

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY

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40512-1-II

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

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State of Washington  
Respondent

v.

**RYAN R. JACKSON**  
Appellant

40512-1-II

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On Appeal from the Superior Court of Pierce County

Cause No. 09-1-04241-3

The Honorable Susan K. Serko, Judge

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**REPLY BRIEF**

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## II. SUMMARY OF THE CASE

Ryan Jackson appeals his conviction for attempted first degree robbery. Jackson asks the Court to reverse his conviction based on numerous constitutional errors including —

- a search and seizure violation;
- a Confrontation Clause violation;
- insufficiency of the the evidence;
- prosecutorial misconduct;
- failure to grant a mistrial when Jackson was viewed in shackles by the identification witnesses; and
- lack of jury unanimity.

The police seized Jackson in downtown Tacoma and detained him for a drive-by identification solely because he was a black man wearing a blue-and-white shirt a few blocks from where a black man in a blue-and-white shirt had attempted a robbery a couple of hours earlier. The police displayed Jackson in shackles and spotlighted next to a police patrol car in the custody of Tacoma police officers. The victim identified him as the guilty party.

This victim and his companion gave inconsistent eye-witness testimony at Jackson's jury trial. Yet the court excluded the witnesses' illegible written statements that showed they were too intoxicated that

night for their evidence to be reliable. And Jackson's trial lawyer failed to object to sufficient damaging inadmissible hearsay to call the reliability of the verdict into question. This included testimonial hearsay identifying Jackson from a witness who did not testify, contrary to the Confrontation Clause and in violation of the court's order in limine.

A breakdown in the prisoner transport procedure allowed key witnesses to see Jackson entering the courtroom shackled and in the custody of Sheriff's deputies right before their in-court identifications. The court denied a mistrial.

Finally, the State charged Jackson with a single robbery but presented evidence of two. The jury received no unanimity instruction.

### III. ARGUMENTS IN REPLY

#### 1. JACKSON WAS UNLAWFULLY SEIZED IN VIOLATION OF WASH. CONST. ART. 1, § 7, AND THE FOURTH AMENDMENT.

**Reviewability:** The State urges the Court to uphold Jackson's conviction based on evidence obtained through manifest search and seizure violations because Jackson's trial counsel neglected to seek suppression. Brief of Respondent (BR) at 7.

But unlawfully-obtained evidence can be challenged for the first time on appeal if failure to suppress the evidence constituted ineffective

assistance of counsel, provided the record contains sufficient evidence for meaningful review. *State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

Jackson raises his search and seizure challenge in the context of an ineffectiveness claim, and the facts surrounding the unlawful stop were fully developed in the record. The Appellant bears the burden of proving he was seized in violation of art. 1, § 7. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). Jackson has met his burden, and all evidence obtained during the unlawful seizure and as a direct result of the seizure would have been suppressed if counsel had filed a suppression motion under CrR 3.6. Therefore, the Court may grant relief.

**Merits:** This was not a lawful *Terry* stop.<sup>1</sup> The validity of a stop depends upon the objective reasonableness of the officer's belief that probable cause exists. *State v. Afana*, 169 Wn.2d 169, 183, 233 P.3d 879 (2010). That is to say, a good faith belief in non-existent probable cause is not good enough.

Interference with Jackson's freedom of movement had to be justified at its inception. *State v. Belieu*, 112 Wn.2d 587, 595-96, 773 P.2d 46 (1989). And even if justified, the lawful scope of an intrusion is limited by the particular circumstances. *Belieu*, 112 Wn.2d at 593-594.

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The police did not have a reasonable suspicion that Jackson was engaged in criminal activity, and they exceeded the scope of any permissible intrusion on his liberty.

There were lots of people milling around on the streets of downtown Tacoma that night. RP 81. Billman was looking for a black man in his thirties, 5' 8" tall, and wearing a checkered shirt. RP 167. Jackson, by contrast, was 45 years old, only 5' 5" tall, and his shirt was striped. RP 130, 150-54. This pretty much leaves the color of his shirt and his skin as the sole reason Jackson was stopped. It was not enough.

A timely CrR 3.6 motion would have resulted in the suppression of the BB gun and Crithfield's identification. Without that evidence, the prosecution could not have been sustained.

The appropriate remedy is to reverse.

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT.

The State claims the evidence was sufficient. BR 32. But the evidence was simply too mixed up, contradictory and conflicting to satisfy the State's burden of proof beyond a reasonable doubt.

To support a criminal conviction, evidence must be such that a rational juror, viewing it in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. *State v.*

*Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. The State must establish every fact necessary to prove guilt beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

On this record, there is no doubt that Jackson was talking to Ochoa when the police drove up and seized him. But no rational juror could find beyond a reasonable doubt that Jackson was the person who accosted Crithfield and Little.

Jackson was less than five and a half feet tall. Crithfield — over six feet and standing barely a foot away from the robber — did not mention to the police that the robber was 8" shorter than he was. He said only that it was a black guy.

In addition, the jury could not have believed both Crithfield and Little, because their stories could not be reconciled. Either the robber positioned himself on the sidewalk in front of the two men or he came up behind them and got between them. Either he pointed a gun directly at Crithfield's stomach, or directly at Little, or directly at himself. He could not have done all three at the same time. This testimony is not sufficient to overcome the presumption of innocence beyond a reasonable doubt.

Besides that, Little and Ochoa saw two different guns. One was a revolver and the other was a semi-automatic. Ochoa and Little both claimed familiarity with the two basic gun types.

Further, a rational juror who was paying attention to the testimony would necessarily have entertained reasonable doubt about Officer Billman's testimony. Billman said he was able to see that Jackson was wearing a sleeveless vest or tee under a sleeved Pendleton-type shirt. This is impossible. And, a reasonable juror would have to question the reliability of testimony that the robber's shirt was simultaneously checkered, striped, and patterned, sort of.

On this record, no sane juror could find beyond a reasonable doubt that Jackson was guilty. It would be one thing if the verdict could be ascribed to the jury's having believed one or another of the witnesses to the exclusion of contradictory evidence. But deference to the jury's factual determinations does not mean a jury can deprive a person of his liberty based on mutually exclusive and irreconcilably contradictory testimony from the same witness. Here, not just one but numerous key witnesses contradicted themselves and testified to facts they could not possibly have witnessed.

The Court should reverse Jackson's conviction and dismiss the prosecution with prejudice.

### 3. JACKSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The State disputes that defense counsel's failure to act as gatekeeper against the State's inadmissible incriminating evidence did not rise to the level of ineffective assistance. BR 22. This is wrong. Counsel's passive approach to the rules of evidence certainly was deficient, and the verdict would not have been the same without the inadmissible evidence.

An out-of-court statement is inadmissible if it is offered to prove the truth of the matter asserted, even though it was made by a person who is now an in-court witness. *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003). The general rule is that the erroneous admission of damaging evidence is waived without a timely objection. *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). But if testimony central to the State's case is erroneously admitted, the failure to object constitutes incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). That is the case here.

Reversal is required if it is reasonably probable that the result of the trial would have been different but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); *Strickland v.*

*Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation that falls sufficiently below an objective reasonableness standard overcomes the otherwise strong presumption that counsel's representation was effective. *Thomas*, 109 Wn.2d at 226. Competent counsel is expected to know and argue the law. *Kyllo*, 166 Wn.2d at 865-69 (case law); *State v. McGill*, 112 Wn. App. 95, 100-02, 47 P.3d 173 (2002) (authority for an exercise of discretion).

Instead of asking Crithfield to testify from personal knowledge based on current memory what the would-be robber looked like, the prosecutor asked him to repeat the description he gave the police at the time. This would make sense if Crithfield lacked sufficient memory to testify under oath about details from six months before. A timely objection would thus have excluded the identification testimony altogether. What Crithfield presently believed he told the police six months ago was irrelevant. The jury needed to learn what the person looked like from Crithfield's trial testimony based on his personal knowledge and current recollection of the event.

The State's "effect on the listener" argument is interesting, but irrelevant. BR 23. Crithfield was not describing the effect on himself of a statement by somebody else. Rather, he told the jury what he himself said for the sole purpose of proving the truth of what he said.

Allowing the prosecutor to get away with this prejudiced Jackson, because it is by no means obvious from this record that Crithfield could have testified under oath that he remembered what anyone was wearing six months before, or anything else, for that matter. For the same reason, no legitimate trial tactic can explain why counsel would ignore this violation.

4. IDENTIFICATION EVIDENCE FROM A NON-TESTIFYING WITNESS VIOLATED THE CONFRONTATION CLAUSE.

Trial counsel also did not object when Officer Spencer testified that Ochoa and a man named Tucker<sup>2</sup> identified Jackson that same night. RP 65. Not only was this inadmissible hearsay, but Tucker did not testify. Therefore, introducing his identification through Spencer constituted a *Crawford* violation.<sup>3</sup>

U.S. Const. amend. VI and art.1, § 22 guarantee the right of defendants to meet their accusers face to face. *Crawford*, 541 U.S. at 68. A statement made in response to police questioning is testimonial, plain and simple. *Crawford*, 541 U.S. at 53; *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743 (2006).

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<sup>2</sup> RP 130.

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The court later ruled that the jury could not hear anything Tucker said. RP 144.

The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). It is the State's burden to overcome the presumption that the error was prejudicial. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). A confrontation clause violation is harmless only when the untainted evidence is overwhelming. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). This Court must be confident that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The error is not harmless if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 24.

The State cannot show that Tucker's testimonial hearsay was harmless beyond a reasonable doubt. Contrary to Ochoa's testimony that the interaction with Jackson was nothing much to speak of, Spencer characterized the incident as an armed robbery and said the victims positively identified Jackson as the perpetrator. RP 58. The effective corroboration of Spencer's false characterization by the absent Tucker would make the jury more likely to convict Jackson of the charged crime.

5. SYSTEMIC EVIDENTIARY ERRORS  
DENIED JACKSON A FAIR TRIAL.

The State defends the court's numerous evidentiary errors, the cumulative effect of which stacked the deck in favor of the State and against Jackson. BR 10-17.

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* The State's interest in excluding prejudicial evidence must "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Darden*, 145 Wn.2d at 622. If evidence offered by the defense is even minimally relevant, the

burden is on the State to show that it “is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* The court is charged with ensuring the integrity of the truthfinding process and the defendant’s right to a fair trial. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Accordingly, no state interest can be compelling enough to preclude the introduction of highly probative evidence in light of the Sixth Amendment and Const. art. 1, § 22. *Hudlow*, 99 Wn.2d at 16.

The Court first reviews a trial court’s interpretation of an evidence rule de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937, 946 (2009). Then, if the trial court interpreted the rule correctly, the Court reviews the decision to admit or exclude the evidence for abuse of discretion. *Id.* A trial court abuses its discretion if incorrectly applies the rule. *Fisher*, 165 Wn.2d at 745, citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The Rules of Evidence exist to admit all relevant evidence and to exclude evidence that is more prejudicial than probative. ER 401, 402, 403. Witnesses may not offer statements made by others out of court as proof of the truth of those statements. ER Title VIII. The same rules apply to both parties, including the State. And the State’s interest in excluding prejudicial evidence must “be balanced against the defendant’s need for the information sought[.]” *Darden*, 145 Wn.2d at 622. Relevant

information can be withheld from the jury only “if the State’s interest outweighs the defendant’s need.” *Id.* “[T]he integrity of the truthfinding process and [a] defendant’s right to a fair trial” are important considerations. *Hudlow*, 99 Wn.2d at 14. The rules do not mean one thing when applied to the State and another when invoked by the defendant. *State v. Roberts*, 142 Wn.2d 471 ,493, 14 P.3d 713 (2000).

(a) The alleged eye-witnesses’ contemporaneous statements were relevant to demonstrate the lack of credibility of the witnesses within an hour of the events, let alone months later. The writings were not offered for their truth. They were not offered to impeach the substance of trial testimony. They were offered to show that the witnesses’ contemporaneous statements were inconsistent with each other at the time and with the trial testimony. In the interests of a complete defense, Jackson had a right for his jury to know the circumstances surrounding the crime report.

(b) The State also twists the evidence rules to justify having police witnesses read inadmissible written reports into the record. RP 13. But the prosecutor completely violated both the letter and spirit of ER 613(a) which allows a witnesses to review an inadmissible report for the purpose of refreshing his memory. This rule does not permit what happened here — officers substituting inadmissible hearsay for personal

recollection. The prosecutor and Officer Billman made no bones about the fact that he was blatantly reading, rather than testifying. RP 162-65; Brief of Appellant (BA) at 35.36.

(c) The testimony of Ochoa also was inadmissible and highly prejudicial to Jackson. The State put before the jury two incidents allegedly involving Jackson. In one, the evidence was pretty convincing that a crime occurred involving Crithfield, but the identification of Jackson was questionable. In the other, it was undisputed that Jackson engaged in some sort of interaction with Ochoa, but there was no evidence of any crime. By presenting the jury with both, the State was able to create the false impression of a complete crime.

The State did not charge Jackson in the Ochoa incident, and they failed to show it was in any way connected to the Crithfield allegations. It was inadmissible for any relevant purpose as contemplated by ER 404(b). Rather, its sole relevance was to persuade the jury that Jackson was a scary guy with a propensity to mug people.

***The State Committed Misconduct.*** The State denies that the prosecutor's zeal crossed the line demarcating misconduct. BR 18. But arguing to exclude defense evidence and to admit evidence of the same character for the State on the same grounds falls below the level expected of officers of the court. *Fisher*, 165 Wn. 2d at 746.

Moreover, defense counsel had specifically moved in limine to prohibit the State's witnesses from introducing inadmissible hearsay gathered in the course of their investigations, and the court granted the motion. RP 12. Eliciting this testimony in violation of a court's pretrial order in response to a defense motion in limine is flagrant misconduct. *Fisher*, 165 Wn. 2d at 746.

This error was highly prejudicial, because of the marginal credibility of the alleged victims. The inadmissible and unconstitutional Spencer testimony was therefore sufficiently harmful to require reversal and a new trial.

Jackson stands by the argument in his opening brief documenting the prosecutor's flagrant violations of the rules of evidence that virtually guaranteed that Jackson would be convicted on less than reliable evidence.

**6. A MISTRIAL IS REQUIRED WHEN  
WITNESSES ENCOUNTER A DEFENDANT  
SHACKLED IN POLICE CUSTODY.**

Crithfield and Little, moments before being asked to identify Jackson as the man they saw six months before, witnessed Jackson being escorted in shackles by prisoner transport officers. The State claims Jackson was not prejudiced by this. BR 37.

But, as trial counsel explained, this incident forced Jackson to choose between his right to provide the the jury with the crucial information that the State's key identification witnesses had just been contaminated by an impermissible display of the defendant in shackles, and his right not to contaminate the jury with the knowledge that he was in custody. RP 194.

The only course consistent with due process and the principles of fairness was to declare a mistrial and start over. The court's refusal to do so was reversible error.

**7. THE COURT FAILED TO ENSURE  
A UNANIMOUS VERDICT.**

The State contends that, because it was clear to the prosecutor which facts the jury was supposed to include in its deliberations, it logically follows that all twelve jurors must intuitively have recognized a distinction between relevant evidence and background chit-chat. This is the logic of the infant who covers her eyes with her fingers and thinks you can't see him.

The evidence of Crithfield, Little, and the police officers was sufficiently inconsistent compared to Ochoa, we cannot be confident that one or more jurors was not were persuaded that the facts surrounding the Ochoa incident were sufficient to establish the elements of the offense.

The trial court did not instruct the jurors not to consider Ochoa's testimony as substantive evidence and nobody told them they had to be unanimous as to which set of facts constituted the charged crime.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Failure of juror unanimity is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

Where the State files a single charge, but puts before the jury facts constituting multiple incidents, any of which could comprise the elements of the charged offense, the prosecutor must make it clear to the jury which incident is the basis for the conviction. Otherwise, the court must instruct the jurors that they must all agree on a single incident that the State proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). If the record leaves some question whether one or more jurors could have relied on a different incident from the others, the

resulting lack of unanimity renders the conviction invalid. *Kitchen*, 110 Wn.2d at 411.

The State contends that merely emphasizing one incident to a greater extent than another is the equivalent of an election by the prosecutor. BR 37. This is simply wrong. *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007).

The prosecutor repeatedly switched back and forth during closing argument between the Crithfield incident and the Ochoa incident. It cannot be said with confidence that all twelve jurors were persuaded by the same facts or that they knew they were supposed to be. The jurors were never told not to base their verdict on the Ochoa incident. This fatally compromised Jackson's constitutional right to a unanimous verdict.

The State seems to be implying, without actually arguing, that the failure to give a unanimity instruction was harmless in this case. RB 36-37. But the error cannot be harmless error unless no sane juror could have found that the elements of the crime were satisfied by more than one of the potentially culpable scenarios. *Kitchen*, 110 Wn.2d at 405-06, 411.

But the record suggests that at least one juror did entertain such doubt. The jury asked to see the illegibly scrawled statements of Crithfield and Little. (Since those statements were the only exhibits the jurors saw besides the gun, the query from the jury room must have

referred to Exhibits 5 and 6 which were admitted as illustrative only and did not go back.) The jury had been invited to infer from the handwriting in exhibits that Crithfield and Little were intoxicated, consistent with the police witnesses' testimony that the pair looked, smelled, and sounded intoxicated. So, it appears that at least some jurors were questioning the reliability of the identification by these two witnesses.

By contrast the prosecutor repeatedly emphasized that Jackson indisputably was the person who confronted Ochoa, that Jackson repeatedly asked Ochoa to hand over items of property and that Jackson displayed what appeared to be a gun which he did put completely away until after Ochoa gave him some change. Because the instructions did not limit the jury's consideration of Ochoa's testimony, it is reasonably likely that some jurors returned a guilty verdict based on Jackson's having displayed a gun while asking Ochoa for money. A rational juror might not share Ochoa's touching faith in human nature and conclude that Jackson intended to take what he could from Ochoa by force or intimidation and that he took a substantial step. This would constitute attempted first degree robbery as defined in Instructions 5–9, CP 29–33.

Moreover, one of the police witnesses actually characterized the Ochoa incident as an armed robbery in which the victims positively identified the perpetrator. RP 58.

Reversal is required.

8. CUMULATIVE ERROR DENIED  
JACKSON A FAIR TRIAL.

The State may quibble about details of Jackson's assignments of error, but the record taken as a whole establishes that Jackson was convicted in a procedure that simply does not meet Washington standards for a fair trial.

Mr. Jackson deserves a new trial.

V. CONCLUSION

For the foregoing reasons, Mr. Jackson asks this Court to reverse his conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 7<sup>th</sup> day of February, 2011.



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Counsel for Ryan R. Jackson

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COURT OF APPEALS  
DIVISION II

11 FEB -8 AM 11:30

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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