

COA NO. 70253-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ORLEN DARDEN,

Appellant.

FILED  
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KING COUNTY

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

**1. IN-COURT IDENTIFICATIONS VIOLATED DUE PROCESS, AND THE TRIAL COURT ERRED IN DECLINING TO GRANT A MISTRIAL AFTER EYEWITNESSES SAW DARDEN IN SHACKLES OUTSIDE THE COURTROOM AND THEN TOOK THE STAND AND IDENTIFIED DARDEN AS THE ROBBER.**

**a. The error is preserved for review.**

The State claims the identification error is not preserved for review because it cannot be raised for the first time on appeal and the motion for mistrial was untimely. Brief of Respondent (BOR) at 1, 13. The State is mistaken for several reasons.

First, the issue of whether an unreliable identification violates due process is an error of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a)(3). State v. Collins, 152 Wn. App. 429, 434, 216 P.3d 463 (2009), review denied, 168 Wn.2d 1020 (2010); State v. Smith, 36 Wn. App. 133, 136, 672 P.2d 759 (1983), review denied, 100 Wn.2d 1040 (1984). The State does not cite either of these cases.

Darden made two assignments of error in the opening brief: (1) the trial court erred in declining to grant a mistrial and (2) allowing eyewitnesses to see appellant in shackles prior to making in-court identifications violated appellant's right to due process. Brief of Appellant (BOA) at 1. Darden could have simply assigned error to the unreliable

identification procedure without regard to the motion for mistrial and the error would properly be before this Court. Assigning error to the denial of the motion for mistrial is not even necessary. Assuming arguendo that the motion for mistrial was untimely, the error is still preserved for review because it can be raised for the first time on appeal without any objection (or motion for mistrial) whatsoever.

"To determine if the error is of constitutional magnitude, we look to see whether, if correct, the claim would implicate a constitutional interest." In re Welfare of A.W., \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2015 WL 710549 at \*4, slip op. at 10 n.10 (slip op. filed Feb. 19, 2015). The constitutional interest here is due process of law, which is violated when an impermissibly suggestive identification procedure results in a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A constitutional error is manifest "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Stated another way, an error is manifest if there is actual prejudice, which means "the asserted

error had practical effect on the trial of the case." A.W., slip op. at 10 n.10.

The practical effect on Darden's trial is already addressed in the opening brief, which sets forth the argument for why the identification procedure was impermissibly suggestive and why the in-court identification testimony was so unreliable that it resulted in a substantial likelihood of misidentification. See BOA at 14-33. The practical effect of the asserted error is that the jury heard tainted in-court identification testimony from eyewitnesses, which formed a crucial part of the State's case against Darden.

"To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." WWJ Corp., 138 Wn.2d at 603. A constitutional claim that has "no chance" of succeeding on the merits will not be reviewed under RAP 2.5(a)(3). Id. The merits of the claimed error are set forth in Darden's opening brief and are further addressed in section 1.b., infra. There is enough merit to the argument to pass the RAP 2.5(a)(3) threshold. Collins, 152 Wn. App. at 434; Smith, 36 Wn. App. at 136.

The record is sufficient to address the claim on its merits. The State asserts the record does not show witnesses saw Darden in shackles. BOR at 27-30. But defense counsel said they did, and the trial judge

accepted that representation in ruling on the motion for mistrial. 4RP 88. More telling, the trial prosecutor did not dispute defense counsel's description of what happened. The trial prosecutor would be expected to do so if defense counsel did not accurately relay that witnesses saw Darden in shackles. The State is poorly positioned on appeal to contend the record does not show witnesses saw Darden in shackles when its own trial prosecutor stood mute and made no such argument when faced with the mistrial motion. The constitutional error is manifest.

That being said, this error is not being raised for the first time on appeal. Defense counsel moved for mistrial before the jury reached a verdict, which the trial court addressed on its merits. The trial court did not deny the motion on the basis of untimeliness. Neither the court nor the trial prosecutor asserted the motion for mistrial was untimely.

Timeliness of objection is not an issue when the trial court is sufficiently apprised of the matter in a motion for mistrial. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980). Even a motion for new trial made after the verdict can be sufficient to preserve an error for appeal despite the lack of argument against the admission of evidence at the time the evidence is offered. State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Darden's counsel did not wait until the verdict and then file a motion for new trial on the issue. Counsel filed a motion for mistrial before the verdict and sufficiently informed the trial court of the substance of his motion: prejudice resulting from eyewitnesses seeing Darden in shackles and then making in-court identifications of Darden as the robber. 4RP 88-90. The trial court clearly understood what was at stake: whether witness observation of the defendant in shackles renders in-court identification impermissible. 4RP 89-91.

And while defense counsel did not utter the words "due process" in making the motion for mistrial, the substance of the argument left no doubt that the fairness of the trial was at stake. The due process issue is naturally related to counsel's articulated argument that the identification process was prejudicial to Darden. See In re Estate of McKiddy, 47 Wn. App. 774, 779-80, 737 P.2d 317 (1987) (court considered an estoppel issue on appeal that was "arguably related" to issues raised in the trial court), abrogated on other grounds, In re Estate of Hansen, 128 Wn.2d 605, 910 P.2d 1281 (1996). Also, counsel referenced his unsuccessful pre-trial motion to exclude pre-trial and in-court identification testimony in connection with his motion for mistrial (4RP 91), and that pre-trial motion sought exclusion on grounds of due process as well as ER 403. CP 21-25; 1RP 88-96.

Further, this Court may reach an issue on appeal where the trial court had an opportunity to consider the merits of an issue, even though there was no contemporaneous objection below. In State v. Burke, the Supreme Court deemed it unnecessary to address the manifest constitutional error standard and reached the merits because the issue was raised in the trial court through a *postverdict* motion for a new trial and the trial court decided the motion on the merits despite the lack of contemporaneous objection. State v. Burke, 163 Wn.2d 204, 210-11, 181 P.3d 1 (2008) (the Court of Appeals also reached the merits of the issue).

Here, the trial court considered the merits of Darden's pre-verdict mistrial motion predicated on the argument that viewing Darden in shackles tainted eyewitness identification testimony. The issue is not being raised for the first time on appeal. The issue was raised below, and the trial court reached the merits of the claim. The trial court found no merit and denied the motion for mistrial. The propriety of that denial is properly before this Court on appeal. Burke, 163 Wn.2d at 210-11.

Trial counsel was unable to cite case law in support of the motion for mistrial as requested by the trial court. The failure to do so is understandable because attorneys in the midst of trial do not typically have the opportunity for comprehensive legal research. In any event, "[t]here is no rule preventing an appellate court from considering case law not

presented at the trial court level." Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto Carriage, Inc., 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987); see also State Farm Mut. Auto. Ins. Co. v. Amirpanahi, 50 Wn. App. 869, 872 n.1, 751 P.2d 329 (1988) ("Although appellants did not argue [a certain case] to the trial court, they did argue the basic reasoning . . . This court can review these issues despite lack of citation to the crucial case law and treatises.").

The State claims defense counsel waited to object as a matter of trial strategy. BOR at 26. But the fact that an objection was made, but not made earlier, shows the lack of strategy. See State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987) ("defense counsel's untimely objection shows that the omission was *not* a trial strategy."). And indeed, the State is unable to articulate how an untimely objection would advance Darden's interests in a favorable outcome. If, as the State contends, Darden's attorney was mistaken that his pre-trial motion was adequate to raise an objection to the identifications, then that mistake cannot be deemed a type of strategy. Moreover, this is not a case where counsel waited to see if the verdict would be unfavorable and then raised the issue for the first time in a motion for new trial. Darden's counsel raised the issue during trial. The issue is preserved for appeal.

**b. It was impermissibly suggestive for eyewitnesses to view Darden in shackles in the hallway before making in-court identifications.**

In State v. Birch, Division Three held it was not by itself impermissibly suggestive for a witness to see a handcuffed defendant escorted by law officers in the hallway before making an in-court identification. State v. Birch, 151 Wn. App. 504, 513, 515, 213 P.3d 63 (2009), review denied, 168 Wn.2d 1004, 226 P.3d 780 (2010). The State claims Darden has not shown Birch is incorrect and harmful under the standard for overturning precedent. BOR at 30 n.1 (citing In re Stranger Creek & Tributaries in Stevens County, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (where Supreme Court considered overturning its own precedent)).

The opening brief addresses why Birch is poorly reasoned and should not be followed by this Court. BOA at 16-19. Allowing witnesses to see the defendant in shackles before taking the stand to make identifications is harmful because it increases the likelihood of unfair outcomes through tainted eyewitness identifications.

There are enough problems with eyewitness identifications without aggravating them through authorizing the viewing of the accused in shackles before the witness takes the stand. See State v. Sanchez, 171 Wn. App. 518, 572, 288 P.3d 351 (2012) ("Mistaken eyewitness identification is a leading cause of wrongful conviction, as recognized by Washington

courts."); United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

The problem with identifications is further exacerbated in a case like Darden's where the identification is cross-racial. See State v. Allen, 176 Wn.2d 611, 621 & n.4, 294 P.3d 679 (2013) (based on scientific research and evidence, there is no serious question about the inherent unreliability of eyewitness identification generally and of cross-racial eyewitness identification specifically).

Allowing witnesses to view the defendant in shackles before making in-court identifications does nothing to enhance the truth-seeking function of the trial process. Instead, the practice compromises the integrity of the process.

That being said, Darden does not have the burden of showing Birch is both incorrect and harmful under the Stranger Creek standard. Division Three decided Birch. Division One is not bound by Division Three's decision. McClarty v. Totem Elec., 119 Wn. App. 453, 469, 81 P.3d 901 (2003) (the decision of a division is not binding on another division), rev'd on other grounds, 157 Wn.2d 214, 137 P.3d 844, (2006);

State v. Schmitt, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004) ("We need not follow the decisions of other divisions of this court.")

The decisions of other divisions only retain the status of persuasive authority and are rejected if found to be unpersuasive. McClarty, 119 Wn. App. at 469; State v. Simmons, 117 Wn. App. 682, 687, 73 P.3d 380 (2003), aff'd, 152 Wn.2d 450, 98 P.3d 789 (2004). As a result, Division One in many cases has declined to follow decisions in other divisions simply because it disagrees with them, without any reference to the Stranger Creek standard.<sup>1</sup> As a matter of institutional control, it is unlikely any division of the Court of Appeals would prefer to be handcuffed by the Stranger Creek standard when it comes to addressing the decision of other divisions, thereby limiting a division from deciding

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<sup>1</sup> See, e.g., State v. Grant, 172 Wn. App. 496, 497, 503, 301 P.3d 459 (2012), review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013); State v. Momah, 141 Wn. App. 705, 715-16, 171 P.3d 1064 (2007), aff'd, 167 Wn.2d 140217 P.3d 321 (2009); Blair v. TA-Seattle East No. 176, 150 Wn. App. 904, 909 n.9, 210 P.3d 326 (2009), rev'd, 171 Wn.2d 342, 254 P.3d 797 (2011); Bartley-Williams v. Kendall, 134 Wn. App. 95, 102, 138 P.3d 1103 (2006); Gontmakher v. City of Bellevue, 120 Wn. App. 365, 372-74, 85 P.3d 926 (2004); JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 8-9, 970 P.2d 343 (1999); Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 340, 983 P.2d 707 (1999), review denied, 140 Wn.2d 1013, 5 P.3d 8 (2000); State v. Johnson, 94 Wn. App. 882, 894-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028, 994 P.2d 850 (2000); State v. Brown, 94 Wn. App. 327, 329, 972 P.2d 112 (1999), aff'd, 140 Wn.2d 456, 998 P.2d 321 (2000); State v. Aho, 89 Wn. App. 842, 852-53, 954 P.2d 911 (1998), rev'd, 137 Wn.2d 736, 975 P.2d 512 (1999); State v. Danis, 64 Wn. App. 814, 819-20, 826 P.2d 1096, review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992).

issues of law as it sees fit in the absence of controlling Supreme Court authority.<sup>2</sup>

So it is unnecessary to address Division Three's decision in Birch under the Stranger Creek standard for overturning precedent. Birch does not bind this Court. Birch should be deemed unpersuasive for the reasons set forth in the opening brief. BOA at 16-19. Birch is also distinguishable because the viewing of Darden in shackles does not stand alone as the only factor contributing to unreliable identification. See BOR at 20-22.

Meanwhile, the Third Circuit in Emanuele recognized "to walk a defendant — in shackles and with a U.S. Marshal at each side — before the key identification witnesses is impermissibly suggestive." United States v. Emanuele, 51 F.3d 1123, 1130 (3d Cir. 1995). The State's attempt to distinguish Emanuele on this point is misguided. In addressing

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<sup>2</sup> On occasion, Division One has invoked the Stranger Creek standard when addressing a previous Division One decision. State v. Stalker, 152 Wn. App. 805, 808, 219 P.3d 722 (2009), review denied, 168 Wn.2d 1043, 234 P.3d 1173 (2010); Little v. King, 147 Wn. App. 883, 889, 198 P.3d 525 (2008), King v. Western United Assur. Co., 100 Wn. App. 556, 560-61, 997 P.2d 1007, review denied, 141 Wn.2d 1027, 11 P.3d 826 (2000). On the other hand, Division One has often disagreed with another Division One panel's decision without regard to the Stranger Creek standard. See, e.g., Kellar v. Estate of Kellar, 172 Wn. App. 562, 588-89, 291 P.3d 906 (2012), review denied, 178 Wn.2d 1025, 312 P.3d 652 (2013); In re Marriage of Maughan, 113 Wn. App. 301, 304-06, 53 P.3d 535 (2002); State v. Alexander, 70 Wn. App. 608, 617 n.12, 854 P.2d 1105 (1993), rev'd on other grounds, 125 Wn.2d 717, 717888 P.2d 1169 (1995); State v. Sly, 58 Wn. App. 740, 746 n.4, 794 P.2d 1316 (1990), abrogated by State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).

Emanuele, the State misreads that decision and conflates the first step of the inquiry (whether an identification procedure is impressively suggestive) with the second step of the inquiry (whether the in-court identification is unreliable under the totality of circumstances).

Thus, the State argues the hallway shackling was impermissively suggestive in Emanuele because the witnesses spoke to one another about his identity and expressed an "it has to be him" reaction. BOR at 32-33. That is not how Emanuele analyzed the situation. The shackling viewing was by itself impressively suggestive. Emanuele, 51 F.3d at 1130. Other factors, such as the witnesses talking to each other and reacting to the viewing, were addressed under step two of the analysis: whether the impermissibly suggestive confrontation were unreliable and created a substantial likelihood of misidentification under the totality of circumstances test. Id. at 1130-31.

**c. The in-court identifications are unreliable under the totality of circumstances and the trial court erred in failing to grant a mistrial.**

In his opening brief, Darden argued the in-court identifications were unreliable under the totality of circumstances test. BOA at 22-33. Darden also argued the trial court abused its discretion in failing to grant a mistrial. BOA at 33-37. Darden stands by those arguments.

The State's response does not adequately take into account that "[s]uggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." Wade, 388 U.S. at 229. This observation holds special force for witnesses Acheson and Fulton, whose respective levels of certainty rose dramatically after seeing Darden in shackles. 3RP 37, 40, 48; 4RP 58, 64-65, 74-76, 79.

The State's attempt to isolate the in-court identifications from the hallway viewing does not comport with psychological reality: "pressured to help solve a heinous crime, often conscious of a duty to do so, and eager to be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit. Unless such a witness is far more introspective than most, and something of a natural-born psychologist, he is usually totally unaware of all of the influences that result in his say, 'That is the man.' And that enables him to speak with conviction and utter honesty further enhancing the danger." Smith v. Paderick, 519 F.2d 70, 75 (4th Cir.), cert. denied, 96 S. Ct. 293, 46 L.Ed.2d 267 (1975).

The State claims any error in the in-court identification testimony is harmless beyond a reasonable doubt. BOR at 46. The State's harmless

error argument looks more like a sufficiency of evidence argument, where the evidence is taken in the light most favorable to the State and most strongly against the defendant, with all evidence favorable to the defendant (alibi evidence) discounted as unworthy of belief. The issue here is not whether the evidence was sufficient but whether the State is capable of overcoming the presumption that this constitutional error is harmless beyond a reasonable doubt. In conducting harmless error analysis, "[a]n appellate court ordinarily does not make credibility determinations." State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Credibility is for the jury to decide, as is the weight to be given to testimony. State v. Rogers, 44 Wn. App. 510, 517, 722 P.2d 1349 (1986). The opening brief explains why the error is not harmless. BOA at 35-37.

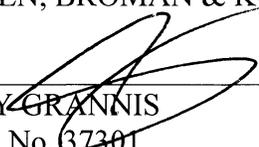
B. CONCLUSION

For the reasons set forth, Darden requests that this Court reverse the convictions.

DATED this 27<sup>th</sup> day of February 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

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

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|                      |   |                   |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, | ) |                   |
|                      | ) |                   |
| Respondent,          | ) |                   |
|                      | ) |                   |
| v.                   | ) | COA NO. 70253-0-1 |
|                      | ) |                   |
| ORLEN DARDEN,        | ) |                   |
|                      | ) |                   |
| Appellant.           | ) |                   |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ORLEN DARDEN  
DOC NO. 300261  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF FEBRUARY 2015.

X *Patrick Mayovsky*