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

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STATE OF WASHINGTON,

Respondent,

v.

TERRY L. RUSSELL,

Appellant.

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

The Honorable, Stanley J. Rumbaugh Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion and violated the appellant's right to due process by admitting the complaining witness' identification of him because it was the result of an impermissibly suggestive or tainted photo montage and was not otherwise reliable.

2. The trial court erred in denying appellant's motion to exclude a witness's out-of-court identification of appellant.

3. Based on the totality of the circumstances, the out-of-court Identification created a substantial likelihood of irreparable misidentification.

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

1. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive photo montage violates due process. Must the appellant have a new trial where a witness's out-of-court identification of him was based on an impermissibly suggestive or tainted photomontage? Assignments of Error 1 and 2.

2. Based on the totality of the circumstances, did the out-of-court identification create a substantial likelihood of irreparable misidentification? Assignment of Error 3.

**C. STATEMENT OF THE CASE**

1. Procedural facts:

Terry Russell was charged by information filed in Pierce County Superior Court on October 11, 2016, with one count of residential burglary, contrary to RCW 9A.52.025. Clerk's Papers (CP) 3.

*a. Photomontage shown to witness Pederson*

Prior to trial, defense counsel objected to the admission of the photomontage shown to Lindsey Pederson on the grounds that it was impermissibly suggestive. 2Report of Proceedings<sup>1</sup> (RP) at 9-15, 18-21, 3RP at 41; CP 17-19. Specifically, Ms. Pederson was sent a surveillance picture of Mr. Russell provided to her by Brandon Tally, who lived next to a house where Mr. Russell had previously done construction work. The house is located in south Tacoma, five to six miles from Ms. Pederson's house. 3RP at 108. Mr. Tally told Ms. Pederson that the man in the surveillance photo was trespassing at the house and was possibly looking for houses to burglarize. Ms. Pederson told him that she thought it was the same person, and Mr. Tally contacted Tacoma police with that information.

The court denied the defense motion to suppress the montage on the basis that Ms. Pederson's previous viewing of a picture of Mr. Russell made the photomontage impermissibly suggestive such that it would deprive Mr. Russell of his due process rights. 2RP at 21. The court stated:

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<sup>1</sup>The record of proceedings consists of eight volumes, which are designated as follows: RP - September 14, 2017; RP - September 28, 2017; 1RP - January 17, 2018; 2RP - January 18, 2018, (motions in limine, jury trial); 3RP - January 22, 2018 (jury trial, day 2); 4RP - January 23, 2018, (jury trial, day 3); 5RP - January 24, 2018, (jury trial, day 4); and 6RP - January 29, 2018, (sentencing).

The photomontage is clearly admissible. I mean montages under the case law are used. The fact that there may be a cross-examination potential because of this other photograph and the fact that Ms. Pederson is alleged to have not been able to clearly identify the Facebook photograph as the Defendant, all of that, the testimony and the evidence, comes in based on what she remembers and what she testifies to, what she's asked about.

But to say per se photomontage identifications are not admissible is simply wrong. I will allow the evidence of the montage and Ms. Pederson's selection apparently of the Defendant from the five photographs presented, and we'll go from there.

2RP at 21.

The court did not review the reliability of Ms. Pederson's identification under the totality of the circumstances. 2RP at 21.

*b. Conviction and sentencing*

The case came on for jury trial on January 18 (2RP at 5-149), January 22 (3RP at 5-157), January 23 (4RP at 5-52), and January 24, 2018 (5RP at 3-9), the Honorable Stanley Rumbaugh presiding.

The jury found Mr. Russell guilty of residential burglary as charged. 5RP at 3; CP 75.

Mr. Russell was sentenced for residential burglary, and also sentenced for possession of methamphetamine, and two misdemeanor offenses obtained by plea stemming from an unrelated incident.<sup>2</sup> 6RP at 3-

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<sup>2</sup>Pierce County cause no. 17-1-03266-4.

24.

Mr. Russell had an offender score of "1" and been in custody for 155 days at the time of sentencing. during that time he entered and was the third person to complete the Pierce County Alliance Program, which counsel described as an eight week in-patient treatment program, and also chaired Alcoholic Anonymous meetings while in the jail. 6RP at 11, 13-14. Defense counsel requested a sentence of six months with credit for time served. 6RP at 12-13. The court sentenced Mr. Russell to nine months in custody followed by twelve months of community custody. 6RP at 18; CP 93. The court waived non-mandatory fees and imposed legal financial obligations consisting of a \$500.00 crime victim penalty assessment, \$100.00 DNA collection fee, and \$200.00 filing fee. 6RP at 20; CP 90.

Timely notice of appeal was filed on February 6, 2018. CP 99. This appeal follows.

**2. Trial testimony:**

Terry Russell is a self-employed general contractor. 3RP at 129. He usually subcontracts out with individual homeowners who are restoring their houses. 3RP at 129. In February 2016 he worked on a house located at 410 51<sup>st</sup> Street in Tacoma. 3RP at 129. He worked at the house for ten to fourteen days doing demolition work and removing overgrown bushes. 3RP at 130. He stated that before starting the job he walked to all the neighbor's houses and introduced himself and told them what he was doing at the

property, the time frame of the job, and when the job would be completed. 3RP at 130. All the neighbors were receptive except next door neighbor Brandon Tally. 3RP at 130. He testified that he was not aware that Mr. Tally had taken surveillance pictures of him while he was working at the property. 3RP at 131.

He was working on the house on 51<sup>st</sup> Street in south Tacoma in February, 2016. 3RP at 132, 133. He stated that on Monday, February 1, 2016 he would have been “tearing down the structure” he described on 51<sup>st</sup> street in south Tacoma. 3RP at 133.

Before the project on 51<sup>st</sup> Street was completed, Mr. Russell moved on to another house project located in Graham, Washington. 3RP at 131, 132.

Lindsey Pederson lives with her father, step-mother and step-brother at 1702 North Pine Street in Tacoma. Ms. Pederson had gone to visit her mother in Seattle, and returned to her father’s and stepmother’s house on North Pine Street in Tacoma on February 1, 2018 at 11:40 a.m. 3RP at 12-13. Her father and step-mother were at work and her step-brother was at school when she returned to the house. 3RP at 13. She parked to the left of the house in her “normal parking spot,” used her phone for a few minutes, and then decided to drive to a nearby convenience store for snacks. 3RP at 13. She backed out of the parking place and then drove down North Pine Street, and as she did, passed a Toyota van driving the other direction. 3RP at 15. The street is narrow and the van’s driver had pulled over to let her pass,

and as she did she waved to the driver. 3RP at 13. She noticed a person in the passenger seat of the van. 3RP at 15.

After returning from the convenience store, she noticed the same van was parked in her father's usual parking spot, which is located to the right of the house. 3RP at 16. Ms. Pederson thought that a person visiting a neighbor had parked in the spot. 3RP at 16-17. He got her backpack and as she walked inside the house she noticed that the van's engine was running. 3RP at 17. The front door of the house was locked, and as she looked through a window she could see that a French door at the back of the house was partially open. 3RP at 17. The family does not leave the house unlocked, so she knew that something was wrong. 3RP at 18. She unlocked the front door went into the house and saw that the French door that was open was shattered by a hole above the door handle. 3RP at 19. She heard footsteps upstairs and said "hello." 3RP at 21. She heard more footsteps and she said "hello" a second time. 3RP at 21. She went out the front door to get back in her car, and as she went down the porch, a man jumped off the roof of the porch and landed on his side on the ground and then looked at her. 3RP at 22. The man, who was wearing black, mismatched gloves, a black beanie, dark pants and a dark or black sweatshirt, immediately got up after landing on his side and ran to the running van. 3RP at 22. The man got in the driver's seat and backed out of the driveway. 3RP at 24. Ms. Pederson saw a blond woman "scrunched down" in the passenger seat. 3RP at 24. Ms. Pederson took out her cell phone

and started taking pictures of the van as it was backing down the driveway and down North Pine Street. 3RP at 24. Exhibits 8, 9, and 10.

Because of glare on the windshield, she was not able to photograph the people in the van, and she did not see a license plate on the front of the vehicle. 3RP at 25.

The van backed up Pine Street and then backed around a corner, out of Ms. Pederson's sight. 3RP at 26. As the van was backing up, it hit a neighbor's car parked on the street. 3RP at 26, 27.

Ms. Pederson called her father at work and after he got to the house they both waited for the police, who arrived two hours later. 3RP at 28, 30. They went inside the house and saw that in the upstairs master bedroom that jewelry had been removed from a dresser and side table drawer and put on the bed. 3RP at 29, Exhibit 6.

Ms. Pederson's step-brother's room is located upstairs and a window looks out on the roof above the front porch. 3RP at 22. Later she saw that the window screen was on the roof and the window to her step-brother's room was open. 3RP at 22-23.

Eric Pederson, Lindsey Pederson's father, stated that the doors to the house were locked when he left for work the morning of February 1, 2016. 3RP at 80. He stated that when he went upstairs, he saw the master bedroom had drawers taken out of the dresser and valuables—mostly jewelry—were placed on the bed. 3RP at 82, 83.

While waiting for police to arrive, Ms. Pederson posted a picture of the van on Facebook. 3RP at 31.

Tacoma Police Officer Rick Hutchinson testified that he was dispatched to the house regarding a burglary report at 11:52 a.m., but was delayed due to an unrelated shooting incident. 3RP at 95.

Ms. Pederson gave a statement to police and also emailed the pictures she had taken of the van. 3RP at 33.

One or two days later she was contacted by Brandon Tally, who sent a picture of a male and asked if the man who jumped off the porch roof looked like the man in the picture. 3RP at 31. Ex. 11. Ms. Pederson testified that she was “pretty positive” that the picture was of the man she saw at the house and that “[r]ight away my gut instinct was that was him, that was the guy that I saw laying in front of me.” 3RP at 31, 32. Ms. Pederson stated that she was “pretty close to him” when the man jumped off the porch roof and landed on the ground. 3RP at 47. She acknowledged in her written statement to police that he was 40 feet from her. 3RP at 47. She stated at trial, however, that she was “not good judging lengths” and that he was “pretty close.” 3RP at 47.

Tacoma Police Detective Christine Coulter was contacted by Brandon Tally on February 2, 2016 regarding the burglary at the Pederson house. 3RP at 101. Mr. Tally gave Detective Coulter the name “Terry Russell” as a potential suspect in the burglary and emailed pictures of the suspect. 3RP at

101, 108. The surveillance pictures provided by Mr. Tally were taken in connection with the house located at 410 South 51st Street in south Tacoma, located next to Mr. Tally's house. 3RP at 108, 120. Mr. Tally also sent the detective photos of a Nissan Sentra that he told police was associated with Mr. Russell. 3RP at 108. The house at 410 South 51st Street is five to six miles from the Pederson's house in north Tacoma. 3RP at 108.

After receiving the information from Mr. Tally, Detective Coulter prepared a photomontage which she showed to Lindsey Pederson on February 25, 2016 after she read an admonition regarding the photomontage. 3RP at 34, 102. Exhibits 12 and 13. Detective Coulter stated that Ms. Pederson picked the upper left photo, Terry Russell, as the person at the house and signed the montage. 3RP at 105.

Ms. Pederson eliminated pictures No. 3 through No. 6 of the montage, leaving No. 1 and No. 2. 3RP at 58. Ms. Pederson picked picture No. 1 from the photomontage, and in her written statement to police she said that she was one hundred percent positive that the person she picked was the man she saw at the house. 3RP at 45. She identified Mr. Russell in court as the man who fell off the porch roof of the house. 3RP at 45.

Ms. Pederson stated that the hair of the person who jumped off the roof in front of her was "a darker color" or brownish hair. 3RP at 23, 50. At trial, however, it was noted that Mr. Russell's hair was "[k]ind of sandy blond." 3RP at 122.

Ms. Pederson testified that she looked at the picture provided to her on Facebook “once or twice” and that she “didn’t look at it for very long.” 3RP at 46. She stated that the man who provided the picture gave her the name Terry Russell, and she stated that she was not familiar with that person. 3RP at 46. Detective Coulter stated that it took less than a minute or “probably about a minute” for Ms. Pederson to select the photograph on the upper left. 3RP at 116, 117.

Mr. Russell denied committing the burglary and denied being in the area. He did not have a car and often relied on the homeowner of the house he was working on for transportation if he needed a ride. 3RP at 134. He stated that he did not receive a ride in a minivan in February, 2016 and that a friend, Anastasia, from whom he gets rides, has a Nissan Sentra but does not have a van. 3RP at 134-35. He testified that he “believe[d] there’s a chance” that he received a ride from his father’s house in Tacoma to work at the house in south Tacoma from Anastasia on February 1, 2016. 3RP at 135. He stated that there was no reason for him to have gone with Anastasia to north Tacoma. 3RP at 136. He denied knowing where the Pederson house was located, denied ever having seen the Pedersons and denied breaking into their house. 3RP at 136. He denied dyeing his hair or changing his facial hair. 3RP at 137. Mr. Russell stated that he was not at the house at 51<sup>st</sup> street in 2015, but did remember driving by the house in December 2015 with the owner prior to starting that job in February 2016. 3RP at 139. During the job, Mr. Russell

lived in another project house that was located nearby. 3RP at 142.

**D. ARGUMENT**

**1. THE IMPERMISSIBLY TAINTED  
PHOTOMONTAGE DENIED MR.  
RUSSELL HIS RIGHT TO DUE  
PROCESS.**

Defense counsel moved in limine to exclude Ms. Pederson's identification of Mr. Russell in the photomontage and to her subsequent in-court identification of Mr. Russell. 2RP at 6-7, 9-16, 21-22; CP 17-19. After the incident, Ms. Pederson posted the pictures she took of the van on Facebook. 3RP at 31. Mr. Tally sent Ms. Pederson a picture of Mr. Russell one or two days later. 3RP at 31. After looking at the picture proved by Mr. Tally, she stated that "[r]ight away my gut instinct" was that the man in the picture was the man who jumped off the porch roof. 3RP at 31. She stated that she was "pretty positive" that it was the same person. 3RP at 32. This occurred approximately three weeks before she identified Mr. Russell in the photomontage as the person who jumped off the porch roof of the house on February 1, 2016. 3RP at 32, 33. At trial, Ms. Pederson identified Mr. Russell in court as the person she saw jump off the roof on February 1, 2016. 3RP at 45.

Defense counsel argued the identification by Ms. Pederson was tainted because the picture of Mr. Russell from the surveillance camera was

posted by Mr. Tally, who stated that he believed that Mr. Russell was “trespassing or burglarizing” or was otherwise involved in wrongdoing at the house next to Mr. Tally’s house. 2RP at 7. Defense counsel argued that the photomontage was impermissibly suggestive because Ms. Pederson previously viewed the picture of Mr. Russell and was told by Mr. Tally that Mr. Russell was involved in criminal activity. 2RP at 7.

The trial court denied the motion to exclude the photomontage and testimony regarding Ms. Pederson’s selection of Mr. Russell as the person she saw jump off the roof. 2RP at 21-22. The trial court erred by admitting the photomontage from which Ms. Pederson identified Mr. Russell as the person she saw at the house.

*a. Standard of review*

This court reviews a trial court’s decision on whether to admit an out-of-court identification for abuse of discretion. *State v. Kinard*, 109 Wn.App. 428, 432, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002).

*b. The photomontage was unduly suggestive.*

Impermissibly suggestive out-of-court identification procedures violate due process where there is a substantial likelihood of irreparable misidentification. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); U.S. Const. amend. XIV; Const. art. I, § 3. An out-of-

court identification of a suspect using a photomontage violates a defendant's right to due process if the procedure was “so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (quoting *State v. Linares*, 98 Wn.App. 397, 401 989 P.2d 591 (1999)). Due process concerns arise in the context of an eye witness identification only when an identification procedure is both suggestive and unnecessary. *State v. Sanchez*, 171 Wn.App. 518, 573, 288 P.3d 351 (2012). An out-of-court court photographic identification meets due process requirements if it is not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wash.App. 397, 401, 989 P.2d 591 (1999) (citing *State v. Vaughn*, 101 Wash.2d 604, 682 P.2d 878 (1984)), review denied, 140 Wash.2d 1027, 10 P.3d 406 (2000); *State v. Weddel*, 29 Wash.App. 461, 476-77, 629 P.2d 912 (1981).

To determine whether a photomontage identification is admissible, courts employ a two-step test to determine whether a photographic identification violated due process and, accordingly, should have been suppressed. *State v. Kinard*, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). The accused must first show the identification procedure was suggestive. *Linares*, 98 Wn. App. at 401. If the defendant carries this burden, the court must then

consider, 'based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.' *Vickers*, 148 Wn.2d at 118. *Linares*, 98 Wn. App. at 401.

To establish that a photomontage was impermissibly suggestive, the defendant must show that the montage directed undue attention to a particular photograph. *State v. Eacret*, 94 Wn.App. 282, 283, 971 P.2d 109 (1999).

Generally, courts have found out-of-court identifications to be impermissibly suggestive when the defendant is the sole possible choice given the witness's earlier description. *State v. Ramirez*, 109 Wn.App. 749, 761, 37 P.3d 343 (2002). If the defendant fails to meet the initial burden of showing the out-of-court identification was impermissibly suggestive, the inquiry ends. *Id.*

If the defendant demonstrates the identification procedure is impermissibly suggestive, the court must proceed to the second part of the inquiry and determine whether, under the totality of the circumstances, the identification contained sufficient indicia of reliability despite the suggestiveness. *Vickers*, 148 Wn.2d at 118. Washington utilizes the *Biggers* test to determine the admissibility of an identification. *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *Vickers*, 148 Wn.2d at 118; *State v. Maupin*, 63 Wn.App. 887, 897, 822 P.2d

355, review denied, 119 Wn.2d 1003 (1992).

The *Biggers* factors include: (1) the witness's opportunity 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. *Biggers*, 409 U.S. at 193. See also *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

*c. The montage procedure was impermissibly suggestive.*

Here, Mr. Russell moved to suppress the photomontage on the grounds that it was suggestive due to Ms. Pederson having previously viewed a picture of Mr. Russell and being told by Mr. Tally that he was involved in criminal activity, including burglary and was therefore unreliable.

The defense challenge to the photomontage itself is not precluded by this Court's ruling in *State v. Knight*, 46 Wn. App. 57, 59, 729 P.2d 645 (1986). In *Knight*, a private citizen who was the victim of a burglary showed a witness photographs of man he suspected had committed the burglary. One of the witnesses identified the defendant. Later the police showed the same witness an array of five photographs, including the defendant. Court's admission of the testimony of 12-year-old Mike, arguing that his eye witness identification of Knight at trial was "tainted by an impermissibly suggestive viewing of a

photograph of appellant prior to any properly conducted pre-trial identification procedure.” *Knight*, 46 Wn.App. at 59. This Court held that the suggestive nature of a pretrial identification does not invalidate a later in-court identification where the pretrial identification did not involve any State action and was, therefore, proper evidence. and that the question of whether the testimony was a matter of witness credibility. *Knight*, 46, Wn.App. at 60.

*Knight* therefore leaves the ability to challenge to the photomontage itself undisturbed.

Ms. Pederson’s identification was not otherwise reliable given the fact she had previously been shown the picture of Mr. Russell and one or two days after the burglary. Ms. Pederson testified that she has a “gut instinct” that the man in the picture sent by Mr. Tally was the same man, and three weeks later was “pretty positive” the picture in the montage was the person she saw at the house. 3RP at 44.

The inescapable conclusion is that Ms. Pederson’s viewing of the picture sent to her by Mr. Tally and being informed that he was involved in criminal activity ultimately influenced her selection of Mr. Russel’s picture in the montage.

*d. Based on the totality of the circumstances, there was a substantial likelihood of misidentification.*

In this case, the totality of the circumstances creates a substantial

question about the reliability of Ms. Pederson's pretrial identification. Because the photomontage procured was suggestive or tainted by previously seeing a picture of Mr. Russell, this Court must consider the five factors described above in determining whether the suggestiveness created a substantial likelihood of irreparable misidentification.

**i. Opportunity to view**

In this case, the totality of the circumstances creates a substantial question about the reliability of Ms. Pederson's identification. First, her opportunity to observe the man who jumped off the porch roof was of a very brief duration, not more than one to two seconds. 3RP at 23, 49. The man jumped from the roof, landed on the ground on his side, looked at her and then "immediately bolted" to the waiting van. 3RP at 22. She was able to only describe him as being about 5'8" in height, and that he had "darker" haired and that it was not blond. 3RP at 23.

**ii. Degree of attention**

Ms. Pederson testified that he looked at her before running to the van. She was undoubtedly startled by the man unexpectedly jumping from the roof and landing in front of her.

**iii. Accuracy of prior description**

Ms. Pederson gave a very vague description of the man she saw on

February 1: 5'8", brownish hair, wearing dark clothes, a black beanie, and mismatched gloves. 3RP at 23, 49-51. Ms. Pederson told police that the man was 40 feet from her. 3RP at 47. At trial, it was determined that Mr. Russell had "sandy blond" hair and that the man was closer than 40 feet to her when he jumped off the roof. 3RP at 47, 122.

This lack of detail and extreme shortness of the time during which Ms. Pederson had to view the man suggests a substantial likelihood of misidentification.

**iv. Certainty of identification**

Ms. Pederson's certainty of correct identification became eroded over time. She wrote on her admonition provided to police on February 25, 2016 that she was "100 percent" sure that the picture she picked in the montage was the man at the house. However, by the time of trial she stated that she was "pretty positive" that she had picked the right person. 3RP at 44-45.

**v. Length of time between crime and identification**

Ms. Pederson identified Mr. Russell in the photomontage as the man she saw more than three weeks after the burglary. Given the likelihood of excitement and state of agitation when the crime occurred, and considering the very short time period--one or two seconds-- that Ms. Pederson had to view the man before he ran to the van, three weeks was enough time for to either forget

or misjudge the person's facial characteristics.

In sum, the impermissibly suggestive photomontage tainted the identifications that followed. Considering the *Biggers* factors, the tainted identification created a substantial likelihood of irreparable out-of-court identifications by Ms. Pederson and was therefore improper. Had the court properly examined the circumstances of the identification procedure, the identification would have been excluded.

As has been argued above, Ms. Pederson was shown by Facebook posting by Mr. Tally an image of the person the police believed to be the person who jumped off the porch roof prior to being shown the photo montage on February 25. The posting of Mr. Russell's image and being named as a suspect by Mr. Tally undoubtedly influenced his identification of Mr. Russell as the burglar, thus tainting the identification. Further, there was no independent evidence which would cause Ms. Pederson to identify the man she saw at her house except for the montage. The photomontage was impermissibly suggestive and under the totality of the circumstances, there existed a substantial likelihood of irreparable misidentification in violation of Mr. Russell's right to due process. Reversal is only appropriate remedy.

*e. The error was not harmless beyond a reasonable doubt.*

The State bears the burden to prove constitutional errors harmless

beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot meet its burden. The trial court's error was not harmless given the nature of the evidence in this case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69; 39 P.3d 294 (2002).

Here, Ms. Pederson's out-of-court identification was not only a critical piece of the State's evidence linking Mr. Russell to the crime—it was the sole evidence against him. The State relied on the witness identification almost exclusively in closing argument. 6RP at 18-20, 43-48. No fingerprints, DNA, or other forensic evidence linked Mr. Russell to the crime. The van used in the escape was not linked to Mr. Russell or any person associated with Mr. Russell. The identification evidence was the sole evidence against Mr. Russell; therefore the admission of the montage and Ms. Pederson's identification of Mr. Russell as the man she saw was not trivial.

This Court should reverse Mr. Russell's conviction and remand for a new trial with instructions to exclude Ms. Pederson's out-of-court and in-court identifications because they violate due process.

## **E. CONCLUSION**

The court's failure to exclude the tainted out-of-court identification procedure requires reversal and remand and the identification must be suppressed. Because it was the State's sole evidence linking Mr. Russell to the crime, Mr. Russell's conviction must be reversed.

DATED: August 23, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM  


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Of Attorneys for Terry Russell

CERTIFICATE OF SERVICE

The undersigned certifies that on August 23, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Ms. Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

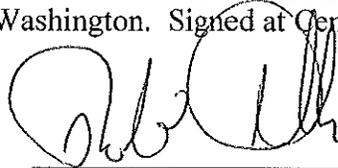
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 23, 2018.



PETER B. TILLER

**THE TILLER LAW FIRM**

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