SUPREME COURT NO. 93019-6
COURT OF APPEALS NO. 33169-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAMON MORFIN, JR.,

Petitioner.

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

The Honorable Alexander c. Ekstrom, Judge

PETITION FOR REVIEW

DANA M. NELSON
Attorney for Petitioner

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Ramon Morfin asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Morfin, COA No. 33169-5-III, filed July 7, 2016, and the court's Order Denying Motion for Reconsideration, filed August 16, attached as Appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Where the only issue in the case was identity, did Morfin receive ineffective assistance of counsel when his attorney failed to move to exclude, or in any way object to, the testimony of two police detectives identifying Morfin as the shooter depicted in a blurry surveillance video, where neither detective had sufficient prior contact with Morfin to more correctly identify him than the fact-finder?

2. Did Morfin likewise receive ineffective assistance of counsel when his attorney failed to move to exclude, or in any way object to, the testimony of one of the detectives that he subsequently interviewed an eyewitness – who did not testify at trial – who confirmed Morfin was the shooter?

D. STATEMENT OF THE CASE

Petitioner Ramon Morfin was convicted following a bench trial of two counts of first degree assault for a shooting that took place in the parking lot of a Motel 6 in Pasco. CP 51-52, 17-30. The only issue in the case was the identity of the shooter. RP 160, 163. The state presented no eyewitness identifying Morfin as the shooter. RP 63, 80. The police did not recover the gun and therefore had no ballistics evidence. RP 53, 112.

Instead, the state presented a blurry surveillance video from the motel that, at the time of the shooting, depicted an indiscernible group of 4-6 people gathered near a Mercedes Benz in the parking lot. RP 41-42, 133. The video depicted one of these individuals – with indiscernible facial features – leaning over the car, followed by a muzzle flash emanating from what appeared to be the end of the person's extended arm. RP 18, 44.

With no objection from defense counsel, the prosecutor elicited testimony from detectives Kirk Nebeker and Bradford Gregory that they were able to identify Morfin as the shooter in the video, based on his "build" and the clothing he wore during a police interview after the shooting. RP 18, 36, 49, 128-29.

Again, with no objection from defense counsel, the prosecutor also elicited from Nebeker that he subsequently interviewed an eyewitness who confirmed Morfin was the shooter. RP 25, 62.

1. Detective Kirk Nebeker's Testimony

Detective Kirk Nebeker responded to the Motel 6 after the shooting. When he arrived, patrol officers had identified three men in room 120 as possible suspects, including Morin, Jose Segura and David Martinez. RP 14, 27-28, 54, 103. When Nebeker interviewed Morfin, he denied any involvement in the shooting. RP 15.

Nebeker obtained the motel's surveillance video and watched it early the next morning. RP 17, 25. At trial, Nebeker testified Morfin was wearing a long-sleeved, gray shirt and dark shorts that night when Nebeker interviewed him. RP 16. According to Nebeker, no one else was wearing that color combination. RP 16, 27, 33-35.

On direct, Nebeker identified exhibit 1 as an accurate copy of the surveillance video from the motel. RP 17. In describing the footage of the shooting (before it was played), Nebeker testified: "And you can see who I identify as Mr. Morfin lean over the car, and you can see the fire from the muzzle as the shots go out." RP 18.

While the video was playing, Nebeker again identified Morfin as the shooter:

> You can see one of those persons starting to lean over the top of the car.
>
> Those are the blasts from the muzzle of the gun. And he's wearing the same attire as Mr. Morfin when I interviewed him.
>
> And then this is who I believe is Manuel Ramirez, who also had long dark shorts, but he had a dark top, and he comes back and moves the black Mercedes. And you see a second ago the white car going southbound with the trunk open on Oregon Avenue.

RP 23-24. Nebeker testified: "it wasn't until I saw that video that I saw it was Ramon [Morfin], and he had left." RP 25.

Nebeker interviewed Manuel Ramirez, whom Nebeker identified as moving the Mercedes. RP 25. The prosecutor ended Nebeker's direct with the following exchange about that interview:

> Q. Did you get a chance to interview Manuel -- ?
>
> A. Ramirez?
>
> Q. Yes.
>
> A. Yes, I did.
>
> Q. And as a result of that interview did that confirm your belief that it was Mr. Morfin?
>
> A. It did.

RP 25; see also RP 62 (same on further redirect examination).

On cross, defense counsel elicited that Nebeker recognized Morfin from prior contacts when speaking to him that night. RP 30.

Nebeker acknowledged the video was blurry and that the facial features of the "[f]our to five, maybe six" individuals around the car were indiscernible. RP 41-42. But as Nebeker claimed in his report, he identified Morfin as the shooter based on the clothing he wore, his "body build" and hairstyle:

> A. Ok. "However, I am able to view the clothing, and I am able to see that the shooter who had the gun and appeared to be the only one to have a gun was wearing the same clothing and the same body build and appeared to have the same hair style as Ramon Morfin, who I had interviewed earlier.

RP 36.

On redirect, Nebeker expanded on his prior contacts with Morfin. RP 57. Eleven years earlier, Morfin had run from him during "a field contact in Memorial Park." RP 57. Nebeker claimed he remembered Morfin "ever since." RP 57. Although Nebeker claimed to have other contacts with Morfin, he acknowledged there were few actual "face-to-face" contacts and that those few contacts were separated by "several years where I have not talked to him face to face." RP 57-58.

2. Detective Bradford Gregory's Testimony

Detective Bradford Gregory also responded to the motel. RP 108. He testified he interviewed David Marinez, as well as "a couple of the

witnesses on the scene." RP 108-109. When asked if he "ever dealt with Morfin, even in the past," Gregory responded:

> A. Not that I recall. I think I'd seen him before, but I don't know that I'd actually dealt with him.

RP 109.

Gregory also viewed the motel's surveillance video. RP 127-28. According to Gregory, the third video showed Morfin as the shooter:

> The third video shows Apolonia's Mercedes parked next to where we found the shell casings with several people standing around it. From viewing Mr., excuse me, Ramos[1] at the time I could clearly see that he's standing next to the vehicle. He takes what appears to be a shooter stance pointing towards where the Lincoln was parked, and then you can see fire coming out of the end of the gun. After the shooting I believe there were six of them standing around altogether. Six – five of them took off running toward the rooms, and then Mr. Morfin walks toward the room and then kind of jogs toward the room and then ends up out of our sight.

RP 128.

The prosecutor asked how Gregory identified Morfin as the shooter and the following exchange occurred:

> A. Body style, clothing. It was clearly him.
>
> Q. And you had contact with Mr. Morfin the prior night how he was dressed?
>
> A. Yes.

[1] Bradford clarified that when he said "Ramos," he meant Ramon. RP 129.

RP 129; see also RP 131 (on cross, identifying Morfin based on his "size, body style." RP 131. As Gregory further claimed, "having seen him at the scene, it was him." RP 131.

3. Court of Appeals Decision Regarding the Detectives' Identifications

Morfin argued he received ineffective assistance of counsel when his attorney failed to object to the detectives' identification of him from the blurry surveillance video. Morfin argued the detectives were in no better position to more correctly identify him than was the trier of fact, as they had insufficient prior contacts with him. BOA at 13-20 (citing inter alia State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009) (an officer who had only talked to the defendants the night of the robbery, but extensively reviewed the surveillance video, invaded the province of the jury when he identified the defendants from the video); cf. State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994) (because officers knew the defendants, they were in a better position to identify the defendant from the grainy video than was the jury); see also Reply Brief of Appellant (RB) at 7-15.

Division III disagreed Morfin received ineffective assistance of counsel, reasoning the detectives' identifications were admissible. Appendix at 5-7. In so holding, the court distinguished George, 150 Wn.

App. 110, and likened the circumstances to those in Hardy, 76 Wn. App. 188:

> The George majority distinguished Hardy on the basis of the "extensive" contacts the Hardy officers had with the defendants during the years. Id. at 119. Although the George officer had based his identification in part on the clothing worn that night, it was clear that there had been some change in clothing between the robbery and the police contact. Id. at n.4. The dissenting judge concluded the officer had enough contact with the defendant that night to comment about the video. Id. at 120-21 (Penoyer, A.C.J., dissenting in part).
>
> We need not opine whether George was properly decided since it, too, is distinguishable from this case. Here, Detective Nebeker had known Mr. Morfin a long time, putting him in at least the same position as the officers involved in Hardy. Although Sergeant Gregory did not have any prior exposure to Mr. Morfin, unlike George there was no evidence that Mr. Morfin had changed his clothing in the brief interval between the shooting and the meeting with the police. That evidence, therefore, was more probative than it was in George.

Appendix A at 6-7.

Strangely, Division III also distinguished George on grounds it was a jury, rather than bench, trial:

> Indeed, as this was a bench trial, there is very little chance the evidence invaded the province of the trier of fact. The court expressly noted that it was free to credit or reject the testimony of the two officers. Report of Proceedings (RP) at 165. Accordingly, the concerns of the George majority have less weight under these facts.

Appendix A at 7.

Morfin filed a motion for reconsideration with respect to Gregory's identification. Motion to Reconsider (MR) at 2. As Morfin argued, Gregory's utter lack of prior contacts with Morfin rendered his identification as unhelpful to the jury as the identification of the detective in George. Id. at 2, 7.

Moreover, Morfin pointed out Division III was wrong about Morfin's opportunity to change his clothes. MR at 8. When detective Nebeker arrived, the three men he interviewed, including Morfin, were in a hotel room. RP 26-27, 54. Thus, it is entirely possible Morfin changed his clothing. In fact, Nebeker testified it is possible someone could have changed his attire by the time he arrived. RP 50, 56.

Morfin argued the appellate court's decision therefore stands for the proposition a sergeant who has had no prior contact with a suspect may identify him from a blurry video based on his "body style" – which he has no real familiarity with – and clothing he may or may not have been wearing at the time of the incident. But this is not the type of contact any prior court has deemed would render the officer's identification as helpful to the trier of fact. MR at 8.

Morfin also questioned the court's distinction of George based on the fact it was a jury trial. As Morfin noted, the court in his case very clearly relied on the detectives' identifications of Morfin to convict him.

RP 165. But Division III denied the motion for reconsideration. Appendix B.

4. Court of Appeals Decision Regarding Out-of-Court Identification by Manuel Ramirez

Morfin also argued he received ineffective assistance of counsel because his attorney failed to object to Nebeker's testimony Manuel Ramirez confirmed Morfin was the shooter. BOA at 22-27; RB at 15-18. The appellate court agreed "counsel erred by not objecting to the detective's two statements that Mr. Ramirez Salazar confirmed that Mr. Morfin was the shooter." Appendix at 8 (footnote omitted). The court found the error harmless beyond a reasonable doubt, however. Id.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. DIVISION III'S DECISION UPHOLDING THE ADMISSIBLITY OF THE DETECTIVES' IDENTIFICATIONS CONFLICTS WITH DIVISIOIN II'S DECISION IN STATE V. GEORGE AND INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Detectives Nebeker and Gregory were allowed to give their opinion Morfin was the shooter depicted in an indiscernible video, based solely on his build and clothing. Whether the detectives could have testified Morfin was wearing clothing matching that of the shooter depicted in the video, neither detective should have been permitted to

testify he was in fact the shooter. Because neither detective had sufficient prior contacts with Morfin to more correctly identify him than the fact-finder, the detectives opinions he was the shooter in the video were inadmissible. Defense counsel's failure to move to exclude the detective's identifications in advance of trial, or to otherwise object to their identifications constituted ineffective assistance of counsel.

This Court should accept review of the ineffective assistance of counsel issue, as it involves a significant question of law under the state and federal constitution. RAP 13.4(b)(3). This Court should also accept review, because Division III's decision upholding the admissibility of the detectives' identification of Morfin – where Nebeker had only minimal prior contacts **and Gregory had absolutely none** – conflicts with Division II's decision in State v. George. RAP 13.4(b)(2).

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 22, of the Washington Constitution guarantee a criminal defendant the rights to representation of counsel and due process of law. The right to counsel necessarily includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

A conviction is reversed for ineffective assistance of counsel where trial counsel's deficient performance prejudiced the accused. State

v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88.

A lay witness may give opinion testimony as to the identity of a person in a surveillance photograph as long as "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." George, 150 Wn. App. 110, 206 P.3d 697 (2009) (quoting Hardy, 76 Wn. App. at 190-91) (citations omitted). Opinion testimony identifying individuals in a surveillance photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]." George, 150 Wn. App. at 118 (quoting U.S. v. La Pierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). But opinion testimony may be appropriate when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. George, 150 Wn. App. at 118 (citing La Pierre, 998 F.2d at 1465).

The circumstances of the detectives' identifications here are analogous to that held inadmissible in State v. George. George and Wahsise were convicted of a robbery that occurred at the Days Inn in Fife. George, 150 Wn. App. at 112-113. While working in the back office, Karen Phillips heard someone say, "[L]ay down, Shut up. Lay down." George, 150 Wn. App. at 112 (citation to record omitted). Shortly thereafter, Christine Huynh, who had been working the front desk, came into the office and told Phillips she had just been robbed. Id.

Moments earlier, Huynh had seen what she described as a red Ford Bronco pull up to the hotel entrance and three Hispanic or Native American men enter the lobby. A heavyset man wearing a leather jacket and beanie pointed a gun at her and demanded money. After taking the money, the man directed Huynh to get on the floor and not look up. Meanwhile, the two other men stole a flat screen television from the lobby, before they all left. George, 150 Wn. App. at 112-13.

Huynh saw the vehicle head toward the freeway and called 911. Officer Thomas Gow and Detective Jeff Rackley attempted to stop a dark red van with an obscured plate that was travelling in the wrong lane. Eventually, the van stopped and the officers ordered the occupants out. George got out of the driver's seat, looked at Rackley and ran. Wahsise and another man exited from the sliding passenger door and eventually

obeyed the officers' command to get on the ground. George, at 113.

Including the driver, there were 9 people in the van, several of Native American ancestry. The officers took the van's occupants into custody. Inside the van, the police located a flat screen television and gun. George, at 113.

George was apprehended shortly after. Huynh arrived with Rackley and identified George as the person who pointed the gun at her. George, 150 Wn. App. at 114. A poor quality surveillance video recorded the Days Inn robbery.

At trial, Rackley testified about his interactions with George and Wahsise on the day of their arrest. Rackely saw George at the van and at the hospital. He also identified Wahsise as one of the first two men who got out of the van's passenger sliding door. He watched Wahsise after ordering him to get on the ground and when he met with him in an interview room at the police station. Rackley compared the characteristics of George and Wahsise to the characteristics of the other van passengers and noted their heights and weights. Id.

Rackely testified that he had viewed the surveillance video "hundreds of times" before trial and identified George as the person standing at the Days Inn counter and Wahsise as one of the two men stealing the television. George, at 115 (citation to record omitted).

Although Rackley could not make out facial features in the surveillance video, he identified Wahsise and George "by their build, the way they carry themselves, the way they move, what they were wearing, and then talking to them later ...." Id. at 115-16 (citation to record omitted).

George objected to Rackley's identification on grounds the identity of the individuals depicted in the video was the ultimate issue for the jury to decide. The court overruled the objection, reasoning the jury could decide whether Rackley's testimony was credible and what weight, if any, to give it. Id. at 116.

On appeal, George and Wahsise argued the court erred in allowing Rackley to give his lay opinion testimony about the identity of the men in the Days Inn video, arguing that Rackley was in no better position to identify the men than the jury. Id. at 117. In resolving the issue, Division II looked to cases where such identifications had been upheld and noted there had been a personal relationship or close familiarity between the individual indentified and the person identifying him. See e.g. Hardy, 76 Wn. App. 188, 192, 884 P.2d 8 (1994) (officer identifying Hardy from video of drug transaction had known Hardy for several years and considered him a friend); United States v. Saniti, 604 F.2d 603, 604-05 (9th Cir. 1979) (identification testimony came from roommates); U.S. v. Beck, 418 F.3d 1008, 1014-15 (9th Cir. 2005) (identification testimony

came from probation officer); and U.S. v. Towns, 913 F.2d 434, 445 (7th Cir. 1990) (identification testimony came from former girlfriend).

Based on these authorities, the court concluded the trial court abused its discretion in admitting Rackley's identification testimony:

> Here, Rackley observed George as he exited the van and ran away and at the hospital that evening. Rackley observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. Rackley based his surveillance video identifications on each defendant's build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and from speaking with them on the day of the crime. These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

George, 150 Wn. App. at 119.

Contrary to Division III's decision, Nebeker's and Gregory's contacts likewise fell far short of the extensive contacts in Hardy and do not support a finding that either detective knew enough about Morfin to express an opinion that he was the shooter on the very poor quality video.

While Nebeker testified Morfin once ran away from him eleven years earlier, Nebeker acknowledged he had few face-to-face contacts with Morfin. Moreover, there were stretches of several years where

Nebeker had no contact with Morfin whatsoever. Contrary to Division III's decision, he was not in at least the same position as the officer in Hardy – the Hardy officer knew the defendant and considered him a friend. Hardy, 76 Wn. App. at 188.

But Division III's decision regarding Gregory's identification is even more at odds with Division II's decision in George. Gregory had no prior contact with Morfin whatsoever before the night in question. Division III recognized as much, but held that because there was no evidence Morfin changed his clothes, Gregory's contacts with him that night rendered him more likely to identify Morfin than the fact-finder. Appendix A at 6-7.

But as indicated, there had was plenty of opportunity for Morfin to change his clothes before Nebeker first encountered him, as he was in a hotel room and Nebeker testified it was possible someone could have changed his attire before Nebeker – who was the first to interview the suspects – arrived.[2] RP 50, 56.

Thus, Division III's decision stands for the proposition a sergeant who has had no prior contact with a suspect may identify him from a

[2] Moreover, Division III distorts the importance of the potential change of clothes noted in the footnote in George, where it was difficult to tell whether George and Wahsise wore the same clothing as some of the robbers depicted in the video. George, 150 Wash. App. at 119 n. 4.

blurry video based on his "body style" – which he has no real familiarity with – and clothing he may or may not have been wearing at the time of the incident. This is not the type of contact any prior court has deemed would render the officer's identification as helpful to the trier of fact. Thus, Division III's decision conflicts with not only George, but all the cases cited within it. This Court should accept review. RAP 13.4(b)(2).

2. THE ADMISSION OF RAMIREZ'S OUT-OF-COURT IDENTIFICATION OF MORFIN INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 22, of the Washington Constitution guarantee a criminal defendant the rights to representation of counsel and due process of law. The right to counsel necessarily includes the right to effective assistance of counsel. Strickland, 466 U.S. 668.

A conviction is reversed for ineffective assistance of counsel where trial counsel's deficient performance prejudiced the accused. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Division III agreed counsel was ineffective in failing to object to Nebeker's two statements Manuel Ramirez confirmed Morfin was the shooter, but found the error harmless beyond a reasonable doubt. Appendix at 8.

Contrary to the appellate court, there is an indication the trial court considered the out-of-court identification as substantial evidence. In its factual finding, the court wrote:

> Detective Nebeker spoke to Manuel Ramirez Salazar, a witness to the shooting. Mr. Salazar was the person who moved the Mercedes Benz immediately after the shooting to a different location in the Motel 6 parking lot and was familiar with those present at the shooting. He confirmed the shooter as being Ramon Morfin.

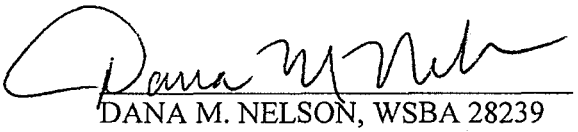
CP 32. This Court therefore should accept review of this significant constitutional question. RAP 13.4(b)(3).

F. CONCLUSION

This Court should accept review because Division III's decision in this case conflicts with Division II's decision in State v. George. It also involves significant questions of law under the state and federal constitutions. RAP 13.4(b)(2), (3).

Respectfully submitted, September 15, 2016

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. RAMON MORFIN JR., Appellant.	)	No. 33169-5-III UNPUBLISHED OPINION

KORSMO, J. — Ramon Morfin appeals from his conviction at a bench trial on two counts of first degree assault, primarily arguing that the trial judge erred in admitting two officers' identification of him as the shooter from a poor quality video recording of the incident. Believing the judge properly admitted that evidence, we affirm.

FACTS

The shooting occurred at a Franklin County Motel 6 late in the evening of August 29, 2011. A man fired multiple shots at Paula and Debbie Villarreal while they were seated in a car outside the hotel. The hotel's video surveillance system captured the shooting. Both women survived; Paula Villarreal had to have a bullet surgically removed from her jaw.

Detective Kirk Nebeker was one of the detectives investigating the shooting. He reviewed the surveillance video and interviewed a number of individuals in rooms of the motel, including Ramon Morfin. The detective also eventually interviewed Manual Ramirez Salazar. The detective indicated to Mr. Ramirez Salazar that the video surveillance was poor quality and did not identify the shooter. Ramirez Salazar told Nebeker that Mr. Morfin was the shooter. Sergeant Brad Gregory also participated in the investigation at the motel and saw Mr. Morfin. He also viewed the surveillance video.

The prosecutor filed two counts of first degree assault while armed with a firearm. The information also alleged the aggravating factors that the crimes were committed to advance the defendant's gang and to advance his own standing within that organization. Mr. Morfin waived his right to a jury and proceeded to a bench trial.

Detective Nebeker's testimony laid the foundation for admitting the surveillance video. Prior to playing the video, the detective described the contents of the video, including his identification of the shooter: "You can see who I identify as Mr. Morfin lean over the car, and you can see the fire from the muzzle as shots go out." Defense counsel did not object to this testimony. The video was then played for the bench.

The detective had periodic prior contacts with Mr. Morfin dating back 11 years before the shooting. When seeing him at the hotel, the detective immediately recognized his face. However, he could not recognize Mr. Morfin's face in the video because of its poor quality. Instead, he recognized Mr. Morfin based on the clothing he was wearing that

night. He similarly thought the shooter had the same body build as Mr. Morfin had.

After discussing the detective's belief that Mr. Morfin was the shooter, the prosecutor asked Detective Nebeker about his interview of Mr. Ramirez Salazar. In both direct and redirect examination, the prosecutor solicited answers that Ramirez Salazar had confirmed the detective's belief that Morfin was the shooter. Defense counsel did not object to either of these statements. Instead, counsel cross-examined the detective concerning perceived inconsistencies between his trial testimony about the quality of the videotape and what he had told Ramirez Salazar about the tape's quality. The detective explained that he used a ruse on Ramirez Salazar to obtain information.

Sergeant Brad Gregory was the only other witness who identified Mr. Morfin as the shooter. Like Detective Nebeker, Gregory could not identify faces on the videotape and based his identification solely on the shooter's clothing and "body style." Unlike Nebeker, Sergeant Gregory had no prior experience with Mr. Morfin before that night.

The trial judge found Mr. Morfin guilty of both charges and the accompanying firearm enhancements, but rejected the two gang-related aggravating factors. Commenting on the evidence, the court indicated that the videotape itself was insufficient to identify the shooter.[1] The court confirmed that it relied on the identification made by the two officers. The written findings of fact prepared by the prosecutor's office also credit the two officers'

[1] "The video itself would not allow an individual who hasn't observed these folks at the scene to make much of it." Report of Proceedings at 165.

identification from the video and describe the clothing worn by Mr. Morfin and seen on the video. The findings also note that Mr. Ramirez Salazar confirmed the identification, although the court's oral remarks did not mention Mr. Ramirez Salazar.

Mr. Morfin timely appealed to this court.

ANALYSIS

This appeal challenges the use of the officers' identification testimony and the reference to Mr. Ramirez Salazar's "confirmation" that Mr. Morfin was the shooter.[2] As there was no objection at trial to any of this testimony, Mr. Morfin frames the issues on appeal as instances of ineffective assistance of counsel. We address the two arguments as sub-issues of that challenge.

Well settled standards govern our review. Typically, the failure to raise an evidentiary challenge at trial waives any challenge to the evidence. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); RAP 2.5(a). In the case of assertions of ineffective assistance of counsel, appellate courts undertake a two-prong analysis. The Sixth Amendment to the United States Constitution guarantee of the right to counsel requires that an appointed attorney perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by the attorney's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899

[2] Mr. Morfin also filed a pro se statement of additional grounds. None of the four issues raised in that document have merit and we will not further discuss them.

P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-692.

Mr. Morfin first contends that his counsel should have objected to the testimony from Nebeker and Gregory identifying him as the shooter in the video based on the clothing he had been wearing. He contends that counsel should have raised a foundational challenge to the testimony in accord with the decision in *State v. George*, 150 Wn. App. 110, 119, 206 P.3d 697 (2009). We think the more apropos decision is *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994).

In *Hardy*, the defendants objected at jury trial to testimony from an officer who identified the defendant from a grainy videotape as the person who purchased drugs from a police informant. *Id.* at 189-190. They contended that the testimony invaded the province of the jury and was improper opinion testimony. *Id.* at 190. Division One noted the lay opinion testimony was proper under ER 701 when it was based on the perception of the witness and was helpful to a clear understanding of the issue. *Id.* After review of cases interpreting the instructive federal version of the rule, the court stated:

> A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.

Id.

In each case, the officers involved had prior contacts with the defendants. *Id.* at 191-192. Because the officers knew the defendants, they were "in a better position to identify [the defendant] in the somewhat grainy videotape than was the jury." *Id.* at 191. The court also rejected the claim that the testimony invaded the province of the jury since the jury was free to disbelieve the officers. *Id.*

A somewhat different factual pattern was presented in *George*, a robbery prosecution. There a divided Division Two panel concluded that an officer who had talked to the defendants the night of the robbery and extensively reviewed the surveillance video invaded the province of the jury when he identified the robbers from the video. 150 Wn. App. at 118. The *George* majority distinguished *Hardy* on the basis of the "extensive" contacts the *Hardy* officers had with the defendants during the years. *Id.* at 119. Although the *George* officer had based his identification in part on the clothing worn that night, it was clear that there had been some change in clothing between the robbery and the police contact. *Id.* at n.4. The dissenting judge concluded the officer had enough contact with the defendant that night to comment about the video. *Id.* at 120-121 (Penoyar, A.C.J., dissenting in part).

We need not opine whether *George* was properly decided since it, too, is distinguishable from this case. Here, Detective Nebeker had known Mr. Morfin a long time, putting him in at least the same position as the officers involved in *Hardy*. Although Sergeant Gregory did not have any prior exposure to Mr. Morfin, unlike *George* there was no evidence that Mr. Morfin had changed his clothing in the brief interval between the shooting and the meeting with the police. That evidence, therefore, was more probative than it was in *George*.

Even more critically than those two distinctions, the question presented by ER 701 is whether the evidence was helpful to the trier of fact. Here the trial court, sitting as trier of fact, expressly noted the importance of the identification by officers who saw the defendant at the scene given the poor quality of the videotape. It was well within the discretion of the trial court under ER 701 to admit the evidence. Indeed, as this was a bench trial, there is very little chance the evidence invaded the province of the trier of fact. The court expressly noted that it was free to credit or reject the testimony of the two officers. Report of Proceedings (RP) at 165. Accordingly, the concerns of the *George* majority have less weight under these facts.

Defense counsel was not ineffective for failing to object. The evidence was admissible under ER 701 and *Hardy*. There is little likelihood an objection would have succeeded. Accordingly, Mr. Morfin's argument fails to satisfy the first prong of *Strickland*.

Mr. Morfin's second argument, however, does satisfy the initial *Strickland* standard. He argues, and we agree, that his counsel erred by not objecting to the detective's two statements that Mr. Ramirez Salazar confirmed that Mr. Morfin was the shooter.[3] This error, however, was harmless beyond a reasonable doubt.

The State agrees the statements constituted hearsay, but argues there was no objection due to defense tactics and the omission was also harmless. We are not convinced that the tactical argument is correct, but need not decide that point since the error was harmless.

The trial judge did not mention the Ramirez Salazar statements when issuing the bench verdict other than in the context of the detective's ruse, but did expressly discuss the identification testimony by the two officers. RP at 163-165. Although the statements were included in the written findings prepared by the prosecution, there is no indication that the trial court did consider the testimony as substantive evidence. Clerk's Papers at 32. Accordingly, we do not believe the evidence had any impact on the bench verdict.

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[3] Normally the decision to not object to inadmissible evidence is tactical, but there is an exception to that general rule. "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The critical evidence was the testimony of the two officers linking the clothing seen in the video to that worn by Mr. Morfin at the time of the incident.[4] The trial court only relied on that testimony in reaching the bench verdict. The statements attributed to Mr. Ramirez Salazar played no part in that determination. The error in not challenging them at trial did not prejudice Mr. Morfin.

In both instances, Mr. Morin has not met his burden of establishing that his trial counsel performed ineffectively. The convictions are 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.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

[4] In this court's view, although the video was so grainy that the shooter's face could not be identified, the shooter's clothing was sufficiently discernable in the video to support the identification testimony based on the clothing alone.

APPENDIX B

FILED
August 16, 2016
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, Respondent, v. RAMON MORFIN JR., Appellant.	)	No. 33169-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered petitioner's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 7, 2016 is hereby denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE FEARING
Chief Judge

NIELSEN, BROMAN & KOCH, PLLC

September 15, 2016 - 1:56 PM

Transmittal Letter

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Court of Appeals Case Number: 33169-5

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Comments:

copy sent to: Ramon Morfin, Jr. # 302052 Washington State Penitentiary 1313 N. 13th Ave Walla Walla, WA 99362

Sender Name: Dana M Nelson - Email: nelsond@nwattorney.net