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NO. 52752-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

COURTNEY PROSSER,  
Appellant.

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

The Honorable Gregory M. Gonzales, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the elements of Robbery in the First Degree and the accompanying deadly weapon enhancement because the victim of the robbery testified during trial that Mr. Prosser was not the perpetrator.
2. The state violated Mr. Prosser's Due Process rights when it offered into evidence an unreliable out-of-court identification that was impermissibly suggestive.
3. The warrant authorizing a search of Mr. Prosser's cell phone was overly broad in violation of the particularity requirement under the Fourth Amendment and Wash. Const. art. I, § 7.
4. The trial court erred when it imposed a \$100 Crime Lab fee as part of Mr. Prosser's sentence despite finding him indigent.

### Issues Presented on Appeal

1. Did the state present sufficient evidence to prove the beyond a reasonable doubt the essential elements of Robbery in the First Degree and the presence of a deadly weapon when the victim testified at trial that Mr. Prosser was not the perpetrator?
2. Did the state violate Mr. Prosser's Due Process rights by offering an impermissibly suggestive out-of-court identification?
3. Did the trial court abuse its discretion when it admitted evidence found on a cell phone that was seized during the execution of a search warrant that lacks constitutionally required particularity and is overbroad?
4. Did the trial court err when it imposed a \$100 Crime Lab fee as part of Mr. Prosser's sentence while also finding him indigent?

#### B. STATEMENT OF THE CASE

##### a. Substantive Facts

Anthony Cavallo was driving home to Kirkland after a trip to

Portland, Oregon with his two daughters when he stopped at the Gee Creek Rest Stop, which is located approximately 15 miles north of the Washington-Oregon border. RP 209-12. Mr. Cavallo parked and walked to the restroom, leaving his two daughters in the car. RP 213. When Mr. Cavallo walked back toward his car, a black male approached him and said, "give me your fucking wallet." RP 217.

Mr. Cavallo noticed that the man was holding a knife in one of his hands, and also noticed a black object in his other hand that Mr. Cavallo thought might have been a gun. RP 217-18. The man kept both of his hands at his side during the confrontation and did not raise or point either object at Mr. Cavallo. RP 217-18.

Mr. Cavallo pulled about \$30 in cash out of his pocket and offered it to the man. RP 218. The man waved the cash away and repeated his demand for Mr. Cavallo's wallet. RP 218. At some point during this confrontation, Mr. Cavallo set his personal cell phone on the roof of his car. RP 219. His daughters heard the unidentified man demand Mr. Cavallo's wallet from inside the car and ran out the passenger's side while yelling for someone to help or call the police. RP 220. The man grabbed Mr. Cavallo's cell

phone off the car and walked back to his silver Mercedes. RP 220-21.

Mr. Cavallo called 911 from his business cell phone as he followed the man out of the rest area. RP 223. Mr. Cavallo reported that the suspect drove north on Interstate 5 before exiting near the city of La Center. RP 189. Mr. Cavallo also reported that someone from the Mercedes threw an unidentified black object out the passenger's side window onto Interstate 5. RP 224.

Officer Gregory McDonald of the La Center Police Department responded to the 911 dispatch by parking near La Center. RP 188-89. After waiting for 5-10 minutes, Officer McDonald observed a silver Mercedes matching the description provided by dispatch approaching his location. RP 190. Officer McDonald observed a passenger and a black male driver. RP 190-91.

The driver of the Mercedes turned down a dead-end road in La Center and eventually pulled into the parking lot of a bank. RP 192-94. Officer McDonald blocked the driveway to the parking lot with his patrol car and activated its emergency lights. RP 194. Officer McDonald ordered the driver to turn the Mercedes off. RP

195. The driver complied and then began to exit the vehicle. RP 195. As he was exiting the vehicle, the driver shouted, "what's this all about?" RP 196. Officer McDonald told the driver to place his hands on the roof of the car and waited for more officers to arrive. RP 196. The man complied and several other police officers arrived on the scene. RP 196-97.

Deputies from the Clark County Sheriff's Office took the suspect into custody and identified the suspect as Courtney Prosser. RP 296. They also identified two passengers inside the Mercedes as Mr. Prosser's children, ages 6 and 12. RP 177, 181. Sergeant Nelson of the Clark County Sheriff's Office contacted the younger child and observed a glass pipe hanging out of his left front pocket. RP 178. Sergeant Nelson seized the pipe and held it as evidence. RP 180.

Residue in the pipe tested positive for methamphetamine. RP 324. Deputy Billy Childers contacted the older child and detained him in handcuffs. RP 272-73. Deputy Childers discovered a knife in the child's front pocket during a pat search that was seized as evidence. RP 273.

i. Search Warrant

Detectives acquired a search warrant for the Mercedes. RP 334. During the execution of this warrant, police seized a cell phone that was found on the passenger's seat, a child's backpack with the email address "prosser.courtney@yahoo.com" written on its identification tag, and mail addressed to a woman named Jennifer Christensen. RP 341-45.

The warrant authorized police to search the Mercedes and seize: personal property and "[c]ellular telephones and their electronically stored memory, as well as other storage or media devices, SD cards, and other digital media containing number, photographs, and other information identifying sources and co-conspirators" or tending to establish "identity, dominion, and control" of the vehicle. CP 18-19.

Mr. Prosser moved to suppress the text messages found on the cell phone seized during the search of the car, arguing they were the fruits of an overbroad search warrant and could not be authenticated. The court held the warrant was valid and denied the motion to exclude ruling that Mr. Prosser's did not have standing to challenge the search of the stolen vehicle or the cell phone.

Mr. Prosser claimed a constitutional right of privacy in the stolen Mercedes and the items contained therein. As noted in *State v. Samalia*, the court specifically stated the defendant “had no privacy interest in the stolen vehicle because it was stolen.” Here, the evidence to support a finding that the vehicle was stolen came from Detective Yakhour.

Detective Yakhour’s search warrant affidavit stated the VIN number of the Mercedes-Benz was processed “through an NCIC check by Dispatch, [and] it was discovered that the vehicle was confirmed STOLEN VEHICLE. Thus, the defendant lacked the requisite standing to claim he had a constitutional privacy interest in the car and the contents therein. His challenge to suppress the evidence found in the vehicle and cell phone must be denied.

CP 77-78.

The police performed a forensic search of the cell phone found in the car and extracted text messages and photographs from its storage. RP 350, 358-59. The police found several text messages in an application called “TextNow” that were admitted at Mr. Prosser’s trial. Ex. 38; RP 362. The profile that sent these messages was listed in the application as “BashGang,” but several messages sent from this profile also identified the sender as “Courtney.” RP 359-60. The content of several messages is as follows:

- March 14: "I got an '08 Benz w no title for sale."
- March 14: "I stole the goddamn car, Jennifer. Do I got to spell it out for you? Are you serious?"
- March 14: "Hell no lol I didn't know where to go and wanted to get away from Everett."
- March 14: "I stole the fucking car. It's stolen. We riding dirty in a stolen car."
- March 15: "But yeah, if you got any partners who fuck with shit like the Benz, I just want \$2,500 for it."
  - The recipient replied: "Yeah, I do. What year, make and model is it?"
  - BashGang replied: "'08 C300 Mercedes, 160 miles."
- March 17: "I'm in Portland now. I got a MF for an '08 Benz, full tank"
- March 17: "Seven days, no shower, stolen car."

Ex. 38; RP 363-66.

Police searched the roadside along Interstate 5 where Mr. Cavallo claimed he had seen a black object thrown from the passenger's side window but were unable to find anything of evidentiary value in this area, and never located a gun on Mr. Prosser's person, in the car, or along the road. RP 197-98. From a substantial distance away, through tinted windows, Mr. Cavallo believed, but was uncertain that the driver was the man who had robbed him. RP 225-26, 239.

ii. Identification

During trial, Mr. Cavallo testified that Mr. Prosser did not match the appearance of the man who had approached him with a knife at the rest area. RP 216-17. To address this deficiency in the evidence, the state sought to admit Mr. Cavallo's statement of identification from the scene through Deputy Andrew Kennison's testimony. RP 255-58. Mr. Cavallo objected to the admission of this testimony under ER 613(b). RP 255. The trial court ruled that the statement was admissible as a prior statement of identification under ER 801(d)(1)(iii). RP 257-58.

[PROSECUTOR]: All right. And when the person approached you, did you take a look at him?

[MR. CAVALLO]: Yeah.

[PROSECUTOR]: And what did he look like?

[MR. CAVALLO]: It was an African American, kind of darkish skin, yeah.

[PROSECUTOR]: Had you ever seen – met that man before?

[MR. CAVALLO]: I have not, no.

[PROSECUTOR]: Okay. Is it the same man here in court today?

[MR. CAVALLO]: To tell you the truth, to the best of my knowledge, that does not look like him.

[PROSECUTOR]: Did he look a little bit different at the time?

[MR. CAVALLO]: To the best of my knowledge, that's not him.

RP 216-17. Defense counsel followed up on this point during cross-examination of Mr. Cavallo:

[DEFENSE COUNSEL]: Okay. And again, to the best of your knowledge, the man sitting to my left here is not the same person as the one who robbed you?

[MR. CAVALLO]: To the best of my knowledge, no, definitely not. And honestly that face, that burned in my memory.

RP 241. Mr. Cavallo could not identify Mr. Prosser. Id.

Mr. Cavallo elaborated on the reasons why an identification was difficult:

[DEFENSE COUNSEL]: Okay. And you made your identification through tinted windows?

[MR. CAVALLO]: I did, yes. It was tinted windows in a – like a pick-up truck. Very tinted windows.

[DEFENSE COUNSEL]: And –

[MR. CAVALLO]: And it was from a really – really good distance.

[DEFENSE COUNSEL]: Can you estimate, and maybe you can use a reference point in the courtroom, if you'd like.

[MR. CAVALLO]: I was thinking, honestly, about anywhere from – I'd say about 200 feet . . . about 2/3s of a football field. Yeah, 200 feet.

[DEFENSE COUNSEL]: So you made the identification through 2/3s of a football field through tinted windows?

[MR. CAVALLO]: So about 200 feet, yeah. That's a guesstimate; that's like a little estimate, guesstimate. That's not for sure.

[DEFENSE COUNSEL]: Okay. And –

[MR. CAVALLO]: But it was quite a distance, yes.

RP 239. Mr. Cavallo also testified that Mr. Prosser was the only suspect viewed. RP 239.

At the conclusion of the evidence, Mr. Prosser moved for a directed verdict on the Robbery in the First Degree charge based on Mr. Cavallo's inability to identify him as the perpetrator, and also asked the court to dismiss the deadly weapon enhancement due to insufficient evidence. RP 366-67. Mr. Prosser also moved for a directed verdict on the Possession of a Controlled Substance charge on the basis that the pipe was not seized from his person. RP 367-68. The trial court denied all of Mr. Prosser's motions. RP 372-74.

b. Procedural Facts

The state charged Mr. Prosser with one count of Robbery in the First Degree, one count of Possession of a Stolen Vehicle, and

one count of Unlawful Possession of a Controlled Substance. CP 4-

5. Mr. Prosser elected to proceed to a jury trial. RP 34.

The jury found Mr. Prosser guilty on all counts and answered “yes” on the special verdict form regarding the deadly weapon enhancement. CP 206-09. RP 489. Mr. Prosser filed a timely notice of appeal. CP 253.

### C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. PROSSER TOOK MR. CAVALLO’S PROPERTY BY THREAT OF FORCE WHEN MR. CAVALLO TESTIFIED THAT MR. PROSSER WAS NOT THE PERPETRATOR OF THE ROBBERY

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v.*

*Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

As charged in this case in count 1, Robbery in the First Degree, required the State to prove beyond a reasonable doubt that: Mr. Prosser, with intent to commit theft, did unlawfully take personal property of another: a cell-phone, by use or threatened use of force, violence, or fear of injury, that was used to obtain possession of the cell phone, and Mr. Prosser was armed with or displayed a deadly weapon during the commission of these acts. RCW 9A.56.200(1). CP 4.

a. Insufficient Evidence Armed with Deadly Weapon

The police did not retrieve a weapon from Mr. Prosser or in the area where Mr. Prosser traveled. RP 197-98. Furthermore, Mr. Cavallo's testimony was inconclusive regarding what the suspect had in his hands at the rest area:

[DEFENSE COUNSEL]: And so this guy approached you and he had a gun in one hand and a knife in the other?

[MR. CAVALLO]: To the best of my knowledge. I'm not 100%, no.

[DEFENSE COUNSEL]: Can you describe what the gun – or what you thought was the gun – looked like?

[MR. CAVALLO]: They both were black objects, I believe. Like I said, I'm not 100%.

...

[DEFENSE COUNSEL]: Okay. And how confident – Let me take them one by one. How confident are you about the gun?

[MR. CAVALLO]: I'm not 100% sure on either.

[DEFENSE COUNSEL]: Can you put a percentage of confidence on it?

[MR. CAVALLO]: It's really hard for me to do so. I'm just not certain on either one.

[DEFENSE COUNSEL]: Maybe if you could put it maybe less than 50% or more than 50% sure?

[MR. CAVALLO]: If I have to give one, I'd probably just say like 50/50 or something. But I – it's really hard for me to do so. I'm – but I'm just not 100% on either one.

[DEFENSE COUNSEL]: Okay. And when you say 50/50, do you mean just as to the gun or as to both?

[MR. CAVALLO]: Both.

RP 230-31.

Mr. Cavallo's testimony established that the suspect was holding two black objects in his hands when the suspect demanded Mr. Cavallo's wallet. Even viewing this evidence in a light most favorable to the State, it is insufficient to establish beyond a reasonable doubt that Mr. Prosser approached Mr. Cavallo with a

gun and knife at the rest area. Mr. Cavallo is the only witness who testified about these objects and he was not even sure they were weapons. The record is insufficient for a trier of fact to conclude Mr. Prosser was armed with a weapon during the commission of the charged crime, and the evidence fails to establish that the knife seized from Mr. Prosser's son matched the object Mr. Cavallo saw in the suspect's hand.

b. Insufficient Evidence Mr. Prosser the Perpetrator

Identity is an element of the crime charged, which the state was required to prove beyond a reasonable doubt. *State v. Huber*, 129 Wn. App. 499, 501, 119 P.3d 388 (2005), (citing *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974)).

First Degree Robbery requires proof beyond a reasonable doubt both the identity of the perpetrator who took or attempted to take property, and his or her intent to deprive. *State v. Molina*, 83 Wn. App. 144, 147, 230 P.2d 1228 (1996); RCW 9A.56.190. 200. "To satisfy the elements of robbery, the defendant must take the property from the owner or someone who has dominion or control over it." *Molina*, 83 Wn. App. at 147.

During the state's case-in-chief, Mr. Cavallo, the only

eyewitness to the robbery, denied that Mr. Prosser was the perpetrator. RP 241. The State's response to this testimony was to offer an out-of-court identification, a "show-up", where Mr. Cavallo from 200 feet away, through tinted windows, saw an African American suspect. RP 225-26, 238-39, 241.

Mr. Cavallo could not identify Mr. Prosser as the suspect, but Deputy Kennison testified he believed Mr. Cavallo seemed certain about his identification. RP 225-26, 238-39, 259-60. Ultimately, Mr. Cavallo testified at trial that Mr. Prosser was not the man who took his phone at the Gee Creek Rest Area on March 18, 2018. RP 216-17.

Without evaluating the credibility of the witnesses, the testimony from Mr. Cavallo, the eyewitness, affirmatively provides that Mr. Prosser was not the perpetrator, and Deputy Kennison's mistaken interpretation of Mr. Cavallo's earlier statements does not establish beyond a reasonable doubt that Mr. Prosser was the perpetrator. Under these circumstances, even viewing this evidence in a light most favorable to the state, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Prosser was the perpetrator.

The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Prosser's conviction for Robbery in the First Degree and remand for dismissal with prejudice.

2. THE TRIAL COURT ERRED WHEN IT ADMITTED TEXT MESSAGES SEIZED PURSUANT TO A SEARCH WARRANT THAT LACKED PARTICULARITY AS TO THE EVIDENCE TO BE SEIZED

Cell phones are 'private affairs' under article I, section 7 of the Washington State Constitution, requiring a warrant or an applicable exception for a lawful search. *State v. Samalia*, 186 Wn.2d 262, 268, 375 P.3d 1082 (2016). The Fourth Amendment to the United States Constitution requires a warrant to describe with particularity the things to be seized. *State v. Higgins*, 136 Wn. App. 87, 91, 147 P.3d 659 (2006).

This requirement exists to "make a general search 'impossible and prevent the seizure of one thing under a warrant describing another.'" *State v. McKee*, 3 Wn. App. 2d 11, 22, 413 P.3d 1049 (2018) *reversed on other grounds*, 438 P.3d 528 (2019)

(quoting *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927) (rev'd on other grounds)). The degree of particularity depends on the nature of the materials sought and the facts of the case. *State v. Keodara*, 191 Wn. App. 305, 313, 364 P.3d 777 (2015). "In general, Washington courts have recognized that the search of computers or other electronic storage devices gives rise to heightened particularity concerns." *Keodara*, 191 Wn. App. at 314.

This heightened particularity arises because advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." *United States v. Galpin*, 720 F.3d 436, 446 (2nd Cir. 2013). "A properly issued warrant 'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." *Keodara*, 191 Wn. App. at 314 (quoting *State v. Askham*, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004)). An overbroad warrant lacks the requisite particularity. *Keodara*, 191 Wn. App. at 312.

Three factors assist in determining whether a warrant suffers

from overbreadth:

(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

*Higgins*, 136 Wn. App. at 91-92 (*internal quotation marks omitted*)

(*quoting United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004)).

Courts evaluate search warrants “in a commonsense, practical manner, rather than in a hypertechnical sense.” *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992) (*citing United States v. Turner*, 770 F.2d 1508, 1510 (9th Cir. 1985) *cert. denied*, 475 U.S. 1026 (1986)).

“The underlying measure of adequacy in a description is whether, given the specificity of the warrant, a violation of personal rights is likely.” *Keodara*, 191 Wn. App. at 313. “A search warrant must be definite enough that the executing officer can identify the property sought with reasonable clarity and eliminate the chance that the executing officer will exceed the permissible scope of the search.” *McKee*, 3 Wn. App. 2d at 28-29.

A warrant is overly broad when it permits a complete

“physical dump” of the cell phone’s contents. *Id.* Appellate courts review de novo a trial court’s probable cause and particularity determinations on a motion to suppress. *Keodara*, 191 Wn. App. at 312. When the language of the search warrant leaves to the police discretion regarding the items to be seized, it violates the particularity requirement of the Fourth Amendment. *McKee*, 3 Wn. App. 2d at 29.

In *McKee*, Division One of this Court recently examined the particularity requirement in regard to warrants authorizing the search of cell phones. In *McKee*, police were seeking evidence related to the crimes of sexual exploitation of a minor and dealing in depictions of minors engaged in sexually explicit conduct on the defendant’s cell phone. *McKee*, 3 Wn. App. 2d at 16. The warrant listed the crimes being investigated and their accompanying statutes. *McKee*, 3 Wn.App.2d at 16. The warrant described the evidence to be seized as follows:

The warrant allowed the police to obtain everything from the cell phone without limitation:

‘Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes.’

*McKee*, 3 Wn. App. 2d at 18. On appeal, McKee challenged the warrant on grounds that it lacked particularity. The Court of Appeals agreed and reversed his convictions. *McKee*, 3 Wn. App. 2d at 30.

The Court in *McKee* held that the warrant in that case was invalid because “the ‘Items Wanted’ portion of the warrant was overbroad and allowed the police to search and seize lawful data when the warrant could have been made more particular.” *McKee*, 3 Wn. App. 2d at 26.

In analyzing the level of particularity required for the warrant to be valid, the Court considered “whether the warrant could have been more specific considering the information known to police officers at the time the warrant was issued.” *McKee*, 3 Wn. App. 2d at 28 (citing *Perrone*, 119 Wn.2d at 553). The Court held that warrant was lacking in particularity because it “allowed the police to search general categories of data on the cell phone with no objective standard or guidance to the police executing the warrant.” *McKee*, 3 Wn. App. 2d at 29.

The warrant at issue in Mr. Prosser’s case suffers from the same flaws presented in the warrant analyzed in *McKee*. The warrant for the silver Mercedes permitted the police to search the

car and seize “[c]ellular telephones and their electronically stored memory, as well as other storage or media devices, SD cards, and other digital media containing number, photographs, and other information identifying sources and co-conspirators.” (Emphasis added) CP 18-19.

This language is analogous to the “obtain everything from the cell phone without limitation” language in the search warrant in *McKee*, where the court held that such language was invalid because “it was a physical dump that was overbroad and allowed the police to search and seize lawful data when the warrant could have been made more particular.” *McKee*, 3 Wn. App. 2d at 29.

As in *McKee*, the warrant does not specify which text message conversations are subject to seizure, nor does it limit in any meaningful way, the warrant’s scope to data relevant to the charged crimes.

The deficiencies in the warrant outlined above would be are insufficient to satisfy the particularity requirement even without heightened scrutiny applied to materials implicating First Amendment rights because the warrant failed to establish any limits on the scope of materials authorized to seized under the warrant.

*McKee*, 3 Wn. App. 2d at 29 (quoting *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)).

The warrant in this case is also constitutionally deficient because it lacks particularity and is overly broad in violation of the First Amendment and Fourth Amendment protections. *McKee*, 3 Wn. App. 2d at 25 (citing *Perrone*, 119 Wn.2d at 545). The admission of the text messages found on the cell phone was highly prejudicial to Mr. Prosser because the messages were offered as statements purported to have been written by Mr. Prosser and contain admissions to stealing a car, being in possession of stolen property, and statements suggesting he was looking for someone who would buy the car under market value. Ex. 38, RP 363-66.

These statements are probative to essential elements of the crime of possession of a stolen vehicle, specifically to prove that Mr. Prosser knowingly possessed a stolen vehicle and acted with knowledge that it was stolen. See WPIC 77.21. The admission of these errors was not harmless because without these statements the state would not have been able to prove theft.

The remedy for an overly broad unlawful search without particularity requires suppression because the search violates the

particularity requirement of the Fourth Amendment, and in this case the First Amendment as well. *McKee*, 3 Wn. App. 2d at 29. This court should reverse Mr. Prosser's conviction and remand for a new trial with suppression of the contents of the cell phone.

Mr. Prosser Has Standing to Challenge the Search Warrant

The trial court denied Mr. Prosser's motion to suppress after finding he did not have standing to challenge the search of the cell phone. CP 77-78.

To determine whether a defendant is entitled to challenge the scope of a search warrant, the Court must first decide whether he has standing to qualify for protection under the Fourth Amendment and art. I, § 7 of the Washington Constitution. *State v. Francisco*, 107 Wn. App. 247, 252, 26 P.3d 1008 (2001). The Court reviews standing to challenged search or seizure de novo. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610, *review denied*, 160 Wn.2d 1025, 163 P.3d 794 (2007).

A defendant may challenge a search or seizure if he or she has a Fourth Amendment privacy interest in the area searched or the property seized. *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994) (*citing State v. Simpson*, 95 Wn.2d 170, 174-75,

622 P.2d 1199 (1980)). Under art. I, § 7, a search occurs when the government disturbs “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

A telephone subscriber has a constitutionally protected privacy interest the contents of his telephone because telephonic and electronic communications are strongly protected under Washington law. *State v. Gunwall*, 106 Wn.2d 54, 66-68, 720 P.2d 808 (1986) (telephone calls protected). A privacy interest is not undermined where the subscriber does not voluntarily relinquish his possession of the cell phone. *Samalia*, 186 Wn.2d at 272-73.

The trial court erred when it relied on *Samalia* to support its finding and conclusions that Mr. Prosser did not have standing to challenge the cell phone search warrant. CP 77-78. In *Samalia*, police attempted to stop the defendant while he was driving a stolen vehicle. *Samalia*, 186 Wn.2d at 266. The defendant exited the vehicle and fled the scene, leaving a cell phone in the car. *Samalia*, 186 Wn.2d at 266. The police seized this cell phone and searched it without a warrant. *Samalia*, 186 Wn.2d at 266-67. The

defendant challenged the warrantless search of the cell phone on appeal. *Samalia*, 186 Wn.2d at 266-67.

The Supreme Court concluded that the defendant could not assert a privacy interest in the stolen car but held that he maintained a privacy interest in the cell phone as a “private affair” even though it was seized from a stolen vehicle. *Samalia*, 186 Wn.2d at 272-73. The court found that under the facts of *Samalia*, despite maintaining a privacy interest, Samalia lacked standing to challenge the search, but only because “he lost that interest when he ‘voluntarily abandoned the cell phone located in the vehicle’ while fleeing from police.” *Samalia*, 186 Wn.2d at 268. Had the defendant not voluntarily abandoned the cell phone, “the officers could not have searched his cell phone without a search warrant or the application of an exception to the warrant requirement.” *Samalia*, 186 Wn.2d at 272.

The trial court’s reliance on *Samalia* to conclude Mr. Prosser does not have standing to challenge the search of the cell phone is misplaced because *Samalia* held that a defendant maintains a privacy interest in a cell phone located in a stolen car when the cell phone has not been abandoned. *Samalia*, 186 Wn.2d at 272-73.

Unlike in *Samalia*, Mr. Prosser maintained possession of the cell phone until his arrest; he did not abandon his cell phone. Under *Samalia*, Mr. Prosser possessed an ongoing privacy interest in the cell phone the police were not permitted to violate without a warrant that met the constitutional requirements for particularity. *Samalia*, 186 Wn.2d at 272-73; RP 341-42.

The error was not harmless. The Court applies a harmless error analysis when the trial court admits evidence that is a product of an invalid warrant. *Keodara*, 191 Wn. App. at 317. Admission of evidence obtained in violation of the state constitution is an error of constitutional magnitude. *Keodara*, 191 Wn. App. at 317. An error of constitutional magnitude can be harmless if we are convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Constitutional error is presumed to be prejudicial, and the state has the burden of proving the error was harmless. *Keodara*, 191 Wn. App. at 317–18.

Here, the trial court erred when it concluded that Mr. Prosser lacked standing to challenge the search of the cell phone and the error is not harmless because without the improper admission of

the cell phone evidence the state would not have been able to prove beyond a reasonable doubt, the elements of the robbery charge. Accordingly, this Court must reverse the charges and remand for suppression if the illegally obtained cell phone records.

3. THE STATE VIOLATED MR. PROSSER'S DUE PROCESS RIGHTS BY ADMITTING MR. CAVALLO'S OUT-OF-COURT IDENTIFICATION WHEN THE RECORD ESTABLISHES THAT THE CIRCUMSTANCES OF THE IDENTIFICATION WERE IMPERMISSIBLY SUGGESTIVE AND UNRELIABLE

Eyewitness identifications can be inherently unreliable. "The reliability of suspect identification by victims or eyewitnesses implicates due process because impermissibly suggestive police procedures may result in mistaken identifications. Courts must therefore ensure that such testimony is reliable. This is accomplished by considering the witness's opportunity to observe the suspect, the accuracy of any prior descriptions, the witness's level of certainty, and the passage of time." *State v. Collins*, 152 Wn. App. 429, 465-66, 216 P.3d 463 (2009) (*citing Manson v. Brathwaite*, 432 U.S. 98, 111-14, 97 S.Ct. 2243, 53 L.Ed.2d 140

(1977)).

Identification testimony should be excluded from evidence if the circumstances of the identification are unnecessarily suggestive and arranged by law enforcement. *State v. Sanchez*, 171 Wn. App. 518, 573, 288 P.3d 351 (2012). “Police use of an unnecessarily suggestive procedure need not have been intentionally suggestive to trigger the requirement for judicial inquiry, however.” *Sanchez*, 171 Wn. App. at 573 (citing *Perry v. New Hampshire*, 565 U.S. 228, 237, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012)).

Courts employ a two-part analysis in determining whether an identification is admissible under the Due Process Clause. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). First, the defendant must establish that the identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118. The court must then determine, based on the totality of the circumstances, whether the identification procedure created a substantial likelihood of irreparable misidentification. *Vickers*, 148 Wn.2d 118.

A single-suspect identification procedure is often impermissibly suggestive because “the very act of showing the witness one suspect indicates that the police have focused their

attention on that person.” *State v. Hanson*, 46 Wn. App. 656, 666, 731 P.2d 1140 (1987)<sup>1</sup>. Mr. Cavallo was shown a single suspect who had already been arrested, handcuffed, and was standing next to a patrol car when the field show-up occurred. RP 260.

The United States Supreme Court disavows the use of a single suspect notification unless the complainant provides in advance, a detailed description for the police to apply. *Manson*, 432 U.S. at 115-117 (complainant provided detailed description of assailant) . Here, to the contrary, Mr. Cavallo was only able to describe the suspect as an African American man. This vague description is inadequate to overcome overly suggestive nature of a single person show up identification.

Here, the circumstances of this identification lack sufficient indicators of reliability to admit it at trial. Constitutional error is presumed to be prejudicial and the state bears the burden of proving the error was harmless.” *State v. Le*, 103 Wn. App. 354, 367, 12 P.3d 653 (2000) (*citing State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that that

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<sup>1</sup> (composite drawing not suggestive because based exclusively on complainant’s description)

any reasonable jury would have reached the same result, despite the error.” *Le*, 103 Wn. App. at 367 (citing *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)).

The error in this case was highly prejudicial to Mr. Prosser because no one was able to identify Mr. Prosser as the perpetrator and the officer’s subjective assumptions regarding Mr. Cavallo’s uncertainty about the identification does not establish that Mr. Prosser was the perpetrator, yet the jury was permitted to rely on this impermissibly subjective evidence. In the absence of this testimony, the record would be devoid of any evidence suggesting that Mr. Prosser was the man who robbed Mr. Cavallo.

Without an identification of Mr. Prosser as the suspect, no reasonable jury could find beyond a reasonable doubt that he took Mr. Cavallo’s property by threat of force. The error in this case prejudiced Mr. Prosser and therefore this court should reverse his convictions and remand for a new trial. *State v. McDonald*, 40 Wn. App. 743, 747-48, 700 P.2d 327 (1985).

4. THE TRIAL COURT ERRED  
WHEN IT IMPOSED A \$100  
CRIME LAB FEE AS PART OF  
MR. PROSSER'S SENTENCE  
DESPITE FINDING HIM  
INDIGENT

The trial court improperly imposed a \$100 crime lab fee because Mr. Prosser is indigent. CP 251-52. The Court in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), held that under the amendments to House Bill 1783, the sentencing court may not impose non mandatory criminal fees when the defendant is indigent. *Ramirez*, 191 Wn.2d at 747.

Because Mr. Prosser is indigent, the court erred by imposing the non-mandatory \$100 crime lab fee. *Ramirez*, 191 Wn.2d at 747. This court should remand for resentencing with instructions to strike the Crime Lab fee from the judgment and sentence.

D. CONCLUSION

The state failed to prove the essential elements of Robbery in the First Degree and the accompanying deadly weapon enhancement. The trial court also erred when it admitted Mr. Cavallo's out-of-court identification of Mr. Prosser because the identification procedures were impermissibly suggestive, and the circumstances of the identification suggest it was not reliable.

Finally, the trial court abused its discretion by admitting text messages seized pursuant to a search warrant that lacked particularity and was overbroad.

Mr. Prosser respectfully requests this court reverse Mr. his convictions and order dismissal of the robbery charge due to insufficient evidence. In the alternative, this court should reverse Mr. Prosser's convictions and remand for a new trial with orders to suppress the illegally obtained cell phone evidence. Finally, this court should remand the case for resentencing with instructions to strike the Crime Lab fee from Mr. Prosser's judgment and sentence.

DATED this 10<sup>th</sup> day of June 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov and Courtney Prosser/DOC#302480, Washington Corrections Center, PO Box 900, Shelton, WA 98584 a true copy of the document to which this certificate is affixed on June 10, 2019. Service was made by electronically to the prosecutor and Courtney Prosser by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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Signature

**LAW OFFICES OF LISE ELLNER**

**June 10, 2019 - 1:07 PM**

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