

NO. 63895-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BIRD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. An appellate court will overturn a trial court's admittance of out-of-court identification evidence only if the identification violates the defendant's due process rights. Here, the photo montage was not suggestive, and the identification made by the victim was reliable. Did the trial court properly admit the photo montage?

2. As a matter of law, First Degree Assault and First Degree Robbery do not merge. If the convictions do not merge, neither conviction can be vacated on appeal. Should the Defendant's conviction for First Degree Robbery be vacated when he was also convicted of First Degree Assault?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY.**

Defendant Daniel Bird was charged by second amended information with First Degree Assault with a firearm enhancement, First Degree Robbery with a firearm enhancement, and Unlawful Possession of a Firearm in the Second Degree. CP 134-35. The

State alleged that while robbing the victim, Bird drew a firearm, put the firearm to the chest of the victim, and pulled the trigger. CP 1-6, 134-35. A jury found the defendant guilty as charged at trial. CP 201-03; 10RP 11.

The trial court held a CrR 3.6 pretrial hearing, where Bird moved to suppress the victim's identification of Bird in a photo montage. 3RP 9-23. Daniel Bird challenged the identification made by the robbery and assault victim, Jose Zamudio, after Zamudio selected Bird out of a six person photo montage. CP 613, 614 (FF 3); 2RP 24. The trial court denied the motion to suppress. 3RP 23-26; CP 613-16.

At sentencing, the trial court did not impose both firearm enhancements because it reasoned that the First Degree Assault conviction "merges" with the First Degree Robbery conviction. CP 622. The court issued a standard range sentence with only one firearm enhancement. CP 622. Bird now appeals his convictions. CP 628-37.

## 2. CrR 3.6 FACTS.<sup>1</sup>

A man unknown to Zamudio asked Zamudio for money as Zamudio walked with his bicycle down the street. CP 614 (FF 1); 2RP 26. The man first asked for money, and then demanded money from Zamudio. CP 614 (FF 1); 2RP 26-27. When Zamudio refused to give money, the man demanded the bicycle from Zamudio. CP 614 (FF 1); 2RP 27. The man then took out a gun, placed it to Zamudio's chest, and pulled the trigger, intending to shoot Zamudio. CP 614 (FF 1); 2RP 28-29. The gun inadvertently expelled the bullet and did not fire. CP 614 (FF 1); 2RP 28. The man then pistol whipped Zamudio, took Zamudio's bicycle, and fled. CP 614 (FF 1); 2RP 28-29.

Zamudio was able to recall the details of the man's appearance. CP 614 (FF 1). Zamudio described the man as wearing black shoes, tan cargo pants, and a white t-shirt. CP 614 (FF 1); 2RP 29-30. He also recalled the suspect as being six feet tall, in his mid to late twenties, with a goatee, tattoos on his arms and long black hair braided down the middle of his back. CP 614

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to as follows: 1RP (12/15/08); 2RP (5/04/09); 3RP (05/05/09); 4RP (05/07/09, 05/13/09); 5RP (05/18/09); 6RP (05/19/09); 7RP (05/20/09); 8RP (05/21/09); 9RP (05/26/09); 10RP (05/27/09); 11RP (07/15/09); 12RP (07/17/09); 13RP (01/05/09).

(FF 1); 2RP 29-30. Zamudio told police that he would be able to recognize the man if he saw him again. CP 614 (FF 1); 2RP 30.

The next day, police obtained store video from a convenience store. CP 614 (FF 2); 2RP 30-32. This video lacked detailed resolution, which made it difficult to view any facial features of the people in the video. CP 614 (FF 1); 2RP 32. However, when Zamudio watched the video he was able to point out the suspect based on matching clothes and his general description. CP 614 (FF 1); 2RP 35. There were other people in the video with the suspect, and based on police interviews with these people, police determined that the robbery suspect was Bird. CP 614 (FF 2); 2RP 34-46.

The case detective created a computer generated photo montage. CP 614 (FF 3); 2RP 47-29. An earlier booking photo of Bird was used in this montage, along with photos of five other men who had similar appearances and physical characteristics. CP 614 (FF 3); 2RP 49-52. The men in the montage all had long hair. CP 614 (FF 3); 3RP 23. Bird's hair, if longer, was only marginally longer. CP 614 (FF 3); 3RP 23. These six men had facial features that matched each other and matched the suspect in the store video. CP 614 (FF 3); 2RP 49-52.

A week after the robbery, the case detective presented the photo montage to Zamudio. CP 614 (FF 3); 2RP 51-52. He advised Zamudio that "because an officer is showing you a group of photographs, this should not influence your judgment in any way; the person who committed the crime may or may not be in this group of photographs; it is just as important to eliminate innocent persons as it is to identify those person responsible; you are in no way obligated to identify anyone; study each photograph carefully before making any comments. Consider that the photographs could be old or new, that hair styles change and that persons can alter their appearance by growing or shaving facial hair." CP 614 (FF 3); 2RP 51-53.

Zamudio looked at the montage and immediately pointed to Bird's photograph, saying this "looks like him, but the hair is different." CP 614 (FF 3); 2RP 52. The detective said that he could not comment about the photographs. CP 614 (FF 3); 2RP 52. Zamudio confirmed, "this is the guy," and again pointed at Bird's picture. CP 615 (FF 3); 2RP 52. Police arrested Bird. CP 615 (FF 3); 2RP 54-56.

The trial court admitted the photo montage for trial. CP 615 (FF 3); 3RP 25-26. The court found that the photo montage was neither created nor presented in a suggestive manner. CP 614 (FF II); 3RP 26. Because Zamudio had a clear view of Bird, was attentive, accurate in his description, certain of his selection, and made the identification soon after the robbery, the court found that the reliability of the identification would offset any suggestiveness, if there was any. CP 614 (FF 3); 3RP 23-25. The court then denied Bird's motion to suppress, and found that "There is no risk of misidentification in this case." CP 615 (FF II); 3RP 25.

### **3. TRIAL FACTS.**

Early on August 22, 2008, Zamudio was walking his bicycle by a convenience store near his apartment, when Bird came from the other direction and approached Zamudio. 7RP 24-31. Bird demanded money from Zamudio. 7RP 30-31. After Zamudio explained that he had no money, Bird told Zamudio that he was going to take Zamudio's bicycle. 7RP 26-27, 30-31. Zamudio and Bird wrestled over bike. 7RP 31-32. Eventually, Bird let go of the bicycle, reached into his pocket, and took out a handgun. 7RP 33-35, 39-40. Bird racked the gun's slide and put the tip of the gun into

Zamadio's chest. 7RP 34-35. Bird pulled the trigger, and the gun clicked. 7RP 35. Bird looked at the gun confused. 7RP 55.

A frozen Zamadio stared into Bird's face. 7RP 35-37. Bird looked to the ground and started to pick up a bullet from the sidewalk that had ejected from his gun. 7RP 36-37, 63-64. Before Bird could reclaim the bullet, Zamadio kicked it away. 7RP 38-39. Bird pistol-whipped Zamadio and left with the bicycle. 7RP 39-40. Zamadio went into the store to call 911. 7RP 26-27. Zamadio would later identify Bird in court as the person who robbed him. 7RP 55-56.

Police responded to the scene. 5RP 46-49. King County Sheriff Deputy Calabrese collected the bullet from the ground outside the convenience store where Zamadio was robbed. 5RP 48-49. The bullet was a semiautomatic .380 caliber CCI brand. 5RP 84.

Calabrese reviewed a convenience store video with Zamadio. 5RP 52-54. In one scene of the video there were four men standing outside the convenience store. 5RP 52-54. Zamadio identified the man in the middle of the image, wearing a white t-shirt, as the man who robbed him. 2RP 32-33; 5RP 52-54; 7RP 66; Ex. 1.

Detective David Keller interviewed the three other men in the video image, who all lived in the neighborhood. 5RP 127-29. Two of these men -- Peter K. and Chris E. -- testified at trial. 7RP 140, 176. Chris confirmed that the man in the middle of the image as Bird. 7RP 142-43. Chris explained that he was with his friends when Bird, who he had met before, approached and asked for beer. 7RP 140-44, 146-47. After Chris said no, Chris explained how Bird began acting "crazy" and began demanding beer. 7RP 144-45. Bird then displayed the group a chrome pistol in his waistband. 7RP 146. Chris told Bird to leave, who went toward the convenience store, the location Bird robbed Zamadio. 7RP 146-47.

Peter also testified that the man in the white t-shirt in the image was Bird. 7RP 179-180. Peter explained that he was with his friends when Bird approached them for beer. 7RP 180. Bird then displayed a firearm. 7RP 180-81.

After interviewing Chris and Peter, Det. Keller created a photo montage and presented it to Zamadio. 5RP 127-29. Zamadio identified Bird in the photo montage. 5RP 135-36; 7RP 19-20. Moments before Bird's arrest, Bird tried to sell a gun to a woman at grocery store, which Bird was keeping in a pink Adidas backpack. 8RP 110-112. This woman saw him try to sell the gun

to a little girl and then saw him running around the apartment complex as police arrived. 7RP 112-116. Two other witnesses saw Bird carrying this pink bag. 7RP 149, 166-67. Bird was found and arrested by deputies outside an apartment complex that was a few blocks from where he robbed Zamadio. 8RP 84-86. The pink bag was found by police nearby. 8RP 60-63.

In this pink bag, Det. Calabrese found a .22 semi automatic pistol. 6RP 35, 40. Zamadio testified that this gun looked similar in size and color to the gun Bird used to rob him. 7RP 26-64. Peter also testified that the gun looked similar to what Bird showed him. 7RP 180-182. Chris said that this was the same chrome gun that Bird displayed just before the robbery of Zamadio. 7RP 147, 152-53. In the chamber of the gun was a CCI .380 semiautomatic bullet, the same type of bullet ejected during the robbery a week earlier. 6RP 47. This particular caliber and brand of ammunition represents two percent of bullets in the market. 8RP 52.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY ADMITTED THE VICTIM'S PHOTO MONTAGE IDENTIFICATION OF BIRD.**

Bird claims that a photo montage was so impermissibly suggestive that the victim's identification of him violated his due process rights. He argues that his photograph in the montage had longer hair than the others. Bird maintains that this suggestiveness, in light of the victim's description of the suspect having long hair in a pony tail, allowed for a very substantial likelihood of irreparable misidentification. Because the trial court found that Bird's hair, if longer, was only marginally longer and would be offset by the overall reliability of the montage, Bird's claim fails.

The validity of an identification procedure is generally left to the jury as a question of fact. State v. Smith, 37 Wn. App. 381, 385, 680 P.2d 768 (1984); State v. Lane, 4 Wn. App. 745, 750, 484 P.2d 432 (1971). A defendant is guaranteed a fair identification process; that is, identification evidence should be admitted and presented to the jury unless it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. State v.

Ortiz, 34 Wn. App. 694, 699, 664 P.2d 1267 (1983); See State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985).

As a result, Washington courts apply a two-part test to determine whether the trial court abused its discretion in admitting identification evidence. See State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). First, the defendant has the burden of showing the identification procedure was impermissibly suggestive. Id. If the defendant fails to meet this burden, the inquiry ends. Id. If the court finds the procedure was impermissibly suggestive, the identification only violates due process if the procedure created a substantial likelihood of misidentification. Id.

The admission a photo montage as evidence is subject to the sound discretion of the trial court.<sup>2</sup> State v. Kinard, 109 Wn.

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<sup>2</sup> This Court had previously relied on State v. Daugherty, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), which held that while there is deference to a trial court's factual findings, an independent, *de novo* review of evidence was necessary in matters involving a potential constitutional question. State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986); see also State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). This holding was subsequently challenged by our State Supreme Court in State v. Hill, 870 P.2d 313, 315, 123 Wn.2d 641, 645 (1994). The Hill Court questioned whether Daugherty was good law since it was premised on the federal review of state matters. State v. Hill, 870 P.2d at 315; Kinard, 109 Wn. App. at 432. This Court in Kinard now relies on Hill and found that Daugherty, Rogers and Taylor are no longer good law and present an outdated standard of review. While the State believes that the current abuse of discretion standard is correct here, even when reviewed *de novo* with deference to the trial court's factual findings, the analysis in this case would be similar and reach the same outcome.

App. 428, 432, 36 P.3d 573 (2001) (citing State v. Tatur, 58 Wn. 2d 73, 75, 360 P.2d 754 (1961)). This is a deferential test, whether there are tenable grounds or reasons for the trial court's decision. Id.; State v. Harris, 97 Wn. App. 865, 870, 989 P.2d 553 (1999).

a. The Photo Montage Identification Was Not Impermissibly Suggestive.

Washington courts consider the totality of the circumstances to determine whether an identification procedure was impermissibly suggestive. See Vickers, 148 Wn.2d at 118-19; State v. Courtney, 137 Wn. App. 376, 385-86, 153 P.3d 238 (2007); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 966 (1987). Courts have considered various factors to determine suggestiveness, including: the showing of only one suspect, the statements made to the witness, and the manner in which the defendant is presented. See e.g., State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992) (only one suspect); Courtney, 137 Wn. App. at 385-86 (statements to witness); Guzman-Cuellar, 47 Wn. App. at 336 (defendant in handcuffs). A defendant asserting that a police identification procedure denied him due process bears the burden of proving the procedure was unnecessarily suggestive. State v. Guzman-Cuellar, 47 Wn. App. at 335.

In this case, Bird has not challenged any of the trial court's written findings. Thus, they are verities on appeal. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

The trial court found that "the photographic montage presented to the victim, Jose Zamudio, was not suggestive in any way." CP 615 (FF II). The montage was neither suggestive in its layout nor the manner in which the detective presented it, and thus "the reliability of the identification would offset any suggestibility in this case." CP 615 (FF II).

The computer-generated montage associated Bird with other individuals who had similar physical characteristics. CP 614 (FF 3). These five photographs had the same appearance and all had the same facial features of the suspect in the case. CP 614 (FF 3). In presenting this montage, "The detective did not suggest the identity of the defendant in any way through his montage presentation," and specifically cautioned the victim that "'because an officer is showing you a group of photographs, this should not influence your judgment in any way; the person who committed the crime may or may not be in this group of photographs; it is just as important to

eliminate innocent persons as it is to identify those persons responsible; you are in no way obligated to identify anyone; study each photograph carefully before making any comments.'" CP 614 (FF 3). The court admitted the montage after finding that "The presentation and contents of the photographic montage containing the defendant was not in anyway impermissively [sic] suggestive as to the defendant." CP 615 (FF IV).

Bird maintains that his hair was longer than the others in the montage and this fact made him the sole suspect because the victim said that the robbery suspect had long black hair braided down the middle of his back. A photo montage is impermissibly suggestive if it designed in a way that makes the defendant the only possible suspect in the montage. State v. Rameris, 109 Wn. App. 749, 761, 37 P.3d 343 (2002).

Bird first relies on State v. Traweek, where the suspect was known to be blond, and Traweek was the only blond person in the photo montage. 43 Wn. App. 99, 715 P.2d 1148 (1986). The Traweek Court held that to not have at least one other blond person in the lineup made Traweek the only possible choice. Id. at 103. While the Court found that the montage was unnecessarily suggestive due to this fact, it ultimately found that the identification

was still reliable after considering the totality of the circumstances. *Id.* at 104-05. Here, Bird's hair color matched that for all of the people in the montage. He was not singled out as the sole possible suspect like Traweek, and the case is inapposite.

Bird next relies on State v. Burrell, where the suspect had a "frizzy Afro' hairstyle" and Burrell was the only person in the photo montage that had this hairstyle. 28 Wn. App. 606, 610, 625 P.2d 726 (1981). The Court found that there were some people in the montage with similar features to Burrell, including skin color, but "none of the individuals closely resemble Burrell" especially due to his unique hairstyle and larger photograph in the montage. *Id.* at 610. The Court found that "On balance, the photos are sufficiently suggestive to require our consideration of whether there are countervailing indicia of witness reliability." *Id.* at 611. However, after considering the identification was made, the Court found that the identification was still reliable. *Id.*

The trial court here found that the montage was not suggestive and that all of those in the montage were similar in appearance. CP 614 (FF 3). The people in the montage matched in facial features and had similar physical characteristics. CP 614 (FF 3). Further, unlike Burrell, the court here found that "All of

those in the photographs had long hair" and "The defendant's hair, if longer, was only marginally longer." CP 614 (FF 3). The court referenced that the detective expressly advised the victim to "Consider that the photographs could be old or new, that hair styles change and that persons can alter their appearance by growing or shaving facial hair." CP 614 (FF 3). Because Bird closely resembled the other people in the montage, the hairstyles were generally similar, and the victim was advised that hair styles can change over time, the defendant was not made the only possible suspect due to his hair.

Moreover, the victim did not select Bird based on his hairstyle. On appeal, Bird implies that the victim selected him only because of his long hair. Appellant's Brief at 8 ("the focus of Mr. Zamudio when he made his identification was Mr. Bird's hair"), at 5 ("Mr. Zamudio selected Mr. Bird from the photographs, noting specifically the length of his hair in the photograph.") This claim misapplies the facts of the case. The victim did not select Bird because of his hair in the montage; the victim identified Bird in spite of Bird's hair in the montage. When the victim looked at the montage he immediately pointed to the photograph of Bird and said, that it "'looks like [the suspect], but the hair is different.'" CP

614 (FF 3). Bird "had a different hairstyle at the time of the assault than when his montage photograph was taken." CP 614 (FF 3). At the time of the crime, Bird had very short hair on top, not long hair as appeared in the photographs. 2RP 58-59; Ex. 4.

The court found that any reference the victim made regarding Bird's hair in the photo montage related to "the fact that his assailant had short hair at the time of the assault, but despite this fact, the defendant's photo matched the physical identity of the assailant." CP 614 (FF 3). Accordingly, the defendant's long hair, much like the others in the photo montage, did not make him the only possible choice in the montage. Indeed, if Bird's hair was longer than those the other photographs, this would make him appear less like the suspect, since the victim was expecting a suspect with short hair on top. Thus, Bird's photograph in the montage did not single him out as the sole choice as the suspect. The trial court did not abuse its discretion by finding that the montage was not suggestive.

Even a suggestive procedure such as show-up identification, where a defendant is the only suspect, is not per se impermissibly

suggestive. Guzman-Cuellar, 47 Wn. App. at 336 (citing Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986)). A defendant asserting that a police identification procedure denied him due process must show that the procedure was *unnecessarily* suggestive. Foster v. California, 394 U.S. 440, 442, 89 S. Ct. 1127, 1128, 22 L. Ed. 2d 402 (1969); State v. Traweek, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986); State v. Booth, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983). In this case, there was nothing unnecessarily suggestive to the victim that Bird was the individual he should identify as the suspect. Each of the individuals in the montage had similar facial features and closely resembled each other. Any marginal differences among them did not make the montage unnecessarily suggestive. Bird is unable to prove that the photo montage was impermissibly suggestive and his due process claim fails.

b. There Is No Substantial Likelihood Of Irreparable Misidentification.

Even if this Court were to find that the line-up procedure was impermissibly suggestive, the identification was still reliable. In order to determine the admissibility of the identifications, this Court examines each procedure to determine whether, under the totality of the circumstances, it was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

Simmons v. U.S., 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968). Reliability is the linchpin in determining the admissibility of identifications. Manson, 432 U.S. at 114. The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the prior description of the criminal, the level of certainty demonstrated at the confrontation, and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

The facts elicited at the CrR 3.6 hearing indicate that Bird cannot satisfy his burden that there was a very substantial likelihood of irreparable misidentification. The trial court found that

"Even if [the montage identification] had been suggestive, like in the form [of] a show-up identification, the reliability of the identification would offset any suggestibility in this case." CP 615 (FF II).

In reviewing the Biggers criteria, the court factually found that "The victim had a clear opportunity to view the assailant at the time of the robbery." CP 615 (FF III). It was early in the afternoon, clear and well-lighted. CP 613 (FF 1). The victim and the suspect looked at each other face-to-face for a length of time, making the victim attentive and focused on the suspect during the robbery. CP 615 (FF III). This full attention allowed for the victim to give a detailed description of the suspect with a high degree of accuracy. CP 615 (FF III). The victim was certain of his identification. CP 615 (FF III). He had previously told police that he would be able to identify the suspect, and when he selected Bird in the montage, the victim said "that's him" when pointing to Bird's photograph. CP 615 (FF III). The victim was able to identify the suspect because the suspect's identity was fresh in his mind, since the robbery was only a week earlier. CP 615 (FF III). These facts support the court's finding that "There is no risk of misidentification in this case." CP 615 (FF II).

On appeal, Bird argues that because the detective showed the victim a still image from a video that contained the robbery suspect the victim's later photo montage identification of Bird became unreliable.<sup>3</sup> But the court found that the identification process was reliable. This image from the video "was not in detailed resolution." CP 614 (FF 2); 2RP 32-33; Ex. 1. "The limited resolution made it difficult to clearly see any facial features of the people in the video." CP 614 (FF 2). While the image did allow the victim to point to the suspect in the image, this identification was made based on the suspect's clothes and the victim's general description. CP 614 (FF 2). The image did not provide the facial features of those in the image, and the suspect in the image had short hair. 2RP 32-33; Ex. 1. Any facial features that were discernable of the suspect in the video matched each person in the photo montage. CP 614 (FF 3). Because the image would not cause the victim to select Bird in a photo montage, Bird cannot prove that there is a substantial likelihood of irreparable misidentification. Thus, Bird's due process claim fails.

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<sup>3</sup> During the CrR 3.6 hearing, Bird did not claim that he was the man in the video image who the victim said was the robbery suspect. Now on appeal, Bird argues that showing this image of him in the video still made later montage identification of him unreliable, because it allowed his image to be seen earlier by the victim. Appellant's Brief at 11.

c. Any Error Would Be Harmless.

Even if the trial court erred in admitting the photo montage, this additional form of identification evidence would be harmless. The victim identified Bird in court as the suspect. Two other witnesses identified Bird in court as being with a gun at the scene of the robbery. Additional circumstantial evidence overwhelmingly connected him to the crime. Because the trial result would be the same without the photo montage, any error in admitting it would be harmless.

While the State bears the burden of showing the error was harmless, any error is harmless if the reviewing court is convinced that any reasonable jury would have reached the same result in the absence of the error. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). This review looks only to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. See Guloy, 104 Wn.2d at 426. If the error is harmless, there is no need for reversal. Easter, 130 Wn.2d at 242.

The evidence in this case was overwhelming. The victim identified Bird in the video as the person who robbed him. The victim also identified Bird in court. Two other witnesses, Peter and

Chris, knew Bird and confirmed Bird's identity in the video image. Peter and Chris testified that they saw Bird with a pistol right before the robbery. This pistol visually appeared to be the gun that Bird possessed a week later. The victim also recognized this gun as being similar to the one used in the robbery. Prior to Bird's arrest, Bird possessed a gun that chambered the exact brand and type of ammunition that was found at the scene of the robbery. There is no reasonable doubt that Bird would be convicted even if the photo montage evidence was not admitted. Moreover, the victim identified Bird in the video and in-court independent of the photo montage. Thus, any error in admitting it would be harmless.

On appeal, Bird challenges that the in-court identification should be ignored because "there is no independent evidence which would cause Mr. Zamudio to remember his assailant except for the montage." Appellant's Brief at 12. Bird argues that the montage would therefore taint the victim's later in-court identification of Bird as the man who robbed him. But the victim identified Bird in the video as the suspect before he was presented the montage. 5RP 52-54, 7RP 66. The suspect in the video was identified by multiple people, including the victim, as Bird. There could be no taint associated with this identification. Moreover, Bird

testified following his in-court identification that he was able to recognize Bird because of Bird's facial features, not because of the earlier montage identification. 7RP 56. There is evidence that is independent of the photo montage that allowed for the victim to identify Bird. Accordingly, any error would be harmless.

**2. BIRD'S CONVICTIONS FOR FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT DO NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.**

Bird contends that his convictions for First Degree Assault and First Degree Robbery merge and violate the prohibition against double jeopardy. He claims that the First Degree Robbery conviction should therefore be vacated. When two convictions merge, double jeopardy requires that the lesser conviction be vacated. State v. Freeman, 153 Wn.2d 765, 758-59, 108 P.3d 753 (2005). Because our Supreme Court has held that First Degree Assault and First Degree Robbery do not merge, there is no double jeopardy violation.

a. Freeman Controls: The Convictions Do Not Merge.

The question before this Court is whether the Legislature intended to have First Degree Assault merge with First Degree Robbery. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008) (quoting Freeman, 153 Wn.2d at 777-80). The question of merger is an issue of statutory interpretation reviewed *de novo*. Freeman, 153 Wn.2d at 770 (citing State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)).

This question of law has been resolved by our Supreme Court. In Freeman, the Court reviewed the legislative intent shown by the punitive punishments imposed for First Degree Assault and First Degree Robbery. 153 Wn.2d at 777-80. The Court was persuaded "that the legislature specifically did not intend that first degree assault merge into first degree robbery." Id. at 778. Our Supreme Court stated:

We conclude that the legislature did intend to punish first degree assault and first degree robbery separately, as the "lesser" crime has the greater standard range sentence.

Id. at 779-80. Accordingly, First Degree Assault does not merge with First Degree Robbery. Id. at 777-80.

Bird ignores Freeman, and instead argues that the trial court's erroneous interpretation of the merger doctrine controls. Appellant's Brief at 16 ("The trial court obviously agreed [there was merger] but imposed convictions for both the Judgment and Sentence"). But the question of merger is an issue of law. Johnston, 100 Wn. App. at 137. Because the question is reviewed *de novo*, the trial court's incorrect reference to the merger doctrine has no affect in this Court's analysis. See Id.; Freeman 153 Wn.2d at 770. Freeman controls in this case. As a matter of law, First Degree Assault does not merge with First Degree Robbery, and thus there is no double jeopardy violation. Freeman, 153 Wn.2d at 777-80. Accordingly, the conviction for First Degree Robbery should not be vacated.

b. The Trial Court Confused The Term of "Merger" With "Same Criminal Conduct."

The trial court did not impose two firearm enhancements on the convictions of First Degree Assault and First Degree Robbery. CP 622. The court only imposed the firearm enhancement on the

First Degree Assault conviction. CP 622. In giving this sentence, the trial court treated the two convictions as "same criminal conduct," but referred to as merger.

This application of "same criminal conduct" is separate and distinct from a double jeopardy violation claim of merger. State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). Unlike a double jeopardy claim which focuses on the charging and trial stage, "same criminal conduct" addresses the defendant's criminal intent during sentencing phase, as to whether the crime was factually committed against the same victim at the same time. Id. While merger and "same criminal conduct" are terms often confused, our Supreme Court has focused on the need to distinguish between these two separate analyses. Id. at 611-12.

The court here properly entered verdicts on all convictions. CP 619. However, the trial court treated the First Degree Robbery conviction as if it was of the "same criminal conduct" with the First Degree Assault conviction. While not expressly making a finding of "same criminal conduct," and instead mistakenly referring to it as merger, this appears to have been the court's intention.

By imposing only one firearm enhancement, however, Bird received a break. Even if the court were to find that both convictions were of the "same criminal conduct," two firearm enhancements should have been imposed and served consecutive to each other. Our Supreme Court recently affirmed that a trial court must impose consecutive firearm enhancements, even where the enhancements relate to crimes found to be the "same criminal conduct." State v. Mandanas, 168 Wn.2d 84, 88-89, 228 P.3d 13 (2010). The State does not seek remand, however, and asks that Bird's conviction and sentence be affirmed.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Bird's convictions.

DATED this 11<sup>th</sup> day of October, 2010.

Respectfully submitted,  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101, containing a copy of the Brief of Respondent, in STATE V. DANIEL RYAN BIRD, Cause No. 63895-5, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Janice Schwarz

Name

Done in Seattle, Washington

10/11/10  
Date

Janice Schwarz

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