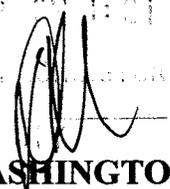


FILED
COURT OF APPEALS
DIVISION TWO

Court of Appeals No. 36039-0-II

BY _____
FILED



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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

LIONEL DEMETRI GEORGE,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-01123-8
The Honorable Frank E. Cuthbertson, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in allowing Detective Rackley to give lay opinion testimony about the identity of the individuals depicted in the surveillance video from the Days Inn.
2. The trial court abused its discretion in denying the motion for mistrial when Detective Rackley violated the pre-trial ruling barring reference to statements made by non-testifying witnesses.
3. It was an abuse of discretion for the trial court to deny Mr. George's motion to sever his trial from Mr. Wahsise's trial and the denial of the motion to sever deprived Mr. George of his right to present a defense.
4. It was error for the trial court to refuse to instruct the jury on the lesser included offense of reckless driving.
5. Cumulative error deprived Mr. George of his right to a fair trial.

II. ISSUES PRESENTED

1. Was it an abuse of discretion for the trial court to allow Detective Rackley to opine what he believed was depicted in the surveillance video where Detective Rackley was not more likely to correctly identify the defendant from the video than was the jury? (Assignment of Error No. 1)
2. Was it an abuse of discretion for the trial court to deny the motion for mistrial when Detective Rackley violated the pre-trial ruling barring reference to statements made by non-testifying witnesses? (Assignment of Error No. 2)
3. Was it an abuse of discretion for the trial court to deny Mr.

George's motion to sever his trial from Mr. Wahsise's trial to allow Mr. Wahsise to take the stand and testify in Mr. George's defense? (Assignment of Error No. 3)

4. Was it error for the trial court to refuse to instruct the jury on the lesser included offense of reckless driving? (Assignment of Error No. 4).
5. Did cumulative error deprive Mr. George of a fair trial? (Assignments of Error Nos. 1, 2, 3, 4, and 5)

III. STATEMENT OF THE CASE

A. Procedural Background

On March 9, 2006, Mr. George was charged with robbery in the first degree while armed with a handgun, unlawful possession of a firearm in the first degree, intimidating a public servant, assault in the third degree, and attempting to elude a pursuing police vehicle. CP 210-212.

On May 2, 2006, Mr. George was ordered to undergo examination by Western State hospital to determine if Mr. George was competent to stand trial. CP 5-8.

On July 7, 2006, Mr. George was found competent to stand trial. CP 14-16, 19-20.

On October 17, 2006, Mr. George filed motions in limine seeking (1) exclusion of evidence that Mr. George had been charged with robbery in

other unrelated cases; (2) severing the charges of intimidating a public servant, assault in the third degree, and attempting to elude a police vehicle in order to allow Mr. George to plead guilty to those counts and have no mention of those charges at trial; (3) excluding all reference to an apparently stolen wallet found in Mr. George's jacket pocket; (4) excluding evidence of Mr. George's criminal history, except such as was admissible pursuant to ER 609, should Mr. George testify; (5) excluding all statements made by Mr. George's co-defendants if the codefendants did not testify at trial; (6) excluding evidence of any and all statements to police by witnesses who do not testify at trial; (7) admitting the written statements by co-defendant Brian Wahsise either (a) pursuant to ER 607 if Mr. Wahsise testified at trial inconsistent with the statements, or (b) pursuant to ER 801(d)(2) and/or ER 804 (b)(3) if Mr. Wahsise exercised his Fifth Amendment right to remain silent or was otherwise unavailable to testify at trial, as an admission of a party opponent or as statements against interest; (8) allowing defense counsel to inquire of the State's civilian witnesses, on cross examination, whether they were under the influence of drugs and/or alcohol at the time of the alleged robbery; (9) allowing Mr. George to stipulate to a conviction of a "serious offense," and (10) excluding witnesses during trial and instructing

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them not to disclose or discuss their testimony with other witnesses. CP 38-70.

Mr. George also filed a motion in limine seeking permission for the defense investigator for Mr. George to review the clothing worn by Mr. Wahsise at the time of his arrest which was being held by the Pierce County jail. CP 71-72.

The trial court granted the motion to exclude evidence that Mr. George had been charged with robbery in unrelated cases, the motion to exclude evidence related to the wallet, the motion to exclude criminal history except for impeachment purposes, the motion to exclude the statements of Robert Maass should Mr. Maass not testify, the motion to exclude witnesses during trial, and the motion to review Mr. Wahsise's clothing held in jail property. CP 75-76.

Mr. George withdrew the motion to allow him to plead guilty to several of the counts and to exclude reference to those counts at trial. RP 8. The trial court reserved ruling on the admissibility of portions of Mr. George's criminal history. RP 13, CP 75-76.

The trial court denied the motion to admit the written statements of Mr. Wahsise under ER 801(d)(2) and reserved ruling, pending further

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evidence of clear indicia of the trustworthiness of the statements, on whether or not the statements were admissible under ER 607 and/or ER 804(b)(3). RP 25-32, CP 75-76.

Mr. George withdrew the motion to permit cross-examination of civilian witnesses as to their state of intoxication and/or impairment due to alcohol or drugs on grounds that the State indicated those witnesses would not be called. RP 32-33.

Trial began on November 13, 2006. RP 71. During the testimony of Detective Rackley, Detective Rackley testified that Mr. Maass, another man in the vehicle stopped by police, had told Detective Rackley he was Mr. George's son. RP 260. Counsel for Mr. George objected on grounds that this testimony was hearsay. RP 260. The trial court sustained the objection, but the testimony was not stricken and the jury was not instructed to disregard the statement. RP 260. Later in his testimony, Detective Rackley testified that Mr. George's son told Detective Rackley that Mr. Wahsise was in the Days Inn. RP 300-301. This testimony was objected to and the trial court sustained the objection and instructed the jury to disregard the statement. RP 301. Counsel for Mr. George moved for a mistrial, but the trial court denied the motion. RP 301-325.

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At the close of the State's case, Mr. George brought a motion to dismiss the attempted eluding charge, the firearm enhancement for the attempted eluding charge, and to dismiss the charge of assault in the third degree. RP 421-424. The trial court dismissed the weapon enhancement and the charge of third degree assault. RP 426-428.

Mr. George also brought a motion to sever his and Mr. Wahsise's trial under CrR 4.4(a) and (c) to allow Mr. Wahsise to testify in Mr. George's defense without incriminating himself. RP 444-449. The trial court denied the motion to sever. RP 449-450.

The jury found Mr. George guilty of first degree robbery while armed with a firearm, guilty of unlawful possession of a firearm, guilty of the crime of intimidating a public servant, and guilty of the crime of attempting to elude a pursuing police vehicle. CP 141-145.

Notice of appeal was filed on March 9, 2007. CP 190-204.

B. Factual Background

On March 8, 2006, police were dispatched to the Days Inn in Fife in response to a report of an armed robbery. CP 1-2. Officers were informed that three men had threatened to shoot the desk clerk and had fled in a dark

colored Bronco or Blazer. RP 75. Police responding to the scene observed a dark red van traveling in the lane for oncoming traffic and began to pursue the van. RP 80-81. The police vehicles pursued the van with a fully marked cruiser with its lights and siren activated in the lead. CP 1-2.

Initially, the van did not stop and the police pursued it. CP 1-2. Eventually, the van stopped and two men got out of the passenger side. CP 1-2. A man, later identified as Lionel George, exited the driver's door of the van and fled on foot. CP 1-2.

Officer Worswick eventually caught up to Mr. George and attempted to fire his taser at Mr. George when Mr. George ignored Officer Worswick's command to stop. CP 1-2. Officer Worswick's taser malfunctioned and did not deploy. CP 1-2. Officer Worswick caught up to Mr. George who turned around, took his jacket off and wrapped it around his hands, and said "I'll shoot you" several times to Officer Worswick. CP 1-2. Officer Worswick drew his handgun and tackled Mr. George. CP 1-2. Mr. George was subdued and found to be unarmed. CP 1-2.

The clerk of the Days Inn told police that three men had entered the motel lobby together. CP 1-2. Two of the men began to disconnect a television in the lobby and the third man pointed a gun at her and demanded

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cash. CP 1-2. The clerk gave the man with the gun over \$470 in cash and her and the two men left with the television. CP 1-2.

The clerk was taken to the location of Mr. George's arrest and identified him as the man with the handgun who had demanded the cash. CP 1-2.

Police recovered an unloaded handgun in a storage pocket of the passenger seat of the vehicle. CP 1-2.

One of the individuals arrested in the vehicle was Robert Maass. CP 38-70. Mr. Maass told police that he was Mr. George's son and that he assisted Mr. Wahsise in stealing the television while Mr. George robbed the clerk at the Days Inn. CP 38-70.

IV. SUMMARY OF TESTIMONY

- ***Officer Thomas Gow***

Officer Gow discusses his employment, training, and educational history. RP 71-73.

Officer Gow discusses responding to a report of an armed robbery at the Days Inn. RP 74-76. Officer Gow discusses pursuing a vehicle that did not match the description of the vehicle involved with the robbery. RP 75-86. Officer Gow discusses people exiting the van and the driver running

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away. RP 86-89.

Officer Gow discusses the video of his pursuit of the vehicle. RP 90-102.

Officer Gow discusses arresting the occupants of the van. RP 102-105.

Officer Gow discusses the pursuit of the vehicle. RP 106-112.

Officer Gow describes the stop of the vehicle. RP 112-115.

● ***Karen Phillips***

Ms. Phillips describes her employment at the Days Inn in Fife. RP 118-119. Ms. Phillips discusses her knowledge of Ms. Huynh. 119-120. Ms. Phillips discusses the events of March 8, 2006. RP 120-125. Ms. Phillips discusses what is depicted in exhibits 6, 9, 10, 1, 12, 13, 14, 15, 16, 17, and 18. RP 125-134.

● ***Christine Huynh***

Ms. Huynh describes her education and employment background. RP 139-140. Ms. Huynh describes the events of March 8, 2006. RP 140-150.

Ms. Huynh discusses the contents of exhibit 15. RP 153-154. Ms. Huynh discusses the contents of her statement to police. RP 155-170.

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● ***Detective Shane Farnworth***

Detective Farnworth describes his employment background and training. RP 183-184. Detective Farnworth describes responding to a report of a robbery at the Days Inn in Fife on March 8, 2006. RP 184-185. Detective Farnworth discusses assisting in the containment of the individuals in the van stopped by Officer Gow. RP 185-187. Detective Farnworth describes searching the vehicle stopped by Officer Gow. RP 186-192.

Detective Farnworth discusses the discovery of a handgun in the vehicle stopped by Officer Gow. RP 199-205.

● ***Franklin Clark***

Mr. Clark discusses his occupational and training history. RP 217-218. Mr. Clark discusses his involvement in this case. RP 219-227.

● ***Detective Jeff Rackley***

Detective Rackley discusses his employment and training history. RP 228-229. Detective Rackley discusses responding to the Days Inn on March 8, 2006, and the pursuit of the vehicle. RP 229-238. Detective Rackley describes taking Ms. Huynh to see the man Officer Worswick had arrested. RP 240-244.

Detective Rackley describes obtaining a copy of the video

surveillance of the Days Inn. RP 245-259.

Detective Rackley describes his interaction with the occupants of the vehicle. RP 259-263. Detective Rackley discusses what he saw on the surveillance tapes from the Days Inn. RP 263-272.

Detective Rackley describes the vehicle stopped by police and the contents. RP 272-279.

Detective Rackley discusses the people getting out of the vehicle stopped by police. RP 284-300. Detective Rackley discusses the failure of police to recover the money stolen from the Days Inn. RP 327-328. Detective Rackley discusses what is depicted in surveillance photos from the Days Inn. RP 328-333.

Detective Rackley discusses the information known to him when he stopped the vehicle. RP 334-339. Detective Rackley discusses the police not observing anything being thrown from the vehicle and the police not finding any money from the Days Inn. RP 339-340.

Detective Rackley discusses taking Ms. Huynh to the La Quinta Inn to identify Mr. George as the man who robbed the Days Inn. RP 343-347. Detective Rackley discusses documenting the scene at the Days Inn. RP 347-348. Detective Rackley discusses executing a search warrant on the vehicle

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stopped by the police. RP 349-352.

- ***Lieutenant Anthony Budzius***

Lt. Budzius describes his employment and training history. RP 363-364. Lt. Budzius describes responding to the Days Inn on March 8, 2006. RP 364-366. Lt. Budzius describes arriving at the scene of the vehicle stopped by Officer Gow. RP 366. Lt. Budzius describes impounding and searching the vehicle. RP 366-367. Lt. Budzius describes the pistol recovered from the vehicle. RP 367-368. Lt. Budzius discusses retrieving video from Officer Gow's vehicle. RP 368-372.

- ***Officer Terry Worswick***

Officer Worswick describes his employment and training history. RP 373-374. Officer Worswick describes responding to the Days Inn on March 8, 2006. RP 374-375. Officer Worswick describes participating in the pursuit of the vehicle. RP 375-376. Officer Worswick describes pursuing the man who exited the driver's door of the vehicle. RP 376-384.

Officer Worswick describes the show-up identification of Mr. George by Ms. Huynh. RP 384-385.

Officer Worswick describes the hat and jacket worn by Mr. George when he was arrested. RP 385-386.

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● ***Terry Franklin***

Mr. Franklin describes his employment and training history. RP 397-404.

Mr. Franklin describes testing a .25 caliber pistol at the request of Detective Rackley in August 2006. RP 404-406. Exhibit 1 is the pistol tested by Mr. Franklin. RP 405.

V. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING DETECTIVE RACKLEY TO GIVE LAY OPINION TESTIMONY ABOUT THE IDENTITY OF THE INDIVIDUALS DEPICTED IN THE SURVEILLANCE VIDEO FROM THE DAYS INN.

The admission of opinion evidence lies within the discretion of the trial court. *State v. Weygandt*, 20 Wn.App. 599, 606, 581 P.2d 1376 (1978), *review denied* 91 Wn.2d 1024 (1979).

A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on

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untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu, 110 Wn.App. at 99, 38 P.3d 1040.

ER 701 permits lay opinion testimony when rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. *State v. Hardy*, 76 Wn.App. 188, 190, 884 P.2d 8 (1994), *aff'd*, *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996). A lay witness may give an opinion as to the identity of a person 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 (citing *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir.1984)).

In *Hardy*, Division One held that because a police officer had known the defendant for several years, he was in a better position than the jury to identify Hardy in the “somewhat grainy” videotape. In addition, the “photograph” at issue was a videotape, and the officer who had seen Hardy in motion was better able to identify him than the jury who had only seen Hardy motionless in court. *Hardy*, 76 Wn.App. at 191. The court disagreed

that the officer's opinion regarding the identity of the man in the videotape invaded the province of the jury. The jury was free to disbelieve the officer, thus leaving the ultimate issue of identification to the jury. *Hardy*, 76 Wn.App. at 191.

Here, Detective Rackley testified that, when he viewed the surveillance video taken at the Days Inn, he recognized Mr. George "because of his physical stature." RP 263. Counsel for Mr. George objected, arguing that the jury was capable of looking at the evidence and determining who was depicted therein, but the trial court overruled the objection. RP 263-271.

Under both Washington ER 701 and Federal ER 701, "[o]pinion testimony by lay witnesses may be admitted if the opinion is '(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue.'" ER 701, Fed.R.Evid. 701, *U.S. v. Saniti*, 604 F.2d 603, 604-605, *cert. denied* 444 U.S. 969, 100 S.Ct. 461, 62 L.Ed.2d 384 (1979).

ER 602 mandates that, "(a) witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Unlike *Hardy*, there was no evidence introduced in this case that there

was some basis for concluding that Detective Rackley was more likely to correctly identify the Mr. George from the video than was the jury. Further, Detective Rackley lacked personal knowledge of the identity of the individuals in the video.

The facts introduced at trial do not meet the requirement of ER 602 that Detective Rackley could testify only on the basis of personal knowledge. Further, Detective Rackley's lay opinion that Mr. George was the individual depicted in the surveillance video was inadmissible since Detective Rackley was in no better position to identify the individuals in the video than was the jury.

The trial court's decision admitting Detective Rackley's lay opinion testimony was an abuse of discretion since the facts of the case did not meet the legal standard for the admissibility of Detective Ringer's testimony.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL WHEN DETECTIVE RACKLEY VIOLATED THE PRE-TRIAL RULING BARRING REFERENCE TO STATEMENTS MADE BY NON-TESTIFYING WITNESSES.

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

Pretrial, the trial court ruled that Mr. Maass' statements to police that he was Mr. George's son and that Mr. George had robbed the Days Inn were not admissible. CP 75-76. Despite this, Detective Rackley testified that Mr. Maass had told him that he was Mr. George's son. RP 260. The trial court sustained the objection to this improper testimony, but did not strike the testimony and did not instruct the jury to disregard the testimony. RP 260. Later, Detective Rackley testified that "Mr. George's son" told Detective Rackley that Mr. Wahsise had been in the Days Inn. RP 300-301.

Counsel for Mr. George moved for a mistrial, arguing that the testimony violated Mr. George's right to confrontation and that the testimony prejudiced Mr. George by placing him inside the scene of the crime. RP 300-320. Citing *State v. Escalona*, 49 Wn.App 251, 742 P.2d 190 (1987), the trial court denied the motion for mistrial, finding that Detective Rackley's testimony did not implicate and therefore did not prejudice Mr. George, and finding that the trial court's instruction to the jury to disregard the testimony was sufficient. RP 323-325.

Under *Escalona*, whether a trial irregularity, such as an inadvertent remark, requires a mistrial depends on several factors: (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other

admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. *Escalona*, 49 Wn.App. at 254, 742 P.2d 190.

The trial court's ruling was an abuse of discretion.

a. Detective Rackley's violation of the motion in limine was a serious irregularity.

Violation of a motion in limine excluding evidence is a serious irregularity. *Escalona*, 49 Wn.App. at 256, 742 P.2d 190. In *Escalona*, a witness for the State, in response to a question whether he was nervous, told the jury, in violation of a ruling in limine prohibiting mention of the defendant's criminal history, that he was nervous because the defendant already had a record and had stabbed someone. The Court of Appeals found that this was a serious trial irregularity and Mr. Escalona's motion for mistrial should have been granted by the trial court. *Escalona*, 49 Wn.App. at 256, 742 P.2d 190.

Here, a witness for the State, in violation of a ruling in limine prohibiting mention of statements made to the police by witnesses who would not testify at trial, repeated the statements of a witness who would not testify at trial.

The *Escalona* court found that improper introduction of evidence of

Mr. Escalona's criminal history was an "extremely serious" irregularity because the "rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes." *Escalona*, 49 Wn.App. at 256, 742 P.2d 190.

The hearsay statements of non-testifying witnesses are similarly inadmissible due to the express policy of the Sixth Amendment that a defendant be able to confront the witnesses brought against him. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (testimonial statements made by a witness outside of court are barred under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

The admission of Mr. Maass' statements to Detective Rackley was a serious irregularity.

b. The testimony of Detective Rackley was cumulative of the testimony of Ms. Huynh.

The statement of Mr. Maass that Mr. Wahsise was inside the Days Inn leads to the obvious inference that Mr. George was also in the Days Inn and participated in the robbery since Mr. George, Mr. Wahsise, and Mr. Maass were all occupants of the same vehicle stopped by the police shortly after the

Days Inn was robbed. The presence of all three men in the van, combined with the statements from Mr. Maass that he was Mr. George's son knew that he knew Mr. Wahsise was inside the Days Inn leads to the inference on the part of the jury that Mr. Maass was inside the Days Inn during the robbery and therefore knew the identity of the other robbers. Since all three men were in the van shortly after the robbery, the jury would infer that Mr. George, the driver of the van, was either a direct participant in the robbery or an accomplice to the robbery.

The inference that Mr. George was involved in the robbery was cumulative of the testimony of Ms. Huynh that Mr. George was the man who robbed her. RP 150.

- c. The prejudice caused by the improper admission of Mr. Maass' statements to Detective Rackley could not be cured by an instruction to disregard the remark.*

“While it is presumed that juries follow the court’s instruction to disregard testimony...no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” *Escalona*, 49 Wn.App. at 255, 742 P.2d 190, citing *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

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The United States Supreme Court has written, and the Washington Supreme Court has concurred, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” *State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), citing *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949).

As discussed above, the statement that Mr. George’s son, who was in the van with Mr. George and Mr. Wahsise when it was stopped, told Detective Rackley that Mr. Wahsise was inside the Days Inn when it was robbed, leads to the highly prejudicial inference that Mr. Maass, Mr. Wahsise, and Mr. George were the three men who robbed the Days Inn. This evidence was inherently prejudicial and would impress itself upon the minds of jurors. Once the jury was made aware of this information, no curative instruction could mitigate the prejudice caused by this information.

d. The trial court abused its discretion in denying the motion to dismiss.

Here, the trial court based its ruling denying Mr. George’s motion for mistrial on the trial court’s recollection that no witness had testified that Mr. Maass was Mr. George’s son. RP 318. This was incorrect. Det. Rackley unambiguously testified that Mr. Maass was Mr. George’s son. RP 260.

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As discussed above, a trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040

Here, the trial court based its denial of Mr. George's motion for mistrial on an improper recollection of the facts introduced at trial. Further, it was error for the trial court to conclude that the prejudicial nature of Detective Rackley's improper testimony could be mitigated by a curative instruction.

It was an abuse of discretion for the trial court to deny Mr. George's motion for mistrial.

3. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY MR. GEORGE'S MOTION TO SEVER HIS TRIAL FROM MR. WAHSISE'S TRIAL AND THE DENIAL OF THE MOTION TO SEVER DEPRIVED MR. GEORGE OF HIS RIGHT TO PRESENT A DEFENSE.

A trial court's denial of a motion to sever is reviewed for abuse of discretion. *State v. Lane*, 56 Wn.App. 286, 298, 786 P.2d 277 (1989).

Pretrial, Mr. Wahsise wrote letters to the prosecuting attorney and Pierce County Superior Court Judge Worswick confessing to being the man

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who robbed the Days Inn and indicating that Mr. George had no part in the robbery and was never in possession of the gun. CP 38-70.

Mr. George filed a motion in limine seeking to have those letters admitted into evidence pursuant to various evidentiary rules. CP 38-70. The trial court denied the motion to admit the written statements of Mr. Wahsise under ER 801(d)(2) and reserved ruling, pending further evidence of clear indicia of the trustworthiness of the statements, on whether or not the statements were admissible under ER 607 and/or ER 804(b)(3). RP 25-32, CP 75-76.

At trial, counsel for Mr. George attempted to make an offer of proof regarding the trustworthiness of the letters by calling Mr. Wahsise to ask him if the statements were his and if it was his signature on the statements but Mr. Wahsise refused to answer any questions about the letters. RP 181.

Part of Mr. George's defense strategy at trial was that Mr. Wahsise would testify as a witness for Mr. George's defense. RP 445. However, during the course of trial, Mr. Wahsise indicated that he did not wish to take the stand and incriminate himself by testifying regarding the letters. RP 181, 451.

During his case in chief, Mr. George brought a motion to sever his

and Mr. Wahsise's trials under CrR 4.4 in order to allow Mr. Wahsise to take the stand and testify without incriminating himself. RP 444-446. Despite counsel for Mr. Wahsise indicating that Mr. Wahsise did, in fact, wish to have his trial severed in order to allow Mr. Wahsise to testify in defense of Mr. George (RP 448-449), the trial court denied the motion. RP 449-450.

CrR 4.4(c)(2) provides, in pertinent part,

The court, on application...of the defendant...should grant a severance of defendants whenever...if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

The trial court denied the motion to sever because it didn't believe "that severance is necessary to achieve a fair determination [of Mr. George's guilt or innocence] in this case." RP 449-450.

A criminal defendant has a constitutional right to present a defense.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The *Washington* Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a

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fundamental element of due process of law.

Washington, 388 U.S. at 19, 87 S.Ct. at 1923, *cited with approval by State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Washington defines the right to present witnesses as a right to present material and relevant testimony. *See State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Here, both Mr. George and Mr. Wahsise desired to have the trial severed in order to permit Mr. Wahsise to testify in defense of Mr. George. Given that Mr. Wahsise would not take the stand in circumstances where his testimony would incriminate himself, the only means by which Mr. George could have introduced evidence of Mr. Wahsise's letters confessing to having robbed the Days Inn would be to have the trials severed so that Mr. Wahsise's testimony would not incriminate him in his own trial.

Mr. Wahsise's testimony was central to Mr. George's defense. Mr. George's theory of defense was that he was not involved in the robbery and had simply been inside the van unaware of what was happening inside the Days Inn. Without at least the testimony of Mr. Wahsise, if not the

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introduction of letters as well, Mr. George was precluded from presenting his defense. Mr. Wahsise's testimony was clearly necessary for a fair determination of Mr. George's guilt or innocence. The trial court's denial of Mr. George's motion to sever the trials was an abuse of discretion and denied Mr. George his right to present a defense.

4. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF RECKLESS DRIVING.

The court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A trial court's refusal to give a defendant's proposed jury instruction based on a legal dispute is reviewed de novo. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

An instruction on a lesser included offense is warranted when two conditions are met: “[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

a. Reckless driving is a lesser included offense of

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attempted eluding of a police vehicle.

Mr. George was charged with attempting to elude a pursuing police vehicle in violation of RCW 46.61.024(1).

RCW 46.61.024 provides,

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

RCW 46.61.500 provides, “Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.”

Former RCW 46.61.024 (1983), the attempt to elude statute, states that “[a]ny driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.” Reckless driving, a misdemeanor, involves driving a vehicle in “willful or wanton disregard for the safety of persons or property.” RCW 46.61.500(1). Both statutes require a willful or wanton disregard for the safety of others. Thus, it is impossible to violate the eluding statute without violating the reckless driving statute, and reckless driving is a lesser included offense of eluding.

State v. O'Connell, 137 Wn.App. 81, 96, 152 P.3d 349 (2007).

b. The facts of this case supported instructing the jury on reckless driving as a lesser included offense to

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attempted eluding of a police vehicle.

The testimony introduced at trial was that police began following Mr. George's vehicle only after it pulled out of a slow moving lane of traffic and began to drive in the lane of oncoming traffic. RP 75-81. The police were already proceeding in the direction the van was traveling with their lights and sirens on when the van pulled out of the line of stopped traffic and began driving in the lane for oncoming traffic. RP 75-81, 231-234.

Given the facts introduced at trial surround how the police pursuit became focused on Mr. George's vehicle, the jury could have believed that Mr. George was frustrated with sitting in non-moving traffic and pulled out in front of the police vehicle by chance with no intent to attempt to elude them. The police were already traveling in Mr. George's direction of travel with their lights and sirens on, so the jury may have concluded that Mr. George had no reason to believe that the police were attempting to stop him specifically.

The jury may have concluded that Mr. George was unaware of the police vehicles and pulled into the lane of oncoming traffic simply to avoid waiting for his lane of traffic to begin moving again. The jury may have inferred that when Mr. George became aware that he had pulled out in front

of two police vehicles which had their lights and sirens activated, he pulled over as soon as was reasonable safe.

The facts of this case supported the inference that Mr. George committed only the lesser crime of reckless driving.

The trial court erred in failing to instruct the jury on reckless driving as a lesser included offense of attempting to elude a police vehicle.

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

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, § 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.

State v. Stevens, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Should this court find that none of the errors described above warrant a new trial, this court should find that the prejudicial effect of these errors combined deprived Mr. George of a fair trial. This court should vacate Mr.

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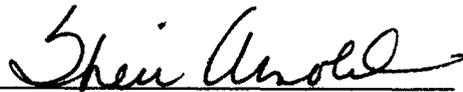
George's convictions and remand for a new trial.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. George's convictions and remand for a new trial.

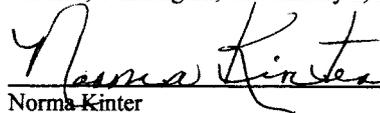
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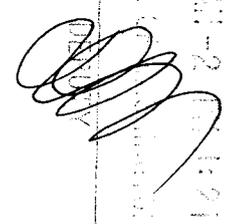
Respectfully submitted,


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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on January 2, 2008, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402, and by U. S. Mail to appellant, Lionel D. George, DOC # 975696, Washington State Penitentiary, 1313 North 13th Street, Walla Walla, , WA.. 99362-1065, true and correct copies of this Opening Brief. 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 January 2, 2008.


Norma Kinter

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