NO. 102238-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CHRISTOPHER HOWARD CONKLIN,

Respondent.

Appeal from Court of Appeals No. 846345
The Honorable Matthew H. Thomas
No. 19-1-04525-8

PETITION FOR REVIEW

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I. INTRODUCTION

In his briefing in front of the Court of Appeals, Conklin argued that his convictions for kidnapping in the first degree should be dismissed as the State failed to introduce sufficient evidence to support all of the alternative means charged. The State conceded that the convictions for kidnapping in the first degree should be dismissed on that basis. *In the alternative*, Conklin argued that his convictions for assault in the first degree should merge with his convictions for kidnapping in the first degree. The State conceded that these convictions would otherwise merge.

However, the Court of Appeals *both* dismissed the kidnapping convictions as insufficient evidence was introduced to support all of the alternative means charged *and* merged the assault convictions with the invalid kidnapping convictions. This had the result of dismissing the otherwise valid convictions for assault in the first degree.

The State requests that this Court accept review as the Court of Appeals' decision conflicts with a decision of this Court, a published decision of the Court of Appeals, and involves an issue of substantial public interest. RAP 13.4(b)(1), (2), and (4).

II. IDENTITY OF PETITIONER

Petitioner, the State of Washington, Respondent below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in section III of this Petition.

III. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals' unpublished opinion in *State v. Conklin*, COA No. 84634-5-I, which was filed on May 8, 2023,[1] together with the Order Denying Motion for Reconsideration filed on June 29, 2023. The

[1] The filed copy of the Court of Appeal's opinion incorrectly lists the date of the decision as May 8, 2022.

decision vacated Conklin's convictions for two counts of kidnapping in the first degree as the State conceded that the prosecution did not provide sufficient evidence to support both of the alternative means charged. However, the decision *also* merged the two convictions for assault in the first degree with the vacated kidnapping convictions, which had the result of vacating the valid convictions for assault in the first degree.[2] Appendix ("App.") at 2-4, 6.

IV. ISSUE PRESENTED FOR REVIEW

Should this Court accept review because the Court of Appeals' decision to merge Conklin's valid convictions for assault in the first degree into his vacated convictions for kidnapping in the first degree, which had the result of vacating his valid convictions for assault in the first degree, is in conflict with a decision of the Washington Supreme Court and a published decision of the Court of Appeals, and involves an issue of substantial public interest that should be determined by the this Court?

[2] The State does not seek review of the portion of the opinion affirming Conklin's conviction for assault in the first degree. App. at 6-9.

V. STATEMENT OF THE CASE

Arlen Stebbins owned property located in Lakebay, Washington. Stebbins was not at the property often, as he and his wife resided in Tacoma. 7/19/21 RP 681-700. Stebbins would check on the property intermittently. 7/19/21 RP 681-685.

In November 2019, Stebbins discovered a "keep out" sign at the entrance to his property that he did not put there and several items missing. This led to Stebbins deciding to stay at the property for several nights. Stebbins' friend, John Fryer, stayed with him. 7/19/21 RP 702-710.

On November 22, 2019, at approximately 4:00 a.m., both Stebbins and Fryer were asleep in the living room of the mobile home and were awakened by a male standing over them holding a revolver. The male demanded to know where "Larry" was. 7/19/21 RP 711-712. Both Stebbins and Fryer told the male that there was no "Larry" and that Stebbins was the owner of the property. Another male holding a rifle came down the hallway of the mobile home stating "it's all clear." The male holding the

handgun, later identified as co-defendant Giancoli, ordered Stebbins and Fryer to get up and to come with them. The male with the rifle was later identified as Conklin. 7/21/21 RP 711-716; 7/29/21 RP 449-457.

Conklin and Giancoli ordered Stebbins and Fryer to leave their wallets and phones behind and directed them at gunpoint out of the mobile home and to a black Escalade parked down the driveway. 7/19/21 RP 718, 730; 7/29/21 RP 464. As they were walking down the driveway toward the Escalade, Fryer started running. Conklin fired at Fryer with the rifle. 7/19/21 RP 728; 7/29/21 RP 467. Stebbins started yelling and Giancoli hit him in the head with the handgun, ordering him to get in the vehicle while holding the gun to his head. Stebbins refused and Conklin walked over to him and shot him in his legs with the rifle. Stebbins then agreed to get in the car, but instead ran into the surrounding woods. 7/19/21 RP 731-740; 7/29/RP 477-478.

Conklin and Giancoli fled the area in the Escalade. Officers responded to a dispatch call and patrol vehicles gave

chase to the Escalade. 7/20/21 RP 51, 54, 55, 82; 7/21/21 RP 18, 26. They followed as the Escalade left the freeway, collided with a median, and came to a stop at the parking lot of an apartment building in Gig Harbor. 7/21/21 RP 44. One deputy observed a white male wearing a reddish-orange beanie, later identified as Giancoli, exit the vehicle from the driver's door. 7/21/21 RP 48-62.

Deputies located Giancoli in the brush and took him into custody. Conklin was later located after a K-9 tracked and found him also lying in the brush a short distance from the vehicle. 7/27/21 RP 31-58.

A jury convicted Conklin of two counts of assault in the first degree, burglary in the first degree, two counts of kidnapping in the first degree, and unlawful possession of a firearm in the second degree. CP 441-442. The trial court sentenced appellant to a total term of 704 months in prison. CP 446-447.

In his briefing before the Court of Appeals filed on May 16, 2022, Conklin argued that his convictions for assault in the first degree should be reversed due to impermissibly suggestive and flawed identification procedures. In his supplemental briefing filed on October 3, 2022, Conklin argued that his convictions for kidnapping in the first degree should be reversed because insufficient evidence was presented to support an alternative means and that his conviction for burglary in the first degree must be reversed because the jury was instructed on an uncharged alternative means.

Conklin also argued in the alternative that, if the court did not reverse his convictions for kidnapping in the first degree, due to insufficient evidence to support an alternative means, the court should find that his convictions for kidnapping in the first degree merge with the convictions for assault in the first degree:

> Based on the foregoing facts and authorities, Mr. Conklin respectfully asks the Court to vacate the burglary conviction, [and] reverse the kidnapping convictions for insufficient evidence. *In the*

> *alternative*, he asks the Court to merge the kidnapping with the assault convictions.

(emphasis added). Apart from the merger claim, Conklin made no argument in his supplemental briefing regarding the validity of his convictions for assault in the first degree.

On May 8, 2023, the Court of Appeals issued its opinion. In this opinion, this court rejected Conklin's argument that his convictions for assault in the first degree should be reversed due to impermissibly suggestive and flawed identification procedures. App. at 6-9. The court also accepted the State's concessions that Conklin's convictions for burglary in the first degree and kidnapping in the first degree should be reversed. App. at 3-5.

However, in regards to Conklin's convictions for kidnapping, the court *also* granted Conklin's request that his vacated kidnapping convictions merge with his convictions for assault in the first degree, which had the result of vacating the convictions for assault in the first degree, even though that argument was made (and conceded to) as an *alternative*

argument to the argument that the convictions for kidnapping in the first degree should be dismissed due to insufficient evidence to support both of the alternative means charged.

VI. ARGUMENT

The Court of Appeals' decision to merge Conklin's valid convictions for assault in the first degree into his vacated convictions for kidnapping in the first degree, which had the result of vacating his valid convictions for assault in the first degree, conflicts with a decision of this Court, a published decision of the Court of Appeals, and involves issues of substantial public interest.

The double jeopardy doctrine protects defendants against "prosecution oppression." 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 25.1(b), at 630 (2d ed.1999). The Fifth Amendment to the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." Article I, section 9 of the Washington Constitution mirrors the federal constitution stating "[n]o person shall be ... twice put in jeopardy for the same offense." "Washington's double jeopardy clause offers the same scope of protection as the

federal double jeopardy clause." *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003) (*citing State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both prohibit "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and, [as important in this case,] (3) *multiple punishments for the same offense imposed in the same proceeding." Percer*, 150 Wn.2d at 48–49 (*citing State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); *Gocken*, 127 Wn.2d at 100) (emphasis added).

In *State v. Michielli*, 132 Wn.2d 229, 238–39, 937 P.2d 587 (1997), this Court held that the merger doctrine arises only when a defendant has been found guilty of multiple charges, and the court must then ask if the Legislature intended only one punishment for the multiple convictions. Although courts may not enter multiple convictions for the same offense without offending double jeopardy, merger only becomes an issue at sentencing. *Id*. at 238.

In the instant case, the Court of Appeals agreed with the parties that Conklin's convictions for kidnapping in the first degree should be dismissed due to insufficient evidence being presented to support all of the alternative means charged. Accordingly, the merger doctrine was inapplicable here as, with the kidnapping convictions reversed, there remained nothing to "merge" Conklin's convictions for assault in the first degree with.[3]

In other words, under *Michielli*, the merger issue only arises if *both* the convictions for assault in the first degree *and* the convictions for kidnapping in the first degree were valid; in that case, the convictions would merge and Conklin would be appropriately sentenced for either the kidnappings or the assaults, whichever were the greater offenses. Here, however, as

[3] Conklin recognized this in his supplemental briefing as he argued that his kidnapping convictions should be reversed due to insufficient evidence of the alternative means charged and that, *in the alternative*, his assault convictions merge into his kidnapping convictions.

Conklin's convictions for kidnapping in the first degree were *not* valid, the Court of Appeals' decision to merge these convictions with Conklin's valid convictions for assault in the first degree conflicts with this Court's decision in *Michielli*. RAP 13.4(b)(1).

The Court of Appeals' decision dismissing Conklin's convictions for assault in the first degree also conflicts with a published decision from the Court of Appeals. In *State v. Schwab,* 134 Wn. App. 635, 643-44, 141 P.3d 658 (2006), the court indicated that it had earlier ordered the lower court to vacate the defendant's valid manslaughter conviction on double jeopardy grounds, as that conviction merged with his felony murder conviction, and on remand the lower court complied with this order. However, when that court later additionally vacated the defendant's felony murder conviction, the basis for the original double jeopardy holding disappeared. Without the felony murder conviction, the defendant could no longer be punished twice for the same crime. The court found that when the trial court reinstated the defendant's original manslaughter

conviction, which was valid when the jury returned its verdict, the court merely restored him to the same position he would have been in if the error—charging and convicting him of felony murder—had not occurred. *Id*. at 643.

Accordingly, the double jeopardy doctrine does not preclude reinstating Conklin's convictions for assault in the first degree because these convictions were vacated *solely* to prevent double punishment for the same crime, not because the jury's verdict was somehow in error, and the basis for the merging of Conklin's convictions for assault and kidnapping are no longer applicable as his kidnapping convictions were dismissed on other grounds. The State may bring multiple charges and the jury may convict on all charged counts without violating double jeopardy. It is only when the trial court *enters judgment and imposes sentence* on more than one conviction for the same crime that double jeopardy is implicated. When a conviction is vacated on double jeopardy grounds, the validity of the jury's verdict of guilty on the vacated charge remains unimpaired. *Schwab*, 134

Wn. App. at 644. Therefore, the Court of Appeals' decision to dismiss Conklin's convictions for assault in the first degree conflicts with a published decision of the Court of Appeals. RAP 13.4(b)(2).

Finally, the decision of the Court of Appeals involves an issue of substantial public interest. The State has a compelling interest in promoting the health, safety, and welfare of its citizens. *State v. Smith*, 185 Wn. App. 945, 955, 344 P.3d 1244 (2015); *State v. Balzer*, 91 Wn. App. 44, 56, 954 P.2d 931 (1998). The State also has an interest in affirming valid convictions. *State v. Kjorsvik*, 117 Wn.2d 93, 108, 812 P.2d 86 (1991).

Here, as set forth above, by granting the State's concession and reversing Conklin's two convictions for kidnapping in the first degree, Conklin was afforded the entire relief he sought. To *additionally* vacate Conklin's otherwise valid convictions for

two counts of assault in the first degree,[4] just because they would otherwise merge with his convictions for kidnapping in the first degree *had those kidnapping convictions been valid*, grants Conklin an unwarranted windfall and deprives the State of its compelling interest to promote the health, safety, and welfare of its citizens, and see that valid convictions are affirmed. As such, the Court of Appeals' decision involves an issue of substantial public interest. RAP 13.4(b)(4).

VII. CONCLUSION

For the aforementioned reasons, the State requests that this Court accept review of the Court of Appeals' decision in *State v. Conklin*.

/ / /

[4] First degree assault has a seriousness level of 12 and first degree kidnapping has a seriousness level of 10. RCW 9A.40.020(2); RCW 9.94A.515; *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 900, 46 P.3d 840 (2002).

This document is in 14 point font and contains 2,469 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 31st day of July, 2023

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the respondent true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

7-31-23	*s/Therese Nicholson*
Date	Signature

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER HOWARD CONKLIN, Appellant.	No. 84634-5-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Christopher Conklin appeals from multiple felony convictions for assault in the first degree, burglary in the first degree, kidnapping in the first degree, and unlawful possession of a firearm in the second degree. We accept the State's concessions as to instructional, evidentiary, and sentencing errors on all convictions except for unlawful possession of a firearm in the second degree and the imposition of the DNA[1] fee at sentencing. Accordingly, we remand for the trial court to vacate the erroneous convictions, resentence Conklin on the remaining charge, and determine whether the DNA fee is proper.

[1] Deoxyribonucleic acid.

FACTS

Christopher Conklin was charged with two counts of assault in the first degree, one count of burglary in the first degree, two counts of kidnapping in the first degree, and one count of unlawful possession of a firearm in the second degree. All of the charges except unlawful possession of a firearm carried additional firearm sentencing enhancements. Prior to trial, Conklin filed motions in limine seeking to prohibit the State from introducing in-court identifications of Conklin by the two named victims. He argued the separate pretrial identification procedures used with each witness were impermissibly suggestive. The trial court denied the motion with regard to witness Arlen Stebbins but reserved the issue as to witness John Fryer. During trial, the State did not seek an in-court identification from Fryer. The jury convicted Conklin on all charges.

Conklin timely appealed.

ANALYSIS

I. State's Concessions of Error and Issues for Remand

Conklin's opening brief assigned error to the trial court's rulings on the identification procedures used with each of the named victims and the imposition of the DNA fee at sentencing. Conklin then filed a supplemental brief that raised several instructional and evidentiary challenges to the kidnapping, assault, and burglary charges. The State properly conceded error on all issues except those relating to identification by the witnesses and, as such, we only briefly analyze the conceded errors here.

The State expressly agrees with the argument and authority set out in Conklin's supplemental brief. Accordingly, the charges of assault in the first degree with firearm enhancements must merge with those of kidnapping in the first degree. Under the double jeopardy clause, the State may not impose multiple punishments for the same offense. State v. Berg, 181 Wn.2d 857, 864, 337 P.3d 310 (2014). Courts utilize the merger doctrine "'to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.'" Id. (quoting State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983)). "Even if crimes would otherwise merge, they can be punished separately if they had an independent purpose or effect." State v. Davis, 177 Wn. App. 454, 465, 311 P.3d 1278 (2013). The parties are in accord that the State relied on the acts of shooting at Fryer and Stebbins as a basis for the elements of assault and the "intent to inflict bodily injury" element of kidnapping. Conklin further notes there was no independent purpose or effect because the State argued the assault was intended to force Fryer and Stebbins into a vehicle as a basis for the kidnapping conviction; no other purpose or effect of the shooting was argued or presented. To avoid a double jeopardy violation, the assaults must merge with the kidnapping charges.

Conklin next avers, and the State concedes, that his convictions for kidnapping in the first degree must then be reversed because the State did not provide sufficient evidence to support both of the alternative means. "When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether 'sufficient evidence supports each

alternative means.'" State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (quoting State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010)). Under Washington law, there are five alternative means under which a jury may find a person guilty of kidnapping in the first degree. RCW 9A.40.020(1).

Here, the court instructed the jury that it could find Conklin guilty of kidnapping if it found he intentionally abducted Stebbins with the intent to either: (1) inflict bodily injury, or (2) inflict extreme mental distress. The parties agree there is insufficient evidence to support the second alternative means, that Conklin intended to inflict extreme mental distress. An intent to inflict extreme mental distress "is an intention to cause more mental distress than a reasonable person would feel when being restrained by the threat of deadly force," while the analysis of the level of distress focuses on "the mental state of the defendant rather than the actual resulting distress." State v. Garcia, 179 Wn.2d 828, 843, 318 P.3d 266 (2014). The State concedes that, even in the light most favorable to its position, the statements regarding the kidnapping charges that it relied upon in closing argument are insufficient to demonstrate an intent to inflict more extreme emotional distress than a reasonable person would feel when being restrained by threat of deadly force.

Conklin next contends his conviction for burglary in the first degree must be reversed because the jury was instructed on an uncharged alternative means. Because this is a manifest error affecting a constitutional right, we may review this assignment of error for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). "Generally, the crime upon which the jury is

instructed is limited to the offense charged in the information," except where a jury is instructed on a lesser included offense. Id. at 539. If the State omits an alternative means of a crime in the information, "it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." Id. at 540.

The State charged Conklin with burglary in the first degree, alleging he "unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter[ed] or remain[ed] unlawfully in a building" while armed with a deadly weapon. However, at trial, the court instructed the jury it could find Conklin guilty of burglary in the first degree if it found that he "was armed with a deadly weapon or assaulted a person." (Emphasis added.) While this "error may be harmless if other instructions clearly and specifically define the charged crime," that is not the case here. See Id. at 540. The State concedes the court erred in instructing the jury on an uncharged alternate means and that reversal is necessary.

Finally, the State agrees that remand is appropriate so that the trial court may determine whether Conklin has already paid the mandatory DNA fee pursuant to a prior felony conviction. RCW 43.43.7541 requires that every sentence for a felony "must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." The trial court found Conklin indigent and waived all discretionary fines; if it concludes on remand that Conklin previously paid the DNA fee, it should be stricken from the judgment and sentence.

We accept the State's concessions on these errors and remand for the court to resentence Conklin after merging the charges of assault in the first degree with those of kidnapping and vacating the convictions for kidnapping in the first degree and burglary in the first degree. On remand, the court should also determine whether the DNA fee is appropriate here or should be waived as previously paid.

II. Witness Identification

Conklin also assigns error to the trial court's handling of his pretrial motions to suppress an identification by Fryer obtained using a "show-up" procedure, and any in-court identification of Conklin by Stebbins. Because the State relied on the testimony of both Fryer and Stebbins to prove Conklin unlawfully possessed a firearm, now the only remaining conviction, we address each argument in turn.

We review decisions on the admissibility of evidence for an abuse of discretion. State v. Birch, 151 Wn. App. 504, 514, 213 P.3d 63 (2009). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. Id. Under the due process clause of the federal constitution, eyewitness identification evidence must be excluded if it: "(1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of the circumstances." State v. Derri, 199 Wn.2d 658, 673-74, 511 P.3d 1267 (2022).

A. Show-Up Identification

Conklin first argues Fryer's identification of Conklin as one of the perpetrators should have been suppressed because the pretrial "show-up" identification procedure was impermissibly suggestive.[2] "Show-up identification is typical shortly after a crime occurs when police show a suspect to a witness or victim." Birch, 151 Wn. App. at 513. Show-up procedures are "not per se impermissibly suggestive," rather, the defendant must demonstrate "that the procedure was unnecessarily suggestive." State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). However, we need not analyze whether Conklin has met this burden because Fryer never identified Conklin in court.

The day after Fryer testified about participating in a show-up identification of a suspect on the same day as the incident, the court asked the prosecutor if he intended "to ask Mr. Fryer whether he recognizes either of the defendants;" the prosecutor confirmed he would not be seeking such an identification. The court stated, "Okay. Then that won't be an issue." Because there was no in-court identification admitted, there is no error. While Fryer described participating in the show-up, he never connected the show-up, or any description of the suspects he saw, to Conklin.[3] Conklin fails to demonstrate a basis for relief on this challenge.

[2] While Conklin frames this assignment of error as the trial court denying his motion to suppress, the record reflects that the court reserved on the issue. The court never made a subsequent ruling (written or oral) granting or denying the motion.

[3] At trial, the State informed the judge that it would not seek to elicit an in-court identification from Fryer, and it did not do so during Fryer's testimony. However, in its closing argument, the State asserted that Fryer identified Conklin the morning of the incident in the police show-up procedure. While there is no testimony to support this statement, Conklin does not assign error to this comment and, as such, the issue is not before us.

B. Photo Montage Identification

Conklin also argues the court should have suppressed the in-court identification by Stebbins because the pretrial photo montage identification by law enforcement was impermissibly unreliable. He asks us to revisit the case State v. Knight, 46 Wn. App. 57, 729 P.2d 645 (1986). There, Division Two of this court held that where a pretrial photographic identification procedure is impermissibly suggestive due to the actions of private citizens, exclusion is not required. 46 Wn. App. at 59. Rather, suppression is only necessary where the State "'instigated, encouraged, counseled, directed, or controlled the conduct.'" Id. at 59-60 (quoting State v. Agee, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1976)). Conklin does not argue that the State controlled or directed the pretrial conduct, but rather that changes to information access and social media necessitate new guidance. We disagree.

"An out-of-court photographic identification violates due process if it so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Here, Conklin contends the police photo montage procedure was impermissibly suggestive because, prior to viewing the montage, Stebbins's wife "had used the county jail roster to learn the names of the individuals arrested in connection with the incident," then "used social media to find photos of Mr. Conklin . . . and showed them to Stebbins." Conklin also notes that Stebbins described the suspect on the night of the incident as having "orange blond" hair and a "blond, more blonder mustache." The officer who created the photo montage did not add

blond hair or a blond mustache in the search criteria, though he stated "it may have already been defaulted to there."

Conklin roots this challenge in Stebbins's exposure to the results of his wife's online research prior to the police photo montage. This alone is insufficient to demonstrate the procedure used by police was unnecessarily suggestive. Rather, the private investigation by Stebbins's wife goes to the weight, not the admissibility, of the identification he later made when police presented the photo montage. Conklin had the opportunity to cross-examine Stebbins on the procedure, including the change in his description of the alleged intruder, and the record reflects that he did so at length. Stebbins admitted that, prior to viewing the police montage, he "viewed some photographs that [his] wife found" based on names published by the State on "the jail roster." Stebbins also acknowledged that Conklin, at the time of trial, had dark hair, a dark mustache, and a dark beard. Stebbins conceded that, in his interview with officers only hours after the incident, he identified the alleged intruder as "a man with orange-blond hair" and a "blonder than blond mustache."

Conklin fails to meet his burden to demonstrate that the photo montage procedure utilized by law enforcement was unnecessarily suggestive. Further, he was able to cross-examine Stebbins at length about his wife's outside research and the inconsistencies in his various identifications and descriptions. As such, the court did not abuse its discretion in admitting the eyewitness identification evidence from the police photo montage.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

Hayes, ACJ

WE CONCUR:

Coburn, J.

Cheung, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

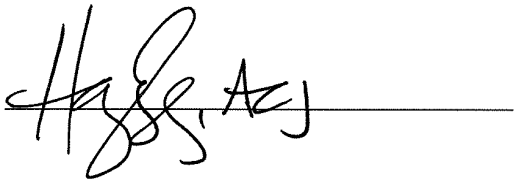
STATE OF WASHINGTON, Respondent, v. CHRISTOPHER HOWARD CONKLIN, Appellant.	No. 84634-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, State of Washington, filed a motion for reconsideration on May 30, 2023. Appellant filed a response to the motion on June 5, 2023. After review of the motion and response, a panel of this court has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



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