

NO. 64253-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GLENN SIMMONS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER A. WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2010 AUG 16 PM 1:27

COURT OF APPEALS
DIVISION I
FILED

3

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. ARGUMENT	7
1. THE DETECTIVE DID NOT OFFER AN IMPERMISSIBLE OPINION AS TO GUILT IN HIS DESCRIPTION OF MONTAGE PROCEDURES.	7
a. Relevant Facts	8
b. Simmons Waived His Right To Object To The Testimony.	11
c. Any Error Was Harmless.....	16
2. THE DETECTIVE DID NOT OFFER AN IMPERMISSIBLE OPINION AS TO BUNN'S CREDIBILITY IN HIS DESCRIPTION OF HER UNUSUALLY DETAILED MEMORY.....	19
a. Relevant facts	19
b. Simmons Waived His Right to Object To The Testimony.	21
c. Any Error Was Harmless.....	24

3.	SIMMONS HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.....	26
4.	THE JURY INSTRUCTIONS DEFINING UNLAWFUL ENTRY WERE NOT CONFUSING.....	34
D.	CONCLUSION	39

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781,
61 L. Ed. 2d 560 (1979)..... 35

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 27, 28, 31, 32

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692,
42 L.Ed.2d 690 (1975)..... 15

United States v. Garsson, 291 F. 646
(D.N.Y.1923) 15

Washington State:

City of Seattle v. Heatley, 70 Wn. App. 573,
854 P.2d 658 (1993), rev. denied,
123 Wn.2d 1011 (1994)..... 28

In re Pers. Restraint of Hutchinson, 147 Wn.2d 197,
53 P.3d 17 (2002)..... 27, 28

State v. Black, 109 Wn.2d 336,
745 P.2d 12 (1987)..... 14

State v. Crawford, 159 Wn.2d 86,
147 P.3d 1288 (2006)..... 32

State v. Deal, 128 Wn.2d 693,
911 P.2d 996 (1996)..... 16, 24

State v. Demery, 144 Wn.2d 753,
30 P.3d 1278 (2001)..... 11, 21

<u>State v. Dolan</u> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	17
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	28
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	11, 12, 15, 21, 23
<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.3d 638 (1999).....	37
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	11, 21, 28
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	11, 15, 24
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	35
<u>State v. Pittman</u> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	38
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	37
<u>State v. Souther</u> , 100 Wn. App. 701, 998 P.2d 350, <u>rev. denied</u> , 142 Wn.2d 1006 (2000).....	38
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	37
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S. Ct. 2007 (2009).....	23
<u>State v. Wicker</u> , 66 Wn. App. 409, 832 P.2d 127 (1992).....	13
<u>State v. Wilber</u> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	22, 23

Other Jurisdictions:

State v. Baker, 338 N.C. 536,
451 S.E.2d 574 (1994) 17

State v. Link, 25 S.W.3d 136 (Mo.),
cert. denied, 531 U.S. 1040 (2000)..... 17

Taylor v. State, 689 N.E.2d 699
(Ind. 1997) 17

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 35

Washington State:

Wash. Const. art. I, §22..... 35

Rules and Regulations

Washington State:

RAP 2.5(a)(3)..... 11, 21, 35

Other Authorities

WPIC 65.01..... 35

WPIC 65.02..... 35

A. ISSUES PRESENTED

1. Whether Simmons has failed to establish that a detective's testimony relating to the presentation of photo montages, including identifying Simmons to the jurors as a suspect and describing witness responses, was manifest constitutional error.

2. Whether the defendant has failed to establish that a detective's testimony relating the nature of a witness' description of the burglar, characterizing it as unusually detailed and describing her as a good witness because of the details, was manifest constitutional error.

3. Whether any error in the detective's testimony about the montage identifications was harmless beyond a reasonable doubt.

4. Whether Simmons has failed to establish that defense counsel's failure to object to the detective's testimony about the montage identifications was deficient performance that caused actual prejudice.

5. Whether Simmons has failed to establish that defense counsel's failure to object to various references that could imply that Simmons had been arrested previously was deficient performance that caused actual prejudice.

6. Whether jury instructions accurately defining the crime of residential burglary and the elements of residential burglary were not confusing, although the definition of unlawful entry provided in separate instructions was broad, and did not constitute manifest constitutional error.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Glenn Simmons was charged by second amended information with residential burglary, theft in the second degree and malicious mischief in the second degree, all occurring on March 11, 2009. CP 18-19. A jury found Simmons guilty as charged. CP 28A, 28B, 28C. Based on Simmons' offender score of 11 on the residential burglary, the court imposed a standard range sentence of 72 months of confinement. CP 76-82.

2. SUBSTANTIVE FACTS

On March 11, 2009, David Mason arrived at the home of Sara Rigel to do yard work and almost immediately a loud alarm began sounding from the home. RP 121-24.¹ He saw that a

¹ The Verbatim Record of Proceedings is in three volumes sequentially numbered, and will be cited simply as RP.

window next to Rigel's front door was broken. RP 124. A neighbor yelled and gestured toward the side of the house, so Mason went to investigate. RP 124-25. He saw a man coming out of the backyard with a computer and a bag full of other property. RP 125-26, 129-30. The man wore a red pullover and red pants. RP 136-37. On April 11, 2009, Mason identified Simmons from a photo montage. RP 136-44; 353-55. Mason identified Simmons in court as the man that he saw, to a 99 percent certainty. RP 130-31.

Mason chased after the man, who ran away carrying the property. RP 132-33. When the man put down the bag and the computer, Mason gave up the chase, and the man ran off through a neighbor's yard. RP 132-33.

Rigel went to work early on March 11, 2009, but returned home after she received two calls about 9:30 a.m., from her home security company and from her lawn service. RP 278-79. She discovered that the window next to her front door was broken and outside in front of her house was her computer and a laundry bag with other electronic equipment and jewelry. RP 280, 282. The items on the ground had been taken from several locations inside the home. RP 284. Rigel does not know Simmons and he did not

have permission to enter her home or take any property. RP 284-85.

Valerie Bunn lived nearby and was home the morning of March 11, 2009. RP 200. She saw a man in an elderly neighbor's yard between 10 and 11 that morning, apparently talking on a cell phone. RP 201-02. She tried to determine who he was but could not. RP 202-06.

When Bunn confronted the man in her neighbor's yard, he was standing in a narrow space between a garage and a fence, but told her he was waiting for someone. RP 207. He was wearing a white undershirt and red jogging pants, although the temperature was 28 degrees. RP 208. The man slowly left when Bunn insisted that he could not wait in her neighbor's yard. RP 209-10.

Minutes later, Bunn found the man next to her home, peeking out from behind a chimney. RP 211. At arm's length from him, she confronted him again and said that she was calling police. RP 213. When she began speaking with a 911 operator, the man ran. RP 214.

Bunn had noticed tattoos on the inside of the man's arms and wrists that looked like letters and dots; one of them looked like

the letter P. RP 216. Simmons has tattoos on his arms, including one tattoo of the letter P. RP 331-33.

On March 24, 2009, Bunn identified Simmons from a photo montage, saying she was 98 percent sure he was the man she had seen. RP 223-26; 335-37. Bunn identified Simmons in court as the man that she saw, saying she was 100 percent certain it was him. RP 218-19.

Susan Derge, who also lived nearby saw a man dressed in red pants and a red sweatshirt in her locked yard at about 9:30 that morning. RP 90. A little later she saw the man no longer wearing the red sweatshirt, but only a white t-shirt. RP 91-92. Derge did not see the man's face and did not think that she could identify anyone in the courtroom for that reason. RP 91.

Derge's husband, Richard Ehle, went outside when he was told there was a man in the yard; he saw a man jump their fence into a neighbor's yard. RP 100-01. The man wore a red sweatshirt and red pants. RP 101. Later Ehle saw the man laying down under a tree, no longer wearing the sweatshirt, and asked the man what he was doing; the man said he was "resting," he was "moving through," and ran off. RP 100-01.

Ehle picked a person other than Simmons from a photo montage, saying he was less than 50 percent sure that it was man he had seen. RP 104-05, 342-43. In court, Ehle said that he would have a hard time saying for sure whether Simmons was the man he had seen. RP 102-03.

When police arrived, Officer Walter Bruce noticed a red Chevrolet Blazer illegally parked across the street from Rigel's home, unlocked and with the keys in the ignition. RP 70. There was a red jacket on the passenger seat. RP 71.

The morning of the burglary, a man identifying himself as Glenn Simmons went to Day and Night Towing to redeem the same red Blazer, which had been impounded previously. RP 252-56. He was wearing a red jogging suit. RP 256. Sherri Sobotor, the employee who released the car to the man, could not identify Simmons in court, explaining that she sees too many people. RP 256.

The man used an expired passport as identification, which was in Simmons' name and had his picture. RP 259-60. Sobotor confirmed that the person who was picking up the truck matched the picture. RP 259-60.

The man was there when Sobotor arrived at work at 8:07 a.m. and left about an hour later, after he had taken a tire from the Blazer to be fixed. RP 257. Sobotor guessed it was 9:30 a.m. RP 257. The tow yard and Rigel's home are both in the north end of Seattle: the tow yard in the 12700 block of Aurora Avenue; Rigel's home in the 1700 block of N. 122nd Street. RP 67, 250, 258, 274-76.

The parties stipulated that on March 3, 3009, Simmons was driving a red Blazer with the same vehicle license number. RP 272-73. When Simmons was arrested in the course of this burglary investigation, he was again with the same red Blazer. RP 186-88, 190-93.

C. ARGUMENT

1. THE DETECTIVE DID NOT OFFER AN IMPERMISSIBLE OPINION AS TO GUILT IN HIS DESCRIPTION OF MONTAGE PROCEDURES.

Simmons claims that three statements of Detective Jones relating to the presentation of photo montages to Ehle and Mason were manifest constitutional error, impermissible opinion as to Simmons' guilt. That claim should be rejected. The testimony was Detective Jones' explanation of how he prepared the montage for

Mason, his observation of Ehle's response to a montage, and Detective Jones' reference to Simmons as a suspect. The testimony was not opinion as to guilt. Defense counsel developed and emphasized this testimony on cross-examination to illustrate alleged bias in Jones' investigation. Simmons did not object to the testimony in the trial court and has waived any error. In the context of all of the evidence and the jury instructions, if it was improper opinion evidence, it was not reversible error.

a. Relevant Facts

Seattle Police Detective Jones investigated the Rigel burglary. RP 324-25. He testified about his investigation, including his presentation of photo montages to witnesses. RP 318-24, 335-44, 347-56.

Simmons claims that three statements during Detective Jones' testimony were impermissible opinions as to guilt.

The first was the detective's description of what Ehle said when he made an equivocal identification from a photo montage of a man other than Simmons:

[H]e was kind of bouncing back and forth between choices of different guys, and he wasn't sure at all even when he finally did choose one. He even told me that, you know, he's less

than 50 percent sure, which means more likely than not he even knows he's choosing the wrong one, so.

RP 343.

The second challenged statement occurred after the detective described Ehle's montage choice. RP 342-43. When asked why the copy of the montage shown to Ehle was in black and white instead of color, as the others were, Jones testified:

Standard policy for me, and I believe most of the other detectives, actually I think it's been official now, is that for a montage identification where it's not, quote, "successful" or it's not part of the person who's going to be – wind up being charged it's not considered really, quote, "evidence." I mean, everything is evidence but that's not specifically something that's considered evidence to be put into evidence. It's added to the case file. It's [sic] obviously has to be preserved because it's part of the investigation that can be used for both sides. So, it's just added into the case file.

RP 344. Then, when the prosecutor asked whether "not successful" referred to the witness not being sure or to the witness picking the "wrong person," the detective responded:

Well, in this case both. If he'd have been unsure and I didn't otherwise have a suspect identified or at least enough to file a case, then the case would have been inactivated anyway. So, yeah, unsuccessful in kind of both regards.

RP 344.

The third challenged statement occurred when Detective Jones was explaining the difference between the montage that he

showed to Mason and that shown to some other witnesses. RP 348-52. He explained that he wanted to bring one that showed a different hairstyle that was closer to the description provided by the witnesses in this case, but did not have it with him. RP 349. He explained that if the photo of Simmons that was in the montage showed a haircut closer to the one the witnesses saw:

it would be more accurate and probably easier for them to make the correct identification based – as opposed to the one that I brought which showed him with a slightly different hairstyle which might make it harder for them to – to choose the right person or, you know, right –

Prosecutor: The person you were looking for?

A: Yeah. The person I believed was responsible.

RP 352.

There was no objection at trial to any of these statements.

RP 343-44, 352.

On cross-examination, defense counsel questioned the detective at length about his methods of presenting photo montages. RP 372-75. She also specifically challenged his failure to record information about Ehle's equivocal pick of someone other than Simmons. RP 372-74.

b. Simmons Waived His Right To Object To The Testimony.

Simmons did not object to the testimony that he now claims was admitted in violation of his right to a fair trial. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Generally a witness may not testify to his or her opinion of a defendant's guilt. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Whether testimony is an improper opinion as to guilt depends on the facts of each case, including the type of witness, the challenged testimony, the charges, the type of defense, and the other evidence. Kirkman, 159 Wn.2d at 928 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). The Supreme Court has noted that "the assertion that the province

of the jury has been invaded may often be simple rhetoric."

Kirkman, 159 Wn.2d at 928.

An analysis of the five factors identified by the Supreme Court establishes that the testimony at issue here was not an improper opinion as to guilt. Although the witness was a detective, he did not suggest that he had information not known to the jury. The testimony specifically related to the manner in which he conducted the investigation, an issue that was central to Simmons' defense.

The first challenged comment, that Ehle knew he was choosing the "wrong person," was the detective's statement of his own understanding of the meaning of Ehle's statement that he was less than 50 percent sure he chose the correct person from the montage. RP 343. It was the detective's interpretation of Ehle's statement as to Ehle's certainty, not an opinion as to Simmons' guilt.

The remainder of the challenged testimony was that the detective considered Simmons a "suspect identified or at least enough to file a case," created a montage that included a man he "believed was responsible," and ignored a tentative choice of another suspect in a montage by Ehle, believing it "unsuccessful."

RP 344, 351-52. This testimony indicated that when Jones prepared the photo montages, that was done based on Jones' belief that Simmons was a suspect, at least enough to file a case. That assertion must apply to every photo montage, as police do not collect random photographs hoping that a suspect will be identified.

Earlier in his testimony, the detective explained the principles of photo montage identification procedures and noted that a montage is based on one person the police are trying to identify. RP 318, 320. In using the term "the person I believed was responsible," the detective again was referring simply to the suspect at that time, that is the person around whom the photo montage was prepared. These statements do not constitute expressions of Jones' belief at the time of trial that Simmons was guilty.

The detective's testimony as to the significance of Ehle's equivocal identification was relevant to the course of the police investigation. The State may not volunteer unnecessary explanations for police actions as a means to present otherwise inadmissible evidence. State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992). However, the nature of the investigation was

vigorously challenged by the defense, and in fact formed a theme of the defense case and the evidence was relevant for that reason.

Opening statements were not transcribed, but Simmons argued in closing that Detective Jones had a bias that affected his investigation. RP 63, 437-38, 440. He relied upon the handling of the Ehle montage as evidence of that bias. RP 437-38. Simmons also cross-examined Detective Jones about Jones' statements to a witness who viewed a montage, suggesting that Jones improperly told the witness that the person Jones believed committed the crime was in the montage. RP 374-75.

Simmons argues that the nature of the charges weighs in favor of a finding that the testimony was improper opinion, because the crimes charged in this case are serious. However, he cites no authority that it is the seriousness of the charges that affects the determination of whether testimony is improper opinion. It is the nature of the charges and the way in which the testimony relates to the charges that is relevant to this analysis. E.g. State v. Black, 109 Wn.2d 336, 348-50, 745 P.2d 12 (1987) (testimony that victim suffered "rape trauma syndrome" when crime charged was rape). The charges in this case are property crimes and the challenged

testimony has no special weight because of the specific crimes charged in this case.

Even if any or all of this testimony was an improper opinion as to guilt, Simmons has not established that it caused actual prejudice. Admission of testimony as to a defendant's guilt, without objection, is not necessarily manifest constitutional error. Kirkman, 159 Wn.2d at 936.

Juries embody "the commonsense judgment of the community." Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, "Juries are not leaves swayed by every breath." United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923).

Kirkman, 159 Wn.2d. at 938. The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 32-33. In considering the possible prejudicial effect of opinion testimony, the jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. Montgomery, 163 Wn.2d at 595-96. The defendant has cited no such evidence in this case.

Because the defendant has not established manifest constitutional error, he has waived this claim.

c. Any Error Was Harmless.

Even if the court concludes that some portion of this testimony was manifest constitutional error, any error was harmless.

A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Any constitutional error in the testimony at issue was harmless beyond a reasonable doubt.

The challenged testimony established only what the jury knew, that the detective considered Simmons a suspect, "at least enough to file a case." RP 344. The two police officers who testified to Simmons arrest on April 6 also repeated that Detective Jones had communicated in his police bulletin that there was probable cause to arrest Simmons. RP 186, 191-92.

The detective did not testify that he eliminated a suspect, but testified that he ignored Ehle's equivocal identification of someone other than Simmons. RP 343-44. The jury heard nothing to suggest that there was any connection between that person and this incident.

Simmons' reliance on State v. Dolan² is misplaced. Dolan was charged with assault of a child. Only two people (Dolan and the child's mother) could have been responsible – the pool of suspects was limited by access to the child. Dolan, 118 Wn. App. at 329. Two State's witnesses testified that they did not believe the child's mother was responsible for the injury. Id. at 328-29. In contrast, in the case at bar, the pool of people who could be the burglar was not limited and the detective did not opine that no one else could be the burglar.

In any event, the elimination of one suspect was not equivalent to a conclusion that Simmons was guilty. See State v. Link, 25 S.W.3d 136, 145 (Mo.), cert. denied, 531 U.S. 1040 (2000) (officer's testimony that other suspects were eliminated was proper and did not invade the province of the jury); State v. Baker, 338 N.C. 536, 555, 451 S.E.2d 574, 591 (1994) (officer's explanation of the basis for his elimination of another suspect was proper opinion testimony); Taylor v. State, 689 N.E.2d 699, 706 (Ind. 1997) (officer's opinion as to the probable guilt of another suspect was harmless because the reasons for that decision were disclosed).

² 118 Wn. App. 323, 73 P.3d 1011 (2003).

There was overwhelming evidence of Simmons' guilt. A Blazer was left illegally parked across from Rigel's burglarized home, unlocked with the keys inside. RP 70-71. A man using Simmons' expired passport for identification, and who matched the picture on the passport, picked up the Blazer from a tow yard minutes before this burglary, alone, and dressed all in red. RP 252-60. Simmons had been driving that Blazer a week before the burglary and Simmons was again with that Blazer when he was arrested weeks later. RP 186-88, 190-93, 272-73.

Mason heard the burglar alarm go off and saw the burglar run from the home with property stolen from inside, and identified Simmons as the burglar from a montage and in court. RP 121-31, 136-44, 353-55. Bunn saw a man dressed in red pants with only a T-shirt (although it was freezing outside) nearby, in a narrow area of her neighbor's yard and soon after, peeking around the chimney of her own home. RP 207-14. Bunn noticed that he had a tattoo on his arm of the letter P and some dots, among other tattoos. RP 216. Simmons has a tattoo on his arm of the letter P and some dots, among other tattoos. RP 331-33. In a montage and in court, Bunn identified Simmons as that man; she was 100 percent certain. RP 218-19, 223-26, 335-37.

Given the compelling evidence against Simmons, there is no doubt that the same result would have been reached in the absence of this alleged error.

2. THE DETECTIVE DID NOT OFFER AN IMPERMISSIBLE OPINION AS TO BUNN'S CREDIBILITY IN HIS DESCRIPTION OF HER UNUSUALLY DETAILED MEMORY.

Simmons claims that testimony of Detective Jones relating to Bunn were improper comment as to her credibility. That claim should be rejected. The testimony was a description of the nature of Bunn's descriptions of the man she confronted, characterizing it as unusually detailed and describing her as a good witness because of the details she provided. The testimony was not an improper opinion as to the truthfulness of Bunn's testimony. Simmons did not object to the testimony in the trial court and has waived any error. In the context of all of the evidence and the jury instructions, if it was improper opinion evidence, it was not reversible error.

a. Relevant facts

Simmons claims two statements in Detective Jones' description of Bunn's identification of Simmons were constitutional error. Both related to witness Bunn's recall of detail. The

challenged remarks are highlighted (by underlining) in the following exchange from the direct examination:

Q. ...[H]ow detailed would you say Ms. Bunn was when you spoke with her about the incident?

A. I thought she was remarkably detailed in her recollection, in things that she remembered. At first when I showed her the montage, you know, I presented it to her, she was silent. I mean, not a word, she didn't move, she just sat there and stared at it emotionless and quiet for I don't know how many seconds or whatever. At that point I started to think, oh, well, she's not going to recall anything. And then she just jabbed her finger at one of the photos and said that's the one or something to that effect, like kind of surprised me how confident she was because I was all ready to think that maybe she was having trouble or something. But just—it seemed like she had such a good recollection of who she was thinking of. Obviously the time that she spent looking at it she was probably just evaluating everybody in the photos, and she just jabbed out her particular selection. That and the recollection she had of these tattoos, which the presence of mind to even see those, let alone recall them to the – with that much detail where I could later see that this person does have tattoos on both arms and just like described was rather startling to me. I found her to be quite an incredibly good witness.

Q. And that's comparing with your experience with other witnesses?

A. Yeah. And, frankly, with myself. I have to admit I'm not that terribly great at remembering little details like that. But, yeah, with other witnesses. And it's not a fault, it's just other people focus on different things. Some people can stare at somebody, and again that might be me, can stare at somebody for a while and later on they might not be able to recall anything really distinctive about them. So, she focused on this person or something because she really had a really good recollection.

RP 333-34.

There was no objection to this testimony. RP 333-34.

b. Simmons Waived His Right to Object To The Testimony.

Simmons did not object to this testimony that he now claims violated his right to a fair trial. RAP 2.5(a) bars consideration of this claim, which does not involve a manifest error affecting a constitutional right. RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333.

Testimony regarding the veracity of a witness may be improper depending on the circumstances of the case. Kirkman, 159 Wn.2d at 928. The court will consider the type of witness, the challenged testimony, the charges, the type of defense, and the other evidence. Id. (citing Demery, 144 Wn.2d at 759). The jury is presumed to follow the court's instruction that it is the sole judge of the witness' credibility. Kirkman, 159 Wn.2d at 928.

An analysis of the five factors identified by the Supreme Court establishes that the testimony at issue here was not an improper opinion. It was simply the detective's description of the unusual detail recalled by Bunn, which made her a good witness.

RP 333-34. The detective did not opine that Bunn told the truth, either in her earlier identification of Simmons or at trial.

Although the witness was a detective, he did not suggest that he had information not known to the jury. RP 333-34. To the contrary, he explained at length exactly what Bunn did and said that formed the basis of his conclusion that she had unusually detailed recall. RP 333-34.

The detective did not testify that he accepted as true Bunn's description of the man she confronted or her identification of Simmons as that man. While the testimony certainly was relevant to the defense of identity, it did not convey an opinion as to the defendant's guilt.

This challenge is very similar to the claim rejected by this Court in State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). In that case, an accomplice initially said that the defendant participated in a burglary but at trial testified that it was another man who participated. Wilber, 55 Wn. App. at 286-97. Two police officers testified to their expertise in determining whether a person is telling the truth, based on body and eye movements. Id. at 297-99. Both officers testified that, in their opinion, the witness was telling the truth when he gave his original statement. Id. at 297.

This Court concluded that the expert opinion was improperly admitted but it was not an opinion as to the defendant's guilt, so the error was not constitutional error and was harmless. Id. at 299-300. The testimony in that case was a direct opinion as to witness veracity concerning identification but nevertheless was not considered an opinion as to guilt. It is even more clear in this case that the alleged implied opinion as to Bunn's veracity was not an opinion as to Simmons' guilt.

Even if the testimony was an improper opinion as to guilt, Simmons has not established that it caused actual prejudice, a necessary component of manifest constitutional error. Kirkman, 159 Wn.2d at 936. "[W]hen a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error." State v. Warren, 134 Wn. App. 44, 55, 138 P.2d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17 (2008), cert. denied, 129 S. Ct. 2007 (2009). Detective Jones did not expressly state his belief in Bunn's identification, he testified only that she had remarkable recall for details and, as a result, was a good witness.

The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 32-33. In

considering the possible prejudicial effect of opinion testimony, the jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). The defendant has cited no such evidence in this case.

Because the defendant has not established manifest constitutional error, he has waived this claim.

c. Any Error Was Harmless.

Even if the court concludes that some portion of this testimony was manifest constitutional error, any error was harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. Deal, 128 Wn.2d at 703.

The detective did not testify that he believed Bunn's identification was correct. The two remarks upon which this claim of error is based are concluding statements in long answers describing Bunn's descriptions of the man she saw and her behavior at the montage. The statements were natural conclusions to the answers given – that Bunn had remarkable recall for detail

and was a good witness as a result. The detective completely explained the basis for his conclusion and the jury had the opportunity to evaluate Bunn's recall itself.

There was overwhelming evidence of Simmons' guilt. A Blazer was left illegally parked across from Rigel's burglarized home, unlocked with the keys inside. RP 70-71. A man using Simmons' expired passport for identification, and who matched the picture on the passport, picked up the Blazer from a tow yard minutes before this burglary, alone, and dressed all in red. RP 252-60. Simmons had been driving that Blazer a week before the burglary and Simmons was again with that Blazer when he was arrested weeks later. RP 186-88, 190-93, 272-73.

Mason heard the burglar alarm go off and saw the burglar run from the home with property stolen from inside, and identified Simmons as the burglar from a montage and in court. RP 121-31, 136-44, 353-55. Bunn saw a man dressed in red pants with only a T-shirt (although it was freezing outside) nearby, in a narrow area of her neighbor's yard and soon after, peeking around the chimney of her own home. RP 207-14. Bunn noticed that he had a tattoo on his arm of the letter P and some dots, among other tattoos. RP 216. Simmons has a tattoo on his arm of the letter P and some

dots, among other tattoos. RP 331-33. In a montage and in court, Bunn identified Simmons as that man; she was 100 percent certain. RP 218-19, 223-26, 335-37.

Given the compelling evidence against Simmons, there is no doubt that the same result would have been reached in the absence of this alleged error.

3. SIMMONS HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.

Simmons claims that his trial counsel was ineffective in failing to object to Detective Jones' testimony that is now alleged to be improper opinion as to guilt, and in failing to object to several alleged references to Simmons' criminal history. These claims are without merit. Detective Jones' testimony relating to identifications he observed was properly admissible and was used by the defense to claim that the detective's investigation was biased. There was no reference to any prior conviction or any direct reference to an arrest, except the arrest for this burglary. Simmons has not established either deficient performance or resulting prejudice in the possible inference that the jury could have drawn that he had been arrested on two other occasions.

To establish ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that

challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

Because Detective Jones' testimony regarding identification procedures was not improper opinion as to the defendant's guilt, the failure to object on that basis cannot be deficient performance. City of Seattle v. Heatley, 70 Wn. App. 573, 582 n.4, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994). Where a claim of deficiency rests on defense counsel's failure to object, the defendant bears the burden of showing that the objection likely would have been sustained. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996).

Even if the detective's testimony was objectionable, defense counsel had at least two tactical reasons not to object. First, the testimony gave her the chance to suggest on cross-examination

that his montage identification procedures were improper. RP 372-75. Second, the testimony added weight to the defense theory that the investigation was biased and inadequate. RP 434-40.

Simmons claims that defense counsel failed to object to "repeated references to Simmons' criminal history," but does not specify the objections that should have been made or explain why the objections would have been sustained. App. Br. at 23.

Simmons does not identify any reference to any criminal convictions and only identifies a possible inference that he had been arrested twice because two photos were used in photo montages with all of the men wearing red shirts. App. Br. at 8-9. This vague argument is insufficient to establish deficient performance.

Simmons claims that failure to request alteration of the exhibits that were photo montages shown to the witnesses, to obscure the red shirts worn by all of the men shown, was deficient. However, Simmons has not identified a plausible objection to the exhibits. The exhibits were the actual color montages shown to the witnesses and thus their probative value was significant where the central issue was identification. Speculation that counsel could have done something to decrease the possibility that the jury would

infer that the photos were booking photos does not establish constitutionally deficient performance.

Simmons claims that Detective Jones revealed that Simmons had been arrested previously, but does not cite any use of the word "arrest" in Jones' testimony. In support of the claim, he cites to Jones' reference to using two photos of Simmons, one taken in 2008. RP 338-39, 349. No plausible objection has been identified to the detective's reference to the use of two photos in which Simmons hair was different. The detective could not have explained the difference between the montages in a more sanitized fashion.

Simmons claims trial counsel was deficient in failing to object to testimony by Officer Richards that he was told that Simmons was in custody and "a possible suspect in some burglaries." RP 191. This statement is taken out of context. The complete sentence was as follows: "What I remember is U-Dub[sic], I believe, had a subject in custody that was matching the description of I think a possible suspect in some burglaries." RP 191. Three questions later, the officer clarified that the man in custody was a possible suspect in only one incident, saying, "I believe there was a prior case, some incident that happened, and there was a suspect in that

case that a detective was looking for." RP 191. There was nothing objectionable about this testimony, which was from an officer who arrived simply to complete the paperwork to impound the Blazer that Simmons had been driving on April 6, 2009. RP 190, 192. The burglary to which Officer Richards refers was the Rigel burglary that is the subject of the trial, as is clear from the testimony of the previous officer that the arrest that day, April 6, 2009, was based on a bulletin by SPD Detective Jones that there was probable cause to arrest Simmons. RP 186.

Even if an objection could have been made to the first reference to "some burglaries," it would be a reasonable tactic for a defense attorney to choose to ignore it instead of highlighting the plural by making an objection. The clarification soon after, that Simmons was a suspect in only one incident, illustrates the wisdom of that choice.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. The defendant must establish a reasonable probability that,

but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

No additional out-of-court information was presented or implied by Detective Jones' testimony about the montage identifications. The jury was instructed that it was the sole judge of credibility and Bunn, Mason, and Ehle each testified at trial about their identifications. CP 32-33; RP 104-05, 136-44, 223-26.

The detective did not state or suggest that he had any special expertise or familiarity with Bunn that would make him a better judge of Bunn's credibility than the jury. Simmons has not shown how the testimony that the detective ignored Ehle's equivocal pick because he considered it "unsuccessful" prejudiced the defense. Trial counsel made good use of that testimony in her cross-examination and closing argument, to suggest bias. RP 372-75, 437-38.

The possible inference that Simmons had been arrested in the past based on similar red shirts worn in the montage photos could not have been avoided because the jury had to have the opportunity to see the montages shown. In any event, the

suggestion that a person has been arrested in the past for unknown reasons is not particularly prejudicial, because it is common knowledge that people may be arrested for very minor reasons, or mistakenly, or for civil disobedience. Any prejudice would be insignificant in light of the compelling evidence of Simmons' guilt.

There was overwhelming evidence of Simmons' guilt. A Blazer was left illegally parked across from Rigel's burglarized home, unlocked with the keys inside. RP 70-71. A man using Simmons' expired passport for identification, and who matched the picture on the passport, picked up the Blazer from the tow yard minutes before this burglary, alone, and dressed all in red. RP 252-60. Simmons had been driving that Blazer a week before the burglary and Simmons was again with that Blazer when he was arrested weeks later. RP 186-88, 190-93, 272-73.

Mason heard the burglar alarm go off and saw the burglar run from the home with property stolen from inside, and identified Simmons as the burglar from a montage and in court. RP 121-31, 136-44, 353-55. Bunn saw a man dressed in red pants with only a T-shirt (although it was freezing outside) nearby, in a narrow area of her neighbor's yard and soon after, peeking around the chimney of her own home. RP 207-14. Bunn noticed that he had a tattoo

on his arm of the letter P and some dots, among other tattoos. RP 216. Simmons has a tattoo on his arm of the letter P and some dots, among other tattoos. RP 331-33. In a montage and in court, Bunn identified Simmons as that man; she was 100 percent certain. RP 218-19, 223-26, 335-37.

Without a showing of prejudice, the defendant's ineffectiveness claim must be rejected, even if the representation was deficient.

4. THE JURY INSTRUCTIONS DEFINING UNLAWFUL ENTRY WERE NOT CONFUSING.

Simmons argues that because the definitions of "enter or remain unlawfully" included reference to unlawful entry upon premises broadly, the instructions in this case were confusing and he was deprived of due process. This claim should be rejected. There was no objection to these instructions below, so the claimed error was not preserved. Moreover, the instructions were not confusing in any way.

Simmons alleges constitutional error in the use of two WPIC definition instructions regarding the residential burglary charge. Instruction 9 provided: "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or

otherwise privileged to so enter or remain." CP 43; WPIC 65.02.

Instruction 10 provided: "The term premises includes any building, dwelling, or real property." CP 44; WPIC 65.01. Simmons did not object to either of these instructions in the trial court. RP 393-97, 403.

Unpreserved claims of error involving jury instructions are subject to the usual analysis of whether the error is manifest constitutional error. RAP 2.5(a)(3); State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Not every instructional error is a manifest constitutional error. Id. at 101 (citing cases).

Due process requires that a defendant be convicted only if there is proof of every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, §22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." O'Hara, 167 Wn.2d at 105. An error in a definitional instruction is of constitutional magnitude if it relieves the State of its burden of proving all of the elements of the crime (or disproving a defense). Id.

Simmons argues that the definition of "enters or remains unlawfully" generally violated his due process rights because it relieved the State of its burden of proving that the crime occurred within a dwelling. Simmons contends because of these definitions, the jury may have believed it could convict Simmons based on his unlawful entry onto premises even if they believed he did not enter a dwelling. Based on the instructions as a whole, the jury could not have drawn that conclusion.

Simmons concedes that the instruction defining residential burglary specified that entry into a dwelling is required. CP 41; App. Br. at 26. Simmons concedes that the instruction setting out the elements of residential burglary also correctly required the jury to find entry into a dwelling. CP 42; App. Br. at 27. Simmons admits that "dwelling" was defined, and he identifies no error in that definition. CP 45; App. Br. at 27.

The only theory upon which Simmons claims that the "unlawfully entered" instructions are confusing is that they cover a situation that was not alleged here: where a person unlawfully enters real property (or another building) but not a dwelling. He offers no reason that a juror would believe that this definition eliminated an element that was explicitly included in the instructions

defining residential burglary and listing the elements required to convict Simmons of that crime.

It is absurd to believe that where the definition of residential burglary and the elements instruction for residential burglary both specified that entry into a dwelling was required, the jury might believe that entry into a dwelling was not required.³ Although the definition of "entering or remaining unlawfully" was broader than necessary in a residential burglary case, that is the nature of definitions of terms.

The Supreme Court has concluded that alternative definitions within instructions defining terms do not establish alternative means of committing the crime, so definitions not applicable to the case may be included without creating constitutional error. State v. Smith, 159 Wn.2d 778, 785-86, 154 P.3d 873 (2007) (definitions of assault); see also, State v. Laico, 97 Wn. App. 759, 762-63, 987 P.3d 638 (1999) (definitions of great bodily harm).

³ State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980), on which Simmons relies is distinguishable. In that case, the jury could have convicted on one count of assault based on either of two assaults that occurred, against two victims. As the court there noted, that constituted two separate crimes. Id. at 190.

Even if this Court concludes that the definitions relating to the term "unlawfully entered" were confusing, the elements instruction was clear. When the elements instruction is clear and correct, an alleged error in a definitional instruction does not have "practical and identifiable consequences," and thus, is not manifest constitutional error. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

Finally, even if the trial court erred in giving these definitional instructions in this case, it is harmless. Even if an instruction is so misleading that it constitutes constitutional error, it is harmless error if the reviewing court is convinced beyond a reasonable doubt that the error did not change the result. State v. Souther, 100 Wn. App. 701, 709-10, 998 P.2d 350, rev. denied, 142 Wn.2d 1006 (2000). The defense in this case was identity—there was no suggestion by the defense that the man who Mason saw coming from Rigel's home with an armload of Rigel's property, as her burglar alarm blared, had not entered her home to get those items. RP 432-33, 440-41. Any error in including a broad definition of unlawful entry was harmless.

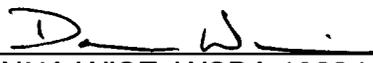
D. CONCLUSION

For the foregoing reasons, all of Simmons' claims of error should be rejected. The State respectfully asks this Court to affirm Simmons' convictions and the sentence imposed.

DATED this 16th day of August, 2010.

Respectfully submitted,

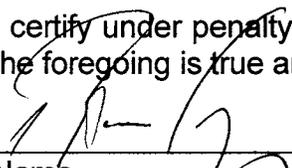
DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
DONNA WISE, WSBA 13224
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan Palmer and Dana Lind, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GLENN SIMMONS, Cause No. 64253-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08/16/10

Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 AUG 16 PM 4:27