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Court of Appeals
Division I
State of Washington

No. 72454-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS LEAR,

Appellant.

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

OPENING BRIEF OF APPELLANT

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Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and The Supreme Court’s Reliability Test in Light of Eyewitness Science: Thirty Years Later, 33 Law & Hum. Behav. 1 (Feb. 2009) 12, 17, 20, 26

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Innocence Project, Eyewitness Identification Reform, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php..... 11

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A. SUMMARY OF ARGUMENT

Travis Lear was tried and convicted for child molestation in the first degree. During the investigation, the alleged victim's father identified a single photograph of Mr. Lear, but police failed to instruct the father not to speak to his daughter about the identification. The father then informed his daughter that he had identified the perpetrator. The detective then told the girl the man identified by her father had been in the lobby of the same building earlier that day, and that he was a registered sex offender. The next day, detectives put a photograph of Mr. Lear in a photo montage, and both the girl and her father identified him.

The trial court ruled that the circumstances surrounding the identification were suggestive; however, the court ruled the identification admissible, finding the suggestiveness did not create a substantial likelihood of irreparable misidentification.

B. ASSIGNMENTS OF ERROR

1. The court erred in finding: “[t]he showing of a single photograph to Jeremy [K.]¹ was impermissibly suggestive, however, the totality of the circumstances indicate that the identification was not so

¹ To preserve the anonymity of the alleged victim, only first names or initials will be used throughout.

impermissibly suggestive as to create a substantial likelihood of irreparable misidentification.” CP 242-43 (FF – H).

2. The court erred in finding: “The montage shown to Jeremy K. was not suggestive. The process itself was not suggestive, nor were the photographs, as the photograph used for the montage was a different photo from the surveillance photo shown the previous day.” CP 243 (FF – I).

3. The court erred in finding: “The montage shown to P.K. was not suggestive. The process itself was not suggestive, nor were the photographs. The comments by the detective and her father did not contain any information regarding who her father picked, descriptions, nor was there any indication that anyone told P.K. who to pick.” CP 243 (FF – J).

4. The court erred in finding: “Even if the showing of the montage to P.K. was impermissibly suggestive, the totality of the circumstances indicate that the identification was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification.” CP 243 (FF – K).

5. The court erred in finding: “P.K. had a good opportunity to view the suspect she interacted with at the library. She had a significant

and meaningful interaction with the man. She had an opportunity to view the man, at the car and in the library bathroom. She had an ongoing conversation with him, face-to-face, and was in close proximity in an intimate and fearful setting.” CP 243 (FF – L).

6. The court erred in finding: “P.K. had a high degree of attention when viewing the suspect at the car at in [sic] the library. She was focused, as she was fearful of the suspect and paying attention to what he was saying and doing.” CP 243 (FF – M).

7. The court erred in concluding the single photo identification procedure by the father was not impermissibly suggestive, was not inadmissible, and did not create a substantial likelihood of misidentification.

8. The court erred in concluding the photo montage identification by the father was not impermissibly suggestive and did not create a substantial likelihood of misidentification.

9. The court erred in concluding the photo montage identification by P.K. was not impermissibly suggestive and did not create a substantial likelihood of misidentification.

10. The court erred in concluding that in-court identifications would not be tainted by the impermissibly suggestive pre-trial identification procedures employed in this case.

11. The special allegation statute, RCW 9.94A.836, fails to provide ascertainable standards to protect against arbitrary, ad hoc, discriminatory, or unfettered exercise of prosecutorial discretion, in violation of due process and equal protection.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To meet due process requirements, an identification procedure must not be impermissibly suggestive, or it may give rise to a substantial likelihood of irreparable misidentification. Where detectives made suggestive comments to the alleged victim's father before showing a single photograph, did the suggestiveness of the encounter taint later identification procedures, denying Mr. Lear due process?

2. A criminal statute is unconstitutionally vague in violation of the due process clauses of the Fourteenth Amendment and Article I, section 3, when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. Where a prosecutor has discretion to file a predatory offense special allegation, but the statute does not provide any standards or guidelines to inform the

exercise of that discretion, is the special allegation statute unconstitutionally vague?

3. A criminal statute violates the equal protection clauses of the Fourteenth Amendment and Article I, section 12 when it authorizes unfettered prosecutorial charging discretion with no means to protect against disparate treatment. Where a prosecutor has discretion to file a predatory offense special allegation, but the statute does not provide any limits to the exercise of that discretion, does the special allegation statute violate equal protection?

D. STATEMENT OF THE CASE

1. Factual Background.

On January 30, 2013, P.K., an 11-year-old girl, was doing her homework at the Enumclaw Public Library. 7/31/14 RP 136; 8/4/14 RP 83-84. Her father, Jeremy K., was sitting nearby, working on his computer. 8/4/14 RP 83- 85. When P.K. finished her homework, she asked her father for the car keys, so she could get an apple from their car for a snack. 8/4/14 RP 89-92.

While P.K. was sitting in the back seat of the family car, eating an apple and reading her library book, she was approached by a man she had never seen before. 7/31/14 RP 140. This “random guy” walked up to the

car and opened the car door. Id. He told P.K. that if she didn't come with him, he would kill her. Id.

After P.K. followed the stranger into the library, he led her into the women's restroom and made her lock herself, along with him, into one of the stalls. Id. at 147-48. P.K. said she was panicking, but she did what she was told. The man said he would let her go if she let him put his hand down her pants, so she agreed. Id. She also let the man kiss her, which she found "disgusting." Id.

After the man left the bathroom, P.K. ran out of the library and found her father, who was waiting for her outside. 8/4/14 RP 16-18, 100-01. P.K. told her father what had happened inside the library, and pointed out a man on the street to her father as the person she believed was responsible. P.K.'s father, Jeremy, ran up to the man on the street – Travis Lear – and confronted him. Id. at 19, 105. Mr. Lear denied the incident and kept walking. Id. Jeremy then confronted Mr. Lear again, and again Mr. Lear denied involvement in the incident. Id.

Following the father's 911 call, police interviewed P.K. and her father at the library briefly, and then at the police station, which is less than two blocks from the library. 8/4/14 RP 24 (the "station is right

there”), 128 (describing police station as approximately 150 - 200 yards from library).

2. Identification procedures.

At the police station, Detective Mark Leitl interviewed P.K. and her father Jeremy in the same conference room. 8/4/14 RP 128, 138; 8/5/14 RP 13-14. Although it is considered the best practice to interview witnesses separately, to prevent witnesses from influencing each others’ accounts, Detective Leitl acknowledged that he disregarded the best practices in this case. 8/5/14 RP 13-14, 45.

Detective Leitl told both P.K. and Jeremy that the police had a suspect, and that the suspect had been in the lobby of the police station that very day. 8/5/14 RP 53. At one point, Detective Leitl interrupted the interview with P.K. to show Jeremy a single photograph of Travis Lear, standing in the lobby of the police station.² Id. at 28; 8/4/14 RP 129-31; Ex. 16. The photo had been downloaded from police surveillance cameras. 8/5/14 RP 22-28; Ex. 16. Jeremy identified Mr. Lear as the man

² At trial, Mr. Lear’s Community Corrections Officer Lillian Wilbur testified that her office shares a lobby with the police department, and that Mr. Lear had visited her the morning of the incident, expressing an interest in visiting the library. 8/4/14 RP 154-55. Pursuant to a pre-trial ruling, no reference was made to Mr. Lear’s criminal history, his status on probation, or Ms. Wilbur’s job title. Id. Ms. Wilbur identified Mr. Lear in court, and stated that she has known him for approximately four years. Id.

he had spoken to outside of the library, and said he was 100 percent sure.

8/4/14 RP 129-32.³

Jeremy's identification of the single photo should have been no surprise, since the detective's comments to Jeremy were suggestive: "We had a gentleman in our lobby earlier today. We don't know what he was wearing, but he was a registered offender." 7/29/14 RP 36; 8/5/14 RP 53 (emphasis added). After Jeremy identified the single photo shown to him, Detective Leitl did not warn him to refrain from discussing the photo with his daughter, P.K. 8/5/14 RP 53-55.

Jeremy then returned to the room where P.K. was waiting, and told her that the police had a photograph of the man, and "I've identified him – we know who it is. And they know who he is. And so they're gonna go and get him and he's gonna get locked up." CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial). Detective Leitl returned to the interview room and likewise told both P.K. and Jeremy that the police knew the person they had identified in the photo, and that the police would get him. CP 88 (citing Ex. 1); Ex. 3 (pre-trial).

The next day, P.K. and Jeremy went back to the police station to look at a photo montage. 8/4/14 RP 27, 132; 8/5/14 RP 78. The montage

³ Detective Leitl's conversation with Jeremy in the next room is audible from the room where P.K. sits. 8/4/14 RP 44; 8/5/14 RP 54-55; Ex. 3 (pre-trial).

included a different photograph of Mr. Lear, along with several other photographs, and was conducted sequentially. 8/5/14 RP 78-82. Both P.K. and her father selected the photograph of Mr. Lear. 8/4/14 RP 27-29, 132-34; 8/5/14 RP 78.

The State charged Mr. Lear with one count of first degree child molestation, which was amended at trial to include a special allegation that it was a predatory offense, because Mr. Lear was a stranger to P.K. RCW 9.94A.030(38); CP 158-59; 7/29/14 RP 42-44.

3. Trial and Sentencing.

Prior to trial, the defense moved to suppress the single photo identification by Jeremy, the montage identifications by P.K. and Jeremy, as well as any in-court identification of Mr. Lear, arguing the in-court identification would be tainted by the suggestive identification procedures. CP 84-93; CP 142-57.

A pre-trial hearing was held on July 28, 2014. Following the hearing, the trial court concluded the identification procedures were conducted under circumstances that were “impermissibly suggestive.” CP 243.⁴ The court found, however, that under the totality of the

⁴ A copy of the court’s written findings of fact and conclusions of law following the suppression hearing is attached as an appendix.

circumstances, the identifications were reliable, and not so suggestive as to taint any in-court identification of Mr. Lear. CP 243-44.

Following a jury trial, Mr. Lear was found guilty as charged.

8/6/14 RP 77; CP 195-96.

At sentencing, the standard range, usually 90-130 months, was increased to 300 months to life, due to the predatory offense special allegation. RCW 9.94A.030(38); 9/12/14 RP 2. The court sentenced Mr. Lear to 300 months to life. Id. at 8-10; CP 227-38.

E. ARGUMENT

1. THE SINGLE-PHOTO IDENTIFICATION PROCEDURE USED WAS IMPERMISSIBLY SUGGESTIVE; BECAUSE THE IN-COURT IDENTIFICATIONS WERE TAINTED, THE LATTER IDENTIFICATIONS SHOULD HAVE BEEN SUPPRESSED.

a. Lack of reliability in eyewitness identification and the problem of wrongful conviction.

Overwhelming evidence indicates that “[m]istaken eyewitness identification is a leading cause of wrongful conviction.” State v. Allen, 161 Wn. App. 727, 734, 255 P.3d 784 (2011), aff’d, 176 Wn.2d 611, 294 P.3d 679 (2013). Indeed, eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of convictions overturned through DNA testing. Brandon

L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 78 (2008) (“The overwhelming number of convictions of the innocent involved eyewitness identification—158 of 200 cases (79%).”).⁵

Research shows that memory is not like a video recording but is a “constructive, dynamic, and selective process.” State v. Henderson, 208 N.J. 208, 245, 27 A.3d 872 (2011). There are three stages of memory: acquisition, retention, and retrieval. Id. (citing Elizabeth F. Loftus, Eyewitness Testimony 21 (2d. ed. 1996)). Memory can be distorted, contaminated, and even falsely imagined at each stage of the process. Id. at 246. “Like physical trace evidence, memory traces can be tampered with, destroyed, lost, distorted, or contaminated by the procedures that are used to collect it.” Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 Wis. L. Rev. 615, 622-23.

Various factors, including some present in this case, significantly increase the chance that an eyewitness’s memory will be false or distorted. Garrett, Judging Innocence, supra, at 79; Innocence Project, 200

⁵ See also Innocence Project, Eyewitness Identification Reform, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (72% of more than 300 wrongful convictions in the U.S. involved mistaken eyewitness identification) (last accessed 6/11/15).

Exonerated: Too Many Wrongfully Convicted 20-21;⁶ Allen, e.g., 176 Wn.2d at 661. For example, a witness's high level of stress reduces the accuracy of the witness's subsequent identification. Kenneth A. Deffenbacher, et al., A Meta-Analytic review of the Effects of High Stress on Eyewitness Memory, 28 L. & Hum. Behav. 687 (2004).

The way in which police administer a suspect lineup or photo montage can also affect witness accuracy, including whether there was a significant delay between the event and the lineup, and whether police failed to use a double-blind procedure, as here. Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later, 33 Law & Hum. Behav. 1, 14 (Feb. 2009); Timothy O'Toole, Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Val. U. L. Rev. 109, 119 (2006).

Rates of misidentification also increase when police tell a witness before viewing a lineup that they have found a suspect, as police did here, or if police use "fillers," *i.e.*, non-suspects, in the lineup who do not fit the

⁶ Available at <http://www.innocenceproject.org/news-events-exonerations/200-exonerated-too-many-wrongfully-convicted?searchterm=200+exon> (last accessed 6/10/15).

witness's previous description of the suspect. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, *supra*, at 6-7 (emphasis added).

Although eyewitness identification evidence is among the least reliable forms of evidence, it is persuasive to juries. "As one leading researcher said: '[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" State v. Clopten, 2009 UT 84, 223 P.3d 1103, 1109 (2009) (quoting Loftus, Eyewitness Testimony, *supra*, at 19).

The recent high number of DNA exonerations make the problem of eyewitness misidentification more pressing than ever. It is plain that our current approach to eyewitness identification has its flaws.

"Although cross-examination is a powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth." Allen, 161 Wn. App. at 741 (quoting Jacqueline McMurtrie, The Role of the Social Sciences in Preventing Wrongful Convictions, 42 Am. Crim. L. Rev. 1271, 1277 (2005)).

- b. The current framework is flawed because it does not sufficiently deter suggestive police practices nor adequately account for the variables that actually affect witness accuracy.

Washington law on the admissibility of eyewitness identifications is based on the federal standard. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). This evolved from three United States Supreme Court cases: Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 191 L. Ed. 2d 1247 (1968), Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Under this standard, an identification procedure violates due process only if it is so impermissibly suggestive that it leads to a substantial likelihood of irreparable misidentification. Linares, 98 Wn. App. at 401. A defendant bears the burden to establish a due process violation by showing, first, that the procedure was “impermissibly” suggestive. Id.; State v. Vaughn, 101 Wn.2d 604, 610-11, 682 P.2d 878 (1984). If, and only if, it was, the court then determines whether, considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification. Linares, 98 Wn. App. at 401. To answer that question, courts consider the following

“Biggers” factors: (1) the witness’s opportunity to view the suspect at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the suspect; (4) the witness’s level of certainty at the time of the confrontation; and (5) the delay between the crime and the confrontation. Id.; Manson, 432 U.S. at 114; Biggers, 409 U.S. at 199-200.

Under this approach, courts examine the five Biggers factors *only if* the defendant meets his threshold burden of showing the identification procedure itself was impermissibly suggestive. Vickers, 148 Wn.2d at 118. If the court finds the procedure was not impermissibly suggestive, the inquiry ends; in such a case, the unreliability of the identification goes to its weight, not its admissibility. Linares, 98 Wn. App. at 402.

The purpose of requiring courts to consider the Biggers factors only in cases where the identification was obtained through an impermissibly suggestive procedure is to “facilitate the admission of identification testimony, not hamper it.” Id. at 401-02 (quoting Vaughn, 101 Wn.2d at 609). Courts apply the factors to determine whether an identification obtained through a concededly-suggestive procedure is nonetheless “reliable” and admissible rather than automatically inadmissible. Manson, 432 U.S. at 109, 114; Linares, 98 Wn. App. at

401. Thus, ultimately, the “reliability” of the identification—and not whether the police procedure was unreasonably suggestive—“is the linchpin in determining the admissibility of identification testimony.” Manson, 432 U.S. at 114.

Scientists, commentators, and courts in other jurisdictions have concluded that this approach does not sufficiently deter suggestive police practices nor guard against the risk of wrongful convictions obtained through mistaken identifications. As the New Jersey Supreme Court stated in its recent decision departing from the Manson framework, the approach “does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony.” Henderson, 208 N.J. at 285.

First, the federal framework does not deter suggestive police practices; instead, it *encourages* them. As stated, an eyewitness identification is admissible, even if obtained through the use of an unnecessarily suggestive procedure, as long as the Biggers factors are met. Manson, 432 U.S. at 109, 114; Linares, 98 Wn. App. at 401. In other words, the State has no obligation to show the procedure the police

used was *necessary*; that is, the State need not show that no less suggestive procedure was reasonably available.

More troubling, at least three of the Biggers factors are *enhanced* by the use of a suggestive procedure. For instance, research shows that when police use poor lineup fillers, *i.e.*, those that do not match the witness's earlier description of the suspect, witnesses tend to report they had a better view of the suspect and paid more attention at the time of the crime, and have greater confidence in their pick. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, *supra*, at 10-12 (and studies cited); Brandon L. Garrett, Eyewitnesses and Exclusion, 65 Vand. L. Rev. 451, 470-71 (2012).

A police officer's confirmatory suggestive remark following an identification (*e.g.*, "Good, you identified the suspect") – as occurred in Mr. Lear's case -- also leads witnesses to inflate their reports of how much attention they paid and how much confidence they have. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, *supra*, at 11 (and studies cited); Garrett, Eyewitnesses and Exclusion, *supra*, at 470; see also State v. McDonald, 40 Wn. App. 743, 744-45, 700 P.2d 327 1985 (reversing conviction where police told witness, "this is the man," following identification). "[T]his suggestive confirmatory effect is

stronger for mistaken eyewitnesses than it is for accurate eyewitnesses, thereby making inaccurate eyewitnesses look more like accurate eyewitnesses and undermining the certainty-accuracy relation.” Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, *supra*, at 12.

Other suggestive features that lead witnesses to report they had a better view of the culprit and are more confident in their pick include subtle, unconscious cues and expectations by the administrator, whether police tell the witness the suspect has been apprehended or is present in the lineup, and even the suggestion that the eyewitness will later be cross-examined about the identification. Garrett, Eyewitnesses and Exclusion, *supra*, at 470. Thus, in these ways, “the Manson factors are circular and highlight the very features of eyewitness memory that may be most profoundly affected by suggestion.” *Id.* at 470-71.

The Henderson court accepted these research findings and concluded they cast doubt on the ability of the Biggers factors to distinguish between reliable and unreliable evidence:

[T]hree of those [Biggers] factors—the opportunity to view the crime, the witness’ degree of attention, and the level of certainty at the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable.

208 N.J. at 286. If self-reports by eyewitnesses are tainted by suggestive procedures, “they become poor measures in a balancing test designed to bar unreliable evidence.” Id.

Moreover, because the Biggers factors are *enhanced* by suggestive police practices, they unintentionally reward such practices rather than deter them:

The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

Id.

Finally, the Biggers factors are generally not helpful in spotting accurate identifications because they are not highly correlated with eyewitness accuracy. For instance, studies show that jurors rely strongly on the confidence of the eyewitness but confidence is not correlated with accuracy. Garrett, Eyewitnesses and Exclusion, *supra*, at 469. Indeed, this scientifically-documented lack of correlation between a witness’s certainty and the accuracy of his or her identification led the Georgia Supreme Court to ban jury instructions that informed the jury they could consider this factor when deciding whether an identification was reliable. Brodes v. State, 279 Ga. 435, 442, 614 S.E.2d 766 (2005).

Likewise, the correlation between the consistency and completeness of the witness's description and identification accuracy is also poor. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 12-13. "Eyewitnesses tend to select the person who looks most like their memory of the culprit and will readily select an innocent person if that person fits the eyewitness's pre-lineup description better than do the lineup fillers." Id. (internal citations omitted).

The witness's opportunity to view the suspect, on the other hand, is positively correlated with identification accuracy. Henderson, 208 N.J. at 264 (citing Colin G. Tredoux, et al., Eyewitness Identification, in 1 Encyclopedia of Applied Psychology 875, 877 (Charles Spielberger ed., 2004)). No minimum time is required to make an accurate identification, but a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure. Id. At the same time, other studies show eyewitnesses' estimates of time and opportunity are often greatly overestimated and can be influenced by confirmatory suggestive comments made by the administrator, as here. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 10 (and studies cited).

In sum, Washington’s test for determining the admissibility of an eyewitness identification encourages rather than deters suggestive procedures and fails to guard sufficiently against unreliable identifications. It does not require courts to determine whether police could have used a less suggestive procedure; it allows courts to consider “reliability” factors only if they first find the procedure used was “impermissibly suggestive;” and the reliability factors it provides do not correlate well with eyewitness accuracy.⁷

- c. Even under current case law, the impermissibly suggestive identification procedures used in this case resulted in a tainted in-court identification of Mr. Lear.

The trial court found the police conduct during the single-photo identification procedure in this case was impermissibly suggestive. CP 242. (FF – A). The court specifically found the father’s identification of a single photo to be problematic, and also found fault with “the combination of Det. Sgt. Leitl’s comments (specifically that they had a suspect in their lobby earlier that day who was a registered offender).”

⁷ The current federal test “does little or nothing to discourage police from using suggestive identification procedures.” Commonwealth v. Johnson, 420 Mass. 458, 466, 468, 650 N.E.2d 1257 (1995). For these reasons, at least three states have abandoned the current federal standard and returned to the earlier federal rule which required suppression of identifications obtained through unnecessarily suggestive procedures. Id.; People v. Adams, 53 N.Y.2d 241, 251-

CP 242 (FF – B). Despite this egregious lapse in police procedure, however, the court ruled the procedure did not result in a substantial likelihood of misidentification under the totality of the circumstances, largely due to Jeremy’s self-reported certainty during the single photo identification, the later montage, and the in-court identification. CP 242.⁸

The flaw in the trial court’s findings is the initial police misconduct – the impermissibly suggestive show-up consisting of the single-photo identification in the hallway – contaminated the subsequent identification procedures. See, e.g., McDonald, 40 Wn. App. at 744-45. Detective Leidl’s comments to Jeremy in the hallway, both before and after he identified the photograph, served to bolster the father’s confidence level in his own purported identification of the suspect. 7/29/14 RP 36; 8/5/14 RP 53 (detective told father they had suspect in custody who was a registered offender, and who had been in lobby the same morning as the assault). Following Jeremy’s identification of the single photo, he returned to the interview room and informed his daughter that the suspect (Mr. Lear) was known to the police, and would

52, 440 N.Y.S.2d 902, 423 N.E.2d 379 (1981); State v. Dubose, 285 Wis.2d 143, 148, 172, 699 N.W.2d 582 (2005).

⁸ Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 11-12 (discussing suggestive confirmatory effect, whereby detective’s

be arrested. CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial).

Detective Lietl similarly told P.K. and Jeremy that the police knew this man and would “get” him. CP 88 (citing Ex. 1); Ex. 3 (pre-trial).

The techniques used during the joint interview with both P.K. and Jeremy present were not only a violation of police procedure, but tainted and corrupted the interviews and identification procedures that followed. For police to make statements during – or even following – an identification procedure that validate a witness’s focus on a particular individual, is a violation of due process. McDonald, 40 Wn. App. at 744-45; see also Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 11-12 (discussing phenomenon of suggestive confirmatory effect, whereby assurances that witness selected “correct” suspect results in repeated selection of same suspect, and high self-reported confidence). Detective Leitl shared with Jeremy and P.K., among other things, Mr. Lear’s presence in the police station lobby the morning of the incident, as well as his criminal history as a registered sex offender. CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial). Any subsequent identification of Mr. Lear was impermissibly contaminated after this, and should have been excluded.

assurances that witness selected the suspect already in custody leads witness to continue to select same suspect, and to rate his own confidence level as high).

- d. Mr. Lear's case should be reversed and remanded for a new trial, at which the montage and in-court identifications of Mr. Lear would be inadmissible.

The trial court's findings that under the totality of the circumstances, the single photo identification was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification were not based upon substantial evidence. CP 242-43. The trial court's finding suggests that because the photo montages shown to P.K. and Jeremy contained a different photograph from the surveillance photo, this cured the taint from the procedure the day before. CP 243 (FF – I, J). However, this finding ignores the insidiousness of the detective's comments to Jeremy regarding him picking the correct person the day before, as well as the comments about Mr. Lear being a sex offender. In addition, the court's finding fails to take into account the joint interview with both father and daughter, against police protocol, and the contamination resulting from this.

In addition, the trial court found that P.K. had "a high degree of attention when viewing the suspect," (FF – M), and found that P.K.'s opportunity to observe the suspect was heightened, due to her "close proximity in an intimate and fearful setting." CP 243 (FF – L). However, P.K. testified that during the attack inside the library, the

suspect actually held her from behind, reaching his hand around to the front of her body. 8/4/14 RP 10. For a large portion of the time that P.K. spent with her attacker, she was facing away from him, unable to see his face. Id.

Lastly, contrary to the trial court's finding that P.K.'s fearful state would have made her more observant, research shows that, a witness's high level of stress reduces the accuracy of the witness's subsequent identification. Deffenbacher, et al., A Meta-Analytic review of the Effects of High Stress on Eyewitness Memory, 28 L. & Hum. Behav. 687 (2004).⁹

The case should be reversed and remanded with instructions for the trial court to hold a new hearing at which it must evaluate whether a new trial can proceed without the two montage identifications or the in-court identifications of Mr. Lear. Although both P.K. and her father identified Mr. Lear in court, these are not admissible if the single photo identification made by the father is suppressed, because the in-court identification does not have an independent origin.

Researchers agree that a mistaken out-of-court identification cannot be "erased" or corrected by a subsequent in-court identification.

E.g., Wells & Quinlivan, Suggestive Eyewitness Identification

Procedures, supra, at 15. As the United States Supreme Court noted decades ago:

It is a matter of common experience that, once a witness has picked out the accused . . . he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before trial.

United States v. Wade, 388 U.S. 218, 229, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (footnote omitted). Simply viewing a montage containing a picture of the accused can taint a later identification because “the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” Simmons, 390 U.S. at 383-84.

For these reasons, courts may not admit an in-court identification unless it has an “independent origin.” Wade, 388 U.S. at 242; State v. Hilliard, 89 Wn.2d 430, 439-40, 573 P.2d 22 (1977); State v. Griggs, 33 Wn. App. 496, 502, 656 P.2d 529 (1982). An in-court identification has an independent origin if the witness had exposure to the accused

⁹ Testimony indicated that Jeremy was also extremely stressed and agitated at the scene when he spoke with Mr. Lear shortly after the incident. 8/4/13 RP 119 (stating he forgot momentarily how to dial his cell phone).

independent of the crime and the prior identification procedure. Hilliard, 89 Wn.2d at 439-40; Griggs, 33 Wn. App. at 502. In Hilliard, for example, the witness had previously spent time with the accused on two occasions and recognized him before the assault. 89 Wn.2d at 440. Similarly, in Griggs, the witness had met the accused before the crime. 33 Wn. App. at 502.

Here, the in-court identification does not have an origin independent of the alleged incident or the identification procedure, itself. The complainant and her father had never seen the accused before. 7/31/14 RP 140 (describing suspect as a “random guy” she did not know); 8/4/14 RP 11. There is insufficient evidence of an independent source for the in-court identification, and it is thus tainted by the impermissibly suggestive identification procedure. Wade, 388 U.S. at 242; Hilliard, 89 Wn.2d at 439-40. If the single-photo identification is suppressed, the in-court identification must also be suppressed.

2. THE ABSENCE OF ANY STANDARDS IN RCW 9.94A.836 TO GUIDE OR LIMIT PROSECUTORIAL DISCRETION TO FILE A SPECIAL ALLEGATION DEPRIVED MR. LEAR OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

- a. A criminal statute is unconstitutionally vague when it fails to provide ascertainable standards to protect against arbitrary enforcement.

“The touchstone of due process is protection of the individual against arbitrary action of government.” Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Accordingly, under the due process clauses of the Fourteenth Amendment and Article I, section 3, a criminal statute is unconstitutionally vague when it fails to sufficiently define the offense so citizens understand what conduct is prohibited, or when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. In re Detention of Danforth, 173 Wn.2d 59, 74, 264 P.3d 783 (2011); City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Although a statute is unconstitutional if either requirement of the vagueness doctrine is not satisfied, the United States Supreme Court has determined that the second requirement is the more important.

[W]e have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine – the

requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (internal quotations and citations omitted). Thus, due process requires that a criminal statute provide minimal guidelines and workable standards to ensure non-arbitrary enforcement. State v. Evans, 177 Wn.2d 186, 207, 298 P.3d 724 (2013); City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988). “What is forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in a given case.” State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984).

- b. The special allegation statute violates due process by failing to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory exercise of prosecutorial discretion.

The special allegation statute provides no ascertainable standards or guidelines to inform prosecutorial discretion in filing the allegation.

RCW 9.94A.836 provides:

Special allegation--Offense was predatory--Procedures

(1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.

(3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

The definition of “predatory” is expansive.

“Predatory” means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the

perpetrator was: (i) a teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, “school” does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) “Home-based instruction” has the same meaning as defined in RCW 28A.225.010; and (B) “teacher, counselor, volunteer, or other person in authority” does not include the parent or legal guardian of the victim.

RCW 9.94A.030(38). In addition, “stranger” is defined as:

“Stranger” means that the victim did not know the offender twenty-four hours before the offense.

RCW 9.94A.030(50).

A defendant such as Mr. Lear who is convicted of child molestation in the first degree must be sentenced as a sex offender. RCW 9.94A.507(1)(i). When sentencing a sex offender, the court must impose a minimum term and a maximum term of confinement. RCW 9.9A.507(3)(a). The maximum term is the statutory maximum for the offense. RCW 9.94A.507(3)(b). In general, the minimum term shall be within the standard

range for the offense. RCW 9.94A.507(3)(c)(i). However, if the jury finds the offense was predatory pursuant to RCW 9.94A.836, the minimum term is the high end of the standard range or 25 years, whichever is greater. RCW 9.94A.507(3)(c)(ii).

Child molestation in the first degree is a Class A felony with a maximum term of life imprisonment. RCW 9A.20.021(1)(a); 9A.44.083. Based on Mr. Lear's offender score of '7,' he faced a standard range sentence of 98 to 130 months. CP 228; 9/12/14 RP 2-5. Based on the special verdict that his offense was predatory, however, the trial court imposed a "statutory minimum" sentence of 300 months to life. CP 228; 9/12/14 RP 8-11.

In State v. Rice, the petitioner challenged the predatory offense special allegation statute on the grounds that the Legislature's use of the term "shall" imposed a mandatory duty on the prosecutor to charge the special allegation and thereby infringed on a prosecutor's inherent charging discretion, in violation of the separation of powers doctrine. 174 Wn.2d 884, 892-908, 279 P.3d 849 (2012). The Rice Court ruled the statute withstood the challenge on the grounds the term "shall," as used in the statute, was discretionary rather than mandatory because: 1) the statute did not provide any consequences for non-compliance with the

statute, 2) prosecuting attorneys have broad, statutory charging discretion, and 3) mandatory charging statutes are unconstitutional. Id. at 895-907.

By ruling that “shall” means “may” in this context, the Court eliminated the legislative directive and opened the door to arbitrary, ad hoc, or discriminatory filing of the special allegation. The statute does not set forth any guidelines or limitations to inform the exercise of prosecutorial discretion. Instead, the prosecutor has unfettered charging discretion.¹⁰ In the absence of any limitations or guidelines to inform when a prosecutor *may* file a special allegation, the special allegation statute is unconstitutionally vague.

c. The special allegation statute violates equal protection by inviting grossly disparate sentences for similarly situated defendants.

The equal protection clauses of the Fourteenth Amendment and Article I, section 12 require that the government treat similarly situated people in a similar manner. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); In re Personal Restraint of Mota, 114 Wn.2d 465, 473, 788 P.2d 538 (1990), (citing Harmon v. McNutt, 91

¹⁰ In State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993), the Court previously considered a vagueness challenge to the juvenile sexual motivation special allegation statute, RCW 13.40.135, which is structured substantially similarly to the predatory offense special allegation statute.

Wn.2d 126, 130, 587 P.2d 537 (1978)). A statute that implicates physical liberty interests is reviewed pursuant to the “rational basis” test, that is, whether the statute is rationally related to achieve a legitimate state objective. State v. Coria, 120 Wn.2d 156, 170-71, 839 P.2d 890 (1992). If there is a disparity in the treatment of individuals accused of the same crime, equal protection requires, at minimum, a rational basis for such disparity. See, e.g., Rinaldi v. Yeager, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (law establishing reimbursement for indigent appeals irrationally discriminated between persons who were confined for offenses and those that were not).

Absent any guidelines or limitations to inform the exercise of prosecutorial discretion, there is no legitimate reason or rational basis to selectively file the special allegation, especially where, as here, the allegation results in a greatly increased minimum sentence. By comparison, the death penalty statute survived an equal protection challenge insofar as it requires prosecutors to “perform individualized weighing of the mitigating factors,” and therefore does not confer prosecutors with unfettered discretion. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995); accord State v. McEnroe, 179 Wn.2d 32, 42, 309 P.3d 428 (2013).

Moreover, a court may not dismiss a special allegation “unless it finds that the order [of dismissal] is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.” RCW 9.94A.836(3). By contrast, a court retains discretion to impose the statutory aggravating or mitigating factors set forth in RCW 9.94A.535, even where a jury has found the factors have been proven beyond a reasonable doubt, when “it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6). By eliminating judicial review and discretion, and by failing to link the exercise of prosecutorial discretion to legislative purpose, the special allegation further confers prosecutors with unfettered discretion to selectively file the special allegation in violation of the constitutional right to equal protection.

- d. The proper remedy is reversal of Mr. Lear’s sentence and remand for sentencing within the standard range.

When a defendant is sentenced pursuant to an unconstitutional statute the proper remedy is to remand for resentencing. State v. Hunley, 175 Wn.2d 901, 915-16, 287 P.3d 584 (2012). Because the special allegation statute violates due process and equal protection, Mr. Lear is

entitled to resentencing without the enhancement and within the standard range.

F. CONCLUSION

For the above reasons, Mr. Lear's case should be reversed and remanded for a new trial, at which the identification procedures would be inadmissible, due to the police department's impermissibly suggestive procedures. In the alternative, because Mr. Lear was sentenced pursuant to an unconstitutional sentencing provision, the predatory special enhancement must be vacated and this matter must be remanded so that Mr. Lear can be resentenced.

Respectfully submitted this 22nd day of June, 2015.

s/ Jan Trasen

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

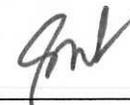
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72454-1-I
)	
TRAVIS LEAR,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JUNE, 2015, 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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