

63253-1

63253-1

**COPY RECEIVED**

MAR 10 2010

CRIMINAL DIVISION  
KING COUNTY PROSECUTORS OFFICE

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

MAR 10 2010

No. 63253-1-1

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

COPIES OF THIS DOCUMENT  
MAY BE OBTAINED FROM  
THE COURT CLERK  
COURT OF APPEALS  
DIVISION ONE  
1000 4TH AVENUE  
SEATTLE, WA 98101  
PHONE: (206) 464-3000  
FAX: (206) 464-3001  
WWW.COURTS.WA.GOV

---

STATE OF WASHINGTON,

Respondent,

v.

SAID ALI

Appellant.

---

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

The Honorable Laura Inveen

---

BRIEF OF APPELLANT

---

James Bible  
Attorney for Appellant

LAW OFFICE OF ST. LAURENT AND BIBLE  
1130 NW MARKET STREET  
Seattle, Washington 98107  
(206) 588-2008

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

SUMMARY OF ARGUMENT.....1

ASSIGNMENTS OF ERROR.....3

ISSUES RELATING TO ASSIGNMENTS OF ERROR.....3

STATEMENT OF THE CASE.....5

ARGUMENT..... 15

I. BECAUSE THE IDENTIFICATION PROCEDURES WERE UNDULY SUGGESTIVE AND PRODUCED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, THE COURT ERRED BY ADMITTING THE IN-COURT IDENTIFICATION..... 15

    A. The identification procedure was unduly suggestive ..... 16

    B. The unduly suggestive procedure created a very substantial likelihood of irreparable misidentification ..... 19

        1. *Opportunity to View and Degree of Attention*.....20

        2. *The witness degree of attention* .....20

        3. *Accuracy of the Witness’ Prior Description of the Criminal*.....21

        4. *Level of Certainty Demonstrated by the witnesses at the Confrontation* ..... 18

II. MR. ALI WS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO MAKE A MOTION FOR SEVERANCE.....25

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A  
CONVICTION IN COUNTS 2, 3, AND 4.....29

CONCLUSION .....32

## TABLE OF AUTHORITIES

### STATE CASES

<u>State v. Burrell</u> , 48 Wn. App. 187, 738 P.2d 316 (1987) .....	15,16
<u>State v. Carter</u> , 56 Wn.App. 606, 625 P.2d 726 (1981).....	26
<u>State v. Clark</u> , 2 Wn.App. 45, 467 P.2d 368 (1970) .....	24
<u>State v. Daugherty</u> , 94 Wn.2d 263, 616 P.2d 649 (1980) <u>cert. denied</u> , 450 U.S. 958 (1981).....	16
<u>State v. Gatalski</u> , 40 Wn.App. 601, 699 P.2d (1985) <u>Rev.denied</u> , 104 Wn.2d 1019 (1985).....	28
<u>State v. Hilliard</u> , 89 Wn.2d 430, 573 P.2d 22 (1977).....	15, 16, 20
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407, <u>Cert. denied</u> , 479 U.S. 995 (1986).....	26
<u>State v. McDonald</u> , 40 Wn.App. 743 P.2d 327 (1985) .....	15, 16 19, 20, 24
<u>State v. Rogers</u> , 44 Wn.App. 510 722 P.2d 1349 (1986) .....	16
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968) <u>vacated in part</u> , 408 U.S. 934 L.Ed. 2d 747, 92 S.Ct.2852 (1972), <u>Overruled on other grounds</u> , <u>State v. Gosby</u> , 85 Wn.2d 758, 539 P.2d 680 (1975).....	27
<u>State v. Standfger</u> , 48 Wn.app. 121, 737 P.2d 1308 (1987), <u>rev.denied</u> , 108 Wn.2d 1035 (1987).....	26
<u>State v. Taracia</u> , 59 Wn.App.368, 798 P.2d 296 (1990), <u>Overruled on other grounds</u> , <u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	26
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	25

<u>State v. Thorkelson</u> , 25 Wn.App. 615, 611, P.2d 1278 (1980), <u>Modified in part</u> , <u>State v. Burrell</u> , 28 Wn.App. 606, 625 P.2d 726 (1981) .....	16
<u>State v. Traweck</u> , 43 Wn.App. 99, 725 P.2d 1148, <u>rev. denied</u> , 106 Wn.2d 1007 (1986), Overruled on other grounds, <u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	26
<u>State v. Visitacion</u> , 55 Wn.App. 166, 776 P.2d 989 (1989) .....	26
<u>State v. Warren</u> , 55 Wn.App. 645, 779 P.2d 1159 (1989), <u>rev. denied</u> , 114 Wn.2d 1004 (1990).....	26

#### FEDERAL CASES

<u>Foster v. California</u> , 394 U.S. 440, 22 L. Ed. 2d 402, 89 S. Ct. 1127 (1969).....	16, 24
<u>Mason v. Brathwaite</u> , 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977).....	20
<u>Niel v. Biggers</u> , 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).....	15, 16, 19
<u>Simmons v. United States</u> , 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).....	15
<u>Stoval v. Denno</u> , 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1127 (1967).....	35
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	25, 26
<u>United states v. Wade</u> , 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967).....	15

**RULES AND STATUTES**

Const.art. 1, §3.....29  
CrR 4.4(a)(2) .....27  
CrR 4.4(b).....27

**FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. V .....29  
U.S. Const. amend. XIII.....29

## A. SUMMARY OF ARGUMENT

Said Ali was the lone person charged and convicted of multiple counts of first degree robbery and an assault in the first degree in relation to several incidents that occurred over the course of two months in 2008. In each incident, the victims were approached by two to eleven perpetrators who threatened them and took personal property from them. On one occasion one of the victims was stabbed in the process of the robbery.

The victims in each case gave relatively generic descriptions of the robbers. The general profile that came from the descriptions was young, thin and of East African descent with accents. On June 11, 2008, Mr. Ali was placed in a police lineup. Mr. Ali, a native Somalian, was one of only two people in the lineup that spoke with an East African accent. Each lineup participant was required to make say a phrase.

The only other member of the lineup that spoke with an East African accent was approximately a decade older than Mr. Ali and had facial hair while Mr. Ali did not. Mr. Ali was also the youngest and shortest member of the lineup. The appellant argues that the lineup was impermissibly suggestive and violated Mr. Ali's due

process rights. As a result, all identifications that stemmed from the impermissibly suggestive lineup should be suppressed.

In addition to Mr. Ali's claim that he was subjected to an impermissibly suggestive lineup, Mr. Ali argues that his attorney's failure to move to sever counts made it so that he did not receive effective assistance of counsel. In a single trial, Mr. Ali was forced to defend against eight separated counts of robbery and assault. The strength of the State's case varied dramatically from count to count. With each count the victims claimed that they were victimized by anywhere from two to eleven people. Mr. Ali was the only person to stand trial for these allegations. In one of the counts Mr. Ali was stopped at or near the scene of the incident and was identified by the victim. In each of the other counts, Mr. Ali was not apprehended at the scene. Additionally, there are questions related to whether the evidence was sufficient to find Mr. Ali guilty of at least two of the counts.

There was insufficient evidence to find Mr. Ali guilty of counts 1, 2 and 3. While both victims indicated that they saw Mr. Ali at the scene, they both indicated that they could not articulate exactly what he did specifically. Both victims indicated that they were attacked and robbed by approximately eleven people. Mr.

Halliburton, who was stabbed, could not say who stabbed him. Mr. Ali was not apprehended at or near the scene and was the only person out of the approximately eleven people that was actually charged with counts 1, 2, and 3.

#### B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress the lineup identifications.

2. The trial court erred in denying trial counsels motion to dismiss due to insufficient evidence.

5. There was insufficient evidence to find Mr. Ali guilty of counts 2, 3 and 4.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the appellant was the youngest, shortest and youngest person and the robber was described as short young and thin, was the lineup impermissibly suggestive so that it created a very substantial likelihood of misidentification and denied the appellant of due process? (Assignment of Error 1)

2. Where the appellant was one of only two people of East African Descent in the lineup and the perpetrator was described as being of East African Descent and having an accent was the lineup

impermissibly suggestive so that it created a very substantial likelihood of misidentification and denied the appellant of due process? (Assignment of Error 1)

3. Was the appellant denied effective assistance of counsel where counsel failed to make a motion to sever counts after the court determined that joinder was appropriate and this failure affected the outcome of the proceedings.

4. Was the evidence in count 2 insufficient to support appellant's conviction where the victims claim that the appellant was present at the scene, but, cannot articulate what exactly the appellant did to make him guilty of the crimes charged.

5. Was the evidence in count 3 insufficient to support appellant's conviction where the victims claim that the appellant was present at the scene, but, cannot articulate what exactly the appellant did to make him guilty of the crimes charged.

6. Was the evidence in count 4 insufficient to support appellant's conviction where the victims claim that the appellant was present at the scene, but, cannot articulate what exactly the appellant did to make him guilty of the crimes charged.

#### D. STATEMENT OF THE CASE

##### 1. Procedural History

The appellant, Said Ali, was initially charged by information with a single count of first degree robbery under cause number 08-1-05113-3 SEA. CP 1-4. An amended information added three additional counts of robbery in the first degree and one attempted robbery in the first degree under cause number 08-1-05113-3 SEA. Before trial, the state moved to consolidate the counts from cause number 08-1-05113-3 SEA with cause number 08-1-0410-7 SEA. CP 20. Under cause number 08-1-0410-7 SEA, Mr. Ali was charged with a single count of Robbery in the first degree stemming from events that were alleged to have occurred on May 1, 2008. CP 20. Mr. Ali's counsel objected to the joinder of the counts in cause number 08-1-05113-3 SEA and the counts in 08-1-0410-7 SEA. 1/13/09 VRP 11. After cause number 08-1-05113-3 and cause number 08-1-0410-7 SEA, the state amended the information yet again to add an additional charge of Assault in the first degree. 1/13/09 VRP 9-11, CP 49-53. Mr. Ali's counsel never sought to sever any of the counts. Prior to trial, Mr. Ali sought to

suppress the line up identifications, photo montage and moved to suppress his statements to police. 1/13/09 VRP 19. The court denied the motions and entered written findings of fact and conclusions of law. 1/15/09 VRP 311-325. Following trial, a jury convicted Mr. Ali of all charges including weapons enhancements. Mr. Ali made a motion for arrest of judgment in relation to count seven. CP 147-156. The judge denied Mr. Ali's motion. Mr. Ali's counsel filed a motion for an exceptional sentence as part of his sentencing memorandum. Mr. Ali also argued that with respect to counts two and three were part of the same course of conduct and, as a result, there should be one weapons enhancement for the two counts. The court rejected this argument as well. The court sentenced Mr. Ali to 129 months for the robbery in the first degree counts, which were counts one two five seven and eight. CP 147-156. For count three, the assault in the first degree charge, the court sentenced Mr. Ali to 240 months. Id. With respect to counts four and six, the attempted robbery in the first degree counts, the court sentenced Mr. Ali to 96.75 months. Id. All counts were run concurrent. The court also imposed 24 months for each of the three deadly weapon findings. Id. The courts total calculation of time for Mr. Ali was 312 months. Id. The Judge noted for the

record that the sentence that was imposed was the lowest she believed she had the option of imposing in this case. 3/27/09 VRP1436.

## 2. Pretrial Motion to Suppress Identification

The appellant moved pretrial to suppress the lineup identification, photo montage identification and "show up" identification of the various witnesses. 1/13/09 VRP 19. Detective Craig testified in pre trial motions that he filled the line up with jail inmates that he had hand picked. 1/13VRP 182. During Detective Craig's testimony, he indicated that that he tried to match the general suspect description. 1/13/09 RP 203. Most of the witnesses indicated to Detective Craig that the suspects in these cases were in their early twenties, of East African descent and had accents. 1/13/09 VRP 186-188. The witness had also indicated to Detective Craig that the suspects had slight builds and ranged in height from five foot seven to six feet one. Id. The number of perpetrators in each case ranged from two to eleven.

On cross examination, Detective Craig testified that he was aware that Mr. Ali was the youngest person in the line up. 1/13/09 VRP 185. Detective Craig further testified that one of the individuals in the lineup was at least nine years older than Mr. Ali. 1/13/09 VRP

186. In addition to being the youngest person in the lineup, Detective Craig testified that Mr. Ali weighed the least of all of the people in the lineup. 1/13/09 VRP 186. During Detective Craig's testimony, he indicated that that he tried to match the general suspect description. 1/13/09 VRP 203. Detective Craig acknowledged during his testimony that several of the witnesses that participated in the lineup had indicated that the suspect had an East African accent. 1/13/09 VRP 186. Mr. Ali was one of only two individuals in the lineup that had an East African Accent. 1/13/09 VRP 258. The Other individual that had an East African Accent was nearly a decade older than Mr. Ali. 1/13/09 VRP 186. Mr. Ali and the other individuals that were a part of the lineup were required by law enforcement to say two phrases in front of the witnesses. 1/13/09 VRP 265.

Leo Hamaji, an attorney from the public defenders association, observed the line up on behalf of Mr. Ali. Mr. Hamaji testified that prior to the lineup he had a brief opportunity to speak with Mr. Ali. 1/13/09 VRP 257. While meeting with Mr. Ali, Mr. Hamaji noticed that Mr. Ali had an accent. Id. Mr. Hamaji believed that Mr. Ali's accent was either Middle Eastern or African. 1/13/09 VRP 258. Mr. Hamajii also noticed that there was one other person

in the lineup that had an accent similar to Mr. Ali's. 1/13/09 VRP 258. The individual that had a similar accent to Mr. Ali was in position number one and Mr. Ali was placed in position number two. 1/13/09 VRP. Mr. Hamajii also testified that in his mind none of the other participants in the lineup had accents. 1/13/09 VRP 266.

Mr. Hamaji testified that Mr. Ali looked quite a bit younger than the person in position number one. 1/13/09 VRP 263. Detective Craig also testified that the individual in position one was nearly a decade younger than Mr. Ali. 1/13/09 VRP 186. Detective Craig further indicated on cross examination that Mr. Ali was actually the youngest participant in the lineup. 1/13/09 VRP 186.

Mr. Hamaji also noted that the person in position number one had facial hair, while Mr. Ali did not have any facial hair. 1/13/09 VRP 263. Specifically, the person in position number one had a goatee and a mustache while Mr. Ali did not have any facial hair. Id.

Dr. Loftus, a professor who focuses on witness identification issues testified at trial about issues that create biased lineups. 1/28/09 VRP1187. Dr. Loftus testified that a lineup that a biased lineup is one in which we assume the suspect to be innocent but, for whatever reason, the suspect has a greater chance of being

misidentified by the witness as any of the fillers. 1/28/09 VRP 1187. Dr. Loftus also indicated during his testimony that factors that make the suspect stand out from the fillers leads to bias. 1/28/09 VRP 1187-1192. Dr. Loftus also indicated during testimony that, when individuals in a lineup are required to say phrases in front of witnesses, bias will likely be present if the suspect and fillers has significantly different speech patterns. 1/28/09 VRP 1190.

### 3. Substantive Facts

In count one, Mr. Ali was charged with robbery in the first degree in relation to an incident that occurred on April 23<sup>rd</sup>, 2008. The incident involved an allegation that Mr. Ali and another person approached Stephanie Martin, threatened her with a knife and then took her cell phone. During trial, Ms. Martin testified that the incident occurred at some time around 1:30 a.m. 1/20/09 VRP 373. She further testified that she was approached by three young Black men one of whom pulled a knife on her. 1/20/09 VRP 373. The individual that pulled a knife on her was wearing a hooded sweatshirt and a hat. 1/20/09 VRP 373. When interviewed by Detective Craig about this incident, Ms. Martin was not able to provide him with a specific description of what the assailants looked

like. 1/20/09 VRP 373. Ms. Martin conveyed to Detective Craig that she believed her assailants were approximately five foot seven, one hundred and sixty-five or one hundred and seventy pounds. 1/20/09 VRP 374. Ms. Martin and also conveyed to Detective Craig that she believed that the robbers were black and spoke with foreign accents. 1/20/09 VRP 373-374, 376. Ms. Martin attended the lineup that was held in a Seattle Police Station on June 8<sup>th</sup> 2008. 1//2009 VRP. Ms. Martin believed that the suspect would be included in the lineup. 1/20/09 VRP 376. Ms. Martin also testified that just two people in the lineup had accents. 1/20/09 VRP 376. Ms. Martin identified Mr. Ali as one of the people that robbed her. At the time of this writing there is no indication that any other individuals were charged or convicted of anything in relation to this incident.

Count 2 involved an allegation that Mr. Ali robbed Carl Halliburton in the early morning hours of April 23, 2008. In the early morning hours of April 23, 2008, Mr. Halliburton and his friend were surrounded and attacked by eleven people one of whom stabbed Mr. Halliburton and took a number of personal items from him. 1/27/09 VRP 978. Mr. Halliburton described his attackers as dark skinned, early twenties with modish attire. 1/27/09 VRP 979. He

also described them as having accents. 1/27/09 VRP 979. Mr. Halliburton was fairly sure that the accents that he heard were of East African. 1/27/09 VRP 1020-1021. Mr. Halliburton attended the lineup that was conducted on June 11, 2008. Mr. Halliburton testified the only person in the lineup that spoke with an accent was Mr. Ali. 1/27/09 VRP 1007. Mr. Halliburton testified at trial that he was one hundred percent sure that he had correctly picked a person that had participated in the assault and robbery during the lineup. Interestingly, Mr. Halliburton also testified that he wrote that he was eighty five to ninety percent positive that he correctly picked one of his many attackers during the lineup on a form that he was given by a detective shortly after the lineup. 1/27/09 VRP 1009. Mr. Halliburton was, however, uncertain about the role the person he picked in the lineup played in the assault. 1/27/09 VRP 1009. Subsequent to the lineup, Mr. Halliburton picked Mr. Ali out of a photo montage. 1/27/09 VRP 1011, 1012.

On cross examination, Mr. Halliburton indicated that he had three and one half beers in the hours prior to the attack and robbery. 1/27/09 VRP 1016. He also indicated that he had just left the bar at the time that this incident happened. Id. Mr. Halliburton was hit, punched, kicked and stabbed by nearly eleven people

during this incident. 1/27/09 VRP 1017. In count 3, Mr. Ali was charged with assault in the first degree. The charging documents indicated that the state believed that Mr. Ali or another stabbed Mr. Halliburton.

In count four, Mr. Ali was charged with attempted robbery in the first degree. The victim in count four was Jonathan Douglas, Mr. Halliburton's friend. The events that gave rise to count four occurred at the same time that Mr. Halliburton was being robbed and stabbed. Mr. Douglas and Mr. Halliburton were friends from high school who were hanging out together when they were attacked by a group of men with African Accents. 1/21/09 VRP 498. Mr. Douglas indicated that the individuals that attempted to rob him were aged eighteen to twenty two, had thin builds and were of East African descent. 1/21/09 VRP 498, 532. Mr. Douglas indicated that Mr. Ali was one of the four people that was attempting to rob him. 1/21/09 VRP 521. Mr. Douglas also indicated that the four individuals that were beating him similar looks, features and speech patterns. 1/21/09 VRP 532. Mr. Douglas did not see much of what happened to Mr. Halliburton because he was seeking to protect himself from the several punches and kicks that he was receiving from the people that were attacking him. 1/21/09 VRP 536. At the

lineup Mr. Douglas noted that the person in position two was the only person that had an East African accent of all of the lineup participants. 1/21/09 VRP 542. Mr. Douglas picked the person in position number two as one of the people that attempted to rob him. 1/21/09 VRP 542. After viewing the lineup, Mr. Douglas' level of certainty that he picked the correct person was ninety to one hundred percent. 1/21/09 VRP 543. Mr. Douglas also indicated he did not have any recollection of anything that the person in position number two in the lineup had done. 1/21/09 VRP 543. In a meeting with Detective Craig after the lineup, Detective Craig told Mr. Douglas that he had picked the police suspect in the lineup. 1/21/09 VRP 544.

In count 5, Mr. Ali was charged with robbery in the first degree in relation to events that occurred on April 30, 2008. In the charging document, the State alleged that Mr. Ali along with another robbed Joshua Longbrake while Mr. Longbrake and his girlfriend were walking around Green Lake with his girlfriend Mackenzie Rollins. Mr. Longbrake participated as a witness in the lineup on June 11<sup>th</sup> along with the victims in the other cases. 1/21/09 VRP 758. Unlike Ms. Martin, Mr. Halliburton, and Mr. Douglas, Mr. Longbrake did not notice that person number two in

the lineup had a foreign accent. 1/22/09 VRP 758. Rather, Mr. Longbrake believed that the person in position number one was the person that had the accent. 1/21/09 VRP 758. Count 6 involves the attempted robbery in the first degree of Mr. Longbrakes girlfriend, Mackenzie Rollins. Ms. Rollins did not participate as a witness to the lineup. The attempted robbery of Ms. Rollins occurred at the exact same time as the robbery of Mr. Longbrake.

#### E. ARGUMENT

1. BECAUSE THE IDENTIFICATION PROCEDURES WERE UNDULY SUGGESTIVE AND PRODUCED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, THE COURT ERRED BY ADMITTING THE IN-COURT IDENTIFICATION.

The due process protections of the state and federal constitutions apply to pretrial identification proceedings. U.S. Const. amends. 5, 14; Const. Art. 1, § 3; Stovall v. Denno, 388 U.S. 293,302, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967); State v. Hiliard, 89 Wn.2d 430, 438, 573 P.2d 22 (1977). Due process attaches to the pretrial photographic montage and lineup procedures because of the “vagaries of eyewitness identifications awe well known” to the courts. United States v. Wade, 388 U.S. 218, 228, 18 L.Ed. 1149, 87 S.Ct. 1926 (1967); State v. McDonald, 40 Wn. App. 749, 745, 700 P.2d 327 (1985); State v. Burrell, 28 Qn. PP. 606, 609, 625 p.2D 726 (1981). Suggestion can be created intentionally or unintentionally, and where a witness’ opportunity to view the criminal is insubstantial, his susceptibility to suggestion is even greater. Wade, 388 U.S. at 228-229. A pretrial identification procedure violates due

process if the procedure is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Hilliard, 89 Wn.2d at 438 (quoting Simmons v. United States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968)).

The first question the courts must address is whether the procedure was unduly suggestive. Where the procedure is determined to be unduly suggestive, the court will look at the totality of the circumstances to determine whether the suggestive procedure created a “very substantial likelihood of irreparable misidentification.” Simmons, 390 U.S. at 384; Hilliard, 89 Wn.2d at 438. If so, the identification is unreliable and inadmissible. Foster v. California, 394 U.S. 440, 443, 22 L. Ed. 2d 402, 89 S.Ct. 1127 (1969); State v. McDonald, 40 Wn. App. 743, 748, 700 P.2d 327 (1985); State v. Thorkelson, 25 Wn. App. 615, 611, 619 P.2d 1278 (1980), modified in part, State v. Burrell, 28 Wn. App. 606, 610, 625 P.2d 726(1981). When addressing these questions, this court has the duty to independently evaluate the evidence. State v. Rogers, 44 Wn.App. 510, 515, 722 P.2d 1349 (1986) (citing State v. Daugherty, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), cert. denied, 450 U.S. 958 (1981)).

a. THE IDENTIFICATION PROCEDURES WERE  
UNDULY SUGGESTIVE

The lineup was impermissibly suggestive. Detective Craig, who prepared the lineup, was well aware that most of the witnesses believed the perpetrators of the robberies and assaults were short, thin and of East African Descent with

accents. 1/13/10 VRP. Remarkably, Said Ali was the shortest, thinnest and youngest participant in the lineup. 1/13/10 VRP.

In addition to being the youngest, shortest and thinnest person in the lineup, Mr. Ali was one of only two participants in the lineup that spoke with an East African accent. It was apparent that voice recognition was important to identification in this case given that at least one of the witnesses during the lineup requested that the participants say a phrase or two. As a result, each lineup participant was required to say the same phrase in front of the witnesses. Leo Hamaji, a public defender from The Defender Association (TDA), was present at the lineup on behalf of Mr. Ali. During his testimony during the motion to suppress the lineup, Attorney Hamaji indicated that Mr. Ali had an accent the he believed was of either Arabic or East African descent.

The only other participant in the lineup had an East African accent was clearly distinguishable from Said Ali. First, he was nearly a decade older than Mr. Ali. The person in position number one was the only other person that had an East African accent. Detective Craig testified that the person in position number one was

twenty eight and that Said Ali was believed to be nineteen at the time of the lineup. During the trial there was also discussion about the possibility that Said Ali was only sixteen at the time of the lineup. Attorney Hamaji testified that it was visibly clear that Mr. Ali was significantly younger than the individual that was in position number one. Second, the person in position number one had facial hair while Mr. Ali did not. Mr. Hamaji testified that he remembered the person in position number one having a goatee and a beard. Mr. Hamaji also testified that Mr. Ali did not have facial hair at the time of the lineup. Dr. Loftus, a professor who focuses on witness identification issues testified at trial about issues that create biased lineups. 1/28/09 VRP1187. Dr. Loftus testified that a lineup that a biased lineup is one in which we assume the suspect to be innocent but, for whatever reason, the suspect has a greater chance of being misidentified by the witness as any of the fillers. 1/28/09 VRP 1187. Dr. Loftus also indicated during his testimony that factors that make the suspect stand out from the fillers leads to bias. 1/28/09 VRP 1187-1192. Dr. Loftus also indicated during testimony that, when individuals in a lineup are required to say phrases in front of witnesses, bias will likely be present if the suspect and fillers has significantly different speech patterns.

1/28/09 VRP 1190. Because Mr. Ali was one of two individuals in the lineup that had an East African accent and was the shortest, youngest and thinnest person in the lineup, the lineup was impermissibly suggestive.

b. THE SUGGESTIVE PROCEDURE CREATED A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

The second question is whether the suggestive identification procedure created a very substantial likelihood of irreparable misidentification. Simmons, 390 U.S. at 384; McDonald, 40 Wn. App. At 746. In the present case, the suggestive identification procedures created a substantial likelihood of irreparable misidentification. An impermissibly suggestive identification procedure which leads to an identification cannot be admitted unless the identification possesses certain indicia of reliability. The courts have used the following five factors to determine whether an identification that resulted from an impermissibly suggestive procedure has sufficient indicia of reliability:

- (1) The opportunity of the witness to view the criminal at the time of the crime,
- (2) the witness' degree of

attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Mcdonald, 40 Wn.App. at 746 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972)); Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 97 S.Ct 2243 (1977); Hilliard, 89 Wn.2d at 438.

(1) Opportunity to View and Degree of Attention.

All of the witnesses in each count indicated that there encounters with their assailants at the time of the incidents were brief. Further, all of the witnesses for each count indicated that the conditions under which they observed their assailants were less than optimal. Each incident occurred in the late hours of the evening or the early morning hours.

(2) The witness degree of attention.

The degree of attention that the witnesses were able to pay to their assailants was significantly diminished by several factors. First, each witness was approached by a minimum of three robbers. Naturally, the witnesses attention would be divided between the multiple suspects. Second, at the time of the incidents many of the suspects were wearing

hoods, hats and other items to disguise what they looked like. Third, in some of the counts the attention of the witness may have been impacted by their focus on the weapon that was in the hands of one of the robbers. In a couple of the counts weapons were used by one of the robbers. Weapons, such as guns and knives typically draw the attention away from the physical characteristic of the aggressors. Third, the degree of attention and memory accuracy are diminished when an individual is in a highly stressful life threatening predicament. Dr. Loftus testified that individuals are not as accurate in their memories or perceptions of a high stress incident. In the present cases each individual was robbed and a weapon was often displayed or used. In the present cases each person was significantly outnumbered by their assailants. In each incident it would be logical that the victims did not pay as great attention to the specifics of their assailants facial characteristics at the time that they were being rob and/or assaulted.

(3) Accuracy of the Witness' prior description of the criminal.

Each witness in every count gave a rather generic description of the robbers. All of the witnesses described the robbers as young, black and thin. The majority of the witnesses believed that the robbers spoke with an East African Accent. Indeed, only one witness, Mr. Longbrake, indicated that the person or persons that robbed him did not have an foreign accent. Interestingly, his girlfriend, Ms. Rollins, who was present at the time Mr. Longbrake was robbed also indicated that the robbers had an East African accent. In Mr. Walker's case, his description of the robbers was so generic that three African American youth were pulled off of a bus and detained for a significant period of time before law enforcement realized that they had seized the wrong people.

(4) Level of certainty demonstrated by the witnesses at the confrontation.

While each of the witnesses in each of the counts seemed to have a relatively high degree of certainty that the person in position number two of the lineup was a participant

in the robberies, it is clear that their level of certainty was likely impacted by the demographics of the lineup. The person in position number two of the lineup, Mr. Ali, was the youngest, shortest and thinnest person in the lineup. Further, Mr. Ali was one of only two people that had an East African Accent. Each of the witness to the lineup believed that the lineup contained a police suspect. Through a process of deduction, the witnesses may have increased their level of certainty as to who the police suspect was rather than actually picking someone that they actually saw at the scene.

(5) Length of Time Between the crime and the confrontation.

The length of time between the incidents and the lineup ranged between one week and six weeks. While there does not appear to be a significant time period between the actual event and the lineup, the actions that occur between the time period in which an incident occurs and the lineup could have a dramatic impact on the perceptions of witnesses. Mr. Halliburton and Mr. Douglass had weekly conversations about the robbery. This would amount to

at least six conversations. It would be logical that during these conversations, the witnesses were, on some level, reconstructing the events in their mind.

c. The identifications Should Have Been Suppressed.

After reviewing the totality of the circumstances, this court should conclude that these impermissibly suggestive procedures created a substantial likelihood of irreparable misidentification. Particularly concerning is that Mr. Said was one of only two people in the lineup that had an accent that was East African. Given that the people in the lineup were required to say a few phrases in front of the witnesses, there is a substantial likelihood that the witnesses chose number two based upon his accent rather than any specific memory they may have had of him. The lineup, show up and photo montage identifications of all of the victims in all of the counts should have been suppressed. The in-court identifications should have been suppressed as well. Failure to suppress the identifications denied Mr. Ali of his right to due process of law. Foster, 394 U.S. at 443; McDonald, 40 Wn. App. At 747-48; State v. Clark, 2 Wn. App. 45, 49, 467 P.2d 369 (1970).

2. MR. ALI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO MAKE A MOTION TO SEVER COUNTS.

While Mr. Ali's counsel objected to the consolidation of counts in case numbers 08-1-05113-3 SEA and 08-1-0410-7 SEA, Mr. Ali's counsel never sought to sever any of the eight counts from the trial. Counsel's failure to make a motion to sever counts so prejudiced Mr. Ali that it denied him of his right to effective assistance of counsel.

In evaluating claims of ineffective assistance of counsel, Washington follows a two-pronged test set forth in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 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 by the Sixth Amendment. Second the defendant must show that he 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.

State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). The proper context of the reviewing court's inquiry is the record of the trial viewed as a whole. State v. Carter, 56 Wn. App. 217, 218-219, 783 P.2d 589 (1989). Once counsel has been shown to be deficient, the defendant must show there is a "reasonable probability" that, but for counsel's conduct or error, the results of the proceeding would have been different. Id.; Strickland, at 694.

In evaluating claims for ineffective counsel, courts indulge a strong presumption that counsel rendered adequate assistance. State v. Visitacion, 55 Wn. App. 166, 173, 776 P.2d 989 (1989). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot be a basis for a claim of ineffective assistance. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). Where, however, there is no way to characterize trial counsel's inadequate performance as a trial tactic, that performance must be found to be deficient under Strickland. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Where a counsel's failure to litigate a motion to sever is the basis of the defendant's claim of ineffective assistance, showing prejudice entails demonstrating that the motion should have been granted. In addition, the defendant must show that there is a "reasonable probability: that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

State v. Standifer, 48 Wn. App. 121, 125-126, 737 P.2d 1308 (1987), rev. denied, 108 Wn.2d 1035 (1987); State v. Warren, 55 Wn. App. 645, 779 P.2d 1159 (1989), rev. denied, 114 Wn.2d 1004 (1990).

In the present case there is a rational probability that the court would have granted a motion to sever counts, had defense counsel actually made the motion. If a motion to sever counts in this case had been granted, the outcome of the proceedings would likely have been different.

CrR 4.4(a) provides that a defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

CrR 4.4 (b) provides that the court, on application of the prosecuting attorney, or an application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

Joinder may prejudice the defendant for the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus in any given case the court must weigh prejudice to the defendant by joinder against the obviously important considerations of economy and expedition in judicial administration.

State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 33 L. Ed. 2d 747, 92 S.Ct 2852 (1972), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)

The Smith court went on to list several factors that may neutralize prejudice to the defendant that results from the joinder of offenses. The factors are: (1) the strength of the State's evidence on each count, (2) the clarity of defense to each count, (3) whether the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes, even if they had been tried separately or never charged or joined. Smith, 74 Wn.2d at 755, State v. Gatalski, 40 Wn.App. 601, 699 P.2d 804 (1985), rev. denied, 104 Wn.2d 1019 (1985)

In the present case, Mr. Ali was prejudiced by the joinder of seven counts of robbery in the first degree and a single count of assault in the first degree. The strength of the State's case varied dramatically with each count. In count seven Mr. Ali was arrested within blocks of the incident and the victim, Katherine Terpstra, identified him at the scene. The other counts did not involve Mr. Ali being stopped at or near the scene of the incident. While Mr. Ali stood alone at trial on all counts, the witnesses reported that the number of assailants in each count ranged from two to eleven. The charging of the eight counts together had the logical effect of creating the significant possibility that Mr. Ali was convicted of all counts as a direct result of the latent feeling of hostility that may be

engendered by the charging of several crimes as distinct from only one. Further, testimony was predictably not taken in such a manner that it would be easy for jurors to determine which evidence logically flowed with a particular count. Many of the civilian witnesses were scheduled to testify at points in time that likely made it difficult for the jurors to look at the merits of each count separately. At the end of presentation of evidence, the jurors were left with a collage of alleged wrong doings that seemed to blend into each other in such a way that it would be remarkably difficult to separate one count from another. Defending against eight counts that were alleged to have occurred on four different dates over the course of a couple of months would logically prejudice the defendant and his or her ability to mount a coherent defense.

3. THE EVIDENCE IS INSUFFICIENT TO SUPPOT MR. ALI'S CONVICTION FOR COUNTS 2, 3 AND 4

In every prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d

368 (1970). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find sufficient proof of all elements beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed 2d 560, 99 S.Ct 2781 (1979) and State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980))

In counts 2, 3, and 4 the victims, Mr. Halliburton and Mr. Douglas, were able to identify Mr. Ali as being present on the crowded street where they were attacked and robbed, however they could not say what he actually did to make him guilty of a crime. Mr. Douglas testified that four people were hitting and kicking him while several others were hitting and kicking Mr. Halliburton. Mr. Douglas also testified that he did not see what Mr. Ali was actually doing. Further, Mr. Halliburton testified that he was not clear on exactly what role Mr. Ali played in the assault and robbery.

During trial, Mr. Halliburton indicated that he had three and one half beers in the hours prior to the attack and robbery. 1/27/09 VRP 1016. He also indicated that he had just left the bar at the time

that this incident happened. Id. Mr. Halliburton was hit, punched, kicked and stabbed by nearly eleven people during this incident. 1/27/09 VRP 1017. In count 3, Mr. Ali was charged with assault in the first degree. The charging documents indicated that the state believed that Mr. Ali or another stabbed Mr. Halliburton.

Both, Mr. Douglas and Mr. Halliburton testified that they had gone to a bar called the emigrant in the University District. The University District is generally known as a high foot traffic area with lots of people frequenting the various stores, taverns and night clubs. Merely being identified as a person that is present at the scene of a crime is not sufficient to find a person guilty of assault and/or robbery.

F. CONCLUSION

For the foregoing reasons, this Court should reverse Said Ali's convictions and remand for a new trial.

DATED this 18<sup>th</sup> day of March, 2010.

Respectfully submitted:



JAMES BIBLE  
WSBA 33985  
Law Office of St. Laurent and Bible  
Attorney for Said Ali