

NO. 65715-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DEVON D. LAIRD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	7
1. THE TRIAL COURT PROPERLY ADMITTED THE SHOW-UP IDENTIFICATIONS .....	7
2. THE TRIAL COURT PROPERLY DETERMINED THAT LAIRD'S TENNESSEE CONVICTION WAS LEGALLY COMPARABLE TO SECOND-DEGREE ASSAULT IN WASHINGTON .....	20
3. LAIRD WAS NOT ENTITLED TO A JURY DETERMINATION OF HIS PRIOR CONVICTIONS .....	27
D. <u>CONCLUSION</u> .....	28

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Neil v. Biggers, 409 U.S. 188,  
93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)..... 10, 11, 15, 16, 18

Washington State:

In re Lavery, 154 Wn.2d 249,  
111 P.3d 837 (2005)..... 23, 24, 25, 27

State v. Banks, 149 Wn.2d 38,  
65 P.3d 1198 (2003)..... 18

State v. Broadaway, 133 Wn.2d 118,  
942 P.2d 363 (1997)..... 15

State v. Ford, 137 Wn.2d 472,  
973 P.2d 452 (1999)..... 22, 23

State v. George, 150 Wn. App. 110,  
206 P.3d 697, review denied,  
166 Wn.2d 1037 (2009)..... 18

State v. Guzman-Cuellar, 47 Wn. App. 326,  
734 P.2d 966 (1987)..... 9, 10, 11, 12

State v. Jordan, 158 Wn. App. 297,  
241 P.3d 464 (2010)..... 21, 24, 25, 26

State v. Kraus, 21 Wn. App. 388,  
584 P.2d 946 (1978)..... 9

State v. Le, 103 Wn. App. 354,  
12 P.3d 653 (2000)..... 18

State v. Linares, 98 Wn. App. 397,  
989 P.2d 591 (1999), review denied,  
140 Wn.2d 1027 (2000)..... 10

<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	23
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	23, 26
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003), <u>cert. denied</u> , 541 U.S. 909 (2004) .....	27
<u>State v. Thiefaul</u> t, 160 Wn.2d 409, 158 P.3d 580 (2007).....	27
<u>State v. Vickers</u> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	9
 <u>Other Jurisdictions:</u>	
<u>State v. Phipps</u> , 883 S.W.2d 138 (Tenn. Crim. App. 1994).....	25

### Constitutional Provisions

#### Federal:

U.S. Const. amend. VI .....	27
U.S. Const. amend. XIV .....	27

### Statutes

#### Washington State:

RCW 9.94A.030 .....	22, 24
RCW 9.94A.525 .....	22, 26
RCW 9.94A.570 .....	24
RCW 9A.36.021 .....	24

Other Jurisdictions:

Tenn. Code Ann. § 39-2-102..... 24  
Tenn. Code Ann. § 39-2-103..... 20  
Tenn. Code Ann. § 39-2-211..... 25

Other Authorities

12 Royce A. Ferguson, Washington Practice:  
    Criminal Practice and Procedure (3d ed. 2011)..... 9, 10, 14  
Persistent Offender Accountability Act..... 24  
Sentencing Reform Act of 1981 ..... 22, 26

**A. ISSUES**

1. A show-up identification is admissible unless it is so impermissibly suggestive that it creates a substantial likelihood of irreparable misidentification. If such an identification procedure is unnecessarily suggestive, courts look at the totality of the circumstances to determine whether the identification is reliable. Here, three witnesses identified Laird at a show-up identification without hesitation and within 30 minutes of the crime, wearing the same clothing that he wore when he committed the crime. Given these circumstances, has Laird failed to demonstrate that the witnesses' identifications were so unnecessarily suggestive that it created a substantial likelihood of irreparable misidentification?

2. Washington courts are required to include out-of-state convictions that are comparable to Washington offenses in a defendant's criminal history. The comparability of an out-of-state conviction does not depend on whether the state of conviction offered identical defenses to those in Washington. Laird was convicted in Tennessee of committing assault with the intent to commit a felony, an offense comparable to second-degree assault in Washington. At the time of Laird's conviction, Tennessee purportedly failed to offer the diminished capacity defense. Has

Laird failed to show that his out-of-state conviction was not legally comparable to a Washington offense?

3. Washington courts have held that the federal and state constitutions do not require the State to prove a defendant's prior convictions beyond a reasonable doubt to a jury. At sentencing, the State submitted proof of Laird's prior convictions to the trial court, which found that Laird had previously committed the crimes. Has Laird failed to show that a jury should have considered his prior convictions?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Devon Laird with Robbery in the Second Degree, alleging that Laird committed the crime with rapid recidivism against a particularly vulnerable victim.<sup>1</sup> CP 10. The jury convicted Laird as charged. CP 34-35, 57; 11RP 12, 78.<sup>2</sup> The

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<sup>1</sup> The State also charged Laird with Possessing Stolen Property in the Second Degree, and alleged the same aggravating factors. CP 11. Laird pled guilty as charged, acknowledging the presence of the aggravating factors. CP 61-88.

<sup>2</sup> The Verbatim Report of Proceedings consists of eleven volumes, with the State adopting the following reference system: 1RP (10/8/09 and 10/19/09), 2RP (11/10/09), 3RP (11/12/09), 4RP (11/16/09 and 11/17/09), 5RP (1/25/10), 6RP (1/26/10), 7RP (1/27/10), 8RP (1/28/10), 9RP (2/8/10), 10RP (2/9/10 and 2/10/10), and 11RP (2/11/10, 2/12/10, 2/16/10, and 6/25/10).

trial court sentenced Laird to life imprisonment without the possibility of parole, based on Laird's prior convictions for two other strike offenses. CP 131-41; 11RP 137-38.

## **2. SUBSTANTIVE FACTS**

On October 14, 2007 around 11:30 a.m., Charles Aramaki dropped off pictures to be developed at the Rite Aid in Renton, Washington. 6RP 72. Small in stature and 89 years old, Aramaki parked his car in the disabled parking spot directly in front of the store. 6RP 71-72. As Aramaki waited inside his car, an African-American male walked up and asked if he had a cigarette lighter. 6RP 75-76; 8RP 103. When Aramaki said no, the man reached inside, grabbed Aramaki's neck, and stole Aramaki's wallet from inside his coat pocket. 6RP 77. While Aramaki fought to keep his car door open, the man tried to close the door on Aramaki's leg. 6RP 77.

At the same time, Michael Patrick was leaving Rite Aid, heard Aramaki scream, and saw Aramaki's foot being "pinched" in the car door by an African-American male. 8RP 103. Patrick immediately walked over to the car and asked if there was a problem. 8RP 103. The man let go of the car door and started

backing away as Aramaki told Patrick what had happened. 8RP 104-05. When the man started to walk away, Patrick dialed 911 on his cell phone and followed behind the man, providing his physical description to the emergency operator. 8RP 105-13. Patrick lost sight of the suspect when he rounded the back corner of Sam's Club. 8RP 113. Police arrived moments later and Patrick pointed them in the suspect's direction. 8RP 115.

Police found Laird four minutes later, lying down in the bushes in the area where Patrick had pointed. 2RP 21-22; 8RP 77-78, 113-15. Laird matched Patrick's physical description of an African-American male, 5'8" tall, with a heavy build, and wearing a black jacket with white sleeves. 8RP 13-14, 78-79. No other people were in the area where police found Laird. 8RP 77. Police found Aramaki's wallet lying on the ground directly underneath where Laird had been. 8RP 19.

Alicia Anderson saw Patrick follow the suspect while calling 911 from his cell phone. 7RP 90-92. Parked four spots away, Anderson saw "a real jerky movement" by Aramaki's car, after which a man walked by her car wearing a brightly colored, striped jacket. 7RP 90-93, 97-98. Anderson looked at the man "dead on" and made "eye-to-eye contact" with him. 7RP 94. After the man

passed, Anderson started following him in her car because “something wasn’t right.” 7RP 94. Anderson quickly lost sight of the suspect when she ran into barriers in the parking lot that prevented her from following him farther. 7RP 94-95. Anderson returned to help Aramaki and waited for police to arrive. 7RP 96.

Shortly after detaining Laird, police individually brought Aramaki, Patrick, and Anderson to Laird's location for a show-up identification. 6RP 108; 7RP 12-13; 9RP 43. At the time of the identification, Laird was handcuffed and standing between two officers. 6RP 110-11. All three witnesses identified Laird as the assailant within 30 minutes of Patrick's original call to police. 2RP 169-71; 6RP 108, 111; 7RP 13. Prior to identifying him, none of the witnesses knew that anyone else had positively identified Laird. 2RP 28, 41-42, 67, 137; 3RP 30; CP 128.

Patrick “[i]mmediately” identified Laird with “100 percent” certainty based on his physical appearance, facial features, and “distinctive” jacket. 3RP 49-50; 8RP 116. Aramaki identified Laird without hesitation, stating, “That’s him.” 9RP 44. Anderson identified Laird with “150 percent” certainty based on his size and face. 3RP 26-27. None of the witnesses identified Laird with the

same certainty at trial, over two years later.<sup>3</sup> 7RP 105-06; 8RP 118-19.

Prior to trial, Laird moved to suppress the witnesses' identifications of him as impermissibly suggestive. CP 12-16; 3RP 69-78. Testifying on Laird's behalf, Dr. Geoffrey Loftus discussed the shortcomings of show-up identifications and the factors that can influence a witness's identification of a suspect. 2RP 87-89. After hearing testimony, the court denied Laird's motion to suppress, finding that the identifications were not unnecessarily suggestive, that the witnesses had a good opportunity to view Laird, that they provided similar physical descriptions of him, and that they positively identified him shortly after the incident without hesitation. 3RP 97-99; CP 129.

Following Laird's conviction for second-degree robbery, the jury found in a separate proceeding that Laird had committed the crime with rapid recidivism. 11RP 78. Laird committed the charged crime 47 days after being released from federal custody. 11RP 41.

At sentencing, Laird disputed having previously been convicted in Washington of Robbery in the First Degree, and in

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<sup>3</sup> Aramaki was not asked at trial whether he could identify Laird.

Tennessee of Assault with Intent to Commit a Felony and Assault with Intent to Commit Robbery. 11RP 114-18. Laird also disputed the legal comparability of his Tennessee convictions, arguing that they were not comparable to Washington offenses because Tennessee did not recognize the same diminished capacity defense available in Washington at the time of these convictions. 11RP 124-26; CP 100-02.

At the sentencing hearing, a latent fingerprint examiner testified that Laird's fingerprints matched those found on judgment and sentences for the prior convictions. 11RP 89-99. The court found that Laird had previously committed the prior offenses, and that Laird's conviction for Assault with Intent to Commit a Felony was legally comparable to second-degree assault in Washington. 11RP 118-20, 126-27.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ADMITTED THE SHOW-UP IDENTIFICATIONS.**

Laird argues that the trial court erred by admitting the witnesses' identifications of him following the robbery. He contends

that the show-up identifications were unnecessarily suggestive based on the inherent suggestiveness of a show-up identification, Anderson's observation that Laird was handcuffed with officers nearby, and Patrick's prediction that the suspect would quickly be apprehended. Laird further contends that the show-up identification created a substantial likelihood of irreparable misidentification based on each person's brief opportunity to view him and the discrepancies in their descriptions. Laird argues that the only remedy for the court's error is reversal and remand for a new trial.

Laird's claims are meritless. Given the record and the case law on show-up identifications, the court properly found that the show-up identifications were not unnecessarily suggestive. Even if the show-up identifications were impermissibly suggestive, they were nevertheless reliable and should have been admitted. The witnesses individually identified Laird as the assailant without hesitation, and within 30 minutes of the robbery. Any error in admitting the identifications was harmless.

Show-up identifications are not "per se impermissibly suggestive."<sup>4</sup> State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). Generally, a show-up identification is admissible if it is held shortly after the crime is committed and in the course of a prompt search for the suspect. State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978). The defendant bears the burden of showing that the identification procedure was "unnecessarily suggestive." Guzman-Cuellar, 47 Wn. App. at 335. If the defendant fails to carry this burden, the inquiry ends. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If the defendant prevails on this point, the court considers, "based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification." Id.

A show-up identification might be impermissibly suggestive based on suggestive remarks or utterances by police officers, or by witnesses who identify a suspect in another witness's presence.

12 Royce A. Ferguson, Washington Practice: Criminal Practice and

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<sup>4</sup> Although show-up identifications are "somewhat suggestive," they allow witnesses to test their recollection of a suspect while their memories are still fresh, and provide for an expeditious release of innocent citizens. 12 Royce A. Ferguson, Washington Practice: Criminal Practice and Procedure § 3210 (3d ed. 2011).

Procedure § 3211 (3d ed. 2011). A show-up identification is not impermissibly suggestive based solely on a defendant being handcuffed in the presence of police officers. Guzman-Cuellar, 47 Wn. App. at 336.

Once a defendant demonstrates that a show-up identification is unnecessarily suggestive, the court must determine whether the identification is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification based on the following factors: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's description, (4) the witness's level of certainty at the time of identification, and (5) the length of time between the crime and the identification. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000).

Here, the trial court properly found that the witnesses' show-up identifications were not unnecessarily suggestive. 3RP 97; CP 129. All three witnesses individually identified Laird outside each other's presence. 2RP 24-26, 134-36, 138-39; CP 127-28. Prior to identifying him, none of the witnesses knew

that anyone else had positively identified Laird. 2RP 28, 41-42, 67, 137; 3RP 30; CP 128.

Neither Aramaki nor Patrick heard anything on the police radio about Laird's apprehension or identification while they were being transported to Laird's location.<sup>5</sup> 2RP 67; 3RP 48. Laird does not argue, and the record does not suggest, that the police did or said anything improper to influence the witnesses' identifications. 2RP 23-24, 135, 138; CP 127-28. Given this record, Laird cannot demonstrate that the show-up identifications were unnecessarily suggestive.

Laird's argument that the trial court should have suppressed the identifications based on the "inherent suggestiveness of a show-up," should be rejected in light of decades-long precedent to the contrary. Appellant's Br. at 12; see e.g., Guzman-Cuellar, 47 Wn. App. at 335-36 (upholding the admission of a show-up identification despite the suggestiveness of having defendant handcuffed near a police car); Biggers, 409 U.S. 195, 200-01 (upholding the admission of a show-up identification despite the

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<sup>5</sup> Anderson likely did not hear anything on the police radio either, given that she drove herself to the show-up identification and remained in her car during the entire incident. 2RP 23; CP 128.

suggestiveness of two officers walking the defendant by the victim and ordering the defendant to say certain words).

The fact that Laird was handcuffed and in the presence of at least one police officer during the show-up identification is insufficient to establish *per se* unnecessary suggestiveness. Guzman-Cuellar, 47 Wn. App. at 336. Although Anderson immediately noticed Laird's handcuffs<sup>6</sup> and the presence of a nearby officer, Anderson's testimony reveals that neither factor influenced her identification:

STATE: When you saw him how sure were you that it was the same person?

ANDERSON: 150 percent sure. No doubt in my mind or I would have said at the time.

STATE: Why would you have said it if you had a doubt?

ANDERSON: Because, like, I wouldn't want to be in the situation where somebody was going to be blamed for something that they shouldn't be blamed for. I mean, clearly there's a lot of average looking guys out there. So.

STATE: What was it about him when you saw him there with the officers that made you think it was the same person you had seen by your car?

ANDERSON: The size and also the face. He was right in front of my car so I looked him

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<sup>6</sup> Aramaki, on the other hand, could not remember whether Laird was handcuffed, and Patrick made no mention of Laird's handcuffs. 2RP 71; 3RP 48-50.

right in the face. He was right in front of my hood.

3RP 27. Thus, Laird's size and face incriminated him, not his handcuffs or the police presence. Anderson identified Laird with absolute certainty, and clearly recognized the serious consequences of her identification.

Laird's final argument that the show-up identification was unnecessarily suggestive based on Patrick's prediction that Laird would quickly be apprehended, is equally meritless. Patrick's comment stemmed from the following exchange:

STATE: Did you feel pressured to go anywhere?

PATRICK: No. Actually I was very eager to go because it pretty much followed my prediction about how easily the guy was going to be apprehended.

3RP 48. Based on his familiarity with the area and the last place he saw Laird, Patrick concluded that "there was pretty much only one direction [Laird] could have gone: Up the hill." 3RP 43-45. Patrick directed police to Laird's suspected location and police apprehended him within minutes. 2RP 21-22; 3RP 43; CP 128-29.

Patrick identified Laird with "100 percent" certainty based on his race, physique, "distinctive" jacket, and facial features. 3RP 49-50. There is nothing in the record, aside from Dr. Loftus's

general suppositions about witnesses and show-up identifications,<sup>7</sup> to suggest that Patrick identified Laird based on anything other than Laird's physical appearance.<sup>8</sup>

Moreover, Laird's argument misses the point. Even if Patrick identified Laird based in part on his prediction, Laird does not explain how *Patrick's* internal belief affected the suggestiveness of an identification procedure that *police* arranged and administered. Typically, a show-up identification is rendered impermissibly suggestive based on police making suggestive remarks during the procedure, or police allowing witnesses to identify the suspect in each other's presence. 12 Ferguson, Washington Practice at § 3211. None of those circumstances existed here. This Court should find that Laird has failed to demonstrate that the show-up identification was impermissibly suggestive.

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<sup>7</sup> Although Dr. Loftus posited that a witness might identify someone based on an expectation "that the person they're looking at is the person they saw commit the crime," he ultimately admitted that "it's not possible" to determine whether a witness's identification is based on the witness's memory, the witness's expectation, or a "variety of other factors." 2RP 88-89.

<sup>8</sup> Indeed, at trial Patrick testified that he did not feel any pressure to identify Laird at the show-up identification, and that he would have told the police if they had the wrong person, "[b]ecause it is the moral and correct thing to do and the honest thing to do." 8RP 120. Patrick testified further that he had a number of African-American friends who had been involved with the criminal justice system, and that he understood the impact of conviction, stating that "I don't take what I do here lightly." 8RP 146.

Nonetheless, even assuming that the show-up identification procedure was impermissibly suggestive, the trial court properly admitted the witnesses' identifications based on their reliability.

Applying the Biggers factors, the court found that:

Three different witnesses affirmatively identified the suspect within 10 to 15 minutes of the arrest . . . Each witness had the opportunity to see the suspect very clearly . . . They were all focused on the conduct of the suspect . . . Their descriptions, although not identical, were very similar: Black male, 5'7"-5'10", medium to heavy build, dark if not black jacket and white sleeves . . . Each person's identification was certain and without any hesitation.

3RP 97-99. Laird does not challenge the court's factual findings, and consequently they are verities on appeal. Appellant's Br. at 1; State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Laird's actions captured the attention of all three witnesses, each of whom had a unique opportunity to view him from a close proximity, during daylight hours on a clear day. 2RP 57; 3RP 10. Aramaki first saw Laird when he asked for a cigarette, and kept his eyes on him throughout the attack. 2RP 57; CP 129. Aramaki described Laird as being "right next" to him during the robbery, and Laird's ability to reach in and take Aramaki's wallet from inside his

coat pocket confirms that Laird was no more than an arm's length away. 2RP 57.

Although Aramaki might have been frightened during the incident, he had no trouble identifying Laird as the person who had taken his wallet. According to Commander Cline, Aramaki identified Laird "within a second or two" of seeing him, stating, "That's him." 2RP 25; CP 128. Laird was wearing a black coat and brown shirt, consistent with Aramaki's description of his attacker. 2RP 26, 70. Aramaki identified Laird within 30 minutes of the robbery. Pretrial Ex. 3; 2RP 49, 170-71; CP 129. Applying the Biggers factors to the undisputed facts, the trial court properly admitted Aramaki's identification of Laird at the scene.

Similarly, the trial court properly admitted Anderson's identification of Laird. Anderson testified that Laird walked "right in front" of her car and "stared right at [her] through the window." 3RP 12; CP 129. According to Anderson, Laird passed as close to her vehicle as possible "without being on [her] hood." 3RP 13. Anderson stated that she paid "particular attention" to Laird when he walked by because it was an "odd situation" and she thought

something was "wrong." 3RP 19. Although Anderson remembered Laird's coat having "blocks of color," she was unsure of its "exact colors." 3RP 15-16. Nonetheless, Anderson was "150 percent sure" that Laird was the person who walked in front of her car, based on his size and face. 3RP 26-27. Anderson identified Laird within 30 minutes of first seeing him pass by her car. Pretrial Ex. 3; 2RP 49, 170-71; 3RP 27-28; CP 129. Based on the record, the trial court properly found that Anderson's show-up identification was reliable and thereby admissible.

Given the circumstances, Patrick's identification of Laird was arguably the most reliable of them all. Patrick first saw Laird from a distance of 10-15 feet away and noticed Laird looking directly at him for a couple of seconds before "slowly" moving away. 3RP 37; CP 129. Patrick pursued Laird around multiple buildings and across a "deserted" parking lot, while simultaneously providing emergency dispatch with Laird's physical description. 3RP 37-42; CP 129.

Patrick accurately described Laird as a heavyset African-American male, wearing a black coat with white sleeves, around

38 years old, and 5'8" tall.<sup>9</sup> 3RP 42; CP 127. Police detained Laird within four minutes of Patrick's 911 call. 2RP 21-22; CP 128. Laird matched Patrick's physical description and was wearing a black-and-white jacket. 2RP 162-66; CP 127. Two minutes later, Patrick identified Laird as the person he was chasing with "100 percent" certainty. 2RP 21-22, 44; 3RP 43; CP 128-29. Applying the Biggers factors to these facts, the trial court properly admitted Patrick's identification.

Any error in admitting the witnesses' identifications was harmless. Assuming that the constitutional harmless error standard applies,<sup>10</sup> there is no reasonable probability that Laird would have been acquitted had the error not occurred. See State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (holding an error is harmless

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<sup>9</sup> Although police received two other descriptions of the suspect, it is unclear from the record who provided those descriptions. 2RP 31-32; Pretrial Ex. 3. Nonetheless, the descriptions were very similar, suggesting that the suspect was an African-American male, 5'7"-5'9" tall, wearing dark pants and either a black jacket with white sleeves, or a light brown vest-type jacket with a dark gray shirt. 2RP 31-32; CP 129.

<sup>10</sup> It is unclear whether the improper admission of a show-up identification constitutes a due process violation, or merely an evidentiary error. Compare State v. George, 150 Wn. App. 110, 206 P.3d 697, review denied, 166 Wn.2d 1037 (2009) (applying the nonconstitutional harmless error standard for improper admission of evidence), with State v. Le, 103 Wn. App. 354, 367-68, 12 P.3d 653 (2000) (applying the constitutional harmless error standard because the identification occurred after an illegal arrest). Even applying the stricter constitutional harmless error standard, this Court should affirm Laird's conviction.

beyond a reasonable doubt if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred"). Separate and apart from the witnesses' identifications, overwhelming circumstantial evidence linked Laird to the crime.

Within two minutes of receiving Patrick's 911 call, multiple police officers arrived in the area and began looking for the suspect. 6RP 108; 8RP 8-12, 77. Four minutes later, police found Laird lying in the bushes where Patrick had suggested that the suspect had fled. 6RP 108; 8RP 77, 115. No one else was in the area, either hiding in the bushes or walking along the adjacent roadway. 8RP 77.

Laird matched the description of the suspect "perfectly." 8RP 20. He was an African-American male, 5'8" tall, with a heavy build, and wearing a black-and-white jacket. 8RP 14, 78. Moreover, Laird was found lying on top of the victim's wallet. 8RP 19. Given the circumstances, it is highly unlikely that another African-American male could have been in the area who matched Laird's height and weight, wore a similar style, black-and-white jacket, stole Aramaki's wallet, dropped it in the bushes, and successfully managed to avoid detection by multiple officers who

responded within minutes to the scene. There is no reasonable probability that a jury would have acquitted Laird in light of this record without the identifications. Even if the trial court erred by admitting the show-up identifications, the error was harmless.

**2. THE TRIAL COURT PROPERLY DETERMINED THAT LAIRD'S TENNESSEE CONVICTION WAS LEGALLY COMPARABLE TO SECOND-DEGREE ASSAULT IN WASHINGTON.**

Laird claims that the trial court erred by considering his 1984 Tennessee conviction for "Assault with Intent to Commit a Felony, to wit: Murder in the Second Degree," comparable to Washington's crime of Assault in the Second Degree.<sup>11</sup> Laird contends that the crimes are not legally comparable because Tennessee did not recognize the defense of diminished capacity at the time of his conviction. He does not dispute that the elements of the Tennessee conviction are substantially similar to second-degree

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<sup>11</sup> Although Laird's 1984 conviction has been referred to as "Assault with Intent to Commit Murder in the Second Degree," a closer review of the judgment and sentence reveals that Laird was actually convicted of "Assault with Intent to Commit Felony, to wit: Murder 2nd." Sentencing Ex. 5. At sentencing and in briefing, the State erroneously relied on Tennessee's Assault with Intent to Commit Murder statute, Tenn. Code Ann. § 39-2-103, as the basis for Laird's conviction. 11RP 120-21; Supp. CP \_\_ (Sub. 184, Memorandum/Persistent Offender). Despite this error, Laird's Tennessee assault conviction is legally comparable to second-degree assault in Washington for the reasons stated below.

assault in Washington, or that the Tennessee conviction is comparable to a Washington "strike offense."

Nonetheless, Laird's claim that the Tennessee conviction is not legally comparable based on the alleged lack of identical defenses in Washington and Tennessee fails. As this Court recently held in State v. Jordan, the comparability of an out-of-state conviction does not depend on whether defenses available in Washington were available in the foreign jurisdiction at the time of conviction. 158 Wn. App. 297, 301-04, 241 P.3d 464 (2010). The trial court properly ruled that Laird's Tennessee conviction was legally comparable to second-degree assault.

Prior to sentencing, the State filed a sentencing memorandum alleging that Laird had an offender score of 10, and should be sentenced to life in prison without parole based on his three prior convictions for: (1) Robbery in the First Degree (Washington, 1993), (2) Assault with Intent to Commit a Felony, to wit: Murder in the Second Degree (Tennessee, 1984), and (3) Assault with Intent to Commit Robbery with a Deadly Weapon (Tennessee, 1985). Supp CP \_\_ (Sub. 155, Statement of Prosecuting Attorney); Supp CP \_\_, (Sub. 184, Memorandum/

Persistent Offender).<sup>12</sup> Laird disputed the State's calculation of his offender score and the legal comparability of his Tennessee convictions. 11RP 124-26; CP 99-102.

The trial court ruled that Laird's Tennessee conviction for Assault with Intent to Commit a Felony was a "strike offense," and legally comparable to the crime of Assault in the Second Degree in Washington.<sup>13</sup> 11RP 126-27. The court imposed a lifetime prison sentence without parole, based on Laird's prior first-degree robbery conviction and his Tennessee assault conviction. 11RP 137.

Under the Sentencing Reform Act of 1981 (SRA), courts are required to include out-of-state convictions that are comparable to Washington offenses in a defendant's criminal history. RCW 9.94A.030(11), .525(3); State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). If a defendant acknowledges the existence and comparability of the prior conviction, no further proof is

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<sup>12</sup> Although this memorandum was not filed with the clerk's office until February 17, 2011, it appears that the trial deputy provided it to the court prior to sentencing on June 25, 2010. See 11RP 120 ("With respect to comparability, your Honor, I have provided briefing . . . on page eight of the State's sentencing memorandum . . .").

<sup>13</sup> The court did not rule on whether Laird's other Tennessee conviction for Assault with Intent to Commit Robbery with a Deadly Weapon was legally comparable to second-degree assault in Washington. 11RP 126-27. The State maintains that this Tennessee conviction is another "strike" offense that is legally comparable to second-degree assault in Washington.

necessary. State v. Mendoza, 165 Wn.2d 913, 927, 205 P.3d 113 (2009).

If the defendant does not agree that his out-of-state conviction is comparable to a Washington felony, the court applies a two-part test to determine comparability. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the sentencing court compares the elements of the out-of-state offense with the elements of the comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are "substantially similar," or if the foreign jurisdiction defines the crime more narrowly than Washington, then the out-of-state conviction is legally comparable and counts toward the defendant's offender score. Lavery, 154 Wn.2d at 255; Ford, 137 Wn.2d at 479-80.

If the foreign statute defines the offense more broadly than the Washington statute, the court must conduct a factual comparability analysis. Morley, 134 Wn.2d at 606. Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment, information, or other records of the foreign conviction, would have violated a comparable Washington statute. Lavery, 154 Wn.2d

at 255. The comparability of an out-of-state conviction does not depend on whether defenses available in Washington at the time of conviction were also available in the foreign jurisdiction. Jordan, 158 Wn. App. at 301-04.

Under the Persistent Offender Accountability Act (POAA), a defendant who has been convicted of two "most serious" offenses must be sentenced to life without parole upon conviction of a third such offense. RCW 9.94A.030(34)(a), .570. Second-degree assault is a strike offense for purposes of the POAA. RCW 9.94A.030(29)(b). "Foreign convictions count as strikes if they are comparable to a Washington strike offense." Lavery, 154 Wn.2d at 254; RCW 9.94A.030(29)(u).

Laird does not dispute that the elements of the Tennessee conviction are substantially similar to second-degree assault in Washington, nor does he dispute that the Tennessee conviction is equivalent to a strike offense in Washington. Appellant's Br. at 19. Assault with Intent to Commit a Felony in Tennessee is legally comparable to Assault in the Second Degree in Washington. Compare Tenn. Code Ann. § 39-2-102 (requiring that "any person assault another, with intent to commit any felony"), with RCW 9A.36.021(e) (requiring that a person "[w]ith intent to commit a

felony, assaults another").<sup>14</sup> At the time of Laird's conviction, Tennessee classified second-degree murder as a felony. Tenn. Code Ann. § 39-2-211(c). Although Washington's comparability test requires only that the elements of an out-of-state offense be "substantially similar" to a Washington offense, Lavery, 154 Wn.2d at 255, in this case the elements are *exactly the same*. The trial court did not err by finding Laird's Tennessee conviction legally comparable to second-degree assault in Washington.

Nonetheless, Laird argues that his Tennessee conviction is not legally comparable because Tennessee did not recognize the defense of diminished capacity at the time of his conviction.<sup>15</sup> This Court should reject Laird's argument in light of its decision to the contrary in Jordan. 158 Wn. App. at 299 ("Comparability of

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<sup>14</sup> All citations are to the Tennessee statutes in effect at the time of Laird's conviction. These statutes can be located on Westlaw by searching the Tennessee database, "tn-stmann86," for the specific statutory provision, i.e., "39-2-102."

<sup>15</sup> Contrary to Laird's claim, Tennessee courts at the time of his conviction admitted evidence of diminished capacity. See State v. Phipps, 883 S.W.2d 138, 148 (Tenn. Crim. App. 1994) (concluding that Tennessee courts have admitted "evidence of an accused's state of mind at the time of the offense . . . to negate the existence of the requisite element of intent" since 1930, despite having "frequently not us[ed] the term 'diminished capacity'").

out-of-state convictions depends on the elements of the crimes, not the available defenses." As this Court noted, requiring Washington sentencing courts to examine the jurisprudence of foreign jurisdictions to ensure that "there were no defenses available here that were unavailable there . . . is contrary to the plain language of RCW 9.94A.525(3) that "[o]ut-of-state convictions for offenses shall be classified according to the *comparable offense definitions and sentences provided by Washington law.*" Jordan, 158 Wn. App. at 303 (emphasis in original).

Moreover, as the Washington Supreme Court recognized in Morley, requiring a foreign jurisdiction to conform to "all of Washington's rules and statutes of criminal procedure" would result in excluding "every single out-of-state conviction" from a defendant's criminal history. 134 Wn.2d at 597. "The Legislature intended sentencing courts to include out-of-state convictions when making sentencing calculations under the SRA." Id. Given the legal comparability of Laird's Tennessee assault conviction to second-degree assault in Washington, the trial court properly

considered Laird's prior Tennessee conviction in sentencing him as a persistent offender.

**3. LAIRD WAS NOT ENTITLED TO A JURY DETERMINATION OF HIS PRIOR CONVICTIONS.**

While recognizing Washington's case law to the contrary, Laird argues that the Sixth and Fourteenth Amendments to the federal constitution require the State to prove his prior convictions beyond a reasonable doubt to a jury. Appellant's Br. at 3 n.3. Washington courts have repeatedly rejected this claim, holding that the State is not required under either the federal or state constitution, to submit a defendant's prior convictions to a jury, and to prove them beyond a reasonable doubt. E.g., State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); Lavery, 154 Wn.2d at 256-57; State v. Thieffault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). Given this jurisprudence, Laird's argument on this issue should be rejected.

D. CONCLUSION

For the reasons stated above, the Court should affirm Laird's conviction and sentence.

DATED this 25<sup>th</sup> day of May, 2011.

Respectfully submitted,

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By:   
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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 Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. DEVON D. LAIRD, Cause No. 65715-1-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

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Date

