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STATE OF WASHINGTON  
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No. 67469-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL JAMES MILLER,

Appellant.

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

The Honorable James D. Cayce

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to declare a mistrial when the investigating officer referenced Mr. Miller's booking photo.

2. There was insufficient evidence to support the jury's verdict of first degree burglary and first degree robbery.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court must grant a mistrial where a trial irregularity so prejudiced the jury that it denied the defendant a fair trial. Here the court entered an *in limine* order prohibiting one of the investigating police officers from referencing that Mr. Miller's booking photo was used in creating the photo montage. During the trial the officer violated the *in limine* order. Did the trial court abuse its discretion in failing to declare a mistrial mandating reversal of Mr. Miller's convictions?

2. Due process requires the State prove each element of the charged offenses beyond a reasonable doubt. As charged here, the State was required to prove Mr. Miller entered or remained in Mr. Anway's home and assaulted him, as well as proving Mr. Miller forcibly took property from Mr. Anway while inflicting bodily injury upon him. Mr. Anway testified he saw Mr. Miller inside his house but could never identify him as one of his assailants; merely

claiming “everyone” was involved. The only other witness who testified stated he saw Mr. Miller *outside* the house but never saw him inside. Did the State fail to prove Mr. Miller was inside the house and/or assaulted Mr. Anway, requiring reversal of his convictions with instructions to dismiss?

C. STATEMENT OF THE CASE

Thirty-one year-old Tyler Anway’s parents owned a home in Covington in which he lived. RP 473, 484. Darrin Keatts, a man Mr. Anway did not know well, was his roommate for a short time. 486, 509.

On the evening of November 29, 2010, Mr. Anway went to bed at approximately 11 p.m., only to be awakened in the early morning hours when his front door being kicked in. RP 512-13. As Anway made his way to the front door from his bedroom, he saw Eric Cooper, a man he had met “a couple of times,” inside his house. RP 506, 515. Mr. Anway did not invite Mr. Cooper into the house. RP 515-16. Mr. Cooper approached Mr. Anway and struck him in the face. RP 517. Mr. Cooper continued to strike Mr. Anway, who retreated to a rear bedroom of the house. RP 518-19. Mr. Anway stated he saw Chris Bingham, a man he knew marginally longer

than Mr. Cooper, Anthony Robles, and Mr. Miller, who Mr. Anway had met “a couple of times” in the house as well RP 506, 520.

Mr. Anway stated generally that all of the men began “beating me up.” RP 521. According to Anway, while he was being assaulted, the men would take items from the room, leave, and then return. RP 523. At some point, the men fled. RP 526. Anway heard the men drive away. RP 595.

Darrin Keatts was also in the house in the early morning hours of November 30, 2010. RP 793. Keatts heard banging on the front door, looked through the peep hole of the door, and saw Eric Cooper, a man he knew well. RP 770, 795-802. Keatts said he heard Cooper say angrily that the two had to talk. RP 803. Keatts immediately turned and fled the house. RP 803. As he left the house, Keatts heard a loud bang. RP 806. As Keatts was fleeing the house, he saw Mr. Miller standing on the walk outside the house. RP 806. Mr. Keatts ran down the street and hid in the bushes. RP 807. With the help of a neighbor, Keatts was able to call the police. RP 808.

Cooper, Bingham, Robles, and Mr. Miller were charged with first degree burglary and first degree robbery. CP 48-49.<sup>1</sup>

Prior to trial, the court granted the defense motion *in limine* prohibiting testimony that the photographs used in creating the montage were booking photographs of the defendants from prior arrests. CP Supp \_\_\_\_; sub no. 30 at 11; RP 68. Despite the *in limine* order, Detective Schrimpsheer testified:

Q: Now, I assume you can't just make a montage out of thin air. Do you need something to get started before you actually meet a witness?

A: Typically, you take a photograph, *and normally, that's a booking photograph.*

...

Q: Without being specific, how do you get started, is what I'm saying, are you given a name from which to work or a description?

A: I'm normally given the name of an individual, yes.

Q: Okay. Do you remember what happened in this case?

A: In this case, *I was given the numbers of the booking* – of the montage forms that were already –

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<sup>1</sup> Cooper and Bingham were also charged with second degree assault and intimidating a witness for another incidents involving Mr. Keatts. CP 50. Robles was charged with the theft of Mr. Keatts car in the other incident as well. CP 49. Mr. Miller was not involved in the other incidents. Prior to trial, Mr. Robles pleaded guilty. RP 112.

RP 705-06 (emphasis added). Objections were made to both comments. *Id.* The first objection was sustained; the second objection necessitated a sidebar. *Id.*

At the conclusion of the detective's testimony, the defendants moved for a mistrial based on the detective's violation of the *in limine* order:

The reason I was concerned about the montage photos was the booking issue and they were in jail, now let it out the bag, these are booking photos, they were in jail. I also note, your Honor, that the Court granted a motion to restrict the State's witnesses from mentioning other – that the photos were taken from booking photos.

...  
[W]e're not challenging that Mr. Anway identified these three individuals. But now [the State has] thrown in to the fact that these individuals are – the jury can imply convicted felons, which they are, but that's not something that for [the jury] to know, and that's something we religiously try to keep out of their view.

RP 720-21.<sup>2</sup>

The trial court denied the motion, noting:

I'm not going to grant a mistrial. I instructed [the jury] not to consider it, but certainly, if the Court of Appeals thought it was prejudicial, I have no problem with whatever they choose to do later. I just don't think it is.

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<sup>2</sup> The motion for a mistrial was made by co-defendant Cooper but specifically joined in by Mr. Miller. RP 720-21.

RP 721.

Mr. Miller was subsequently convicted by the jury as charged. CP 60; 6/9/2011RP 3.<sup>3</sup>

D. ARGUMENT

**1. The court abused its discretion in failing to declare a mistrial for Detective Schrimpsheer's violation of the *in limine* ruling.**

a. Mistrial is a proper remedy for a violation of a court's pretrial rulings.

A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

The remedy for a violation of an *in limine* order by a prosecution witness is a mistrial. *State v. Escalona*, 49 Wn.App. 251, 256, 742 P.2d 190 (1987). In determining the effect of an irregularity in trial proceedings, courts examine (1) the seriousness of the irregularity; (2) whether the irregularity involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard the irregularity. *State v. Weber*, 99 Wn.2d 158,

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<sup>3</sup> Cooper and Bingham were convicted of these charges as well but acquitted of the additional charges arising out of the different incident involving Keatts. 6/9/2011RP 2-3.

165-66, 659 P.2d 1102 (1983). A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

- b. Detective Schrimpsher's reference to Mr. Miller's booking photo improperly implied he was guilty because he was already a convicted felon.

The defense argued, and the trial court agreed in granting the *in limine* motion, that testimony that the photos for the photo montage were the booking photos of the defendants from prior arrests was inadmissible and more prejudicial than probative. Nevertheless, the investigating detective violated the order twice telling the jury the photos were booking photos of the defendants.

In *Escalona, supra*, the defendant was charged with assault while armed with a deadly weapon, a knife. 49 Wn.App. at 252. Before trial, the court granted a defense motion *in limine* to exclude any reference to Mr. Escalona's prior conviction for the same crime. *Id.* At trial, Vela, the State's primary witness, testified that Escalona "already has a record and had stabbed someone." *Id.* at 253. Although the trial court instructed the jury to disregard the statement, Escalona moved for a mistrial, which was denied. *Id.*

On appeal, this Court held that the trial court abused its discretion in denying Mr. Escalona's motion for a mistrial,

concluding that the prejudicial effect of Vela's statement could not be cured due to "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement." *Escalona*, 49 Wn.App. at 256.

In analyzing the first *Weber* factor, the seriousness of the irregularity, this Court held that Vela's statement was "extremely serious" in light of ER 609 and 404(b). *Id.* at 255. This Court emphasized the weakness of the evidence against Mr. Escalona, pointing out that the State's entire case essentially rested on Vela's testimony, which contained many inconsistencies. *Id.* This Court next determined that the second *Weber* factor, whether the statement was cumulative, undermined the trial court's ruling since it ruled *in limine* to exclude evidence relating to the prior conviction. *Id.* Finally, in applying the third *Weber* factor, whether the trial court's instruction to disregard the statement could cure the error, the *Escalona* Court determined that Vela's statement was inherently prejudicial due to "the logical relevance of the statement," reasoning that "the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Mr. Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past." *Id.* at 256.

Here, as in *Escalona*, the detective's statements were extremely serious in light of ER 609 and 404(b). This is even more so in light of the relatively weak case against Mr. Miller. One of the residents of the house saw Mr. Miller *outside* the house, never inside, and the other resident stated he saw Mr. Miller inside the house but was unable to specifically identify him as one of the people who assaulted him or took his possessions. In addition, the detective's statements were not cumulative or repetitive of other evidence. In fact, the trial judge had ruled that this information could not be admitted. Finally, the court's instruction to the jury to disregard the detective's remark could not "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Escalona*, 49 Wn.App. at 255, quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Further, a "bell once rung cannot be unring." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). In light of the *Escalona* decision, the trial court's failure to declare a mistrial was an abuse of discretion. This Court must reverse Mr. Miller's convictions.

**2. There was insufficient evidence presented to support the jury's verdict that Mr. Miller was guilty of either burglary or robbery.**

- a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

Due process requires the State to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove Mr. Miller was inside the house or that he assaulted Mr. Anway.

In order to prove first degree burglary, the State had to show that Mr. Miller (1) entered or remained unlawfully in a dwelling, (2) with an intent to commit a crime against a person or property therein, and (3) assaulted Tyler Anway. CP 48; RCW 9A.52.020(1)(b); *State v. Dow*, 162 Wn.App. 324, 330, 253 P.3d 476 (2011).

To convict Mr. Miller of first degree robbery, the State had to prove beyond a reasonable doubt that he (1) unlawfully took property of another, (2) intended to do so (3) by use of force (4) in order to obtain the property, and (5) in the commission of the robbery or flight therefrom, inflicted a bodily injury. RCW 9A.56.190, RCW 9A.56.200(1)(a)(iii).

Under RCW 9A.08.020(3), an individual is guilty as an accomplice if he “solicits, commands, encourages, or requests” another person to commit a crime or aids in its planning or commission, knowing that his act will promote or facilitate the commission of the crime. The State must prove more than a person's physical presence at the crime scene and assent to establish accomplice liability. *State v. Everybodytalksabout*, 145

Wn.2d 456, 472-73, 39 P.3d 294 (2002); *State v. McDaniel*, 155 Wn.App. 829, 863, 230 P.3d 245 (2010).

Applying these elements here, Mr. Anway testified he saw Cooper and Bingham inside his house and testified Cooper struck him causing him to retreat into a rear bedroom. Anway said he was struck repeatedly while the men one by one took items from his house. He identified Mr. Miller as being in the house, yet was unable to describe anything that Mr. Miller might or might not have done, merely stating that everyone was hitting and kicking him.

Mr. Keatts also failed to provide anything that would support the jury's verdict. He testified he fled the house as soon as he identified Cooper entering the house. As he fled, he stated he saw Mr. Miller *outside* the house. Keatts did not see what occurred in the house after he fled.

Given this dearth of evidence produced by the State regarding Mr. Miller's conduct, the evidence simply does not support the jury's verdict that Mr. Miller entered Anway's house, and once inside took Anway's property by force. There was insufficient evidence to support the jury's verdicts.

c. Mr. Miller is entitled to reversal of his convictions with instructions to dismiss.

Since there was insufficient evidence to support Mr. Miller's convictions, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding"), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

F. CONCLUSION

For the reasons stated, Mr. Miller requests this Court reverse his convictions with instructions to dismiss or remand for a new trial.

DATED this 26th day of January 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) | NO. 67469-2-I |
| v.                   | ) |               |
|                      | ) |               |
| DANIEL MILLER,       | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| KING COUNTY COURTHOUSE               | ( ) | _____         |
| 516 THIRD AVENUE, W-554              |     |               |
| SEATTLE, WA 98104                    |     |               |
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**SIGNED** IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF JANUARY, 2012.

X \_\_\_\_\_ 

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