

67843-4

67843-4

No. 67843-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROY HOLMES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Washington courts should adopt a new procedure to ensure that only sufficiently reliable eyewitness identifications are admitted into evidence in criminal trials**

- a. Mr. Holmes may make this argument in his appeal.

RAP 2.5(a)(3) permits a party to challenge for the first time on appeal a “manifest error affecting a constitutional right.” An accused has a constitutional due process right to have excluded from his or her trial eyewitness identification evidence that is infected by improper police influence and is so unreliable that it creates a substantial likelihood of misidentification. Perry v. New Hampshire, __ U.S. __, 132 S. Ct. 716, 720, 181 L. Ed. 2d 694 (2012). Thus, admission of the identification evidence in this case affected Mr. Holmes’s constitutional right to due process.

In addition, the error is “manifest.” An asserted error is “manifest” if it had “practical and identifiable consequences in the trial of the case.” State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). An error in admitting evidence is “manifest” if the evidence would have been excluded had the defendant successfully

raised the challenge at trial, and if the State's case would have been seriously undermined as a result. Id. at 900. Here, had Mr. Holmes succeeded in challenging the evidence at trial, it would have been excluded and the State's case would have been seriously undermined.

Even if Mr. Holmes's challenge does not fall under RAP 2.5(a)(3), this Court should address it. The general rule precluding a party from raising an issue for the first time on appeal is discretionary rather than absolute. RAP 2.5(a) ("The appellate court *may* refuse to review any claim of error which was not raised in the trial court.") (emphasis added); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The rule never operates as an absolute bar to review. Ford, 137 Wn.2d at 477.

An appellate court may exercise its discretion to consider a newly-articulated theory for the first time on appeal if it is "arguably related" to issues raised in the trial court. Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), aff'd, 166 Wn.2d 264, 208 P.3d 1092 (2009). Here, Mr. Holmes challenged admission of the identification evidence at trial and the trial court entered detailed findings and conclusions related to the suggestiveness of the procedures used and the reliability of the evidence. Thus, the

theory articulated on appeal is more than “arguably related” to issues raised at trial and this Court may therefore consider it. Id.

Also, an appellate court has inherent authority to consider an issue not raised in the trial court if necessary to reach a proper decision in the case. Harris v. State, Dept. of Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d 1056 (1993). In Harris, the Supreme Court addressed an issue raised for the first time on appeal because numerous similar cases were currently pending raising the same issue. Id.

Similarly, here, the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant a reevaluation of the two-step procedure governing admissibility of identification evidence adopted almost 30 years ago by the Washington Supreme Court in State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984). See State v. Lawson, __ P.3d __, 2012 WL 5955056, at *9 (2012) (since 1979, more than 2,000 scientific studies have been conducted on the reliability of eyewitness identification which reflect on the effectiveness of existing tests for admission of eyewitness identification evidence). This reevaluation can only be conducted by the appellate courts. This Court should exercise its discretion and reach the issue.

Finally, this Court should reject the State's contention that the record is not adequate to permit review. In Lawson, the Oregon Supreme Court recently concluded the scientific literature had progressed sufficiently "to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence." Id. In State v. Guilbert, 306 Conn. 218, 234-37, 49 A.3d 705 (2012), the Connecticut court noted the "near perfect scientific consensus" regarding the fallibility of eyewitness identification testimony and the variables that are most likely to lead to a mistaken identification. The results of decades of research are summarized not only in the opening brief but also by the Oregon court in Lawson, the Connecticut court in Guilbert, and the New Jersey court in State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011), among other places. That information is sufficient to permit a reevaluation of the effectiveness of Washington's existing test governing the admissibility of eyewitness identification evidence.

- b. Washington courts have inherent authority to adopt procedures governing the admissibility of evidence in criminal trials that are more stringent than those required by the Due Process Clause.

The State contends Washington courts do not have authority to adopt a test governing admissibility of eyewitness evidence that is more stringent than the test required by the federal Due Process Clause. But that is not correct because “the power to prescribe rules for procedure and practice is an inherent power of the judicial branch and flows from article IV, section 1 of the Washington Constitution.” State v. Gresham, 173 Wn.2d 405, 428, 269 P.3d 207 (2012) (internal quotation marks and citations omitted). As argued in the opening brief, Washington courts have inherent authority to adopt procedures governing the conduct of criminal trials that are more protective than the procedures required by the United States Constitution, when warranted to further “sound judicial practice.” State v. Martin, 171 Wn.2d 521, 537, 252 P.3d 872 (2011); State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

As the United States Supreme Court recognized in Perry, the procedures for determining the admissibility of evidence in state courts are generally derived from state statutes and rules rather than the federal constitution. Perry, 132 S. Ct. at 723. States are not precluded from

adopting procedures that are more protective of a defendant's rights than the procedures mandated by the Due Process Clause.

In Lawson, the Oregon court determined that its state rules of evidence mandated the exclusion of eyewitness identification evidence that is insufficiently reliable. Lawson, 2012 WL 5955056 at *9. In light of the recent research surrounding eyewitness identifications, the court concluded that a new process governing admissibility of eyewitness identifications—based on state law—was warranted. Id.

Just as the Oregon court had authority to adopt a new procedure based on state law, so do the courts of Washington. Given the developments in the scientific research, Washington courts should re-examine whether the procedure we currently use to determine the admissibility of eyewitness identifications is sufficient to ensure that unfairly unreliable evidence is not admitted at trial.

- c. Developments in social science warrant adopting a new procedure governing the admissibility of eyewitness identifications in criminal trials.

In a recent opinion issued after the opening brief was filed in this case, the Oregon Supreme Court concluded that the results of thousands of scientific studies demonstrating the fallibility of eyewitness identification testimony and the variables affecting its

reliability necessitated a new procedure governing the admissibility of identification evidence that is based on state law. Lawson, 2012 WL 5955056. The court’s extensive discussion and in-depth analysis provide further justification for the test advocated in the opening brief. That test should be supplemented by some of the procedures adopted by the Oregon court in Lawson.

The Lawson court accepted the fundamental premise that trial courts are important gate-keepers in ensuring that only sufficiently reliable identifications are admitted into evidence. Id. at *13. The court noted that, “as an evidentiary matter, the reliability of eyewitness identification is central to a criminal justice system dedicated to the dual principles of accountability and fairness.” Id. at *9. It is “imperative” that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification. Id. Courts should take that literature into account in deciding whether current rules governing the admissibility of eyewitness identifications are adequate to ensure that criminal trials are fair and effective at reaching the truth. Id. at *13.

Similar to the variables identified in the opening brief, the Lawson court identified several variables affecting the reliability of

eyewitness identifications that have emerged from the literature. The scientific literature generally divides those factors into two categories: system variables and estimator variables. Id. at *9. “System variables” refer to the circumstances surrounding the identification procedure itself that are generally within the control of those administering the procedure. Id. Lawson identified the following system variables: whether the procedure was administered blindly; the content of any pre-identification instructions given; the construction of the lineup; whether the lineup was administered simultaneously versus sequentially; whether the procedure used was a showup, which is particularly suggestive; whether any questioning of the witness was suggestive; whether the witness’s memory was contaminated by any suggestive feedback or other questioning; and the degree of confidence recorded by the witness. Id. at 10-11. “Estimator” variables, by contrast, generally refer to characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted by state actors. Id. at *9. Lawson identified the following estimator variables: the witness’s degree of stress at the time of the event; the witness’s degree of attention; the duration of the witness’s exposure to the suspect; environmental

viewing conditions; witness characteristics; perpetrator characteristics such as distinctive features, the use of a disguise, and whether the suspect's race is different from the witness's; the witness's level of certainty; and memory decay. Id. at *11-12.

In light of these variables and their demonstrated effect on the reliability of eyewitness identifications, the court concluded the federal two-step test for determining admissibility is insufficient to guard against unreliable evidence. Id. at *13. As explained in the opening brief, under that test, trial courts cannot consider whether an identification is reliable until some evidence of suggestiveness is first introduced. Id. But as a matter of state law, “there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability.” Id. Therefore, as an initial matter, courts should consider the effect of both system and estimator variables on the reliability of the identification in determining whether it is admissible. Id. at 15-17.

In addition, the Oregon court recognized that the current scientific knowledge and understanding regarding the effects of suggestive identification procedures indicates that some variables such as the witness's estimated degree of attention, his or her estimated

duration of exposure to the suspect, and his or her level of certainty, can be inflated by the suggestive procedure itself. Id. at *14.

Therefore,

[b]ecause of the alterations to memory that suggestiveness can cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness's original memory is very difficult to retrieve; it is, however, only the original memory that has any forensic or evidentiary value.

Id.

In light of these considerations, the court adopted the following procedure governing the admissibility of eyewitness identifications. First, when a defendant challenges the admission of an identification, the State, as the proponent of the evidence, bears the burden to “establish that the witness could make a rational inference of identification from the facts that the witness actually perceived.” Id. at *18. If the witness’s perceptions are capable of supporting an inference of identification but there is competing evidence of an impermissible basis for that inference, such as suggestive police procedures, the State must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an

impermissible one. Id. Although a defendant may present evidence of particular suggestive influences, the burden ultimately rests with the State to prove the identification was rationally based on the witness's perceptions. Id.

If the State satisfies its initial burden, the burden shifts to the defendant to demonstrate that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. Id. at 21; see ER 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The more reliable the identification, the more probative it is. Id. at 19. Conversely, the more system or estimator factors present that weigh against reliability of the identification, the less probative it is. Id.

Trial courts should be rigorous in excluding unreliable identification evidence from trial—or in limiting its use—because

[a]s a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures

are particularly susceptible to concerns of unfair prejudice. Consequently, in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because “traditional” methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.

Id. at 20. If the probative value of the evidence is outweighed by the danger of unfair prejudice, the trial court can either exclude the identification or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. Id. at 21. The decision whether to admit or exclude evidence, or fashion an appropriate intermediate remedy short of exclusion, is committed to the sound exercise of the trial court's discretion. Id.

2. The firearm enhancements must be vacated because the State did not prove beyond a reasonable doubt that the robbers were armed with operable firearms.

The State's argument that it was not required to prove beyond a reasonable doubt that the robbers were armed with operable firearms is contrary to well-established case law. Washington courts have consistently held that, for purposes of imposing a sentence

enhancement based on the use of a firearm, the State must prove the firearm was operable.

More than 30 years ago, in State v. Tongate, 93 Wn.2d 751, 755, 613 P.2d 121 (1980), the Washington Supreme Court held that, for purposes of imposing a sentence enhancement under RCW 9.95.040¹, the State must prove the accused was armed with a “deadly weapon in fact.” If the alleged deadly weapon was a firearm, the State must prove more than that the accused was armed with a “gun-like but nondeadly object.” Id. Although such evidence might be sufficient to prove an element of first degree robbery², it is not sufficient to impose a sentence enhancement. Id.

In State v. Pam, 98 Wn.2d 748, 753-55, 659 P.2d 454 (1983), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), the Supreme Court relied on Tongate to hold that, for

¹ RCW 9.95.040, which applies to crimes committed before July 1, 1984, authorizes a sentence enhancement for a person who was “armed with a deadly weapon at the time of the commission of the offense.” The statutory definition of “deadly weapon” includes a “pistol, revolver, or any other firearm.” Id.

² A person is guilty of first degree robbery if he or she “[d]isplays *what appears to be* a firearm or other deadly weapon” during the commission of a robbery or in immediate flight therefrom. RCW 9A.56.200(a)(ii) (emphasis added).

purposes of a firearm enhancement under former RCW 9.41.025³, the State bore the burden to prove the accused was armed with a firearm that was “deadly in fact.” To prove the firearm was “deadly in fact,” the State was required to prove the firearm was operable. Id. In Pam, a rational jury could have a reasonable doubt as to whether the State proved the firearm was operable because the weapon fell apart as the defendant was running away from the scene, police recovered only the wooden forestock of “what appeared to be a shotgun,” and no shots were fired or bullets recovered. Id. at 754-55.

In State v. Recuenco, the Supreme Court cited Pam with approval and stated, “[w]e have held that a jury must be presented with sufficient evidence to find a firearm operable” in order to uphold a firearm enhancement. 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (citing Pam, 98 Wn.2d at 754-55). In Recuenco, “[t]he jury was not given facts supporting the firearm enhancement.” Id. at 439. The evidence was insufficient because the victim testified only that, during an assault, Recuenco retrieved a gun from a filing cabinet and pointed it

³ Former RCW 9.41.025 authorized a sentence enhancement for a crime committed while the accused was “armed with a firearm.” Quoted in Pam, 98 Wn.2d at 753 n.2. A “firearm” was defined as a “weapon from which a projectile may be fired by an explosive such as gun powder.” Pam, 98 Wn.2d at 754 (quoting WPIC 2.10).

at her, and that she was afraid he was going to shoot her. State v. Recuenco, 117 Wn. App. 1079, 2003 WL 21738927, at *1 (2003) (unpublished opinion). Thus, although the testimony supported an inference that the victim *thought* the gun was operable, it was not sufficient to prove the gun was “deadly in fact” because it did not show the gun was *actually* operable.

Pam has not been overruled. The Supreme Court recently cited it with approval in Recuenco. Mr. Holmes is aware of no Washington Supreme Court case—nor has the State cited any—which holds a trial court may impose a firearm enhancement even if the State did not prove the firearm was operable.

The Court of Appeals has also consistently held that, to prove an accused was armed with a “firearm” under RCW 9.41.010, the State must prove the gun was operable, or at least that the gun could be rendered operable with reasonable effort and within a short period of time. See State v. Raleigh, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 624 (2011) (“A firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of former RCW 9.41.010(1)”; evidence was sufficient where, although

gun's firing pin did not work, officer testified it could be easily repaired within a short period of time); State v. Pierce, 155 Wn. App. 701, 705, 714, 230 P.3d 237 (2010) ("To uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm operable"; evidence was not sufficient where State proved only that, during a burglary, the accused "was holding what appeared to be a handgun" and presented no evidence that the gun was capable of firing a projectile); In re Pers. Restraint of Rivera, 152 Wn. App. 794, 797-98, 803 n.22, 218 P.3d 638 (2009), aff'd sub nom., In re Pers. Restraint of Jackson, 175 Wn.2d 155, 283 P.3d 1089 (2012) ("our courts have held that there must be sufficient evidence to find a firearm operable to uphold a firearm enhancement"; evidence was sufficient where State proved defendant actually shot victim with firearm) (citing Pam, 98 Wn.2d at 754-55); In re Pers. Restraint of Delgado, 149 Wn. App. 223, 237, 204 P.3d 936 (2009) ("a weapon is not a 'firearm' under the statutory definition unless it is operable"); State v. Releford, 148 Wn. App. 478, 490-91, 200 P.3d 729 (2009), review denied, 166 Wn.2d 1028, 217 P.3d 336 (2009) (State proved defendant was armed with a "firearm" where "all that the pistol required in order to be fully operable was ammunition" and, "based on the evidence introduced by

the State, the jury reasonably could have concluded that Releford could have obtained the ammunition for the pistol with reasonable effort and in a reasonable time”); State v. Padilla, 95 Wn. App. 531, 535-36, 978 P.2d 1113 (1999) (“a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1),” whereas “a gun rendered *permanently* inoperable is not a firearm under the statutory definition”; evidence was sufficient where State proved disassembled pistol could be reassembled in a matter of seconds); State v. Anderson, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), rev’d on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000) (State proved gun was “firearm” for purposes of statute where gun was admitted into evidence and displayed a serial number, and two police officers testified gun was loaded when they found it; “[t]hat the weapon was loaded leads to an inference that it was either operable or could be made operable within a reasonable period of time—why else would it have been loaded?”).

The only case that appears to be inconsistent with this extensive body of case law is the case on which the State relies, State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998). In Faust, during an assault, Faust pointed a .380 semi-automatic pistol at his wife. Id. at 374.

Police recovered the gun but could not get it to fire because it jammed when they inserted the magazine. Id. Nonetheless, the Court held that Faust was armed with a “firearm” for purposes of the statute because “a malfunctioning gun can be fixed.” Id. at 381.

Faust has not been approved or cited by the Washington Supreme Court. It is inconsistent with Pam and Recuenco and most other cases from the Court of Appeals. This Court therefore should not follow it.

But even under Faust, the evidence is insufficient in this case. In Faust, the evidence showed that the gun was a real gun, that it was loaded at the time of the crime, and that it had been capable of firing a projectile at some point in the past. Faust, 93 Wn. App. at 375. Here, by contrast, the State did not prove that the gun-like objects the robbers were carrying were real guns that had *ever* been capable of firing projectiles. The gun-like objects were not offered into evidence. There was no evidence that they were loaded or that they were ever fired or could be fired. That the victims *believed* they were guns and that the robbers *acted* like they were guns is not enough. Pam, 98 Wn.2d at 754-55; Recuenco, 163 Wn.2d at 437; Pierce, 155 Wn. App. at 705, 714. Thus, the firearm enhancements must be vacated.

B. CONCLUSION

For the reasons given above and in the opening brief, Mr. Holmes's convictions must be reversed, the firearm enhancements must be vacated, and the offender score must be recalculated.

Respectfully submitted this 21st day of December, 2012.

A handwritten signature in cursive script that reads "Maureen M. Cyr".

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67843-4-I
)	
JAMES HOLMES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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