle he immediately turned to Joseph Haviland and yelled at him to "punch it." He also admitted during trial that he had repeatedly stated that it was the defendant who did the shooting, but not because he had been able to identify the shooter himself. Rather, he clarified that he identified the defendant as the shooter because Robert Huey had told him that the defendant was the shooter. RP II 198. Thus, when the trial court allowed the state to elicit evidence that Aaron Malone had made numerous out-of-court identifications of the defendant as the shooter, the court violated ER 602

because Aaron Malone did not make his identifications from personal knowledge. Rather, he was simply adopting the claims he had heard Robert Huey make.

Finally, in his testimony at trial, Mr. Huey also stated that he could not identify the defendant as the shooter. On direct, he specifically testified: “No, I didn’t know who it was.” RP III 29. Rather, he simply believed it to be the defendant: “. . . but I figured it was who it was.” RP III 30. This testimony reveals, as with Mr. Haviland and Mr. Malone, this witness did not get a sufficient view of the shooter to identify who it was. Rather, he simply assumed it was the defendant. Thus, he also did not have personal knowledge of the identity of the shooter, and the court also violated ER 602 when it allowed the state to present evidence under ER 801(d)(1)(iii) that Mr. Huey had stated that the defendant was the shooter.

As was already explained in this argument, none of the witnesses at trial identified the defendant as the person who perpetrated the offense in this case. In addition, since none of these witnesses had personal knowledge as to who the shooter was, their out-of-court identifications were not properly admissible under ER 801(d)(iii) because they did not have personal knowledge of the identity of the shooter as is required under ER 602. Thus, in this case, the state failed to present any competent, properly admissible evidence that the defendant was the person who committed the crime. As a

result, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction against him.

***(2) Substantial Evidence Does Not Support the Conclusion That the Defendant Assaulted Joseph Haviland.***

In the case at bar, the state charged the defendant with one count of first degree assault against Aaron Malone under RCW 9A.36.011(1)(a) or (c) and one count of first degree assault against Joseph Haviland under RCW 9A.36.011(1)(a). This statute states:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) . . .

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011(1).

Under this statute, the state had the burden of proving that in Counts I and II the defendant had the "intent to inflict great bodily harm" to both Aaron Malone and to Joseph Haviland as well. The defendant concedes that the state did have substantial evidence that the shooter had this requisite intent toward Aaron Malone. However, the defendant argues that the state failed to present substantial evidence that the defendant harbored any *mens*

*rea* at all toward Joseph Haviland. The following presents this argument.

In the case at bar, the state's theory of the case was that (1) a few months prior to the shooting, the defendant had been in a vehicle owned and driven by a person who was member of a street gang that was a rival to the defendant's street gang, (2) that the owner of the car had stopped at the defendant's girlfriend's house in order to vandalize her car, (3) that the defendant was in the back seat of the car driven to the defendant's girlfriend's house, (4) that the defendant either saw or determined that the defendant was in the car that had stopped to vandalize his girlfriend's vehicle, and (5) that the defendant thus had motive to harm the defendant and did so when he was given the opportunity. Although the issue of identity was very much at issue at trial, a number of salient points were not. These points included the following: (1) that the shooter spoke with a Hispanic accent, (2) that he walked up to Aaron Malone in an aggressive manner and repeatedly asked who he was and (3) that when Aaron Malone yelled at Joseph Haviland to "gun it" the person outside the car raised the gun and shot five times, hitting Aaron Malone once.

Under this theory of the case, the defendant, if the shooter, fired his gun five times at Aaron Malone because he had motive to harm him. Thus, there is substantial evidence to prove an "intent to inflict great bodily harm" on Aaron Malone. However, there is no evidence whatsoever to support an

inference that the defendant, if he was the shooter, had any intent to inflict any type of injury on Joseph Haviland. As the testimony the state presented at trial reveals, the defendant and Joseph Haviland had never met. There was no animosity between the two. Indeed, Joseph Haviland was not a gang member nor was he associated with gang members. He had caused no injury to either the defendant or anyone associated with the defendant. Thus, there is no evidence that the defendant, if he was the shooter, had any evil intent toward Mr. Haviland.

It is true that under the first degree assault statute, the intent to inflict serious bodily injury need not attach to the person who suffers injury from the defendant's acts. For example, in *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994), the defendant fired a number of shots from a handgun at a bartender and a patron who had kicked him out of a bar. Instead of hitting them, he hit two other bar patrons he did not intend to injure. Following his conviction for four counts of first degree assault, he appealed, arguing that the state had failed to present substantial evidence that he had the intent to inflict serious bodily injury on the unintended victims. However, the court rejected this argument, holding that the intent to inflict serious bodily injury (proven against the bartender and the first patron), did not have to match to the two patrons who were actually injured. However, this decision has no application to facts in the case at bar because Joseph Haviland was not

injured. Thus, the trial court erred when it entered judgment of conviction for first degree assault against Joseph Haviland because the state failed to prove any of the elements of that offense.

**II. THE TRIAL COURT'S ADMISSION OF PROPENSITY FOR VIOLENCE EVIDENCE TO PROVE THAT THE DEFENDANT ACTED IN CONFORMITY WITH THAT VIOLENT PROPENSITY VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

It is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of a mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court’s permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state’s request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: “It’s true that you have had cocaine in your possession in the past, isn’t it?” The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal,

he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence

that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, Federal Evidence § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

In the case at bar, the court allowed the state to elicit the following evidence over defense objection: (1) that there is Hispanic street gang in Lewis County called the LVLs, (2) that this gang is a criminal organization whose members support themselves by committing both property crimes and violent crimes, (3) that in order to become a member of this gang, a person had to commit property crimes and violent crimes, and had to help other gang members commit property crimes and violent crimes, and (4) that the defendant was a member of the LVLs. The logical conclusion from this evidence was that the defendant was a member of a criminal organization and that he continuously committed property crimes and violent crimes in conjunction with other gang members. In fact, the conclusion to be drawn from this evidence was that the defendant not only had the propensity to

commit violent crimes, but that he did commit such crimes on a routine basis.

The unfairly prejudicial effect of this evidence grossly outweighed any slight relevance that it possessed. The state's theory of the case was that the defendant had a motive to shoot Aaron Malone because the defendant either saw or was told that Aaron had participated in the vandalism of the defendant's girlfriend's vehicle. Evidence of motive such as this is commonly and properly introduced at trials such as the one before this court and no unfair prejudice arises from it. However, in the case at bar, the trial court allowed the state to use this evidence of motive as a guise to introduce the litany of propensity evidence that invited the jury to believe that the defendant was guilty simply because he was a gang member and the conduct charged against him was precisely the typical conduct of a gang member. Thus, the admission of this evidence was error under ER 404(b) and also violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

As was set out at length in Argument I of this brief, the evidence of identification in this case was exceptionally weak. The defendant argues that it does not even rise to the level of substantial evidence sufficient to constitutionally support a conviction. However, even if this court disagrees, the discussion from Argument I does illustrate how weak the state's case was on the element of identification. With such facts as these, the error in

allowing the unfairly prejudicial gang evidence cannot be seen as harmless. The defendant argues that this was the very improper evidence that convinced a jury to convict that would have otherwise acquitted the defendant. Thus, the error in admitting the improper gang evidence compels the grant of a new trial to the defendant.

**III. THE TRIAL COURT'S ADMISSION OF UNDULY SUGGESTIVE PHOTO MONTAGE IDENTIFICATION EVIDENCE VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

Under ER 801(d)(1)(iii), statements are not hearsay if the declarant testifies at trial, the declarant is subject to cross examination concerning the statement, and the statement is one of "identification of a person made after perceiving the person." The rule includes a witness's statement of identification made from a photo montage or physical showup, assuming the other requirements of the rule are met. *State v. Jenkins*, 53 Wn.App. 228, 766 P.2d 499 (1989). However, where the photo montage or physical showup is impermissibly suggestive, admission of the identification evidence violates the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. Shea*, 85 Wn.App 56, 930 P.2d 1232 (1997); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

In *State v. Shea, supra*, this court said the following concerning the

standard by which the court determines whether or not a montage or “showup” is impermissibly suggestive. In this case, the court stated:

Washington law on suggestive identification procedures evolved primarily from three U.S. Supreme Court cases: *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); and *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The defendant must show (1) that the procedure was unnecessarily suggestive; and, if so, (2) whether considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification. In the second step, the trial court considers the following factors: (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. *State v. Maupin*, 63 Wash.App. 887, 897, 822 P.2d 355 (1992), review denied, 119 Wash.2d 1003, 832 P.2d 487 (1992); *Manson*, 432 U.S. at 115-16, 97 S.Ct. at 2253-54; *Gould*, 58 Wash.App. at 185, 791 P.2d 569 (citing *Guzman-Cuellar*, 47 Wash.App. at 335, 734 P.2d 966).

*State v. Shea*, 85 Wn.App. at 59.

For example, in *State v. Burrell*, 28 Wn.App. 606, 625 P.2d 726 (1981), the court held that a photo montage was unduly suggestive when the witnesses identified the suspect as having “frizzy Afro” style hair, and the only person in the montage with such hair was the defendant. Similarly, in *State v. Trawee*, 43 Wn.App. 99, 715 P.2d 1148 (1986), the court held that a photo montage was unduly suggestive when the witness identified the suspect as having blond hair, and the only person in the montage with blond hair was the defendant. Finally, in *State v. Maupin*, 63 Wn.App. 887, 822

P.2d 355 (1992), the court held that a photo showup with only one photograph was unduly suggestive.

In the case at bar, the application of the criteria in *Shea, supra*, compels a conclusion that both the montage itself, as well as the procedures for its use, were unnecessarily suggestive and created a situation in which there was a substantial likelihood of irreparable misidentification. First, as Joseph Haviland himself testified, the first time he looked at the photo montage he only identified the persons shown in locations two and five as really meeting the physical description of the shooter. Unknown to him, one of those people was the defendant and one was not. He chose the person who was not.

Apparently the police were unsatisfied with Mr. Haviland's inability to identify the defendant. As a result, they had Mr. Haviland come in for at least one further view of the same montage (the police evidence) or perhaps as many as two or three other views of the same montage (Joseph Haviland's evidence). This repeated use of the same montage gave a clear message to Mr. Haviland: you didn't identify the right person the first time you looked at the montage, so now look at it again and pick out another person. Unsurprisingly, he picked out the only other person in the montage that he had already determined fit his idea of the general description of the shooter. This procedure, in light of the results of Mr. Haviland's first viewing of the

montage, nearly compelled him to pick the picture of the defendant. Thus, both the montage used and the procedures employed by the police were unnecessarily suggestive and created a situation in which there was a substantial likelihood of irreparable misidentification

The second step in the analysis suggested in *Shea* is to review five separate factors. The following examines each of these factors in light of the evidence present in this case.

*Factor (1): The Opportunity of the Witness to View the Criminal at the Time of the Crime.* In the case at bar, Mr. Haviland testified that he had little if any opportunity to see the shooter. First, the person had his head obscured with a sweatshirt hood, and he had his head pointed down. Second, he approached the vehicle from the passenger side such that Mr. Haviland could only see the person from the bottom of the nose down. Third, the event only took a short span of time from beginning to end. This criteria illustrates the suggestiveness of the montage procedure the police employed and suggests that the defendant's identification from the montage was not the result of his memory of the event.

*Factor (2): The Witness's Degree of Attention.* As was just mentioned, the event at issue occurred over a very brief span of time, perhaps a little as five, ten, or fifteen seconds. During this brief span of time, Mr. Haviland had his attention pointed in four separate sequential directions.

First, his attention was focused upon his general task of driving the vehicle and looking for Mr. Huey. Second, his attention was then focused upon the shooter as he walked up to the passenger side of the vehicle. Third, his attention was then drawn to Mr. Malone as he yelled “punch it, punch it.” Finally, his attention was drawn forward as he drove the vehicle away at the highest rate of speed he could attain. This factor demonstrates how little time he had to look at a person whom he saw but for a few seconds and then from the bottom of the nose down.

*Factor (3): The Accuracy of the Witness’s Prior Description of the Suspect.* Mr. Haviland’s first description of the shooter was extremely vague. He described a male of average to stocky build, about five foot ten inches tall who spoke with what he thought to be a Hispanic accent. Nothing within this vague description suggests that when Mr. Haviland finally identified the defendant at the second, third, or fourth viewing of the same montage he was accurately identifying someone for whom he had given a detailed description.

*Factor (4): The Level of Certainty Demonstrated at the Confrontation.* At confrontation, Mr. Haviland demonstrated anything other than any level of certainty. Rather, he repeated in his testimony that when he identified the two separate people from the single montage, he was simply identifying the two people whom he believed fit the general physical description of the person he saw.

*Factor (5): The Time Between the Crime and the Confrontation.* In the case at bar there was only a couple of days between the crime and Mr. Haviland's first identification from the photo montage. This relatively short time span would militate in favor of the accuracy of his identification and the lack of suggestiveness in the montage had he (1) correctly identified the defendant as opposed to another person, and (2) had he not perceived the montage as containing only two photographs that generally matched his memory of the person he saw. However, since he did not accurately identify the defendant, and since the police then had him come in for further viewings of the montage much later, this factor suggests that his eventual identification of the defendant was the result of the suggestiveness of the montage and the procedures the police used.

Under all of the factors suggested in *Shea* as seen in the light of the facts of this case, the montage and the procedures the police used in repeatedly showing it to the defendant support the conclusion that the montage and procedures were impermissibly suggestive. As a result, the trial court erred when it denied the defendant's motion to preclude the evidence concerning Mr. Haviland's photo montage identification. Given the paucity of evidence of identification in this case, this error cannot be seen as harmless. As a result, the defendant is entitled to a new trial.

**IV. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE CALLED UPON ONE OF THE COMPLAINING WITNESSES TO SPECULATE AS TO THE IDENTIFY OF THE PERSON WHO SHOT HIM, AND WHEN THE STATE ELICITED INADMISSIBLE HEARSAY EVIDENCE OF IDENTIFICATION VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsels failure to object when the state called upon Mr. Malone to speculate upon the identity of the person who shot him, and when the state repeatedly called upon witnesses to testify to out-of-court identifications of the defendant under ER 801(d)(1)(iii) without first meeting the requirements of ER 602. This evidence concerning the former argument occurred in the following exchange:

Q. So you didn’t know for sure if it was Cyclone at that point when you were shot?

A. No.

Q. Did you think it was anybody other than Cyclone?

A. I didn’t really think of anybody in particular. I thought, yes, there was a very good possibility because it was his girlfriend’s car this whole thing had revolved around. He would be the only one to be upset about the situation.

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Who the witness “thought” or “believed” was the shooter was pure speculation and violated ER 602 because it was not a statement derived from the defendant’s personal knowledge. In addition, it also constituted an improper opinion of guilt that violated the defendant’s right to have a jury determine the facts of the case. The following addresses this argument.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant’s guilt, either directly or inferentially, “because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’ “ (Citations omitted.) 5A K.B. Tegland, *Wash.Prac., Evidence Sec.* 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.

To the expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury.

*State v. Carlin*, 40 Wn.App. 701 (some citations omitted).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to

permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. To the proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

To the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

*State v. Haga*, 8 Wn.App. At 491-492. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

There was no tactical advantage in the case at bar for the defense in failing to object to this improper opinion evidence. Indeed, the defense in the case at bar was that the defendant was not the shooter, not that a shooting didn't take place or that it was justified. With such a defense, it was critical that the defense keep out any and all improper evidence that had a tendency

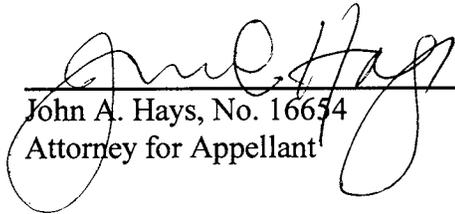
admission of the improper out-of-court identification evidence caused prejudice. The reason is that absent this evidence, there would be insufficient evidence of identification. Thus, had counsel simply made the proper objections to the reception of this inadmissible evidence, the trial court would have had to grant the motion to dismiss. Consequently, trial counsel's failures to object caused prejudice and denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. The defendant is entitled to a new trial.

## CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to dismiss the charges because the record does not contain substantial evidence that the defendant committed the crime. In the alternative, the defendant is entitled to a new trial based upon (1) the erroneous admission of improper propensity evidence and an unduly suggestive montage, and (2) ineffective assistance of counsel.

DATED this 25<sup>th</sup> day of September, 2008.

Respectfully submitted,



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**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**ER 401**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**ER 402**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

**ER 403**

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.

**ER 404**

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

#### **ER 602**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

#### **ER 801(d)(1)**

(d) Statements Which Are Not Hearsay. A statement is not hearsay if-

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

