

NO. 34941-8 (Consolidated No.)

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ABDUL KAHLIF CALHOUN, APPELLANT
ZACHARY L. FRAZIER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 05-1-03396-9
No. 05-1-03395-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in admitting the show-up identification when there were several factors supporting the reliability of the identifications?
2. Did the trial court abuse its discretion in not requiring a competency hearing for Calhoun when it had ample opportunity to interact with Calhoun and there was substantial evidence supporting his competency including the assessment of a mental health professional?
3. Did the trial court abuse its discretion in denying Frazier's requests for severance and a mistrial where Calhoun was properly found competent and his courtroom behavior in no way prejudiced Frazier?
4. Did the trial court err in giving a jury instruction that accurately stated the law of accomplice liability?
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Rolan's assault served a purpose independent of the robbery?

6. Did the sentencing court err in not treating the convictions for robbery and the assault of Rolan as the same criminal conduct where the defendants did not raise the issue at sentencing and the two convictions involve different victims?
7. Did the sentencing court err in including Frazier's California convictions in his offender score where Frazier stipulated to the inclusion of these convictions?

B. STATEMENT OF THE CASE

Abdul Calhoun and his codefendant at trial, Zachary Frazier, appeal convictions for first degree robbery, first degree burglary, and two counts of second degree assault. CP (34941-9) at 134; CP (34983-3) at 81. Frazier also appeals a conviction for third degree assault. CP (34983-3) at 81. These convictions stem from an incident where Calhoun and Frazier broke into a home, assaulted two of the residents, stole a safe, and then, upon being arrested, Frazier assaulted a law enforcement officer. The trial proceedings and evidence presented at trial are as follows.

1. The Crime

In July of 2005, Celia Issac, Isha Issac, Rolan Kimbrough, and four children lived in a one-bedroom apartment. III RP at 27, 29-30. Celia and Isha are sisters and Isha and Rolan were dating. III RP at 27, 29. Isha kept a small safe in the apartment and Celia stored the safe key in her bra. III RP at 45, 47.

Isha was friends with Verndeleao Joy Banks. III RP at 26. Banks often came to the apartment and she knew about the safe and the key in Celia's bra. III RP 26, 48-49; VI RP at 211-12. Banks had seen Isha take money out of the safe to pay bills or give to her children. VI RP at 211. A day or two before the robbery, Banks brought a man over to the apartment and introduced him to Isha and Rolan as her boyfriend, "Creme." VI RP at 200, 214. At trial, Isha and Rolan would identify that man as Frazier. VI RP at 200, 214.

On the night of July 10, 2005, Rolan slept in the bedroom with his and Isha's one-year-old daughter. III RP at 32; VI RP 139. Isha slept in the living room with her daughter. III RP at 32. Celia slept on a couch in the living room and her two daughters also slept in the living room on a loveseat. III RP at 32.

According to Celia, she was the last to fall asleep, doing so around 2 or 3 a.m. III RP at 31-32. Sometime thereafter, Celia was awoken by a "big bang." III RP at 33. She saw two men jumping through a living-room window. III RP at 33. Both men had scarves covering their faces

and Celia was never able to identify them. III RP at 33. One man ran into the bedroom where Rolan was sleeping. III RP at 35. The other man jumped on top of Celia and stuck his hand down her shirt and into her bra to retrieve the safe key. III RP at 36-37. The men began asking where the safe was and they were told that it was in the living room. III RP at 39. They then took the safe and ran out of the apartment. III RP at 39. Celia followed the two men and saw them get into a red truck with the safe and drive off. III RP at 41-42.

According to Rolan, he too was awoken by a loud sound. VI RP at 140-42. Rolan came out of the bedroom to see two men coming through the window. VI RP at 142. Rolan began to retreat into the bedroom to protect his daughter when one of the men came after him. VI RP at 142. Rolan was then struck “pretty hard” with something, causing him to fall back onto the bed where his daughter was sleeping. VI RP at 142-43. At trial, Rolan identified Calhoun as the man who hit him. VI RP at 144-45. The men began yelling, “Where’s the safe, you know, we come for?” VI RP at 142, 149. The men then began “fumbling” around the apartment until they found the safe and ran out of the apartment. VI RP at 149. By the time Rolan ran outside, Isha was standing in the street calling 9-1-1 and a red truck was driving away. VI RP at 151-53.

Isha recounted the event similar to Celia and Rolan. She was awoken by two men coming through a window. VI RP at 216. She saw one man go into the bedroom and the other jump on top of Celia and stick

his hand down her shirt. VI RP at 216, 220. At trial, Isha identified Calhoun as the man who went into the bedroom and Frazier as the one who stayed in the living room. VI RP at 214-18. While Frazier was on Celia, he repeatedly asked where the safe was. VI RP at 220. After the two men fled the apartment, Isha followed them while also calling 9-1-1. VI RP at 222-24. Isha saw the men get into a red truck and drive away. VI RP at 22-24. Isha was able to see the truck's license plate number and she relayed that information to the emergency operator. VI RP at 224.

A local officer was on routine patrol when he received a priority dispatch concerning the incident. VII RP at 304-06. The officer was enroute to the scene when, seven minutes after the dispatch, he was passed by a red truck with the license plate number that Isha had reported. VII RP at 307-08, 310. The officer stopped the truck and detained the driver, Calhoun, and the two passengers, Frazier and Banks. VII RP at 311-12, 328, 354. Inside the truck was Isha's safe. VI RP at 250; VII RP at 313.

Thereafter, Isha and Rolan were transported to the scene where the truck had been stopped so they could make a possible identification of the suspects. VII RP at 343. Isha and Rolan identified Frazier and Calhoun as the two robbers. CP (34983-3) at 99-100. These identifications will be discussed in greater detail shortly.

Banks, Calhoun, and Frazier were arrested. VII RP at 286-87. At the jail, Frazier attempted to kick an officer. VII RP at 287-90.

The State charged Banks, Calhoun, and Frazier as codefendants. CP (34983-3) at 1.

2. The Motion for Competency Evaluation

Calhoun was appointed an attorney; however, two attorneys withdrew after he filed a bar complaint against one attorney and after he insisted that the second attorney “sign a written contract to represent him in the manner in which he saw was constitutionally required.” RP (Apr. 27, 2006) at 34. The trial court denied Calhoun’s motion to represent himself. RP (Apr. 19, 2006) at 13.

The week before trial, Calhoun’s third attorney filed a motion requesting a competency evaluation for Calhoun. RP (Apr. 27, 2006) at 33. Calhoun’s attorney cited several reasons for the motion: Calhoun’s problems with his two previous court-appointed attorneys; his references to himself in the third person; his insistence on applying the Uniform Commercial Code (UCC)¹ to his criminal case; and his use of drugs supposedly known to cause permanent brain damage. RP (Apr. 27, 2006) at 33-37.

The court heard testimony from a mental health professional (MHP) at the Pierce County Jail. RP (Apr. 27, 2006) at 39. Tudor relayed

¹ Title 62A RCW.

the written conclusions of another MHP who had interviewed Calhoun for 30 to 45 minutes. RP (Apr. 27, 2006) at 39-40. According to that MHP:

Mr. Calhoun does have some issues. One is some personality issues, and another is that he's extremely anxious about the outcome of this case. He's very concerned about his future, and the combination of these two things have made him very distrustful of his attorney, present and past. There was nothing indicating any psychotic symptoms; nothing indicating that we would have him submit to one of our psychiatrists to take medications. He is housed in general population and there have been no indications from uniform staff that he's presenting with mental health issues. There have been a number of write-ups for behavioral things, but nothing they thought were stemming from an inability to understand or get along with the rules of the jail.

RP (Apr. 27, 2006) at 40. The MHP noted that Calhoun's thoughts were "clear and nonpsychotic" and that his "personality tends to lead him towards being overly controlling and reactive." RP (Apr. 27, 2006) at 40-41. The MHP also indicated that Calhoun was receptive to behavioral changes that would result in a better working relationship with his attorney. RP (Apr. 27, 2006) at 41.

The court also directly questioned Calhoun. In response to the court's questions, Calhoun described the "extremely" serious nature of the pending charges. He also described with detail the roles of the court, the prosecutor, and the defense attorney. RP (Apr. 27, 2006) at 42-43.

The court denied counsel's motion to subject Calhoun to a competency evaluation. RP (Apr. 27, 2006) at 44. The court concluded

that Calhoun understood the nature of the criminal charges and was capable of assisting in his defense. RP (Apr. 27, 2006) at 44. The court based its opinion in part of several *pro se* pleadings that Calhoun had filed which “seem to reflect a fundamental understanding of the proceedings in this case.” RP (Apr. 27, 2006) at 44.² In addition, the court referenced Calhoun’s previous comments that “there are no medical or mental issues at hand that would – that I may say would impede my effectiveness to have assistance of counsel.” RP (Apr. 27, 2006) at 26, 47 (referencing RP (Apr. 27, 2006) at 38-39). The court also opined that some of Calhoun’s behavior was based on being detained in the jail, where individuals “run into jail-house lawyers, become jail-house lawyers, try to be, and so some of the concerns about the legalism and some of the terms – it’s not atypical to hear people get wrapped up in what I call legalisms, all the legal jargon and all that.” RP (Apr. 27, 2006) at 44.

After the court denied the competency-hearing motion, Banks’ attorney made a motion to sever her trial from Calhoun’s. RP (Apr. 27, 2006) at 50. The motion was based on Banks’ attorney’s conclusion that Calhoun was incompetent. RP (Apr. 27, 2006) at 50. Frazier’s attorney did not join the motion and it was denied. RP (Apr. 27, 2006) at 50.

² These pleadings have been submitted to this court as a supplemental CP.

3. Motion to Suppress the Show-Up Identifications

Prior to trial, Calhoun and Frazier brought a motion to suppress Isha and Rolan's identifications made when they were transported to where the truck had been pulled over. RP (Apr. 27, 2006) at 51. In support of the motion, Calhoun and Frazier stipulated to the facts as set forth in the police reports; live testimony was not offered or requested. CP (34983-3) at 97, 103-05. Calhoun and Frazier argued on several grounds that the show-up identification was tainted and impermissibly suggestive: (1) Isha and Rolan had minimal opportunity to view Calhoun and Frazier in the apartment; (2) Isha and Rolan had supposedly seen, in the patrol car while being transported to the scene, a booking photo of one of the men; (3) the show-up identification was done in front of the red truck that had previously been identified as involved in the incident; and (4) Isha and Rolan's identifications were supposedly hesitant until they also saw Banks at the scene. RP (Apr. 27, 2006) at 52-56.

The court denied Calhoun and Frazier's motion and after trial issued written findings of fact and conclusions of law to support the ruling. CP (34983-3) at 97-101; RP (Apr. 27, 2006) at 66.³ The court concluded that the identification procedure was not impermissibly suggestive and it did not create a substantial likelihood of

³ The court's findings and conclusions are attached to the State's brief as Appendix "A".

misidentification. CP (34983-3) at 100. The court considered the following findings to be particularly pertinent:

- a. The opportunity of the victims to view the two defendants at the time of the crime: Apart from the bandanas worn by the defendants and recovered by the police the victims' opportunity to view the two defendants at the time of the crime was unimpaired.
- b. The victims' degree of attention: The victims' attention was riveted on the two defendants. They were not distracted nor was their attention divided.
- c. The accuracy of the victims' description: The description of the two robbers given by the victims before the show up matched the appearance of the two defendants.
- d. The level of certainty: The victims were positive in their identifications.
- e. The time between the crime and the show up: The time lapse was less than 30 minutes. This was not long enough for the memory of the appearance of the two robbers to have faded from the victims' memories.

CP (34983-3) at 100-01. The court also found that Isha and Rolan had not seen any photograph of Calhoun, Frazier, or Banks prior to the identifications. CP (34983-3) at 99.

4. Banks' Plea Agreement

After Celia testified, Banks decided to resolve the charges against her by pleading guilty to one count of attempted first degree theft. VI RP at 83-89. The court accepted Banks' guilty plea. VI RP at 89. Banks was not called to testify at Calhoun and Frazier's trial.

5. Calhoun's Courtroom Behavior

Calhoun's courtroom behavior was less than ideal. During pretrial motions, Calhoun interrupted the proceeding by yelling that he was firing his attorney. II RP (May 2, 2006) at 3, 10.

Several days into the trial, Calhoun attempted to file, in court, a bar complaint against his attorney. VII RP at 276. The court declined to hear the matter and brought the jury into the courtroom. VII RP at 276. Once the jury was situated, Calhoun again interrupted the proceedings:

MR. CALHOUN: Ladies and gentlemen of the jury, I would like you to know that Mr. Schoenberger --

[PROSECUTOR]: Your honor, I object.

THE COURT: Excuse me.

MR. CALHOUN: -- is fired. He is fired.

[PROSECUTOR]: Your honor --

THE COURT: Mr. Calhoun.

MR. CALHOUN: He has denied me my constitutional rights.

THE COURT: Mr. Calhoun, you're out of order.

[PROSECUTOR]: Your honor, may we excuse the jury to the jury room?

MR. CALHOUN: I object to this man representing me. He is lying. He will not uphold my rights.

VII RP at 277-78. Once the jury was excused, the court warned Calhoun about his outburst. VII RP at 278. The court also noted Calhoun's continuing objection to the attorney representing him. VII RP at 278.

Based on the outburst, Frazier made a motion for a mistrial, and in the alternative, a motion to sever his trial from Calhoun's. VII RP at 279-80. The court denied the motions, instead choosing to instruct the jury to "disregard the outburst of Mr. Calhoun" and "draw no inferences from anything he said." VII RP at 281-82.

Calhoun also filed an affidavit of prejudice and a petition for an order disqualifying the trial judge. X RP at 425, 454. Calhoun accused the judge of treason for violating his constitutional rights. X RP at 454-55. The court denied the petition, finding it untimely and not supported. X RP at 455.

Shortly thereafter, Calhoun chose to testify. Calhoun initially refused to state under oath or affirmation that he would testify truthfully. X RP at 458-59. Rather, Calhoun indicated that he would abide by the Holy Bible and article I, section 6 of the Washington Constitution.⁴ X RP at 459. At this time, Calhoun's attorney again renewed his request for a

⁴ Article I, section 6 of the Washington Constitution provides: "The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered."

competency hearing. X RP at 461. The court denied the motion. X RP at 461.

Calhoun denied taking part in the burglary and theft of the safe. According to Calhoun, Banks asked him to accompany her in the truck and they were pulled over exactly at the moment that they were picking up Frazier. X RP at 465-66. Calhoun denied that Frazier was in the truck at the time that they were pulled over. X RP at 466, 478-79.

During a tense cross-examination, Calhoun stated to the prosecutor: “You just don’t want them to know the whole story. I want them to know the whole story.” X RP at 473. The court then told Calhoun he was in contempt of court, to which Calhoun responded, “Well, you can do what you want. If that’s the case, they need to know the whole story.” X RP at 473. Later during cross-examination, the prosecutor asked if Calhoun agreed with his attorney that it was undisputed that Rolan, Celia, and Isha were victims of a crime and that the dispute was over who committed the crimes. X RP at 474. Calhoun responded: “I don’t agree with nothing that man says because he’s not my attorney. He’s been lying the whole time trying to keep the whole story from you people.” X RP at 474. The court then excused the jury and warned Calhoun that any further outbursts would necessitate more security personnel or use of a stun belt. X RP at 476. After Calhoun finished testifying and the court was about to adjourn trial for the day, Calhoun announced to the jury: “Ladies and gentlemen of the jury, I’d like to

inform you that . . . he'll shock me with shocker. He told me he would shock me with a shocker because he does not want you to know the truth.” X RP at 499-500.

6. Verdict and Sentencing

The jury found Calhoun and Frazier each guilty of first degree robbery, first degree burglary, and two counts of second degree assault. CP (34941-9) at 77-80; CP (34983-9) at 95-96; XIII RP at 595. The jury also found Frazier guilty of third degree assault. XIII RP at 595.

At sentencing, Frazier signed a stipulation of prior record and offender score. CP (34983-3) at 106-19. Frazier stipulated that his offender score was a “9” and that he had five California felony drug convictions that were the equivalent of Washington convictions for class C nonviolent felonies. CP (34983-3) at 106-19 Frazier stipulated that these California felonies did not “wash out” under RCW 9.94A.360(3) or 9.94A.525. CP (34983-3) at 106-19. During sentencing, Frazier’s attorney noted that even had the California convictions “washed out,” Frazier’s offender score would still be “9,” i.e., the upper limit of the sentencing guidelines. RP (Frazier Sentencing) (June 2, 2006) at 4.

The court also sentenced Calhoun based on an offender score of “9.” CP (34941-9) at 106-19. Neither Calhoun nor Frazier asked the court to treat any of their convictions as the same criminal conduct for sentencing purposes.

Calhoun and Frazier (hereinafter collectively referred to as the defendants) appeal.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANTS' MOTION TO SUPPRESS THE SHOW-UP IDENTIFICATIONS.

An out-of-court 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) (quoting State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)). A defendant challenging an identification must first establish that the identification procedure was impermissibly suggestive. Vickers, 148 Wn.2d at 118.

If the identification is tainted by suggestive factors, it is still admissible if, under the totality of the circumstances, the identification is reliable. Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Vickers, 148 Wn.2d at 118. A trial court should consider several factors in assessing the reliability of a suggestive identification: the opportunity of the witness to view the defendant at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the defendant; the level of certainty demonstrated at the confrontation; and the time between the crime and the confrontation.

Biggers, 409 U.S. at 199; State v. Vaughn, 101 Wn.2d 604, 607-08, 682 P.2d 878 (1984).

The defendants maintain that the trial court should have granted their motion to suppress the show-up identifications because the identification procedure was suggestive and that the resulting identifications were not reliable. The defendants challenge the court's written findings and conclusions on this issue by citing certain discrepancies in the trial testimony of the State's witnesses. This however, overlooks the fact that the defendants stipulated to the facts in the police reports for purposes of the motion to suppress—the motion was held pretrial and was not based on live testimony. When a case or motion “is submitted to the trial court on stipulated facts, neither party may argue on appeal that the facts were other than as stipulated.” Glen Park Assocs., LLC v. Dep't of Revenue, 119 Wn. App. 481, 487, 82 P.3d 664 (2003)

If the defendants are to challenge the court's findings of fact, they must show that the findings are not supported by substantial evidence in the police reports. Vickers, 148 Wn.2d at 116. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Vickers, 148 Wn.2d at 116.

Here, the State will assume for the sake of argument that the trial court erred in concluding that the identification procedure was not suggestive. Arguably, the procedure was suggestive for two reasons: it was done near the red truck that the witnesses had previously identified as

being involved; and only Calhoun, Frazier, and Banks were presented during the identification. *Compare State v. Ramirez*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002) (“Generally, courts have found lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness’s earlier description.”), *with State v. Guzman-Cuellar*, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987) (show-up identification, where suspect stands with police officers in handcuffs, does not establish impermissible suggestiveness), *and State v. Rogers*, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986) (“Show-up identifications are not per se unnecessarily suggestive, and one held shortly after the crime is committed and in the course of a prompt search for the suspect is permissible.”).

Nevertheless, a trial court has broad discretion to determine whether a suggestive identification is reliable and therefore admissible. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002). Even flawed identifications should generally be submitted to the jury because, “[u]ncertainty or inconsistencies in the [identification] testimony affects only the weight of the testimony and not its admissibility.” *State v. Gosby*, 85 Wn.2d 758, 760, 539 P.2d 680 (1975); see also State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984) (reaffirming *Gosby*). A court abuses its discretion in admitting a suggestive identification only when its decision is manifestly

unreasonable or based on untenable grounds or reasons. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

According to the stipulated reports, Isha turned on a light when she was awoken at the beginning of the robbery. CP (34941-8) at ___ (declaration of counsel in support of the defendant Banks' motion to dismiss, Ex. A at pg. 16-17). Isha came face-to-face with Calhoun and Frazier; she was able to describe what they were wearing; she described the bandanas covering their noses and mouths; and she followed them as they ran out of the apartment. Id. Rolan came face-to-face with Frazier; he described the bandana over Frazier's face; and he described getting hit in the face by Frazier. Id.

At the show-up scene, officers "walked Frazier, Calhoun, and Banks in front of [the] patrol car so they could clearly be seen. Both Isha and [Rolan] positively identified Frazier and Calhoun as the men who entered their house." Id. at 17. The show-up identification occurred within one hour of the incident. CP at ___ (declaration of counsel in support of the defendant Banks' motion to dismiss, Ex. F at pg. 1-2).

The stipulated reports support the trial court's conclusion that the identifications were reliable. Substantial evidence supports the trial court's findings that the "the victims' opportunity to view the two defendants at the time of the crime was unimpaired;" that "[t]he victims' attention was riveted on the two defendants;" that "[t]he description of the two robbers given by the victims before the show-up matched the

appearance of the two defendants;" that "[t]he victims were positive in their identifications;" and that there was "not long enough for the memory of the appearance of the two robbers to have faded from the victims' memories." CP (34983-3) at 100-01. Also bolstering the reliability of the identifications was the other evidence of guilty—namely, that within a few minutes of the incident, Calhoun and Frazier were found possessing the stolen safe and in the truck identified by Isha as involved in the incident.

Lastly, it is important to note the strong parallels between this case and this court's opinion in State v. Shea, 85 Wn. App. 56, 930 P.2d 1232 (1997), overruled on other grounds by, State v. Vickers, 107 Wn. App. 960, 967 n.10, 29 P.3d 752 (2001), aff'd, 148 Wn.2d 91 (2002). In Shea, two men broke into a car at 3 a.m. and stole a stereo and CDs while the victim watched from his home 15 feet away and called the police. The victim saw the two men leave in another car. The men were stopped within a matter of minutes. The victim was taken to where the two men were stopped and he identified them as they stood handcuffed on the side of the road next to the car he had seen them leave in. The victim also identified his CDs.

This court held that the identifications were properly admitted. The court concluded that the procedure used was not suggestive because "[t]he presence of a suspect in handcuffs surrounded by police is not enough by itself to demonstrate that the procedure was flawed." Shea, 85 Wn. App. at 60. The court also found several factors supporting the

reliability of the identifications: that the victim had ample opportunity to observe the suspects; that there was some light, albeit minimal, to see the suspects; that the victim was absolutely positive in his identifications; and that the identification occurred within 15 minutes of the incident. Shea, 85 Wn. App. at 60-61.

Here, the trial court did not abuse its discretion in admitting Isha and Rolan's identifications of Frazier and Calhoun. The facts and identification procedure were quite similar to those that this court approved in Shea. Several factors supported the court's conclusion that the identifications were reliable. This court should reject the defendants' assignment of error on this issue.⁵

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A COMPETENCY EVALUATION OF CALHOUN.

A defendant must be competent in order to stand trial. In re PRP of Fleming, 142 Wn.2d 853, 861, 16 P.3d 210 (2001). A defendant is

⁵ Moreover, even if the out-of-court identifications were inadmissible, there can be no finding of prejudice. At trial, Rolan was able to identify Calhoun and Isha identified both Calhoun and Frazier as the perpetrators. VI RP at 144-45, 214, 217. An appellant assigning error to an out-of-court identification must also challenge an in-court identification if he is to establish prejudice; otherwise, the erroneous out-of-court identification is essentially cumulative of the admissible in-court identification. See State v. Hilliard, 89 Wn.2d 430, 439, 573 P.2d 22 (1977) (noting that an in-court identification is admissible if its origin is independent of any prior inadmissible identification). Here, the defendants have not challenged Isha and Rolan's trial identifications that essentially made their disputed out-of-court identifications moot.

competent if he understands the nature of the charges and is capable of assisting in his defense. Fleming, 142 Wn.2d at 862.

The “ability to assist” requirement is minimal. State v. Harris, 114 Wn.2d 419, 429, 789 P.2d 60 (1990). A defendant need not be able to suggest a trial strategy, help to formulate defenses, or even be able to recall past events. Harris, 114 Wn.2d at 428. Courts have found defendants competent despite being diagnosed with schizophrenia, being unable to differentiate reality from fantasy, having brain damage, and being unable to consult with counsel. See Harris, 114 Wn.2d at 429. And for example, in State v. Lord, 117 Wn.2d 829, 901-04, 822 P.2d 177 (1991), the defendant was deemed competent even though he indicated that he should be handcuffed so he would not attack his attorney and he stated that he had a conversed with the Lord and the Devil and the Devil asked him to drink a cup of his own blood to prove his innocence.

A competency hearing is required only when a defendant has entered a plea of not guilty by reason of insanity or when there is reason to doubt his competency. RCW 10.77.060(1). A trial court is vested with broad discretion in judging a defendant’s competency. Fleming, 142 Wn.2d at 863; State v. Osborn, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). The trial court should consider several factors in determining whether a competency examination is required: the defendant’s appearance, demeanor, and conduct; his personal and family history; his past behavior; medical and psychiatric reports; and the statements of defense counsel.

Fleming, 142 Wn.2d at 863. The court should also consider the defendant's understanding of the charge, the facts giving rise to the charge, the consequences of conviction, and his ability to relate the facts to his attorney in order to help prepare the defense. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985).

Here, Calhoun maintains that the court erred in denying his counsel's pretrial competency evaluation motion. He also suggests that the court should have ordered an evaluation due to his behavior at trial. This court should disagree.

Counsel's pretrial motion was not based on seriously bizarre behavior or extreme mental health issues. Rather, it centered on his contentious relationships with his attorneys, his references to himself in the third person, his insistence on applying the UCC, and his use of drugs supposedly known to cause brain damage. RP (Apr. 27, 2006) at 33-37. The MHP explained that these issues were not one of competency but of Calhoun's distrust of attorneys, his extreme anxiousness over the pending charges, and his general personality of being "overly controlling and reactive." RP (Apr. 27, 2006) at 40-41. The MHP concluded that Calhoun's thoughts were clear and there was no evidence of psychotic symptoms or mental health issues.

The court then directly questioned Calhoun and reviewed his *pro se* pleadings. The court was satisfied that Calhoun understood the nature of the criminal charges and was capable of assisting in his defense. Based

on the nature of the allegations, the court's interactions with Calhoun, and the information provided by the MHP, it was not manifestly unreasonable to conclude that Calhoun was competent.

Calhoun also suggests that even if there was not initially a competency concern, there should have been after his behavior during trial. But Calhoun's trial conduct merely evidenced what the MHP had already reported. For an extremely anxious, controlling, and reactive defendant who distrusted his attorney, it was not surprising that he would yell or interrupt proceedings to try and fire his attorney, file a bar complaint, or make accusations against a judge. Nor could it be said to be a matter of competency simply because during a heated cross-examination, he attempted to turn the courtroom into a theater where he could directly relate to the jury and tell them his side of the story. While this behavior is not appropriate, it is not all that irregular in the criminal-justice system, and surely, by itself, is not suggestive of incompetency. The court had a full opportunity to view the defendant's behavior and it had reasonable grounds to conclude that the defendant was competent throughout trial. This assignment of error should be rejected.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FRAZIER'S MOTIONS FOR A SEVERANCE AND A MISTRIAL.

In a related argument, Frazier suggests that the trial court erred in denying his motions to sever his trial from Calhoun and in denying his motion for a mistrial based on Calhoun's conduct. This court should disagree.

A court may grant a severance of defendants before trial if "it is deemed *appropriate* to promote a fair determination of the guilt or innocence of a defendant," or if during trial, "it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(i)-(ii). "Separate trials are not favored in Washington and defendants seeking severance have the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). A trial court has broad discretion in ruling on a severance motion and it will not be overturned absent the defendant pinpointing specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982); State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

Likewise, this court reviews for abuse of discretion a trial court's ruling on a motion for a mistrial. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 451 (2002). Trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can

insure that the defendant will be tried fairly.” Rodriguez, 146 Wn.2d at 270 (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)). A trial court’s denial of a motion for mistrial will be overturned only when there is a substantial likelihood that the error prompting the request for a mistrial affected the jury’s verdict. State v. Rodriguez, 146 Wn.2d at 269-70.

Frazier brought only one motion for severance, and that motion was joined by his only motion for a mistrial. Frazier assigns error to the pretrial severance ruling but that motion was made by Banks alone. He therefore cannot assign error to that ruling. But even had he joined Banks’ pretrial severance motion, this motion was made after the court concluded that there was no reason to doubt Calhoun’s competency. RP (Apr. 27, 2006) at 50; RP (May 1, 2006) at 4. This motion was made solely because Banks’ counsel believed that Calhoun was not competent. RP (Apr. 27, 2006) at 50. As previously discussed, the trial court did not err in its pretrial conclusion that Calhoun was competent. It therefore also did not err in denying the intertwined motion for severance.

Turning then to the severance and mistrial motion that Frazier actually did make, these joint motions were brought when Calhoun announced to the jury that he had fired his attorney because “[h]e is lying. He will not uphold my rights.” VII RP at 278. The trial court denied Frazier’s motions, instead choosing to instruct the jury to “disregard the outburst of Mr. Calhoun” and “draw no inferences from anything he said.”

VII RP at 279-82. The court also instructed the jury: “You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.” CP (34941-9) at 88.

In now arguing that the court’s curative instructions were insufficient to protect his right to a fair trial, Frazier relies on State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (N.C. 1979). But McGuire completely undercuts Frazier’s position. There, one of three defendants made numerous outbursts during the joint trial: he repeatedly called a witness a liar; he told the jury “Keep Cool. Peace!” as it was retiring and said “Good-bye girl!” to one juror; he remarked to a codefendant “Pete, I believe we have got it won”; and near the end of trial, he had to be removed from the courtroom after he broke into a tirade of obscenities and blasphemies. McGuire, 297 N.C. at 74.

The North Carolina Supreme Court affirmed the trial court’s decision not to sever the codefendants’ trial. McGuire, 297 N.C. at 76-77. The court found it sufficient that the trial court had instructed the jury not to allow the defendant’s behavior to “influence your decision in any way when you come to weigh the evidence or determine the issues of guilt [as to any defendant].” McGuire, 297 N.C. at 77. The court noted:

When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to

accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. . . . On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst.

McGuire, 297 N.C. at 75 (quoting State v. Sorrells, 33 N.C. App. 374, 376-77, 235 S.E.2d 70 (1977)).

The court also noted that the defendant's behavior was "mild" when compared to two other cases where the decision not to sever had been upheld. McGuire, 297 N.C. at 75-76 (discussing United States v. Bamberger, 456 F. 2d 1119 (3d Cir. 1972), cert. denied sub nom. Crapps v. United States, 406 U.S. 969 (1972), and United States v. Marshall, 458 F. 2d 446 (2d Cir. 1972)). In Bamberger, 456 F. 2d at 1127-28, the court properly denied the motion to sever a three-defendant trial even after one defendant called witnesses liars and made derogatory remarks to the trial judge and another defendant continually interrupted the testimony of witnesses and finally swallowed one of the prosecution's exhibits. And in Marshall, 458 F. 2d at 451-52, the court properly denied the motion to sever even though one defendant repeatedly made obscene remarks, threw a water pitcher at the prosecutor, hurled a chair toward the jury box, and cut his wrists and tongue with a razor blade.

Calhoun's behavior was saintly in comparison to the cases above where the courts were found to have properly denied motions for severance and mistrial. Calhoun did not curse, he was not violent, and he did nothing to impugn Frazier's character or presumption of innocence. Calhoun's behavior, while inappropriate, only suggested to the jury that he took the criminal charges extremely serious and wanted the best legal representation possible. Frazier cannot pinpoint specific prejudice that resulted from Calhoun's behavior. The trial court properly exercised its discretion in giving the curative instructions that it did but denying the motions for severance and a mistrial.

4. JURY INSTRUCTION SEVEN IS A PROPER STATEMENT OF THE LAW.

The defendants next assert that the trial court erred in giving jury instruction seven, which provided: "If you are convinced that both defendants participated in a crime or crimes charged in this case and that the crime or crimes have been proven beyond a reasonable doubt, you need not determine which defendant was an accomplice and which was

principal.” CP (34941-8) at 90.⁶ The defendants raise two arguments as to why this instruction is erroneous. Each argument should be rejected.

The defendants first assert that the instruction relieved the State of its burden of proof by instructed the jury that if they found that a defendant participated in any one of the charged crimes, they need not determine whether he was guilty as a principal or an accomplice. Br. of Appellant Calhoun at 29; see also Br. of Appellant Frazier at 22. But the defendants misunderstand the law of complicity, i.e., that criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). Accomplice liability is not an element or alternative

⁶ Instruction seven was given in tandem with instruction six, which provided:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP (34941-9) at 89. This instruction mirrored 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.51 (Supp. 2005).

means of a crime. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004).

The distinction between accomplice and principal liability is empty:

[A]nyone who participates in the commission of a crime is guilty of the crime . . . regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. *The elements of the crime remain the same.*

State v. McDonald, 138 Wn.2d 680, 688, 981 P.2d 443 (1999) (quoting State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974)). The defendants are wrong in asserting that the jury had to find whether they acted as a principal or accomplice for each charged crime.

The defendants next challenge instruction seven because it “required the jury to determine only whether the fact that a crime had been committed had been proven beyond a reasonable doubt, not that Mr. Frazier or Mr. Calhoun had committed the crime beyond a reasonable doubt.” Br. of Appellant Frazier at 22; see also Br. of Appellant Calhoun at 29. But this is a flat misreading on the instruction. The instruction stated that the principal-accomplice distinction was immaterial if the jury was convinced “*that both defendants* participated in a crime or crimes charged in this case and that the crime or crimes have been proven beyond a reasonable doubt.” CP (34941-8) at 90 (emphasis added). This instruction made clear that if a jury was considering accomplice liability

for any count, it had to find that the defendant participated in the charged count and that the count was proven beyond a reasonable doubt. See generally State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000) (accomplice instructions must specify that the evidence must show that the defendant knew his actions would promote the crime charged, rather than any potential crime); State v. Roberts, 142 Wn.2d 471, 510-513, 14 P.3d 713 (2000) (same). Instruction seven is an accurate statement of the law and the trial court did not err in giving it.

5. THE STATE CONCEDES THAT THE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF CELIA VIOLATE DOUBLE JEOPARDY. HOWEVER, THE CONVICTIONS FOR ROBBERY AND THE ASSAULT OF ROLAN DO NOT VIOLATE DOUBLE JEOPARDY.

The defendants maintain that their convictions for first degree robbery and two counts of second degree assault violate double jeopardy. They argue that the assault convictions should be vacated because, under State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), each assault merged with the robbery. The State concedes that under Freeman, the assault conviction involving Celia merged with the robbery. However, the State maintains that there was no merger with the robbery as relates to the assault conviction involving Rolan.

This court recently discussed and applied Freeman in State v. Wade, 133 Wn. App. 855, 138 P.3d 168 (2006). Wade's discussion of Freeman is appropriate here:

Although the constitutional guaranty against double jeopardy protects against multiple punishments for the same offense, the legislature has the power to define criminal conduct and to assign punishment to it. Therefore, where a defendant's act implicates multiple criminal statutes, a court weighing a double jeopardy challenge must determine if the legislature intended the charged crimes to constitute the same offense. The merger doctrine is one tool for determining legislative intent.

“[T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).”

The doctrine is not conclusive, for the legislature may explicitly or implicitly express its intent that crimes be treated separately even if they otherwise merge.

In *Freeman*, the court addressed this state's robbery statutes. Robbery elevates from second degree to first degree if, in the commission of the robbery or in the immediate flight therefrom, the defendant inflicts bodily injury, which is an assault. The *Freeman* court concluded that the legislature intended to punish separately both a robbery elevated to first degree by a first degree assault, and the assault itself; therefore, both convictions do not violate double jeopardy. As to robbery elevated to first degree by a second degree assault, the *Freeman* court held that “a case by case approach is required to determine

whether first degree robbery and second degree assault are the same for double jeopardy purposes.” The court concluded that generally, the assault will merge with the robbery unless the assault has an independent purpose or effect.

Wade, 133 Wn. App. at 871-72 (citations omitted) (alteration in original).

The Freeman court went on to conclude that an assault conviction merged with a robbery conviction where the defendant met a woman to sell her drugs but instead punched her in the face, causing serious damage, and then stole her money and casino chips. 153 Wn.2d at 760.

Applying Freeman, this court concluded that Wade’s second degree assault conviction did not merge with his first degree robbery conviction. Wade, 133 Wn. App. at 872. Wade had broken into a home and confronted four people in an effort to track down money and another individual. Wade used a gun to repeatedly club one man, Ben, when Ben stated that he did not know where the money or the individual was. After he then robbed another couple, Wade turned the gun back on Ben and demanded his money and jewelry. In rejecting Wade’s merger challenge, this court wrote:

The assault conviction was based on Wade’s multiple acts of clubbing Ben with the gun when Ben responded that he did not know where the bachelor was or where the women’s money was. Wade’s robbery conviction occurred when, after he had already robbed the Wakefields, he pointed the gun at Ben, thereby committing another assault, and demanded Ben’s money and jewelry. While this second

assault may have merged with the robbery, it was not the basis for the second degree assault conviction. The assault conviction was based on acts designed to obtain information. As such, it had a purpose independent of the later robbery of Ben's money and jewelry.

Wade, 133 Wn. App. at 872 (citation omitted).

Merger is an issue here because the defendants were convicted of first degree robbery and second degree assault and the robbery conviction contained an assault element. CP (34941-8) at 91, 93, 95-96. Because the defendants were convicted of two counts of second degree assault it is necessary to assess whether each assault had a purpose or effect independent of the robbery.

a. The assault of Rolan did not merge with the robbery.

Count II required the State to prove that the defendants, either as a principal or an accomplice, assaulted Rolan. CP (34941-8) at 105-06. This assault occurred when Rolan came out of the bedroom after being awoken by the defendants breaking into the home. VI RP at 140-42. Rolan began to retreat into the bedroom to protect his daughter when one of the men came after him and struck him, causing him to fall back onto the bed. VI RP at 142-43.

This assault had a purpose independent of the robbery's goal of securing the safe. Rolan was fleeing from the defendants, and as such, the

assault was designed to ensure that he did not escape, that he could not protect his daughter, that he did not call for help, and that he did not retrieve a weapon for defensive purposes. These reasons for subduing Rolan were qualitatively different than an assault directly aimed at obtaining the safe. For example, an assault may have merged if, much like the scenario in Freeman, Rolan was in possession of the safe and he was assaulted so he would let go of it. Merger would also be an issue if, after Rolan was on the bed, he was assaulted again as one of the defendants tried to elicit the location of the safe.⁷ These types of assaults would be so intertwined with the purpose of the robbery that they were incidental to the robbery, or to put it another way, they were almost necessary acts to effectuate the taking of the safe. The assault of Rolan stands in contrast to these examples.

This conclusion is supported by State v. Prater, 30 Wn. App. 512, 635 P.2d 1104 (1981), which was favorably cited repeatedly in Freeman, 153 Wn.2d at 774-75, 779. In that case, Harold and James Prater broke into Mr. and Mrs. Ross' apartment. Harold went with Mrs. Ross looking for money while James stayed with Mr. Ross. Harold jabbed at Mrs. Ross

⁷ This situation would be different than that occurring in Wade. In Wade, the non-merging assault was designed to gain information unrelated to the defendant's later robbery of the victim's money and jewelry. Here, this hypothetical assault of Rolan would be directly related to the robbery of the safe.

with a gun as she attempted to find the money and then struck her on the side of her head. While the two were gone, James shot Mr. Ross, causing him to lose consciousness.

Division One held that the assault on Mrs. Ross merged with the robbery offense because it “was part of the force used to induce her to find money, the object of the robbery. The purpose was to intimidate.” Prater, 30 Wn. App. at 516. But the court held that shooting of Mr. Ross did not merge because it had a purpose and effect independent of the robbery; in fact, by disabling him it hindered rather than facilitated finding money in the house. Prater, 30 Wn. App. at 516.

Here, while the purpose of assaulting Rolan related to the robbery in the broad sense that it was part of the entire incident and occurred while the defendants were seeking to steal the safe, this did not make the assault incidental to the robbery. Was this the case, every assault would be incidental to a robbery. But as Wade and Prater demonstrate, assaults do not merge simply because they occur during a robbery. The real question is one of an independent purpose.

The defendants’ aim was to steal the safe, and to that end, Frazier jumped on Celia, who knew where the safe was and was known to possess the safe key. Like the defendants in Prater, the defendants had a hostage independent of Rolan who could and did quickly give them what they

wanted. The assault of Rolan, much like the assault of Mr. Ross in Prater, was not a necessary act to effectuate the robbery. The assault bore the independent goals of preventing Rolan from escaping, protecting his daughter, calling for help, or obtaining a weapon in self defense. The assault of Rolan had a function independent of the robbery and the two convictions do not violate double jeopardy.

b. The assault of Celia did merge with the robbery.

Count III required the State to prove that the defendants, either as a principal or an accomplice, assaulted Celia. CP (34941-8) at 107-08. This assault was based on Frazier jumping on Celia and sticking his hand down her bra in order to obtain the safe key. The State agrees that under the principles just discussed, this second degree assault did merge with the first degree robbery conviction. This assault was directly aimed at securing the safe and therefore did not have a purpose independent of the robbery. The State concedes that under Freeman, count III for each defendant should be vacated.

6. THE DEFENDANTS' ARGUMENT THAT THEIR ASSAULT AND ROBBERY CONVICTIONS ARE THE SAME CRIMINAL CONDUCT IS MOOT, WAIVED, AND INCORRECT.

Multiple current offenses are counted separately for offender score purposes unless the offenses involve the same criminal conduct. RCW 9.94A.589(1)(a). Current offenses involve the same criminal conduct only when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Courts narrowly construe the requirements for same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The sentencing court has broad discretion to determine what constitutes same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The defendants maintain that the sentencing court erred in not treating their convictions for robbery and assault as the same criminal conduct. However, because the State concedes that one count of second degree assault should be vacated, resentencing is required. This issue is thus moot. The State will address this however as it is likely to arise on remand.

It is first important to note that neither defendant raised the same criminal conduct issue at sentencing. Because same criminal conduct is largely a discretionary ruling for the sentencing court, the issue can

generally not be raised for the first time on appeal. State v. Nitsch, 100 Wn. App. 512, 522-23, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). Moreover, the issue is waived if, as Frazier did, a defendant stipulates to his criminal history and offender score. State v. Ross, 152 Wn.2d 220, 231-32, 95 P.3d 1225 (2004); Nitsch, 100 Wn. App. at 522.

In any event, it would be error to treat the robbery and remaining assault conviction as the same criminal conduct. Rolan was the victim of the assault conviction. Isha and Celia were the victims of the robbery conviction. Offenses against different victims cannot constitute the same criminal conduct. RCW 9.94A.589(1)(a); State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998) (noting that two crimes do not involve the same criminal conduct where one involves one victim and the other involves the same victim but also another victim). This assignment of error should be rejected.

7. FRAZIER’S ARGUMENT THAT HIS CALIFORNIA CONVICTIONS SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE IS MOOT AND NOT PROPERLY RAISED.

Frazier maintains that the sentencing court erred in including his California convictions in his offender score. Frazier contends that these convictions washed out under RCW 9.94A.525(2). Because the State concedes that one count of second degree assault should be vacated, resentencing is required and this issue is moot.

Moreover, Frazier specifically stipulated to his offender score and to the fact that his California convictions *did not* wash out. See In re PRP of Cadwallader, 155 Wn.2d 867, 873, 123 P.3d 456 (2005) (“A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof.”). Certain prior offenses will wash out of an offender’s criminal history if there is a crime-free statutory period of time between the date of release from the prior offense and the next date of confinement. RCW 9.94A.525(2). Here, if Frazier is to overcome his sentencing stipulation, he must now offer more than just his cursory statements that the California convictions washed out. He must submit evidence concerning his release dates on those convictions. Because this evidence is not contained in the record, this is not the appropriate forum to

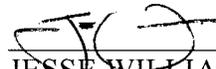
raise this issue; he must do so through a personal restrain petition. State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

D. CONCLUSION.

The trial court did not abuse its discretion in admitting the show-up identifications, finding Calhoun competent, in denying the motions for severance and a mistrial, or in giving the legally accurate jury instruction seven. The State concedes that the convictions for the robbery and assault of Celia violate double jeopardy and the assault conviction should be vacated. However, the convictions for the robbery and assault of Rolan do not violate double jeopardy. The appellants' sentencing errors are without merit, and in any event, are moot in light of the required resentencing. The State respectfully requests that this court affirm each of the appellants' convictions except for count III, which should be vacated.

DATED: March 13, 2007

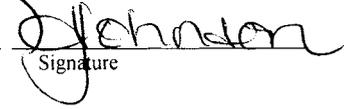
GERALD A. HORNE
Pierce County
Prosecuting Attorney



JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB # 35543

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/19/07 
Date Signature

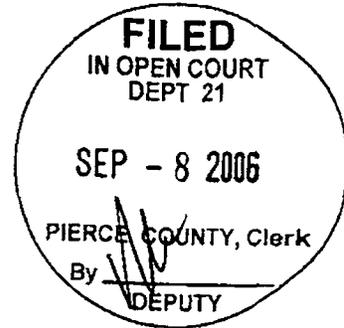
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APPENDIX "A"

Findings of Fact and Conclusion of Law



05-1-03398-9 28113970 FNCL 08-11-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03395-1

05-1-03396-9 ✓

vs.

ZACHARY LYNN FRAZIER, and ABDUL K. CALHOUN,

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: IDENTIFICATION SUPPRESSION MOTION

Defendants.

THIS MATTER came before the court on the motion of the defendants to suppress evidence of the identification of the defendants at a police show up. By stipulation of the parties the court considered copies of the police reports and other investigative materials that were assembled by the state. (Those materials were submitted to the court for the Knapstad motion filed by co-defendant Verndelæo Banks under cause No. 05-1-03394-2.) Neither defendant offered any evidence. The court also considered the arguments and authorities submitted in the written memoranda and presented at the hearing on this motion. The court issued an oral ruling denying the motion. The court now enters the following findings of fact and conclusions of law as required by CrR 3.6:

I. FINDINGS OF FACT.

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1. On July 11, 2005, at approximately 3:48 in the morning a home invasion robbery was committed by two men at the apartment of Isha Isaac. The apartment was located at 14436 Washington Avenue SW in Tillicum.

2. The apartment was small and consisted of one bedroom, a bathroom, and a kitchen, living room area. At the time of the robbery there were three adults present in the apartment. All three had face to face contact with the robbers for several minutes during the robbery.

3. The victims were awake and alert at during the robbery. They had been awakened before the robbery by a loud bang on the window and had time to get up from where they were sleeping before the robbers came through the window into the apartment.

4. The lighting in the apartment was sufficient to see by. The victims could see well enough to distinguish facial and clothing features and described those features to the police. The lighting was provided by a television in the living room, bathroom lights and possibly a light in the kitchen.

5. The victims' attention was directed specifically at the two robbers. The two robbers commanded the victims' attention by their actions; they were shouting commands at the victims and making demands of them throughout the time they were in the apartment. There were no weapons displayed that would have attracted the victims' attention away from the robbers features.

6. The robbers wore bandanas over the lower part of their facial features. These coverings did not obscure their eyes, hair, height, weight, build or clothing.

7. Isha Isaac was able to make a 911 call and report the robbery to the 911 operator before the two defendants left the apartment complex. She recited to the 911 operator the license

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2 number, direction of travel and a description of the get away vehicle while watching it flee the
3 scene.

4
5 8. The defendants were stopped in the vehicle described by Isha Isaac seven minutes after
6 the robbery. The vehicle was identical to the vehicle described by Ms. Isaac during the 911 call;
7 it was a red Ford Ranger pickup, license number A33871C.

8
9 9. In addition to stopping the get away vehicle, the police recovered several items of
10 evidence either stolen or used in the robbery. These items were found before the show up. One
11 of these items was a brief case safe. The officer making the stop, Lakewood Officer Russell
12 Martin, saw defendant Frazier attempt to hide the safe under the pickup after it was stopped.
13 After the show up Isha Isaac identified the safe as hers and the safe was found to contain her
14 important papers and money.

15 10. The second item of evidence recovered by the police was two blue bandanas. These
16 matched the bandanas described as worn as masks by the robbers during the robbery.

17
18 11. The victims gave the police a description of the robbers before the show up. The
19 description matched the two defendants as to clothing and stature.

20 12. The defendants were positively identified by two of the three victims at the show up.
21 Isha Isaac and Rolan Kimbrough were taken in a police car to the place where the three
22 defendants had been stopped.

23 13. During the short ride to the show up, the officer had a computer in the police car that was
24 capable of displaying photographs of the defendants. However neither of Ms. Isaac nor Mr.
25 Kimbrough could see the screen and neither of them saw any photographs before the show up.

26 14. The three defendants were taken out of separate patrol cars one at a time. They were
27 displayed to Isha Isaac and Rolan Kimbrough by means of head lights and a spot light from a
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FINDINGS OF FACT AND -- 3
CONCLUSIONS OF LAW

Office of Prosecuting Attorney
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3 police car. Ms. Isaac and Mr. Kimbrough were positive in their identification of the defendants
4 as the two robbers.

5 15. In conducting the show up the officers did not make any suggestions about the
6 identification. Ms. Isaac was able to identify one of the defendants as the robber who had been
7 in the living room and who had assaulted her sister. Mr. Kimbrough identified the other
8 defendant as the robber who had come into the bedroom where he had been with his daughter
9 and who had punched him in the head. Ms. Isaac also identified co-defendant Verndeleano Banks
10 as a friend of her family and as a person who had knowledge of the safe and its contents.

11 16. The show up was completed less than half an hour after the robbery.

12 II. CONCLUSIONS OF LAW.

13 17. The defendants have the burden to prove that the show up identification in this case was
14 impermissibly suggestive.

15 18. A show up is impermissibly suggestive if it is unnecessarily suggestive. If a show up is
16 impermissibly suggestive it may nevertheless be admitted if it did not create a substantial
17 likelihood of irreparable misidentification considering the totality of the circumstances.

18 19. The defendants in this case failed to establish that the show up was unnecessarily
19 suggestive.

20 20. The defendants also failed to establish a substantial likelihood of irreparable
21 misidentification considering the totality of the circumstances. In reaching this conclusion the
22 court considered the following factors:

23 a. The opportunity of the victims to view the two defendants at the time of the
24 crime: Apart from the bandanas worn by the defendants and recovered by the police the
25 victims' opportunity to view the two defendants at the time of the crime was unimpaired.

26 b. The victims' degree of attention: The victims' attention was riveted on the two
27 defendants. They were not distracted nor was their attention divided.
28

c. The accuracy of the victims' description: The description of the two robbers given by the victims before the show up matched the appearance of the two defendants.

d. The level of certainty: The victims were positive in their identifications.

e. The time between the crime and the show up: The time lapse was less than 30 minutes. This was not long enough for the memory of the appearance of the two robbers to have faded from the victims' memories.

21. In view of the foregoing conclusions of law evidence of the identification of the defendants by the victims was properly admitted at trial.

DONE IN OPEN COURT this 8 day of September, 2006.

[Signature]

JUDGE

Presented by:

[Signature]

James S. Schacht
Deputy Prosecuting Attorney
WSB# 17296

FILED
IN OPEN COURT
DEPT 21
SEP - 8 2006
PIERCE COUNTY, Clerk
By *[Signature]*
DEPUTY

Approved For Entry:

James Schoenberger
Attorney for Defendant Calhoun
WSB# _____

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