SUPREME COURT NO. 89936-3

COURT OF APPEALS NO. 31077-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

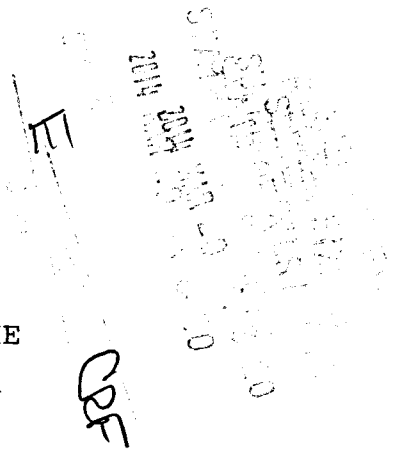
STATE OF WASHINGTON,

Respondent,

v.

PATRICK K. GIBSON,

Petitioner.



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

The Honorable Tari Eitzen, Judge

PETITION FOR DISCRETIONARY REVIEW

PATRICK K. GIBSON
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TABLE OF AUTHORITIES

A.) IDENTITY OF PETITIONER:

Patrick K. Gibson, the appellant below, asks this Court to review the Court of Appeals decisions referenced in Section B.

B.) COURT OF APPEALS DECISION

Gibson requests review of the decision in State v. Gibson, No 31077-9-III, filed January 16, 2014.

C.) MOTION FOR RECONSIDERATION DECISION

Gibson requests review of the decision in State v. Gibson, No 31077-9-III, file February 11, 2014.

D.) Introduction:

When petitioner filed his Statement of Additional Grounds, he only listed two grounds for his S.A.G. Abuse of Discretion and Prosecutor Misconduct. In the content of those grounds, petitioner also raised the lost evidence issue which was tied to both of those issues. The trial court ignored all the lost evidence that proves actual innocence, and the state lied to the court about the lost evidence.

In the conclusion of the S.A.G., petitioner asked the court to reverse his conviction in part, because of the lost evidence. Petitioner submitted two RAP 10.8 Additional Authorities in support of the lost evidence issues raised in his S.A.G. and the court accepted them.

Petitioner is asking this court for some leeway in how he presented the lost evidence issues in his S.A.G., as they were raised throughout the S.A.G. and brought up as a specific issue in the Motion for Reconsideration, which the court accepted, but denied the motion. Petitioner is 61 years old and struggling with health issues while trying to learn the intricacies of the Washington State Appeal process.

1.) ASSIGNMENT OF ERROR

A.) The court erred by failing to address lost/destroyed exculpatory and potential exculpatory evidence that was raised in S.A.G. and RAP 12.4.(C) motion. The destroyed fingerprint evidence is proof of actual innocence.

B.) The court erred in finding that there was no evidence in the trial record to suggest prosecutor misconduct. The record clearly shows the state lied about lost/destroyed exculpatory evidence throughout the trial and there is clear evidence the state allowed its witnesses to lie on direct examination.

C.) The court erred in finding there was no abuse of discretion in the trial court's evidence rulings, concluding evidence was sufficient to support conviction. The court ignored clear evidence that showed the court was confused and did not understand what was presented to it by the state and defense. The trial court fabricated findings of fact that the appeals court ignored. The fact finding process was infected with error by ignoring all exculpatory evidence and multiple unknown DNA profiles found at the crime scene.

2.) ISSUES PRESENTED

A.) Did the court fail to address lost/destroyed exculpatory evidence that is proof of a claim of actual innocence?

B.) Did the court ignore evidence presented to it of prosecutor misconduct. Did the prosecutor lie to the court about evidence?

C.) Did the trial court admit to being confused and misunderstanding testimony and facts presented to it by the state and defense? Did the trial court fabricate Findings of Fact, and if so, did it infect the entire Fact Finding process by concluding there was sufficient evidence to convict, when in fact there was insufficient evidence to convict? Did the court address these issues?

3.) STATEMENT OF CASE

Petitioner accepts the Court of Appeals opinion filed Jan. 16, 2014, detailing the "FACTS" of the case for the purposes of the Petition, with one notable exception. The court details evidence of two white hairs at Pg. 6 of their opinion and infers that the two white hairs actually exist. The white hair evidence has been lost since 2006 and was raised extensively on appeal as evidence that had exculpatory value. The trial court ignored the evidence, the state lied about the evidence throughout the trial and the appeals court still thinks it exists.

Because petitioner is restricted to just 25 pages for this petition, he respectfully asks the court to review the Court of Appeals opinion for the facts of this case.

4.) Argument

A.) The court erred by failing to address lost/destroyed exculpatory and potential exculpatory evidence raised in S.A.G. and RAP 12.4.(c) motion. For the purposes of this petition, lost and destroyed evidence will be referred to as "Lost" evidence. Refernce S.A.G. at pages 16-17, 31-33, 36, 44, 47, 48, RAP 12.4(c) motion, Argument 1, pages 1-8, 19, RAP 10.8 motions filed 8-19-2013 and 12-2-2013 both in support of issues raised in S.A.G. including lost evidence.

At page three of the Court's opinion, the court stated; "Police recovered a fingerprint from the handcuffs, but it did not match Mr. Gibson." The handcuffs containing the unknown exculpatory print were destroyed in 1998, along with all the other evidence collected at the Idaho crime scene. This also included an undocumented portion of the clump of fake beard hair fibers recovered at the Spokane crime scene that Det. Henderson gave to Det. Jiran for testing purposes. RP 295-302, 450-454. Det. Henderson and Det. Jiran testified that a print was recovered from the chrome plated handcuffs and submitted to the Idaho State Crime

Lab for testing. All the Idaho evidence was processed by Idaho authorities. The crime lab ran the print through A.F.I.S. and it came back unknown. Petitioner's prints have been in the A.F.I.S. databases since the 1970's due to past criminal convictions. RP 295-302, 421-422, 1218.

Det. Henderson requested that the Idaho evidence be preserved within the first three days of the crimes, but he failed to follow through with a written request until 2003, 11 years later. RP 297-298, 453-454.

Officer Calderwood testified that the robber walked into the Kid's Fair store carrying a daypack or knapsack. He pulled out some gloves, several pairs of handcuffs and flexcuffs. RP 280. State's Exhibits 1,2,& 3 are pictures of the chrome plated handcuffs and flexcuffs recovered at the Idaho crime scene. RP 286. Teresa Benner testified that she did not recall the robber wearing gloves. RP 217.

Petitioner asserts that the unknown fingerprint on the handcuff is positive exculpatory evidence left by the robber when he handled the handcuffs before he put on gloves, as he took them out of his knapsack. It is intimate forensic evidence that could only have been left by the robber because they were his handcuffs, brought to the crime scene by him. They were not an item that was accessible to the general public. The robber tried to retrieve the handcuffs but failed because he broke off the key in the lock on the handcuffs. RP 104.

A reasonable person could conclude that if a robber brings gloves to a crime scene, the robber was worried about leaving fingerprint evidence. Petitioner asserts that it is reasonable to conclude that the chrome plated handcuffs would have been wiped clean by the robber before he put them in his knapsack because chrome plated surfaces are one of the best surfaces to see and collect a print from. There was only one unknown fingerprint recovered from the handcuffs that

did not belong to the witnesses at the Idaho crime scene. RP 302. Det. Jiran testified that the robber did not have on gloves when he entered the store, he pulled them out after he entered the store, from a backpack he was carrying. RP 296.

In additional authorities filed 8-19-2013, petitioner cited State v. Burden, 104 Wn.App. 507,(2001), which relies on the the standards set forth in State v. Wittnebarger, 124 Wash.2d, at 475,880 P.2d 517. Petitioner asked the court to apply the Burden caselaw rulings to the lost exculpatory fingerprint evidence on the handcuffs listed in his S.A.G. at pages 17, 36-37. The court failed to do so.

Washington courts have held that evidence is "materially exculpatory" only if it meets a two fold test. 1.) Its exculpatory value must have been apparent before the evidence was destroyed, and 2.) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other means.

Constitutional Law - Duty to Preserve

To comport with due process, the prosecution has a duty not only to disclose materially exculpatory evidence, but it also has a related duty to preserve the evidence. U.S.C.A. Const.Amend. 14; West's RCWA Const.Art. 1,§ 3.

Constitutional Law - Sanctions for Destruction or Loss

If the evidence meets the standard as materially exculpatory, criminal charges against the defendant must be dismissed if the State fails to prserve it.

Under both State and Federal constitutions, due process in criminal prosecutions requires a fundamental fairness and a meaningful opportunity to present a complete defense.

Constitutional Law - Duty to Preserve

If evidence does not meet test for determining whether it is materially exculpatory and is only "potentialy useful" to the defense, failure to preserve does not constitute a denial of due process unless the criminal defendant can

show bad faith on the part of the State. U.S.C.A. Const.Amend. 14; West's RCWA Const.Art. 1,§ 3.

Petitioner asserts that the handcuff fingerprint evidence meets the two fold test exactly. It was tested in 1992 at the Idaho State crime lab and came back as "unknown." It cannot be replaced with comparable evidence because all the Idaho evidence was destroyed in 1998. Det. Henderson requested it be preserved but failed to follow through in writing until 11 years later. Petitioner's fingerprints were not found at either crime scene. RP 534-535. Three (3) unknown DNA profiles were found on items recovered at the Spokane crime scene.

A hat, sunglasses and a clump of fake beard were recovered at the Spokane crime scene. The sunglasses contained a mixture of at least two DNA profiles. The hat contained a mixture of at least 4 DNA profiles with the fourth DNA profile still unknown. RP 964, 1065-1067. It is unknown whose DNA is in the portion of the fake beard sent to Idaho authorities and destroyed in 1998. It only takes a billionth of a gram of DNA to be detectable. RP 967, 1083-1084

Petitioner asserts that if in fact his DNA was in the hat, as WSPCL Supervisor Lorriane Heath testified, it is the result of a contamination transfer by Det. Henderson, at the crime scene when he processed the hat and fake beard as evidence items. This has already happened in this case in the WSP crime lab. Ms. Heath transferred WSPCL employee Kathy Fritz's DNA to the fingernail clippings of Brian Cole, while processing the evidence. It is called a Locards Exchange. RP 1072-1073. Det. Henderson processed the Spokane crime scene and his DNA was in the hat more than anyone else's. There is no evidence that Det. Henderson ever wore the hat, he only handled it during evidence processing and when he took it to the America's Most Wanted T.V. show. Defense expert, Dr. Ballard, disagreed with the state's claim that petitioner's DNA was in the hat. RP 1163-1164.

There is a third piece of lost evidence, two white hairs recovered from the hat found at the Cole crime scene, by Det. Henderson, that were lost as of 6-13-2006. S.A.G. Pg. 16-17, 31-33, 47, 48, RAP 12.4(c), Argument #2, Pg. 8-10, Appellant's Reply Brief, Pg. 2-4, RAP 10.8 Motion, Pg. 1-2.

The court erred, inferring the two white hairs actually still exist and were sent to the WSPCL for testing just days before trial started. Court's opinion at page 6. Those two white hairs were lost and the state knowingly lied to both the court and defense about their existence which petitioner will detail in the prosecutor misconduct argument of this petition. The trial court ignored this lost evidence completely because of the prosecutor misconduct. RP 960-963.

These two white hairs have exculpatory value by virtue of their color alone, as petitioner's hair color was brown, not white, and Ms. Cole testified that she did not know the color of the robber's hair. Defense Exhibit 205, RP 183.

Det. Henderson grossly mishandled all of the evidence in this case from the start of his investigation. He never documented where the white hairs were found on the hat. He never gave the white hairs a separate inventory control number. He submitted the hat and sunglasses to the WSPCL for DNA testing in 2004 and never checked to make sure no other evidence items were contained in the packages he was sending. The hat contained the envelope that was supposed to contain the two white hairs Det. Henderson collected from the Hat. He never listed the two white hairs on his request sheet to the WSPCL for testing.

The Court of Appeals refused to address the lost white hair evidence even though it was repeatedly raised by both petitioner and his counsel on direct appeal. The court and the trial court have ignored all of the lost evidence except the separated fibers from the clump of fake beard. They have erred because they refused to consider that any of the lost evidence could contain the one billionth

of a gram of DNA needed to be detected to see if someone else's DNA was on the lost evidence. RP 967-969, 1094 Ln. 14-25, RP 1336-1357.

Det. Henderson also allowed the hat evidence to be mishandled. AS a 15 year veteran of the Sheriff's Dept., common sense should rule that you never let actual evidence be used in a T.V. show to re-enact the crime. And Henderson should have never altered the clump of fake beard hair fibers to give some to Idaho authorities. You never alter evidence under any circumstances.

Petitioner asserts that this gross mishandling of the evidence constitutes "Bad Faith" , therefore the bad faith clause should apply to all the lost evidence because it has denied petitioner of his right to due process. U.S.C.A. Const. Amend.14, West's RCWA Const.ART. 1, 3,§ 22.

When you have three (3) unknown DNA profiles on two items that the suspect used at the Cole crime scene, (2 on the sunglasses and one in the hat), multiple unknown fingerprints , RP 606-607, and the unknown fingerprint on the handcuffs at the Idaho crime scene, a reasonable person could conclude that DNA evidence could exist on the lost white hair evidence and any of the destroyed evidence from the Idaho crime scene that was supposed to be preserved.

In State V. Bridge, 955 P.2d 418, which is a Division III case, the court held that fingerprint evidence alone was sufficient to support a conviction, if a jury could "Reasonably" conclude that the fingerprint evidence could only have been imprinted at the time that the crime was committed. Petitioner asserts that the same principle holds true when the print exonerates a defendant.

In State v. Wilson, 231 P.2d 291, the court held; "A fingerprint is an unforgeable signature." In this case, we have that unforgeable signature on the handcuffs left by the actual person who committed the Kid's Fair robbery and the murder of Brian Cole. At Pg. 18 of S.A.G., petitioner asserted that

the unknown fingerprint on the handcuff was absolute proof that appellant did not do these crimes. The trial court ignored the fingerprint evidence completely because the state lied to the court in final closing argument, claiming the suspect wore gloves from the very beginning. RP 217, 280, 1359. The appeals court refused to address any of the lost evidence or apply the Additional Authority caselaw petitioner requested the court to apply to the lost evidence.

In State v. Vaster, 659 P.2d ~~534~~ 528, regarding other evidence could provide a reasonable possibility of lost evidence being exculpatory, the court held that the eyewitness description was unusually detailed and there was an exact match up between petitioner and the original description of the suspect. Therefore, the court was not inclined to find that a reasonable possibility of lost evidence being exculpatory.

In this case you have the exact opposite evidence. Every witness at both crime scenes described the suspect as 5'8" to 5'9" in height, with a slim to medium build, about 30 years old. RP 283, 312, 432-436, 759. Petitioner was 6'1" in his bare feet, 195 lbs., and 40 years old at the time this crime was committed. With a hat and shoes on, petitioner would have stood close to 6'3", which is 6-7" taller than any of the actual witnesses at the crime scenes described the robber as. RP 526-527, 699-700, 1234-1235, 1346, Br. of Appellant at Pg. 22. Ms. Cole testified that the robber's eyes were not brown, they were blue, and that the robber had a very baby face with no shadow of beard growth at all. RP 163-164, 187, 201 Ln. 17-25, Br. of Appellant at Pg. 11, RP 189.

Officer Calderwood testified that he was the first to arrive at the Kid's Fair robbery scene and get the initial descriptions of the suspect from the three witnesses. Calderwood testified that he was 6'1", the exact height as petitioner, and not one witness said "Hey you know, he was your height." S.A.G. Pg. 6-7, RP 292.

Petitioner asserts that this large difference in height, weight, eye color and not having a baby face (Ms. Cole's testimony at RP 201), is further proof that the unknown fingerprint on the handcuff belonged to the robber. Because the handcuff fingerprint is intimate forensic evidence, is supersedes all other DNA evidence and the witness misidentification of petitioner by all witnesses in this case.

Mistaken eyewitness identification is a leading cause of wrongful conviction, as recognized by Washington courts..."the vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect". State v. Sanchez, 171 Wn.App. 581, 572, 288 P.3d 351 (2012) reconsideration denied Jan. 2013. (Alteration in the original; internal citations omitted).

The Innocence Project Northwest cites that 77% (173 cases) that were documented exonerations in the United States of the first 225 DNA exonerations, were due to eyewitness misidentification. ipnw.org. In this case the same three witnesses that identified petitioner at trial almost 20 tears after the crimes occured, are the same three that misidentified Hugh Knuttgen just 13 months after the the crimes happened. They were 100% wrong then and they are 100% wrong now because the intimate forensic fingerprint evidence left by the robber on the handcuff is absolute proof. Court's opinion, Pg. 3-4.

Ms. Cole testified that she was only $2\frac{1}{2}$ feet away from the robber. RP 162. She stated "And I, when he came up to the counter, I looked straight into his eyes and I saw his eyes." RP 164, RP189. It is clear from the court record that Ms. Cole had an excellent look at the robber's eyes. She was positive he didn't have brown eyes. Petitioner has brown eyes. RP 527 Ln. 3. This is further proof that the fingerprint on the handcuffs belonged to the actual robber.

Ms. Cole also testified that her husband was bigger than the robber. Brian Cole was 5'10", 170 lbs. RP 188. Petitioner testified that he was 6'1" and 195 lbs, in 1992. Because Ms. Cole testified that the suspect had such a baby face with no shadows of beard growth, petition grew a full beard in 18 days for the court to see that petitioner has substantial facial hair and would therefore exhibited substantial beard growth by 8 PM, if were petitioner that had done this crime. RP 1234-1236.

ARGUMENT "B"

The court erred in finding that there was no evidence of prosecutor misconduct. The record clearly shows that the prosecutor lied to the court in closing arguments and allowed its witnesses to make false statements when they testified. The state has also misrepresented the facts in their Br. of Respondent and at oral arguments, making claims that are not supported by the record.

Petitioner cited numerous incidents of prosecutor misconduct, whose cumulative effect was so prejudicial, that it resulted in the trial court completely ignoring every exculpatory statement made by state's witnesses and every piece of lost evidence that was exculpatory or could have exculpatory value. S.A.G. Pg. 31-46, RAP 12.4(c) motion, argument 3, Pg. 10-15, Br. of Appellant, White hair issue, Pg. 2-4, Brief of Resp. at 6, rebuttal in Brief of App. at 7-8, RAP 10.8 Motion, Pg. 2, filed 8-19-13.

WHITE HAIR STRANDS:

At page 6 of court's opinion, the court asserted that two white hairs extracted from hat still exist and were sent for testing to the WSPCL shortly before trial started. Appellant's counsel mis-stated the facts of the lost white hairs in Brief of Appellant, but corrected the mistake in Reply Brief of Appellant at Pg. 2-4, S.A.G. Pg. 31-33,47, RAP 12.4(c), Pg. 8-10.

At a May 17, 2012 hearing, the State tells defense and the court that they had located the two white hairs extracted from the hat. RP 64. Just a few minutes later, the state tells the court and defense that Det. Johnston, who is sitting directly behind the prosecution in the courtroom, is trying to get in touch with Lorriane Heath out at the crime lab. "It is possible that the fibers that were found from the hat were analyzed by the technician and determined to be untestable for DNA." RP 65. The state is clearly representing that they have the white hair strands and that they are at the crime lab for testing at that exact moment. The state is lying to the defense and the court. The white hairs have been lost since at least June 13, 2006. State's witness, former WSPCL employee, James Currie, will testify to that fact. RP 962-963.

In closing argument, the defense tells the court the white hairs are missing. RP 1337. The state's response is to claim in final closing argument that the two white hairs were "Lint", not white hairs, that they were located by Ray Pellegrin, who was a WSPCL Tech working the crime scene, and since they were lint, it was not relevant evidence. The state tried to inject a claim of new evidence, not supported by the record, after the state rested its case, in closing argument, which is illegal. RP 426-427, 1358-1359.

It was gross prosecutor misconduct to knowingly lie to the court and defense and claim 1.) They located the evidence. 2.) That the evidence may not be testable and represent that the evidence was sent to the crime lab for testing. 3.) That the evidence was "Lint", not white hair strands, and that Ray Pellegrin collected the hairs, not Det. Henderson.

Not only was this misconduct about valuable exculpatory evidence by virtue of its color alone, but it was "Bad Faith" by the state to misrepresent that they have the evidence and it is at the crime lab being tested.

HANDCUFF FINGERPRINT EVIDENCE:

In closing arguments, the Defense tells the court that the fingerprint on the handcuffs left by the robber, is proof that appellant is not responsible for these crimes. RP 1339-1340. The State's response is to tell the court that Teresa Benner testified that the defendant was probably wearing gloves, and it was initially reported that he was wearing gloves. RP 1359, Ln. 17-24. The record clearly contradicts this lie by the state to the court. RP 217, 280 Ln. 22-25.

ADDITIONAL PROSECUTOR MISCONDUCT IN CLOSING ARGUMENTS:

The state tells the court they have DNA evidence that links defendant to crime in Coeur d 'Alene. RP 1314. This is a lie that is not supported by the record. The only forensic evidence recovered at the Idaho crime scene is the fingerprint from the robber on the handcuffs, and that print proves that petitioner did not commit these crimes. RP 297-302.

The State tells the court Heather Bender saw the suspect. "She simply drove by quickly." "She didn't have a lot of time to see him." RP 1317 Ln. 5-10. That is a lie not supported by the record. RP 142 Ln.15-19, 144 Ln.22-23, 148, 149 Ln.8-10.

The state tells the court that the same kind of sunglasses were found at the crime scene that the witnesses described in the Idaho crime. RP 1319 Ln.4-16. This is a lie that is not supported by the record. RP 283, 387, 963-965, 1070-1071. Yoko Ono style round coke bottle lens glasses do not look like aviator style lens.

PROSECUTION ALLOWING STATE'S WITNESSES TO MAKE FALSE STATEMENTS:

Because the state turned over discovery reports that detailed what each eyewitness told police in their original interviews, the state is fully aware of what is in those police reports. Therefore, when a witness lies

under direct examination, the state is fully aware that their witness is not telling the truth on that specific question. It is prosecutor misconduct to not correct the false statement the witness just made in the furtherance of witness credibility.

On direct examination, Steve Benner stated three (3) times that the robber was behind him, claiming the third time the robber was behind him for much of the time. RP 103, 104, 105. Five minutes later when the prosecutor asks Mr. Benner what part of the 15 minutes that the robber was in the store, was he in front of Mr. Benner. Mr. Benner answered "Quite a while, for most of it." RP 110. The state knows that Mr. Benner is lying because he just testified that he was behind him most of the time. This does not go to credibility determination but rather, the fact that the prosecutor did not ask, "Are you sure, because you just testified he was behind you most of the time?"

Ms. Cole testified that the robber had the sunglasses found at the crime, in his pocket, when asked by the state about them. RP 176. The state knows this is a lie not supported by the police report, later testified to at trial by Deputy Trautman. RP 314 Ln.11-19

Ms. Cole testified that she did not know what a pin number was at the time of the crime. This is a lie not supported by the police report, later testified to at trial by Det. Fojtik. RP 165-166, 758-759.

Heather Bender testified that she saw a man wearing a truckers cap, and sunglasses, carrying a backpack. This is a lie not supported by the police report, later testified to at trial by Det. Henderson. RP 145, 440.

Both Steve and Teresa Benner testified that Teresa Benner had just gone to the front of the store to flip the sign and was heading back when they heard the bell on the door ring. A man came in and walked right up next to Teresa's

elbow, and proceeded to rob the store. This is a lie not supported by the police report, later testified to by Officer Calderwood. RP 99, 209, 280. Teresa Benner was in the back room with her husband and children when the robber came in. The only person in the front of the store was Kathy Ward, who also gave the same basic rehearsed testimony as to how the robbery event started at their store. RP 251.

When it was to the state's benefit to correct the witness when he was "mistaken", the state stated "Okay." "Is it possible you might be mistaken as to whether she was involved that day?" RP 113 So this is clear evidence that the state did know how to correct false testimony, and it should have been in the dozens of incidents that took place at trial and are just too many to bring to the court's attention due to the restriction of a 25 page limit for this petition, by the court. It is a big case, there are lots of incidents like this throughout the court record.

MISREPRESENTING THE FACTS IN ORAL ARGUMENTS AND BRIEF OF RESPONDENT:

In Brief of Respondent at page 6, the state misrepresented to the court that the defendant's DNA was found at the Idaho crime scene. This is not true. The only forensic evidence from the Idaho crime was the unknown print on handcuffs that did not match petitioner. Court's opinion, Pg. 3

In Brief of Respondent at page 19, the state misrepresents the facts to the court by claiming that defendant failed to place the fake beard used on November 7, 1992, on anyone else's face prior to that date. In Oral arguments, the state again makes the same misrepresentation to the court, claiming "What we're talking about here is a circumstance that occurs before he ever even tries one of his bank robberies."

These misrepresentations by the state are not supported by the record and

contradicts what the state presented in its own brief. The state acknowledges that petitioner attempted his first bank robbery in October 1992, but aborted. That is one month before Brian Cole was murdered. Brief of Respondent at page 19.

The Dictionary defines the word "Attempt" as; To try to subdue or take by force. Petitioner attempted to take by force, a bank by force in October 1992. Petitioner aborted because everything was not right. RP 1261.

Petitioner testified that the first two guys he hired were Tim and Tweeker. They were going to hold the lobby and be a lookout for the first bank robbery. Tweeker secured a storage facility for petitioner in Portland, Oregon, so that petitioner could store all his bank robbery "tools of the trade" in that locker. That included all of petitioner's disguises, everything except weapons. And that Tim and Tweeker would be fully disguised for the bank robbery. RP 1222-1231,1253-1254, 1261.

Because Tim and Tweeker were involved in the attempted bank robbery, they were in possession of disguises provided to them by petitioner. Because Tweeker was the legal tenant of the storage locker he rented for petitioner, he had legal access to it automatically. Petitioner lived in Everett, Wa, over 200 miles away from the storage locker, therefore, he would have no way of preventing someone who was the legal tenant of the storage locker from entering it. The record does not specifically address the issue of whether petitioner's accomplices ever went into the storage locker. Common sense should rule that when Tweeker rented the storage locker for petitioner, that they both went to the storage locker at that time. The state argues in their response brief, that petitioner trusted no one with the tools of his trade, including disguises. That is not supported by the record. They were trusted enough to rent the storage locker that held the disguises and everything else. They were trusted to hold the bank lobby,

and buy get-away-cars. In Reply brief of Appellant, counsel responded to the misrepresentation of facts stated in Brief of Respondent, page 19, regarding access to disguises and storage lockers. The Court of Appeals is presented with clear evidence from appellant counsel that the state is not being truthful with the court, and the court just ignored what is further evidence of the state lying and misrepresenting the facts to the court.

The state in oral arguments, admits the accomplices rented the storage locker, but then state "They may have rented it, but they didn't go in it." There is nothing in the record to substantiate that claim. The record does not address that specific issue at all. Tweeker was the legal tenant, therefore he had legal access. That is what the record reflects. RP 1229-1230.

When petitioner testified about his bank robbery operation, he was only trying to explain that the robberies in Spokane and Idaho were not the type of robberies he did. He was not trying to brag. He gave explicit details about his bank robberies so that the court could see the differences. Every word petitioner stated was true. The State had 3665 pages of FBI discovery documents on the bank robbery operation, turned over to defense by the state, that verified every word of petitioner's bank robbery operation with regards to planning, disguises, hired help and M.O. The state put on no rebuttal witness because there was nothing to dispute about the facts of his bank robbery operation.

In State v. Jones, 183 P.3d 307, 144 Wn.App.284, at [22] the court stated: Cumulative error may warrant reversal, even if each error standing alone could otherwise be considered harmless.

Standards of Prosecutor Misconduct:

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial.

Prejudice is established where there is a substantial likelihood the instances of misconduct affected the jury's verdict.

Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are **"NOT"** permitted to make prejudicial statements unsupported by the record.

In order to establish that a defendant is entitled to a new trial due to prosecutorial misconduct, the defendant must show that the prosecutor's misconduct was improper and prejudiced his right to a fair trial.

Petitioner asserts that the cumulative effect of the prosecutor misconduct was so substantial and prejudicial, that it influenced the trial court's fact finding conclusions. In each instance where the state misled the court about lost evidence and exculpatory statements made by the state's own witnesses, the trial court ignored that evidence, even though it was argued by defense in closing arguments. This denied petitioner of his due process rights to a fair trial.

The Court of Appeals erred because they failed to look at the incidents of misconduct presented in the S.A.G., RAP 12.4(c) Motion for Reconsideration, Reply Brief of Appellant, and at oral argument, did not recognize that the state was misrepresenting the facts that were already refuted in Reply Brief of Appellant about defendant's accomplices having access to storage locker and disguises. The most glaring example is the Court's conclusion that the two white hairs still exist.

ARGUMENT "C"

The court erred in finding there was no abuse of discretion in the trial court's evidence rulings, concluding evidence was sufficient to support conviction. Petitioner presented clear evidence that the trial court admitted to being confused by testimony and that it did not understand what had been presented to it by both defense and state. S.A.G. Pg. 1-31, RAP 12.4(c) Motion for Reconsideration,

Argument #4, Pg. 15-19, RAP 10.8 Motion of Additional Authorities, filed Aug. 19, 2013, Brief of Appellant and Reply Brief of Appellant.

When the court agreed to go forward with a bench trial, the court explained in detail to petitioner, how the court's Realtime software works and how it aids the court in cross-referencing testimony, etc. RP 24-26, S.A.G. Pg.1.

The court record is absolutely clear, based on the Findings of Fact by the trial court, that the trial court did not use the Realtime software to cross-reference testimony and facts as the court promised it would do. Because most of what petitioner presented in his S.A.G. about abuse of discretion dealt with credibility determinations, those incidents could not be reviewed because state courts do not review credibility determinations, per the court's ruling.

Petitioner now understands that only federal courts can review credibility determinations. Taylor v. Maddox, 366 F.3d 992 (2004) U.S.App.

However, petitioner did present two instances in which the trial court court admitted that they were confused by testimony or did not understand what was presented to it by both defense and state, admitting the defense made a clear record to the court. Also, several instances of fabricated finding of facts were presented that did not deal with credibility determinations. They dealt only with complete fabrications by the court that are not supported in the record anywhere. The court erred because they refused to address these incidents. These incidents are the foundation that proves the entire fact finding process was infected with confusion, and facts not supported by the record.

On the third day of trial, the court stated; "I'm so totally confused by some of the prior testimony at this point". RP 550 Ln.13-14.

At page 8 of court's opinion, the court acknowledges that the trial court made a evidence ruling based on a misunderstanding. At RP 895, the court states

"You made a clear record, but I didn't understand what you were saying." RP 895 Ln.3-9. The defense made it clear to the court that the state knew the hat had a mixture of at least three people since 2006. RP 564 Ln.7-13. On May 31, 2012, the court heard testimony from Det. Henderson that the hat was sent to the WSPCL for testing in April 2004. RP 426-427. The court was told the hat was contaminated in 1993. RP 560-583. The trial record is crystal clear that the court was made aware that the hat went to a T.V. show, was handled by multiple people at the show in 1993, and sent for DNA testing 11 years later, in 2004.

Just how confused the court was about these facts is evidenced by when the state and defense are trying to explain again to the court, the timeline of events and the court keeps on referring to "The Sample" that was taken from the hat. There was never any talk of a sample taken from the hat, and the state tells the court there is no sample. The court just pulled that fact out of thin air. RP 885-906.

FABRICATED FINDING OF FACT BY THE TRIAL COURT:

The court fabricated its finding of fact that Ms. Benner walked to the front door, "Flipped off the lights," and turned and walked back to the cash register. RP 1382 Ln.11-12, S.A.G. Pg.3. There was no evidence ever presented at trial that indicated the lights were flipped of. The state tells the court in closing arugment twice, that the Kid's Fair store was "Well Lit." RP 1315 Ln.25, 1322 Ln.12-15. In the court's ruling on Eyewitness Identification, the court states "He testified there were fluorescent lights." RP 1378 Ln.11-13. The state also informed the court the lighting was good, twice at RP 1306.

The court fabricated its finding of fact when it stated; "The man was carrying sunglasses." The fact is not supported in the record anywhere. RP 1382 Ln.16-17. The court proves its' own fabrication in the very next statement it makes. "The

man wore sunglasses the entire time." RP 1382 Ln.20-21. This statement is correct.

The court fabricated its finding of fact when it stated; "The defendant was traveling around California and Oregon and Washington doing reconnaissance for bank robberies." RP 1391 Ln.9-12, S.A.G. Pg.11. This is a fabrication of fact not supported by the record. Petitioner testified that he only did bank robberies and reconnaissance in Oregon and California. RP 1228-1252. The court illegally injected "Washington" into the fact finding tying to infer that petitioner was involved in criminal activity in Washington state, which he was not.

The court ignored every piece of lost exculpatory evidence and every exculpatory evidence and every exculpatory statement made by state's witnesses that prove petitioner did not do this crime. The court ignored the fact that there are a mixture of two unknown DNA in the sunglasses and 1 unknown DNA in the hat.

The court ignored the fact that the fingerprint on the handcuffs recovered at the Idaho crime scene does not match the defendant and that the print could only have come from the robber.

The court ignored the fact that the two white hairs were lost, that defendant did not have white hairs at that time, and that Ms. Cole did not know the color of the robber's hair.

The court ignored the fact that every victim witness described the robber as the exact same height, 5'8" to 5'9", and defendant was 6'1" without shoes on.

The court ignored the fact that Ms. Cole testified that the suspect did not have brown eyes, they were blue. RP 189. The court ignored the fact that Ms. Cole testified that defendant did not have a baby face after substantial testimony was giventhat the suspect did have a very very baby face. RP 162-163, 187, 201, S.A.G. Pg.19-20.

The court ignored the fact that Heather Bender testified that she did not

see the suspect she saw on November 7, 1992, in the courtroom, when asked by the prosecution. RP 149, S.A.G. Pg.8.

It was an abuse of discretion for the trial court to ignore all of this exculpatory evidence and statements made by state's witnesses. It shows that the fact finding process by the trail court was infected with errer, and that the Court of Appeals erred because they refused to look at these instances of abuse of discretion. It is the cumulative effect of the trial courts errors that calls into question, the entire fact finding process by the court and the Appeals Court.

In State v. Rohrich, 71 P.3d 638, the court held that abuse of discretion occurs when decisions based on "Untenable Grounds" or made for "Untenable Reasons" if it rests on facts unsupported by the record. Petitioner presented clear evidence to the court that abuse of discretion occurred. The court erred by not addressing these instances which were mixed in with the credibility determinations.

The court erred in its finding of fact for its final conclusion to determine guilt when it stated; "The evidence is this case consists of solid, and as to the clump of fake beard, uncontroverted DNA evidence; the eyewitness testimony from people who did not confer before identification. There is no doubt in the Court's mind that the crime in Coeur d 'Alene and the crime in Spokane were committed by the same person." RP 1400,

The fingerprint left by the actual robber, on the handcuff is the absolute proof that appellant is not responsible for the Kid's Fair robbery. RP 302 It proves that the witnesses from that crime misidentified petitioner, just as they misidentified Hugh Knutten just 13 months after the crime happened, in 1993. Court's opinion at Pg.4. Because the trial court ruled the same person committed both the Idaho crime and the Spokane crime, it proves Ms. Cole also misidentified petitioner, just as she did Hugh Knuttgen, in 1993.

The court erred in relying on the DNA evidence in the beard, because the beard has been altered from its original form found at the crime scene and it is unknown whose DNA is on the portion sent to Idaho in 1992. RP 450-454, S.A.G. Pg. 17. Furthermore, the beard is a movable piece of evidence that can be worn by anyone at anytime. And the DNA in this case is not intimate DNA that could only have been left at the crime scene when the crime happened. Ms. Heath testified for the state, that some people are super shedders of DNA, while others shed undetectable amounts. RP 1067-1068, S.A.G. Pg.44

Because the DNA is not intimate DNA, and is on a movable item, it is the same as fingerprint evidence that is on a movable item. In Borum v. United States, 380 F.2d 595, the court held; "But to allow this conviction to stand would be to hold that anyone who touches anything which is later at the scene of a crime may be convicted." We decline to adopt such a rule. The court also noted that there was nothing in the record that indicated that the defendant could not have had contact with the jar that contained the coins, at an earlier time. The record simply did not address that issue at all.

In petitioner's case, the trial record is clear that petitioner admits that it was probably a disguise that had at one time belonged to him, that he practiced with his disguises for at least a month, and that he supplied some of his disguises to his accomplices in October 1992 in an attempted bank robbery that he aborted on because conditions were not right. RP 1220-1231, 1238, 1252-1256, 1261. The record is also clear that petitioner always had an accomplice for the bank robberies, and that the accomplice rented a storage locker to store all the disquises, and as the legal tenant, he would have access to the locker and its contents.

The fingerprint evidence on the destroyed handcuffs supersedes all other

evidence and witness misidentification of petitioner. RP 302. Relying on the DNA found in the altered clump of fake beard is in error because there are three other unknown DNA profiles in the combination of the sunglasses and hat found at the crime scene.

The Due Process Clause of the Fourteenth Amendment and Aritice 1,§§ 3,22 of the Washington State Constitution require the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Ament.14; Wash. Const.Art. 1,§§ 3,22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The court erred because it ignored the lost fingerprint evidence that proves actual innocence, and ignored the fact that there are three unknown DNA profiles on items that the robber brought with him to the crime scene, that do not match petitioner.

The trial was infected with error, turning a blind eye to every piece of exculpatory evidence presented to, almost entirely by state's witnesses, with the incorrect witness identifications being the most unreliable evidence the court can rely on, in light of the fact that the same three witnesses were 100% wrong when they identified Hugh Knuttgen in 1993. Now almost 20 years later, they're right? Fingerprint evidence proves they are wrong.

5.) CONCLUSION

Based on the foregoing facts and authorities, Petitioner respecfully asks this court to reverse his conviction with prejudice based lost exculpatory evidence, prosecutor misconduct, and insufficiency of the evidence. In the alternative, he requests a new trial.

Respectfully submitted the 19 day of March 2014.

Patrick K. Gibson

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APPENDIX

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31077-9-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
PATRICK K. GIBSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

BROWN, J.—Patrick Gibson appeals his bench trial first-degree murder conviction for killing Brian Cole during a 1992 Spokane store robbery. In addition to evidence insufficiency, he contends the trial court erred in admitting (1) tainted in-court identifications, (2) evidence of a similar robbery the same day, and (3) deoxyribonucleic acid (DNA) evidence. Mr. Gibson in his pro se statement of additional grounds (SAG) generally asserts the trial court did not understand the evidence and suggests prosecutorial misconduct. We find no abuse of discretion in the trial court's evidence rulings, conclude the evidence sufficiently supports Mr. Gibson's conviction, and reject Mr. Gibson's SAG. Accordingly, we affirm.

FACTS

On November 7, 1992, two robberies occurred within three hours committed by a man wearing a black baseball cap that read "Solid Gold," sunglasses, and a fake beard (the disguise). The robber employed the same method of operation described below. The first occurred at 5:00 p.m. in Coeur d'Alene, Idaho. The second, the subject of this murder case, occurred around 8:00 p.m. in Spokane. The disguise, method of operation, and timing linked the two crimes but it was not until years later that DNA linked Mr. Gibson as a suspect. The court at a later bench trial learned, and generally found, the following facts.

In Coeur d'Alene, Teresa Benner was closing Kid's Fair, the store she owned with her husband, Steve Benner, when a man wearing the disguise briskly walked through the doors, displayed a small, silver handgun, and said, "'You are being robbed.'" Clerk's Papers (CP) at 319. The man ordered Ms. Benner and employee Kathy Ward, to the backroom where he found Mr. Benner and the Benners' two young children. The man ordered Ms. Ward to handcuff Mr. Benner and zip tie herself to Ms. Benner, then demanded cash, credit cards, and, unsuccessfully, personal identification number (PIN) numbers. They gave the man approximately $100 in cash. Before leaving, the man unsuccessfully tried to remove the handcuffs from Mr. Benner. When police arrived, the victims described the man and his disguise, describing the beard as "Amish-style." CP at

320. Police recovered a fingerprint from the handcuffs but it did not match Mr. Gibson. The robber was not then apprehended.

In Spokane, a man wearing the disguise entered Cole's Furniture and stated, "'This is a stickup.'" CP at 322. He displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Michele Cole retrieved $18 from her purse and handed it to her husband, Brian Cole, who handed it to the robber. The robber ordered the Coles to the back of the store. Ms. Cole suffers from multiple sclerosis and drove her scooter toward the back. Mr. Cole then asked, "'You wouldn't hurt a handicapped lady, would you?'" *Id.* The robber responded, "'I might.'" *Id.* Before reaching the back of the store, Ms. Cole heard a ruckus and a gunshot. When she turned around, she saw her husband and the intruder struggling and crashing into furniture. Blood stained Mr. Cole's back. The intruder fired a second shot, hitting Mr. Cole in the head and fled. The Coles called 911. Mr. Cole died due to his injuries.

At the crime scene, police found the robber's sunglasses, the black baseball cap, and a clump of fibers from the fake beard. Ms. Cole described the robber as "clean-shaven with a fake beard and a thin face, 5'8", thin, about 30 years old." CP at 324. By chance, Heather Bender stopped her car at a well lit intersection directly in front of Cole's and saw a man wearing the disguise pass about 10 feet in front of her car and make a "beeline" toward Cole's. CP at 321. She described the man as 30-35 years old, about 5'11" and "'not heavy, not slim.'" *Id.*

In late 1993, the lead detective Mark Henderson showed Ms. Cole a photomontage. Ms. Cole was 85 to 90 percent certain the intruder was number four, Hugh Knuttgen. The same day, Detective Henderson showed the same photomontage to the Benners and Kathy Ward. Both Benners tentatively and separately identified number four, Mr. Knuttgen, as the robber. Kathy Ward was unable to positively identify anyone. Police later cleared Mr. Knuttgen of involvement.

Also in 1993, Detective Henderson took the black hat to Washington, D.C. The television show, "America's Most Wanted," used the hat to reenact the robbery. Three people handled the hat: Detective Henderson, producer John Walsh, and actor, Trevor St. John, each unintentionally causing DNA contamination.

In April 2004, Detective Henderson submitted the hat, along with the sunglasses found at the scene, to the Washington State Patrol Crime Lab (WSPCL). The crime lab forensic specialist James Currie analyzed the hat for DNA. Specialist Currie inconclusively found DNA from at least three people.

In 2007, Spokane County Detective Lyle Johnston assumed responsibility for the Cole murder case. In December 2010, he submitted the clump of fibers from the fake beard to the WSPCL. The lab found DNA from one individual on the clump of fibers, and ran it through the Combined DNA Index System (CODIS). CODIS reported the DNA match to Mr. Gibson. The lab concluded a one in 3.1 trillion chance existed the DNA on the clump of fake beard does not belong to Mr. Gibson. When Detective

Johnston learned the DNA on the beard belonged to Mr. Gibson, he asked the crime lab to analyze the hat collected from Cole's Furniture. The lab found Mr. Gibson potentially contributed his DNA to the hat. But, because the hat contained at least three DNA contributors, without more, one out of every two people in the United States could have contributed DNA to the hat.

Detective Johnston reviewed Mr. Gibson's file and learned he had not previously been contacted nor considered a suspect. Detective Johnston checked the National Crime Information Center (NCIC) records. The NCIC reported that the Federal Bureau of Investigation (FBI) had arrested Mr. Gibson in 1994 for bank robbery. The FBI briefed Detective Johnston on Mr. Gibson's bank robbing operation. His usual bank robbing method, according to Special Agent Frank Harrill, included wearing a hat, beard, and trench coat as a disguise.

In April 2011, Detective Johnston prepared a photomontage of six photos, including Mr. Gibson's 1994 driver's license photo. The bottom of the photomontage admonished the suspect's photograph may or may not be among those in the lineup, and specified the witness was not obligated to make an identification. Detective Johnston presented the photomontage to witnesses of both the Coeur d'Alene and Spokane robberies. From the photomontage, Ms. Cole identified Mr. Gibson as her husband's murderer. Mr. Benner identified Mr. Gibson as the man who robbed his store. Ms. Benner and Ms. Ward could not positively identify anyone. Ms. Bender was not

contacted. Detective Johnston did not follow the Spokane County Sheriff's office policy manual explaining the best practices for using photos to identify suspects by being involved in the investigation and not presenting the photos sequentially.

On May 4, 2011, authorities arrested Mr. Gibson who was charged with first-degree murder. At a May 17, 2012 pretrial hearing, the State sought to admit evidence from the similar Coeur d'Alene robbery, arguing the evidence was relevant as res gestae or, alternatively, under ER 404(b) exceptions for common scheme, plan, and identity. The court reserved ruling until the State presented evidence about both robberies. Then, the court admitted the Coeur d'Alene robbery evidence because it showed a common scheme, plan, and identity. And, the court stated it would admit the evidence as res gestae.

At the May 17, 2012 pretrial hearing, the State informed the court it was conducting DNA analysis on two pieces of evidence recovered from the scene of Mr. Cole's murder, two white hairs extracted from the baseball cap and fluid found on sun glasses. The crime lab, however, would not complete the testing until the 12th day of trial. The court lectured this could require a lengthy continuance, explaining, "It doesn't work that way. So either we stop this right now and reset it, or you know that we're going to go through this trial and if you don't get it in time, you're not going to get it in time . . . . I can't bifurcate a murder trial." Report of Proceedings (RP) at 90-91. After a recess, the State informed the court the DNA analysis would be ready by June 11, 2012.

The State and Mr. Gibson agreed to go forward, without knowing what the DNA results would show.

At a bench trial on May 29, Mr. Benner, Ms. Benner, and Ms. Cole identified Mr. Gibson, in court, as the person who robbed them in 1992. The defense unsuccessfully objected that the identifications were tainted by suggestive photo identification procedures and faulty memories.

At the end of court on May 31, 2012, the State informed the defense it had sought DNA samples from Detective Henderson, Mr. Walsh, and Mr. St. John. With those samples, the State intended to link Mr. Gibson to the hat found at Cole's Furniture. The State theorized if forensic analysts matched their DNA to the DNA found on the hat, their DNA could be excluded, allowing the crime lab to conclude with greater probability that Mr. Gibson contributed his DNA to the hat.

On June 1, 2012, the fourth day of trial, Mr. Gibson moved to suppress the additional DNA analysis results, arguing the State's analysis was untimely and prejudicial. Mr. Gibson emphasized his expert witness would not have time to retest the samples and the tests would impugn his alibi defense that he was on a fishing trip the weekend of the robberies. Further, Mr. Gibson conceded he wore the fake beard in the past, but claimed one of his bank robbing accomplices must have used the fake beard during the November 7 robberies. The court initially decided not to admit the results of the DNA comparison, unless the defense argued the hat was contaminated.

On June 7, 2012, the State successfully asked the court to reconsider its ruling. The court reasoned its prior ruling was based on a misunderstanding, explaining, "I looked at it purely as a contamination issue . . . . That's not the issue . . . . It's an exclusion issue and there is a huge difference." RP at 925. The issue is whether an analyst can isolate the DNA on the hat prior to contamination by excluding the "three people who purportedly touched the hat." RP at 925. Because the DNA results would be relevant and probative, the court admitted the evidence. Mr. Gibson argued "trial by surprise." RP at 895. In response, the court granted Mr. Gibson a 30-day recess and permitted him to call and recall any witness he desired to assuage any prejudice he suffered relying on the court's previous decision. After the recess, Mr. Gibson recalled witnesses and a DNA expert contesting the WSPCL's methods.

After entering extensive findings of fact and conclusions of law, the trial court found Mr. Gibson guilty as charged. He appealed.

ANALYSIS

A. In-Court Identification

The issue is whether the trial court erred in allowing the in-court identifications of Mr. Gibson over his impermissibly-suggestive taint objections.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Sanchez*, 171 Wn. App. 518, 579, 288 P.3d 351 (2012) (citing *State v. Kinard*, 109 Wn. App. 428, 435, 36 P.3d 573 (2001)).

"An out-of-court photographic identification violates due process if it is '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) (quoting *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)). If impermissible suggestiveness is established, we consider whether the challenged procedure created "'a substantial likelihood of irreparable misidentification.'" *Vickers*, 148 Wn.2d at 118 (quoting *Linares*, 98 Wn. App. at 401). If, however, Mr. Gibson fails to make that showing, our inquiry ends. *Vickers*, 148 Wn.2d at 118.

Mr. Gibson argues the photomontages were impermissibly suggestive because Detective Johnston did not follow his department's best practices when he presented the photomontages to Mr. Benner and Ms. Cole. When the investigator, Detective Johnston, presented the photomontages, he did so simultaneously, not sequentially. Mr. Gibson argues picking one out of three photos is not a fair test of a witness's ability to identify a suspect. His objections go to the weight of the evidence not its admissibility. The fact finder decides the persuasiveness of properly admitted evidence, not an appellate court. Nothing about the composition of the photomontage or the photos singles out one photo from the others. Additionally, the photomontage provided the warning the defense expert recommended that the suspect's photograph may or may not be among those in the lineup and that they were not obligated to make an identification. When they made their

identifications, law enforcement had not disclosed to the media that Mr. Gibson was a suspect.

Presenting the photographs simultaneously is not suggestive per se. *Sanchez*, 171 Wn. App. at 581 (citing *State v. Outing*, 298 Conn. 34, 49-50, 3 A.3d 1 (2010) (simultaneous photographic array is not unnecessarily suggestive, per se, even if not administered in a double-blind procedure); *State v. Marquez*, 291 Conn. 122, 153-56, 967 A.3d 56 (2009) (until scientific research produces more definitive answers, due process does not require suppression of photographic identification that is not the product of a double-blind sequential procedure))).

Because Mr. Gibson fails to show the procedure was impermissibly suggestive, we do not consider if the challenged procedure created "'a substantial likelihood of irreparable misidentification.'" *Vickers*, 148 Wn.2d at 118 (quoting *Linares*, 98 Wn. App. at 401).

Mr. Gibson next argues the in-court identifications were improperly suggestive. In support, he cites a Maryland case where the court explained, "[A]n in court identification of the defendant as a perpetrator is inherently suggestive." Appellant's Br. at 24 (citing *Wood v. State*, 196 Md. App. 146, 159, 7 A.3d 1115 (2010)). The Maryland court explains, "[A] one-on-one show-up is suggestive, just as 99 out of every 100 judicial or in-court identifications are suggestive. . . . A jury, however is perfectly capable of weighing the pluses and minuses of such an identification." *Wood*, 196 Md.

App. at 159. A judge is just as capable, if not more, of weighing the pluses and minuses of an in-court identification. Thus, we need not consider if the challenged procedure created "'a substantial likelihood of irreparable misidentification.'" *Vickers*, 148 Wn.2d at 118 (quoting *Linares*, 98 Wn. App. at 401). Considering all, we conclude the trial court did not abuse its discretion when allowing the in-court identifications.

B. ER 404(b) Similar Happening Rulings

The issue is whether the trial court erred under ER 404(b) in admitting evidence of the similar Idaho robbery.

We review ER 404(b) rulings for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *State v. Lough*, 70 Wn. App. 302, 313, 853 P.2d 920 (1993). A court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *Stenson*, 132 Wn.2d at 701.

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting ER 404(b) evidence, a trial court "'must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value

against the prejudicial effect.'" *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The first requirement is uncontested.

Regarding the second requirement, the trial court admitted evidence from the Idaho robbery under ER 404(b) exceptions for common scheme and plan, identity, and under res gestae. Mr. Gibson argues evidence admitted under the common scheme and plan exception may not be used to show identity. It is unclear whether the trial court distinguished the exception for a common scheme or plan from the identity exception. The Washington State Supreme Court does distinguish between the exceptions. *See Foxhoven*, 161 Wn.2d at 179 (court permits evidence of prior misconduct for the purpose of identity, but not under the common scheme or plan exception); 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 404.22, at 552-53 (5th ed. 2007). Because of this lack of clarity we turn first to identity, and then analyze res gestae.

Under the identity exception, Mr. Gibson solely disputes "whether the evidence is relevant and necessary to prove an essential element of the crime." Appellant's Br. at 25; *Foxhoven*, 161 Wn.2d at 175. To be relevant, evidence must tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401; *see also Foxhoven*, 161 Wn.2d at 176. Mr. Gibson argues the

evidence was irrelevant because the court admitted evidence of an uncharged crime, by an unknown assailant, whose description did not match his.

Again, his objections go purely to the weight given the evidence, not its admissibility. The court made substantial findings of fact detailing the similarities between the crimes. Mr. Gibson challenges the court's ultimate conclusion, but he does not challenge the findings of fact the court relied on to reach that conclusion. Those findings are verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010) (citing *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002)). At trial Mr. Gibson asserted an alibi defense, claiming he was fishing in the Puget Sound on November 7, 1992. The court found the evidence from the Kid's Fair robbery relevant because it contradicted Mr. Gibson's alibi, and proved an essential element of the crime: his identity. The court concluded the same man robbed both stores. The evidence from the Kid's Fair robbery increases the probability that Mr. Gibson robbed Cole's Furniture and murdered Mr. Cole, thus establishing the relevance of the Kid's Fair evidence. *Foxhoven*, 161 Wn.2d at 176.

Mr. Gibson argues, even if the evidence is relevant, it is unfairly prejudicial, but he does not explain how the evidence is unfairly prejudicial. The trial court found the evidence was highly probative and outweighed any prejudice. The court reasoned that it directly contradicted Mr. Gibson's alibi. We weigh the high probative value of this evidence against the prejudice to Mr. Gibson. ER 403; *State v. Tharp*, 96 Wn.2d 591,

594, 637 P.2d 961 (1981). The purpose of ER 403 is to prohibit introducing evidence of a defendant's past crime that may unfairly inflame the passions of the jurors. *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950). Here, no jury is involved because Mr. Gibson requested a bench trial. Considering, his direct testimony detailing his long criminal history, including forgeries, burglaries, rape, robberies, stealing cars, and numerous bank robberies, it is difficult to follow Mr. Gibson's reasoning singling out this one additional event or find any prejudice. Even if the trial court had erred in considering the evidence under the ER 404(b) identity exception, the error would be harmless because, as next discussed, the trial court properly admitted the evidence under a theory of res gestae. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Res gestae permits a trial court to admit misconduct that would otherwise be inadmissible when that misconduct is connected in time, place, circumstances, or means employed and constitutes proof of the history of the crime charged. *State v. Lillard*, 112 Wn. App. 422, 432, 93 P.3d 969 (2004) (under res gestae, evidence of other crimes or bad acts are admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime). Mr. Gibson argues the story of the Cole's Furniture robbery and murder was complete without the Benners' testimony, but it tended to rebut his alibi. Under res gestae, evidence may be admissible if it is relevant to rebut a material assertion by the defendant. *See State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987) (evidence admissible to contradict the defendant's

claim of self-defense); 5 TEGLAND, *supra* § 404.18, at 528. The Benners' testimony identifying Mr. Gibson as the man who robbed their store that weekend rebuts his claimed alibi. Given all, we conclude, under res gestae the trial court did not abuse its discretion in admitting the Kid's Fair evidence. *Thompson*, 47 Wn. App. 1.

C. DNA Evidence

The issue is whether the trial court erred in admitting the late developed DNA evidence in Mr. Gibson's trial. Citing *Hutchinson*, Mr. Gibson contends admitting the DNA violated discovery rules. 135 Wn.2d at 883. But we reason the State did not violate discovery rules. CrR 4.7(a)(1)(iv) provides, in part,

> [T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's *possession or control* no later than the omnibus hearing: . . . any reports or statements of experts . . . including results of physical or mental examinations and scientific tests, experiments, or comparisons.

The State possessed the hat, DNA results from the hat, and knew Detective Henderson, Mr. Walsh, and Mr. St. John handled the hat. The State timely disclosed this information to Mr. Gibson. What the State did not disclose until after the omnibus hearing, is the DNA test comparing the DNA on the hat with that of those three. But the State did not possess the DNA results until June 7, 2012, after the omnibus hearing. Thus, it did not violate CrR 4.7(a)(1).

Under CrR 4.7(h)(2) a party that "discovers additional material or information which is subject to disclosure . . . shall promptly notify the other party." The State

disclosed that it was seeking the DNA from the three on May 31, 2012, before it had the results. Under CrR 4.7(h)(2), the State properly disclosed the evidence. Therefore, *Hutchinson* does not help Mr. Gibson. 135 Wn.2d at 883. Whether the trial court properly admitted the DNA comparison is an evidentiary ruling we review for an abuse of discretion. *State v. Ellis*, 126 Wn.2d 498, 504, 963 P.2d 843 (1998). A court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *Stenson*, 132 Wn.2d at 701.

Continuance, not suppression, is one proper remedy when the State fails to give notice prior to trial of its intent to introduce newly discovered evidence. *State v. Hughes*, 56 Wn. App. 172, 783 P.2d 99 (1989). "Violations of that nature are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence." *Hutchinson*, 135 Wn.2d at 881. The trial court gave Mr. Gibson a 30-day continuance and leave to call and recall witnesses. The trial court acted within its discretion. *See, e.g.*, *Linden*, 89 Wn. App. at 947 (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information).

D. Evidence Sufficiency

When a defendant challenges the sufficiency of the evidence underlying his conviction, a reviewing court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

To convict Mr. Gibson of first-degree murder, the State had to prove beyond a reasonable doubt he committed an armed robbery, and in the course of the robbery he caused the death of another. RCW 9A.32.030(1)(c). Mr. Gibson does not contest the Idaho and Spokane robbery events, but he denies his involvement. We reason substantial evidence supports the trial court's findings.

At trial, the Benners testified a man wearing the disguise robbed their store, Kid's Fair. The man displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Ms. Cole testified that three hours after Kid's Fair was robbed, a man wearing the same disguise robbed her store. CP at 322. The man displayed a small, silver handgun and demanded cash, credit cards, and PIN numbers. Ms. Bender testified she saw a man outside of Cole's Furniture around 8:00 the night of the robbery wearing the same disguise. From this evidence a rational trier of fact could conclude beyond a reasonable doubt that the same man robbed both Kid's Fair and Cole's Furniture.

DNA evidence on a piece of the fake beard recovered at Cole's Furniture matched Mr. Gibson's DNA. Based on the analysis of the WSPCL, a one in 3.1 trillion chance exists the DNA on the clump of fake beard does not belong to Mr. Gibson. In addition, after the WSPCL excluded the DNA of the three other contributors, the lab concluded the DNA on the hat matched Mr. Gibson by an exclusion factor of one in 10 million.

Given all, substantial evidence sufficiently supports Mr. Gibson's conviction.

D. SAG

Mr. Gibson disagrees with the trial court's findings of fact and claims the court misunderstood the evidence or fabricated certain findings. But credibility determinations are left to the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In sum, the court found the State's witnesses credible and not Mr. Gibson's witnesses.

Next, Mr. Gibson believes the prosecutor lied to the court about the DNA on the hat, conspired with witnesses to evoke perjury, and that transcripts have been edited to remove incriminating remarks. He offers no evidence to support his speculation. The court reporter's declaration contradicts his assertion that the transcripts have been edited. Nothing in the record suggests the prosecutor lied to the court.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, J.

Fearing, J.

FILED
FEB. 11, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. PATRICK K. GIBSON, Appellant.	)	No. 31077-9-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration of this court's decision of January 16, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

DATED: February 11, 2014

PANEL: Jj. Brown, Kulik, Fearing

FOR THE COURT:

KEVIN M. KORSMO
CHIEF JUDGE

State Prosecution: Good morning, may it please the court, Mark Lindsey of the state of Washington. I, I'll start at the back and go forward with respect to, um, the DNA evidence, the testimony from Dr. Ballard, who was the defense expert specifically indicated in response to the can it be de-, can we deconvolute a complex mixture. Um, in process of that, um, of her testimony, Dr. Ballard comes forward and says, well, I used the Kern County, California, um, model for deconvolution and on cross-examination had to admit that, um, in order to use that she was going to have to go through the exact same process that the Washington State Patrol Crime Lab's DNA expert did, Ms. Heath.

She was going to have to take one of those known profiles and extract it in order to get the Kern County, California, um, software to work because it was based upon a mixture of only two individuals. So, with respect to the DNA, the mixture, all that sort of, um, discussion, I think the record fairly provides the court with the ability to analyze what the trial court had before it as far as the DNA evidence was concerned and whether it, that DNA evidence, was something that [inaudible] rely upon.

Dr. Ballard also admitted, um, both during direct and cross that she agreed wholeheartedly, 100%, to a scientific certainty with the fact that Mr. Gibson's DNA was on the fake beard fibers that were found at the Cole Furniture robbery scene. So, I, the hat and whether the, um, science is signif-, is sufficient for purposes of deconvoluting and removing Sgt. Lis-, um, Detective Henderson, um, Mr. Walsh and Mr. St. Trevor [sp] from that complex mixture of DNA to the point where you can go from a one to two probably to a one to ten million.

The significance of the hat is the fact that you had independent witnesses from the Idaho, the Kid's Fair robbery, um, indicate that there was a hat, a fake beard, disguise, that sort of, um, d-, um, description. And that's when they saw the, um, composite picture that was created for purposes of the Spokesman-Review article on the Cole's Furniture, that they immediately, the light sort of shined on it and they said, well, that's the guy, that's a better composite, that's a better sketch than the one that we came up with.

None of those individuals prior to the trial had met. None of them had talked. And so, when they s-, when they stood or they sat before the court and gave their testimony, it was based upon their own individual recollections of what had happened. This isn't so, a circumstance where this is a, um, these indivi-, these individuals came face to face, in very close proximity with the individual who robbed them, Mr. Gibson, and the, and they all are fairly consistent in their statements with respect to description of the disguise that was used, how well the disguise, um, fit Mr. Gibson's face.

And you'll recall from the testimony of Mr. Gibson himself, that when he, ih-, was describing his own, um, development of his expertise in how to apply disguises and so on, that he learned early on that he needed to glue the beard to his face. It's important to recognize that with respect to Mr. Gibson's testimony, that he, he provides a very detailed analysis of his own criminal procedures. The two robberies that we're talking about here, the one that he was convicted of is the one that happened at Cole's Furniture, um, along with the murder. What we're talking about here is a circumstance that occurs before he ever even tries one of his bank robberies.

So when he testified that he learned that he needed to glue the m-, his disguise to his face and we go back and we look at the testimony of the witnesses and what they described and the fact that, how loosely the beard, fake beard, hung on the individual's face, it's not beyond the realm of reasonable inference to conclude that Mr., when Mr. Gibson talks about learning and perfecting his craft, that he was l-, he learned that lesson with respect to the Cole robbery and the, um, Kid's Fair robbery.

With respect to the eyewitness identifications, once again, um, you had Dr. Devenport [sp] testify about, um, eyewitness identifications, how memory works with respect to that type of a circumstance and Dr. Devenport talks about trauma. She also talks about the fact that you end up having, um, it's normal for us to fill in details as time passes we have a tendency to fill in details. We know f-, from analysis of how we read that we fill in words. We don't necessarily read every word. But Dr. Devenport's theory was that these people were filling in details and that's why they came up with the identifications they came up with.

It's hard to reconcile that type of an opinion with the fact that the individuals never met, never talked. The only details they had were the exact same details from each of those circumstances, the fake beard, the glasses, the hat. The rest of it was filled in. It's just as easy to go through the process and say, well, Dr. Devenport's analysis also applies to Mr. Gibson's alibi that he filled in details.

You recall from the testimony that in order to try and fit the alibi to the, to the November 7th, 1992 date, Mr., I'm not sure if it was Mr. Houser, Mr. Gibson, or his brother, um, Gibson, who went on the internet, searched for the date, and found out that at that, on the 7th of November, there was a protest going on by the local fishermen at Point No Point, which is, um, on the peninsula. And they were protesting the fact Native American fishermen weren't able to have an unlimited catch. And this protest, this, um, conf-, conflict had been going on for some time. That conflict was reported in the newspapers, and so he was able to find it with respect to his internet search and it happened to coincide with that date.

Dr. Devenport, Devenport's analysis would indicate that since Mr. Gibson had no independent recollection on the, any of the others could pinpoint either the photographs or anything else with that great chum salmon, um, catch, that they filled in the detail that it occurred on the 7th.

It's up to the trial court in this circumstance that by virtue of the fact that this is a bench trial, and you can go back and look at Mr. Gibson's discussion, the colloquy that he had with the trial court judge about, are you really sure you want to waive your right to a jury? And Mr. Gibson, from the very start, at that motion says, I want somebody who's experienced enough to discern the evidence in this case and be able to, um, re-, um, reconcile what happened.

It's very illuminating to go back and read Mr. Gibson's initial comments to the court and then come back later and have a circumstance where we're arguing that somehow he was misidentified in a circumstance where he also tries to indicate that some of his accomplices; remember his testimony about what, the type of relationship with his accomplices. They may have rented the, the storage space, but they were never allowed to, to go in the storage space, nor were they allowed to put anything in there.

Mr. Gibson specifically said, I'm the one who bought the disguises, bought the gun, did all this stuff, put the bank directory in there, checked out to see whether the local law enforcement officers, or there was a local law enforcement agency, whether the bank, the tar-, target bank had any guards or any sort of, um, protection system. At no point in time did he ever indicate that anybody was allowed into his storage facility. They rented it, but they didn't go in it. And so, to argue that, that, when he comes back and he argues to the trial court; I know my, I know what I'm doing. I stole $840,000 cash and a, and a million dollars in traveler's checks over the course of 12 robberies, I know what I'm doing, to then come back and say, well, these guys did it.

The defense in this case had a difficult road to hoe from the very beginning simply because of the fact that Mr. Gibson, in his colloquy with the trial court judge, um, reveals just exactly how expertise he is at, with respect to the, how procedures are with court, um, the fact that he'd won motions, that he'd, um, in some of his other cases, but we have an individual who then comes back and tries to build an alibi that simply didn't hold water. And so, rather than attacking the evidence, he simply says, I wasn't there.

We spent a lot of time talking about the DNA evidence from the hat. The best DNA evidence is the fact that the one, the people that just b-, don't talk about, and that's the, the fake beard that was torn off of him when he killed Mr. Cole. How did that get there? How did his DNA, and you'll remember the testimony of the experts, DNA in the fake beard is probably the best, it came from a rich source by virtue of the fact that it was close to his mouth. Some of

the richest sources of DNA come from saliva, blood, etc. In this particular circumstance, we have a fake beard 300 miles from where he's supposed to be with his DNA on it. His own DNA expert could not find anything wrong with the state's analysis of that, um, or the extraction of that profile and the matching. That's the crime that he was convicted of and that's where the evidence was found at the Cole's robbery. Thank you.

Court: Nothing further? Thank you.

INNOCENCE PROJECT NORTHWEST
University of Washington School of Law
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Seattle, WA 98145
www.ipnw.org

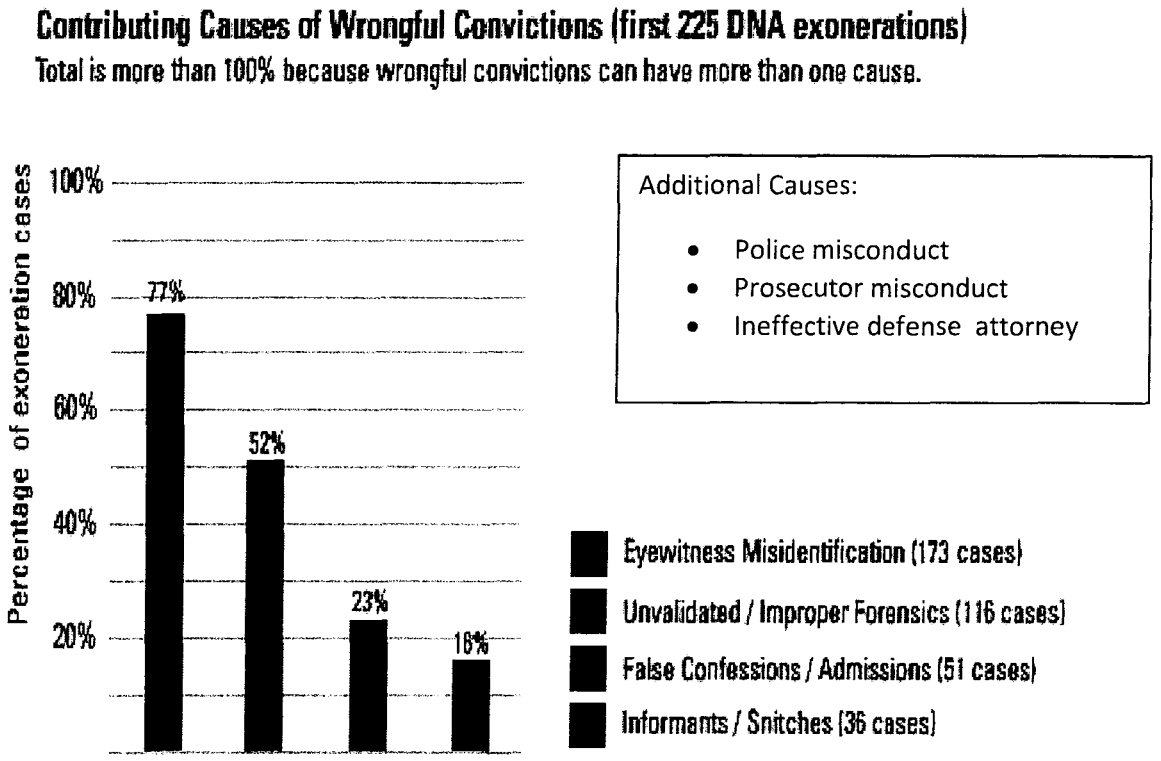
Anna Tolin - Deputy Director, Supervising Attorney
Laura Fox – DNA Paralegal

The **Innocence Project Northwest** (IPNW) works to free innocent prisoners in Washington State using DNA and other new evidence. IPNW was founded in 1997 as a volunteer organization and now operates at the University of Washington School of Law. At IPNW our primary goal is to free people imprisoned for crimes they did not commit. We also work to change laws and policies to help prevent wrongful convictions in our criminal justice system, and we educate and train law students to become thoughtful and skilled attorneys.

DOCUMENTED EXONERATIONS IN THE UNITED STATES

Total since 1989 = Over **1, 181** Exonerations involving DNA = **311**

IPNW Exonerations = **12** total, **4** DNA



Source: Innocence Project: Understand the Causes, http://innocenceproject.org/understand

CERTIFICATE OF SERVICE

I, Patrick K. Gibson, Petitioner, Pro Se, Supreme Court of the State of Washington, Case No. 89936-3, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that true and correct copy of Petitioner's Petition for Discretionary Review was sent by first class mail, postage prepaid on March 18, 2014, to The Supreme Court of the State of Washington, Temple of Justice, P.O. Box 40929, Olympia, Wa 98405-0929.

Patrick K. Gibson

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CERTIFICATE OF SERVICE

I, Patrick K. Gibson, Petitioner, Pro Se, Supreme Court of the State of Washington, Case No. 89936-3, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of Petitioner's Petition for Discretionary Review was sent by first class mail, postage prepaid on March 18, 2014, to:

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