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DIVISION II

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No. 34698-2-II

STATE OF WASHINGTON

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

BY amm
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

FRANK C. MENDOZA,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Procedural History.

The defendant was charged by Information on December 8, 2005 with Robbery in the Second Degree, RCW 9A.56.210, and Kidnaping in the Second Degree, RCW 9A.40.030. On December 13, 2005, the State of Washington filed noticed that it would be seeking an exceptional sentence on the basis that the defendant knew or should have known that the victim was particularly vulnerable and incapable of resistance. (CP 1-3, 27). Arraignment was held on December 19, 2005. The defendant entered a plea of not guilty.

A CrR 3.5 hearing was entered on March 16, 2006. The court found the out of court statements of the defendant to be admissible. Written findings were subsequently entered on April 4, 2006.

The jury trial commenced on April 4, 2006. The jury returned a verdict finding the defendant guilty of Robbery in the Second Degree and Unlawful Imprisonment. The jury returned a special verdict as to each count that the victim was particularly vulnerable and that the defendant knew or should have known that the victim was particularly vulnerable.

Sentencing was held on April 17, 2006. The state filed a written Statement of Prosecuting Attorney. (CP 28-32). The judgment and sentence was entered on April 17, 2006. Despite the jury finding, the court declined to impose an exceptional sentence. (CP 4-12).

Factual Background.

At the time of this incident, Lester A. Selin was 84 years of age. (RP 11). On Sunday, August 7, 2005, he got up at about 5:30 a.m., leaving his wife asleep in bed. He walked to a nearby convenience store to pick up a newspaper shortly before 6:00 a.m. (RP 7, 139). As Mr. Selin was approaching the store, he saw the defendant coming the other way. (RP 8-9). Mr. Selin was in the store for a few minutes and then began to walk home. As Mr. Selin neared his home, the defendant fell in behind him and followed Mr. Selin up to the driveway of his home. (RP 9-10).

When Mr. Selin got to his home, he turned and spoke to the defendant asking, "Can I help you?" (RP 9-10). The defendant responded, "I came to shoot and kill you". You're a "bad man". He told Mr. Selin that a drug cartel had paid him big money to kill him. (RP 10-11, 40). The defendant told Mr. Selin that his girlfriend had been in jail and that Selin had roughed her up. As it turns out, Mr. Selin's son is a corrections officer at the Grays Harbor County Jail.

At this point, the defendant demanded money. He saw a VISA card in Mr. Selin's wallet. He looked at the card and then returned it to Mr. Selin. Selin turned over \$16.00 in cash that he had. (RP 12-13). The defendant then told Mr. Selin that he wanted a ride to the tavern. Mr. Selin testified that he saw the defendant had his hand in his pocket and was not about to tell the defendant no. Mr. Selin drove the defendant a distance away and ultimately dropped him off at the Northwest Passage, a tavern located in South Aberdeen. As he got out of the vehicle, the defendant told Mr. Selin that if he called the police that he would come back and kill him. (RP 16).

Mr. Selin drove back home and spoke to his wife. She described him as "shaking all over" and crying. (RP 50). He told her that a man was going to kill him. (RP 50). Mr. Selin and his wife drove to Montesano where their son was working at the Grays Harbor County Jail. The son described his father as being "tearful and shaken up". (RP 57). Their son took them to the Aberdeen Police Department. Officer Watts took the initial complaint. Watts later processed Mr. Selin's motor vehicle and lifted a latent impression from the passenger side door handle. (RP 68-69). This was identified as the defendant's thumb print. (RP 84).

Officers seized the video tape from the convenience store and viewed the video tape for the purpose of attempting to identify the perpetrator. (RP 47-48). Corporal King reviewed the video tape and identified the defendant. (RP 111-112). In that regard, King stated that he was acquainted with the defendant prior to August 7, 2005 as he had "several prior contacts with him".

The defendant was arrested on the evening of August 7, 2005 by Officer Steve Timmons of the Aberdeen Police Department. Timmons testified that he was acquainted with the defendant and that he was looking for the defendant because there was "pc to arrest the defendant for a separate charge" as well as in the case at hand. (RP 103). The defendant was located about a block away from the original incident. (RP 103). The defendant fled on foot and was later apprehended. (RP 104).

Detective George Kelley had previously viewed the video tape and identified the defendant. (RP 134). In that regard, Kelley was asked if he knew the defendant prior to August 7, 2005. Kelley replied that he did. Kelley interviewed the defendant. The defendant acknowledged being in the store. When asked about a package of donuts that Mr. Selin had seen in the defendant's shirt pocket, the defendant stated that a friend of his had purchased them at the store. (RP 139-140). The defendant denied having any contact with Mr. Selin.

RESPONSE TO ASSIGNMENTS OF ERROR

The State has the obligation of proving beyond a reasonable doubt the identity of the individual who committed the offense.

(Response to Assignment of Error Nos. 1 and 2)

The evidence established that Mr. Selin first saw the defendant as the defendant was walking toward him from the direction of the convenience store. Mr. Selin, himself, was walking toward the convenience store. The police, quite logically, viewed the surveillance tape from the store to see if they could identify anyone in the store that matched the description given by Mr. Selin. Two officers, Corporal King and Detective Kelley viewed the tape and identified the defendant. (RP 111-112, 134). They recognized the defendant in the video tape because they had met him before and recognized the image on the video tape from prior contacts.

The fact of the prior contacts was not solicited for the purpose of improperly prejudicing the defendant. The State was entitled to show the basis upon which the officers had the ability to make the identification. How can it be improper, under these circumstances, for Corporal King to say that he was acquainted with the defendant based on several prior contacts? How can it be improper for Detective Kelley to say that he knew the defendant prior to the time he viewed the tape?

As concerns Officer Timmons, testimony at trial established that he arrested the defendant later in the evening of the same day that the events occurred. Timmons was asked the following:

- Q. Are you acquainted with the defendant?
A. Yes, I am.
Q. And were you acquainted with him on August 7th of this year?
A. Yes, I was.
Q. What shift did you work on that day?
A. I worked the evening shift, which consisted of eight o'clock at night until seven in the morning.
Q. Now, did you see Mr. Mendoza that evening?
A. Yes, I did.
Q. Were you looking for him?
A. Yes, I was.
Q. Why is that?
A. At the beginning of my shift I was advised that there was PC to arrest the defendant for a separate charge, and also that he was a suspect in this case.
Q. Did you locate Mr. Mendoza?
A. Yes, I did.

Timmons' response concerning "PC to arrest the defendant for a separate charge" was not responsive to the question. The State's question was intended to elicit from him that he knew of the current offense and was looking to locate the defendant. No reasonable person could say that the question asked or the answer given was malicious or ill-intentioned.

In the first instance, the State of Washington did not attempt to elicit testimony known to be inadmissible. The fact of prior contacts is relevant evidence on the issue of identification. Our courts have long recognized the “vagaries” of eyewitness identification. See State v. Cheatam, 150 Wn.2d 626, 649, 81 P.3d 830 (2003).

The obligation of the defendant is to show improper conduct and prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The testimony concerning the basis for the officer’s identification was prejudicial to the defendant because it was properly offered to establish his identity and his guilt of the crime. Improper prejudice was never established. Such improper prejudice may only be established, even conceding the questioning was improper, if the court can find a substantial likelihood that the alleged instances of misconduct affected the jury’s verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). In the case at hand, the testimony properly affected the jury’s verdict because it bore on the question of the defendant’s guilt or innocence and was properly admissible.

At best, counsel for the defendant had to decide what to do about the unsolicited remark of Officer Timmons. The defendant asserts that there should have been some sort of curative instruction given to the jury. A competent attorney would understand such an instruction would simply

call attention to the matter once again. The prejudice of the comment, if any, was minimal. The effect of instructing the jury concerning the matter would bring it back to their attention. This was a matter of trial strategy. Counsel should not now be allowed to second guess the actions of trial counsel. State v. McNeil, 145 Wn.2d 352, 362-363, 37 P.3d 280 (2002).

In short, the questions asked were not improper. There was no prosecutorial misconduct. The defendant has no good faith basis to so claim.

The defendant received effective assistance of counsel.

(Response to Assignment of Error Nos. 3 and 4)

The courts have recognized a two-pronged test when examining an allegation of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2 674, 104 S.Ct. 2052 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in all significant decisions. Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985). There must be a showing that the representation fell below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The defendant cannot make that showing.

As previously explained, the objected to evidence was not offered to show the defendant's propensity to commit this crime. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". ER 401. The fact that two individuals, Corporal King and Detective Kelley, who were personally acquainted with the defendant identified him on the surveillance video is relevant evidence that the defendant was in the store immediately prior to the arrival of Mr. Selin. This is relevant evidence to prove that the individual Mr. Selin saw walking toward him from the store was the defendant and was the same individual who robbed and kidnaped him.

The evidence was presented in a proper manner. No one was told about the facts or circumstances of the prior contacts. On the record, given the testimony of Corporal King and Detective Kelley, the only evidence is that they had seen the defendant before and knew him. There are a myriad

of reasons why a law enforcement officer contacts private citizens other than to make an arrest. The evidence served a legitimate purpose and was relevant to prove an element of the crime, the identity of the defendant. State v. Cook, 131 Wn.App. 845, 850, 129 P.3d 834 (2006).

Whatever else can be said about the testimony of Detective Kelley, Corporal King and of Officer Timmons, it certainly did not raise a reasonable probability to undermine the confidence of the outcome. In Re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001).

Counsel for the defendant did elicit one response during the cross-examination of Detective Kelley that he did not expect. The exchange went as follows:

- Q. Now, the video that we have seen, the time on the video that Mr. Mendoza is seen is about five o'clock in the morning, 5:02 in the morning; is that right?
- A. That's correct.
- Q. Now, in that video is Mr. Mendoza doing anything wrong?
- A. No.
- Q. Did he shoplift?
- A. No.
- Q. Did he commit any crimes while standing there?
- A. Well, as a matter of fact, he actually was in the process of committing a crime that - it's not observed there, but he is also required to register his address.
- THE COURT: Excuse me, would you please rephrase your question.
- MR. KUPKA: Thank you, Judge.

- Q. Let me rephrase that question. At the time you observed Mr. Mendoza in the video, was he committing an actual crime, was he doing anything wrong at that time?
- A. No.
- Q. Was he doing anything wrong when he existed the store?
- A. No.
- Q. Is it a crime to come and go from 7-Eleven?
- A. No.

As can be seen from the record, the judge immediately interjected himself and suggested that counsel rephrase the question. That was done. The facts that counsel wanted to bring out came forth. Counsel for the defendant could have immediately raised an objection to the response and highlighted the response by his actions. Kelley's response did not directly refer to the fact that the defendant was a convicted sex offender. Kelley said that the defendant was "required to register his address". Had counsel made the objection at that time, he would have immediately highlighted the response and allowed the jury to make the connection that the defendant was a sex offender who was required to register. It would have been very difficult to unring that bell.

In the end, the question is whether the defendant received a fair trial. The defendant is not entitled to an error free trial. Evans, supra, 96 Wn.2d at page 5. The asserted errors, if any, were deminimis. The defendant received a fair trial. The language of State v. Colbert, 17 Wn.App. 658, 664, 564 P.2d 1182 (1977) is appropriate here.

The defendant is entitled to a fair and unbiased trial. *State v. Beard*, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained. To suggest that perfect trial is a normal expectation is to suggest that a judge, two attorneys, 12 jurors and innumerable witnesses, all of various ages and talents are omnipotent, not subject to human error...

For the reasons set forth, this assignment of error must be denied.

The trial court properly imposed sentence.

The defendant did not see fit to include the materials submitted to the trial court judge at sentencing as part of the record in these proceedings. In particular, the State of Washington provided a written Statement of Prosecuting Attorney to the court and to counsel prior to sentencing. (CP 28-32).

In that Statement of Prosecuting Attorney the State listed all of the defendant's known prior criminal history, including the nature of the offense, the court of conviction, and the date of the offense. No objection was filed to this listing of the defendant's criminal history. Presumably, this was because the defendant, himself, knew the extent of his own criminal history and verified the correctness of the information to his attorney. A certified copy of the Statement of Prosecuting Attorney is attached as Appendix A.

This information was presented by the State and documented at the sentencing hearing. The court was entitled to rely upon this information when imposing sentence. RCW 9.94A.530.

This assignment of error must be rejected.

CONCLUSION

For the reasons set forth, the convictions must be affirmed.

Dated this 25 day of October, 2006.

Respectfully Submitted,

By: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

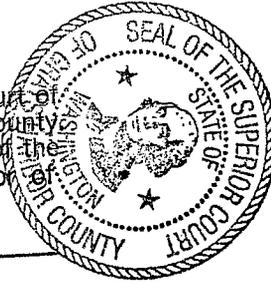
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Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file on record in this court.

Done this day of OCT 20 2006

Cheryl Brown, Clerk By *Cheryl Brown*
Deputy Clerk



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CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

No.: 05-1-722-5

v.

STATEMENT OF
PROSECUTING ATTORNEY

FRANK C. MENDOZA,

Defendant.

COMES NOW H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, Washington, by and through his deputy, Gerald R. Fuller, and submits the following report for consideration at the sentencing of the defendant in the above-entitled cause.

NATURE OF CASE

The defendant was charged on December 8, 2005 with Robbery in the Second Degree, RCW 9A.56.210, and Kidnapping in the Second Degree, RCW 9A.40.030. The matter was tried to a jury commencing on April 4, 2006. On April 5, 2006 the jury returned a verdict of guilty to Robbery in the Second Degree and guilty to the lesser included offense of Unlawful Imprisonment, RCW 9A.40.040. The jury also made a special finding as to each offense that the defendant knew or should have known that the victim, Lester A. Selin, was particularly vulnerable due to age.

STATEMENT OF
PROSECUTING ATTORNEY -1-

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4 **CURRENT OFFENSE**

5 On August 7, 2005 shortly before 6:00a.m., Lester A. Selin left his home to walk to the
6 store to buy a newspaper. Mr. Selin is 84 years of age. He and his wife have lived at their
7 residence in Aberdeen for over 40 years. As Mr. Selin walked across Boone Street he passed the
8 defendant, who was walking the other direction. After buying his paper, Mr. Selin walked back
9 home. As he neared his residence, the defendant came out from behind a building and followed
10 Mr. Selin to the front of Mr. Selin's residence.

11 As Mr. Selin arrived at his house he asked the defendant if he could help him. The
12 defendant responded that he was going to shoot and kill Mr. Selin. He told Mr. Selin that he was
13 going to get "big money" for killing him. Mr. Selin spoke to him and tried to convince the
14 defendant that he had the wrong person. During the course of a brief conversation, it came out
15 that the defendant was looking for Mr. Selin's son, a corrections officer who worked at the Grays
16 Harbor County Jail. The defendant had been told that Mr. Selin's son, Lester T. Selin, had
17 assaulted his girlfriend.

18 The defendant demanded money. Mr. Selin pulled out his wallet and handed over \$16.00
19 that he had. The defendant demanded that Mr. Selin give him a ride. The defendant directed Mr.
20 Selin down Clark Street, a distance of about 10 blocks, to where the defendant got out of the
21 vehicle. The defendant told Mr. Selin that if he called the police that he would come back and
22 kill him.

23 Mr Selin went home and told his wife, who was still asleep. Mr. Selin locked the doors
24 and remained in the residence for a period of time. Eventually he and his wife drove to
25 Montesano to speak with their son, who was at work. Their son directed them to the police and
26 the matter was reported.

27 The defendant was identified on the surveillance tape at the convenience store. The

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4 defendant was seen outside the store just before Mr. Selin arrived to purchase his newspaper. The
5 defendant's fingerprint was found on the passenger-side door handle of Mr. Selin's vehicle. The
6 defendant, when initially interviewed, admitted being in the convenience store, but denied
7 accosting Mr. Selin.

8 **PRIOR RECORD**

9

10 CRIME	DATE OF SENTENCE	SENTENCING COURT (County and State)	DATE OF CRIME	A (Adult) or J (Juvenile)	TYPE OF CRIME
11 Child Molestation 1		Jefferson 96-8-23-1	12/15/95	J	Felony
12 Child Molestation 1		Clallam 96-8-223-7	3/4/96	J	Felony
13 Intimidating a Witness		Clallam 98-8-505-4	12/4/98	J	Felony
14 Failure to Register		Clallam 00-8-35-3		J	Felony
15 Malicious Mischief 2		Clallam 00-1-182-6	5/27/00	A	Felony
16 Failure to Register		01-1-390-1	6/9/00	A	Felony
17 Failure to Register		02-1-164-8		A	Felony
18 Failure to Register		02-1-461-2		A	Felony
19 Failure to Register		03-1-257-0		A	Felony
20 Failure to Register		05-1-471-4		A	Felony
21 Failure to Register		00-1-212-1		A	Felony
22 Possess. Marijuana			2002		
23 Poss. Drug Para.			2002		
24 Obstructing		Aberdeen Municipal	2004		
25 Unlawful Display of a Weapon		Aberdeen Municipal	2004		
26 False Reporting		Aberdeen Municipal	2003		
27 False Reporting		Aberdeen Municipal	2005		
			2005		
		GHC District Court I	2002		

CRIME	DATE OF SENTENCE	SENTENCING COURT (County and State)	DATE OF CRIME	<u>A</u> (Adult) or <u>J</u> (Juvenile)	TYPE OF CRIME
Coercion		GHC District Court I	2002		
False Reporting		Aberdeen Municipal	2002		
Resisting Arrest		Aberdeen Municipal	2002		
Obstructing		Aberdeen Municipal	2001		

EVALUATION

This is a serious offense that is going to have a long term impact on Mr. Selin. The acts of the defendant were irrational. Nevertheless, it is clear that the defendant made threats to kill Mr. Selin. The defendant, by his conduct, has demonstrated himself to be extremely dangerous.

The defendant certainly knew that Mr. Selin was particularly vulnerable. The defendant, once he realized he had the wrong person, could have simply walked away. He chose not to do so. He chose to take advantage of the situation and take advantage of Mr. Selin. He warrants a lengthy term of incarceration.

RECOMMENDATION

Robbery in the Second Degree is a Level IV offense. The defendant has an offender score of at least 9, therefore, the standard range is 63-84 months in prison. The maximum punishment for this crime is 10 years in prison and/or a \$20,000 fine.

Unlawful Imprisonment is a Level III offense. The defendant has an offender score of 9 and a standard range of 51-60 months in prison. The maximum term of confinement is 60 months.

Because of the special finding by the jury that Mr. Selin was particularly vulnerable and the defendant knew or should have known that he was particularly vulnerable, this court has authority to impose an exceptional sentence.

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4 Robbery in the Second Degree is a violent offense. The defendant will be subject to a
5 term of Community Custody of 18-36 months for a period of earned early release whichever is
6 longer so long as the total of the sentence and the community custody does not exceed 120
7 months.

8 The State recommends that the defendant serve a term of 84 months on Count 1, Robbery
9 in the Second Degree and a term of 51 months, consecutive, on Count 2, Unlawful
10 Imprisonment. The court should order that the defendant be placed on community custody for a
11 term of 18-36 months on Count 1.

12 The defendant is responsible for the following costs and assessments.

- 13 1. \$200.00 Court Costs.
14 2. \$500.00 Victim/witness Assessment.
15 3. \$100.00 DNA Collection fee.
16 4. Attorney fees, as paid to counsel.
17 5. Restitution to Mr. Lester A. Selin in the amount of \$16.00.

18 Additional conditions of sentence should include the following:

- 19 1. No contact with Lester A. or Maxine Selin, Lester T. Selin or any member of
20 their families.
21 2. The defendant should be ordered to complete a drug evaluation within 45 days
22 of release and successfully complete any recommended treatment. \
- 23 3. The defendant should be prohibited from possessing or consuming controlled
24 substances or possessing drug paraphernalia without a valid prescription.
25 4. The defendant should be subject to random urinalysis to ensure compliance.
26 5. The defendant should be prohibited from possessing any deadly weapon, any
27 firearm, or any dangerous weapon as defined by RCW 9.41.270.

Respectfully Submitted,

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: *Gerald R. Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143