

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

STATE OF WASHINGTON,

Respondent,

v.

CLABON BERNIARD,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Clabon Berniard's trial was riddled with serious errors. The court violated his Sixth Amendment rights by removing a holdout juror who was upset that the other jurors "ganged up on" her and by allowing police officers to testify extensively about what other suspects who were not at the trial told them about the crimes. In violation of article I, section 3, a witness who could only describe the first two intruders the day after the crime and was not even sure whether there were three or four perpetrators was permitted to testify that later, when she saw Mr. Berniard on TV, she was sure he was the fourth intruder. Evidence procured in violation of the Privacy Act was admitted. There were multiple double-jeopardy violations and several errors regarding the aggravating factors.

In its response brief, the State dodges the issues, setting up straw men instead of addressing the actual errors. In response to Sixth Amendment violations, the State argues the trial court complied with statutes and evidentiary rules. In response to a state constitutional error, the State professes adherence to the federal constitution. Eventually, the State reverts to copying the sentencing memorandum it filed in the trial court, neglecting to remove arguments not at issue on appeal, while failing to address the errors identified in the opening brief. This Court should reverse.

B. ARGUMENT

1. The trial court violated Mr. Bernard's rights under the Sixth Amendment and article I, sections 21 and 22 when it removed a holdout juror as "mentally defective".

As explained in Mr. Bernard's opening brief, the trial court violated his constitutional rights by dismissing a juror who was upset because other jurors were "against" her and "ganged up on" her. The dismissal of the juror violated Mr. Bernard's rights under the Sixth Amendment and article I, sections 21 and 22, because it was reasonably possible that the impetus for dismissal stemmed from the juror's views on the merits of the case, and because the court did not even interview the juror before dismissing her. Thus, reversal is required under the Supreme Court's decision in *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) and this Court's decision in *State v. Johnson*, 125 Wn. App. 443, 105 P.3d 85 (2005). Brief of Appellant ("App. Br.") at 15-23.

Additionally, the dismissal was improper under RCW 2.36.110 because this juror was not "mentally defective," but rather, was understandably upset by the traumatic deliberative process. This Court should be gravely concerned that a juror who was conscientiously performing her duties, who was trying to convince other jurors to follow instructions despite the fact that they "ganged up on" her, was thanked for

her efforts by being labeled “mentally defective” and removed from service. App. Br. at 24-26 (citing juror studies).

The State in its response does not even mention the Constitution or the most analogous case, *Johnson*. Brief of Respondent (“Resp. Br.”) at 10-16. It claims the trial court did not abuse its discretion under the statute, which is incorrect, as explained in Mr. Berniard’s opening brief. More importantly, though, a legislative act cannot trump the Constitution. *Cf. State v. Miles*, 160 Wn. 2d 236, 249, 156 P.3d 864 (2007) (government complied with statute in seizing bank records, but reversal required under article I, section 7 of state constitution). Because the dismissal of Juror 2 violated the Constitution, reversal is required.

The State begins its analysis by discussing a case in which a juror was removed *for sleeping*. Resp. Br. at 11 (citing *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000)). The discussion is wholly irrelevant to the issue here: removal of a holdout juror in violation of Mr. Berniard’s constitutional rights. Unlike in *Jorden*, the juror at issue here was not an irresponsible citizen falling asleep during jury duty. To the contrary, she was so conscientious that she alerted other jurors that they were not following the court’s instructions, and she was “trying hard to find the courage within” herself to follow the instructions on the burden of proof even as the other jurors “ganged up on” her and appeared to be

“against” her. CP 606-07, 641-42; 15 RP 2220, 2222. Thus, this case involves a *diligent* juror whose removal violated the *Constitution*, while *Jorden* involved a *sleeping* juror whose removal was evaluated only under the *statute*.

The State then acknowledges that when Juror 2 was crying and upset, she said she “could see it getting to the point where everyone was against her.” Resp. Br. at 13. Yet, without explanation, the State claims the juror’s distress had nothing to do with the deliberation process. As explained in the opening brief, the law requires a juror *not* be dismissed if there is *any reasonable possibility* that the basis for a juror’s conduct stems from his or her views on the merits of the case. App. Br. at 20-22 (citing *Elmore*, 155 Wn.2d at 776; *Johnson*, 125 Wn. App. At 457). Because the State admits that when the juror was upset she said it appeared everyone was against her, reversal is required under *Elmore* and *Johnson*.

The State makes the perverse argument that this “reasonable possibility” standard applies only where there is an allegation that the juror at issue is refusing to follow the law or otherwise committing some type of misconduct. Resp. Br. at 14-15. This makes no sense. In the cases the State cites, it is true that jurors were accused of misconduct, but *that* is not the reason courts were required to keep them on the jury. These jurors

could not be dismissed *despite their misconduct* because there was a reasonable possibility that their conduct stemmed from their views of the merits of the case – i.e., their view that the State had not met its burden to prove guilt.

The same rule applies to other allegations of unfitness, because the point is that if there is any reasonable possibility that the conduct forming the basis for the allegation of unfitness stems from a juror’s belief that the State failed to prove its case, dismissal of the juror violates the defendant’s constitutional rights. Here, the allegation of unfitness is “mental distress.” Standing alone, a “mental defect,” like misconduct, is a basis for a finding of “unfitness” to serve. RCW 2.36.110 . But because there is a reasonable possibility that this juror’s alleged unfitness (here mental distress) stemmed from her disagreement with her fellow jurors on the merits of the case, her dismissal violated Mr. Bernard’s rights under the Sixth Amendment and article I, sections 21 and 22. *Johnson*, 125 Wn. App. at 458-59.

Perhaps because there is no way it could meaningfully distinguish it, the State does not even acknowledge, let alone address, this Court’s decision in *Johnson*. As explained in the opening brief, *Johnson* controls. There, this Court reversed where the trial court improperly removed a juror who was “emotionally distraught”. *Id.* at 451, 459. The juror herself

(Juror 9) had asked to be removed during deliberations, expressing that “she was in an emotional and physical state such that she could not continue deliberating.” *Id.* at 451. She was distressed because she interpreted the instructions differently from other members of the jury, and disagreed with the foreperson’s proposed process for discussing the case. The foreperson told the trial court that Juror 9 was crying a lot, often retreated to a corner to embroider, and would cease communicating with other jurors. *Id.* at 451-52. The trial court dismissed the juror.

On appeal, the defendant argued the dismissal of Juror 9 violated his constitutional rights, and in response, the State made arguments remarkably similar to those made here: “the State argues that juror 9 was ‘not so much a hold out on a hung jury as she was a disabled juror who was, for psychological or emotional reasons, unable to participate meaningfully in the jury’s deliberative process.’” *Id.* at 457. This Court agreed with the defendant, noting, “[w]here the record shows *any reasonable possibility* that the impetus for a juror’s removal stems from his or her views on the merits of the case, the dismissal is error.” *Id.* This Court recognized that Juror 9 was “emotionally distraught,” but noted that her own testimony indicated that one of the reasons she had been crying and was upset was “because she took a different view of the jury instructions and other issues in the case.” *Id.* at 458-59. Thus, the trial

court violated the defendant's constitutional rights when it removed the juror. *Id.* at 459.

The same is true here. As in *Johnson*, the juror here was upset and crying, but as in *Johnson*, the reason the juror was upset was because of disagreement over the evidence and jury instructions. CP 606-07, 641-42; 15 RP 2220, 2222. Also as in *Johnson*, although the juror here was initially reluctant to continue deliberating, she made clear before the hearing on the issue that she felt better and was able to continue deliberating. CP 607; 15 RP 2219-13. The trial court was required to err on the side of retaining the juror in order to protect Mr. Berniard's constitutional rights. *Elmore*, 155 Wn.2d at 779; *Johnson*, 125 Wn. App. at 458-59.

In sum, the State does not even cite, let alone address, the primary authority requiring reversal in this case: the Sixth Amendment, article I, sections 21 and 22, and *Johnson*. This Court should reverse and remand for a new trial. App. Br. at 15-27.

2. The trial court violated Mr. Berniard's Sixth Amendment right to confront the witnesses against him by allowing two detectives to testify about what three absent co-defendants told them about the crimes.

As explained in Mr. Berniard's opening brief, the trial court violated his rights under the Confrontation Clause of the Sixth

Amendment by allowing Detectives Johnson and Jimenez to testify at length about what Amanda Knight, Joshua Reese, and Kiyoshi Higashi told them about the crimes at issue. The statements fell within the “core class” of testimonial statements subject to the Confrontation Clause because they were elicited during police interrogations several days after the crimes, and the police were interviewing the suspects as part of their investigation for criminal prosecution. None of the three was present or available for cross-examination at Mr. Berniard’s trial, and none had been available for prior cross-examination. Thus, the introduction of their statements violated Mr. Berniard’s constitutional rights under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d (2004). App. Br. at 27-38.

In response, the State sets up a straw man by arguing that the codefendants’ statements fall within an exception to the rule against hearsay. Resp. Br. at 16-17. Mr. Berniard did not argue the statements were inadmissible under the rule against hearsay or any of the rules of evidence; he argued they were inadmissible under the Confrontation Clause of the Sixth Amendment to the Constitution. App. Br. at 27-38. The State’s discussion of ER 804(b)(3) is thus completely irrelevant. *See Crawford*, 541 U.S. at 61 (“we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence”).

The State eventually addresses the application of the Confrontation Clause, and concedes that the statements are testimonial and therefore fall within the protection of the Sixth Amendment. Resp. Br. at 19. But the State then makes the same mistake the trial court made: it cites cases involving the admission of co-defendants' statements in *joint trials*, and argues that under those cases the statements of Mr. Berniard's co-defendants were admissible even though they were testimonial and Mr. Berniard never had an opportunity for cross-examination. Resp. Br. at 19 (citing *In re Hegney*, 138 Wn. App. 511, 158 P.3d 1193 (2007); *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). The State is wrong.

As already explained in the opening brief, *Richardson* and *Bruton* dealt with the question of how to protect defendants' rights under the Confrontation Clause when they are tried *together*. In such circumstances, a nontestifying defendant's statement is admissible *against himself*, but *not* against his jointly tried co-defendant. Thus, the statement must be redacted to protect the other defendant, and the jury must be instructed to use the statement only against the speaker. See App. Br. at 34. *Hegney* merely recognized that *Crawford* did not overrule *Bruton*, and that the *Bruton* rule continues to apply for joint trials. *Hegney*, 138 Wn. App. at

545 (“[o]rdinarily, a witness whose testimony is introduced *at a joint trial* is not considered to be a witness ‘against’ a defendant if the jury is instructed to consider that testimony only against a codefendant”).

But where, as here, defendants are tried *separately*, the absent defendant’s statement is not admissible at all – because the only reason it is admissible in a joint trial is for use against the speaker. Where that speaker is absent, there is no one remaining against whom the statement may be used without violating the Confrontation Clause. That is why this case is controlled by *Crawford*, not by *Bruton*. The State utterly fails to address this point. Indeed, it concedes that the trial court followed the confrontation analysis of *Hegney*. Resp. Br. at 21. Because that analysis applies to jointly tried co-defendants, but *Crawford* applies to cases in which the speaker is not tried with the defendant, the trial court erred. *See* App. Br. at 34-36.

Finally, the State makes no attempt to meet its burden to prove beyond a reasonable doubt that this constitutional violation did not contribute to the verdict. The failure to present argument on this issue should be considered a concession. *In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999). In any event, the State could not meet this burden, and this Court should reverse and remand for a new trial. App. Br. at 37-38.

3. The trial court erred in admitting a video KOMO TV recorded of their reporter informing Mr. Bernard's family that he was wanted for murder.

The trial court violated Mr. Bernard's rights under the Privacy Act by admitting evidence obtained when KOMO TV ambushed Joan and Lacey Bernard in their own living room, informed them Clabon was wanted for murder, and surreptitiously recorded their reactions without their consent. App. Br. at 38-50.

The State's brief begins by applying the wrong standard of review. It says, "The trial court did not abuse its discretion in admitting the KOMO TV video." Resp. Br. at 21. The standard of review is not abuse of discretion. As explained in the opening brief, where, as here, the facts are undisputed, the question of whether a conversation is private for purposes of the Privacy Act is a question of law this Court reviews *de novo*. *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004). The State's citation to a non-Privacy Act case is therefore unavailing. Resp. Br. at 21 (citing *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

- a. The conversation between two family members in their own home about another family member was private.

The State then wrongly argues this conversation was not private. It claims the conversation was public because a third party was present, the

criminal investigation was “a high profile news event,” and the living room is “the least private location in [a] residence.” Resp. Br. at 21-28. But the reason a third party was present, as in many Privacy Act cases, is because the third party was the one illegally recording the private conversation. Just as the KOMO employees were present and illegally recording this excruciatingly private conversation, police officers were present and illegally recording private conversations in *State v. Fjermestad*, 114 Wn.2d 828, 91 P.2d 897 (1990) and *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993). Their presence did not render the conversations public; on the contrary, the Supreme Court suppressed the evidence in both cases because the third parties illegally recorded *private* conversations without consent or judicial authorization. *Fjermestad*, 114 Wn.2d at 836; *Salinas*, 121 Wn.2d at 697.

Furthermore, the fact that the criminal investigation was a “high profile news event” is irrelevant to the question of whether *this conversation* was private. Joan and Lacey Berniard were not discussing a newscast. Joan was wailing with shock and grief because she had just found out her son was wanted for murder. Lacey was sobbing and relaying information about her brother to her mother. The topic of their conversation was Joan’s *son*, and Lacy’s *brother*. To them, this was a private family matter.

As the State acknowledges, *Townsend* is instructive on the question of what constitutes a “private conversation”. See Resp. Br. at 24 (citing *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002)). There, the Court held e-mail messages between a defendant and undercover officer posing as an underage girl were private for purposes of the Act. *Townsend*, 147 Wn.2d at 674. This was so because from the *defendant’s* point of view the sexual messages were to be shared only with “Amber,” and this expectation was reasonable even though “Amber” was not real and the conversation was not “private” as far as the undercover officer or anyone else was concerned. Indeed, the reason the officer engaged in the sting operation is that sexual victimization of children is a problem of grave *public* concern. Similarly here, even though “the Craigslist killing” was a matter of public concern, Joan and Lacey Berniard’s conversation about their beloved family member being accused of a crime was private.

Finally, the State resorts to claiming that a family’s living room is not a private location. Resp. Br. at 27. This contention is absurd. As explained in the opening brief, the home is the location in which individuals enjoy the utmost protection of privacy. *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994); *contrast State v. Clark*, 129 Wn.2d 211, 228, 916 P.2d 384 (1996) (conversation on public street not private). “Generally, a person’s home is a highly private place. In no area is a

citizen more entitled to his privacy than in his or her home.” *Young*, 123 Wn.2d at 185. Joan Berniard clearly was not expecting guests or contemplating a public conversation; she was in her pajamas and the house was not picked up. Ex. 164. This was a highly emotional conversation between two family members about another family member that took place in the living room of their own home while Joan was still in her pajamas. There can be no doubt that it was private. *See App. Br.* at 38-45.

- b. The Berniards did not consent to the recording, either explicitly or implicitly; the KOMO employees admitted they ambushed the family, did not tell them they were recording them, blocked their view of the camera, and turned off the recording light.

Furthermore, the Berniards did not consent to the recording of their conversation. The State concedes that KOMO did not obtain express consent to record the conversation. *Resp. Br.* at 31. Its only argument is that Joan and Lacey impliedly consented to the recording under RCW 9.73.030(4) because the recording device was “readily apparent or obvious to the speaker.” *Resp. Br.* at 29-32. The State is wrong.

Amazingly, the State claims that although they did not seek consent, “Sabra Gertsch and Dan Strothman did everything they could to put the Berniards on notice that the interview was audio and video

recorded.” Resp. Br. at 31. Nothing could be further from the truth. Indeed, Gertsch’s and Strothman’s testimony made clear that they purposely hid the fact that they were recording until the Berniards were so shocked and grief-stricken that they would not notice. This is also apparent on the video itself. As explained in the opening brief, the testimony and video reveal:

- The camera operator, Strothman, did not go to the door with Gertsch initially (2 RP 324);
- Neither Joan nor Lacey let Gertsch inside; she was already in the living room when they came upstairs (2 RP 309);
- Both Gertsch and Strothman admitted they did not introduce themselves to either Joan or Lacey (2 RP 327; 3 RP 369);
- **Both Gertsch and Strothman admitted they did not tell either Joan or Lacey they were recording or seek their consent** (2 RP 325; 3 RP 371-72);
- **Strothman explained that the only time they don’t seek consent or notify subjects of the recording is when they want to “ambush” them** (3 RP 365);
- **Strothman admitted that although he was recording he turned off the red light that indicates the camera is recording** (3 RP 367);
- **Gertsch blocked Joan Berniard’s view of the camera until after she delivered the devastating news** (ex. 164 at ~0:30);
- Lacey Berniard was only 14 years old, had been deprived of oxygen at birth, and had an IQ of 30-55;

Child psychiatrist Marsha Kent did not think Lacey understood she could refuse consent (2 RP 170, 182, 215-16, 229);

- Gertsch did not pick up her hand microphone until eight minutes into the recording, after Lacey had already told her mother about the incriminating conversation she overheard. (Ex. 164 at ~8:00).

In light of the above facts, consent was neither explicit nor implicit. The camera was hidden until after Gertsch delivered the devastating news, at which point no reasonable person would have noticed it. As Mr. Berniard's attorney pointed out, no one would have consented to being recorded in their own home after hearing news like that, as they were wailing with grief in their pajamas. "No one with a shred of dignity or privacy would do that." 3 RP 418. Neither Joan nor Lacey Berniard consented to the recording of this unbearable family conversation. KOMO simply recorded it anyway, in violation of the Privacy Act.

The State incorrectly argues consent was implied in this case as it was in *Townsend* and *In re the Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997). Resp. Br. at 30. These cases do not help the State. In *Townsend*, the defendant impliedly consented to the recording of communications because the conversations were over e-mail, which is always recorded by a computer. *Townsend*, 147 Wn.2d at 676. And in *Farr*, the communication was a voicemail message, which is necessarily

recorded. *Farr*, 87 Wn. App. at 184. Here, in contrast to the e-mail conversation in *Townsend* and the voicemail communication in *Farr*, the conversation between Joan and Lacy was an *in-person* conversation between family members in their living room. It is *not* the type of conversation that is automatically recorded like e-mail or voicemail. Instead, KOMO surreptitiously recorded this face-to-face family conversation. KOMO purposely hid the camera, kept the red recording light off, and declined to tell the Berniards they were recording. The recording violated the Privacy Act, and the evidence obtained thereby was not admissible. App. Br. at 38-50.

4. The trial court violated Mr. Berniard's right to due process under article I, section 3 of the Washington Constitution by admitting Charlene Sanders's unreliable identification of Mr. Berniard as one of the perpetrators.

Charlene Sanders's identification of Mr. Berniard as one of the perpetrators was unreliable and should have been suppressed. Ms. Sanders could not even describe, let alone identify, the fourth perpetrator immediately after the crimes. Her inability to do so makes sense because (a) the situation was highly stressful; (b) the perpetrator was wearing a mask; (c) Ms. Sanders was face down on the floor while the perpetrator was behind her; (d) the perpetrator was much younger and was a different race (African American); and (e) the perpetrator was holding a gun to her

head. The appearance of Mr. Berniard on TV a week later was essentially a one-person showup, which Ms. Sanders used to construct a memory of the fourth suspect that she did not actually perceive during the incident. 3 RP 445-543. Although this unreliable identification may well be admissible under the federal due process clause, Mr. Berniard asks this Court to hold that it is inadmissible under article I, section 3 of the Washington Constitution. *See* App. Br. at 51-65 (performing *Gunwall* analysis and citing modern studies regarding fallibility of eyewitness identification).

The State correctly notes that the Washington Supreme Court recently addressed a related issue, but the State mischaracterizes the opinion. Resp. Br. at 33 (citing *State v. Allen*, ___ Wn.2d ___, 294 P.3d 679 (2013)). In *Allen*, the issue was whether and when trial courts should instruct juries on the weakness of cross-racial eyewitness identifications. The State wrongly asserts, “the Court held that a cautionary instruction was not required in such a case.” Resp. Br. at 33. In fact, the Court held a cautionary instruction was not required *in that case*, but that in some cases it would be reversible error not to provide the instruction. *Allen*, 294 P.3d at 690 (Madsen, C.J., concurring) (“where a victim makes a cross-racial identification based on a suspect’s facial features, hair, or other physical characteristic implicating race, a trial judge likely would abuse his or her

discretion if he or she refused to provide a cross-racial identification instruction”); *id.* at 691 (Chambers, J., concurring in result) (“Given the demonstrated weakness of eye witness testimony in general and cross-racial eye witness identification in particular, in my view, expert testimony and instruction to the jury on the weakness of cross-racial identifications should be the standard in our courtrooms whenever it would be helpful”); *id.* at 692 (Wiggins, J., dissenting) (“The most important lesson of this case is that every member of this court would support giving a cross-racial identification instruction in an appropriate case – but we differ on what constitutes an appropriate case”).

The State also notes that “[t]he lead opinion pointed out that the defendant’s rights were protected by confrontation of witnesses, vigorous cross-examination, and argument” along with instructions on the burden of proof and witness credibility. Resp. Br. at 33. The State neglects to mention that a majority of the justices *rejected* this reasoning. Chief Justice Madsen stated, “The dissent properly recognizes that cross-examination, expert testimony, and closing argument may not provide sufficient safeguards against cross-racial misidentification because the very nature of the problem is that witnesses believe their identification is accurate.” *Allen*, 294 P.3d at 690 (Madsen, C.J., concurring); *accord id.* at 694 (Wiggins, J., dissenting).

Also contrary to the State's brief, the Supreme Court *rejected* the prosecution's argument that a court's action addressing the fallibility of eyewitness identification would be an impermissible comment on the evidence. *Compare* Resp. Br. at 33-34 to *Allen*, 294 P.3d at 686 n.7 (lead opinion); *id.* at 691 (Chambers, J., concurring in result). In sum, all nine justices in *Allen* recognized the shortcomings of eyewitness identifications in general, and cross-racial identifications in particular.

The Court in *Allen* did not address the specific issue raised here: whether article I, section 3 of the Washington Constitution provides stronger protection against the admission of unreliable eyewitness identification evidence than the Fourteenth Amendment. *Allen*, 294 P.3d at 685 n.4. Not only did *Allen* not address it, the State utterly fails to address it in its response brief, notwithstanding the extensive analysis in the opening brief.

The State instead describes and applies the *federal* standard for admissibility of eyewitness identifications, and repeatedly points out that the police did not orchestrate the suggestive television showup at issue here. Resp. Br. at 34-37. Mr. Berniard already acknowledged that under federal law, eyewitness identification evidence should be excluded only where police arranged the suggestive circumstances. App. Br. at 54 (citing *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 181

L.Ed.2d 694 (2012)). Mr. Berniard argued, “[t]his Court should hold a different standard applies under the state constitution.” App. Br. at 54.

Specifically, because reliability rather than deterrence is of paramount concern under Washington’s Due Process Clause, unreliable eyewitness identifications should be excluded regardless of the government’s role in procuring it. App. Br. at 55-59 (citing, inter alia, *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984)). In determining whether an identification is reliable, courts should consider several factors culled from the scientific research, including level of stress, duration, presence of weapons, disguises, and own-age and own-race bias. App. Br. at 59-63 (citing, inter alia, Recent Case, *Evidence – Eyewitness Identifications – New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications – State v. Henderson*, 27 A.3d 872 (N.J. 2011), 125, Harv. L. Rev. 1514 (2012)). An evaluation of the relevant factors in this case shows Charlene Sanders’s identification of Clabon Berniard as the fourth intruder was unreliable and should have been excluded. App. Br. at 64-65.

In the opening brief, Mr. Berniard cited cases from several states, and proposed a modified version of the standard adopted by the New Jersey Supreme Court in *Henderson*. App. Br. at 55, 59-64 (citing, inter alia, *State v. Henderson*, 27 A.3d 872 (N.J. 2011)). Since the filing of the

opening brief, yet another state has radically altered its standards for evaluating the admissibility of eyewitness identifications, and has done so in a manner consistent with Mr. Berniard's proposed framework. *See State v. Lawson*, 352 Or. 724, 291 P.3d 673 (Or. 2012).

In *Lawson*, the Oregon Supreme Court jettisoned its outdated test for assessing the reliability and admissibility of eyewitness identifications – a standard which mirrored the process set forth by the U.S. Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). *Lawson*, 352 Or. at 738. Like the New Jersey Supreme Court in *Henderson*, Oregon's high court recognized that in the past three decades, "there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification." *Id.* at 739. The studies echo Dr. Loftus's testimony in Mr. Berniard's case, and show that numerous factors must be considered in determining the reliability of an eyewitness's identification. 3 RP 445-543. Those factors include stress, witness attention, duration, viewing conditions, and witness and perpetrator characteristics. *Lawson*, 352 Or. at 744-45. As particularly relevant here, accuracy is compromised by high levels of stress, use of a disguise, and differences in race between the observer and suspect. *Id.*

Like the standard proposed in Mr. Berniard's brief, the Oregon standard does not condition exclusion of eyewitness identification on

police misconduct. *Id.* at 747 (distinguishing the federal standard under *Perry*, 132 S.Ct. at 730). The state supreme court held that as a matter of Oregon law, “there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability.” *Id.* The same is true under Washington law. App. Br. at 51-65.¹

Not only is the standard set forth in *Lawson* instructive, so is the result. Two cases were consolidated, and the court reversed in one and affirmed in the other. It affirmed in a case where the witnesses were face-to-face with the perpetrators for a lengthy period of time and were able to provide detailed descriptions to the police within minutes of the crime. *Lawson*, 352 Or. at 765-66. In contrast, the court reversed in a case where the witness was under tremendous stress at the time of the viewing, was lying on the floor when she encountered the perpetrator, and the perpetrator wore a hat which obscured key features. She could not describe or identify the perpetrator shortly after the event, but identified him “with 100% certainty” much later after she had seen a newspaper

¹ The Oregon Supreme Court relied on that state’s rules of evidence, which are substantially similar to Washington’s. In Washington, however, our Due Process Clause mandates the same result because reliability is of paramount concern under our constitution. *See* App. Br. at 54-59; *Bartholomew*, 101 Wn.2d at 639.

article with his picture and had been subjected to other suggestive circumstances. *Id.* at 763-65. At that point, she had no doubt the defendant was the perpetrator and said, “I’ll never forget his face as long as I live.” *Id.* at 765. Under these circumstances, the Oregon Supreme Court reversed because of “serious questions concerning the reliability of the identification evidence admitted at defendant’s trial.” *Id.* at 765; *cf. Young v. Conway*, 698 F.3d 69, 80-82 (2d Cir. 2012) (granting habeas relief because eyewitness identification was not independent of tainted lineup; original viewing conditions were adversely affected by a disguise, weapon-focus, high stress, and own-race bias; it was likely through unconscious transference that witness later believed her identification was accurate).

The circumstances of the identification in Mr. Bernard’s case are very similar to those in the case in which the Oregon Supreme Court reversed. The night of the crime, Charlene Sanders could describe only the first two perpetrators, and did not even know whether there were three or four total. 1 RP 78-85, 105-09. The third and fourth perpetrators wore masks which obscured key features. 1 RP 81; 3 RP 564. Ms. Sanders was lying face-down on the floor when the third and fourth perpetrators arrived. 6 RP 905-07. She did not identify Mr. Bernard until she’d seen him on TV. 1 RP 134. Eight months later, she said she recognized his

face and that it was burned into her memory. 3 RP 542. This identification was unreliable and should have been suppressed. *See Lawson*, 352 Or. at 763-65.

In sum, under article I, section 3 of the Washington Constitution, unreliable eyewitness identification testimony should be suppressed, and the factors to be evaluated in making that determination should be updated based on current scientific research. App. Br. at 54-64. In reviewing the relevant considerations, Charlene Sanders's identification of Mr. Berniard as the fourth intruder was unreliable and should be excluded. App. Br. at 51-53, 64-65. The State's failure to address Mr. Berniard's Washington State Constitutional argument should be considered a concession. Mr. Berniard asks this Court to reverse and remand for a new trial at which the identification will be suppressed.

5. The convictions for robbery and felony murder predicated on robbery violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the robbery conviction.²

As noted in the opening brief, the conviction on count two and its associated enhancement must be vacated because entering convictions for both felony murder and the underlying felony violates the Fifth

² If this Court reverses and remands for a new trial based on one or more of the first four arguments, it need not reach arguments 5 through 10.

Amendment right to be free from double jeopardy. App. Br. at 65-70 (citing, inter alia, *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004)).³

- a. There is no question that this error may be raised for the first time on appeal.

The State begins its response by claiming a double-jeopardy violation may not be raised for the first time on appeal. Resp. Br. at 39-40. None of the cases the State cites so holds. *O'Hara* involved a challenge to a jury instruction, not a double jeopardy claim. *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009) (cited in Resp. Br. at 39). *Burns* likewise was not a double jeopardy case. *State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990) (cited in Resp. Br. at 40). There, the Court addressed an argument that two offenses constituted the “same criminal conduct” for sentencing purposes under the SRA. No constitutional issue was raised. *See id.*

³ Mr. Berniard argued in the alternative that the two crimes constitute the same criminal conduct for sentencing purposes. App. Br. at 70-74. Mr. Berniard relies on his opening brief for this argument. The Court need not reach it as the two convictions clearly violate double jeopardy, and because a new trial is required on all counts in any event because of the other errors discussed above and in the opening brief.

In *Vladovic*, the Court reached the merits of a double-jeopardy argument, and nowhere stated that the issue could not be raised for the first time on appeal. *State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983) (cited in Resp. Br. at 40). *Freeman*, also cited at page 40 of the response brief, similarly addressed double jeopardy arguments on the merits. *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). Furthermore, the Supreme Court has cited *Freeman* for the proposition that an appellant *may* raise a double jeopardy violation for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2007) (citing *Freeman*, 153 Wn.2d at 771) (“A double jeopardy claim may be raised for the first time on appeal”). Mr. Berniard already cited *Jackman* for this proposition in the opening brief. App. Br. at 65.

The Supreme Court has never overruled this holding from *Jackman*. Indeed, it recently reaffirmed it. *State v. Strine*, ___ Wn.2d ___, 293 P.3d 1177, 1181 (2013) (holding other issues not raised in trial court could not be raised on appeal, but that “Strine’s double jeopardy claim can be raised for the first time on appeal”); *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803, 812 (2011) (“A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal”). There is no question that Mr. Berniard has properly raised this double jeopardy violation. The State’s argument to the contrary is without merit.

- b. Mr. Bernard was convicted of both robbery and felony murder predicated on the robbery, in violation of his constitutional right to be free from double jeopardy.

On the merits, it is clear that convictions for both felony murder and the underlying felony violate the Fifth Amendment right to be free from double jeopardy. App. Br. at 65-70. Two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at 772 (citing *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)). Prosecutors may not “divide a defendant's conduct into segments in order to obtain multiple convictions.” *Jackman*, 156 Wn.2d at 749. Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates the Fifth Amendment. *Id.* In other words, entering convictions for two crimes violates double jeopardy if “it was impossible to commit one without also committing the other.” *Id.* This is the case for felony murder and the underlying felony. *Harris*, 433 U.S. 682; *Francis*, 170 Wn.2d at 522 n.2; *Orange*, 152 Wn.2d at 818.

This Court recognized as much in *State v. Williams*, 131 Wn. App. 488, 128 P.3d 98 (2006). There, this Court reversed an attempted robbery conviction where the defendant had also been convicted of felony murder

based on the attempted robbery. This Court said, “the attempted robbery count merged into the felony murder because it was the predicate offense.” *Id.* at 491-92. In other words, “the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other.” *Id.* at 498.

This Court similarly reversed predicate convictions in *State v. Fagundes*, 26 Wn. App. 477, 614 P.2d 198 (1980). There, the defendant was convicted of first-degree felony murder as well as the predicate felonies of first-degree kidnapping and first-degree rape. *Id.* at 485. This Court vacated the convictions for kidnapping and rape, noting that these convictions violated double jeopardy because proof of the underlying felonies provided essential elements of the first-degree murder. *Id.* at 485-86; *contrast Vladovic*, 99 Wn.2d at 420, 423-24 (no double jeopardy violation where convictions for both kidnapping and robbery were entered, because proof of kidnapping is not necessary to prove robbery).

The State cites *Peyton* for the proposition that convictions for felony murder and the underlying robbery do not violate double jeopardy if the robbery and homicide are “disconnected in time, place, and circumstances.” Resp. Br. at 47 (citing *State v. Peyton*, 29 Wn. App. 701, 630 P.2d 1362 (1981)). This is a dubious proposition. After all, as this

Court explained in *Williams*, if the robbery and homicide are disconnected, the defendant could not be convicted of *felony murder*:

If, as the State suggests, the jury found the attempted robbery was complete when Mr. Williams took some undefined substantial step earlier in the evening, then it could not have found that the shooting was in furtherance of ... that attempt. And the first degree murder conviction could not stand. Likewise, the State's assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge.

Williams, 131 Wn. App. at 499. In any event, unlike in *Peyton*, the decedent here was not killed after the perpetrators robbed someone else and fled the scene of the robbery. Mr. Sanders was killed by Higashi at the scene of the robbery in the course of the robbery. Higashi killed him in order to further the robbery. The perpetrators were not able to leave the house with stolen goods until after Higashi shot Mr. Sanders. This is why the defendants were charged with, and convicted of, felony murder as opposed to intentional murder. As this Court explained in *Williams*, the two convictions violate double jeopardy.

This conclusion is also mandated by U.S. Supreme Court precedent. In *Harris*, the Court held the Fifth Amendment prohibited the defendant's conviction for robbery following a conviction for felony murder predicated on robbery. *Harris*, 433 U.S. 682. The Court similarly vacated a conviction for a predicate felony in *Whalen v. United States*, 445

U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). There, the defendant was convicted of both rape and felony murder predicated on rape. *Id.* at 685-86. In vacating the rape conviction, the Court noted:

[R]esort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that “each provision requires proof of a fact which the other does not.” A conviction for killing in the course of a rape cannot be had without proving all of the elements of the offense of rape.

Id. at 693-94.

The same is true here. Mr. Berniard could not have committed felony murder without also committing the underlying robbery. *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987); *Williams*, 131 Wn. App. at 498-99; *Fagundes*, 26 Wn. App. at 485-86. Thus, his convictions for both counts one and two violate the Fifth Amendment prohibition on double jeopardy. *Harris*, 433 U.S. 682; *Orange*, 152 Wn.2d at 818; *Jackman*, 156 Wn.2d at 749. The conviction on count two should be vacated, and the case remanded for resentencing. *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2000); *Fagundes*, 26 Wn. App. at 486.

6. The convictions for robbery of Charlene Sanders and assault of Charlene Sanders violate the Fifth Amendment prohibition on double jeopardy, requiring vacation of the assault conviction.

Not only do counts one and two violate double jeopardy, counts four and five do as well. App. Br. at 74-78. “[S]ince 1975 courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing.” *Freeman*, 153 Wn.2d at 774. Indeed, there is “no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” *Id.* at 776. Furthermore, the merger doctrine precludes two convictions where an assault is committed in furtherance of a robbery. *Id.* at 778. The only exception is where the injury from the assault is “separate and distinct from and not merely incidental to” the robbery. *Id.* But in the usual case where the assault furthers the robbery, the assault conviction cannot stand. *Id.* at 779 (reversing second-degree assault conviction under double jeopardy clause because it merged with first-degree robbery conviction); *Francis*, 170 Wn.2d at 525 (vacating second-degree assault conviction under double jeopardy clause because it merged with first-degree attempted robbery conviction).

The opening brief quoted the argument the State made in its sentencing memorandum on this issue, and then explained why the State's argument was foreclosed by *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008). App. Br. at 76. Yet the State in response simply copied the same section of its sentencing memorandum verbatim. Resp. Br. at 50. It did not address *Kier*. It was apparently unable to respond to the argument in Mr. Berniard's opening brief, so instead resubmitted its response to arguments made in the trial court.⁴ For the reasons stated in the opening brief, this Court should vacate the conviction on count five and its associated enhancement. App. Br. at 74-78.⁵

7. The aggravating factors should be vacated and the exceptional sentence reversed for several independent reasons.

As explained in the opening brief, the aggravating factors should be vacated and the exceptional sentence reversed because (1) the State

⁴ Indeed, instead of addressing the fact that *Kier* requires reversal for the double jeopardy violation on counts four and five, the State claims Mr. Berniard raised an issue *he did not actually raise on appeal*, but raised only in the trial court: that convictions for counts two and three also violate double jeopardy. Resp. Br. at 47, 50.

⁵ As with the double jeopardy violation on counts one and two, Mr. Berniard argued in the alternative that counts four and five constitute the same criminal conduct for sentencing purposes. App. Br. at 78-79. Again, Mr. Berniard relies on his opening brief for this argument. The Court need not reach it as the two convictions clearly violate double jeopardy, and because a new trial is required on all counts in any event because of the other errors discussed above and in the opening brief.

presented insufficient evidence to support them; (2) the aggravating factors are unconstitutionally vague; (3) the instruction and verdict forms erroneously told the jury it could answer “yes” to the aggravating factors but not that it could answer “no”; and (4) the aggravators were improperly applied to counts for which Mr. Berniard was an accomplice. Each of these errors independently requires reversal of the exceptional sentence. App. Br. at 79-101.

First, the State presented insufficient evidence that Mr. Berniard committed the crimes with deliberate cruelty or a high degree of sophistication and planning. To prove these aggravating factors, the State was required to present evidence of conduct that did not inhere in the crimes themselves and which rendered these crimes atypical. It failed to do so. The facts used to support the deliberate cruelty aggravator were precisely the facts used to support the underlying convictions for assault and robbery. Furthermore, the State failed to present any evidence of the level of violence typically associated with such crimes. The same is true for the aggravating factor of sophistication and planning. For this factor, not only did the State fail to present evidence of atypicality, it also failed to present evidence that Mr. Berniard, as opposed to an accomplice, planned the crimes, as required to support this aggravator. App. Br. at 81-89 (citing, inter alia, *State v. Ferguson*, 142 Wn.2d 631, 647-49, 15 P.3d

1271 (2001); *State v. Strauss*, 54 Wn. App. 408, 417, 773 P.2d 898 (1989);
State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986)).

It is difficult to find the State's response to the sufficiency challenge. The only reference to it is the second to last paragraph in the brief:

Here, the evidence, as previously outlined, supported the jury's findings that the defendant acted with deliberate cruelty and participated in crimes that required sophistication and planning. The defendant used gratuitous violence on Mrs. Sanders and in terrorizing the family as a whole. The crimes required coordination and planning of four people in carrying out a well-organized strike on this family.

This conclusory statement does not address the deficiency identified in the opening brief. *See* App. Br. at 81-89.

Mr. Berniard argued in the alternative that the aggravating factors are unconstitutionally vague as applied. A statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," violates due process. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). That is the case here as there are no standards for determining whether the conduct was atypical and therefore subject to enhanced penalties. App. Br. at 89-90. The State responds by saying definitional instructions may not be challenged for the first time on appeal, but it

acknowledges that “vagueness analysis as applied to statutes” may be addressed. Resp. Br. at 62. This Court should therefore hold that the statutory aggravating factors of deliberate cruelty and high degree of sophistication or planning are unconstitutionally vague as applied. App. Br. at 89-90.

Another major error in this case was the failure to tell the jury it could find Mr. Berniard not guilty of the aggravating factors. Both the instruction and the verdict forms told the jury it could answer “yes” to the question of whether Mr. Berniard was guilty of the aggravators but not that it could answer “no”. App. Br. at 91-92. The instructions and verdicts forms constituted an unconstitutional comment on the evidence, and violated Mr. Berniard’s right to due process. App. Br. at 96-99.

The prosecutor on appeal misunderstands the issue, characterizing it as a mere *Nuñez* error. Resp. Br. at 64 (citing *State v. Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012)). As explained in the opening brief, the instructions and verdict forms here complied with neither *Nuñez* nor its predecessor, *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). App. Br. at 93-95. Under either *Nuñez* or *Bashaw*, as well as current and prior versions of the pattern instructions and verdict forms, courts were always required to tell juries they could answer “no” to the question of whether a defendant was guilty of an aggravating factor. The only confusion was

over whether they had to be unanimous to do so. In this case, however, the jury was not told it could say “no” under any circumstances – in other words, this jury was not allowed to find Mr. Berniard not guilty of the aggravating circumstances. *See* App. Br. at 91-95; CP 380-81; CP 398-409. This violates both the Fourteenth Amendment and article IV, section 16. App. Br. at 96-99.

Contrary to the State’s argument, this error was not “invited”. Mr. Berniard did not propose the instruction or verdict forms, and, as this Court has explained, “mere failure to object to an instruction proposed by the other party does not establish invited error.” *State v. Goble*, 131 Wn. App. 194, 203 n.5, 126 P.3d 821 (2005); *accord State v. Clark*, 117 Wn. App. 281, 284, 71 P.3d 224, 225 (2003) *aff’d sub nom. State v. Roggenkamp*, 153 Wn.. 2d 614, 106 P.3d 196 (2005) (“failing to object to an instruction does not constitute invited error”).

Furthermore, the State wrongly claims Mr. Berniard bears the burden of proving the error was prejudicial. Resp. Br. at 65. As explained in the opening brief, it is the *State’s* burden to prove no prejudice resulted from this constitutional violation. App. Br. at 98-99 (citing *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006); *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011)). The State does not even attempt to meet its burden to show no prejudice resulted from instructions and verdict

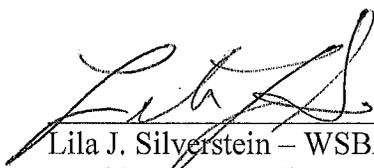
forms which did not allow the jury to answer “no” to the question of whether Mr. Berniard was guilty of the aggravating factors. The failure to do so should be deemed a concession.

C. CONCLUSION

For several independent reasons discussed above and in the opening brief, this Court should reverse the convictions on all counts and remand for a new trial. In the alternative, because of the double-jeopardy violations, Mr. Berniard asks this Court to reverse the robbery conviction on count two and its associated enhancement and reverse the assault conviction on count five and its associated enhancement, and remand for resentencing on the remaining counts. The aggravating factors and exceptional sentence should be vacated, and concurrent sentences imposed.

DATED this 26th day of March, 2013.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 42579-3-II
)	
CLABON BERNIARD,)	
)	
APPELLANT.)	

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