

NO. 36039-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN WAHSISE,

Appellant.

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

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of violating the Uniform Firearms Act (VUFA).

2. The trial court erred in allowing Detective Rackley to testify appellant was one of the individuals pictured in the motel surveillance video.

3. Prosecutorial misconduct deprived appellant of his right to a fair trial.

4. Appellant received ineffective assistance of counsel at trial.

5. Cumulative error deprived appellant of his right to a fair trial.

6. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Where appellant was one of eight passengers riding in a van in which a small handgun was later found stuffed in a pouch and the state presented no evidence appellant owned the van or exercised dominion or control over it, was the evidence insufficient to establish appellant constructively possessed the

handgun, a required element of first degree unlawful possession of a firearm?

2. Did the trial court err in allowing detective Rackley to give his opinion that appellant was one of the individuals recorded on motel's surveillance system during the charged robbery, where that video was of concededly lousy quality and did not reveal any facial features, and where Rackley had no prior familiarity with appellant other than five minutes worth of observation at the arrest location and some limited contact in an interview room at the police station?

3. Did prosecutorial misconduct deprive appellant of his right to a fair trial where the prosecutor failed to guard against testimony by detective Rackley that violated the court's in limine ruling and introduced unfairly prejudicial evidence against the appellant?

4. To the extent defense counsel contributed to the error by asking open-ended questions allowing the opportunity for the detective's prejudicial response, did appellant receive ineffective assistance of counsel?

5. Did cumulative error deprive appellant of his right to a fair trial where the strongest evidence against appellant consisted

of the detective's identification testimony and his testimony violating the court's in limine order?

6. Did appellant receive ineffective assistance of counsel at sentencing where his attorney agreed to an offender score that wrongly included points for offenses that clearly merged under double jeopardy principles or counted as the same criminal conduct?

B. STATEMENT OF THE CASE

1. Procedural Facts

Following a jury trial in Pierce County Superior Court, appellant Brian Wahsise was convicted of first degree robbery while armed with a firearm and unlawful possession of a firearm¹ for his alleged participation in holding up the Days Inn Motel in Fife on March 8, 2006. CP 1-4, 44-46.

At trial, Wahsise, together with co-defendant Lionel George, moved in limine to exclude evidence of statements Robert Maas, a third co-defendant, made to police. RP 15-17.² Maas had since

¹ Wahsise stipulated he had a prior qualifying offense for a first degree violation. CP 5; RCW 9.41.040(1)(a).

² The verbatim report of proceedings consist of eight bound volumes consecutively paginated, designated as "RP," and sentencing held on March 2, 2007, designated as "1RP."

pled guilty and was not expected to testify. RP 15-17. The court granted the motion. RP 17.

In anticipation of sentencing, the defense signed a written stipulation agreeing to the state's understanding of Wahsise's criminal history, set forth as follows:

<u>Crime</u>	<u>Date of Sentence</u>	<u>County</u>	<u>Date of Crime</u>	<u>Adult/ Juve</u>	<u>Crime Type</u>	<u>Class</u>	<u>Score</u>	<u>Felony or Misdemeanor</u>
Burg 2	2/07/95	Pierce	1/15/95	Juv	NV	B	.5	Felony
Burg 2	11/03/95	Pierce	9/15/95	A	NV	B	1	Felony
Aslt 2	1/19/96	Yakima	11/24/95	A	V	B	2 or 1	Felony
Aslt 2	1/19/96	Yakima	11/24/95	A	V	B	2 or 1	Felony
Rob 1	1/19/96	Yakima	11/24/95	A	V	A	2 or 1	Felony

CP 56.³

The defense also agreed that the current offenses scored against each other, rendering Wahsise's offender score 8 points for the first degree robbery and 5 points for the VUFA. CP 56-57; RCW 9.94A.525(8) (for a violent offense, prior violent offenses count as two points); RCW 9A.52.030(50)(i) (class A felonies are violent offenses); RCW 9A.56.200(2) (first degree robbery is class

³ The state's understanding of Wahsise's criminal history also included a 1995 juvenile adjudication for second degree burglary, which scored as only one-half point and therefore did not count towards his offender score. CP 56; RCW 9.94A.525(8).

A offense); RCW 9.94A.030(50)(viii) (second degree assault is a violent offense).

As proof of the offenses highlighted in bold, the state submitted the amended information filed under Yakima Superior Court No. 95-1-01980-9, alleging the following three counts:

By this Information (Count I of III), the Prosecuting Attorney accuses you of the crime of:

FIRST DEGREE ROBBERY – RCW 9A.56.190/9A.56.200(1)(a)^[4]/9A.08.020

...
In that you, on or about November 24, 1995, in Yakima County, Washington, acting as either the principal or an accomplice to another who did unlawfully take, personal property, to-wit: beer, from the person or in the presence of Ruth Smartlowit and Reynaldo Iturbide, property belonging to Crossroad Markets, against said person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or his/her property or the person or property of anyone with intent to obtain or retain the property taken, and in the commission of or immediate flight therefrom, the accused was armed with a deadly weapon, to-wit: .22 caliber handgun; . .

By this Information (Count II of III), the Prosecuting Attorney accuses you of the crime:

SECOND DEGREE ASSAULT – RCW 9A.36.021(1)(c)^[5]

...

⁴ Under RCW 9A.56.200(1)(a), a person is guilty of first degree robbery if in the commission of a robbery or of immediate flight therefrom, he is armed with a deadly weapon.

⁵ Under RCW 9A.36.021(1)(c), a person is guilty of assault in the second degree if he, under circumstances not amounting to assault in the first degree, assaults another with a deadly weapon.

In that you, on or about November 24, 1995, in Yakima County, Washington, did intentionally assault Ruth Smartlowit, a human being, with a deadly weapon, to-wit: .22 caliber handgun.

...

By this Information (Count III of III), the Prosecuting Attorney accuses you of the crime of:

SECOND DEGREE ASSAULT – RCW 9A.36.021(1)(c) . . .

In that you, on or about November 24, 1995, in Yakima County Washington, did intentionally assault Reynaldo Iturbide, a human being, with a deadly weapon, to-wit: .22 caliber handgun;

CP 63-65. The state's documentation indicated Wahsise entered a Newton⁶ plea to the charges. CP 69-72.

The court sentenced Wahsise to an underlying sentence of 108 months, the low end of the standard range as calculated by the state, and an additional 120 months for the firearm enhancement.⁷

CP 95-96. Wahsise timely appeals. CP 106.

2. The Days Inn Robbery

Christine Huynh testified she was robbed on March 8, 2006, while working the front desk at the Days Inn Motel in Fife. RP 140. She testified that sometime between 4:00 and 5:00 p.m., she noticed a red Ford Bronco pull up, and a heavysset man enter the

⁶ State v. Newton, 87 Wn.2d 363, 366, 552 P.2d 682 (1976).

⁷ Because Wahsise was previously sentenced for a firearm enhancement, the current enhancement was doubled. CP 69; RCW 9.94A.510(d).

lobby with two others. RP 141. The heavyset man approached the counter, pointed a gun at Huynh,⁸ directed her to load a plastic bag with cash, and threatened to shoot if Huynh looked at him. RP 141. Meanwhile, the other two individuals took a television set from the lobby and headed out. RP 141, 145. Huynh put all the money from the register into the baggie (\$476). RP 124, 144. The heavyset man grabbed the baggie and left, after directing Huynh to lie on the ground. RP 145.

According to Huynh, the suspects were of Hispanic or Native American decent. RP 161. Huynh described the stick-up man as 5'11" – 6' tall and approximately 220-280 pounds. According to Huynh, one of the men who took the television set was the same height as the stick-up man (approximately 5'11"), but slender and wearing a white "hoodie." RP 142. At trial, Huynh testified the other individual was 5'7" or 5'8" tall, although she previously told police the men who took the television were *both* 6'1" tall and slender. RP 142, 157. At trial, Huynh claimed the shorter one was holding the right side of the television set and was the first to exit the motel. RP 145.

⁸ Huynh testified she could only see the gun's barrel, as it was small and tucked into the heavyset man's sleeve. RP 143. Someone standing behind the man would not have been able to see the gun, according to Huynh. RP 159.

Just before 5:00 p.m., police dispatched information about the robbery, including that the Bronco was heading westbound on Pacific Highway towards Tacoma. RP 74-75. Officer Thomas Gow and Detective Jeff Rackley attempted to track the suspect Bronco, but encountered heavy traffic at the Puyallup River Bridge. RP 75. Detective Rackley drove down the center lane with his lights and siren activated while examining the traffic in an attempt to locate the suspect vehicle. RP 232-33. It was not long before a dark-colored conversion van pulled out into oncoming traffic to cross the bridge. RP 80, 233. As Rackley and Gow pursued the van, Gow took the lead since he was driving a fully marked patrol vehicle. RP 75, 234.

After several blocks, the van ultimately stopped, and the police ordered everyone out. RP 85-86, 236. Gow had pulled up on the passenger's side of the vehicle, while Rackley pulled up on the driver's side. RP 236-38. Brian Wahsise and Robert Maas exited from the sliding passenger door. RP 87, 236, 260. Gow testified that despite some initial hesitation, Washise and Maas eventually obeyed his command to get on the ground. RP 88. Lionel George next exited from the driver's door and took off

running. RP 88, 237. For officer safety reasons, neither Gow nor Rackley chased him. RP 88, 237.

As Rackley approached the passenger side of the van to see if it was cleared, Washise and Maas were laying on the ground. RP 237-38. Rackley assumed "Gow somehow got them to get down on the ground," since Gow was closer than Rackley. RP 238. Upon reaching the van, Rackley saw six more people inside. RP 238, 341. Surprised, he retreated to his police car. RP 238, 276-74. Rackley testified that ultimately, the police "got [the other occupants] all to lay down on the ground so they could be secured and searched for weapons." RP 238. Four of these other occupants were men, possibly of Native American decent. RP 102, 113, 259, 341.

Police subsequently recovered a flat screen television set from the van, but no money. RP 115, 187. In a pouch located on the back of the passenger seat, one officer noticed what he perceived to be the handle of a handgun. RP 187, 191. The pouch was "crammed" and "stuffed full of items," however, and the officer had to "remove a few of those items" to confirm that what he saw was indeed a small handgun. RP 189, 192, 197. This was the gun the state claimed Wahsise constructively possessed. RP 497-98.

Meanwhile, Rackley drove to the Days Inn for further investigation. RP 240. While there, Rackley learned another officer had apprehended the van's driver. RP 241. Rackley drove Huynh to the arrest location, whereupon she positively identified George as the stick-up man. RP 243-44.

Upon returning to the Days Inn, Rackley learned the motel had a "very old" video surveillance system that recorded the robbery onto the motel's computer, which Rackley viewed. RP 245. Because he was not able to obtain a copy of the video, he "ended up having to take the whole system" to computer specialist Frank Clark. RP 219, 245. Because the equipment used by the Days Inn "wasn't real high quality," however, Clark could not record the video onto a compact disk to be played on another computer. RP 219, 223. Instead, he used a video camera to record the robbery as it played on the Days Inn computer monitor and put the recording onto a disk, which he then downloaded to Rackley's laptop computer. RP 219, 245-46. The recording would not play, however, without additional software. RP 249. As Rackley explained:

I believe Mr. Clark put a reader of some sort in there. I'm not a computer expert but he got it to work after doing some stuff.

RP 249, 257.

At trial, Rackley was permitted to play the 8.5-second video on his laptop, although the laptop was not admitted as evidence. RP 254, 289-90, 258-59. Instead, the state submitted the "stuff" Clark used to enable the laptop to play. RP 255-58; Ex 27 (five compact disks and one floppy disk). Also admitted was exhibit 3, a frame-by-frame copy of the video (67 still images) of concededly "lousy" quality, although not any worse than the 8.5-second video Rackley played. RP 221, 223-24, 247; Ex 3.

The still photos in exhibit 3 depict a man with black hat and a two-toned jacket (black on top, light-colored on bottom) enter and walk across the lobby from left to right, followed by a man wearing a white-hooded jacket with the hood covering his head. Ex 3 (pictures 8-16). The men appear to be the same height, although the second man appears thinner than the first. Ex 3 (pictures 8-16). Exhibit 3 next shows a third, heavier man wearing a single-toned, light-colored jacket and a white baseball cap enter and stand at the counter for several frames. Ex 17-20.

The man wearing the white-hooded jacket and the man wearing the two-toned jacket reemerge from the right and carry a

television set across the lobby and out the door. Again, the two men appear to be the same height. Ex 3 (pictures 34-38). The white-hooded man thereafter returns and stands next to the heavysset man at the counter. The white-hooded man appears taller than the heavysset man. Ex 3 (picture 57-58).

After playing the video, the prosecutor questioned Rackley about his overall contact with George, Wahsise and Maas, apparently intending to lay a foundation for Rackley's subsequent identification of them as the individuals depicted on the video. RP 259-63. Regarding George, Rackley testified that in addition to his contact at the van location, Rackley also saw him later that evening at the hospital. Regarding Wahsise and Mass, Rackley testified he met with them following their arrest in an interview room at the police station. RP 259-261. Wahsise made no statements to police, however. RP 16.

When the prosecutor subsequently asked Rackley whether he recognized anyone in the video, the following exchange between the parties and the court occurred.

Q [Prosecuting Attorney Jones] Based on your observations of Robert Maas, Brian Wahsise, and Lionel George at the arrest scene, upon your subsequent contact with each of them along with your observations of the other occupants of the van, did

you recognize anybody when you viewed the surveillance video at the Days Inn?

A Yes.

Q I could recognize Mr. George because of his physical stature. There was no question that it was him standing at the counter. The other two people carrying the television –

MS. MacDONALD [Defense Counsel for George]: Objection, goes to the ultimate issue.

THE COURT: I'm going to overrule the objection. The question was: Who could you recognize? He indicated, the response was he could recognize Mr. George, and you can finish answering the question.

Q Who else did you recognize, Detective?

A The other two who were carrying the television were the same ones that got out of the vehicle.

MR. HESLOP [Defense Counsel for Wahsise]: Objection, clearly speculation. Your Honor, I've looked at the pictures. Everybody looked at the pictures. You couldn't tell who was there.

THE COURT: Overruled. Thank you.

RP 264.

Heslop thereafter requested to voir dire Rackley outside the presence of the jury, but the court denied the request and held a sidebar conference instead. RP 265. For the record, the court

indicated afterward that it ruled counsel's objections related to the weight, rather than admissibility, of Rackley's identification. RP 266-67. Heslop supplemented the record as to his objection as follows:

MR. HESLOP: Your Honor, with regards to Detective Rackley, in his statement he says, yes, those are the two. I mean, there's no foundation laid. There's nothing that says that he had a good look. As a matter of fact -- I mean, obviously there's cross-examination -- he was on the other side of the vehicle when he got out of the van. He even said he didn't know how they got on the ground, how Officer --

THE COURT: Gow.

MR. HESLOP: -- Gow got them on the ground. He was on the other side. He couldn't see, and yet without anything else, oh, yes, that's obviously the two guys. And that's -- so, yeah, I probably won't disagree with the Court now that we will talk about that on cross-examination, but, you know, it's clearly, though, the ultimate issue here; he's saying, yeah, these are the two guys without any basis whatsoever.

RP 267.

MacDonald added that the jury was "perfectly capable of looking at the photos, hearing all the evidence and deciding who was or was not in that building," without Rackley's "lay" opinion. RP 267-68. The court maintained its ruling. RP 270. Rackley thereafter reiterated his identification of Wahsise and Maas as the individuals carrying the television set. RP 272.

On cross-examination, Heslop attempted to discredit Rackley's identification by suggesting that his contact with Wahsise and Maas at the arrest location was too minimal to provide Rackley with a sufficient basis to identify them – as opposed to the other Native American men in the van – as the individuals carrying the television. RP 286. In that regard, Rackley acknowledged he was positioned on the driver's side of the van, rather than the passenger side from which Wahsise and Maas exited, and did not see how they got onto the ground. RP 286. And although Rackley claimed he "would glance over and [] was aware of the entire situation," he conceded he was at the arrest location for "maybe five minutes" before driving to the Days Inn motel. RP 287-88.

Heslop also attempted to discredit Rackley's identification based on the poor quality of the tape, which Rackley admitted did not reveal "any facial features" of the individuals shown. RP 289, 293. Despite the conceded lack of any facial features to compare, Rackley claimed he recognized the individuals on the video "by their build, the way they carry themselves, the way they move, what they were wearing, and then talking to them later as well." RP 289.

But Heslop elicited (from Rackley himself) evidence suggesting Wahsise's known height did not compare to that of the

individual Rackley identified as Wahsise in the video. Significantly, Rackley identified Wahsise as the first man who entered wearing the two-toned jacket and Maas as the second man wearing the white hooded jacket. RP 285, 333; Ex 3. But Rackley also agreed – when examining pictures of the first and second man entering as well as leaving – that they appeared to be the same height. RP 329-31. Rackley likewise agreed when looking at a picture of the white hooded man standing next to the heavysset man at the counter that the white hooded man was at least as tall as the heavysset man. RP 332. According to booking photos, however, Wahsise is 5'8" tall and 180 pounds; Maas is 6'1" tall and 170 pounds;⁹ and George is 5'11" tall and 280 pounds. Ex 2-3, 30-31.

Interestingly, two of the other passengers in the van were closer in height to Maas than Wahsise. Specifically, Reuben Yellow Owl, who police reports indicate is 5'11" tall,¹⁰ and Angelo Riveria, who police reports likewise indicate is 5'11" tall. RP 295-96, 299; Ex 31. Although Rackley claimed the other van occupants

⁹ Rackley incorrectly judged Maas to be a mere 5'7" tall. RP 285.

¹⁰ Rackley incorrectly judged Yellow Owl to be 5'5" tall. RP 295.

were obviously intoxicated,¹¹ he admitted he could not tell from watching the video whether the participants had been drinking. RP 294.

And although Rackley claimed he recognized the individuals in the video by their clothing as well as their size, he did not remember what either Wahsise or Maas was wearing at the time of arrest, and police never recovered a white hooded or a two-toned jacket. RP 291-92, 329, 351.

While attempting to discredit Rackley's identification, Heslop asked whether police had "[a]ny other type of evidence [his] client was even in the Days Inn?" RP 301. Rackley responded that, "Mr. George's son told me he was." RP 301. Earlier on direct, Rackley had testified that Maas told him he "was the son of Mr. George," although George's hearsay objection was sustained. RP 260. Heslop's objection to Rackley's testimony on cross was likewise sustained, and the court instructed the jury to disregard it. RP 301.

Although Heslop doubted the court could "unring the bell," he opted to reserve any motion for a mistrial until after the state rested its case, and after the court ruled on his anticipated motion to

¹¹ Although Rackley claimed he had to assist two of the passenger out of the van (RP 299), Gow described the other passengers as "spilling out of the passenger side of the van." RP 88.

dismiss for lack of evidence. RP 313-16, 323-25. The court subsequently denied Heslop's motion to dismiss, but Heslop did not motion for a mistrial.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT WAHSISE OF POSSESSING THE FIREARM FOUND IN THE VAN'S POUCH.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 894 P.2d 403 (1995); State v. Wade, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

Unlawful possession of a firearm may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in the actual,

physical possession, but that the person charged with possession has dominion and control over the goods. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). The Supreme Court's analysis in Callahan establishes that Wahsise neither actually possessed the firearm at issue here nor constructively possessed it.

In Callahan, the court considered whether Michael Hutchinson illegally possessed drugs found in Cheryl Callahan's houseboat, where Hutchinson had been staying. Police entered the houseboat to execute a search warrant, which they served on tenant Callahan. When the officers entered the living room, they found Hutchinson and another individual sitting at a desk on which were various pills and hypodermic syringes. A cigar box filled with various drugs was on the floor between the two men. Other drugs were found in the kitchen and bedroom of the premises. Callahan, 77 Wn.2d at 28.

Hutchinson admitted that two guns, two books on narcotics and a set of broken scales belonged to him. He further admitted he had actually handled the drugs earlier that day. At the time of his arrest, he told police he had been staying on the houseboat for two or three days. Callahan, at 28. Based on this evidence, a jury found Hutchinson guilty of possessing illegal drugs. Id.

On review, the Supreme Court held the evidence was insufficient to establish Hutchinson's actual possession.

There was no evidence introduced that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers he had handled the drugs earlier. Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

Callahan, 77 Wn.2d at 29.

The court noted the state's case therefore depended upon whether there was sufficient evidence for the jury to find that Hutchinson had constructive possession of the drugs, i.e. whether there was "substantial evidence to show that he had dominion and control over the drugs." Callahan, at 29. After reviewing a number of its prior constructive possession cases, the court concluded there was not.

Although there was evidence that the defendant had been staying on the houseboat for a few days there was no evidence that he participated in paying rent or maintained it as his residence. Further, there was no showing that the defendant had dominion and control over the houseboat. The single fact that he had personal possessions, not of the

clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

Callahan, at 31.

As in Callahan, there was no evidence of actual possession here. Although Wahsise exited from the passenger side of the van, where the pouch containing the gun was located, close proximity does not establish actual possession. As in Callahan, the state's case therefore depended upon showing Wahsise constructively possessed the gun, i.e. substantial evidence he exercised dominion and control over the gun. But as the state argued in closing argument, all it proved was accessibility.

Constructive possession is what Mr. Wahsise did. You'll recall the officers testifying when they got everybody out of the van and was securing the area for weapons, the officer looked in the pouch behind the passenger seat and found the .25 caliber semiautomatic pistol. And he was asked, "Was that pouch accessible by the passenger? Certainly. Was that pouch also accessible by the driver?" -- and it was Mr. George at that point -- "Certainly." He actually said that weapon was accessible to everybody in that van. So constructive possession, Mr. Wahsise didn't actually have to have that gun in his hand, but there's dominion and control over the item and it may be immediately exercised. He can gain control of that firearm. I would submit to you that if the firearm is in that pouch behind the seat, and Mr. Wahsise is a front seat passenger, he simply reaches behind. If Mr. Wahsise is one of the last three people to enter that van, he has access just like everybody else to that gun as it sits in that pouch as they're

driving away. “May be immediately exercised.” He doesn’t have to reach over and grab it; it just has to be in an area where he can grab it, if need be.”

RP 498 (emphasis added).

Accessibility is just another name for proximity, however, and it is insufficient to establish constructive possession. Callahan, 77 Wn.2d at 31 (Hutchinson’s proximity to drugs was insufficient evidence of constructive possession). While accessibility may be a determining factor in considering whether an individual is armed during the commission of an offense – which, by statute (RCW 9.94A.602), renders all accomplices so armed – it is not a determining factor of unlawful possession under Callahan. This makes sense because access to a firearm during the commission of an offense could escalate an already dangerous situation; whereas, possession of a firearm in and of itself is not inherently dangerous.

As in Callahan, the state failed to prove Wahsise exercised dominion and control over the contraband. The state submitted no evidence he had dominion and control over the van where it was found. George was the driver, whereas Wahsise was merely one of eight passengers. For that reason, this case is unlike State v. Turner, in which the court found sufficient evidence of unlawful

possession of a firearm where the gun in question was located on the back seat of Turner's own car. State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000) (where owner/operator of a vehicle has dominion and control of a vehicle and knows firearm is inside the vehicle, there is sufficient evidence of constructive possession). This Court should reverse Wahsise's VUFA conviction.

2. THE TRIAL COURT ERRED IN ADMITTING DETECTIVE RACKLEY'S LAY OPINION THAT WAHSISE WAS ONE OF THE INDIVIDUALS IN THE SURVEILLANCE VIDEO.

In the usual circumstance, a lay witness should only relate observations to the jury and let jurors form their own opinions and conclusions. Ashley v. Hall, 138 Wn.2d 151, 978 P.2d 1055 (1999). This is because a lay witness is in no better position to arrive at an opinion or conclusion from the facts known to a witness. Ashley v. Hall, at 156.

The Washington Rules of Evidence permit lay opinion only when (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. ER 701. Because ER 701 is identical to Federal Rule of Evidence 701, federal cases are

instructive. State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994).

In general, the federal cases hold that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. Hardy, 76 Wn. App. at 190-91 (citing cases). Thus, the courts have held that an identification by someone who knows the person depicted is helpful to the jury and admissible. see e.g. United States v. Jackman, 48 F.3d 1 (1st Cir. 1995) (wife's identification of man in bank robbery video, whose face was partially obscured by a hat, was helpful and admissible since wife had familiarity jurors would not have); United States v. Barrett, 703 P.2d 1076 (9th Cir. 1983) (testimony of defendant's live-in girlfriend that defendant was the person depicted in bank surveillance photographs was admitted).

As the Fourth Circuit has explained:

[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater

appreciation of defendant's normal appearance. Thus, their testimony the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting.

United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986), vacated on other grounds, 479 U.S. 1077 (1987).

As the state may point out, the Sixth Circuit has gone so far as to allow testimony by a police officer identifying the defendant in a photograph seized in the raid of a drug house, despite the absence of prior contacts or other circumstances giving the officer an advantage in evaluating the photograph. United States v. Maddox, 944 F.2d 1223, 1230-31 (6th Cir.), cert. denied, 502 U.S. 950 (1991), amended sub. nom. United States v. Arnold, 12 F.3d 599 (6th Cir. 1993), cert. denied, 510 U.S. 1206 (1994). However, the Ninth Circuit has been extremely critical of such police identifications. United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993).

LaPierre was convicted of bank robbery. At his trial, a police officer (Miller) was allowed to testify that the individual pictured in the bank surveillance photos was LaPierre, even though Miller had no prior contact with LaPierre. On review, the Ninth Circuit held that the trial court's ruling allowing the testimony was an abuse of

opinion testimony of this sort. But this is not such a case. Miller's level of familiarity with LaPierre's appearance falls far short of that required by our cases and by Rule 701's requirement of helpfulness. Whether the person sitting before the jury was the one pictured in the surveillance photographs was a determination properly left for the jury.

LaPierre, 998 F.2d at 1465.

Neither of the two scenarios identified by the Ninth Circuit support admission of Rackley's testimony either. First, there was no evidence Wahsise's courtroom appearance and appearance at the time of the robbery was significantly different. In fact, Rackley's testimony was exactly the opposite. RP 263. Moreover, considering the lousy quality of the video, Rackley was in no better position to identify Wahsise than was the jury. See e.g. Jackman, 48 F.3d at 4-5 (such opinion testimony admissible when witness possesses relevant familiarity with the defendant the jury cannot also possess and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better suited than the jury to make the identification). Second, and perhaps most importantly, Rackley had not had the sort of "substantial and sustained contact" with Wahsise that would render his opinion helpful to the jury. LaPierre, 998 F.2d at 1465. Although Rackley had some contact with Wahsise – five minutes at

the arrest location and some contact in an interview room¹² at the police station – it was not enough time for Rackley to become sufficiently familiar with Wahsise to identify him from the surveillance video any better than the jurors.

In contrast to the Sixth Circuit, other jurisdictions appear to be in line with the Ninth Circuit and have required a significantly higher level of familiarity for such police identifications. See e.g. United States v. Stormer, 938 F.2d 759, 762 (7th Cir.1991) (four police officers' testimony identifying former police officer as robber in surveillance photographs helpful where officers had worked with defendant for several years, photographs were of poor quality and robber wore baseball cap and hosiery pulled over face); United States v. Wright, 904 F.2d 403, 404-05 (8th Cir.1990) (identification of defendant in bank surveillance photograph by law enforcement officers and bail bondsman who had known defendant for periods ranging from two to thirteen years admissible where photograph showed partially obscured face of robber and defendant had grown slight beard since time of robbery); United States v. Langford, 802 F.2d 1176, 1179 (9th Cir.1986) (testimony of defendant's cousin

¹² As indicated previously, Wahsise made not statements to police, so the interaction could not have been significant. RP 16.

and parole officer identifying defendant in bank surveillance photographs helpful because parole officer had met with defendant about 50 times and cousin had known defendant most of his life); United States v. Allen, 787 F.2d 933, 936 (4th Cir.1986) (identification of defendants in bank surveillance photographs by police officer and parole officer familiar with defendants "especially helpful" where photographs depict only parts of robbers' faces), vacated on other grounds, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed.2d 132 (1987).

Washington case law likewise appears to require a heightened level of familiarity. Hardy, 76 Wn. App. 188. Hardy was convicted of delivering cocaine, following an undercover buy/bust operation involving the use of an automobile equipped with a hidden video camera. At trial, a police officer (Maser) was allowed to testify that the individual pictured in the videotape had features similar or consistent with Hardy. Hardy, 76 Wn. App. at 189.

On appeal, this Court upheld the admission of Maser's testimony:

Because Maser had known Hardy for several years, he was in a better position to identify Hardy in the somewhat grainy videotape than was the jury. We agree with the trial court that the identification testimony of Maser was helpful to the jury in

determining whether Hardy was the person in the videotape. In addition, the "photograph" at issue here was in fact a moving picture, unlike the surveillance photographs in the federal cases cited above. Maser, who had seen Hardy in motion and was familiar with his mannerisms and body movements, was certainly in a better position to identify him than the jury, who had seen Hardy motionless in court.

Hardy, 76 Wn. App. at 191.

Whereas Maser knew Hardy for "several years," Rackley observed Wahsise for "maybe five minutes" before he identified Wahsise from the video. RP 264. And while Maser presumably had opportunity to view Hardy "in motion" throughout the course of those years, Rackley at most observed Wahsise exit from the van and later in an interview room where Wahsise made no statements. Unlike Maser, Rackley had not interacted with Wahsise "in natural settings" that would give him a greater appreciation of Wahsise's appearance. Allen, 787 F.2d at 936.

When lay opinion testimony relates to a core element the state must prove, Washington authority suggests there must be a substantial factual basis supporting the opinion. State v. Farr-Lenzini, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999). Because Maser had known Hardy for several years, there was a substantial factual basis supporting his opinion that the person depicted in the

video was indeed Hardy. The same cannot be said of Rackley's opinion. The trial court therefore erred in admitting it.

Considering the "paucity of evidence implicating Mr. Wahsise" – as was the court's characterization (RP 324) – the jury was no doubt impacted by the experienced detective's identification. Although Heslop attempted to discredit Rackley's opinion, jurors were like to give added weight to the detective's opinion due to his official position in society. See e.g. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (the jury may especially be likely to be influenced by opinion testimony from a police officer, whose opinion may carry a special aura of reliability). Because there is a reasonable probability Rackley's opinion affected the outcome of the trial, the trial court's error in admitting it warrants reversal of Wahsise's robbery conviction. See State v. Aaron, 57 Wn. App. 277, 283, 787 P.2d 949 (1990).

3. PROSECUTORIAL MISCONDUCT DEPRIVED WAHSISE OF A FAIR TRIAL.

As indicated in the procedural facts section, the court granted Wahsise's motion to exclude Maas' statements to police. In direct contravention of the court's order, Rackley testified Maas told him Wahsise was involved. The state's failure to guard against

the admission of this excluded evidence constituted misconduct. Although the court attempted to cure the prejudice by instructing the jury to disregard it, no instruction would have been effective to “unring the bell,” since identity was the central issue in the case.

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). In order to establish prosecutorial misconduct, Wahsise must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” Dhaliwal, 150 Wash.2d at 578, 79 P.3d 432 (quoting State v. Pirtle, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

The purpose of orders in limine is to clear up questions of admissibility before trial to prevent the admission of highly prejudicial evidence. See State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981); State v. Austin, 34 Wn. App. 625, 633, 662 P.2d 872 (1983), aff'd sub nom., State v. Koloske, 100 Wn.2d 889,

676 P.2d 456 (1984); see also ER 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements . . . in the hearing of the jury").

When a trial court makes an in limine ruling excluding evidence, the attorneys must abide by the ruling. Washington courts often have found prejudicial misconduct where a prosecutor's actions violate an in limine ruling. See, e.g., State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor's violation of motion in limine excluding evidence of defendant's prior drug-related offense was "flagrantly improper"); State v. Ransom, 56 Wn. App. 712, 713 n.1, 785 P.2d 469 (1990) (citing State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987)).

As the state will undoubtedly point out, the prosecutor here did not elicit Rackley's testimony that Maas reportedly told him of Wahsise's involvement. But prosecutors have a duty to inform the state's witnesses of the court's earlier rulings so they will not bring up the excluded evidence during their testimony. State v. Underwood, 281 N.W.2d 337, 342 (Minn. 1979) ("state has a duty

to properly prepare its own witnesses prior to trial”); Tegland, 5 Wash. Pract., Evidence, § 13 (3d ed. 1989); see also People v. Warren, 45 Cal.3d 471, 754 P.2d 218 (1988) (“A prosecutor has a duty to guard against statements by his witnesses containing inadmissible evidence.”)

Without such a duty there would be no point in bringing a motion in limine. Without proper admonishment, the risk is high that a state’s witness would unknowingly testify to previously excluded evidence – especially if logically relevant – despite defense counsel’s sincere efforts to avoid the subject. The end result is the same, however, whether the prosecutor intentionally elicits the inadmissible evidence or recklessly fails to guard against its admission by failing to admonish its witnesses: the court’s order is violated and the jury hears prejudicial evidence it should not have heard.

The prosecutor’s failure to inform Rackley of the court’s pre-trial ruling constituted prejudicial misconduct. As the trial court itself recognized, the evidence implicating Wahsise was sparse. RP 324. Huynh did not identify Wahsise, and the video was of lousy quality. Were it not for the wrongful admission of Maas’ untested out-of-court statement implicating Wahsise, jurors may have had a

have prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

It was the defense theory that the state had the wrong man. There was therefore no tactical reason for defense counsel to elicit evidence that the state had additional evidence it was not allowed to present, which arguably supported the state's charge against Wahsise. Having successfully sought the exclusion of this evidence, reasonably competent counsel would have protected against its admission by avoiding open-ended questions that could be construed as opening the door to the inadmissible and incriminating evidence. For the reasons stated in the previous section, Wahsise was prejudiced by his counsel risky question. There is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different.

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

Cumulative trial error may deprive a defendant of his right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). The evidence against Wahsise was far

from overwhelming. In the absence of Rackley's improper testimony identifying Wahsise and his testimony violating the court's in limine order, there is a strong possibility the jury would have acquitted Wahsise. Because the combination of the errors deprived Wahsise of his right to a fair trial, this Court should reverse.

6. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The state's sentencing records indicate Wahsise was convicted of first degree robbery for robbing Ruth Smartlowit and Reynaldo Iturbide at gun point for beer belonging to the Crossroads Market on November 24, 1995. The state's records also show Wahsise was convicted of two counts of second degree assault for assaulting Smartlowit and Iturbide, respectively, with a firearm on November 24, 1995. CP 63-65.

The state scored each of these offenses as two points in calculating Wahsise's offender score. CP 56. Defense counsel's agreement to this calculation constituted ineffective assistance of counsel because the assaults are what elevated the robbery from a second degree to a first degree offense. The assaults therefore merged with the robbery and should have been vacated from

Wahsise's criminal history. If this Court disagrees the assaults should merge, they should have been counted as same criminal conduct and not scored as part of Wahsise's offender score.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. at 687; State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision will be found deficient if it is not reasonable. Hendrickson, 29 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000).

Failure to request an exceptional sentence may constitute deficient and prejudicial representation. See, e.g., State v. McGill, 112 Wn. App. 95, 98, 47 P.3d 173 (2002). Logically, the failure to point out to the court that prior offenses included in the state's calculation either merged under principles of double jeopardy or count as same criminal conduct may also constitute deficient and prejudicial representation. There can be no legitimate tactical reason for not making the argument where it will result in a shorter sentence for the defendant.

The United States and Washington State constitutions protect against double jeopardy. U.S. Const. amend. V; Wash. Const. art. 1, § 9. The state may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. Freeman, 153 Wn.2d at 770; Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Freeman, 153

Wn.2d at 771 (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

The applicable tool for determining legislative intent here is the merger doctrine. Freeman, Wn.2d at 772. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. Freeman, at 772-73.

In State v. Freeman, the Supreme Court considered whether the legislature intended to punish separately both a robbery elevated to first degree by an assault, and the assault itself. Freeman, at 771. The Court concluded the legislature did not so intend with respect to second degree assault.

Accordingly, we conclude that there is evidence that the legislature did intend to punish first degree assault and robbery separately. But we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.

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

Generally, it appears that these two crimes will merge unless they have an independent purpose or effect.

Freeman, 153 Wn.2d at 776-780.

In Wahsise's case, it is clear from the state's paperwork that the assaults of Smartlowit and Iturbide had no independent purpose but were done solely to facilitate the robbery. They therefore merge with the first degree robbery offense and should be vacated.

See Freeman, at 774.

In response, the state may argue that the assault offenses should not merge because, unlike the circumstances in Freeman, there were two victims in Wahsise's case. Under the circumstances of the robbery, however, there was only one offense, regardless of the number of victims. State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005).

In Tvedt, the Supreme Court considered what constitutes the unit of prosecution for robbery. Tvedt, 153 Wn.2d at 707. The Court concluded a single taking can result in a conviction on one count of robbery, regardless of the number of persons present.

If there is one taking of property, as the taking of the business's receipts from a single business safe or a single cash register, there can be a conviction for robbery on only one count, regardless of the number of employees present who have authority over the property, because there has been only one taking. . . .

Counts may not be multiplied based simply on the number of employees who have authority or control over the property who are present during the taking.

Tvedt, 153 Wn.2d at 716.

According to the state's documentation, there was only one taking in Wahsise's case: beer from the Crossroads market facilitated by assaulting Smartlowit and Iturbide, which elevated the offense from second to first degree. Under the combined reasoning of Freeman and Tvedt, there is only one offense for double jeopardy purposes.

Assuming this Court disagrees, however, the offenses should have been counted as same criminal conduct. RCW 9.94A.525 directs courts to count prior offenses separately unless there is a determination that they encompass the same criminal conduct. "Same criminal conduct" means two or more crimes that require the same intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589.

These criteria are established with respect to Wahsise's prior robbery and assault offenses. Because the assaults furthered the robbery, the offenses involve the same intent. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) ("if one crime furthered another, and if the time and place of the crimes remained the same,

then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct"). There can be no argument that the crimes did not occur at the same time and place. Finally, each assault involved a same victim as the robbery. The assault convictions therefore should have counted as same criminal conduct and not scored as part of Wahsise's offender score.

Wahsise received ineffective assistance of counsel at sentencing when his attorney failed to point out that his prior assaults should not be included in his offender score either because they merged or because they constituted the same criminal conduct as the robbery, which they elevated. Wahsise was prejudiced because his resulting standard range increased. This Court should remand for resentencing.

D. CONCLUSION

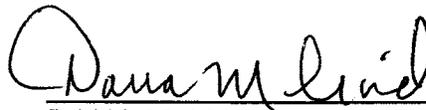
Because the state failed to prove Wahsise had dominion and control over the small handgun found stuffed in a pouch in the van, this Court should reverse and dismiss that conviction. This Court should also reverse Wahsise's first degree robbery conviction because it was obtained in violation of Wahsise's right to a fair trial. Finally, this Court should also remand for resentencing. Because

the evidence was insufficient to support the VUFA, Wahsise's offender score calculation wrongly included a point for that offense. Likewise, Wahsise's offender score wrongly included 4 points for the prior assault convictions.

DATED this 30th day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Dana M. Lind", written over a horizontal line.

DANA M. LIND
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Attorney for Appellant

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

STATE OF WASHINGTON)

Respondent,)

vs.)

BRIAN WAHSISE,)

Appellant.)

COA NO. 36039-0-II

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
NOV 30 2007
BY [Signature]

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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- BRIAN WAHSISE
DOC NO. 743175
WASHINGTON STATE PENITENTIARY
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2007.

x *Patrick Mayovsky*