

NO. 74402-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER COWAN,

Appellant.

FILED
October 28, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Richard Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's right to due process was violated when the trial court admitted a witness's identification of appellant based on an impermissibly suggestive photomontage.

2. The trial court erred in concluding the photomontage was not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.¹

3. The trial court erred in denying appellant's motion to suppress a witness's out-of-court and in-court identification of appellant.

4. The trial court erred in admitting improper propensity evidence under ER 404(b).

5. The trial court erred in giving a flawed reasonable doubt instruction, violating due process and the right to a jury trial.

6. Prosecutorial misconduct deprived appellant of a fair trial.

7. Cumulative error deprived appellant of a fair trial.

8. The trial court erred in calculating appellant's offender score.

9. The trial court erred in concluding appellant's North Carolina convictions are legally comparable to Washington felonies.

10. The State failed to prove appellant's North Carolina convictions are factually comparable to Washington offenses.

¹ The trial court's CrR 3.6 findings and conclusions are attached as Appendix A.

11. Counsel was ineffective for failing to object to the comparability of appellant's North Carolina convictions.

12. The trial court erred in failing to consider appellant's argument that his two convictions constituted the same criminal conduct for sentencing purposes and should have been scored as a single offense.

13. Counsel was ineffective for failing to explicitly argue appellant's first degree assault and first degree robbery convictions were the same criminal conduct.

Issues Pertaining to Assignments of Error

1. Must appellant have a new trial where a witness's out-of-court and in-court identification of him was based on an unduly suggestive photomontage and the totality of the circumstances created a substantial likelihood of irreparable misidentification?

2. Did the trial court err in admitting ER 404(b) evidence that appellant had a knife on his person when he was arrested three days after the charged incident, where the knife was never linked to the crime, and instead established only that appellant had the propensity to carry a knife?

3. Does the jury instruction defining reasonable doubt as "one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

4. Was appellant denied a fair trial when the prosecutor improperly shifted the burden of proof in rebuttal by asserting appellant failed to offer an explanation for a certain piece of evidence?

5. Did cumulative error deprive appellant of a fair trial?

6. Was defense counsel ineffective for failing to object to counting eleven of appellant's North Carolina convictions towards his offender score, where the offenses are not legally comparable to Washington felonies and the State failed to prove they are factually comparable?

7. Did the trial court err in failing to consider appellant's argument that his two current offenses constituted the same criminal conduct for the purposes of his offender score?

8. Where defense counsel argued appellant's convictions for attempted second degree murder and first degree robbery were the same criminal conduct, was counsel ineffective for failing to argue, in the alternative, that appellant's conviction for first degree assault, was also the same criminal conduct as the robbery?

B. STATEMENT OF THE CASE²

The State charged Christopher Cowan by amended information with one count of attempted first degree murder, one count of first degree assault,

² Given the length of this brief, the relevant procedural facts are discussed in their corresponding argument sections.

and one count of first degree robbery, all with a deadly weapon. CP 151-52. The State alleged that on January 17, 2015, Cowan stabbed Michael Brenick with a knife when Brenick caught Cowan car prowling. CP 242-45.

Brenick is a delivery driver for Domino's Pizza on Highway 99 in Edmonds, Washington. 4RP 48-49; 6RP 210-11.³ The Domino's storefront faces Highway 99, but Brenick parked behind the building so he could charge his electric car by running an extension cord through a vent in the Domino's back wall. 4RP 71-73; 6RP 212. The back parking lot is poorly lit and is one story below the main floor of Domino's. 6RP 214. Brenick typically did not lock his vehicle. 6RP 219.

Late in the evening on January 17, 2015, Brenick walked a delivery order around the building to his car. 6RP 218-19. He noticed a man sitting in the driver's seat of his car with the doors closed. 6RP 219, 246. When Brenick opened the driver's side door and the man claimed, "This is my sister's car." 6RP 221-22. Brenick described the person as a black male, late 20s to early 30s, wearing a backpack and a dark winter coat. 6RP 221.

Brenick pulled the man from the car and they began scuffling. 6RP 221-23. Brenick said the man tried to get away as Brenick tried to wrestle him to the ground and hold him there until police arrived. 6RP 222-23;

³ This brief refers to the verbatim reports of proceedings as follows: 1RP – 8/13/15; 2RP – 9/24/15; 3RP – 10/9/15; 4RP – 10/19, 10/20/15; 5RP – 10/19, 10/20/15 (voir dire and opening statements); 6RP – 10/21/15; 7RP – 10/22/15; 8RP – 10/23/15; 9RP – 10/26/15; 10RP – 10/27/15; 11RP – 10/27/15 (pre-trial); 12RP – 10/28, 10/29/15; 13RP – 12/1/15.

10RP 924. During the scuffle, Brenick saw the man holding a folding knife with a blade about four inches long. 6RP 223-24. Brenick explained he suddenly felt very tired, put his hand over his stomach, and realized he had been stabbed because he could feel his intestines. 6RP 224-25. Brenick ran to the front of the Domino's, but testified he could see the man head east towards the apartment complex next to the Domino's. 6RP 226.

Brenick's coworkers let him inside the Domino's and called 911 at 11:42 p.m. 4RP 76-77, 94-95; 6RP 228. The first police officers arrived at 11:44 p.m. and immediately started administering first aid to Brenick's abdominal wound, as well as another wound they found near Brenick's left armpit. 4RP 97-100, 127-29. Brenick gave the officers a vague description of the man who stabbed him and told them he did not see where the man went, contrary to his trial testimony. 4RP 102, 113; 6RP 248-49. Brenick was transported to Harborview at 11:53 p.m. 4RP 130-31. He spent eight days in the hospital recovering from surgery. 6RP 230-31.

At 11:56 p.m., a K-9 unit began a track from Brenick's car. 4RP 160. The dog tracked down 230th Street Southwest, the street immediately south of Domino's, then into the Park Ballinger apartment complex, behind the Domino's. 4RP 164-65. The K-9 handler, Officer Jacob Robinson, explained the dog then turned north through the complex and tracked until they came across a witness, Cale Stasiak. 4RP 164-65; 6RP 185. Robinson

told Stasiak who they were looking for and Stasiak said he had seen someone matching that description flee northbound moments earlier. 4RP 166. Robinson said the dog alerted positively to several items in the stairwell, including a winter coat, digital scale, and papers that had been stuffed in a coffee can used for cigarette butts. 4RP 168-69; 6RP 208.

The K-9 unit continued the track through the apartment complex, then north on 76th Avenue West, the road immediately east of Highway 99. 4RP 170-71. Robinson explained it was a very rainy, windy night, and the dog lost the track by the time they reached 228th Street Southwest, the street just north of the Domino's. 4RP 164, 170-74. Robinson officially ended the track at 12:44 a.m. near a Circle K convenience store. 4RP 176-78.

Stasiak was 19 years old at the time and lived with his grandparents in unit 29 of the Park Ballinger Apartments, an apartment complex with a central courtyard. 6RP 258-60. On January 17, Stasiak had been at a friend's house in Mukilteo. 6RP 262-64. Though Stasiak claimed he only had one beer that night, his friend insisted on driving him home. 6RP 262-64. Once his friend dropped him off, Stasiak realized he had forgotten his keys. 6RP 265. Stasiak did not want to wake his grandparents up, so he waited outside the apartment while his friend returned to her home, retrieved Stasiak's keys, and drove back to his apartment. 6RP 265-66.

Stasiak was leaning against the stairwell near his front door, looking at social media on his phone, when he saw a man “sluggish[ly] jog” through the courtyard. 6RP 266-67. The man knocked faintly on the door to unit 27, looked over at Stasiak, and told Stasiak it was his friend’s apartment. 6RP 267. Stasiak explained, “then after that we had both kind of sat down and that was the starting point of our conversation.” 6RP 267.

At trial, Stasiak described the person as a “[b]lack male, big baggy winter jacket, baggy jeans with a backpack.” 6RP 273. Stasiak said the man was carrying a manila folder in one hand “and his other hand was almost kind of concealed in his jacket.” 6RP 273. Stasiak eventually saw the man had a pocket knife in his hand. 6RP 274, 296-97.

As they talked, the man pulled a digital scale out of his pocket and told Stasiak “somebody had just tried to rob him for his weed, and then asked if he could use Stasiak’s cell phone to call a cab. 6RP 275. Refusing to hand over his cell phone, Stasiak called Checker Cab twice for the man, at 11:48 and 11:50 p.m., but did not reach anyone. 6RP 275-76.

Stasiak then stepped a short distance away to call his friend. 6RP 279-80. Stasiak said while he was on the phone, the man put the scale and manila envelope in the coffee can on the stairs. 6RP 277-80. The man also took off his coat and left it in the stairwell. 6RP 277-78. By the time Stasiak

got off the phone a minute or two later, the man had left, heading north out of the apartment complex. 6RP 279-80.

Police collected the coat, scale, and envelope from the apartment complex that night. 7RP 389-97. The coat was gray with some black trim and crimson piping. 7RP 394. The envelope contained car insurance documents belonging to Brenick. 6RP 232-34; 7RP 395. Police also collected a black baseball hat found near Brenick's car that did not belong to Brenick. 6RP 255; 7RP 387, 408-09.

After the K-9 track ended, Officer Robinson went inside the Circle K to ask the clerk about surveillance video, but the clerk was unable to access them because he did not have the password. 4RP 177. Marcus Weinall started his shift at the Circle K the next morning. 6RP 328. As he tidied up the store, near the lottery machine he found a pawn receipt from January 17 made out to Cowan at Cash America on Aurora Avenue. 6RP 333-36.

Sergeant Robert Barker returned to the Circle K later that morning to obtain the surveillance video. 7RP 417. Weinall showed them footage from around midnight on January 17 into the early hours of January 18, and turned over the pawn receipt he found. 6RP 336-37, 344; 7RP 417. The video showed a man wearing a backpack enter the store at 49 seconds after midnight, pause at the lottery machine, purchase a candy item with cash, and then exit the store. 6RP 341-43, 354-55.

Barker then took the pawn receipt to the Cash America Pawn Shop on 170th Avenue in Shoreline. 7RP 422-23. Surveillance video from the Cash America showed Cowan complete a pawn transaction on January 17 around 1:15 p.m.. 7RP 422-23; 8RP 484; 9RP 668-69. Barker also obtained Cash America surveillance videos from January 8 and January 20, when Cowan made additional pawn transactions. 7RP 434-41; 8RP 506-08. Over defense objection, police officers testified the coat Cowan was wearing in January 8 and January 17 videos looked similar to the one recovered outside Stasiak's apartment. 7RP 425, 37-38; 9RP 721.

Using Cowan's Department of Licensing (DOL) photo, Sergeant Shane Hawley prepared a photomontage to show Brenick and Stasiak. 9RP 637-38; Exs. 146, 147, 147A-E. Hawley selected five other photos from the Edmonds Police Department database of black men around Cowan's age. 9RP 638-39. Cowan was wearing earrings in his photo, so Hawley covered the earrings with black boxes, and did the same on the other photos to make Cowan's photo less distinctive. 9RP 637-40, 698-99.

Cowan's photo also showed his teeth, with a prominent gap in the top front two. 9RP 699; Ex. 147C. Only one other photo in the montage showed the person's teeth, but that individual was wearing a "grill," or a row of gold teeth. 9RP 699-700; Ex. 147. The other four photos did not show the individuals' teeth. 9RP 699-700; Exs. 147, 147A-E. Defense expert

Jennifer Devenport testified that highlighting Cowan's teeth made the montage suggestive, because it essentially reduced the montage size from six to two photos. 10RP 803.

Hawley showed Brenick the photomontage on January 19. 9RP 640. Brenick reviewed the photos several times, but could not identify anyone. 6RP 240; 9RP 661-62, 700-01.

Sergeant Barker showed Stasiak the same montage on January 20. 7RP 429. Barker testified Stasiak looked at the photos one at a time until he came to photo four, Cowan's photo, which he set to the side face up. 7RP 432. Stasiak looked at the remaining two photos, then put photo four on the top of the stack, saying something like "that's the guy." 7RP 432. On the montage admonition sheet, Stasiak explained his identification: "The gap in the teeth was the same along with the facial hair. Same facial features from what I was able to see that night." Ex. 146. At trial, Stasiak again explained he identified Cowan's photo because of "the gap in the teeth. The top two teeth. That was the big standoffish." 6RP 288; 309-10. Barker denied it, but Stasiak said Barker told him he identified the correct person. 6RP 309; 7RP 433. Stasiak identified Cowan in the courtroom. 6RP 276-77.

Shoreline police arrested Cowan on the 16500 block of Highway 99 in the early morning hours of January 21. 8RP 550-51, 564. Cowan struggled with the police as they attempted to restrain him, asking several

times what he was being arrested for. 8RP 554-57. Cowan was wearing a backpack and police found a black-handled folding knife in Cowan's pocket. 8RP 557-58, 567-68, 577-78.

Sergeant Hawley interviewed Cowan that night. 8RP 664; Ex. 187. Cowan repeatedly denied stabbing anyone. Ex. 187, at 11-14. He said he had stayed with his friends Brad and Nicola at Andy's Motel on Saturday, January 17. Ex. 187, at 4-6. Cowan explained he went to the store that night and bought a cigar, then went back to the room and smoked marijuana, ate, and went to sleep around 10 p.m. Ex. 187, at 5, 14. Nicola Dines, who has convictions for crimes of dishonesty, testified she did not see Cowan that evening. 9RP 732-33.

Hawley sent the coat, digital scale, baseball hat, knife, and Cowan's shoes to the crime lab for forensic testing. 9RP 675-76, 680. None of the items showed any blood stains. 9RP 680-83. DNA on the items was a mixture of at least four contributors, so no comparison could be made. 9RP 680-83. Hawley then had the knife disassembled by a local knife manufacturer and returned it to the lab for additional testing. 9RP 682. No blood was found inside the knife handle even after disassembly. 9RP 682, 714-15. Hawley agreed the items did not establish any forensic link between Cowan and the crime. 9RP 712-16.

Edmonds Patrol Officer Melbre Moore occasionally examines fingerprints and has done about 30 identifications over the course of his 19-year career. 10RP 750, 833-34. Not until July 2015 did Moore examine the manila envelope and paperwork inside for latent fingerprints. 9RP 675-65; 10RP 836. The paperwork was stored in the Edmonds Police Department evidence lab. 10RP 837-38. Moore did not know who had accessed the lab while the paperwork was stored there or how many times the lab was accessed. 10RP 837-38. The evidence lab is not accredited through the state or the International Association of Identification. 10RP 833-34.

Moore explained he sprayed the envelope and paperwork with ninhydrin, a chemical that is used to process latent fingerprints on porous surfaces. 10RP 763-64. Moore believed the ninhydrin reacts with amino acids left behind by touch, but Moore could not explain what amino acids are. 10RP 764, 837. Moore found several prints on the envelope from several different sources. 10RP 769-77, 843-44. Moore concluded that a partial print on the envelope matched Cowan's left thumb. 10RP 781. He sent a photocopy of the partial print to the state crime lab for verification. 10RP 781. A scientist there reached the same conclusion. 10RP 895.

The jury could not reach a verdict on attempted first degree murder, but found Cowan guilty of the lesser included offense of attempted second degree murder, as well as first degree assault and first degree robbery. CP

54-58. The jury returned special verdicts finding Cowan was armed with a deadly weapon at the time of the offenses. CP 51-53.

The trial court dismissed the attempted second degree murder conviction. 13RP 10-11. Based on Cowan's offender score of 13, the court sentenced Cowan to the top end of the standard range: 318 months on the assault and 171 months on the robbery, to run concurrently. CP 6-7, 26-28. With an additional 48 months for the two deadly weapon enhancements, Cowan was sentenced to 366 months total confinement. CP 28. Cowan timely appealed. CP 11.

C. ARGUMENT

1. AN IMPERMISSIBLY SUGGESTIVE PHOTOMONTAGE AND SUBSEQUENT IN-COURT IDENTIFICATION DENIED COWAN HIS RIGHT TO DUE PROCESS.

“An out-of-court photographic identification violates due process if it is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). One of the harms of an unduly suggestive photomontage is that once the witness makes a misidentification, he is apt to retain the image of the photograph in his memory rather than of the person actually seen, “reducing the trustworthiness of subsequent courtroom identification.” State v. Hilliard, 89 Wn.2d 430, 439, 573 P.2d 22 (1977).

Courts employ a two-step test to determine whether a photographic identification violated due process and, accordingly, should have been suppressed. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). The accused must first show the identification procedure was suggestive. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). Once the accused makes this showing, courts review the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Id. In making this determination, courts consider five factors: (1) the opportunity of the witness 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 level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. State v. Traweek, 43 Wn. App. 99, 104, 715 P.2d 1148 (1986) (citing Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

a. Relevant facts

Before trial, Cowan moved to suppress Stasiak's identification of him in the photomontage and subsequent in-court identification. CP 224-30. Cowan argued the photomontage was impermissibly suggestive and created

a substantial likelihood of misidentification, in large part because he was the only individual pictured in the montage with a gap in his teeth. CP 224-30.

The trial court held a pretrial hearing on the issue. 2RP 4-5. Sergeant Hawley testified about how he compiled the photomontage. 2RP 45-60. Sergeant Barker testified about how he administered the montage, as well as Stasiak's identification of Cowan. 2RP 31-45. Dr. Jennifer Devenport testified on Cowan's behalf. 2RP 64-65.

Devenport is an associate professor of psychology at Western Washington University. 2RP 65. Her specialty is psychology law and she focuses her research on eyewitness memory and identification. 2RP 66. Based on her review of the police reports and photomontage, Devenport concluded the montage was suggestive because, of the six photos, only two men were showing their teeth and, of those two men, only Cowan had a gap in his teeth. 2RP 73.

Despite Devenport's testimony, the trial court concluded the photomontage was not unduly suggestive. CP 4-5. The court acknowledged Cowan's photo "does have some differences," but believed it "does not draw undue attention to Mr. Cowan's photograph which was number 4." CP 4. The court noted the gap in Cowan's teeth was a "different unusual characteristic[]," but concluded it was not dispositive because Stasiak "did not mention the teeth of the suspect when he described the suspect to

officers.” CP 5. The court further concluded the montage did not “give rise to a substantial likelihood of misidentification.” CP 5. The court therefore denied the motion to suppress Stasiak’s out-of-court and in-court identifications of Cowan. CP 5; 2RP 98-103.

b. The photomontage was unduly suggestive.

Case law provides useful guidance as to what constitutes a suggestive photomontage. Minor differences in the photos are not unduly suggestive. State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999); see, e.g., Vickers, 148 Wn.2d at 118-19 (defendant’s photo had lighter background and he was the only one not wearing coveralls); State v. Hendrix, 50 Wn. App. 510, 513, 749 P.2d 210 (1988) (defendant’s photo was the only one without a tiny number in the corner); State v. Weddel, 29 Wn. App. 461, 474-76, 629 P.2d 912 (1981) (defendant’s photo was one-quarter inch wider than the other five photos and the six photos contained three different backgrounds with only defendant pictured against an off-white wall).

Rather, a suggestive photomontage “is one that directs undue attention to a particular photo.” Eacret, 94 Wn. App. at 283. For instance, in Kinard, the witness described the suspect as a black man with a gap in his teeth. 109 Wn. App. at 433. The photomontage included photos of six black men, but was unduly suggestive because the only photograph showing

prominent gapped teeth was Kindard's. Id. Similarly, in Traweck, a lineup was impermissibly suggestive where the witness described the robber as blonde, and Traweck was the only blonde participant in the lineup—"thus the only possible choice." 43 Wn. App. at 103.

Similarly, in State v. Burrell, the witness described the suspect as having a "frizzy Afro" hairstyle. 28 Wn. App. 606, 607, 610-11, 625 P.2d 726 (1981). The police showed the witness nine photos, none of whom closely resembled Burrell or had hair as long as Burrell's. Id. at 610. Burrell's photo was also a closer view than the others, "which might have tended to call attention to his photo." Id. Under these circumstances, the court concluded the photomontage was "sufficiently suggestive" to require "consideration of whether there are countervailing indicia of witness reliability." Id. at 611.

The photomontage used in Cowan's case was unduly suggestive in several respects. Stasiak described the suspect as a "dark skinned black male." 2RP 20. Of the six black men depicted in the montage, Cowan was the darkest complexion. Exs. 147, 147A-E. This is similar to Burrell, where the witness described the suspect as having a "frizzy Afro" hairstyle and Burrell's hair was the longest among the nine photos. Given Stasiak's description, Cowan would have stood out among the six photographs.

Even more significantly, Cowan is one of only two individuals in the montage with his teeth showing and the only individual in the montage with gapped teeth. Exs. 147, 147A-E. The man depicted in photo one has his teeth showing, but is wearing a gold grill, which is significantly different than Cowan's teeth. Ex. 147. By contrast, Cowan has his teeth showing in his photo, including a prominent gap in his two front teeth. Ex. 147C. Hawley recognized this made Cowan's photo unique in the montage, but did not correct the problem. 2RP 54-57; 9RP 698-700.

Devenport explained a unique feature like Cowan's gapped teeth "increases the suggestibility of the [montage], because the witness is going to be drawn to unusual factors that make an individual stand out in that [montage], increasing the likelihood that a particular photo would be chosen." 2RP 73. Given that only two men in the montage were showing their teeth, Devenport testified the "functional size" of the montage was actually two instead of six photos. 10RP 803.

Cowan was the only person in the montage with a gap in his teeth. This is precisely like Kinard, where the suspect was the only person in the montage with a gap in his teeth, and like Traweck, where the suspect was the only blonde person in the lineup. Cowan's distinctive teeth effectively reduced the montage size to one photo. Stasiak then identified Cowan based on the "big standoffish" gap in the teeth—the exact feature that made

Cowan's photo unique. 6RP 288, 309-10; Ex. 146. Based on this unique characteristic of Cowan's photo, Devenport concluded the montage was suggestive. 2RP 73.

Finally, Sergeant Barker denied it, but Stasiak testified Barker told him he identified the correct person in the montage. 6RP 309; 7RP 433. Devenport explained the witness should not be informed he or she picked the correct person, because "then you feel very confident in your ability to select that person. You know now I've selected the right person, according to the police, you have no reason not to believe the police. Therefore, that's going to artificially inflate your initial level of confidence." 10RP 802. Barker telling Stasiak he picked the correct person irrevocably tainted Stasiak's in-court identification of Cowan.

The identification procedure used here was unduly suggestive, given the unique features of Cowan's photo, effectively reducing the montage size to one photo. The trial court erred in concluding otherwise.

- c. Based on the totality of the circumstances, there was as substantial likelihood of misidentification.

Because the photomontage was suggestive, this Court must consider the five factors described above in determining whether the suggestiveness created a substantial likelihood of irreparable misidentification. "Where the photographic identification procedure is suggestive, 'the corrupting effect of

the suggestive identification itself' must be weighed against other factors probative of the reliability of the witness' identification." Burrell, 28 Wn. App. at 610 (quoting Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Application of the factors demonstrates Stasiak's identification was unreliable.

Opportunity to view the suspect. Stasiak's encounter with the suspect lasted no more than 10 to 15 minutes, close to midnight on a rainy, windy, "nasty January night." CP 227; 4RP 94, 164; 6RP 275-76, 341. Stasiak has an astigmatism, which affects his ability to see well at night. 6RP 292-93. On the montage identification form, Stasiak noted he made the identification "from what I was able to see that night." Ex. 146. All of this suggests Stasiak had a limited or difficult time observing the suspect.

Degree of attention. Stasiak testified he sat for a while with the individual, but was on his phone looking at social media, trying to pass the time. 6RP 300. He also said he had to google a cab company and called the cab company twice from his phone, at 11:48 and 11:50 p.m. 6RP 301. After calling the cab company, Stasiak stepped away to call his friend. 6RP 279, 301-02. The suspect had his back to Stasiak during the phone call, and then left the courtyard while Stasiak was still on the phone. 6RP 279-80. Police had to ask Stasiak to put his phone down when they came through the courtyard on the K-9 track. 6RP 280, 302.

Stasiak's degree of attention was greatly diminished by using his phone throughout the encounter. Devenport explained, "[i]f a person is on their cellphone, that's where their attention is. There are various reasons we have to attend to it, in order to hit the right buttons and read what's being displayed." 10RP 799. Attention is like a "spotlight" shining on the phone, which means "we're not attending to other things around us." 10RP 799-800. Use of a phone during an encounter increases the likelihood of mistaken identifications. 10RP 800.

Stasiak also said the man was holding a knife in his hand and "holding it up to his chin" during their encounter. 6RP 273-74, 296. Devenport described a phenomenon called "weapon focus effect," which impacts a witness's memory and diminishes his ability to identify the particular individual. 2RP 71-72; 10RP 800. She explained:

[W]hat happens when a weapon is present is that the witnesses tend to focus on that instrument, whether it's a gun or a knife, and when our attention is focused in one area, we don't have the ability to then attend to other things in our environment such as the description of the perpetration.

2RP 72. In other words, "when our attention is focused on, say, a weapon, it's not focused on the person's face encoding their characteristics." 10RP 799. Devenport explained "individuals who have experienced an event with a weapon tend to make a higher rate of false identifications than those who don't have a weapon present during those events." 10RP 800. The suspect's

prominent display of the knife also likely impacted Stasiak's degree of attention on the suspect's facial characteristics.

Accuracy of prior description. Stasiak gave a very vague description of the man he saw on January 17: "dark skinned black male, short hair, thin mustache," "wearing a jacket, backpack and black pants." 2RP 20. Stasiak did not mention the gapped teeth in his initial description, but then noted this as the main reason he identified Cowan in the montage. This lack of accuracy suggests a substantial likelihood of misidentification.

Level of certainty. Stasiak said he was 10 out of 10 certain the individual in photo four was the individual he saw on January 17. 2RP 35. Devenport explained, however, "[t]he research shows only a small correlation between confidence and accuracy, in other words, the witness can be quite confident but inaccurate." 2RP 86; accord 10RP 801. Stasiak also identified Cowan primarily based on the gap in his teeth—a feature only Cowan's photo had. 6RP 309-10; Ex. 146. Devenport further explained research shows individuals are much more likely to make an incorrect identification when viewing someone of different race. 2RP 71-72. This also increased the likelihood of misidentification, because Cowan is African American and Stasiak is Caucasian.⁴ 2RP 43-44.

⁴ This is supported by the recent trend in Washington case law. In a split opinion in State v. Allen, the Washington Supreme Court agreed a cross-racial identification instruction

Time between crime and identification. Stasiak viewed the suspect on January 17 and then viewed the photomontage on January 20. 2RP 31-32. Devenport agreed this was a “fairly good amount of time.” 10RP 819-20. However, she also noted “research shows that within 24 hours we oftentimes lose up to 50 percent of what we could originally recall immediately after an event. So the sooner the better.” 10RP 799.

Each case involving challenge to an identification procedure must be considered on its own facts. Simmons v. United States, 390 U.S. 377, 384, 384, 19 L. Ed.2d 1247, 88 S. Ct. 967 (1968). Considering all of the circumstances in this case, there is “a very substantial likelihood of irreparable misidentification.” Id.

d. The error was not harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). A constitutional error is harmless only if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Id. (quoting State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

should be given in appropriate cases. 176 Wn.2d 611, 635-36, 294 P.3d 679 (2013) (Wiggins, J., dissenting). Cowan’s jury was so instructed. CP 65; 12RP 935-36.

Stasiak's out-of-court and in-court identifications were significant pieces of the State's evidence linking Cowan to the crime. The State relied on them heavily in closing argument. 12RP 966, 974. Beyond Stasiak's identifications, the police recovered only a partial print from Brenick's insurance paperwork and testified the coat Cowan was wearing prior to the incident was similar to the one recovered at Stasiak's apartment. Brenick could not identify the suspect. No DNA or blood linked Cowan to the crime. The identification evidence likely dispelled doubts that Cowan was the perpetrator. The evidence was not trivial.

This Court should reverse Cowan's convictions and remand for a new trial with instructions to exclude Stasiak's out-of-court and in-court identifications because they violate due process.

2. THE TRIAL COURT ERRED IN ADMITTING ER 404(b) EVIDENCE THAT COWAN HAD A KNIFE AT THE TIME OF ARREST, WHEN THERE WAS NO LINK BETWEEN THE KNIFE AND THE CRIME.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

ER 404(b)'s prohibition encompasses “any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). The rule applies to evidence of other acts regardless of whether they occurred before or after the charged crime. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989).

Before admitting ER 404(b) evidence, the trial court must, on the record, (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudice. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). A trial court’s decision to admit ER 404(b) evidence is reviewed for abuse of discretion. Id. at 922. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Id. The party who loses a motion in limine has a standing objection and does not need to make further objections. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

Evidence of other acts is relevant to identity “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also

committed the other crimes with which he is charged.” State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994) (quoting State v. Hernandez, 58 Wn. App. 793, 798-99, 794 P.2d 1327 (1990)). In other words, the “modus operandi” must be so unusual and distinctive as to be like a signature. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). The distinctive features must be shared between the two crimes or acts, and must “bear[] such a high degree of similarity as to mark it as the handiwork of he accused.” Id.; State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir. 1974)).

In State v. Hartzell, Hartzell and Tieskotter were convicted of second degree assault while armed with a firearm and unlawful possession of a firearm for shooting into an apartment occupied by a woman and her daughter. 153 Wn. App. 137, 145-48, 221 P.3d 928 (2009). Police were able to link the two men to the crime through ballistics evidence establishing the guns they possessed in two subsequent incidents were the same guns used to shoot into the apartment. Id. at 145-47.

On appeal, Hartzell and Tieskotter argued the trial court improperly admitted the ER 404(b) evidence connecting them to the two guns used after the shooting, “because it was used to show they had propensity to commit gun crimes.” Hartzell, 153 Wn. App. at 149. They likewise asserted their

conduct in the other incidents was not similar enough to the charged conduct to be admissible to prove identity. Id. at 151.

This Court concluded the evidence was relevant “to show that the weapons used to fire bullets into Hoage’s apartment were found shortly thereafter in the possession of Hartzell and Tieskotter.” Id. at 151. Such evidence tended “to make it more probable that they were the individuals who did the shooting at Hoage’s apartment.” Id. The State also limited the amount of information it introduced about the incidents, minimizing the prejudicial effect. Id. In other words, the evidence was not admitted to show Hartzell and Tieskotter had a general propensity to use guns, but because it connected them to the particular guns used in the shooting. Id. at 152. This Court therefore held the trial court did not err. Id.

Before trial, defense counsel moved to exclude testimony under ER 404(b) that Cowan was in possession of a knife at the time of his arrest. CP 143-44; 4RP 14-15. Counsel pointed out there was no evidence connecting the knife in Cowan’s possession to the knife used in the assault, distinguishable from Hartzell. CP 143-44. Counsel asserted there was no probative value in admitting the evidence except to show he was a knife-carrying type person—impermissible propensity evidence. CP 144; 4RP 15.

In response, the State claimed the knife was relevant and admissible because it matched “the rough description given by the two witnesses who

saw the knife the night of January 17—dark colored folding knife, with a blade approximately 4" in length.” Supp. CP__ (Sub. No. 60, State’s Responsive Brief to Motions in Limine, at 9). The State emphasized the knife’s “dark handle” matched Brenick’s and Stasiak’s description of the knife. 4RP 15-16. The trial court admitted the evidence for the reasons articulated by the State, but acknowledged “[m]aybe it wasn’t the knife in question.” 4RP 16.

Brenick described the knife as a “folding knife about four inches in length.” 6RP 224. Stasiak described the knife only as a “fold-out” pocket knife. 6RP 274, 296-97. Neither Brenick nor Stasiak testified to the color of the knife handle. 6RP 223-24 (Brenick); 6RP 274, 295-97 (Stasiak). Brenick specifically testified he was not able to see the color of the knife handle. 6RP 224. No blood was found anywhere on the knife seized from Cowan’s person. 9RP 681-82, 714-16. Nor could any DNA comparison be made to the mixture of at least four contributors on the knife blade and handle. 9RP 681-82, 714-16.

Given the lack of connection between the knife used in the assault and the knife in Cowan’s possession, the State argued in rebuttal: “But the knife the police collected from the defendant on the 21st I would suggest is not the knife that was used on Michael Brenick. My suggestion is that like the coat that got shed, the knife that was actually used on Brenick got

tossed.” 12RP 1023. This was directly contrary to the State’s assertion before trial that there was enough of a link between the two knives to be admissible under ER 404(b). 4RP 15-16.

The only similarities between the knife used in the assault and the knife Cowan possessed at the time of arrest were they were folding knives with roughly the same blade length. See Supp. CP__ (Sub. No. 60, at 9) (explaining the blade of the knife found on Cowan was 3.5 inches). There was no forensic connection between the two knives. This is not “such a high degree of similarity” or “so unusual and distinctive” that it marked Cowan’s “handiwork.” Coe, 101 Wn.2d at 777; Thang, 145 Wn.2d at 643. The knife therefore did not meet “the stringent test of uniqueness required for admission to establish identity.” Coe, 101 Wn.2d at 778. The State’s own argument in rebuttal acknowledged this reality.⁵

The only remaining purpose for the evidence that Cowan possessed a knife was that he was a knife-carrying type person, with a general propensity to use knives. If the only logical relevancy of evidence is to show propensity, admission of the evidence may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in

⁵ Indeed, if the knife Cowan possessed was not the knife used in the stabbing, then it invites the question: what *was* the purpose of admitting the knife? The only logical answer can be propensity: if Cowan possessed a knife at the time of arrest, then he was more likely to have possessed a knife on January 17 when Brenick was stabbed. ER 404(b) does not allow such evidence.

Pogue's trial for possession of cocaine, the court allowed the State to elicit Pogue's past cocaine possession on the issue of knowledge and to rebut his assertion that the police planted the drugs. Id. This Court reversed, holding:

The only logical relevance of [Pogue's] prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Id.; accord State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999) (reversing where trial court admitted two prior instances of drug dealing to show Wade's possession with intent to deliver drugs). The trial court therefore erred in admitting the knife for the improper purpose of establishing the identity of Brenick's assailant.

Improper admission of ER 404(b) evidence requires reversal where there is a reasonable probability the outcome of the trial would have been different without the inadmissible evidence. State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

Such is the case here. Identity was Cowan's defense at trial. Brenick could not identify the suspect and the photomontage that allowed for Stasiak's identification of Cowan was unduly suggestive. The jury was not instructed to consider the knife only for its proper purpose. See Gunderson, 181 Wn.2d at 923 ("The trial court must also give a limiting instruction to the jury if the evidence is admitted."). Indeed, no limiting instruction could

have been given because the only purpose for the knife was propensity.⁶ The jury was therefore allowed to consider the knife as evidence of the suspect's identity, which is impermissible because Washington law requires a much higher bar for modus operandi. The knife helped establish Cowan's identity in that he had the general propensity to carry knives.

There is a reasonable probability that without this harmful propensity evidence, the jury would have reached a different outcome. This Court should reverse and remand for a new trial. Id. at 927.

3. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

At Cowan's trial, the trial court gave the standard reasonable doubt instruction, WPIC 4.01, which reads, in part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 66. This instruction is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement onto reasonable doubt, making it more difficult for jurors to acquit and easier for the

⁶ WPIC 5.30 provides the following pattern instruction that can be used with properly admitted ER 404(b) evidence: "Certain evidence has been admitted in this case for only a limited purpose. This evidence [consists of _____ and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.30, at 180 (3d ed. 2008) (WPIC).

prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases.

In order for jury instructions to be sufficient, they must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev’d on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.⁷

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both

⁷ See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of the word “presume” to determine how jury may have interpreted the instruction); State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, making it possible the jury applied the erroneous standard), overruled on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

for a jury to return a “not guilty” verdict. Examination of the meaning of the words “reasonable” and “a reason” shows this to be true.

“Reasonable” means “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1892 (1993). For a doubt to be reasonable, it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. But WPIC 4.01 does not do that. Instead, WPIC 4.01 requires “a reason” for the doubt, which is different from a doubt based on reason. “A reason” in the context of WPIC 4.01 means “an expression or statement offered as an explanation of a belief or assertion or as a justification.” WEBSTER’S, supra, at 1891. In contrast to definitions employing the term “reason” in a manner that refers to a doubt based on

reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable. This is unconstitutional.

Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires the defense or the jurors to supply a reason to doubt, shifting the burden and undermining the presumption of innocence. The presumption of innocence "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The WPIC 4.01 language does that in directing jurors they must have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such arguments "misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence," because "a jury need do nothing to find a defendant not guilty." Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01’s language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before making the fill-in-the-blank argument: “A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors: “What [WPIC 4.01] says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for their doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt “for which a reason exists” language provides a natural and seemingly irresistible basis to argue that jurors must give a reason for their reasonable doubt. If lawyers mistakenly believe WPIC 4.01 requires articulation of doubt, then how can average jurors be expected to avoid the same pitfall?

No appellate court in recent times has directly grappled with the challenged language. The Bennett court directed trial courts to give WPIC 4.01 at least “until a better instruction is approved.” 161 Wn.2d at 318. The Emery court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759.

In State v. Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The court concluded the trial court’s erroneous instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id. at 585.

None of the appellants in Bennett, Emery, or Kalebaugh argued the language requiring “a reason” in WPIC 4.01 misstates the reasonable doubt standard. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not

challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the right to a jury trial. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82. Though defense counsel did not object to the instruction, structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it also requires an articulable doubt. This undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Cowan's convictions.

4. COWAN WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF DURING REBUTTAL.

Prosecutors are officers of the court and have a duty to ensure the accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When a prosecutor's comments are improper and there is a substantial likelihood that they affected the jury's verdict, the defendant's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

The presumption of innocence, and the corresponding burden on the State to prove every element of the offense beyond a reasonable doubt, is "the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. A criminal defendant has no duty to present evidence, and it is misconduct for the prosecution to shift the burden of proof and invite the jury to draw an adverse inference from a defendant's failure to produce evidence. Emery, 174 Wn.2d at 759-60; State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990).

In rebuttal, after defense counsel made her closing argument, the prosecutor said, "One thing that I kept waiting for is an explanation for the coat. How do you counter that coat?" 12RP 1020. Defense counsel

objected to this argument as improper burden shifting. 12RP 1020. The trial court overruled the objection, stating, “It’s not burden shifting.” 12RP 1020. The prosecutor then went on to emphasize the coat that was collected from the Park Ballinger apartments, arguing, “You have multiple videos of the defendant wearing that coat prior to the assault.” 12RP 1020.

The prosecutor’s argument that Cowan needed to provide an explanation for that coat was similar to the burden shifting comments held improper in Cleveland. There, the prosecutor argued: “Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.” 58 Wn. App. at 647. This Court explained “the inference from this argument is that Cleveland had a duty to present favorable evidence if it existed.” Id. at 648. The prosecutor’s argument was therefore improper because it “clearly suggest[ed]” Cleveland did not present favorable evidence because none existed. Id. at 647-48. This Court held defense counsel’s objection should have been sustained, the argument stricken, and the jury instructed to disregard it. Id. at 648.

State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990), provides a useful contrast. Contreras’s defense to second degree assault was alibi. Id. at 472-73. Contreras testified he was elsewhere with a friend during the

incident, but did not call that friend to testify. Id. In closing, the prosecutor asked, “And where is [the friend]?” Id. at 476. He continued, “You have the obvious witness that you would expect to be called not here, and it is not just like she is not around. Something fishy is going on here.” Id.

This Court found no impropriety. Id. The court reasoned: “The prosecutor may comment on the defendant’s failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies the uncalled witness’s ability to corroborate his theory of the case.” Id. Importantly, however, the court distinguished other cases where the accused did not testify or call witnesses, so “[t]he only issue was the strength of the State’s case.” Id. at 473-74. Under such circumstances, it is “clearly improper” to reference the accused’s failure to call witnesses or present evidence. Id. at 474.

Cowan’s timely objection should have been sustained, the comment stricken, and the jury admonished to disregard it. Cowan had no duty to present evidence and no duty to provide “an explanation for the coat,” as the prosecutor argued. 12RP 1020. Rather, it was the State’s duty to prove the elements of the offenses beyond a reasonable doubt. Like Cleveland, the prosecutor’s argument suggested Cowan did not present evidence countering the coat because there was none. This impermissibly shifted the burden of proof to Cowan to present favorable evidence. Cowan had no such duty, and

it was misconduct for the prosecutor to suggest otherwise. Cleveland, 58 Wn. App. at 647-48; see State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (noting it is “particularly grievous” for a prosecutor, as “an officer of the State,” to “mislead the jury regarding the bedrock principle of the presumption of innocence”).

There is a substantial likelihood the prosecutor’s improper burden shifting affected the outcome of Cowan’s trial. The trial court overruling the objection “lent an aura of legitimacy to what was otherwise improper argument.” State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). The court augmented the prosecutor’s misconduct by putting its imprimatur on the improper remarks. State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). “This increases the likelihood that the misconduct affected the jury’s verdict.” Id. Courts also recognize when prosecutors make improper remarks in rebuttal, it “increas[es] their prejudicial effect.” State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

The prosecutor’s burden shifting was particularly damaging in the context of the entire trial. The coat was a key piece of the State’s case. The K-9 unit alerted positively to the coat and Stasiak testified the suspect shed it in the apartment complex stairwell. 4RP 168-69; 6RP 277-78. Over strenuous defense objection, police testified Cowan appeared to be wearing a similar coat in surveillance footage from the pawnshop on January 8 and

January 17. 4RP 24-31; 7RP 425, 37-38; 9RP 721. Cowan was not wearing a coat in the Circle K surveillance video or on the January 20 pawnshop video. 9RP 670; 12RP 963-64.

The State repeatedly emphasized the coat in closing, asserting “this coat figures somewhat prominently into this case for a number of reasons.” 12RP 960. The State argued Cowan was wearing the coat before the incident but not after, insinuating he was the one who left the coat behind at Stasiak’s apartment. 12RP 961-64. The State further claimed it was unlikely that, as a homeless man, Cowan would not wear a heavy winter coat in January unless he needed to hide from the police. 12RP 964.

Instead of stopping there, though, the State shifted the burden to Cowan to provide an explanation for the coat. This suggested Cowan had a duty to present evidence to counter the coat and his failure to do so must mean no such evidence existed. Given the importance of the coat to the State’s case, this was highly damaging to Cowan. This Court should therefore reverse Cowan’s convictions and remand for a new trial because prosecutorial misconduct deprived him of his right to fair trial. Lindsay, 180 Wn.2d at 434-37, 444.

5. CUMULATIVE ERROR DEPRIVED COWAN OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. Coe, 101 Wn2.d at 789. Each error described above was prejudicial. Together they are even more so, because they significantly undercut Cowan's identity defense. Because their cumulative effect deprived Cowan a fair trial, this Court should reverse and remand for a new trial. Id.

6. COWAN'S NORTH CAROLINA CONVICTIONS ARE NOT LEGALLY COMPARABLE TO WASHINGTON FELONIES AND THE STATE FAILED TO PROVE THEY ARE FACTUALLY COMPARABLE, SO THEY SHOULD NOT BE COUNTED IN HIS OFFENDER SCORE.

In calculating Cowan's offender score, the State included eleven of his convictions from North Carolina, asserting they are all legally and factually comparable to Washington felonies.⁸ Contrary to the State's assertions, however, none of the North Carolina offenses are legally comparable to the identified Washington offenses. Furthermore, the State failed to prove the factual comparability of all eleven offenses. The proper remedy is to vacate Cowan's sentence and remand for resentencing.

⁸ A table of the North Carolina offenses and the purportedly comparable Washington felonies is attached as Appendix B to this brief.

This Court reviews a challenge to the comparability of an out-of-state conviction de novo. State v. Moncrief, 137 Wn. App. 729, 732, 154 P.3d 314 (2007). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a foreign conviction is included in a defendant's offender score only if it is "comparable" to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525(3). Washington courts employ a two-part test to determine the comparability of a foreign offense. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

First, courts determine legal comparability: "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." Id. Second, if the out-of-state offense's elements are broader than the Washington offense's elements, courts turn to factual comparability: "whether the conduct underlying the foreign offense would have violated the comparable Washington statute." Id. "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Id. When a foreign conviction is neither legally nor factually comparable, it cannot be counted in an offender score. Id.

Cowan's counsel did not object to the comparability of his out-of-state convictions. 13RP 3. However, a claim of ineffective assistance of counsel may be raised for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy constitutes reasonable performance. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226.

In Thiefault, the Washington Supreme Court held defense counsel was ineffective for not objecting to a Montana conviction the State failed to prove was legally or factually comparable. 160 Wn.2d at 417. Defense counsel's failure to object was deficient because the Montana attempted robbery statute is broader than its Washington counterpart and the record

contained insufficient documentation to establish the Montana conviction was factually comparable. Id.

Counsel's deficient performance was prejudicial because "[a]lthough the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable." Id. The court vacated Theifault's sentence and remanded for the trial court to conduct a factual comparability analysis of the Montana conviction. Id.

- a. The State failed to prove Cowan's eight North Carolina convictions for breaking and entering are legally or factually comparable to residential burglary in Washington.

From 2003 to 2008, Cowan pled guilty to eight counts of breaking and entering in North Carolina. CP 43. The State asserted these offenses are "directly comparable" to Washington's residential burglary statute and should therefore count as eight points in Cowan's offender score. Supp. CP__ (Sub. No. 83, State's Sentencing Memorandum, at 2-3). The State is mistaken on both counts.

- i. Breaking and entering is not legally comparable.

North Carolina's breaking and entering statute criminalizes broader conduct than Washington's burglary statutes. N.C.G.S. § 14-54(a) specifies:

“Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.” See also State v. Haymond, 203 N.C. App. 151, 168, 691 S.E.2d 108 (2010) (elements of breaking and entering are (1) the breaking or entering, (2) of any building, (3) with intent to commit any felony or larceny therein).

Under Washington’s burglary statutes, a burglary is committed only if a person “enters or remains unlawfully” in a building or dwelling, “with intent to commit a crime against a person or property therein.” RCW 9A.52.020(1) (first degree burglary), .025(1) (residential burglary), .030(1) (second degree burglary) (emphasis added).

The elements of Washington burglary require the intent to commit a crime against a person or property therein. By contrast, North Carolina requires intent to commit any felony therein. This criminalizes broader conduct than Washington’s burglary statutes, which require a crime against person or property. For instance, entering a building with intent to possess a controlled substance would be breaking and entering in North Carolina, but would not be a burglary in Washington.

The State incorrectly looked to the North Carolina charging documents to determine the elements of breaking and entering, rather than the North Carolina statute. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005) (“Where the statutory elements of a foreign

conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.” (emphasis added)). Breaking and entering in North Carolina is not legally comparable to residential burglary, or any burglary, in Washington.

- ii. The State failed to prove factual comparability.

If a foreign statute is broader than the Washington statute, courts then consider whether the offenses are factually comparable. State v. Olsen, 180 Wn.2d 468, 473, 325 P.3d 187 (2014). As discussed, sentencing courts may consider only facts that were “admitted to, stipulated to, or that were proved beyond a reasonable doubt.” Thiefault, 160 Wn.2d at 420 (explaining this rule is compelled by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); accord Lavery, 154 Wn.2d at 258.

In Descamps v. United States, the U.S. Supreme Court explained that, in a jury trial, “the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances.” __U.S.__, 133 S. Ct. 2276, 2288, 186 L. Ed. 2d 438 (2013). The same is true when an individual pleads guilty: “he waives his right to a jury determination of only that offense’s elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.” Id. (citing Shepard v.

United States, 544 U.S. 13, 24-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

The Washington Supreme Court has likewise recognized “the elements of the charged crime must remain the cornerstone of the comparison.” Lavery, 154 Wn.2d at 255 (quoting State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). This is in part because the defendant “often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to.” Descamps, 133 S. Ct. at 2289; accord Lavery, 154 Wn.2d at 258 (noting defendant had “no motivation in the earlier conviction to pursue defenses” that would have been available to him under Washington law but unavailable in the foreign jurisdiction).

In Cowan’s first 2003 conviction for breaking and entering (03CR 055125), a magistrate’s order and information alleged he unlawfully, willfully, and feloniously broke and entered a dwelling with intent to commit larceny therein. Supp. CP__ (Sub. No. 83, Appendix A).⁹ In the transcript of plea, Cowan agreed only that he was “in fact guilty” of the “charges shown on the attached sheet,” which stated “B&E.” Id. Nowhere in the plea did he stipulate or agree to the facts as alleged in the magistrate’s order or the information. Id.

⁹ Exhibit 3 contains the same conviction information and is slightly better copy quality than the appendix attached to the State’s sentencing memorandum.

Cowan pled guilty to two counts of breaking and entering in 2003, one committed on June 9, 2003 and the other on June 27, 2003 (03CR 056891 and 03CR 056892). Supp. CP__ (Sub. No. 83, Appendix B). The warrant for arrest and information for the June 9 offense alleged Cowan unlawfully, willfully, and feloniously broke and entered a dwelling with intent to commit larceny therein. Id. The record does not contain any warrant for arrest or charging document for the June 27 offense. Id. In the transcript of plea, Cowan agreed only that he was “in fact guilty” of two counts of breaking and entering. Id. Nowhere in the plea did Cowan stipulate or agree to the facts as alleged in the warrant for arrest or the information. Moreover, the record does not establish any factual basis whatsoever for the June 27 offense.

Cowan also has four 2005 convictions for breaking and entering (04CRS 058232, 233, 468, 469). Supp. CP__ (Sub. No. 83, Appendix C). The warrants for arrest and charging documents for each alleged Cowan unlawfully, willfully, and feloniously broke and entered a dwelling with intent to commit larceny therein. Id. Cowan pled guilty to all four in the same transcript of plea (along with financial card theft, felony larceny, and attempted first degree burglary, all discussed below). Id. Like Cowan’s 2003 pleas, he agreed only that he was “in fact guilty” of “4 counts B&E.”

Id. And, again, nowhere did he stipulate or agree to the facts as alleged in the warrants for arrest or charging documents. Id.

Finally, in Cowan's 2008 conviction for breaking and entering (08CR 057730), the warrant for arrest and information likewise alleged he unlawfully, willfully, and feloniously broke and entered a dwelling with intent to commit larceny therein. Supp. CP__ (Sub. No. 83, Appendix D). Cowan pled guilty to "felonious breaking or entering." Id. In his plea, Cowan did not admit or stipulate to the facts alleged in the warrant for arrest or information. Id. Cowan merely agreed he was "in fact guilty," "that there are facts to support [his] plea," and "to a summarization of the evidence related to this factual basis." Id. But the plea nowhere provides a summary of the factual basis, except the "felonious breaking and entering." Id.

Though the charging documents alleged facts ostensibly comparable to residential burglary in Washington, charging documents are insufficient. But the State offered only allegations and judgments. In none of Cowan's guilty pleas did he admit or stipulate to the facts as alleged in the charging documents. Rather, under Descamps, his guilty pleas admitted only the elements of breaking and entering, which are not comparable to Washington's burglary statutes. See State v. Thomas, 135 Wn. App. 474, 486, 144 P.3d 1178 (2006) ("Where facts alleged in the charging documents

are not directly related to the elements, a court may not assume those facts have been proved or admitted.”).

Each of the transcripts of plea included language that “[u]pon consideration of the record proper, evidence presented, answers of defendant, and statements of the lawyer for the defendant and the District Attorney,” the court found “there is a factual basis for the entry of the plea.” Supp. CP__ (Sub. No. 83, Appendices A-D). But the plea documents do not establish the evidence presented, Cowan’s answers, or the lawyers’ statements. See State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008) (“We cannot assume the existence of facts that are not in the record.”). Nor does this language specify Cowan admitted or stipulated to the factual basis of the plea, or what the factual basis was.

The State accordingly failed to prove Cowan’s eight convictions for breaking and entering are factually comparable to Washington felonies.

- b. The State failed to prove Cowan’s North Carolina conviction for attempted first degree burglary is legally or factually comparable to residential burglary in Washington.

Cowan pled guilty to one count of attempted first degree burglary in North Carolina (04CR 058542). CP 43. Like the breaking and entering convictions, the State asserted the conviction was legally and factually comparable to residential burglary in Washington, and therefore counted as

one point in Cowan's offender score. Supp. CP__ (Sub. No. 83, at 3). The State is again mistaken.

In North Carolina, the elements of first degree burglary are: (1) breaking and entering in the nighttime (2) into the dwelling or apartment of another actually occupied at the time of the offense, (3) with "intent to commit a felony therein." N.C.G.S. § 14-51; State v. Brown, 221 N.C. App. 383, 385-86, 732 S.E.2d 584 (2012) (quoting State v. Singletary, 344 N.C. 95, 101, 472 S.E.2d 895 (1996)). As discussed, burglary in Washington requires intent to commit a crime against a person or property therein. First degree burglary in North Carolina specifies only "a felony therein," which, like breaking and entering, is broader than Washington's burglary statutes.

Also like the breaking and entering convictions, the State failed to prove the conviction was factually comparable to residential burglary. The warrant for arrest and indictment charged Cowan with first degree burglary, alleging he unlawfully entered a dwelling at night with intent to commit larceny therein. Supp. CP__ (Sub. No. 83, Appendix C). In exchange for Cowan's guilty plea, the prosecutor reduced the charge to attempted first degree burglary. Id. As established in section 6.a.ii, supra, nowhere in his guilty plea did Cowan stipulate or admit to the facts alleged in the warrant for arrest or indictment. Id. His plea established only that he agreed to the

elements of attempted first degree burglary, which are not legally comparable. Id. The State again failed to prove factual comparability.

- c. The State failed to prove Cowan's North Carolina conviction for financial card theft is legally or factually comparable to second degree possession of stolen property in Washington.

Cowan pled guilty to one count of financial transaction card theft in North Carolina (04CRS 058027). Supp. CP__ (Sub. No. 83, Appendix C). The State asserted this offense was “directly comparable” to second degree possession of stolen property, specifically, a stolen access device under RCW 9A.56.160(1)(c). Id.

Cowan was broadly charged under N.C.G.S. § 14-113.9, which has several alternative means of committing financial card theft. One way to commit the offense is if the individual “[t]akes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder’s consent and with intent to use it.” N.C.G.S. § 14-113.9(a)(1). By contrast, under Washington law, “possessing stolen property” means “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1).

Possession of stolen property in Washington does not include taking the access device “from the person, possession, custody or control of another,” like the North Carolina statute. N.C.G.S. § 14-113.9(a)(1). The Washington statute punishes only knowing possession of the stolen access device. RCW 9A.56.140(1), .160(1)(c). The North Carolina financial card theft statute criminalizes broader conduct than Washington’s possession of stolen property statute. The offenses are therefore not legally comparable.

Like the convictions discussed above, the State failed to prove financial card theft and possession of stolen property are factually comparable because Cowan did not admit or stipulate to any specific facts in pleading guilty. Supp. CP__ (Sub. No. 83, Appendix C). In his plea, Cowan admitted he was “in fact guilty” of financial card theft, which admits only the elements of that legally incomparable offense.

- d. The State failed to prove Cowan’s North Carolina conviction for felony larceny is legally or factually comparable to second degree theft in Washington.

Finally, Cowan pled guilty to four counts of felony larceny in North Carolina. CP 43; Supp. CP__ (Sub. No. 83, at 4). The State asserted one of them (04CRS 058233) was “directly comparable” to second degree theft in Washington, because Cowan was alleged to have stolen property worth

\$2,800.¹⁰ Supp. CP__ (Sub. No. 83, at 4). The State believed the other three felony larceny counts, which alleged amounts of stolen property less than \$750, were not comparable because “[u]nder North Carolina statute the dollar amount of the theft does not matter—the mere fact of the theft after Breaking and Entering elevates the theft to a felony.” Id. The State is correct on this point, but is incorrect that it does not make all the felony larceny offenses incomparable to theft in Washington.

North Carolina charged Cowan with felony larceny pursuant to N.C.G.S. § 14-72(b)(2) and § 14-72(c). Supp. CP__ (Sub. No. 83, Appendix C). Under N.C.G.S. § 14-72(b)(2), the “crime of larceny is a felony, without regard to the value of the property in question,” if the larceny is committed pursuant to a violation of N.C.G.S. § 14-54 (breaking and entering). Under N.C.G.S. § 14-72(b)(2), possession of stolen goods is likewise a felony if the individual knows or has reasonable grounds to believe the goods to be “stolen in the circumstances described in subsection (b), . . . without regard to the value of the property in question.” Thus, the crime of felony larceny in North Carolina appears to encompass theft and possession of stolen goods pursuant to breaking and entering, no matter the value of the property.

¹⁰ The State appears to have cited the incorrect cause number in its sentencing memorandum. Supp. CP__ (Sub. No. 83, at 4). After reviewing the record, counsel believes 04CRS 058233 is the correct cause number because it aligns with the allegation of \$2,800 in stolen property.

North Carolina's statute is considerably broader than Washington's theft statutes. Theft has several definitions, including to "wrongfully obtain or exert control" over another's property, to obtain control of another's property "[b]y color or aid of deception," or to "appropriate lost or misdelivered property" of another. RCW 9A.56.020(1). Each of these includes some type of taking, not just possession of stolen property.

Further, second degree theft requires theft of property or services that "exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value." RCW 9A.56.040(1)(a); see also RCW 9A.56.030(1)(a) (first degree theft means property exceeding \$5,000 in value); RCW 9A.56.050(1) (third degree theft means property not exceeding \$750 in value). Unlike North Carolina's felony larceny statute, Washington's theft statutes require proof of the value of the property. Because felony larceny in North Carolina encompasses broader conduct than theft in Washington, the statutes are not legally comparable.

Like the other convictions, the State failed to prove felony larceny and second degree theft are factually comparable because Cowan did not admit or stipulate to any specific facts in his guilty plea. Supp. CP__ (Sub. No. 83, Appendix C). Cowan admitted he was "in fact guilty" of larceny, which admits only the elements of that legally incomparable offense.

In summary, the State failed to prove Cowan's eleven North Carolina convictions are legally and factually comparable to Washington felonies. Under Thiefault, defense counsel's failure to object to comparability constituted ineffective assistance of counsel. 160 Wn.2d at 417. This Court should vacate Cowan's sentence and remand for resentencing. Id. at 420; Thomas, 135 Wn. App. at 488.

7. COWAN'S CONVICTIONS FOR ASSAULT AND ROBBERY ARE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF HIS OFFENDER SCORE.

When a person is sentenced for two or more current offenses, "the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involved the same victim, were committed at the same time and place, and involved the same criminal intent. Id.

At sentencing, Cowan's counsel argued attempted second degree murder was the greater offense, requiring the first degree assault to be vacated. 13RP 7-8; CP 36-38. Counsel thus asked the trial court to find the attempted second degree murder and first degree robbery convictions were the same criminal conduct for sentencing purposes. 13RP 8; CP 38-40. Counsel asserted "the criminal intent is very clear in this case that the

evidence established that the stabbing essentially took place in furtherance or in trying to get away and flee from the robbery.” 13RP 8.

The trial court vacated the attempted second degree murder conviction as the lesser offense. 13RP 10-11. The court then concluded Cowan’s offender score for the assault was 13, including two points for the robbery, without addressing Cowan’s same criminal conduct argument. 13RP 4, 11-12; CP 26.

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). “A trial court abuses its discretion when it fails to exercise its discretion, such as when it fails to make a necessary decision.” State v. Stearman, 187 Wn. App. 257, 265, 348 P.3d 394 (2015).

The trial court therefore abused its discretion in failing to address Cowan’s same criminal conduct argument. See State v. Salinas, 169 Wn. App. 210, 225, 279 P.3d 917 (2012) (remanding where trial court failed to address defendant’s request to treat three convictions as same criminal conduct for sentencing purposes). Though Cowan argued the attempted murder and robbery were the same criminal conduct, he was clearly referring to the stabbing conduct, which was the basis for the assault. As demonstrated below, had the trial court actually exercised its discretion

and considered Cowan's argument, it would have been compelled to find the assault and robbery constituted the same criminal conduct.

Cowan's assault and robbery convictions involved the same victim: Brenick. The crimes also occurred at the same time and place: in the back parking lot of the Domino's Pizza just before midnight on January 17, 2015.

The two offenses also involved the same criminal intent. "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In applying this test, courts consider whether the crimes are linked, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Crimes may involve the same criminal intent if they were part of a "continuing, uninterrupted sequence of conduct." State v. Porter, 133 Wn.2d 177, 186, 942 P.2d 974 (1997). Intent in this context is the offender's objective purpose in committing the crime, not the mens rea element of the particular crime.¹¹ State v.

¹¹ The supreme court's recent decision in State v. Chenoweth, 185 Wn.2d 218, 370 P.3d 6 (2016), does not change the objective criminal intent standard. There, the court held first degree incest and third degree child rape were not the same criminal conduct because "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." Id. at 223. But those crimes are strict liability offenses with no mens rea elements. RCW 9A.64.020(1)(a); RCW 9A.44.079(1). The Chenoweth court therefore did not create a new rule that courts must look to the statutory mens rea elements in determining criminal intent for the purposes of same criminal conduct.

Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014).

For instance, in State v. Rienks, this Court held first degree burglary, robbery, and assault, encompassed the same criminal conduct. 46 Wn. App. 537, 544, 731 P.2d 1116 (1987). Rienks entered the victim's apartment to collect money owed to a third person, assaulted another man, and stole money from a briefcase. Id. at 539. This Court held the three offenses "were committed as part of a recognizable scheme or plan, . . . with no substantial change in the nature of the criminal objective." Id. at 543. The court explained "there was no independent motive for the secondary crime; rather, the objective was to accomplish or complete the primary one." Id. at 544.

The same is true here. Brenick found the suspect inside his vehicle, car prowling, which was the basis for the robbery. 6RP 219-22. Only when Brenick pulled the man from the car and they started scuffling did the man stab Brenick. 6RP 221-24. Brenick said the man was trying to get away during their encounter. 10RP 924. This demonstrates the man did not have separate intent to stab Brenick, but only intent to flee the robbery, which is consistent with the jury's lack of a verdict on attempted premeditated murder. The assault furthered completion of the robbery.

Washington law supports this conclusion. Courts have adopted a transaction analysis of robbery, “whereby the force or threat of force need not precisely coincide with the taking.” State v. Truong, 168 Wn. App. 529, 535, 277 P.3d 74 (2012). Rather, the taking is ongoing until the assailant has effected an escape. Id. at 535-36. “The definition of robbery thus includes ‘violence during flight immediately following the taking.’” Id. at 536 (quoting State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990)). In fact, to prove first degree robbery, the State needed to prove Cowan committed an assault in furtherance of the robbery. CP 93; State v. Freeman, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).¹² This Court should therefore remand for the trial court to actually consider Cowan’s same criminal conduct argument. Salinas, 169 Wn. App. at 225.

The State may argue Cowan waived his same criminal conduct argument because he asserted it only as to attempted second degree murder and not first degree assault. Such an argument would be overly technical, because Cowan’s trial counsel was clearly asserting the robbery was the same criminal conduct as the stabbing, whether attempted murder or assault. See CP 39 (“Here, the robbery had not been completed because the stabbing occurred during the course and in furtherance of the robbery.”

¹² The only reason first degree assault does not merge into first degree robbery is because first degree assault carries a longer sentence. Freeman, 153 Wn.2d at 778. Second degree assault, however, merges into first degree robbery. Id.

(emphasis added)). However, if this Court agrees with the State, then Cowan's counsel was ineffective for failing to make the alternative argument that assault and robbery were also the same criminal conduct. Failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance of counsel. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

Criminal defense attorneys are entitled to make alternative, and even inconsistent, arguments. There was no reasonable or strategic basis for Cowan's counsel to fail to assert, in the alternative, that assault and robbery were the same criminal conduct. Defense counsel clearly wanted Cowan's two current offenses to be found to be the same criminal conduct, thereby reducing his offender score by two points. Counsel's performance was deficient.

Counsel's deficient performance prejudiced Cowan. "A correct offender score must be calculated before a presumptive or exceptional sentence is imposed." State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). However, the sentencing court need not calculate a precise offender score that exceeds nine points unless considering an exceptional sentence. State v. Lillard, 122 Wn. App. 422, 433, 93 P.3d 969 (2004). Typically, remand for resentencing is unnecessary where it is apparent the sentencing court would simply impose the same sentence again. Tili, 148

Wn.2d at 358. Remand also is generally unnecessary where a standard range sentence was imposed and the error does not impact that range. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

Despite these rather forgiving standards, remand is necessary. Although not required to do so, the trial court determined a precise score above nine. That score is wrong, and it is inscribed on Cowan's judgment and sentence for consideration in any future cases. Thus, minimally, Cowan's offender score should be corrected in the judgment and sentence.

Moreover, it is impossible to conclude the trial court would have imposed the same sentence with a reduced offender score. Cowan sought a low-end sentence. 13RP 8-9; CP 40. The trial court instead adopted the State's recommendation and sentenced Cowan to the top of the standard range: 318 months on the assault plus a mandatory 48 months for two deadly weapon enhancements. 13RP 7, 11-12; CP 26-28. In doing so, the court reasoned, "our sentencing guidelines really don't comprehend the magnitude of this offense coupled with Mr. Cowan's offense history, given that the score is 13." 13RP 12.

Given the court's specific reliance on Cowan's erroneous offender score of 13, rather than 11, prejudice resulted from counsel's deficient performance. Remand is necessary, particularly if this Court remands on comparability, which could lower Cowan's offender score below nine.

8. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Cowan does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Cowan’s ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed.¹³ The trial court made no such finding, instead waiving all discretionary LFOs. CP 30; 13RP 13. Cowan was 35 at the time of sentencing. CP 246. At the time of his arrest, he was homeless and had been sleeping outside for about seven months. Ex. 187, at 2-4. His last employment was a year prior at a sandwich shop. Ex. 187, at 3; 9RP 730. He reported zero assets, income, or savings. Supp. CP__ (Sub. No. 94, Motion and Declaration for Order of Indigency). He is now serving a 30-year sentence. CP 28. Courts must consider an individual’s length of

¹³ See State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992)).

incarceration in determining whether he has the ability to pay. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

The trial court also found Cowan indigent for purposes of the appeal. CP 8-9. If an individual qualifies as indigent, “courts should seriously question that person’s ability to pay LFOs.” Blazina, 182 Wn.2d at 839. There has been no order finding Cowan’s financial condition has improved or is likely to improve. He has remained incarcerated throughout the appeal. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court must therefore presume Cowan remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Cowan in the event he does not substantially prevail on appeal.

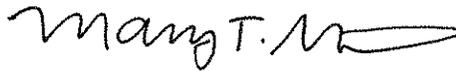
D. CONCLUSION

This Court should reverse Cowan's convictions and remand for a new trial, given the suggestive photomontage, admission of improper ER 404(b) evidence, the unconstitutional reasonable doubt instruction, and prosecutorial misconduct. This Court should also remand for resentencing because Cowan's offender score is incorrect.

DATED this 28th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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WSBA No. 45668
Office ID No. 91051

Attorneys for Appellant

Appendix A

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STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

15-1-00166-8
A3

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER V. COWAN,

Defendant.

Case No.: 15-1-00168-8

FINDINGS OF FACTS & CONCLUSIONS
OF LAW PURSUANT TO CrR3.6 (AS TO
PHOTOMONTAGE ISSUE ONLY)

The undersigned Judge of the above court hereby certifies that a hearing has been held in the absence of the jury pursuant to CrR 3.6 and now sets forth:

1. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 10 were admitted during the hearing held on September 24th and 29th.

2. UNDISPUTED FACTS

- a. On January 17, 2015, at approximately 11:42pm, Officers from the Edmonds Police Department were dispatched to an assault with a weapon call at Dominos Pizza located at 22941 Highway 99, Edmonds, WA.
- b. Officers who arrived on scene observed a male, later identified at Michael Brenick, with several stab wounds. Prior to being transported to the hospital Mr. Brenick described the suspect as a black male in his twenties wearing a backpack.

ORIGINAL

103,

- 1 c. A containment area was set up for a K-9 track to be completed by Officer
2 Robinson. The K-9 track led through the Park Ballinger Apartment complex
3 located directly to the east of the parking lot where the incident occurred.
- 4 d. During the K-9 track, Officers encountered a witness, Cale Stasiak, who provided
5 a description of the suspect and described his interaction with the suspect. The K-
6 9 track was ultimately unsuccessful.
- 7 e. Mr. Stasiak informed officers that he spent approximately 10-15 minutes with the
8 suspect and described him as a black male in his 20s with a beard and mustache
9 wearing dark pants, a backpack, and a grey and black checkered button up shirt.
10 The male also had a knife in his hands.
- 11 f. Mr. Stasiak is a white male while Mr. Cowan is African-American male.
- 12 g. Following the K-9 track, Officer Robinson responded to the Circle K/76 gas
13 station to speak with the clerk, Robert Best, who indicated that there was a young
14 black male in the store around the time that police were in the area.
- 15 h. Detectives Barker and Tryker responded to the 76 gas station on January 18, 2015
16 where they spoke with the clerk, Marcus Weinell, who showed the Detectives the
17 surveillance video from the time period and also provided a pawn slip that was
18 found on the counter at 8:00am that morning. The pawn slip had Mr. Cowan's
19 name on it and was for a transaction occurring on January 17, 2015 at 1:22pm at
20 Cash America.
- 21 i. Later that day, Sgt. Barker and Det. Tryer went to the Cash America to view and
22 obtain surveillance video of Mr. Cowan's pawn transaction.
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- 1 j. On January 19, 2015, Detective Hawley obtained Mr. Cowan's Department of
2 Licensing photograph to create a photomontage.
- 3 k. In creating the photo montage Detective Hawley selected five filler photos from a
4 database of DOL photos kept by the Edmonds Police Department. These
5 photographs are organized by gender, ethnicity, and age. The five filler photos
6 that were selected by Detective Hawley came from a database of approximately
7 100 photographs that fit defendant's age and ethnicity.
- 8 l. Detective Hawley observed that Mr. Cowan's photograph depicted earrings on
9 both ears. On Mr. Cowan's photograph and the 5 filler photographs, Detective
10 Hawley drew black boxes around the ears with Photoshop.
- 11 m. Mr. Cowan's picture had his teeth showing. There was one other photograph with
12 the teeth showing, Number 1, which had a grill.
- 13 n. On January 20, 2015, Sgt. Barker went to Mr. Stasiak's apartment to show him
14 the photomontage.
- 15 o. Sgt. Barker handed the admonition form to Mr. Stasiak which he read and signed.
16 Further, Mr. Stasiak indicated that he did not have any other questions.
- 17 p. Sgt. Barker handed the stack of 6 photographs to Mr. Stasiak who looked through
18 them and when he got to Number 4 placed that photograph to the side while he
19 looked through the remaining photographs.
- 20 q. Mr. Stasiak picked number 4 as the suspect. He indicated that it was the "gap in
21 the teeth was the same along with the facial hair. Same facial features from what I
22 was able to see that night." Number 4 was a photograph of the defendant. Mr.
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1 Stasiak indicated that on a scale of 1-10, he was a "10" as to the certainty of his
2 pick of photograph four.

3 r. Dr. Jennifer Devenport who is an assistant professor of psychology at Western
4 Washington University testified as to the best practices for completion of a
5 photomontage as published by the Department of Justice.

6 s. The best practices put out by the Department of Justice include topics such as
7 admonishment, the manner presented, the manner in which the photos are
8 selected, the identification should be recorded, and who completes the
9 photomontage.

10 t. Dr. Devenport further testified as to factors that affect a witness's memory and
11 accuracy including cross-racial identification and weapon focus. In Dr.
12 Devenport's opinion is that the photomontage was suggestive because Mr.
13 Cowan's photograph was the only individual with a gap in the teeth.
14

15 3. DISPUTED FACTS

16 There were no disputed facts.

17 4. CONCLUSIONS AS TO DISPUTED FACTS

18 Not applicable.

19 5. CONCLUSIONS AS TO SUPPRESSION OF THE EVIDENCE

20 The photomontage created and showed to the witness does have some differences but does
21 not draw undue attention to Mr. Cowan's photograph which was number 4. The size and
22 closeness of Mr. Cowan's photograph compared the filler photographs is different but it is a
23 slight difference. Slight differences in photographs are allowed pursuant to State v. Ecret.
24
25

1 With regards to the teeth, there were two photographs showing teeth both of which have different
2 unusual characteristics but the witness in this case did not mention the teeth of the suspect. ~~Here,~~ ^{when he described the suspect to officers.}

3 Mr. Stasiak ^{did not} never mentioned the teeth of the suspect until after he had been shown the montage. [^]

4 This case is distinguishable from State v. Kinard where the witness was primarily focused on the
5 suspect's teeth. ~~Thereby,~~ the photomontage used by Detectives in this case is not unduly
6 suggestive.

7 Furthermore, the likelihood of misidentification does not meet the Biggers standard. Mr.
8 Stasiak spent a significant amount of time with the suspect. ~~Thereby,~~ and the suspect spoke
9 directly while approximately 5 feet apart. In Exhibit 3, Mr. Stasiak indicated that he paid
10 attention to the contact because he was concerned for his personal safety. Mr. Stasiak paid a high
11 degree of attention to the suspect. Mr. Stasiak's level of certainty in the photomontage was a 10
12 out of 10. Additionally, the photomontage was shown to the witness less than 2 days after the
13 incident.

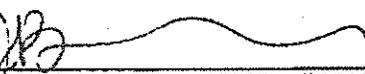
14 ^{the last finding} ~~Thereby,~~ the photomontage was not impermissible suggestive as to give rise to a substantial
15 likelihood of misidentification. The defense motion to suppress is denied.

16 Signed in open court this 13th day of January, 2016.

17
18 
19 Judge

20 Copy Received:

21 
22 Craig Matheson, WSBA# 18556
23 Deputy Prosecuting Attorney

24 
25 Jennifer Bartlett, WSBA#43171
Attorney for the Defendant

Appendix B

Each of the following offenses counted as one point towards Cowan's offender score.

| NC Offense | NC Statute | Date of Offense | Date of Conviction | NC Cause Number | Purported WA Comparability | Location in State's Memo |
|---------------------------------|-----------------------------|-----------------|--------------------|-----------------|---|--------------------------|
| Breaking and entering | § 14-54(a) | 07/04/03 | 08/13/03 | 03CR 055125 | Residential burglary | Appendix A |
| Breaking and entering | § 14-54(a) | 06/09/03 | 10/01/03 | 03CR 056891 | Residential burglary | Appendix B |
| Breaking and entering | § 14-54(a) | 06/17/03 | 10/01/03 | 03CR 056892 | Residential burglary | Appendix B |
| Financial card theft | § 14-113.9 | 10/26/04 | 03/03/05 | 04CRS 058027 | Second degree possession of stolen property | Appendix C |
| Breaking and entering | § 14-54(a) | 10/30/04 | 03/03/05 | 04CRS 058232 | Residential burglary | Appendix C |
| Breaking and entering | § 14-54(a) | 09/30/04 | 03/03/05 | 04CRS 058233 | Residential burglary | Appendix C |
| Felony larceny | § 14-72(b)(2) § 14-72(c) | 09/30/04 | 03/03/05 | 04CRS 058233 | Second degree theft | Appendix C |
| Breaking and entering | § 14-54(a) | 11/11/04 | 03/03/05 | 04CRS 058468 | Residential burglary | Appendix C |
| Breaking and entering | § 14-54(a) | 11/11/04 | 03/03/05 | 04CRS 058469 | Residential burglary | Appendix C |
| Attempted first degree burglary | § 14-51 | 09/15/04 | 03/03/05 | 04CRS 058542 | Attempted residential burglary | Appendix C |
| Breaking and entering | § 14-54(a) | 11/8/08 | 11/19/08 | 08CR 057730 | Residential burglary | Appendix D |