No. 29641-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ALAN DALE JENKS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Harold D. Clarke, III

BRIEF OF APPELLANT

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1. The trial court erred in allowing evidence of other acts of misconduct contrary to ER 404(b).

2. The trial court erred in allowing an expert DNA analyst to testify about the results of DNA tests that were conducted by other people who did not testify.

3. Mr. Jenks was denied effective assistance of counsel.

4. Mr. Jenks was denied a fair trial.

Issues Pertaining to Assignments of Error

1. Does a trial court abuse its discretion in allowing evidence of prior bad acts contrary to ER 404(b)?

2. Is the Sixth Amendment Confrontation Clause violated when an expert witness's testimony is based on the work of others who did not testify and that work was done for the purpose of criminal prosecution?

3. Is it improper under ER 602, ER 701, or ER 702 to allow a witness to testify as to the identity of a person in a video when such opinion evidence tends only to establish a fact which an average juror could decide for his or her self from viewing the video?

4. Was Mr. Jenks denied effective assistance of counsel when his attorney failed to object to Detective Gilmore's opinion testimony and the DNA expert witness' testimony?

5. Did cumulative error deprive Mr. Jenks of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22?

B. STATEMENT OF THE CASE

On December 9, 2008, James Berg was clerking at the Zip Trip store on West Northwest Boulevard, Spokane, Washington. RP 32–33. A person with a bandana covering his face and possibly a hood covering his hair appeared and stuck out what appeared to be a gun, telling Berg to lie on the floor face down. RP 33, 35–36. Berg complied, and the male left within two to five minutes. RP 34, 47. Berg thought the male was close to his own height, 5'8". RP 34. Berg could tell the male was not Black, but could not identify the suspect and his voice was unfamiliar. RP 36–37.

The manager of the store, Bruce Denend, heard the command and stayed in the back office. RP 44–45. Watching the surveillance tapes being made from various cameras set up throughout the store, he saw the suspect grab two 18-packs of Budweiser beer from the cooler and take some cigarettes from behind the counter. RP 45–46. A customer, who opened the door just as the suspect began to leave, stepped aside and let

him go by. The customer did not recognize the male. RP 39–42. The customer thought the male was close to his own height, 5'11". RP 42. At a distance, Denend followed the suspect along a hedge of bushes and over the top could see the male appear to take off his sweatshirt next to some parked cars. The male got into a car and drove away from the parking lot. RP 47–48, 55–58.

Police arrived. RP 93–94. They recovered a maroon shirt from under a car in the area, which Denend thought was the clothing he had seen discarded. They found a white doo rag nearby. RP 48, 95–96. Denend gave a copy of the surveillance tape to police. RP 49. The tape showed a male with a doo rag covering his hair, a cloth bandana over his lower face, and wearing a maroon colored shirt, and pants and shoes. Exhibit 4. About one week later, Denend reviewed surveillance tapes from an apparent shoplifting incident that occurred in the store a month earlier, on November 8, 2008. Denend thought the person in that earlier incident might be the same male involved in the current robbery, and gave a copy of it to police. RP 49–50. Denend recognized the person in the earlier incident as a former regular customer. RP 53. The tape of the earlier incident showed a male with long blond hair gathered in a ponytail,

no covering over his face and also wearing a shirt, pants and shoes. Exhibit 3.

Spokane Police Department Detective David Gilmorewas told by another officer that the suspect in the tape of the earlier incident was the defendant, Alan Dale Jenks. RP 102, 105. After comparing the two tapes and reviewing some other photos, Det. Gilmore concluded the male involved in both incidents was Mr. Jenks. RP 105–06. Mr. Jenks lived about four blocks from the Zip Trip store. RP 107. In late December 2008 the detective went to the house and left a message with a family member there that he was conducting a criminal investigation and wanted to talk to Mr. Jenks. RP 107–08. Mr. Jenks thereafter left a message saying he had heard that Det. Gilmore wanted to talk with him. RP 108.

On January 19, 2009, Det. Gilmore went to Mr. Jenks' house. RP 108. Mr. Jenks' hair was shaved off. RP 110. In the interview, Mr. Jenks admitted he was the person who was shoplifting in the earlier surveillance tape but denied having anything to do with the December 2008 robbery. When asked why he had shaved off his hair, Mr. Jenks said he was just tired of taking care of his long hair. RP 111.

Police submitted the maroon shirt and doo rag for DNA testing. RP 114. After the lab found biological matter on the clothing, Det.

Gilmore obtained consent and took a buccal swab from Mr. Jenks for a DNA reference sample. RP 114–18. Police thereafter charged Mr. Jenks with first degree robbery based on the December 9, 2008 incident. CP 1.

Admissibility of videotape of prior uncharged shoplifting and related testimony.

Prior to the first trial, the State sought to admit the videotape of the earlier shoplifting incident under ER 404(b). CP 8–13. The State argued the tape was admissible primarily under the identity exception:

> Here one of the main issues, and the issue, I think is identification. The surveillance video from November 8th shows the defendant without any concealment around his face; it shows his height; it shows his facial characteristics; it shows his mannerism, how he carries himself; it shows his hair length. It shows him under ordinary circumstances.
>
> In the [December 9] video … you have a situation where the suspect robber now has a bandana around his face, but it is clear you see that the individual has long hair, you see that the individual is of the same or very close to similar height [to] the defendant as he appeared without a bandana on his face. It shows that he is familiar with that particular store; that he's not a stranger to that particular store from the November 8, 2008 video. It shows his mannerisms. It shows his dress.
>
> And since the issue, again, will focus on the issue of identity – as the main umbrella – but all those other prongs, absence of mistake, knowledge of the place – clearly are … all acceptable reasons for the admissibility of the video.

RP 204–05. The State simply stated the "the probative value clearly outweighs any prejudice in this particular case." RP 205. The State observed there was "no way if you looked at the December video to say

that was the defendant", and also noted that the earlier tape was a "key component" in Det. Gilmore's investigation and the trail would not have led to Mr. Jenks in the absence of the detective's being able to compare the two videos. RP 205, 208.

Defense counsel objected, noting the incidents were entirely unrelated transactions with no indication they were connected or part of some common scheme or plan; the video of the December robbery offered its own opportunity for identification; the fact that Mr. Jenks had been in the store before does not necessarily make it more likely than not that he may have been in the store a second time, and the similarity of theft and robbery crimes created a very high risk of unfair prejudice. RP 206–07. Counsel suggested that if the court were to allow admission of the earlier video, it should exclude any testimony and/or reference to possible shoplifting. RP 207.

The trial court determined the earlier videotape was relevant because the main purpose of introducing it was to establish Mr. Jenks' identity as the person who committed the present crime. RP 211–12. The court concluded the video had probative value that outweighed any danger of unfair prejudice (which it did not discuss):

> The probative side is … how closely or directly the misconduct tends to prove the crime charged. If the misconduct is remote in

> terms of time or other considerations, then, you, we get less probative.
>
> Here we have this act, again, within one month, same store, again, same again type of act, removal of property without consent of the owner, in that general category of a crime. So it seems to me to be extremely probative in the sense of finding identity.

RP 212–13. The court allowed admission of the earlier video, saying no mention was to be made of shoplifting; the State could simply establish that Mr. Jenks was the person in the video and the video could be shown to the jury. RP 213.

The jury was deadlocked and unable to reach a verdict in the first trial, and a mistrial was declared. RP 4. In a CrR 3.5 hearing held prior to the second trial, the State elicited testimony from Det. Gilmore that Mr. Jenks admitted being in the Zip Trip store on November 8, 2008 and that he had shoplifted some beer. RP 10–11. The detective said the surveillance tapes of November 8, 2008, showed two beer thefts about an hour apart, that Mr. Jenks was involved in both, and that it depicted Mr. Jenks and a second person grabbing beer and running outside with the beer. RP 10–11. The December 9, 2008 video is approximately two minutes long; the November 8, 2008 video is about eight to ten minutes long. RP 209. The State renewed its ER 404(b) motion to admit the surveillance video from the earlier shoplift incident. Summarily relying on its prior ER 404(b) and ER 403 analysis, the trial court again allowed

admission under ER 404(b), but excluded any mention that Mr. Jenks admitted to taking some beer. RP 19– 25.

The surveillance tapes from November 8, 2008 (Exhibit 3) and December 9, 2008 (Exhibit 4) were played for the jury. RP 49–52. During trial, Detective Gilmore testified he compared the two video tapes and photos of Mr. Jenks and Mr. Jenk's brother. Based on his perception of similar stature, height, pants and shoes, and their movements within the store, the detective concluded the male shown in the later video was Mr. Jenks. RP 105–107. The detective testified that "[t]he big difference between what you could see very clearly in the November 8th video and the January 19th talk on the front porch was that [Mr. Jenks'] head was shaved; there was no ponytail anymore. Still had the goatee." RP 110. When asked, Mr. Jenks said he was about 5'4" tall. RP 111. Detective Gilmore testified he could tell the male in the earlier video was "definitely on the short end of adult white males," "I don't care if he's 5'2" or 5'6" ", and "when the person who is on the robbery video on December 9th comes in, it appears to be the same-sized person, the stature is the same, and some of the clothing looks the same." RP 112. Denend had described the robbery suspect as a male in his 20's with short blond hair. Detective Gilmore later testified that description did not match the person shown

committing the robbery. RP 56, 109. Mr. Jenks denied that he committed the robbery. RP 112–14.

Testimony regarding DNA results.

The only evidence linking the DNA profile to Mr. Jenks was testimony given by Lorraine Heath, a supervising forensic scientist in the DNA section of the Washington State Patrol Crime Laboratory. RP 60, 60–87. To use DNA to identify somebody, a reference sample taken from an individual of interest is compared with a profile obtained from items from the scene. RP 64–65. Robin Harper, who no longer works at the lab and could not be contacted for purposes of testifying at this trial, was the only person who conducted the reference sample DNA profile from Mr. Jenks' buccal swab. RP 64–65, 68, 76. For purposes of this trial, Ms. Heath re-tested the sweatshirt and doo rag to obtain a wearer DNA profile. RP 65–67.

The lab has strict policies and guidelines to follow when processing evidence samples and evidence so as to avoid contamination, and Ms. Heath testified she followed them in the work she did in this case. RP 67–68, 76–77. Ms. Heath determined that the DNA profile she obtained from the doo rag was consistent with DNA from Ms. Harper's reference sample profile of Mr. Jenks and at least two other people. Based

on the U.S. population, it is estimated that one in four individuals is a potential contributor to the doo rag profile. RP 70. The DNA profile she obtained from the sweatshirt was consistent with DNA from Ms. Harper's reference sample profile of Mr. Jenks and at least one other person as significant contributors, as well as with one other person as a trace contributor. Based on the U.S. population, it is estimated that one in 630,000 individuals is a potential significant contributor to the sweatshirt profile. RP 72. Identical twins will have identical DNA profiles. RP 84. A given profile will have more similarities with DNA of parents and siblings than with DNA of people who are not family members. RP 84–85. Testimony showed that Mr. Jenks had a father and at least one brother. RP 104–06. Over defense objection, Detective Gilmore testified that he had reviewed Mr. Jenks' birth record and determined that he does not have an identical twin brother. RP 117–19.

The jury found Mr. Jenks guilty as charged of first-degree robbery. RP 164; CP 44. The court imposed a standard range sentence of 60 months and an 18-month period of community custody. RP 179; CP 47–49. This appeal followed. CP 57.

C. ARGUMENT

1. The trial court abused its discretion in allowing evidence of other bad acts contrary to ER 404(b).[1]

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.

Rule 404(b) thus provides that prior misconduct is not admissible to show that a defendant is a "criminal type", and is thus likely to have committed the crime for which he or she is presently charged. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). However, crimes or misconduct other than the acts charged may be admitted for a variety of other reasons including the proving of a scheme or plan of which the offense charged is a manifestation. See, e.g., 5 K. Tegland, Wash.Prac., Evidence §§ 114, 117, at 383, 404 (3d ed. 1989). When the very doing of the act charged is still to be proved, one of the facts that may be introduced into evidence is the person's design or plan to do it. 2 John H. Wigmore, Evidence § 304, at 249 (James H. Chadbourn rev. ed. 1979). If the

[1] Assignment of Error No. 1, 4.

evidence is offered for a legitimate purpose, then the exclusion provision of rule 404(b) does not apply. Lough, 125 Wn.2d at 853, 889 P.2d 487.

Besides being relevant and necessary to purposes other than proving character or propensity, a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice. State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987) (*citing* 5 K. Tegland, Wash.Prac., Evidence, Comment 404, at 258 (2d ed. 1982)). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

Thus, to admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Dennison, 115 Wn.2d at 628, 801 P.2d 193.

Herein, the "other act" at issue is the surveillance video tape portraying the earlier shoplifting incident of November 8, 2008 (Exhibit 3) that was not prosecuted and was not related to the charged crime of robbery. The trial court excluded any testimony referring to the incident as "shoplifting/theft" or to Mr. Jenks' admission that he committed it, but did not prohibit evidence that Mr. Jenks admitted he was the person portrayed in the video. However, the court's ruling failed to insulate the jury from the harmful prejudicial nature of this bad-character evidence.

Evidence of other misconduct may be admissible to prove identity, assuming identity is actually at issue, and then only when the evidence, in some tangible way, links the defendant to the crime with which the defendant is charged. 5D K. Tegland, Wash. Prac., Handbook Wash. Evid. ER 404(b), Sec. (11) (2010–11 ed.). Admissibility to show identity and admissibility to show a unique modus operandi are two ways of saying

the same thing, and evidence of prior misconduct is admissible on the issue of identity only if it demonstrates a unique *modus operandi*. State v. Russell, 125 Wn.2d 24, 66–67, 882 P.2d 747 (1994); *see also* State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002).

Evidence of other crimes is relevant on the issue of identity only if the method employed in the commission of both crimes is "so unique" that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged. State v. Hernandez, 58 Wn. App. 793, 798–99, 794 P.2d 1327 (1990) (citation omitted); *see* State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984) (evidence of prior robbery admissible under ER 404(b) where crimes committed 3 weeks apart where both involved forcible entry into family residences by three persons dressed in army fatigues (though not the same three) and where both involved firearms and similar use of a shotgun); *see also* State v. Lynch, 58 Wn. App. 83, 792 P.2d 167 (two prior robberies admissible where all crimes involved wearing a brown wig, similar time of day, a red 10-speed bicycle, display of a gun tucked in a waistband, and theft of car keys from victims), *rev. denied*, 115 Wn.2d 1020, 802 P.2d 126 (1990).

In Hernandez, the reviewing court considered whether the trial

court should have severed three robbery charges for trial. The court rejected the State's argument that evidence of the robberies was cross-admissible and therefore reduced any prejudice incurred by denial of the motion to sever.

> Here, there is no evidence that the methods employed in these robberies was unique. While the stores that were robbed were similar, there was no showing that the robberies were committed in an unusual or unique manner. In each case, the robber entered the store, pulled a gun, asked for the money and fled upon receiving it. There is nothing about this method of robbery that suggests it is highly probable that the same robber committed all three crimes. We conclude, therefore, that evidence of any one of the charges here would not have been admissible in a separate trial on either of the other two charges. Consequently, cross-admissibility may not be considered as a "prejudice-mitigating" factor.

Hernandez, 58 Wn. App. at 799.

Here, identity of the robbery suspect was at issue because Mr. Jenks denied having any knowledge of the robbery. However, as in Hernandez, there was nothing tangible and unique about the commission of the shoplift and robbery crimes that created a high probability that Mr. Jenks committed both. The robbery currently charged involved an armed and masked suspect, who confronted the cashier and threatened an incoming customer,[2] and fled with cases of beer. In contrast, the uncharged shoplift incident involved no disguise, no gun, no confrontation

[2] RP 40.

and was committed simply because Mr. Jenks was drunk.[3]

The facts that Detective Gilmore used the earlier surveillance tape in his investigation and that it led him to Mr. Jenks and ultimately to a DNA reference sample is irrelevant to the ER 404(b) analysis. The conduct depicted in the video does not fall under any of the categories for admissibility listed in ER 404(b) nor has the State shown a legitimate alternate basis. Any probative value of the conduct under ER 403 is minimal. Allowing the jury to see the eight-minute video of what was obviously a shoplift in progress together with testimony that Mr. Jenks admitted he was the person in the video was extremely prejudicial, and served only to show that he had a propensity to commit theft and likely committed the current crime. Evidence of this nature is inadmissible under ER 404(b). Therefore, the trial court abused its discretion in admitting the November 8, 2008 surveillance video tape evidence.

[3] RP 10.

2. The Sixth Amendment Confrontation Clause was violated when the DNA expert witness's testimony was based in part on the work of another who did not testify, and that work was done for the purpose of criminal prosecution.[4]

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is made binding on the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." In State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. Id. at 391-92, 128 P.3d 87 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)). An alleged violation of the Confrontation Clause is subject to de novo review. Lilly

[4] Assignment of Error 2, 4.

v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

Until the Supreme Court decided Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a 'particularized guarantee of trustworthiness.' Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by Crawford, 124 S. Ct. 1371 (2004).

Under Crawford, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford, 124 S. Ct. at 1374. But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. Crawford, 124 S. Ct. at 1374. After Crawford, a state's evidence rules no longer govern confrontation clause questions. See United States v. Cromer, 389 F.3d 662, 679 (6th Cir.2004).

The U.S. Supreme Court applied the Crawford analysis to statements prepared by expert, forensic witnesses in Melendez-Diaz v.

Massachussetts, -- U.S. --, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). It found that the certificate of a laboratory analyst asserting that the tested substance was cocaine was a testimonial statement. Id., 129 S. Ct. 2527, 2540. It rejected various arguments that the statements of scientific experts should be treated differently from the statements of other witnesses. Id. at 2532-42. Consequently, the analysts were "witnesses" for confrontation clause purposes and Melendez-Diaz had the right to confront them. *Id*. at 2532. Because he was not given this opportunity, the evidence should not have been admitted. Id. at 2542. The Court concluded, "The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." Id.

The issue in this case is whether the reasoning of Melendez-Diaz applies when, as here, a live expert witness testifies at trial but it is not the same one who performed all of the forensic analysis. In State v. Lui, 153 Wn. App. 304, 221 P. 3d 948 (Division II, 2009)[5], the Court determined the decision in Melendez-Diaz, "does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product." Lui, 153 Wn. App. at 318-19. The Court relied for persuasive precedent on a

[5] Review accepted, 168 Wn.2d 1018, 228 P.3d 17 (March 30, 2010, No. 84045-8). The case was argued 9/14/10 and is pending.

decision of an intermediate appellate court in California[6] and two decisions from Illinois courts. Id. at 323-24. It recognized that "some courts have reached contrary results." Id. at 325, n.21.

In fact, many courts have held – both before and after the Melendez-Diaz ruling, that the sort of testimony presented in this case and in Lui violates the Confrontation Clause. Courts reaching that conclusion prior to Melendez-Diaz include: McMurrar v. Indiana, 905 N.E.2d 527 (2009) (quality assurance manager of lab testified to drug test performed by analyst); Maine v. Mangos, 957 A.2d 89, 2008 ME 150 (2008) (confrontation violation where DNA lab supervisor testified based on work of analyst); United States v. Mejia, 545 F.3d 179, 198-99 (2d Cir. 2008) (gang expert violated confrontation clause by basing opinion on statements of others); Florida v. Johnson, 982 So.2d 672 (Fla., 2008) (laboratory supervisor testified about results of a drug test performed by a subordinate); Roberts v. United States, 916 A.2d 922 (D.C. 2007) (DNA expert gave opinions regarding probability of a match based on work of analyst who tested samples); State v. Hopkins, 134 Wn. App. 780, 142 P.3d 1104 (2006), *rev. denied*, 160 Wn.2d 1020, 163 P.3d 793 (2007)

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[6] California v. Rutterschmidt, 176 Cal.App.4th 1047, 98 Cal.Rptr.3d 390 (2009), relied on by the Lui Court, may no longer be cited as authority under California's rules because the California Supreme Court granted review in California v. Rutterschmidt, -- Cal.Rptr.3d -- , 2009 WL 4795343 (Cal. Dec 02, 2009) (No. S176213).

(discussed below); New York v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2005), *cert. denied*, 547 U.S. 1159, 126 S.Ct. 2293, 164 L.Ed.2d 834 (2006) (psychiatrist based her opinion regarding defendant's sanity on interviews with third parties who had contact with defendant); Michigan v. Lonsby, 268 Mich. App. 375, 707 N.W.2d 610 (2005) (crime laboratory serologist's testimony that stain on bathing suit was semen violated Crawford because it was based on work of another serologist from same laboratory); Smith v. Alabama, 898 So.2d 907 (2004) (testimony of medical examiner violated Confrontation Clause because it was based in part on the work of a pathologist who actually performed autopsy).

Favorable cases decided after Melendez-Diaz include: Michigan v. Payne, 285 Mich. App. 181, 774 N.W.2d 714 (2009) (Confrontation Clause violated when witness who testified about DNA testing was not the analyst who performed the tests); North Carolina v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (2009) (chief medical examiner improperly based conclusions on work of pathologist who performed autopsy and dentist who identified victim from remains); North Carolina v. Galindo, 683 S.E. 2d 785 (N.C. App. 2009) (chemist improperly gave opinion regarding weight and nature of drugs when he relied on report of analyst who

actually performed tests); People v. Dendel, -- N.W.2d -- , 2010 WL 3385552 (Mich.App. Aug. 24, 2010) (Confrontation Clause violated when laboratory supervisor testified to toxicology tests performed by subordinates); Commonwealth v. Durand, 457 Mass. 574, 931 N.E.2d 950 (Mass. Aug. 19, 2010) (Confrontation Clause violated where doctor's testimony included observations made by non-testifying medical examiner who actually performed autopsy); Vega v. State, 236 P.3d 632, 2010 WL 3184312 (Nev. Aug. 12, 2010) (Doctor's testimony relating observations and findings of sexual assault nurse violated Confrontation Clause); State v. Craven, 696 S.E.2d 750, 2010 WL 2814417 (N.C.App. July 20, 2010) (Confrontation Clause violated when forensic chemist testified based on work of other, non-testifying chemists); Gardner v. United States, 999 A.2d 55, 2010 WL 2679339 (D.C. July 8, 2010) (Testimony by DNA expert from Orchid Cellmark violated Confrontation Clause where it was based on work of non-testifying analysts).

The U.S. Supreme Court's resolution of the petition for a writ of certiorari in Ohio v. Crager, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), most notably demonstrates the Lui court's misinterpretation of Melendez-Diaz. In Crager, as here, the State introduced DNA evidence through an expert witness. Crager, 116 Ohio St.3d at 371. The analyst who actually

performed the testing was not produced because she was on maternity leave. Id. The testifying analyst performed a "technical review" of the other's work, which "involved reviewing her notes, the DNA profiles she generated, her conclusions, and the final report." Id. at 373. He came to an independent opinion regarding the conclusions. *Id.* The Ohio Supreme Court found that, because the testifying analyst had reached his own conclusions, he conveyed any "testimonial" aspects of the DNA examination. Id. at 384. There was no confrontation violation in the Court's view because the testifying analyst could be questioned about "the procedures that were performed, the test results, and his expert opinion about the conclusions to be drawn from the DNA reports." Id. (citations and internal quotations omitted).

On June 29, 2009, four days after the opinion issued in Melendez-Diaz, the Supreme Court issued the following order in Crager:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009).

Crager v. Ohio, -- U.S. --, 129 S.Ct. 2856, 174 L.Ed.2d 598 (2009). The Supreme Court will issue such an order only when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a

premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." Lawrence v. Chater, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996).

On remand from the U.S. Supreme Court, the Ohio Supreme Court reversed Crager's conviction and ordered "a new trial consistent with Melendez-Diaz v. Massachusetts." Ohio v. Crager, 123 Ohio St.3d 1210, 914 N.E.2d 1055 (2009). The facts in this case are indistinguishable from Crager. This Court should therefore grant Mr. Jenks the same relief that Crager received.

The decision in Lui conflicts with the very recent decision in Bullcoming v. New Mexico, --- U.S. ---, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

> In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way. See Melendez–Diaz, 557 U.S., at ——, 129 S.Ct., at 2545 (KENNEDY, J., dissenting) (Court's holding means "the ... analyst who must testify is the person who signed the certificate").

Bullcoming, 131 S.Ct. at 2716.

Furthermore, the decision in Lui also conflicts with a prior decision by Court of Appeals, Division II. In State v. Hopkins, supra, Division II recognized that the Confrontation Clause prohibits one medical

expert from testifying in place of another. In that case, the child victim of sexual abuse was examined by a nurse practitioner, who prepared a report. Her supervising doctor then testified at trial, relying on the nurse's report. Hopkins, 134 Wn. App. at 784. The Court accepted that the victim's statements to the nurse fit within the hearsay exception of ER 803 (a)(4) (statements for the purpose of medical diagnosis), and the nurse's report could fit within the exception under RCW 5.45.020 (business records) if the proper foundation were laid. Id. at 788-89. Nevertheless, the doctor's testimony violated the Confrontation Clause. Hopkins, 134 Wn. App. at 790-91. The nurse's report was "testimonial" because she would have understood that it would be available for use at a later trial. Id., citing Crawford, 541 U.S. at 51-52.

The situation in the present case is indistinguishable from Hopkins. Lorraine Heath did not perform the reference sample DNA test herself. In order to compare the reference sample DNA profile with the wearer sample DNA profiles, Ms. Heath had to rely entirely on the reference sample results prepared by Robin Harper—the person who actually did the reference sample DNA profile. Ms. Harper no longer works for the Washington State Patrol Crime Laboratory and did not testify in this case. RP 64–65, 68, 70, 72, 76. Ms. Harper's reference sample DNA profile

result was clearly testimonial because the profile was prepared specifically for use at trial. Therefore, Ms. Heath's testimony based upon it violated the Confrontation Clause.[7]

"Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis." State v. Jasper, 158 Wn. App. 518, 245 P.3d 228, 237 (2010) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). It is the State's burden to prove harmless error. Id. (citing State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "'A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.'" Id. (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). "A conviction should be reversed 'where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.'" Id. (emphasis added) (quoting Guloy, 104 Wn.2d at 426).

The admission of the reference sample DNA profile evidence was not harmless. There is a reasonable possibility that the use of the evidence generated by an absent forensic scientist and resulting testimony by Ms.

[7] The undersigned counsel thanks David B. Zuckerman, Attorney at Law and counsel for Mr. Lui on appeal, for his contribution to the research and writing of this issue.

Heath as to her conclusions based upon a profile attributed to Mr. Jenks was necessary for the jury to find Mr. Jenks guilty of the robbery. *See* Jasper, 158 Wn. App. 518, 245 P.3d at 237 (quoting Guloy, 104 Wn.2d at 426). The DNA statistics based upon a comparison with Mr. Jenks profile was the primary evidence that linked Mr. Jenks to the scene of the robbery. The error was not harmless, and Mr. Jenks' conviction for first degree robbery must be reversed.

3. Mr. Jenks was denied effective assistance of counsel when his attorney failed to object to Detective Gilmore's opinion testimony and the DNA expert witness' testimony.[8]

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In Strickland, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Deficient

[8] Assignment of Error 3, 4.

performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id., citing Strickland, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the Strickland test has been met. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). A reviewing court considers the representation in light of the entire record and presume that it is within the broad range of reasonable professional assistance. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (citing State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). The presumption of

effectiveness fails, however, if there is no legitimate tactical explanation for counsel's actions. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

a. Failure to object to opinion evidence of identity. Detective Gilmore's identification testimony that Mr. Jenks was the suspect depicted in the robbery video based on his comparison of both videos as to mannerisms, hair, clothing and height was improperly admitted in violation of ER 602 (personal knowledge), ER 701 (lay opinion testimony), and ER 702 (expert witness foundation). State v. Jamison, 93 Wn.2d 2d 794, 613 P.2d 776 (1980), was a case tried prior to Washington's adoption of the Rules of Evidence. It involved photographs and testimony by counselors who knew the defendant and that he was the person depicted in photographs of a robbery. 93 Wn.2d 2d at 799. The court concluded the testimony invaded the province of the jury since there was no showing of special need for the testimony. Id.

State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994), *aff'd sub nom. on other grounds by* State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996), involved a prosecution after the Rules of Evidence were adopted. There, a police officer who was more familiar than the jury with the defendant was permitted to identify him on a videotape shown the jury. 76

Wn. App. at 190. The court noted there was significant federal authority permitting identification testimony under ER 701 as long as the lay witness was more likely to correctly identify the person in the photograph than the jury was. Id. at 190–91. In Hardy, the officer knew the defendant and had seen him in motion before, something the jury had not. Accordingly, it was proper to allow the identification testimony. Id. at 191.

In contrast to Hardy, there was no evidence here that Detective Gilmore knew Mr. Jenks or had seen him in motion before. ER 602 prohibits a witness from testifying unless he has personal knowledge of the matter. In the objectionable testimony, the detective is not testifying as an expert but rather as a lay witness identifying for the jury what they could identify for themselves by their viewing of the video. ER 701 limits a witness' testimony, other than from an expert, to only those opinions or inferences which are based upon the perception of the witness and helpful to the jury. The foundation for such lay witness testimony requires that the witness is familiar with the person and explains how he became familiar. E. Imwinkelried, *Evidentiary Foundations,* Ch. 9, p. 220 (1980 2d. ed.). Detective Gilmore had no such familiarity with Mr. Jenks. ER 702 allows expert testimony from a witness who has specialized knowledge or

training, but only if the testimony will assist the trier of fact. Here, the identifying "facts" from the video tapes included mannerisms, pants, shoes, facial features, hair length and color, and height—certainly not the type of facts requiring specialized knowledge to interpret. The jury, just as well as Detective Gilmore, could observe Mr. Jenks in the courtroom and look at the video tapes (as discussed above, the earlier video should never have been shown to the jury) and make a decision themselves whether the individual depicted was indeed Mr. Jenks.

Defense counsel was ineffective for not objecting to Detective Gilmore's opinion testimony regarding identity. Identity was the sole issue in this case and the detective had no greater expertise as to the simple facts depicted in the video(s) than that available to the trier of fact. There was no tactical explanation for counsel not to object. Furthermore, the failure to object was not harmless. The eyewitnesses to the event could not recognize the robbery suspect and they had differing perceptions of the suspect's appearance. RP 34, 36–37, 39–42. Mr. Jenks denied any involvement. Detective Gilmore testified exclusively as to the persons observed in the two videos, and was an "expert" in the jury's mind. He was allowed to testify one of the eyewitness' recollection of the suspect's height was just plain wrong and that he believed Mr. Jenks had committed

the robbery. By doing so, he testified to an ultimate fact in the prosecution and thereby invaded the sacred province of the jury to view the surveillance videos and together with all the evidence, decide whether the State had proved Mr. Jenks committed the crime of robbery.

b. Failure to object to opinion evidence of non-identity. Detective Gilmore was allowed to testify without objection that after comparing a photo of Mr. Jenks' brother to the suspects shown in the two videos, he concluded Mr. Jenks and not his brother was the robbery suspect. RP 105–107. Ms. Heath had testified that family members would very likely have more commonality in their DNA profiles than members of the general public. RP 84–85.

Defense counsel was ineffective for not objecting to the detective's opinion testimony regarding non-identity. For the same reasons set forth in the preceding section, there was no foundational basis to allow the testimony under ER 602, ER 701 and ER 702. The record discloses no prior familiarity by Detective Gilmore with Mr. Jenks' brother, and the jury could just as easily have compared a photo with the suspects depicted in the videos. The statistics given by Ms. Heath (1 in 4, 1 in 630,000) were comparatively low as far as pinpointing a DNA profile match between Mr. Jenks and the two items collected near the scene. There was

no tactical reason for counsel not to object, and thereby let the jury make the comparison provided the State laid a foundation for submitting the brother's photo into evidence.

The failure to object was not harmless. There were no positive identifications and the eyewitnesses differed in their perceptions of the robbery suspect's appearance. As argued *supra*, the video tape of the earlier shoplift incident was not admissible under ER 404(b). It is possible that the jury could have compared the photo to the video of the robbery suspect and to Mr. Jenks there in the courtroom, and determined in their collective mind whether the brother, Mr. Jenks or even someone else was depicted in the video. Instead, the jury was shown an extremely prejudicial video tape and Detective Gilmore was allowed to tell the jury he believed Mr. Jenks committed the robbery—and not Mr. Jenks' brother or anyone else. The opinion testimony that someone else did not commit the robbery implicated an ultimate fact in the prosecution and invaded the province of the trier of fact to alone determine whether the State had proved Mr. Jenks committed the crime of robbery.

c. Failure to object to testimony in violation of the Confrontation Clause. Here, because defense counsel failed to object to testimony in violation of the Confrontation Clause, the State may argue that Mr. Jenks

waived his confrontation rights. *See* Melendez-Diaz, 129 S.Ct. at 2534 n.3.[9] Defense counsel was ineffective for not asserting Mr. Jenks' right to confront the forensic scientist who created his reference sample DNA profile. The identity of the robbery suspect was the only issue before the jury. Counsel had already unsuccessfully challenged admission of the earlier shoplift video, leaving the jury open to deciding, "well, he was a bad boy then so he must be one now." Ms. Heath's testimony that 1 in 4 people may have worn the doo rag, or even that 1 in 630,000 people may have worn the maroon shirt, did not involve tremendously damning and incriminating statistics in the world of DNA identification analysis. Mr. Jenks' DNA profile was the underlying linchpin in the analysis, without which no comparison could be made to items at the scene. There was no logical or tactical explanation for counsel *not* to make a Crawford challenge and seek to prevent the reference sample DNA profile (and thus all of the State's expert testimony about DNA) from being admitted before the jury. Counsel's failure to do so clearly satisfies the first prong of Strickland, *supra,* because there was no conceivable strategic or tactical advantage or motive in failing to eliminate some the strongest evidence

[9] "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence."

against your client, in a case with little admissible evidence in the first place.

The second Strickland prong is also satisfied. If defense counsel had challenged this aspect of Ms. Heath's testimony, the DNA evidence would likely have all been excluded. There is a reasonable probability that, but for counsel's errors the result of the trial would have been different. Therefore, Mr. Jenks was denied effective assistance of counsel.

4. Cumulative error deprived Mr. Jenks of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22.[10]

Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors "deny a defendant a fair trial." State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997).

[10] Assignment of error 1, 2, 3, 4.

Mr. Jenks did not receive a fair trial. The State was well aware of the weakness of identification in its case, and used the substance of the evidentiary and constitutional errors to bolster its case before the jury. Mr. Jenks own counsel failed to provide effective representation on key points. There is reasonable doubt that a jury would have reached the same result in absence of all of these errors. Reversal is required.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction for first degree robbery.

Respectfully submitted on October 3, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 3, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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