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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 34698-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Frank C. Mendoza,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00722-5

The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

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ARGUMENT

I. THE OFFICERS' ABILITY TO IDENTIFY MR. MENDOZA WAS NOT AT ISSUE IN THIS CASE.

Respondent first argues that the officers' testimony about Mr. Mendoza's criminal past was necessary to establish his identity. Brief of Respondent, pp. 5-8. This is incorrect, because the officers' ability to identify Mr. Mendoza was not at issue in the case. *See, e.g., State v. Sanford*, 128 Wn. App. 280 at 286, 115 P.3d 368 (2005). In essence, Respondent argues that the testimony was necessary to show that the officers had probable cause to arrest Mr. Mendoza. But probable cause to arrest--although sometimes an issue in a CrR 3.5 or CrR 3.6 hearing-- is irrelevant to the question of guilt at trial. The videotape was admitted as evidence, and the jury was free to examine the tape and determine whether or not the individual on the tape was Mr. Mendoza. The opinions of Corporal King and Detective Kelley on that subject were irrelevant and inadmissible.

Respondent next argues that Officer Timmons' reference to "PC to arrest the defendant for a separate charge" was not responsive to the prosecutor's question. Brief of Respondent, p. 6. This is incorrect. As Respondent points out, the sequence of questions was "Were you looking

for [Mr. Mendoza],” followed by “Why is that?” RP (4/4/06) 103. The answer was clearly responsive to the question. Furthermore, the subject matter was irrelevant: Officer Timmons’ state of mind did not relate to an issue in the case.

Respondent next argues that the prosecutor’s question was “intended to elicit” that Officer Timmons “knew of the current offense and was looking to locate the defendant.” Brief of Respondent, p. 6. Again, Officer Timmons’ state of mind was not relevant to any issue in the case. Respondent’s declaration of the prosecutor’s subjective intentions (which are not part of the record) do not help Respondent’s position.

Respondent utterly fails to address Lieutenant Darst’s testimony that he used a booking photo to prepare a photomontage, nor does Respondent address the court’s improper admission of Mr. Mendoza’s booking photo as substantive evidence. *See* Appellant’s Opening Brief, p. 5.

On the issue of prejudice, Respondent contends that “the basis for the officer’s [sic] identification was prejudicial to the defendant because it was properly offered to establish his identity and his guilt of the crime... the testimony properly affected the jury’s verdict because it bore on the question of the defendant’s guilt or innocense [sic] and was properly admissible.” Brief of Respondent, p. 7. As noted above, the officers’

identification of Mr. Mendoza was not relevant to any issue in the case. The officers' familiarity with Mr. Mendoza did nothing to enhance Selin's identification.

Throughout the course of the state's case, the prosecutor elicited numerous references to Mr. Mendoza's prior arrests and contacts with law enforcement, as well as an unrelated charge. The improper testimony was highly prejudicial. *See, e.g., State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997); *State v. Acosta*, 123 Wn. App. 424 at 439, 98 P.3d 503 (2004), *Sanford, supra*. The conviction must be reversed and the case remanded for a new trial.

II. MR. MENDOZA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent argues that defense counsel's performance was not deficient because propensity evidence was properly admitted. Brief of Respondent, p. 9-12. Respondent again asserts that the officers' ability to recognize Mr. Mendoza in the store video was somehow relevant and admissible. Brief of Respondent, p. 9. This is incorrect. The officers' opinions (that the person in the video was Mr. Mendoza) were tantamount to an opinion as to his guilt. They were not relevant or admissible. The jury had the videotape and it had the opportunity to observe Mr. Mendoza and to make its own identification. The prosecutor should not have

elicited the officers' opinions, or their prior contacts with Mr. Mendoza, and defense counsel should have objected to the inadmissible material. Ideally, this would have been handled prior to trial with a standard defense Motion in Limine. Defense counsel's performance was deficient for failing to bring such a motion, and for failing to object to the improper testimony the first time it emerged and for each time thereafter. By failing to object, defense counsel opened the gates to more improper testimony.

Respondent goes on to suggest that defense counsel made the strategic decision not to object to Detective Kelley's highly prejudicial testimony that Mr. Mendoza "was in the process of committing a crime" by failing to register his address. RP (4/4/06) 147. According to Respondent, an objection "would have immediately highlighted the response... It would have been very difficult to unring that bell." Brief of Respondent, p. 11.

But the bell had already been rung: the statement had been made, and the judge had personally interrupted the testimony. Jurors are presumed to follow instructions to disregard improper evidence. *State v. Roberts*, 142 Wn.2d 471 at 533, 14 P.3d 713 (2000), *citing State v. Russell*, 125 Wn.2d 24 at 84, 882 P.2d 747 (1994). A corrective instruction could only have helped, and defense counsel's failure to request one was deficient.

Respondent again fails to address Lieutenant Darst's testimony that he used a booking to create a photomontage. Nor does Respondent address Officer Timmons' testimony that he was seeking Mr. Mendoza to arrest him on an unrelated charge. These two instances alone provided the kind of prejudicial evidence that have required reversal in other cases.

See, e.g., Sanford, supra.

Finally, Respondent asserts that the "errors, if any were deminimis [sic]." Brief of Respondent, p. 11. This is incorrect: the jury was given a picture of Mr. Mendoza as a repeat offender, well-known to the police department, who was guilty of failing to register his address (presumably for some prior heinous crime). There is a great possibility that this propensity evidence colored the jury's entire view of the case and had a profound effect on the verdict. Reviewing the case *de novo*, there is a probability of error sufficient to undermine confidence in the outcome. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000); *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001).

Because defense counsel failed to object to any of the inadmissible evidence, accidentally elicited improper evidence on cross-examination, and failed to request any limiting or curative instructions, Mr. Mendoza was denied the effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Article I, Section 22; *Strickland v. Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The conviction must be reversed and the case remanded for a new trial.

III. RESPONDENT RELIES ON THE PROSECUTOR'S "BARE ASSERTIONS" AS EVIDENCE OF MR. MENDOZA'S CRIMINAL HISTORY.

To support the sentencing judge's finding of criminal history, Respondent cites the "Statement of Prosecuting Attorney" filed by the prosecutor prior to sentencing, in conjunction with the defendant's failure to object. Brief of Respondent, p. 12-13. Citing RCW 9.94A.530, Respondent asserts that "[t]he court was entitled to rely upon this information when imposing sentence." Brief of Respondent, p. 13.

This is incorrect. A failure to object constitutes acknowledgment only where the defendant fails to object to "information stated in the presentence reports." RCW 9.94A.530(2). Presentence reports are documents prepared by the Department of Corrections at the court's request under RCW 9.94A.500. No presentence report was requested or filed by DOC in this case. The "Statement of Prosecuting Attorney" relied upon by Respondent contains nothing more than allegation. As the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the

burden of proof to the defendant.
State v. Ford, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

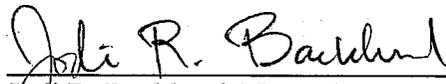
Respondent's reliance on the prosecuting attorney's bare assertions is misplaced. Although the written statement prepared by the prosecuting attorney is undoubtedly helpful to both parties and to the court, it does not constitute proof under RCW 9.94A or under *Ford, supra*. Respondent has provided no other basis for sustaining Mr. Mendoza's sentence; accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing.

CONCLUSION

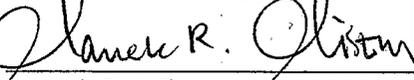
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 17, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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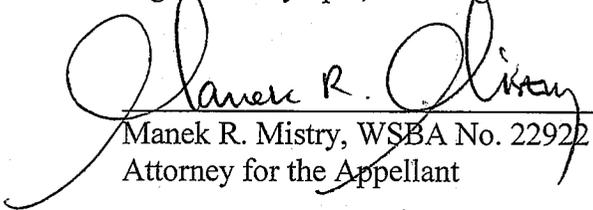
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 17, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on November 17, 2006.


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