

FILED
Court of Appeals
Division III
State of Washington
5/27/2020 4:49 PM

NO. 37124-7-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

HAVEN SCABBYROBE,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Faulty eyewitness identifications are the leading cause of wrongful convictions and the unreliability of identification testimony is counter-intuitive for the layperson.

The police detained Haven Scabbyrobe because of her gender and perceived race. Her clothes, hairstyle, possessions, and a distinguishing facial feature did not match those the witness described. The police presented her to the witness in a suggestive show-up procedure. The witness concluded she was the person who tried to steal his car, although he noticed she wore completely different clothes twenty minutes later.

Ms. Scabbyrobe's attorney questioned witnesses to show the stop was based on race alone, the show-up procedure was suggestive, and the identification was not corroborated and unreliable. She argued mistaken identity.

However, she never moved to suppress the unreliable identification resulting from the suggestive procedure. Ms. Scabbyrobe was convicted, despite the evidence suggesting she was the wrong person.

B. ASSIGNMENT OF ERROR

Ms. Scabbyrobe was denied her right to effective assistance of counsel due to her counsel's failure to move to suppress the unreliable pre-trial identification of Ms. Scabbyrobe that tainted the complaining witness's subsequent in-court identification.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An accused person is denied the right to effective assistance of counsel where defense counsel's performance was deficient and the deficiency prejudiced the defendant. Impermissibly suggestive identification procedures create a substantial likelihood of irreparable misidentification. Here the charge hinged on the identification of one witness, but the identification occurred in a highly suggestive show-up procedure. Ms. Scabbyrobe's attorney did not move to suppress the identification, despite her theory of mistaken identity. Did counsel's failure to seek suppression deprive Ms. Scabbyrobe of her right to the effective assistance of counsel?

D. STATEMENT OF THE CASE

Jeffery Huff had left his car running in his driveway at about 7:00 a.m. and returned to his house; he then saw the car backing down the driveway. RP 204, 207. He hurried outside; a person he did not recognize was in the car. RP 208. At the edge of the driveway, the driver turned the car to begin to drive forward, but hit an object and stopped. RP 208-09.

A woman was in the driver's seat of car. RP 210-11. Agitated, he yelled at her to get out, using an expletive. RP 211; Supp. CP __, sub. no. 16, at 10. She looked scared. RP 211. He did not notice any distinguishing marks on her face. RP 231. He continued to yell at her, using profanities. Supp. CP __, sub. no. 16, at 10. Once out, she began to dig through her pockets. RP 231. Mr. Huff was afraid she was getting a weapon and told her, using profanity, if she pulled something out, he would knock her out. Supp. CP __, sub. no. 16, at 10.

The woman who tried to take the car was Hispanic, wearing a large, puffy black coat, and dark sweat pants. RP 228-32. She had long, dark hair, worn down; no noticeable

facial features or makeup; and she was carrying two dark backpacks. *Id.*; RP 312.

The woman walked away with her bags and Mr. Huff called the police. RP 214, 245. While he was speaking with an officer, another officer detained a woman Ms. Scabbyrobe in the neighborhood. RP 215. The officer detained her based on a description that the attempted thief was a “Hispanic female” in a black coat, carrying two backpacks. RP 215, 335-36, 341. RP 215, 335-36, 341; Supp. CP __, sub. no. 16, at 10, 12. Ms. Scabbyrobe is Native American. CP 15. She wore no coat and carried no bags. RP 246-47.

The officer brought Mr. Huff to Ms. Scabbyrobe’s location to determine if she was the person he had seen. RP 215. About 20 minutes had passed since the time Mr. Huff had seen his car backing down his driveway. RP 207, 287, 303. When he arrived, Ms. Scabbyrobe was either inside a marked police SUV or standing in front of it, next to a uniformed officer. RP 303-08. Eventually, Mr. Huff observed her outside the SUV, next to the officer. RP 307-08.

Mr. Huff noticed immediately Ms. Scabbyrobe was not dressed like the woman in the car. RP 215. Ms. Scabbyrobe was wearing a white t-shirt and dark shorts. RP 236-37. Her hair was up, not down. RP 312. She had a facial tattoo. RP 348. She had no backpacks, coat, or sweatpants. RP 246-47.

Despite these discrepancies, Mr. Huff believed Ms. Scabbyrobe was the woman from the car. RP 216. After seeing Ms. Scabbyrobe, he stated the woman had “a tattoo” on her hand. RP 312-13; Supp. CP __, sub. no. 16, at 11. He did not describe it. RP 313. Ms. Scabbyrobe also had a hand tattoo and the officers arrested her without verifying her tattoo was the one Mr. Huff mentioned. RP 313; Supp. CP __, sub. no. 16, at 11. The police did not show him any other people. RP 238.

The prosecutor charged Ms. Scabbyrobe with theft of a motor vehicle. CP 15. Defense counsel did not move to suppress the identification as suggestive and unreliable.

At trial, her attorney elicited testimony showing the suggestive nature of the identification process, the weaknesses of observation when distracted, and the

vagueness of Mr. Huff's description. RP 228-232; 298, 300, 302-08, 312. Mr. Huff acknowledged his description did not match Ms. Scabbyrobe's appearance. RP 228-32, 236-37, 246-47, 348. The arresting officer admitted he saw no commonality between the description and Ms. Scabbyrobe other than perceived race and gender. RP 335-36, 341.

In closing, defense counsel argued the police stopped Ms. Scabbyrobe for her race and that Ms. Scabbyrobe was not the same person as the woman in Mr. Huff's car. RP 422-35. She argued Mr. Huff had unknowingly made a mistake in his identification. *Id.* She did not argue to the jury about the weaknesses of eyewitness identification or the suggestive nature of the show-up procedure.

The prosecutor argued that Mr. Huff had no motive to lie and was a reliable witness. RP 407-08.

After about two and a half hours of deliberation, the jury told the court they were at an impasse. RP 451-52; CP 51. The court directed they continue deliberating. RP 452; CP 51. The jury convicted Ms. Scabbyrobe of the charge. CP 49.

E. ARGUMENT

Defense counsel was ineffective for failing to move for suppression of the identification of Ms. Scabbyrobe that was based on a highly suggestive procedure with a substantial risk of irreparable misidentification.

1. Unreliable identifications from unduly suggestive show-up procedures should be suppressed.

An identification procedure violates due process when “it is 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); U.S. Const. amend. VI, XIV; Const. art. I, § 22. Ultimately, “[t]he reliability of the identification testimony is the linchpin to determining its admissibility.” *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Suggestive procedures increase the likelihood of misidentification. *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). A witness’s recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. *Brathwaite*,

432 U.S. at 112. “[T]he dangers for the suspect are particularly grave when the witness’s opportunity for observation was insubstantial and thus his susceptibility to suggestion is the greatest.” *Wade*, 388 U.S. at 229.

“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). An unnecessarily suggestive identification procedure violates due process unless the totality of the circumstances nevertheless provide sufficient indicia of reliability to outweigh the “corrupting effect of the suggestive identification” procedure. *Brathwaite*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200).

Identification evidence must be suppressed if there is a “substantial likelihood of irreparable misidentification.” *State v. McDonald*, 40 Wn. App. 743, 747–48, 700 P.2d 327 (1985)

(citing *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)).

A suggestive identification procedure is “one that directs undue attention to” one individual. *State v. Kinard*, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). Though not “per se unnecessarily suggestive,” the show-up practice is “widely condemned” as unnecessarily suggestive. *State v. Rogers*, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986). Generally, “single suspect identifications are suggestive.” *State v. Hanson*, 46 Wn. App. 656, 666, 731 P.2d 1140 (1987); see *State v. Ramirez*, 109 Wn. App. 749, 762, 37 P.3d 343 (2002).

Research has long established memory distortion may occur “after being exposed to misleading information related to that memory, [for example,] an impairment in the memory of the face of a perpetrator after being exposed to a photo of a police suspect who was not the true perpetrator.” Joyce W. Lacy & Craig E. L. Stark, *The neuroscience of memory: implications for the courtroom*, 14 *Nature Rev. Neuroscience*

649, 651 (2013).¹ To yield an unreliable result, the identification procedure need not have a “suggestive” manner or setting—the mere presentation of a single wrong suspect is enough to change a witness’s memory permanently. *Id.*

Brathwaite analyzed the identification procedure used by a police officer who identified a suspect using only one photograph, when there was no emergency or exigent circumstance. *Brathwaite*, 432 U.S. at 109. There was no question this procedure was unnecessarily suggestive—it was “suggestive (because only one photograph was used) and unnecessary (because there was no exigent circumstance).” *Id.* The procedure used here was similarly unduly suggestive and the identification unreliable.

2. The officers used a highly suggestive show-up procedure, though the attempted thief had a distinctly different appearance from Ms. Scabbyrobe.

The identification procedure here was at least as suggestive as the one used in *Brathwaite*. As in *Braithwaite*,

¹ Available at www.researchgate.net/profile/Joyce_Lacy/publication/255951845_The_Neuroscience_of_Memory_Implications_for_the_Courtroom/inks/5710de2e08ae19b186950052/The-Neuroscience-of-Memory-Implications-for-the-Courtroom.pdf.

only one person was presented to the witness. *See Brathwaite*, 432 U.S. at 109. Thus, it was suggestive. *See id.* Further, the suggestiveness was “unnecessary [as] there were no exigent circumstances.” *Id.*

Mr. Huff’s first view of Ms. Scabbyrobe was either of her detained inside the marked police car or standing right next to a uniformed and armed officer. RP 303-08. Unlike the witness in *Brathwaite*, Mr. Huff was not a trained police officer but a civilian likely to be influenced by the presence of officers, weapons, handcuffs, and police cars. RP 220, 303-08.

Further, the witness would reasonably assume the single person presented was chosen by the police based on the witness’s description, making use of a single person even more suggestive to an untrained witness, given the aura of authority the police hold. *See Lacy & Stark, supra* at 651; *Hanson*, 46 Wn. App. at 666.

Mr. Huff initially viewed a woman in his car while he was under emotional distress and a sense of urgency. RP 211; Supp. CP __, sub. no. 16, at 10. Consequently, his memory

could be easily distorted by the circumstances or by the actions of the police. *Brathwaite*, 432 U.S. at 112.

Finally, as in *Brathwaite*, there were no exigent circumstances. *See Brathwaite*, 432 U.S. at 109. No crime was ongoing and the witness and his property were not in any danger from the woman who had left the scene. Ms. Scabbyrobe complied with the officer who contacted her; she agreed to speak with him and willingly approached him. RP 342. The officer could have taken her information and looked up DOL or booking photos, or perhaps even been permitted by Ms. Scabbyrobe to take a new picture. Then, the officers could have put together an appropriate photomontage of multiple people matching the witness's description in a non-suggestive manner. *See, e.g., Vickers*, 148 Wn.2d at 119.

The *Brathwaite* Court held the single person identification, with a trained police witness, was unnecessarily suggestive when no exigency existed. *See Brathwaite*, 432 U.S. at 109. The procedure here was at least as suggestive and similarly unnecessary. *See id.*

3. *Wide scientific consensus shows the unreliability of eyewitness identifications.*

The dangers of faulty eyewitness identification testimony are undisputed. *Wade*, 388 U.S. at 228; *State v. Allen*, 176 Wn.2d 611, 616, 294 P.3d 679 (2013) (plurality opinion); Lacy & Stark, *supra* at 649. Eyewitness identification is only accurate between one third and two thirds of the time. Lacy & Stark, *supra* at 651-52 (citing controlled study with stressors employed; 33% accuracy); Taki V. Flevaris & Ellie Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 866 (2015) (citing Brief for Am. Psych. Ass'n as Amici Curiae at 14-17, *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) (citing multiple studies finding 33% inaccurate eyewitness identifications)).

Faulty eyewitness identification is the leading cause of wrongful conviction, responsible for approximately 71% of wrongful convictions overturned by DNA evidence. Innocence

Project, *Eyewitness Identification Reform*;² Lawrence Rosenthal, *Eyewitness Identification and the Problematics of Blackstonian Reform of the Criminal Law*, 110 J. Crim. L. & Criminology 181, 183 (2020). “The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.” *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (quoting Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008)).

The research establishes that “witnesses often make mistakes, that they tend to make more mistakes in cross-racial identifications ... and that the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions.” 1 McCormick, *Evidence*, § 206 (6th Ed. 2006). “In fact, in many cases a suspect need not bear any resemblance to the real perpetrator for an eyewitness to falsely identify the suspect.” Flevaris &

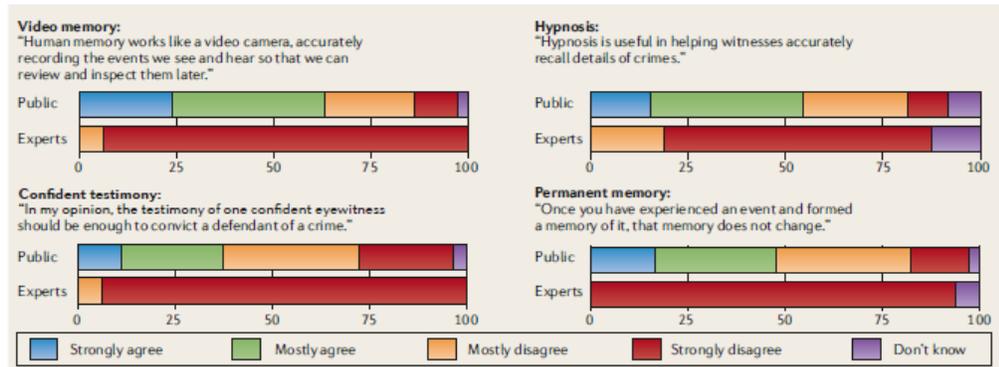
² Available at www.innocenceproject.org/eyewitness-identification-reform (last accessed May 19, 2020).

Chapman, *supra*, at 867 (citing Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3-4 (2009)).

Despite the clear evidence that eyewitness testimony is unreliable, jurors accept it even when the evidence itself is flawed. Elizabeth F. Loftus, *Eyewitness Testimony* 9 (1979). They can “accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence.” *Id.*

This may be unsurprising, as most people believe visual memory works like an accurate video recording. Lacy & Stark, *supra* at 650 (citing Daniel J. Simons & Christopher F. Chabris, *What People Believe About How Memory Works: A Representative Survey of the U.S. Population*, 6 PLoS ONE 3 (2011)). In fact, “judges and law enforcement personnel are not much more aware of memory phenomena than are college students.” *Id.* at 649. While many people believe “the testimony of one confident eyewitness should be enough to

convict a defendant,” 94 percent of memory experts in a large national study “strongly disagreed” with this statement:



Id. at 650.

4. *The unnecessarily suggestive procedure was unreliable and led to irreparable misidentification.*

A court may admit an identification stemming from a suggestive procedure like the one here only when the “corrupting effect of the suggestive identification” is outweighed factors indicating reliability. *Brathwaite*, 432 U.S. at 114; *McDonald*, 40 Wn. App. at 746.

A court must examine (1) the witness’s opportunity to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the

confrontation. *Brathwaite*, 432 U.S. at 114-116 (citing *Biggers*, 409 U.S. at 199-200).

Moreover, since *Brathwaite*, scientific consensus has determined that “[w]itnessing a potentially traumatic event does not produce an unbiased, indelible memory of the event. Memory is an adaptive process based on reconstruction.” Lacy & Stark, *supra* at 657. “[S]tudies conducted ... since *Brathwaite* [confirm] eyewitness testimony is often hopelessly unreliable.” *Comm. v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995). “The fallibility of memory obviously has implications for ... how much weight should be given to eyewitness testimony in court cases.” Lacy & Stark, *supra* at 649.

Here, for factor (1), Mr. Huff had only 30 to 90 seconds to observe the woman in the car. RP 235, 245. This is a short period of time, considering these factors were developed in consideration a case where the witness spent up to half an hour with the suspect. *See Biggers*, 409 U.S. at 200.

Additionally, due to his admitted agitation, Mr. Huff’s ability to form an accurate memory in this short time was likely

reduced. RP 211; Supp. CP __, sub. no. 16, at 10; *see Brathwaite*, 432 U.S. at 112; Lacy & Stark, *supra* at 655.

For factor (2), the degree of attention, Mr. Huff appeared to have his attention focused on the crime and the actions of the woman in his car. However, during a brief crime, a witness is often focused on the “central gist” and actions of the crime, not a suspect’s face or identifying features. Lacy & Stark, *supra* at 655. This focus on danger impairs the memory of a perpetrator, and likely impaired Mr. Huff’s memory of the features of the woman in his car, particularly when he thought she was reaching for a weapon. *Id.* at 653, 655; RP 231; Supp. CP __, sub. no. 16, at 10.

Accordingly, his initial description to the officers was very general; gender, perceived race, two items of clothing, and two bags. Supp. CP __, sub. no. 16, at 10. In contrast, the witness in *Biggers* supplied five characteristics regarding hair texture, skin texture, build, age, and fitness, showing a high degree of attention. *Biggers*, 409 U.S. at 184, 200. Further, she rejected multiple suspects in lineups, show-ups, and in 30

or 40 photographs before she was shown the defendant, whom she quickly identified. *Id.* at 195.

Factor (3), the inaccuracy of Mr. Huff’s prior description, as compared to Ms. Scabbyrobe, demonstrates its unreliability. In *Brathwaite*, as in *Biggers*, the witness gave a prior description that was very detailed; it included the suspect’s race, height, build, clothing, hair color, hairstyle, and his high cheekbones. *Brathwaite*, 432 U.S. at 115. The Court noted the defendant did not claim this did not match his features. *Id.* Here, in contrast, Ms. Scabbyrobe matched none of the descriptors Mr. Huff provided before seeing her:

Accuracy of witness’s prior description compared to Ms. Scabbyrobe			
Source ►	Woman in car	Ms. Scabbyrobe	◀ Source
Supp. CP —, sub. no. 16, at 11	Sweat pants	Shorts	RP 236, 246
<i>Id.</i>	Hair down	Hair worn up	RP 312
<i>Id. at 10</i>	2 backpacks	No bags	RP 246
<i>Id.</i>	Hispanic	Native American	CP 15
<i>Id.</i>	Black coat	White shirt	RP 237, 247
RP 211	No facial marks	Facial tattoo	RP 348

Other than being a woman, Ms. Scabbyrobe did not meet any of the characteristics Mr. Huff described.

Brathwaite's factor (4) suggests the witness's initial confidence in the identification matters. However, since *Brathwaite*, scientific consensus has determined "[t]he belief that a confident memory is always highly accurate and resistant to distortion or loss is an unfortunate misunderstanding about memory that has important consequences in court." Lacy & Stark, *supra* at 649. With memories of crimes and traumatic events, a witness's confidence does not predict accuracy and higher confidence may correlate with reduced accuracy. *Id.* at 650; Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. Appl'd Psych. 524, 524 (2004).

Consequently, while Mr. Huff indicated he was highly confident upon seeing Ms. Scabbyrobe, his claimed confidence is nearly meaningless in determining reliability. *See* Lacy & Stark, *supra* at 650. Particularly as he was given no choice of

other people, and formed his memory during a time of agitation, his confidence level is not scientifically related to reliability and should not be given significant credence by this Court. *See id.* at 650-51. With all attention focused on one person, the witness's memory was subject to suggestion. *See id.; Kinard*, 109 Wn. App. at 433.

Factor (5) is the time between the crime and the confrontation. About 20 minutes had passed; this short period does not lend any reliability to Mr. Huff's identification of someone completely different from whom he described.

The factors show (1) a short opportunity to view the woman, distracted by her actions; (2) relative disattention to her face; (3) a highly inaccurate prior description; (4) the scientific irrelevance of witness certainty, and (5) a brief time interval. Along with "the corrupting effect of the suggestive identification itself" and the fact that 33 to 66 percent of identifications are erroneous, this identification presents "a substantial likelihood of irreparable misidentification." *Brathwaite*, 432 U.S. at 114; *Vickers*, 148 Wn.2d at 118. Lacy

& Stark, *supra* at 651-52; Flevaris & Chapman, *supra*, at 866. Consequently, the trial court likely would have suppressed the identification, had defense counsel so moved the court.

5. A person accused of a crime has the right to effective assistance of counsel.

The right to the effective assistance of counsel is “a bedrock principal in our justice system” and “the foundation for our adversary system.” *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); U.S. Const. amend. VI, XIV; Const. art. I, § 22. Only “effective assistance” can satisfy the right.

An attorney renders constitutionally inadequate representation when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). While an attorney’s decisions are treated with deference, and her competence is presumed, her actions must be reasonable based on all circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533-34, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). Even if

defense counsel had strategic or tactical reasons for his actions, the “relevant question is ... whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

“[E]ffective representation entails certain basic duties, such as the overarching duty to advocate the defendant’s cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541 (2019). Deficient performance is performance falling “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

When the trial record is developed sufficiently to determine whether a defense motion to suppress would have been granted or denied, the appellate court can review whether failure to raise a suppression issue was ineffective assistance of counsel. *State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). “Failure to bring a plausible

motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006) (citing *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001)).

6. Defense counsel had no legitimate strategic purpose and was unreasonable in failing to move to suppress the unreliable identification of Ms. Scabbyrobe.

The identification of Ms. Scabbyrobe was the result of an unnecessarily suggestive identification show-up procedure. *See Brathwaite*, 432 U.S. at 109. It lacked the reliability factors present in *Brathwaite and Biggers*. *See id.* at 112-116; *Biggers*, 409 U.S. at 184, 200.

The defense theory at trial was that Ms. Scabbyrobe was not the woman in the witness’s vehicle. The description Mr. Huff provided did not match Ms. Scabbyrobe. Defense counsel accordingly used cross-examination to expose the suggestiveness of the identification and used testimony as well as argument to show the detention and identification were based on race without corroboration. RP 228-32, 236-37, 246-47, 303-08, 312, 348, 335-36, 341. She argued Ms.

Scabbyrobe was not the woman the witness had encountered; the officer stopped someone based on race and the witness was unknowingly but truly mistaken. RP 422-23.

However, given these choices by counsel and the mistaken identity defense, no reasonable strategy can justify counsel's failure to move to suppress the witness's identification of Ms. Scabbyrobe. *See Flores–Ortega*, 528 U.S. at 481. The choice to forgo it was unreasonable. *See id.*

The identification here was weak and uncorroborated, based on a momentary glimpse of a stranger under stressful circumstances. Beyond describing clothing and bags Ms. Scabbyrobe did not possess, Mr. Huff's description was not inherently reliable like the ones in *Brathwaite and Biggers*. *Brathwaite*, 432 U.S. at 112-116; *Biggers*, 409 U.S. at 184, 200. Mr. Huff did not describe the woman's facial features or show attention to subtle details of her or her belongings. RP 228-232, 300, 302-03. He was distracted by the her actions and potential for danger. *See Lacy & Stark, supra* at 653. Due to his consequent inattention to her facial features, it is more

likely Mr. Huff would select the wrong woman, were he shown only one. *See Kinard*, 109 Wn. App. at 433; Lacy & Stark, *supra* at 651, 653, 655.

The unnecessarily suggestive show-up created a “substantial likelihood of irreparable misidentification.” *McDonald*, 40 Wn. App. at 747. Given the evident unreliability of Mr. Hoff’s identification, the trial court likely would have granted a suppression motion. Counsel’s representation was unreasonable and deficient in failing to advocate for her client. *See Crow*, 8 Wn. App. 2d at 507. This was ineffective. *See Meckelson*, 133 Wn. App. at 436.

7. Defense counsel’s deficient performance prejudiced Ms. Scabbyrobe’s right to a fair trial.

A new trial is required when counsel’s deficient performance prejudices the defendant. *State v. A.N.J.*, 168 Wn.2d 91, 109, 119-20, 225 P.3d 956 (2010) (citing *McFarland*, 127 Wn.2d at 334–35).

A person is prejudiced by her attorney’s deficient performance if there is a reasonable probability of a different outcome absent the deficient performance, but the defense

need not show counsel's conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784. “[A] ‘reasonable probability’ is lower than a preponderance standard,” and reflects “a probability sufficient to undermine confidence in the outcome.” *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal citations omitted) (quoting *Strickland*, 466 U.S. at 694).

The result of the suggestive and highly unreliable pre-trial identification procedure should not have been admitted at trial. *See Brathwaite*, 432 U.S. at 114.

Following a misidentification, a “witness thereafter is apt to retain in his memory the image [presented by police] rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” *Simmons*, 390 U.S. at 383–84. Consequently, the unreliable identification also tainted the witness’s subsequent in-court identification of Ms. Scabbyrobe and should similarly be inadmissible. *See State v. Smith*, 36 Wn. App. 133, 138, 672 P.2d 759 (1983).

The discrepancies in the descriptions of the woman in the car and Ms. Scabbyrobe were readily apparent. The jury struggled with the verdict and formally announced itself at an “impasse,” showing strong disagreement over the sufficiency of the evidence. RP 451; CP 51. There is a reasonable probability the trial court would have granted a suppression motion; this is “a probability sufficient to undermine confidence in the outcome.” *Lopez*, 190 Wn.2d. at 116.

F. CONCLUSION

Ms. Scabbyrobe’s trial was unfair. Her counsel’s failure to move to suppress the unreliable identification prejudiced the result. This Court should reverse and remanded for a new trial with Mr. Huff’s initial and in-court identifications excluded.

Submitted this 27th day of May 2020.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 37124-7-III
v.)	
)	
HAVEN SCABBYROBE,)	
)	
Appellant.)	

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