

63895-5

63895-5 TWB

No. 63895-5-I

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

STATE OF WASHINGTON,
Respondent,
v.
DANIEL RYAN BIRD,
Appellant.

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

The Honorable Michael Heavy

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Bird's right to due process by admitting the complaining witness' identification of him because it was the result of an impermissibly suggestive photo montage and was not otherwise reliable.

2. Where the trial court ruled the robbery merged into the assault, entry of convictions for first degree assault and first degree robbery for the same act violated double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive photo montage violates due process. The photo montage challenged prior to trial by Mr. Bird contained five photographs of men with hair above their collar and a photograph of Mr. Bird as the only one with hair flowing to his shoulders. Was the photo montage impermissibly suggestive and the victim's subsequent identification of Mr. Mr. Bird unreliable, entitling Mr. Bird to reversal of the convictions for a violation of due process?

2. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same

act where the Legislature has not authorized such multiple punishment violates double jeopardy. The trial court here found the robbery count merged into the assault count but entered convictions for both offenses. Must this Court strike the robbery conviction in order to avoid a violation of double jeopardy where the assault provided the force necessary to complete the robbery?

C. STATEMENT OF THE CASE

Twenty-two year old Jose Zamudio Sanchez was returning home from a job interview, riding bicycle he had borrowed from his nephew. 5/20/09RP 26-27. Mr. Zamudio was walking the bicycle near a mini-mart on Ambaum Boulevard when he was approached by a man. 5/20/09RP 30-31. The man initially asked Mr. Zamudio for money. 5/20/09RP 31. When Mr. Zamudio told the man he had none, the man demanded Mr. Zamudio's bicycle, then tried to take it away from Mr. Zamudio. 5/1/20/09RP 31-32. A struggle ensued and the man pulled out a handgun and held it to Mr. Zamudio's chest. 5/20/09RP 34-35. The man pulled the slide of the semi-automatic handgun, ejecting a bullet, then pulled the trigger. 5/20/09RP 34-35. The gun did not fire. 5/20/09RP 35.

Mr. Zamudio saw the live bullet on the ground and kicked it away. 5/20/09RP 37-39. The man struck Mr. Zamudio in the chest

with the gun, causing Mr. Zamudio to lose his grasp on the bicycle. 5/20/09RP 40-41. The man grabbed the bicycle and ran away. 5/20/09RP 41. Mr. Zamudio walked into the nearby mini-mart and called the police. 5/20/09RP 44.

A subsequent police investigation led to appellant, Daniel Bird. Mr. Zamudio was shown a photo montage prepared by the King County Sheriff's department and selected Mr. Bird as his assailant. 5/18/09RP 130-36. Mr. Bird was charged with first degree assault and first degree robbery, both enhanced by a firearm enhancement, and unlawful possession of a firearm in the second degree. CP 134-35. Mr. Bird argued the wrong man was prosecuted, but following a jury trial, Mr. Bird was found guilty as charged. CP 201-03.

At sentencing, the trial court ruled the robbery conviction merged into the assault conviction, but the completed Judgment and Sentence contained convictions for both offenses. CP 622.

D. ARGUMENT

1. MR. BIRD'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN MR. ZAMUDIO'S IDENTIFICATION WAS ADMITTED WHERE IT WAS THE PRODUCT OF AN IMPERMISSIBLY SUGGESTIVE PHOTO MONTAGE

Prior to trial, Mr. Bird moved to suppress the photo montage and ensuing identification as the result of an impermissibly suggestive identification procedure. CP 26-33. Officer David Keller of the King County Sheriff's Office testified he was assigned to investigate the case. As part of the investigation he noted that immediately following the incident, Mr. Zamudio and responding police officers viewed a surveillance video of the outside of the mini-mart provided by the market's manager, and Mr. Zamudio pointed to one of the people on the video and claimed that that was the person who assaulted him. 5/4/09RP 35. Keller interviewed Mr. Zamudio as part of the investigation and showed him a still photograph taken from the surveillance video of an individual. 5/4/09RP 70-71.

The officer prepared a photo montage in an attempt to obtain a positive identification of the assailant. 5/4/09RP 48. In preparing the montage, the officer sought photos of men who had a similar

appearance to Mr. Bird. 5/4/09RP 48. The computer generated several pages of photographs, each page containing 18 photographs. 5/4/09RP 75. The officer selected five photographs to accompany Mr. Bird's to complete the montage. 5/4/09RP 48, 75.

The officer had Mr. Zamudio review the montage, and Mr. Zamudio selected Mr. Bird from the photographs, noting specifically the length of his hair in the photograph. CP 33; 5/4/09RP 51-52, 76. (A copy of the photo montage was appended to Mr. Bird's motion to suppress and is attached herein as Appendix A). Based upon this identification, the police arrested Mr. Bird. 5/4/09RP 54.

Mr. Bird stressed the photo montage was impermissibly suggestive given the difference between the length of his hair in the photograph as opposed to the other five men in the montage. CP 28-32; 5/5/09RP 10-16. The court denied the motion, concluding initially, the montage was not impermissibly suggestive. 5/5/09RP 23. The court went on to review the reliability of Mr. Zamudio's identification under the totality of the circumstances and ruled the identification nevertheless reliable:

All that said, under the totality of the circumstances, the defense has not shown that the ID of the defendant in the photo montage was so impermissibly

suggestive that it would have created a very substantial likelihood of misidentification. In fact, I have a hard time getting to the factors because I really don't find that is impermissibly suggestive or suggestive.

5/5/09RP 25.

Mr. Bird renewed his objection to the impermissibly suggestive photo montage at trial during Officer Keller's testimony about showing the montage to Mr. Zamudio and Mr. Zamudio's subsequent identification of Mr. Bird. 5/18/09RP 131-38.

a. An out-of-court court photographic identification violates due process when it is so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. *Chambers v. Mississippi*, 410 U.S. 284, 310, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). “[R]eliability [is] the lynchpin in determining admissibility of identification testimony” under a standard of fairness that is required under the Due Process Clause of the Fourteenth Amendment. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). An improper photomontage can violate due process.

United States v. Wade, 388 U.S. 218, 302, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

A pretrial identification procedure, such as a photo montage, violates due process if it is “so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.”

State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002), quoting *State v. Linares*, 98 Wn.App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000).

b. Mr. Bird established the photo montage was impermissibly suggestive. To establish a violation, Mr. Bird bore the burden of showing that the identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118. To do this, Mr. Bird was required to demonstrate that the montage directed undue attention to a particular photograph. *State v. Ramires*, 109 Wn.App. 749, 761, 37 P.3d 343 (2002). Generally, courts have found montages impermissibly suggestive only when the defendant is the sole possible choice in light of the witness's earlier description. *Ramires*, 109 Wn.App. at 761; *State v. Traweek*, 43 Wn.App. 99, 715 P.2d 1148 (1986) (robber described as blond; defendant was the only blond in lineup); *State v. Burrell*, 28 Wn.App. 606, 625 P.2d 726 (1981) (suspect described as having

“frizzy Afro” hairstyle; defendant was the only subject with that characteristic).

Mr. Zamudio described his assailant as having a long pony tail going down his back. 5/4/09RP 30. The officer created a photo montage using a computer program which produced photographs of people with similar physical characteristics. 5/4/09RP 48-50. In selecting the other five photos to insert into the montage along with Mr. Bird’s photo, the officer reviewed hundreds of photos prior to making his selections. 5/4/09RP 75.

As Appendix A details, the focus of Mr. Zamudio when he made his identification from the montage was Mr. Bird’s hair. 5/4/09RP 52. Mr. Zamudio commented that the photograph was of the person he believed took his bicycle, but that the assailant’s hair was different. 5/4/09RP 52. There was only one photo where the person had long hair: the photo of Mr. Bird. Mr. Bird’s photograph was the only one with the person’s hair extending down and past his shoulders. The others’ photographs had the hair ending before their shoulders.

Further, the computer did not randomly select the photographs for the photo montage. As Officer Keller testified, the computer provided a substantial number of similar photographs

which were then reviewed by Keller, who selected the final five photographs from those photographs. 5/4/09RP 74-75.

The end result was that the montage was assembled so that the sole choice in light of Mr. Zamudio's prior description was Mr. Bird. By including only one photograph of a person with long hair, it was guaranteed that Mr. Zamudio would select that photograph. Thus, contrary to the trial court's conclusion, the photo montage was impermissibly suggestive.

c. The *Biggers* factors required suppression of Mr. Zamudio's identification of Mr. Bird. Once the court determines the photo montage was impermissibly suggestive, the court must then determine whether, under the totality of the circumstances, the identification was nevertheless reliable. *Vickers*, 148 Wn.2d at 118.

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reaffirmed that a conviction based upon eyewitness identification will be set aside if the "identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Id.* at 197 (citation omitted). But the court found that an identification can nonetheless be admissible if it otherwise reliable. *Id.* The Court identified a test to ascertain whether, under the "totality of the circumstances," an

identification is reliable despite the suggestive procedures. *Id.* at 199-200.

The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Biggers*, 409 U.S. at 193. *See also Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Washington utilizes the *Biggers* test to determine the admissibility of an identification. *Vickers*, 148 Wn.2d at 118.

Here, Mr. Zamudio's identification was not otherwise reliable given the fact he had previously been shown the video of Mr. Bird and the others outside the store on the night of the robbery and was shown a still photograph of Mr. Bird from that same video prior to being shown the montage. Immediately following the robbery, Mr. Zamudio viewed, along with the store's manager, a surveillance video taken from outside of the store. 5/4/09RP 35. When interviewed by Officer Keller prior to being shown the montage, Mr. Zamudio was shown a still photograph from the same video. 5/4/09RP 70-72.

The inescapable conclusion to draw from these facts was that Mr. Zamudio's initial observation of his assailant was clouded, and ultimately influenced by this repeated viewing of the person's image. Thus, the entire identification procedure was designed to direct Mr. Zamudio's choice to Mr. Bird since that was the photograph repeatedly shown to him. Under the *Biggers* standard, Mr. Zamudio's identification of Mr. Bird was not otherwise reliable.

d. Mr. Zamudio's in court identification was tainted by the impermissibly suggestive photo montage identification. An in-court identification is inadmissible and violates due process, where it is the result of impermissibly suggestive procedure. *State v. Vaughn*, 101 Wn.2d 604, 609-10, 682 P.2d 878 (1984). Under the circumstances, the witness may make an in-court identification if the State shows by clear and convincing evidence that the in-court identification has a basis independent of the pretrial procedure. *State v. Redmond*, 75 Wn.2d 62, 65, 448 P.2d 938 (1968).

As has been argued, Mr. Zamudio was repeatedly shown images of the person the police believed to be his assailant prior to being shown the photo montage. These repeated viewings undoubtedly influenced his identification of Mr. Bird as his assailant, thus tainting the identification. Further, there was no independent

evidence which would cause Mr. Zamudio to remember his assailant except for the montage. As a consequence, the in-court identification was tainted by the pretrial identification and should have been suppressed.

e. The error in admitting the unreliable identification requires reversal of Mr. Bird's convictions. A constitutional error is presumed prejudicial. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). The State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

Absent the identification by Mr. Zamudio of Mr. Bird as his assailant, there was no independent evidence proving that Mr. Bird assaulted Mr. Zamudio. Without this identification, there was no evidence that Mr. Bird possessed a firearm and that he occasionally acted carelessly with it prior to and immediately after leaving the mini-mart. Further, the surveillance video from the mini-mart showed Mr. Bird and others standing outside prior to the robbery of Mr. Zamudio, but the video did not show the assault nor

any other criminal activity by Mr. Bird or any of the other men shown in the video. 5/4/09RP 65-66. The error in admitting Mr. Zamudio's identification was not a harmless error and Mr. Bird is entitled to reversal of his convictions.

2. IMPOSITION OF CONVICTIONS FOR FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT VIOLATED DOUBLE JEOPARDY

At sentencing, the court merged the assault count into the robbery count but the two convictions nevertheless remained in the judgment and sentence. CP 622. The trial court's failure to strike the robbery conviction was error. In light of the trial court's oral ruling merging the two offenses, this Court should strike the robbery conviction.

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Personal Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006).

Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.*; see *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a

double jeopardy violation. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent*. *Hunter*, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.*; *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* “same evidence” test to determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

b. The conviction for first degree robbery and first degree assault merged. Imposition of convictions for first degree robbery and first degree assault for the same act violated Mr. Bird’s right against double jeopardy because the assault constituted the

force for the robbery. The trial court obviously agreed but imposed convictions for both in the Judgment and Sentence. 7/15/09RP 17 (“Although I do realize [the robbery] merges with the assault in the first degree.”).

The merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, it must be presumed the Legislature intended to punish both offenses through a greater sentence for the greater crime. *State v. Vladovic*, 99 Wash.2d 413, 419, 662 P.2d 853 (1983).

A person commits robbery when he or she unlawfully takes property from the person of another by force or fear. RCW 9A.56.190. If a person commits robbery while armed with or displaying a deadly weapon, or inflicts bodily injury, the crime is robbery in the first degree. RCW 9A.56.200.

The trial court recognized the two offenses merged, but imposed convictions in the Judgment and Sentence for both offenses. The trial court erred in entering convictions for both offenses.

c. The remedy for a double jeopardy violation where two or more offenses arise from the same conduct is to strike the robbery conviction. In *State v. Womac*, the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007). Accord *State v. League*, 167 Wn.2d 671, 672, 223 P.3d 493 (2009) (“When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.”). In *Womac*, the convictions involved were homicide by abuse, second degree felony murder, and first degree assault, all based upon the same act. The trial court ruled the convictions violated double jeopardy but conditionally dismissed them, allowing for reinstatement if the greater verdict and sentence were later set aside. The Supreme Court ruled that only the homicide by abuse conviction could stand and the other two convictions *must* be dismissed. *Id.*

Here, the court agreed that the two offenses merged. CP 62; 7/21/09RP 4. Under *Womac*, the remedy was to strike the robbery conviction, but the court entered convictions for both in the

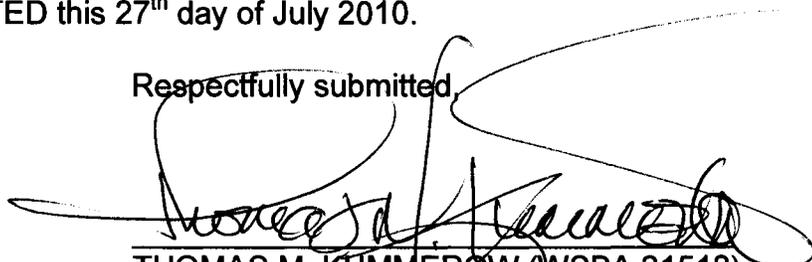
Judgment and Sentence. Under *Womac*, the remedy is for the robbery count to be stricken. This Court should order the robbery conviction stricken.

E. CONCLUSION

For the reasons stated, Mr. Bird submits this Court must reverse his convictions or strike the robbery conviction.

DATED this 27th day of July 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and contact information.

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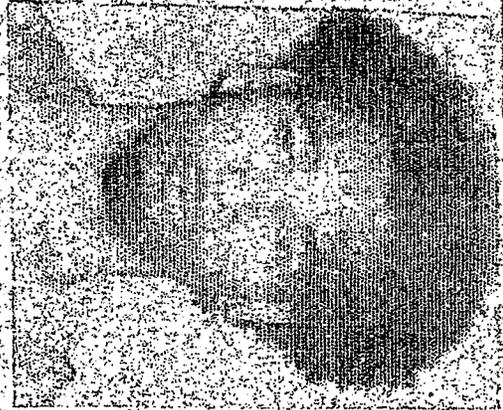
APPENDIX A

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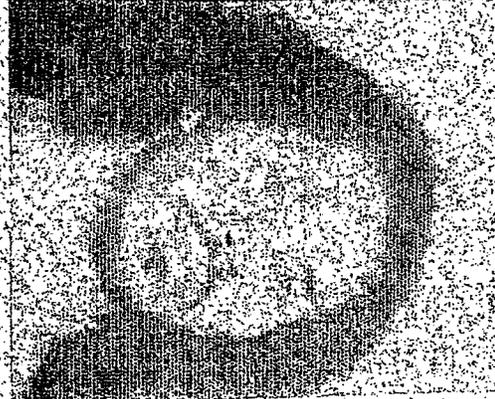
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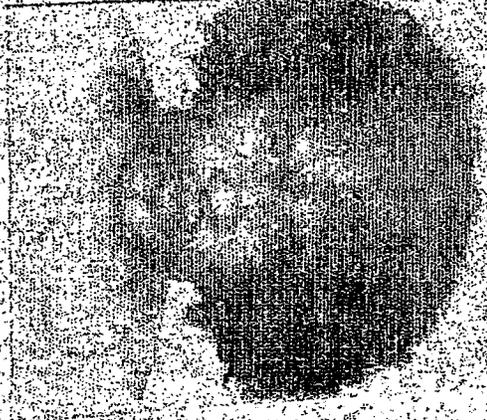


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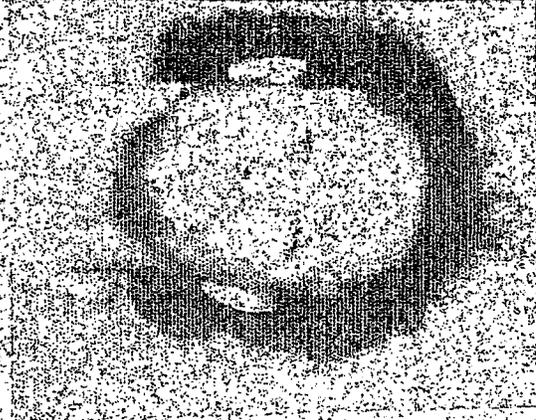
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63895-5-I
v.)	
)	
DANIEL BIRD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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