

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY C. CLEMONS,

Appellant and Petitioner

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STATE OF WASHINGTON
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CONSOLIDATED APPEAL AND PERSONAL RESTRAINT
PETITION FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge
Cause No. 08-1-02160-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the jury instruction defining recklessness created a mandatory presumption that relieved the State of its burden to prove recklessness.

2. Whether defense counsel provided ineffective assistance because he did not object to Jury Instruction No. 11.

3. Whether Clemons is entitled to a new trial based upon newly discovered evidence, ineffective assistance of counsel, irregularity of the proceedings, absence of substantial justice, ineffective assistance of counsel, or any of the other grounds asserted in Clemons's statement of additional grounds and personal restraint petition.

B. STATEMENT OF THE CASE.

The State accepts Clemons's statement of the substantive and procedural facts as set forth in his opening brief on the direct appeal. Because his personal restraint petition, Case No. 40053-7-II, has been consolidated with his direct appeal, the State will address both in this response brief.

C. ARGUMENT.

1. Jury Instruction No. 11 properly defined recklessness, did not create a mandatory presumption, and did not relieve the State of its burden to prove recklessness.

Clemons was tried for one count of second degree assault.

Jury Instruction No. 14, the to-convict instruction, read as follows:

To convict the defendant of the crime of assault in the second degree, as charged in Count I

each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 26, 2008, the defendant intentionally assaulted JESSE EATON COHEN;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on JESSE EATON COHEN; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[CP 31}

The court defined "knowingly" in Jury Instruction No. 10:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the

element is also established if a person acts intentionally as to that fact.

[CP 27]

Clemons challenges the constitutionality of Jury Instruction

No. 11, which defined recklessness:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

[CP 28] This instruction is taken verbatim from WPIC 10.03. 11

WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL at 209 (3d ed. 2008).

Clemons did not object to any of the jury instructions given.

[07/22/09 RP 41] He now contends that the instructions contain an error that violated his due process rights. Instructional errors affecting constitutional rights may be raised for the first time on appeal. [RAP 2.5(a)(3). Therefore, he may raise his claims regarding Jury Instruction No. 11 on appeal. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

A mandatory presumption is one in which “the jury is required to find a presumed fact from a proven fact” while a

permissive inference is one in which “the jury is permitted to find a presumed fact from a proven fact but is not required to do so.” State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). “Mandatory presumptions potentially create due process problems . . . if they serve to relieve the State of its obligation to prove all of the elements of the crime charged.” Id.; Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). In order to determine whether a mandatory presumption exists, the reviewing court looks to “whether a reasonable juror would interpret the presumption as mandatory.” State v. Hayward, 152 Wn. App. 632, 642, 217 P.3d 354 (2009).

“Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.” State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A reviewing court should review jury instructions by reading them as whole, taking the challenged segments in proper context. State v. Pirtle, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). It is well-established law that juries are presumed to follow the instructions given them. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Clemons cites to State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) to support his argument that Instruction No. 11 did not limit the substituted mental state of either intentionally or knowingly to the specific element—infliction of substantial bodily harm—to which the recklessness requirement applied. [Appellant’s Opening Brief at 7-8] In Hayward, however, the jury instruction used was different than the instruction used in Clemons’s trial. Hayward, 152 Wn. App. at 640. The second paragraph of the instruction in the Hayward case was taken from the former version of WPIC 10.03 and read, “Recklessness also is established if a person acts intentionally.” Id.

RCW 9A.08.010(c) defines recklessness: “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(2) allows for the substitution of recklessness saying, “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.”

The second paragraph of WPIC 10.03 was revised in July 2008 “to more closely follow the statutory language” of RCW 9A.08.010(2) and address the related instructional issues which arose in State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL, cmt. at 211 (3d ed. 2008); 11 WPIC 10.03, note on use at 209 (2008). In Goble, this court held the instruction defining “knowledge” created a mandatory presumption because it conflated the element of intentional assault with knowledge of the victim’s status as a law enforcement officer. Goble, 131 Wn. App. at 203. Even though it appeared to mirror the then current WPIC 10.03, the court said the instruction, “did not follow the exact wording of RCW 9A.08.010(b),” thus it was “confusing, misleading, and a misstatement of the law,” Goble, 131 Wn. App. at 202. As a result, WPIC 10.03 now states, “[When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].].” 11 WPIC 10.03, at 209 (2008) (alterations in original).

The Hayward court reversed Hayward’s conviction because the former version of WPIC 10.03 did not limit the substituted

mental states to the specific element to which it applied. Hayward, 152 Wn. App. at 646. The WPIC was revised between the time of Hayward's trial and the time the opinion was issued, and the court approved of the 2008 version.

. . . WPICs are not the law; they are merely persuasive authority. . . Where a WPIC is in conflict with the applicable statute, the jury instruction must follow the statutory language. . . Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), jury instruction 10 violated Hayward's constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove Hayward recklessly (or intentionally) inflicted substantial bodily harm.

Id., at 646, (emphasis added, internal cites omitted).

In other words, Jury Instruction No. 11 did exactly what Clemons argues it should have done. A jury looking at Jury Instruction No. 14 would see that the first element requires an intentional assault. It would then turn to Jury Instruction No. 9, [CP 26] the definition of intent, which Clemons has not challenged. Once it dealt with that element it would go on to the second, which required recklessly inflicted substantial bodily harm. It would then look at Jury Instruction No. 11, which defines recklessness, and find that "when recklessness is required to establish an element of

a crime, the element is also established if a person acts intentionally or knowingly.” [CP 28] From there it could go back to Jury Instruction No. 9 and to Jury Instruction No. 10, which defines knowledge. The final paragraph of that instruction makes it clear that the mental state is limited to the specific element under consideration.

Had Jury Instruction No. 11 in Clemons’s case been the pre-2008 version he would, under Hayward, likely prevail. Because his instruction was the 2008 version, which was approved in Hayward, he has not shown that any error occurred. His argument simply ignores the fact that the instruction used in his case was the 2008 version of WPIC 10.03.

Clemons’s harmless error argument is based on his incorrect premise that Jury Instruction No. 11 relieved that State of its burden of proof. It did not, and thus there was no error, harmless or otherwise.

2. Defense counsel was not ineffective because he failed to object to Instruction No. 11.

Clemons correctly sets forth the law pertaining to ineffective assistance of counsel. The facts, however, are that the instruction defining recklessness was correct and there was no basis on which

to object. He has shown neither substandard performance nor prejudice. While WPICs are not the law, they are the result of careful consideration of statutes and case law. It can hardly be considered deficient performance for counsel to accept the most recent version of a WPIC amended within the last two years to reflect the holdings of recent appellate opinions, and which was approved in Hayward. He has failed to demonstrate ineffective assistance of counsel.

3. In his statement of additional grounds and personal restraint petition, Clemons fails to establish grounds for reversing this conviction.

Clemons filed a motion for a new trial and relief from judgment pursuant to CrR 7.5 and 7.8. That motion was transferred to this court as a personal restraint petition (PRP). In addition, Clemons has filed a supplemental brief and a statement of additional grounds (SAG) for his direct appeal. Both the PRP and SAG cover much the same issues.

a. Newly discovered evidence.

In his PRP, Clemons asserts that he has newly discovered evidence in the form of affidavits from his girlfriend, Amanda Coss, and his sister, Ashley Triance, which are attached to his petition. Neither affidavit presents newly discovered evidence.

Whether to grant a new trial based on newly discovered evidence is within the discretion of the trial court, and its ruling will be affirmed absent an abuse of discretion. State v. Taylor, 22 Wn. App. 308, 318, 589 P.2d 1250 (1979).

A new trial may be granted on the basis of newly discovered evidence only if each of five requirements is satisfied: the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

State v. Evans, 45 Wn. App. 611, 613, 726 P.2d 1009 (1986) (citing to State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

It is clear that the testimony of neither of these witnesses is newly discovered evidence. Amanda Coss was Clemons's girlfriend, [07/22/09 RP 27] and it is difficult to believe the matters asserted in her affidavit were both unknown and unable to be known by the defense. The affidavit of his sister, Ashley Triance, does not even claim to offer evidence. She asserts that Clemons's lawyer advised not introducing certain information, which means that the defense knew about it before trial. She impugned the character of the victim, Jesse Cohen, which would at most be impeachment evidence even if it were newly discovered, although that is tenuous. She admits knowing nothing about the assault

except that “my brother told me all that occurred (sic) on that day he has no reason to lie to me about it and the story of a violent beating that Jesse Cohen told the courts is not at all close to that story.” See affidavit attached to petition. There is simply no evidence there at all.

b. Irregularity in the proceedings and substantial justice.

Clemons raises as grounds for a new trial that there was irregularity in the proceedings, CrR 7.5(a)(5), claiming that his attorney failed to call witnesses such as Coss and Triance, Patrick Lamp, Curtis Walker, Kelly Lapcynski, Mark Sheffield, and Cathy Reeves, and that substantial justice was not done, CrR 7.5(a)(8), because his attorney failed to call these people at trial. A decision by defense counsel not to call certain witnesses does not constitute an irregularity in the proceedings. Examples of irregularities are serious juror misconduct, governmental interference with communications between defendant and his counsel, or improper references to a defendant’s criminal history. Evans, 45 Wn. App. at 616, fn. 4.

In his Supplemental Brief Pursuant to Motion For New Trial, Clemons presents affidavits from Curtis Walker and Patrick Lamp, both asserting that Clemons was present at the time of the incident

but that no assault occurred. Clemons also offers his own affidavit in both his petition and supplemental brief, and in that affidavit claims that he was in Shelton all that afternoon and had an alibi. At sentencing, when given his opportunity for allocution, Clemons told the court:

[T]his is just a simple act of defending myself and a woman who I loved and her child, trying to live a life out there and make a life for myself the first time ever at 30 years old. And yeah, I don't—I don't think I got this coming. I can't say that I feel bad for what happened to Mr. Cohen simply because the attack was provoked by him. And he—I gave no more than what I got in that instance. And did I mean to break his face? No. But that's what happened. And if I got to pay for that, then I'll pay for that.

[07/30/09 RP 14]

Clemons has an imperfect understanding of what is newly discovered, relevant, admissible, and possibly truthful, evidence. A court is unlikely to grant a new trial based on evidence which is not only not newly discovered, but offered to prove two inconsistent “facts,” neither of which was true.

c. Ineffective assistance of counsel.

Clemons's real complaint, expressed at some length, is dissatisfaction with the performance of his trial attorney. Deficient performance occurs when counsel's performance “[falls] below an

objective standard of reasonableness.” State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, “judicial scrutiny of counsel’s performance must be highly deferential.” Strickland 466 U.S. at 689; *See also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Further,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

Clemons believes that his attorney should have called a number of witnesses whom he identified. The record shows that defense counsel likely had good reasons for failing to do so. On

June 3, 2009, defense counsel sought and received a continuance because he had not been able to speak to Amanda Coss. She had failed to keep appointments with counsel and he needed to hire an investigator to track her down. [06/03/09 RP 3-4] On July 1, 2009, defense counsel sought another continuance because he had not been able to consult with Clemons, who had suffered a back injury, and at the same time counsel told the court that he had spoken with potential defense witnesses and decided not to call them “because I don’t think that they can provide testimony.” [07/01/09 RP 4] Tactical decisions on the part of counsel cannot form the basis for a claim of ineffective assistance of counsel, nor is it ineffective assistance for counsel to decline to put forth a nonsensical defense.

Given that Clemons wanted his attorney to present evidence both that he was in Shelton at the time and that he was present at the scene of the assault but that no assault occurred, with no explanation of how Cohen got a broken bone in his face, counsel had very good strategic reasons for refusing to call witnesses that Clemons thought were important. He did a good job for Clemons in spite of Clemons’s best efforts.

d. Inconsistencies and impeachment.

In his SAG, Clemons presents a long list of errors he claims his trial attorney committed during the trial. First is the discrepancy in addresses where the victim was contacted. Deputy Kimball testified that he was dispatched to 7403 Fair Oaks Loop. [07/22/09 RP 7] When he arrived he saw Cohen in the back of an ambulance. [07/22/09 RP 8] On cross-examination, Kimball testified that in his report, he noted that Cohen had driven to 7511 Fair Oaks after the assault, and that the two addresses were perhaps 200 yards apart. [07/22/09 RP 11] Kimball's report also indicated he had spoken to Cohen at 7403 Fair Oaks Loop SW. [07/22/09 RP 13] On recross, Kimball said he had gone to the ambulance when he got to the area, and that the two houses were very close together. [07/22/09 RP 14] On recross Kimball testified that he had gone to the address where he was dispatched, 7403 Fair Oakes Loop SW, and was unable to contact anyone at that residence. [07/22/09 RP 15-16]

Clemons argues that this testimony was very prejudicial. He claims that the two addresses are actually some distance apart and that the deputy would not have encountered the ambulance on the way to 7403 Fair Oaks Loop. [SAG 1-2] It is not at all clear how this

is important or why it makes the slightest difference to the issues before the jury. Even had defense counsel inquired further into any “discrepancies,” there is nothing to indicate the result of the trial would have been any different.

Next, Clemons asserts that his attorney should have impeached Cohen with inconsistent statements made during the investigation. He does not indicate what those statements were, or in what way they were relevant to the criminal charge. [SAG 2] When a defendant claims constitutional error in a personal restraint petition, he has the burden of making a prima facie showing of constitutional error resulting in actual and substantial prejudice. In re Personal Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990).

Clemons next argues that Cohen contradicted himself regarding whether the truck door was open or closed and whether he was in or out of the truck at the time he was hit. [SAG 2] Regarding the position of the victim and the truck door, the record shows the evidence was not so much contradictory as abbreviated. [07/22/09 RP 19-21] It isn't clear how and when Cohen got into the truck. Cohen couldn't say for sure how many times he was struck, whereas he had told the police he was struck several times. After

escaping from the defendant and Lamp, Cohen drove to where “these guys” were parked. [07/00/09 RP 19-21, SAG 3] Clemons finds this incredible. However, all of this information was before the jury, and it decides whom to believe and whom to disbelieve. It seems unlikely to make the slightest difference if Cohen told the police he was struck several times (which is not part of the record) and that on the stand he said he was struck more than once but fewer than ten times. [07/22/09 RP 20] Most people would find “several” consistent with “more than once but fewer than ten.” Cohen said he drove to where “these guys” were parked, not where they actually were at the time. When examined, none of these “inconsistencies” makes any difference whatsoever. Even if defense counsel had questioned the witnesses in minute detail, there is nothing Coleman identifies that would have made any difference, and there was the possibility that given a greater chance to explain further, the witnesses would have made Clemons’s case even worse.

Clemons maintains trial counsel failed to adequately investigate and talk to the witnesses he identified. [SAG 4] The record does not reflect that. As noted above, during the June 3 and July 1 hearings, counsel indicated Coss was being uncooperative

and he was going to have to get an investigator to find her, and that he had talked to witnesses and concluded they would not be helpful to Clemons.

Clemons believed his attorney should have impeached the victim with his “erratic behaviors” and “criminal history.” [SAG 5] However, there is nothing in the record to substantiate that those things existed or that they would have been admissible if they did. The bare assertion that the victim had a motive to lie is not proof that he did. Clemons also does not offer any explanation for how Cohen’s face got to be broken and bloody at the time his own witnesses, Lamp and Walker, put him at the scene on Fair Oaks.

In closing argument, defense counsel did, in fact, discuss several reasons why the jury should not believe Cohen. [07/22/09 RP 67-70] Criminal defendants are represented by attorneys at trial because attorneys have knowledge of the law that is generally greater than that of the defendants. Clemons blames his attorney for his unsuccessful defense, but his attorney could not change the facts.

e. Booking photo.

Clemons maintains that the prosecutor committed misconduct by offering into evidence a booking photo of him from

Mason County and that his attorney was ineffective for failing to object to it.

The photograph, which was admitted as Exhibit 2, was never referred to as a booking photograph. Detective Haller did testify that he obtained it from the Mason County Sheriff's Office, however, [07/22/09 RP 32] and the jury could have reached that conclusion. Even if it was an improper reference, it does not require reversal.

Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Neidlich, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotes omitted). Failure to object to admission of photos that were clearly mug shots is not necessarily ineffective assistance. See Pittman v. Warden, Pontiac Correctional Ctr., 960 F.2d 688 (7th Cir. 1992) (failure to object to mug shot and lineup identifications was defensible strategic decision within range of competent professional assistance). Nor is failure to request a limiting instruction ineffective assistance where it could be presumed that counsel decided not to reemphasize potentially damaging evidence. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

To determine the effect of an improper statement, the court must determine whether the remark, when viewed against the backdrop of all the evidence, so tainted the entire proceeding that the accused did not have a fair trial. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). Here there was reference to photos obtained from Mason County, but no reference to any crimes Clemons had previously committed. Even if the reference was improper, it was not so prejudicial as to require reversal. If the jurors recognized the significance of the reference to the sheriff's office, at most it told them that Clemons had probably been arrested before. Even if Detective Haller had not testified that he got the photo from Mason County, reasonably knowledgeable jurors would have realized that the photos had to come from some place, and the place a police officer is most likely to look is among booking photos.

Clemons maintains that the prosecutor committed misconduct by offering the photo into evidence. However, that photo was the one the detective showed to Cohen to confirm the identity of the person who beat him up. The State has the right to put before the jury the circumstances of the case and the way in which it developed. Clemons cites to State v. Sanford, 128 Wn.

App. 280, 115 P.3d 368 (2005), to support his argument that admitting the photo was reversible error. However, in Sanford identity was not an issue—Sanford admitted having an altercation with the victim—and there was no reason to offer the booking photo. In Clemons’s case, it was. The police have a limited number of sources from which to obtain photographs of suspects.

Even if it was error for the detective to refer to obtaining a photograph of Clemons from the Mason County Sheriff’s Office, which the State does not concede, “[e]rroneous admission of evidence is not grounds for reversal ‘unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’” Sanford, 128 Wn. App. at 285, (quoting from State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). Here the jury heard the direct evidence of the victim, who said Clemons and/or Lamp, acting together [07/22/09 RP 20], beat him severely enough to break a bone in his face. If the jury believed him, which it obviously did, any other evidence making the defendant look bad wasn’t going to make it any worse. If the jury didn’t believe the victim, it would have acquitted no matter how many other bad things they knew about Clemons. Exhibit 2 did not materially affect the outcome of the trial.

f. Prospective juror who recognized Clemons.

Clemons asserts that during voir dire a prospective juror was excused because he recognized Clemons from another case. There is nothing in the record to substantiate this claim. It is impossible for the State to address or this court to decide. Clemons did not arrange to have the record of voir dire transcribed. An appellate court may not speculate regarding facts not in the record. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977).

D. CONCLUSION.

The jury instruction defining recklessness did not create a mandatory presumption nor relieve the State of its burden of proof. There was no ineffective assistance of counsel. None of the numerous issues raised by Clemons in his SAG or PRP have merit. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 5th day of April, 2010.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

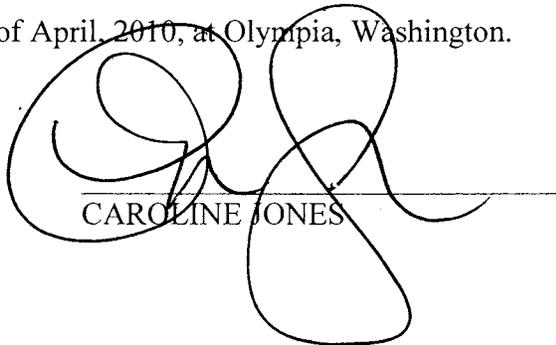
- US Mail Postage Prepaid
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TO: THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
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BY Caroline Jones
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5 day of April, 2010, at Olympia, Washington.



CAROLINE JONES