

62523-3

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No. 62523-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 9

 1. THE ADMISSION OF A POLICE DETECTIVE’S IDENTIFICATION OF MR. SMITH AS THE PERSON SEEN IN SURVEILLANCE PHOTOGRAPHS FROM THREE BURGLARIES INVADED THE PROVENCE OF THE JURY WHERE THE DETECTIVE HAD NEVER MET MR. SMITH AND THUS WAS IN NO BETTER POSITION TO IDENTIFY HIM THAN THE JURY 9

 a. The court permitted Detective Wall to testify Mr. Smith strongly resembled men caught in surveillance cameras at three burglaries 11

 b. Detective Wall’s opinion that Mr. Smith strongly resembled the person caught on the surveillance cameras at three burglaries was inadmissible because the detective was unfamiliar with Mr. Smith and thus had no greater ability to identify him than did the jury..... 13

 c. The trial court abused its discretion by admitting the identification evidence to explain police procedure when the investigation was not at issue..... 18

 d. The admission of Detective Wall’s conclusion that Mr. Smith strongly resembled the person in all three videotapes was not harmless, and two of Mr. Smith’s burglary convictions must be reversed 20

 2. MR. SMITH’S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT PERMITTED A POLICE DETECTIVE TO OFFER HIS EXPERT OPINION THAT MR. SMITH WAS GUILTY OF THE BURGLARIES..... 22

a. Detective Wall testified that Mr. Smith was guilty of the offenses.....	23
b. Detective Wall’s opinion that Mr. Smith was guilty of the burglaries was improper	26
c. The admission of Detective Wall’s opinion that Mr. Smith committed the four burglaries was not harmless, and two of Mr. Smith’s burglary convictions must be reversed.....	30
 3. MR. SMITH’S CALIFORNIA BURGLARY AND ATTEMPTED BURGLARY CONVICTIONS WERE NOT COMPARABLE TO A WASHINGTON BURGLARY AND SHOULD NOT HAVE BEEN INCLUDED IN HIS CRIMINAL HISTORY	31
a. Prior out-of-state convictions may only be included in an offender’s criminal history if the State proves the out-of-state offense is comparable to a Washington felony	32
b. The State did not prove that the California burglaries and attempted burglary were comparable to a Washington burglary or attempted burglary	33
c. The computation of Mr. Smith’s criminal history and offender score cannot be based upon a 2003 stipulation	36
d. Mr. Smith’s case must be remanded for a new sentencing hearing	38
 E. CONCLUSION	39

TABLE OF AUTHORITIES

Washington Constitution

Const. art. 1, § 21	22
Const. art. 1, § 22	22

Washington Supreme Court Decisions

<u>Ashley v. Hall</u> , 138 Wn.2d 151, 978 P.2d 1055 (1999)	9
<u>In re Personal Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	38
<u>In re Personal Restraint of Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005)	33
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	23, 29
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	22, 23, 29, 30
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) ...	32, 33, 34, 39
<u>State v. Lord</u> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	18
<u>State v. Mace</u> , 97 Wn.2d 840, 650 P.2d 217 (1982)	22
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009)	33-34, 38-39
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008)	10, 22, 23, 28-29
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2002)	18
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004) ...	32-33, 34, 39

<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007), <u>cert. denied</u> , 128 S.Ct. 2964 (2008).....	27
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Washington Court of Appeals Decisions

<u>In re Personal Restraint of Rowland</u> , 149 Wn.App. 496, 204 P.3d 953 (2009)	37
<u>State v. Aaron</u> , 57 Wn.App. 277, 787 P.2d 949 (1990)	19
<u>State v. Barr</u> , 123 Wn.App. 373, 98 P.3d 518 (2004), <u>rev. denied</u> , 154 Wn.2d 1009 (2005)	23
<u>State v. Farr-Lenzini</u> , 93 Wn.App. 453, 970 P.2d 313 (1999)	10, 27, 31
<u>State v. George</u> , 150 Wn.App. 110, 206 P.3d 697 (2009)	9, 10, 13, 14-15, 18, 21, 22
<u>State v. Hardy</u> , 76 Wn.App. 188, 884 P.2d 8 (1994), <u>aff'd</u> , <u>State v. Clark</u> , 129 Wn.2d 211(1996).....	10, 13-14, 15
<u>State v. Hudson</u> , ___ Wn.App. ___, 208 P.3d 1236 (2009)	23, 29, 31
<u>State v. Thomas</u> , 135 Wn.App. 474, 144 P.3d 1178 (2006)	33, 34, 35, 36, 37
<u>State v. Wicker</u> , 66 Wn.App. 409, 832 P.2d 127 (1992).....	19

United States Constitution

U.S. Const. amend. 6	1, 22
U.S. Const. amend. 14	22

United States Supreme Court Decision

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824,
17 L.Ed.2d 705 (1967)31

Federal Circuit Court Decisions

United States v. Dixon, 413 F.3d 540 (6th Cir. 2005)..... 15
United States v. Jackman, 48 F.3d 1 (1st Cir. 1995)..... 15
United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993).....16-17
United States v. Stormer, 938 F.2d 759 (7th Cir. 1991) 16
United States v. Wright, 904 F.2d 403 (8th Cir. 1990)..... 16

Washington Statutes

RCW 9.94A.030 32
RCW 9.94A.500 33
RCW 9.94A.510 32
RCW 9.94A.515 (2007) 32
RCW 9.94A.525 (2007) 32
RCW 9.94A.530 (2007) 32
RCW 9A.52.030 34

Washington Evidence Rules

ER 6029
ER 701 1, 9, 10, 12, 15, 17, 18
ER 7049

California Statute

Cal. Penal Code § 45934-35

Federal Evidence Rule

FRE 701 15, 17

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Detective Wall's testimony that Mr. Smith strongly resembled men seen in videotapes from surveillance cameras at the time of three separate burglaries.

2. The trial court erred by admitting Detective Wall's expert opinion that the same person committed all three burglaries.

3. Detective Wall's testimony that Mr. Smith was the person seen in surveillance videotapes and photographs from three burglaries, the three burglaries shared common and unusual characteristics, and the burglaries were committed by the same person who he believed was Mr. Smith constituted an inadmissible comment on Mr. Smith's guilt in violation of his constitutional right to a jury trial. U.S. Const. amends. 6, 14; Const. art. 1 §§ 21, 22.

4. The trial court erred by including two California burglary convictions in computing Mr. Smith's criminal history.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A witness may identify the defendant in a surveillance photograph or videotape if the witness is particularly familiar with the defendant's appearance at the time of the incident. ER 701. Detective Wall compared a photograph of Mr. Smith with

surveillance videos from three burglaries believed Mr. Smith was the person seen in each case even though the detective had never met Mr. Smith. Did the trial court abuse its discretion by permitting the detective to testify Mr. Smith strongly resembled the men depicted in surveillance footage from three burglaries?

(Assignment of Error 1 and 2).

2. The federal and state constitutions guarantee the right to a fair trial by an impartial jury. Admission of a police officer's opinion of the defendant's guilt violates these constitutional provisions. Was Mr. Smith's constitutional right to a jury trial violated when a police detective offered his opinion that Mr. Smith was the person seen in video surveillance footage from three burglaries, that the burglaries had similar but unusual characteristics, and the detective was confident he was correct when Mr. Smith was arrested for a fourth burglary? (Assignments of Error 1-3).

3. California's burglary statute is broader than Washington's, as it does not require an unlawful entry and covers property other than buildings. The trial court listed five California burglaries and one California attempted burglary in Mr. Smith's criminal history and used two of those convictions in computing his

offender score. Where Mr. Smith did not raise the comparability issue, but also did not agree the prior convictions existed or were comparable to a Washington burglary, must his case be remanded for a new sentencing hearing? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Tony Smith appeals his convictions for three counts of second degree burglary. CP 45-47, 57-59. Mr. Smith was first arrested on January 7, 2008, at a Seattle motel. Two police officers were sitting in a police van in a north end motel parking lot when a man approached them to request permission to enter a motel room and pick up a television set he had left there the night before. 8/21/08RP 103-05; 8/25/08RP 69-70, 72. With the police officers' approval, the man went to a motel room and knocked, and he was admitted by someone inside the room. 8/21/08RP 105-06; 8/25/08RP 72-74. Meanwhile the motel manager reported to the officers that the room's occupants had already checked out, so the police went to the room to arrest to investigate a possible trespassing. 8/21/08RP 106-07; 8/25/08RP 74.

The man the police had spoken to let them into the room, which was filled with items such as electronics equipment, cords, cameras, and two messenger bags were on the bed. 8/21/08RP

107-08, 110, 117-23; 8/25/08RP 75, 79-80. Mr. Smith was inside the room, and the police arrested him for trespassing and possession of drug paraphernalia they noticed in the room; the other man was released with a television set after he signed a "trespass agreement." 8/21/08RP 110-11; 8/25/08RP 78-79, 83, 93.

The officers seized the goods in the motel room and eventually determined laptop computers found in the bags had been stolen from the Freeman Company's office at 564 First Avenue South in Seattle. 8/21/08RP 113-14, 8/25/08RP 90, 99. Mr. Smith was wearing a Freeman Company polo shirt. 8/21/08RP 115. When a police sergeant took the shirt from Mr. Smith, she told him the police had his "picture" from the Freeman Company burglary. Id. at 116. Mr. Smith reportedly asked if the photo showed him coming or going and added the police must be happy now that they had caught him. Id.

The Freeman Company office manager explained the office had been broken into during the weekend of January 5-7, 2008, and nine laptop computers and two digital cameras were taken. 8/25/08RP 111-14. The office manager identified items found in the motel room, including laptop computers, cameras, and the

Freeman polo shirt as belonging to the company or its employees.

Id. at 119.

The company was located in a building with motion-activated surveillance cameras. 3/25/08RP 111, 126-27. A copy of the surveillance footage showing an African-American man forcibly entering the building on the evening of January 5 was shown to the jury. *Id.* at 129-32; Ex. 45.

Later in January, a couple walking by the DSHS office on Second Avenue in downtown Seattle observed a man inside the office break a window with a trashcan and walk into an office. 8/25/08RP 21-23. Initially he was wearing undershorts, but he came out of the room wearing pants. *Id.* at 21, 23, 31-32. After the couple called 911, a Seattle Police Sergeant arrived, and he also observed the man inside the DSHS office apparently going from cubicle to cubicle on the first floor. 8/21/08RP 13-15, 31. The man was unable to exit the building, even after trying to break the door. 8/21/08RP 15-17; 8/25/08RP 23, 28, 33.

Several police officers surrounded the building but were unable to enter until a night custodian came out and let them in. 8/21/08RP 17-19, 80, 94, 96. The custodian, Hee Lim, testified the DSHS door was open when he arrived and a small window was

shattered. 8/25/08RP 11. Mr. Lim heard someone inside the building and eventually saw Mr. Smith, who was startled and looked like he was about to cry. Id. at 11-13, 15. Mr. Lim called his employer who decided to call the police. Id. at 15. Mr. Lim also instructed Mr. Smith to wait in the upstairs lounge area. Id. at 13, 15. Mr. Lim then directed the officers to the second floor where they found Mr. Smith sitting in a chair in the lobby. 8/21/08RP 19-20, 43-44, 73-74, 85; 8/25/08RP 13.

The first floor of the DSHS office was damaged and there were items such as electrical equipment and backpacks on the floor. 8/21/08RP 21-22, 60, 62, 64-65, 95; 8/25/08RP 16. Mr. Smith had two screwdrivers in his pants pockets and several more in a backpack. 8/21/08RP 51-52; 8/25/08RP 42. Mr. Smith was mumbling and followed the officers' commands clumsily; Sergeant Coombs opined Mr. Smith was trying to give the officers the impression he was intoxicated, but Coombs did not smell alcohol. 8/21/08RP 24. After he was advised of his constitutional rights, Mr. Smith told the officers he was sorry. Id. at 48.

The Seattle Financial Group,¹ located at 190 Queen Anne Avenue North, suffered a burglary on December 27, 2007; laptop computers, cameras, personal items, and a series of uncut one-dollar bills were missing. 8/26/08RP 17-18. The building surveillance system captured several images of a man inside the building, and these were shown to the jury. 8/25/08RP 58; 8/26/08RP 23-30, 53-54; Ex. 63, 66.

Seattle Financial Group and another business in the same building had also been burglarized in September 2006; the businesses lost items such as laptop computers, a camera, and a projector. 8/26/08RP 6-9, 10-11. A CD containing footage from the building's surveillance cameras was also shown to the jury. 8/25/08RP 50-51; 8/26/08RP 12-17; Ex. 56. The jury did not reach a verdict on this burglary. 8/29/08RP 8-10.

At trial, Seattle Police Detective Phillip Wall testified he believed the same person was captured by the video surveillance cameras in the Freeman and two Seattle Financial Group burglaries. 8/26/08RP 39, 44-45, 64. His opinion was based upon physical appearance and characteristics he believed distinguished

¹ Seattle Financial Group is the parent company for Seattle Mortgage and Seattle Bank. The company is referred to by different names by different witnesses.

both the burglar and the crime from typical burglaries. Id. at 40-43, 47-49, 59-65, 74. In addition, the detective was permitted to testify over objection that Mr. Smith strongly resembled the person seen in all of the surveillance tapes. Id. at 45. This opinion was based upon comparing the surveillance tapes with a photograph of Mr. Smith, as the detective had never met him. Id. 44, 48.

Mr. Smith asserted an intoxication defense to the DSHS case. He testified that he was very intoxicated after drinking several cocktails at a downtown bar in addition to his normal medication.² 8/27/08RP 16-17, 20. He was so intoxicated that he urinated on himself after leaving the bar. Id. at 17, 22. Mr. Smith then remembered entering the DSHS building, which he knew had a shower, and taking a shower there. Id. at 17-18. After taking the shower, however, he was unable to get out of the locked building and started crying. Id. at 18. Mr. Smith blacked out and was aided by the custodian, who called the police. Id. at 18. He had no memory of damaging the building or seeing people outside, and he explained he normally has tools for his work. Id. at 18-19, 23-25.

² The court would not let Mr. Smith specify what medication he was taking because he was not raising a diminished capacity defense. 8/27/08RP 12-14.

Mr. Smith was convicted of the DSHS, Freeman, and 2007 Seattle Financial Group burglaries. CP 45-47, 57-59. His offender score of 9 or over was based in part upon prior California burglaries. CP 89-96; 9/23/08RP 3. He received a prison-based DOSA sentence of 59 and one-half months. CP 92; 9/23/08RP 8. This appeal follows.

D. ARGUMENT

1. THE ADMISSION OF A POLICE DETECTIVE'S IDENTIFICATION OF MR. SMITH AS THE PERSON SEEN IN SURVEILLANCE PHOTOGRAPHS FROM THREE BURGLARIES INVADED THE PROVENCE OF THE JURY WHERE THE DETECTIVE HAD NEVER MET MR. SMITH AND THUS WAS IN NO BETTER POSITION TO IDENTIFY HIM THAN THE JURY

A lay witness may normally relate only his observations, thus permitting the jurors to form their own opinions and conclusions.

Ashley v. Hall, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999); ER 602. A lay witness may, however, offer an opinion if that opinion is rationally based upon the witness's perceptions and is helpful to the jury's understanding of the testimony or fact in issue. ER 701, 704; State v. George, 150 Wn.App. 110, 117, 206 P.3d 697 (2009).

Washington court rules permit lay witnesses to offer opinions that reach the ultimate issues before the jury. State v. Montgomery,

163 Wn.2d 577, 590-91, 183 P.3d 267 (2008); ER 701, 704. The closer the tie between the opinion and the ultimate issue of fact, however, the stronger the supporting factual basis for the opinion must be. State v. Farr-Lenzini, 93 Wn.App. 453, 460, 970 P.2d 313 (1999). Importantly, no witness in a criminal case may offer the opinion that the defendant is guilty or comment on the defendant's intent or veracity. Montgomery, 163 Wn.2d at 591.

Thus, a lay witness may testify as to the identity of a person in a surveillance photograph or videotape only if "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury." George, 150 Wn.App. at 118 (quoting State v. Hardy, 76 Wn.App. 188, 190-91, 884 P.2d 8 (1994), aff'd, State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996)). Whether a witness's opinion falls within the requirements of ER 701 is reviewed for an abuse of discretion. Id. at 117.

Here, Detective Wall's testimony that Mr. Smith strongly resembled the person seen in videotape footage from three separate burglaries was inadmissible because the detective had no familiarity with Mr. Smith and was in no better position to identify him than was the jury. The trial court abused its discretion by

admitting Detective Wall's identification to show the basis for the police investigation.

a. The court permitted Detective Wall to testify Mr. Smith strongly resembled men caught in surveillance cameras at three burglaries. Prior to jury selection, Mr. Smith sought to prevent the State's witnesses from offering opinions as to his guilt, specifically mentioning police officers' opinions that Mr. Smith was the person in the surveillance tapes. CP 18-19; 8/7/08RP 24, 29-31. The State told the Honorable Jeffrey Ramsdell that the officers would only testify they believed Mr. Smith was the person in the surveillance tape to explain why they arrested Mr. Smith. "This is why I took the action I did." 8/7/08RP 29. Judge Ramsdell ruled that a lay witness could testify that the person in the surveillance tapes looked like Mr. Smith, but could not testify it was Mr. Smith. Id. at 30. The court's ruling was based upon the rationale that the opinion evidence would explain "the actions the officers took and why." Id. at 31.

When the case was reassigned to the Honorable Palmer Robinson, the parties informed the court of the pre-trial ruling admitting the police officers' opinion that Mr. Smith was the person in the videos in order to explain the officers' later actions.

8/13/08RP 7-8; 8/26/08RP 50. Defense counsel objected when the prosecutor asked Detective Wall what about the suspect made him believe the three burglaries were the same and requested a standing objection to the detective's testimony. 8/26/09RP 39-40. At a sidebar, defense counsel argued that the detective's testimony was an improper opinion on the ultimate issue before the jury, but her objection was overruled based upon Judge Ramsdell's prior ruling. Id. at 39, 49-51. The prosecutor asserted the matter had been "hashed out pretty lengthy" with Judge Ramsdell, who found the evidence fit the requirements of ER 701. Id. at 51.

Detective Phillip Wall testified he reviewed the video tapes taken from surveillance footage at the two Seattle Financial Group burglaries as well as the Freeman Company burglary and concluded they were all the same person. 8/26/08RP 38-39, 64. Detective Wall told the jury Mr. Smith "strongly resembled" the person seen in all three videos. Id. at 45. The detective had never met Mr. Smith, but based his identification on a photograph of him. Id. at 44, 88.

b. Detective Wall's opinion that Mr. Smith strongly resembled the person caught on the surveillance cameras at three burglaries was inadmissible because the detective was unfamiliar with Mr. Smith and thus had no greater ability to identify him than did the jury. A witness may offer his or her opinion that the defendant is the person depicted in a photograph or videotape only if the witness has more information about the defendant than the jury and is therefore more likely to correctly identify the defendant. George, 150 Wn.App. at 118; State v. Hardy, 76 Wn.App. at 190-91. While such opinion testimony runs the risk of invading the province of the jury and unfairly prejudicing the defendant, it may be admitted when the witness has had sufficient contacts with the defendant or the defendant has altered his appearance. George, 150 Wn.App. at 118.

In Hardy, this Court upheld the admission of lay opinion testimony concerning people pictured in video tape of a drug transaction recorded on a camera hidden in a car. Hardy, 76 Wn.App. at 189. One police officer had known defendant Hardy for several years and testified the person in a video tape had similar features to the Hardy. Id. at 189, 191. A different officer had known the defendant Johnson for 6 or 7 years and considered him

a friend. Id. When asked if he recognized the voice of the person pictured, the officer responded the person was defendant Johnson. This Court concluded the testimony was admissible because the police officers had seen the defendants in motion, whereas the jury had only seen them sitting at counsel table, and the officers were therefore in a better position to identify the defendants in a “somewhat grainy” videotape. Id. at 191-92.

A police officer’s identification of two defendants as the people in a surveillance tape was not properly admitted in George. There, the jury saw a poor quality surveillance video tape of a motel robbery and 67 still photographs taken from the video. George, 150 Wn.App. at 115. The State also introduced the defendant’s booking photographs and the video tape taken when officers stopped the defendant’s van shortly after the robbery; one of the defendants was arrested along with seven other occupants of a van; the other fled on foot but was soon apprehended. Id. at 113, 115. One of the arresting officers then testified about the identity of the men in the motel surveillance video. Id. 117.

This Court held the police detective’s opinion was inadmissible because, although the officer saw one defendant when he was arrested and saw the other flee and observed him

again at the hospital, the contacts were not sufficient. George, 150 Wn.App. at 119. “These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video.” Id.

The analysis of George and Hardy is consistent with that of federal circuit courts interpreting FRE 701. Because ER 701 and FRE 701 are identical, federal cases are instructive in interpreting the rule. Hardy, 76 Wn.App. at 190. The federal courts have upheld identification of a person in a surveillance photograph by someone who knows the defendant well enough to be familiar with the defendant’s appearance at the time the photograph was taken and such identification would be helpful to the jury, such as when the surveillance photograph is of poor quality. United States v. Dixon, 413 F.3d 540, 544-46 (6th Cir. 2005) (identification by family members properly excluded where they were not particularly familiar with defendant’s appearance at time of offense, defendant had not since altered his appearance, and photographs not of poor quality and showed suspect from waist up); United States v. Jackman, 48 F.3d 1, 3-6 (1st Cir. 1995) (defendant’s ex-wife and two acquaintances properly identified defendant in blurred

photograph where face difficult to see due to angle and hat). Similarly, a law enforcement officer who has a familiarity with the suspect that the jury does not share may offer an opinion as to whether the defendant is depicted in a surveillance photograph. United States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991) (four police officers identified a former officer as a robber in surveillance photos; officers had worked with defendant for several years, photographs were of poor quality, robber's face obscured by cap and hosiery); United States v. Wright, 904 F.2d 403, 404-05 (8th Cir. 1990) (law enforcement officers and bail bondsman who had known defendant for periods ranging from 2 to 13 years identified him in photograph where face partially obscured and defendant had grown slight beard since time of robbery).

When, however, a police officer's knowledge of the defendant was based only upon photographs and witness descriptions, his opinion that the defendant was pictured in several bank surveillance photographs was of "dubious value" and "ran the risk of invading the province of the jury and unfairly prejudicing" the defendant. United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993). In LaPierre, there was no evidence that the defendant's appearance had changed since the time of the robbery in question,

and the court found the detective's identification was thus not helpful to the jury as required by FRE 701. Id.

Here, Detective Wall had never met Mr. Smith, but based his identification upon one photograph.³ He had even less contact with Mr. Smith than the jury, thus falling far short of the familiarity required by Hardy, George, LaPierre, and ER 701. The State may argue that the detective had the opportunity to look at the video tapes more carefully than the jury, as he testified that he watched the video tapes frame by frame. 8/26/08RP 61, 62, 64. But nothing prevented the State from using the same techniques in court. Here, the jury actually had a greater opportunity to observe the defendant than did Detective Wall. The jury viewed Mr. Smith every day at counsel table as well as when he testified. The detective, in contrast, worked from a single booking photograph.

Detective Wall not only testified Mr. Smith strongly resembled the men depicted in the burglary surveillance evidence from the three burglaries, he added that the same person was seen in all three. Since the jury was just as capable as viewing the surveillance footage as the detective, logically this testimony was

³ The State did not introduce the photograph the detective used because it was a jail booking photograph, and the photograph is thus not in evidence. 8/26/08RP 33; 8/27/08RP 69.

also inadmissible under ER 701 and invaded the province of the jury. The trial court thus abused its discretion by permitting the detective to testify that the men in the three video tapes were the same person and that Mr. Smith strongly resembled that person.

c. The trial court abused its discretion by admitting the identification evidence to explain police procedure when the investigation was not at issue. This court normally reviews a lower court's evidentiary rulings for an abuse of discretion. George, 150 Wn.App. at 117. A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Basing an evidentiary ruling upon unsupported facts or a misunderstanding of the testimony, taking a view no reasonable person would take, applying the wrong legal standard, or misunderstanding the law constitute an abuse of discretion. Id. at 284. The court's interpretation of the evidence rules and the application of a court rule to the facts of the case, however, is reviewed de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2002).

The trial court based the decision to admit the detective's opinion that Mr. Smith resembled the men in the video tapes on the

importance that the jury learn why the officers acted as they did. 8/7/08RP 30-31; 8/26/08RP 50. Mr. Smith, however, did not attack Detective Wall's investigation into the burglaries, but simply challenged his identification of Mr. Smith as the perpetrators of the crimes. Nor would the jury question why the police arrested Mr. Smith when he was first found trespassing in a motel room with drug paraphernalia and stolen property and later arrested after hours inside an office building that had been broken into.

The court made this ruling because the State asserted the evidence was needed to show the reason behind the police officers' actions. 8/7/08RP 29; 8/13/08RP 7-8; 8/26/08RP 50. The State may not volunteer unnecessary explanations for police actions as a means to introduce otherwise inadmissible evidence. State v. Wicker, 66 Wn.App. 409, 412, 832 P.2d 127 (1992). Detective Wall's state of mind was simply not in issue and was not relevant to the issues before the jury. See State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990) (officer's state of mind in reacting to information from dispatcher not in issue; hearsay improperly used to prove truth of matter asserted, not officer's state of mind).

Detective Wall based his conclusion that Mr. Smith strongly resembled the person seen in the videotapes from all three

buildings upon comparing the surveillance tapes and a photograph of Mr. Smith. The tapes were of relatively high quality, and the jury could see Mr. Smith in person and compare him to the tapes itself. Additionally, the detective's opinion that the same person was in all three video tapes was based in large part upon what the detective saw in the surveillance tapes. The detective's opinion was not needed or used to show why he conducted his investigation as he did, but rather to prove Mr. Smith was guilty. The trial court abused its discretion by admitting Detective Wall's testimony that the same person was in all the building surveillance tapes and that the person strongly resembled Mr. Smith.

d. The admission of Detective Wall's conclusion that Mr. Smith strongly resembled the person in all three videotapes was not harmless, and two of Mr. Smith's burglary convictions must be reversed. Detective Wall's testimony that Mr. Smith strongly resembled the person seen in surveillance footage requires reversal of the two convictions based upon the surveillance tapes, the Freeman burglary and the 2007 Seattle Financial Group burglary. An error in the admission of evidence is harmless if it is minor in reference to overwhelming evidence as a whole. George, 150 Wn.App. at 119. That cannot be said here.

In George, this Court held police officers' identification of two defendants as the people in the motel surveillance photographs was harmless as to one defendant and required reversal as to the other. Critical to the court's determination that the error was harmless was the identification of one defendant by an eyewitness to the robbery and the fact the defendant drove the van containing the property containing an item taken in the robbery and fled from the police. George, 150 Wn.App. at 119-20. As to the other defendant, however, there was no eyewitness identification and he did not fit the eyewitness's description. Id. at 120.

Here, identity was the crucial issue for the jury in resolving the Freeman and Seattle Financial Group burglaries. 8/27/08RP 49, 50. The only evidence that Mr. Smith was the person who committed the Financial Group burglary was the surveillance tape. The State could not tie Mr. Smith to any of the property taken in the case. Rather, the State's proof was based upon the surveillance tapes and purported patterns observed by Detective Wall.

The Freeman Company burglary is a closer question because Mr. Smith was found in the motel with property taken in that burglary. Simple possession of stolen property, however, does not establish burglary. See State v. Mace, 97 Wn.2d 840, 843, 650

P.2d 217 (1982) (reversing a burglary conviction based only upon possession of recently stolen property and the defendant's silence when questioned about the property). This Court cannot be satisfied that the jury would necessarily convict Mr. Smith based upon this testimony absent the improper testimony from Detective Wall.

Given Detective Wall's position as a burglary detective and public servant, the jury may have been especially influenced by his testimony. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (police officer's opinion may carry special aura of reliability). Mr. Smith's burglary convictions for the Freeman and Seattle Finance burglaries, Counts 1 and 4, must be reversed and remanded for a new trial. George, 150 Wn.App. at 120.

2. MR. SMITH'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT PERMITTED A POLICE DETECTIVE TO OFFER HIS EXPERT OPINION THAT MR. SMITH WAS GUILTY OF THE BURGLARIES

The state constitutional right to a jury trial is "inviolable," and the right to have factual questions decided by the jury is crucial to this right. Const. art. 1, §§ 21, 22; Montgomery, 163 Wn.2d at 590-91. The Sixth Amendment also protects the right to a jury trial. U.S. Const. amends. 6, 14. In a criminal case, a witness may not

offer his opinion that the defendant is guilty. Montgomery, 163 Wn.2d at 591. Such an opinion is so prejudicial it may violate the defendant's constitutional right to a jury trial and the jury's duty to independently determination of the facts and assess the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Barr, 123 Wn.App. 373, 380, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005).

Whether a particular witness's testimony constitutes an unconstitutional opinion on the defendant's guilt depends upon the circumstances of the case, including (1) the type of witness involved, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) other evidence before the jury. Montgomery, 163 Wn.2d at 591; Demery, 144 Wn.2d at 759. This issue is reviewed under the constitutional harmless error standard. State v. Hudson, ___ Wn.App. ___, 208 P.3d 1236, 1241 (2009).

a. Detective Wall testified that Mr. Smith was guilty of the offenses. Prior to trial, Mr. Smith sought to exclude testimony that any of the State's witnesses believed Mr. Smith was guilty. CP 18-19; Detective Wall offered his opinion that Mr. Smith committed the burglaries through (1) his expert opinion that the same person

committed the Freeman burglary and the 2007 and 2006 Seattle Financial Group burglaries, (2) his opinion, discussed above, that Mr. Smith was the person depicted in video surveillance tapes of all three burglaries, and (3) his conclusion that Mr. Smith's arrest in the DSHS office "cemented the deal for me."

As mentioned above, Detective Wall was permitted to offer his opinion that Mr. Smith "strongly resembled" the person seen in the surveillance footage from three burglaries. 8/26/08RP 45. When the prosecutor asked Detective Wall "what about the suspect" made him it was the same person in all three burglaries, Mr. Smith's objection was first sustained and then, after a side bar conference, overruled. Id. at 39-40, 50-51. Counsel requested a standing objection to the detective's opinion. Id. at 40.

Detective Wall went on to opine that burglars usually mirror the demographics of the communities in which the burglaries occur. Thus, while most burglars in Seattle are white, the burglar in these three cases was black. 8/26/08RP 40-41. Additionally, the detective noted that in all three burglaries the suspect remained in the building for a long time, which is unusual because time inside the building increases the chances of getting caught. Id. at 41. Detective Wall also testified over objection that burglars like to

return to the same location because they are familiar with the obstacles and where the cameras are located. Id. at 59-60. And he noted that many burglars do not take electronics equipment because they prefer cash. Id. at 60.

As the various surveillance videos were shown to the jury, Detective Wall pointed out things he believed showed the crimes were committed by the same person, such as white objects on the man's hands, and his use of a tool to enter a building and backpacks to remove items. 8/26/08RP 42-43, 62, 62-65. Defense counsel's objection to this manner of testimony was overruled. Id. at 65. He later claimed the use of gloves by burglars is unusual. Id. at 74. The detective related that the man seen in the earlier Seattle Financial Group video was looking for cameras, whereas on the later date he looked down as if he already knew where the cameras were. Id. at 63. The detective also opined that all three suspects had a shaved face, protruding jaw line, and round cheeks, but admitted he did not do a scientific comparison or see any distinguishing features, such as a scar or tattoo. Id. at 42, 81, 84.

Detective Wall also related other evidence that confirmed in his mind that Mr. Smith was the man seen in all of the surveillance videos. He stated the person in the 2007 Seattle Financial Group

burglary was wearing a chain with a round object around his neck, and, while most men do not wear necklaces, Mr. Smith was wearing a silver ring on a chain when arrested. 8/26/08RP 47-49; 8/25/08RP 83-84. Detective Wall added that it did not appear that the suspect had a vehicle, which was “confirmed” when Mr. Smith was arrested at the motel without a vehicle. 8/26/08RP 41. And he claimed to be able to tell the burglar was of average height from the burglar’s relationship to windows seen in the surveillance footage, although the detective did not go to the scenes to measure. Id. at 61, 77-78.

Detective Wall concluded that when Mr. Smith was arrested at the DSHS office building, he was confident he was the burglar in each case. 8/26/08RP 65. “That cemented the deal for me.” Id.

b. Detective Wall’s opinion that Mr. Smith was guilty of the burglaries was improper. The State asserted prior to trial that Detective Wall would offer his lay opinion that all three burglaries were committed by the same person, a person who closely resembled Mr. Smith. In fact, the detective’s testimony was much more extensive, including his expert opinion concerning typical burglaries and the similarities between the three burglaries, designed to show that the three burglaries were unusual and

support his conclusion that Mr. Smith was guilty of the crimes. While the State did not explain whether it was offering this testimony as expert or lay opinion, a police officer or other witness may offer expert testimony based upon expertise in an area that is not known to the average juror. State v. Yates, 161 Wn.2d 714, 762-63, 763-66, 168 P.3d 359 (2007) (FBI agent called as expert in crime scene investigation and crime scene “linkage;” health department worker as expert on prostitution), cert. denied, 128 S.Ct. 2964 (2008); Farr-Lenzini, 93 Wn.App. at 461 (experienced trooper qualified to testify concerning police procedure, vehicle dynamics and accident reconstruction, but not as to suspect’s state of mind).

Detective Wall had been employed by the Seattle Police Department for 20 years and had been a detective for only two years; he was currently working as a detective in the burglary and theft unit. 8/26/08RP 31, 80. He offered the expert opinion about burglars. Id. at 40-41, 59-60, 74. The detective explained these characteristics demonstrated the burglaries in this case were highly unusual and therefore more likely to have been committed by the same person, as did other features of the three burglaries. Id. at 42-43, 61-65. This testimony was amplified by his opinion that Mr.

Smith strongly resembled the person seen in the surveillance tapes from all three burglaries and his declaration that his suspicions were confirmed when Mr. Smith was arrested in the DSHS office. Id. at 45, 65.

Mr. Smith's case is similar to Montgomery, supra. The defendant in that case was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. Montgomery, 163 Wn.2d at 583. An investigating detective testified that the couple was buying ingredients to manufacture methamphetamine, "based upon what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes." Id. at 587-88. He added, "I've seen those actions several times before." Id. at 588. Another detective asserted, based upon his experience and training, "[t]hat those items were purchased for manufacturing." Id. Additionally, the State's forensic chemist opined that the items the defendant purchased lead him to conclude "this pseudoephedrine is possessed with intent." Id. The Montgomery Court held the testimony was an improper opinion on the defendant's guilt because the testimony (1) went to the only disputed element in the case, intent, (2) the witnesses expressed their opinions explicitly

using the legal standard, and (3) the witnesses' testimony carried an "aura of reliability" because they were law enforcement officers. Id. at 594-95 (quoting Demery, 144 Wn.2d at 765).

The detective's opinion in this case is arguably less direct than that in Montgomery. Opinion testimony need not be direct to be improper, however; a witness's inference may be sufficient. Montgomery, 163 Wn.2d at 275. The Washington Supreme Court reversed a rape conviction where a psychologist testified the alleged victim suffered from rape trauma syndrome, finding, in the absence of any other sexual encounter during the relevant time period, the testimony implied that the victim was telling the truth, had in fact been raped, and the defendant was guilty. Black, 109 Wn.2d at 349. More recently, this Court reversed a rape conviction on similar grounds where a sexual assault nurse examiner and her clinical coordinator testified that the alleged victim's injuries were so severe that they were caused by nonconsensual intercourse. Hudson, 208 P.3d at 1237. This Court found the explicit testimony that the injuries were caused by nonconsensual sexual encounter was an improper statement that the defendant was guilty. Id. at 1237-39.

Here, Detective Wall testified that, in his opinion, the same person committed the three burglaries based upon the surveillance footage and that he was “able to tie those three together” only after seeing a photograph of Mr. Smith. 8/26/08RP 64-65. He added that when Mr. Smith was “actually caught in the building” at the DSHS officer, which “cemented the deal for me.” Id. at 65. While the detective’s testimony that Mr. Smith was the guilty was less direct than in Montgomery, it was nonetheless a conclusion that Mr. Smith committed the burglaries.

c. The admission of Detective Wall’s opinion that Mr. Smith committed the four burglaries was not harmless, and two of Mr. Smith’s burglary convictions must be reversed. Detective Wall should not have been permitted to offer his opinion that Mr. Smith was guilty. As a police detective, his opinions were no doubt seriously considered by the jury. Demery, 144 Wn.2d at 759. His testimony went to the main issue for the burglaries at issue – identity – and thus impacted Mr. Smith’s defense that he was not the person seen in the surveillance footage. And, as argued in Section 1(d) above, there was little if any untainted evidence to support the convictions for the Seattle Financial Group and Freeman Company burglaries.

When a witness improperly offers his opinion that the defendant is guilty, this Court must determine if the error is harmless using the constitutional harmless error standard. Hudson, 208 P.3d at 1241; Farr-Lenzini, 93 Wn.App. at 465. The reviewing court assumes the error is prejudicial, and the State must demonstrate beyond a reasonable doubt that the jury would have reached the same verdict absent the error. Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This Court may not assume that the jury disregarded the detective's opinion. In light of the lack of evidence and the particular prejudice that results from a police officer's opinion that the defendant is guilty, the State cannot meet its burden here. Mr. Smith's convictions for the Freeman and Seattle Finance burglaries must be reversed. Hudson, 208 P.3d at 1241.

3. MR. SMITH'S CALIFORNIA BURGLARY AND ATTEMPTED BURGLARY CONVICTIONS WERE NOT COMPARABLE TO A WASHINGTON BURGLARY AND SHOULD NOT HAVE BEEN INCLUDED IN HIS CRIMINAL HISTORY

The trial court included five burglary and one attempted burglary conviction in Mr. Smith's criminal history and included two of the convictions in computing his offender score. The court, however, never determined the California burglary statute was

comparable to Washington's as required by RCW 9.94A.530 and RCW 9.94A.525(3). Although Mr. Smith did not object to his offender score and standard sentence range, he did not agree the burglary convictions were comparable to a Washington felony. A review of the information provided by the State and the California statute reveals that Mr. Smith's convictions were not comparable to a Washington burglary and should not have been included in computing his offender score.

a. Prior out-of-state convictions may only be included in an offender's criminal history if the State proves the out-of-state offense is comparable to a Washington felony. Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily-established seriousness of the current offense and the defendant's offender score. RCW 9.94A.510; RCW 9.94A.515 (2007); RCW 9.94A.525 (2007); RCW 9.94A.530 (2007); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly calculate the offender score, the court must determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); RCW 9.94A.030(14).

Out-of-state convictions are included in the offender score if they are for crimes that are comparable to a Washington criminal statute in effect at the time the foreign crime was committed. Ross, 152 Wn.2d at 229. This determination is made by comparing the elements of the out-of-state crime with the elements of “potentially comparable Washington crimes.” Id. (quoting Ford, 137 Wn.2d at 479). If the out-of-state crime is not substantially similar to a Washington crime, the sentencing court may look at the defendant’s conduct, as found in the record, but with the understanding that facts or allegations contained in the record may not have been sufficiently proved at trial or admitted in the plea agreement. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Thomas, 135 Wn.App. 474, 486, 144 P.3d 1178 (2006).

b. The State did not prove that the California burglaries and attempted burglary were comparable to a Washington burglary or attempted burglary. The State must prove the existence and nature of any prior offenses by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); Ross, 152 Wn.2d at 230; RCW 9.94A.500(1). Reliable evidence is required to establish the accuracy of the State’s offender score calculation.

Ford, 137 Wn.2d at 482. The best evidence of a prior conviction is a certified copy of the prior judgment. Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 480. A defendant's "affirmative acknowledgment" of the existence and comparability of out-of-state convictions, however, satisfies the State's burden of proof. Mendoza, 165 Wn.2d at 920; Ross, 152 Wn.2d at 233.

The California Penal Code section outlawing burglary does not contain an element that is found in Washington's burglary statute and also covers property not included in Washington. Cal. Penal Code § 459; RCW 9A.52.030; Thomas, 135 Wn.App. at 483-84. In Washington, a person is guilty of second degree burglary if he unlawfully enters or remains in a building with the intent to commit a crime against persons or property in the building. RCW 9A.52.030. In contrast, California's burglary statute does not require an unlawful entry and includes property not included within the definition of building. Cal. Penal Code § 459. The California statute reads in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, ... floating home, ... railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, ... any house car, ... inhabited camper, ... vehicle, ... when the doors are locked,

aircraft, ... or mine or underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. ...

Cal. Penal Code § 459 (2009).⁴ Thus, the two statutes are not comparable for purposes of determining an SRA offender score. Thomas, 135 Wn.App. at 483.

The State provided information concerning Mr. Smith's prior convictions in a document entitled "Presentence Statement of King County Prosecuting Attorney." SuppCP ____ (sub. no. 122, filed 9/30/08) (hereafter Presentence Statement). In addition to information concerning the present case, such copies of the second amended information and certification for determination of probable cause, copies of California court documents are attached.⁵ Presentence Statement at 16-53.

Mr. Smith's Judgment and Sentence lists a 1999 California second degree burglary with cause number VCR 14468, but nothing containing that case number appears to be found in the information presented by the prosecutor. The complaints charging with Mr. Smith with the attempted burglary and three of the five burglaries listed on the Judgment and Sentence are included in the

⁴ Statutory amendments in 1989 and 1991 do not affect Mr. Smith's case.

⁵ It is unclear if the attached information includes certified copies or copies of certified copies.

prosecutor's packet of information. Presentence Statement at 29-31, 35-38, 43-44, 52-53. The prosecutor, however, did not include any guilty plea statements or nolo contendere pleas.

The three informations alleging burglary do not include unlawful entry, as that is not statutorily required in California. *Id.* at 35, 43, 52. The information alleging attempted burglary charges Mr. Smith "did unlawfully attempt to enter" a building. *Id.* at 29. No guilty plea statement, however, is included, so this Court cannot determine if Mr. Smith agreed that his attempted entry was unlawful. *Id.* at 27-31; *Thomas*, 135 Wn.App. at 486-87 (even if unlawful entry mentioned in charging document, record does not establish defendant adopted that allegation in pleading guilty).

Thus, the State did not provide any information to establish that Mr. Smith's California burglary and attempted burglary convictions were comparable to a Washington burglary.

c. The computation of Mr. Smith's criminal history and offender score cannot be based upon a 2003 stipulation. Although the Judgment and Sentence lists five California burglaries and one attempted burglary, the State apparently only relied upon two burglaries to compute his offender score. Presentence Report at 10-13. The prosecutor's packet of sentencing information includes

three copies of an SRA scoring form taken from the 2000 adult sentencing guidelines manual. Id. In the section for adult history, the prosecutor filled in two burglary conviction and one other felony conviction. Id. Because burglaries are scored as two points, the total points for prior criminal history was five. Id. Written in next to the calculation are the words, “Based on 2003 stipulation by defendant.” Id. It appears that Mr. Smith signed a felony plea agreement when he was convicted of malicious mischief in the first degree in King County Superior Court in 2003, and the box stating he agreed to the prosecutor’s understanding of his criminal history was checked. Id. at 62 (signed plea agreement); CP 96 (Judgment and Sentence listing malicious mischief conviction).

Mr. Smith’s 2003 stipulation to his criminal history is not sufficient to establish the convictions are comparable to Washington offenses. In 2006, this Court decided Thomas, supra, holding that the California burglary statute is broader than Washington’s burglary statute, encompassing a broader range of property and lacking a requirement that the defendant enter or remain unlawfully. Thomas, 135 Wn.App. at 478. This opinion was a significant change in the law. In re Personal Restraint of Rowland, 149 Wn.App. 496, 506-07, 204 P.3d 953 (2009). As a

result, any 2003 stipulation would not be an intelligent one.

Moreover, a defendant may not stipulate to a sentence in excess of that authorized by statute. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (defendant did not object to convictions that had “washed out”).

d. Mr. Smith’s case must be remanded for a new sentencing hearing. At Mr. Smith’s sentencing hearing, the State did not explain the basis of its calculation of Mr. Smith’s criminal history and offender score, except to assert he had “a number of prior burglary convictions,” a malicious mischief conviction, and his offender score was “nine plus.” 9/23/08RP 3. Mr. Smith’s counsel did not dispute the offender score calculation, and instead successfully argued for a prison-based DOSA sentence. Id. at 4-5. In so doing, she asserted Mr. Smith’s prior burglaries were probably to fuel his drug habit. Id. at 6.

Unless the defendant affirmatively acknowledges the prior convictions and their inclusion in his defendant’s criminal history, the State must prove the prior convictions by a preponderance of the evidence. Failure to object to the prosecutor’s assertions concerning the prior burglaries is not an agreement or stipulation to the use of the prior convictions. Mendoza, 165 Wn.2d at 928-29.

Additionally, even if defense counsel had affirmatively agreed Mr. Smith's prior California convictions existed, this is not a stipulation that the California burglaries were comparable to Washington offenses. Ross, 152 Wn.2d at 233; Ford, 137 Wn.2d at 483-85.

Mr. Smith's sentence must be vacated because the State did not prove that the California burglary and attempted burglary convictions were comparable to a Washington burglary. Mendoza, 165 Wn.2d at 930. Due to the lack of a specific objection, a new sentencing hearing must be held where the State will have the opportunity to attempt to prove the comparability of the convictions. Id.

E. CONCLUSION

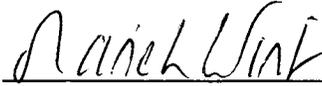
Two of Mr. Smith's three burglary convictions must be reversed and remanded for a new trial because Detective Wall offered his opinion that Mr. Smith was guilty and was permitted to identify Mr. Smith in surveillance videotapes even though the detective had never met Mr. Smith.

In addition, Mr. Smith's California burglary and attempted burglary convictions were improperly included in the computation of his offender score when they are not comparable to Washington

burglaries. His sentence must be vacated and his case remanded for a new sentencing hearing.

DATED this 23rd day of July 2009.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62523-3-I
v.)	
)	
TONY SMITH,)	
)	
Appellant.)	

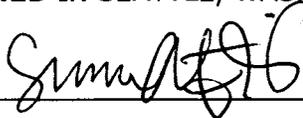
DECLARATION OF DOCUMENT FILING AND SERVICE

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 23RD DAY OF JULY, 2009, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
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[X] TONY SMITH	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 23RD OF JULY, 2009.

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