

FILED

APR 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30176-1-III

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DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KIETH W. PARKINS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Mr. Parkins was deprived of his right to a fair jury trial under the Sixth Amendment and article I, sections 21 and 22 when the lead detective testified that images captured from video surveillance showed him committing the crimes.
2. The prosecutor violated Mr. Parkins' Fourteenth Amendment right to due process by mischaracterizing the burden of proof in rebuttal closing argument.
3. The police officer's stop of Mr. Parkins violated article I, section 7 of the Washington Constitution because it was not based on reasonable suspicion of criminal activity, and the trial court erred in denying the motion to suppress the evidence thereby obtained.
4. The convictions on counts two and four violate Mr. Parkins' Fourteenth Amendment right to due process because the State presented insufficient evidence that Mr. Parkins committed robbery as charged in those counts.
5. Mr. Parkins was deprived of his Fifth Amendment right to be free from double jeopardy because the jury instructions

for several counts did not make clear that a separate act was required for each count.

6. It was impermissibly suggestive, in violation of the Fourteenth Amendment right of due process, for officers to escort Mr. Parkins in handcuffs in front of witnesses who were about to testify on the key issue of identification.
7. The trial court abused its discretion in denying Mr. Parkins' motion for a new trial.
8. The sentencing court violated Mr. Parkins' Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a sentence of life without the possibility of parole based on prior convictions where the existence of the convictions and the identity of the perpetrator were found by a judge by a preponderance of the evidence.
9. The sentencing court violated Mr. Parkins' Fourteenth Amendment right to equal protection by imposing a sentence of life without the possibility of parole based on prior convictions where the existence of the convictions, and the identity of the perpetrator were found by a judge by a preponderance of the evidence.

II.

ISSUES PRESENTED

- A. Did the trial court properly correct a perceived error by using a curative instruction?
- B. Has the defendant shown that the prosecutor engaged in improper argument?
- C. Was there a *Terry* stop in this case?
- D. Was there sufficient evidence to support the convictions in Counts II and IV?
- E. Did the defendant show a violation of his “double jeopardy rights”?
- F. Has the defendant shown prejudice from an alleged courthouse hallway incident involving the transporting of the defendant in handcuffs past unspecified State’s witnesses?
- G. Should this court re-address long settled law pertaining to the POAA?

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with eight counts of first degree robbery, two counts of attempted second degree assault and one count of attempt to elude a police vehicle. The jury returned verdicts of guilty on counts I, III, VI, VII, X and XI as charged. The jury returned a verdict of not guilty on count V and a lesser included conviction of second degree robbery on count II. The jury found the defendant not guilty on counts VIII and IX. All charges occurred between October 25, 2007 and October 28, 2007.

The defendant's trial proceeding commenced on March 7, 2011. The robberies occurred at convenience stores and a restaurant. The police were on alert looking for the robber. RP 31. Prior to the trial actually commencing, the defendant brought a motion seeking to suppress various items discovered in the defendant's pickup truck and allegedly connected to the robberies. RP 21, et seq. The defendant's theory was that the police had insufficient/incorrect data for a *Terry* stop of the defendant's truck. RP 21, et seq.

Officer Buchmann is a Spokane police department officer. RP 29. Ofc. Buchmann testified that he was aware of the robberies and had information that the Fairco Mini-mart had just been robbed. RP 30. Ofc.

Buchmann was traveling northbound on Ash and noticed a pickup that caught his attention as being similar to the vehicle described as being involved in the robbery. RP 31. The officer testified that the point at which he saw the truck was a reasonable distance from the Fairco store given the time frame. The officer turned off his emergency lights and turned around to investigate the truck. RP 32. Ofc. Buchmann testified that he caught up with the truck around Northwest Blvd. RP 33. The officer pulled into the center lane directly next to the pickup truck. RP 33. The officer stated that he wished to see the occupants to see if they matched any descriptions. RP 33. The driver matched the description of the robber from the Fairco robbery. RP 33.

Officer Buchmann then slowed and pulled in behind the truck. The truck quickly turned right-on Indiana and sped up quickly. RP 34. The truck drifted into the left half of the roadway. RP 34. It appeared to the officer that the truck was attempting to get away from the police. RP 34. At this point, Ofc. Buchmann turned on his overhead lights and siren. The defendant then travelled residential streets with 25 mph speed limits at speeds of 60 and 80 mph. RP 35-36. The defendant was failing to stop at stop signs. RP 35.

Ofc. Buchmann saw the defendant swerve directly at a parked patrol vehicle. RP 36. Eventually there were three patrol cars in pursuit

of the defendant. RP 37. The police were forced to initiate a PITT maneuver designed to cause the pursued vehicle to spin and bring the vehicle to a stop. RP 38. The defendant collided with some other vehicles that were parked on the street. RP 38. The defendant began to run on foot from the police and was ultimately apprehended. RP 38. The defendant did not comply with the officers' commands. RP 38-39.

Ofc. Buchman looked into the pickup truck from the outside. RP 40. He saw currency and coins on the driver's side of the seat, a nude-colored nylon stocking on the floorboard of the passenger side and a black watch cap with what appeared to be another pair of pantyhose inside of the hat. RP 40-41.

The trial portion of the proceeding consisted mainly of testimony from the clerks/attendants of the various establishments that had been robbed. RP 170, et seq.

Based on prior convictions and the robberies involved in the present case, the defendant was sentenced to life imprisonment. RP 980.

This appeal followed. CP 216.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CORRECTING A PERCEIVED ERROR WITH A CURATIVE INSTRUCTION.

The defendant argues that Det. Hill's comment regarding the collection of six photographs of robberies was so prejudicial that it could not be cured by the trial court's giving of a curative instruction.

The defendant claims the detective's testimony in this case was "especially prejudicial because Det. Hill told the jury not only that Mr. Parkins was guilty, but that he was guilty of all six robberies shown in the surveillance videos." Brf. of App. 17-18. This statement is not supported by the record. At no point does the record indicate that the detective told the jury anything about the defendant being guilty. The defendant is going beyond the record to argue in the realm of self-generated facts.

In the middle of his arguments about Det. Hill's comment on a photo collection, the defendant inexplicably inserts an argument from a different case in which the prosecutor called a defendant a liar. Brf. of App. 17. There is no explanation for this detour and there is little or no apparent connection to the case at bar.

The defendant states in a presumptive manner that there can be no question that the error being discussed was "serious." Actually, there is

considerable question that the detective's comment was "serious." The defendant cites (incorrectly) to *State v. Perez-Valdez*, 172 Wn.2d 808, 265 P.3d 853 (2011).¹ The defendant flatly claims the court found the irregularity in that case to be "serious" but the defendant does not explain that the reason the *Perez-Valdez* court found the irregularity in that case "serious" was because the case "hinged on the credibility of two witnesses for whom another witness apparently vouched." *Id.* at 818-19. That is not the situation here. The defendant also fails to note that the *Perez-Valdez* court affirmed the court's denial of a mistrial because the questioned testimony was cumulative and a curative instruction was given. The court in *Perez-Valdez* held that the trial court did not abuse its discretion in denying a mistrial. So, the defendant's supporting case upheld the denial of a mistrial in a "serious" error because the testimony was cumulative and a curative instruction was given. That is the same situation as in this case.

The defendant here tries to amplify the "seriousness" of the alleged irregularity by arguing that the detective stated the defendant was shown committing six strike offenses. Brf. of App. 15. Det. Hill said nothing about "strike offenses." The defendant does not explain how a jury of lay people would know that anything that occurred during the trial involved

¹ The defendant directs the reader to page 856 of the opinion. The opinion, (including the dissent opinions) does not include a page 856.

“strikes.” Even the instructions do not contain any mention of the POAA or “strikes.” Further, the photographs are obviously still photos not showing the defendant doing anything. The detective could not have said anything beyond the fact that the defendant was present during other robberies. Yet, the detective did not make that statement either.

The defendant tries to support his arguments by citing to *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). *Montgomery* is inapposite here as the opinion testimony in *Montgomery* involved detectives testifying the defendants had purchased cold medications for the purpose of manufacturing methamphetamine. This is a direct comment on the guilt or innocence of the defendants. In this case, the supposed “opinion” testimony pertained to a photo collection and was not a comment on the guilt or innocence of the defendant. “It [jury] may well have acquitted him on additional counts if Detective Hill had not told them Mr. Parkins was the person committing those crimes.” Brf. of App. 18. This statement is the rankest of speculation with no support whatsoever. The defendant is surely aware that the transcript *does not say* that Det. Hill told the jury the defendant committed those crimes.

The defendant claims the detective’s testimony was not cumulative. This is incorrect. Although the defendant, (with zero support in the record), repeatedly claims the detective told the jury that the

defendant was guilty of all six robberies. An examination of the transcript shows that the detective never made that statement. Brf. of App. 15, 16, 17, 18.

The defendant confuses the issues by claiming that a witness at the Wall Street Diner robbery was 70% sure that a person "...in a photomontage..." was not the defendant. It is important to separate the word "photomontage" as used for the photographic "line-up" sets shown to witnesses and the sometimes used word "photomontage" as the noun identifying the collection of six still photographs obtained from the security video recordings. Even so, the fact that one witness at the Wall Street Diner was not completely positive that the defendant was the person in the montage shown to that witness adds nothing to the issues here.

The State maintains that no error of any sort occurred when the detective made his contested statements. The detective was asked to identify the piece of paper he was holding. Exh. 77. The detective simply testified as to what the item was. The item was a grouping of photos obtained from security video during six robberies. In order to admit any item into evidence, it must be shown to be relevant and probative. ER 401, 402. The defendant does not explain exactly how the State was to show the relevance of the item without testimony that it was a series of photos showing robberies and the defendant's presence at the robberies. It

is not pertinent to the trial that the detective simply had a montage showing six photos. The obvious question would be: photos of what? Even if the detective testified only that the document was a compilation of six photos of robberies, without more the document would not be relevant. It could be referring to six robberies that occurred in a different state. To show relevance to *this* trial, the State needed to elicit testimony that the document was six photographs of robberies showing the defendant. The submission of a document containing unidentified pictures would not be relevant and therefore inadmissible.

The questions asked of Det. Hill were:

Q: Beginning with Item 77, do you recognize that?

A: I do.

Q: What is it?

A: This is a piece of photo paper that has six separate images on it. Each one of the images is from a different robbery that had occurred. Each one of them shows the defendant, Mr. Parkins, facing forward at the camera, so he's looking at the camera.

Q: Are these –

MR. MCCOOL: Your honor, I have to object.

THE COURT: Sustained.

RP 713.

At no point did Det. Hill state that the defendant committed any of the robberies. The photos only show that the defendant was in the range of the security cameras in six different businesses. At the time the objection was made and sustained, the only information presented in court was the detective's assertion that the defendant was shown in the six photos. The record does not indicate that the photos showed anything but the defendant's presence. Despite the defendant's repetitions of a non-existent fact, at no point did Det. Hill tell the jury that the defendant committed six robberies. At best, the defendant could claim that the detective said the defendant was in six photographs of robberies. Which robberies? When? What aspect of the photographs showed the defendant committing a robbery? The defendant has done little except create a smoke screen.

The State had two choices: leave out the photos and weaken their case, or proceed to identify the photo collection document for relevance. The defendant does not explain exactly what "ultimate issue" was commented upon by the detective. The defendant was not charged with being present at the scene of a robbery, nor was he charged with appearing on a security camera.

The trial court sustained the defendant's objection on the grounds that the detective had commented on the guilt of the defendant. The trial

court offered the defense a chance to construct a curative instruction but the defendant objected to the giving of a curative instruction, demanding instead, a mistrial. RP 734.

A mistrial should be granted only when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” In other words, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial.

State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (citing *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963)).

The court in *State v. Weber*, 99 Wn.2d 158, 659 P.2d 1102 (1983) discussed a trial court’s decision to deny a mistrial and noted multiple aspects of that decision. *Id.* The first factor is the seriousness of the irregularity. In the *Weber* case, the appellate court found that the trial court had improperly found error in the first place and therefore the irregularity was minor. *Weber, supra* at 165-66. In this case, the trial judge erroneously found error in Det. Hill’s identification of the photo document. As argued previously, the State maintains that the trial court should not have found error.

Despite the defendant’s assertions to the contrary, the facts of the record show that the detective’s identification of the photos was cumulative. It is important to note that the allegedly improper comment

came near the end of the State's case. In fact, the detective was the last witness in the State's case in chief. By this point, the jury had already seen the security videos, heard all the surrounding testimony, etc. The *Weber* court noted the question of whether the irregularity involved cumulative evidence was another factor in deciding how serious an irregularity might be.

The third factor in the *Weber* analysis was the presumption that the jury followed the judge's instructions to disregard the remark. *Weber, supra* at 166. Thus, even if the trial court was correct in finding an error in the detective's testimony, the trial court gave the jury an instruction to disregard the allegedly offending testimony. The jury is presumed to follow the trial court's instructions. *Weber, supra* at 166.

Washington law applies the abuse of discretion standard in reviewing a trial court's denial of a motion for mistrial. *State v. Mak*, 105 Wn.2d 692, 701, 719, 718 P.2d 407 (1986). An abuse of discretion exists when "no reasonable judge would have reached the same conclusion." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, *corrected*, 780 P.2d 260 (1989). In this case, the allegedly offending testimony was cumulative, minor (in light of the mass of testimony coming before) and the trial court cured the difficulty with an instruction which the jury was presumed to follow.

B. THE DEFENDANT HAS NOT SHOWN THAT THE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT.

The defendant argues that the prosecutor improperly stated in rebuttal closing argument that the reasonable doubt instruction meant that the jury had to have a reason for any reasonable doubt.

The defendant objected at trial to the prosecutor's arguments, but there is nothing in the transcript that shows the prosecutor telling the jury that a reason must be attached to any reasonable doubt. The prosecutor was apparently using a slide projector during her argument. When the objection was made, the trial judge asked defense counsel to show the supposedly offending language to the judge. The judge stated that while he could see the Power Point slide, he could not see any offensive language as referenced by the defendant. 3/23 RP 78-79.

The defendant, without saying as much, is attempting to bypass the trial court. Obviously, an appeal issue is based on something that happened or did not happen during trial. The defendant objected during the prosecutor's rebuttal closing argument, arguing essentially the same points and allegations of prosecutorial misconduct raised by the defendant on appeal. 3/23 RP 77-79.

However, when the defendant objected, the trial judge asked the defendant to point out the claimed error in the prosecutor's argument. The

judge stated that he could not see the error being claimed by the defendant. Thus, the trial judge did not sustain or reject the defendant's objection. There is no trial court decision for the defendant to appeal on this topic. 3/23 RP 79. Additionally, since the defendant could not successfully show the trial court the error he claimed, the trial court could not correct any defects it might have otherwise found.

Yet, even in the absence of a trial court's ruling, the defendant puts forth assignments of errors and arguments attacking a non-existent trial court ruling. The defendant is creating arguments out of what appears to be only the trial defense counsel's version of events. There is nothing in the record that states exactly what was displayed by the prosecutor. The only factual basis is the defendant's self-serving assertions. It is the responsibility of the appellant to provide a record from which this court may decide the issues raised. RAP 9.2. The trial defense counsel simply did not make a record of the point upon which he was trying to have the trial court rule.

It appears from the record that this particular area of the law was a "pet peeve" of the defense counsel and he may have over-reacted when the prosecutor said something even close to an area sensitive to trial defense counsel. In any event, at this point the only item before this court is the bald assertions of the defendant and no trial court decision to examine.

C. THERE WAS NO *TERRY*² STOP.

The defendant claims that the initial stop of his pickup was done with an improper, unconstitutional *Terry* stop and all items seized should be suppressed. This argument fails as there was no *Terry* stop.

An examination of the testimony , shows that Ofc. Buchmann was going in an opposite direction from the defendant. The officer thought, based on the information he had, that the pickup might be the one police were looking for in connection to the robberies. The officer turned around and pulled alongside the defendant. The driver appeared to match the information in the officer's possession. RP 33. At this point, the officer did not have his emergency lights on and did not try to stop the defendant. RP 32.

The defendant turned right and sped up. RP 34. When the defendant turned right, he drifted into the oncoming lane. RP 34. The officer activated his lights and siren. RP 34. Instead of stopping, the defendant speeded up and engaged in attempts to elude the police. At one point, the defendant was exceeding 60 mph and at another point the defendant was exceeding 80 mph. RP 35, 36. According to the officer, the posted speeds were 25 mph.

² *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Without a doubt, the defendant's actions of running stop signs, speeding, etc. gave the police more than ample cause to stop the defendant for his criminal activities.

At the outset, the officer was, perhaps, considering stopping the defendant based on the matching information known to the officer. The important point (not mentioned by the defendant) is that the officer never stopped the defendant or even attempted to stop the defendant. The issue of an unconstitutional *Terry* stop is nothing but a red herring. Since the defendant was never stopped by the officer prior to the defendant's attempt to elude activities and the police had to use the PITT maneuver to force the defendant to stop. RP 38. Even after colliding with another vehicle, the defendant took off running and had to be captured by officers. RP 39. The defendant was uncooperative. RP 39-40.

It is very safe to say that the nature, validity and use of a *Terry* stop is of no moment in this case. It is doubtful that anyone could conclude that the officers did not have sufficient probable cause to arrest the defendant on a number of charges.

D. THERE WAS AMPLE EVIDENCE FOR
COUNTS 2 AND 4.

The defendant claims that the State presented insufficient evidence to support the convictions on Count II and Count IV.

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant correctly notes that Aischa Barleson, the clerk involved in the robbery in Count II, testified that she could not make out the robber's face. RP 76. The defendant fails to attribute any weight to the security camera operating during the robbery. The State admitted a copy of the relevant portion of the security video as Exh. #6. The video was shown to the jury. RP 80. The jury was certainly entitled to make

whatever determinations it chose from the video. In light of the conviction on Count II, it seems reasonable to assume that the jury found the defendant to be the robber.

As for Count IV, the defendant leaves out part of the record in making his arguments. The defendant claims that Jason Beagle, the clerk during the robbery of the “Zip Trip,” said that the person who robbed his store was only 25-35 yrs. old and had no facial hair. Brf. of App. at 34. The defendant does not mention that the clerk testified that the robbery took place approximately three years prior to the clerk’s testimony in court. RP 244. The clerk did not remember any facial hair by the time of his testimony. RP 244. The defendant also fails to accurately relate the record when he states that Mr. Beagle testified that the perpetrator was only 25-35 yrs. old. Brf. of App. 34.

What actually happened in court was that trial defense counsel was cross-examining the witness and asked whether Mr. Beagle remembered the person was *probably* 25-35 yrs. old. RP 250. Mr. Beagle responded: “That’s...” and then defense counsel pushed in with a different question, not allowing the witness to finish his response. RP 250.

So, according to the transcript, the witness was testifying to three year old memories and actually never made the statement argued on appeal by the defendant. The trial defense counsel made the claim

regarding age and did not allow the witness to respond. The claim by defendant in his brief is remarkably different than what the transcript actually reflects.

However, despite the defendant's mistakes in relating the record, similar facts sink the defendant's arguments on Count IV. There was a security camera at the "Zip Trip" and a copy of the security camera's "take" was entered as Exh. 13. The video was played for the jury. RP 247.

The defendant attempts to discount the videos by calling both of them "grainy" and the robber was wearing a disguise. This sort of argument, along with the earlier arguments of the testimony of the clerks, points up a fundamental flaw in the defendant's approach. The defendant does *not* get to decide which pieces of evidence are deemed relevant by the jury nor does the defendant get the opportunity to attempt to convince this court of the correctness of the jury's decisions based on the evidence. As pointed out above, "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d at 201. Each one of the two counts questioned by the defendant contains information bearing on each of the elements of the charged crimes. Any arguments regarding "grainy" videos and the like are pointless as they do not remove the fact that the

videos do exist and could be used by the jury to find the final element of the crimes: identity.

E. THE DEFENDANT HAS NOT SHOWN THE DEFECTIVE INSTRUCTIONS CAUSED A “DOUBLE JEOPARDY” VIOLATION.

The defendant maintains that because the jury instructions for counts one, two and three, did not delineate sufficient identifying facts, the jury could have found the defendant guilty in violation of “double jeopardy.”

Generally, RAP 2.5(a)(3) prohibits a party from raising an issue for the first time on appeal unless the issue shows a “manifest error affecting a constitutional right.” RAP 2.5. The defendant in this case has the burden of showing that (1) the claimed error is “truly of constitutional dimension” and (2) the error was “manifest.” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). It is not enough to simply claim that an error is of constitutional magnitude. *Id.*

Jury instruction errors are not automatically constitutional in magnitude. *See O'Hara*, 167 Wn.2d at 106. If the error is found to be constitutional, then this court must determine whether the claimed error is manifest. *O'Hara*, 167 Wn.2d at 99. To show an error is “manifest,” an appellant must show that the asserted error had practical and identifiable

consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). This is the point at which the defendant's issue is clearly shown not to be "manifest" and that all the defendant's arguments along these lines must fail. The defendant makes the claim of a violation, but the claim is not supported by anything other than a bald assertion. The defendant has presented nothing but the *possibility* of a violation of his "double jeopardy" rights. The defendant has no proof to support his claim. In fact, since the jury dismissed one count, the evidence would support the State's position.

The jury returned a "not guilty" verdict on count #5, which was one of the numerous robbery charges. RP 892. Obviously, the jury did not "lump" all the robberies into one and do as the defendant claims: use the data from one count to find the defendant guilty of another count.

The Washington State Supreme Court, in a case with facts more egregious than the one at bar, held that despite defective jury instructions, it was apparent that the jury found the defendant guilty of five separate acts of rape supporting five separate convictions. *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). The Court in *Mutch* stated: "In fact, we are convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation." *Mutch, supra* at 665. The *Mutch* Court apparently came to the

above mentioned conclusion because the information charged five separate counts, one of the witnesses testified to five separate episodes of rape and there were exactly five “to convict” instructions. *Id.* “In light of all of this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed [the witness] regarding one count, it would as to all.” *Id.* at 665-66. The Supreme Court held that the defendant in the *Mutch* case was not being punished multiple times for the same criminal act. *Id.* In the end, it was not the defective instructions that became the deciding factor. It was the sum of the facts.

The totality of the facts in this case show a multi-count information, a different clerk/witness for every count, and the transcript of the prosecutor’s closing arguments show an extensive and detailed discussion of the various counts. As mentioned previously, the defendant comes down hard on the issue of defective instructions, but supplies nothing but speculation as to what the jury might have done. Speculation that the defendant’s rights against “double jeopardy” were violated is not the same thing as actual facts. This argument should be dismissed.

F. THE DEFENDANT HAS NOT SHOWN PREJUDICE FROM AN UNKNOWN NUMBER OF UNIDENTIFIED STATE'S WITNESSES BEING IN THE HALLWAY WHEN THE DEFENDANT WAS TRANSPORTED TO COURT IN HANDCUFFS.

The defendant requested a mistrial when it came to light that the defendant was seen in handcuffs by witnesses. The trial court denied the mistrial motion. The State's position is that the trial court did not err.

The defendant claims that the viewing by the witnesses of the defendant in handcuffs created a dilemma for defense counsel: how to challenge the witnesses about their in-court identifications after they observed the defendant in the hallway without exposing the fact that they observed Jackson in custody, wearing restraints. According to the defendant, his constitutional right to be tried in an untainted proceeding was impacted.

The defendant wishes to have a hearing on the issue, but the defendant cannot show that any of the witnesses saw him, noticed handcuffs, etc. The defendant cannot show which witnesses might have seen him.

The defendant raises no rationale for why he could not have cross-examined the witnesses alleged to have seen the defendant being transported.

In an appellate setting such as this, it is the defendant's burden to show prejudice. Unless the defendant wants to claim prejudice from his obvious trial court arrangements, there is no untoward prejudice shown by a witness happening to see the defendant in the process of being transported to court. It does not take a super-naturally gifted person to presume that the person, (who is not a prosecutor sitting with an officer), who is sitting at the other table with defense counsel, is likely the defendant. The defendant does not explain why a short view of the defendant being transported in the hallway is somehow more onerous than the standard courtroom physical arrangements.

G. SHOULD THIS COURT RE-ADDRESS LONG SETTLED CONSTITUTIONAL LAW PERTAINING TO THE POAA³?

The defendant's brief becomes confusing towards the end. The assignments of errors list nine separate alleged errors, but the argument section of the brief contains only eight arguments. Because the arguments throughout his brief cover exceedingly large swaths of legal territory, it is difficult to say exactly what might be missing from the arguments.

Assignment of Error No. 7 is listed in the Assignments of Error section of the defendant's brief as a complaint that the trial court abused

³ Persistent Offender Accountability Act.

its discretion in denying Mr. Parkins' motion for a new trial. The argument labeled "7" is a discussion of aspects of sentencing under the POAA. The State is unable to find any arguments in the remainder of the defendant's brief that directly match Assignment of Error No. 7.

If the defendant was meaning to argue from the motion for a new trial brought on July 21, 2011, the situation becomes murkier, not clearer. The record for the motion for a new trial has the trial defense counsel saying he made no objection to prosecutor's closing rebuttal arguments. RP 937. If the defense counsel made no objection to the prosecutor's closing rebuttal arguments, it is not possible to bring up what appears from other arguments on appeal, to be a major point for the appellate case.

"Counsel may not secretly nurture an error, speculate upon a favorable verdict, and then, in the event it is adverse, bring forth the error as a life preserver on a motion for a new trial." *Agranoff v. Morton*, 54 Wn.2d 341, 346, 340 P.2d 811 (1959).

If the defendant did not object to the prosecutor's closing rebuttal arguments, it is not plain upon what the defendant bases his claim of error. The State is not willing to go further in responding. Without a clear statement of the basis for the defendant's claims for a new trial, the State is engaging in guessing as to what the defendant really intended to argue in his brief. The State has undertaken to give the defendant the benefit of

the doubt and assume that the defendant would argue from a readily identifiable point.

Assignment of Error No. 7 addresses an allegation of the trial court failing to grant a new trial. Throughout the defendant's trial and appellate brief, there are several occasions of requests for reversals. The defendant faults the trial court on several occasions for not granting a mistrial. Now, the defendant presents an Assignment of Error that could refer to any of the complaints and objections raised at the trial level. The State cannot discern exactly which of the multitude of reasons promulgated by the defendant might have been intended to form an argument regarding the "denial of a new trial."

The argument listed as No. "7" is a broad constitutional argument pertaining to aspects of sentencing under the POAA. The argument listed as No. "8" is a different take on alleged defects in sentencing under the POAA. Neither argument deals directly with a "new trial."

There is no argument No. 9 although there are nine listed Assignments of Error. In the interests of attempting to address the POAA issues raised by the defendant, the State will combine the defendant's final two complaints into one response.

The defendant attacks the POAA on grounds long since rejected by the appellate courts of this State. The first attack addressed by the State is

the defendant's claim that the POAA violates the Equal Protection Clause of the Constitution because the existence of prior convictions used to enhance the sentence can be proved to a judge rather than to a jury.

The defendant underpins his arguments with a mistaken reading of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The defendant claims that according to *Blakely*, he is entitled to have a jury finding on every fact essential to punishment. However, the defendant leaves out a very important part of the *Blakely* holding. The Court stated: "*other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*" *Blakely, supra* at 301, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

According to the court in *State v. Reyes-Brooks*, 165 Wn. App. 193, 267 P.3d 465 (2011) the Washington State Supreme Court has repeatedly rejected the argument being made by the defendant. *State v. Thieffault*, 160 Wn.2d 409, 158 P.3d 580 (2007).

Courts conduct *de novo* review of a sentencing court's decision to consider a prior conviction as a strike. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), *review granted in part and remanded*, 154 Wn.2d 1031, 119 P.3d 852 (2005).

The Court in *Thiefault* stated:

This court has repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt. See, e.g., *Lavery*, 154 Wash.2d at 256–57, 111 P.3d 837; *State v. Smith*, 150 Wash.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004); *State v. Wheeler*, 145 Wash.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S.Ct. 1559, 152 L.Ed.2d 482 (2002); see also *Ortega*, 120 Wash.App. 165, 84 P.3d 935; accord *Almendarez–Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (holding that the State need not prove the fact of a prior conviction to a jury).

State v. Thiefault, 160 Wn.2d at 418.

Stripped of the defendant's attempts to distract, the main issue of a prior conviction/jury issue remains currently decided in favor of the State in *Almendarez–Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). The defendant claims that *Almendarez–Torres* was incorrectly decided, but the defendant cannot show any controlling authority overruling the *Almendarez–Torres* decision. The defendant cites to a “dissenting/concurring” opinion by one judge in the Division 2 case of *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011). Despite the fact that one Division 2 judge thinks the State needs to prove strike offenses to a jury, the state of the law as it currently exists does *not* require a jury to prove POAA past offenses.

Interestingly, the defendant acknowledges that the Washington State Supreme Court has rejected his arguments on these issues. Brf. of App. 50.

V.

CONCLUSION

For the reasons stated, the convictions and sentencing of the defendant should be affirmed.

Dated this 19th day of April, 2012.

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