No. 41287-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ANDREW SORTLAND,

Appellant.

On Appeal from the Pierce County Superior Court

Cause No. 10-1-01145-7

The Honorable Katherine Stolz, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
ISSUE A

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PM 5-31-11

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I. Assignment of Error

A. The trial court erred when it denied Kenneth Sortland's motion to proceed pro se, infringing upon his rights under Article I, sec. 22 of the Washington State Constitution, which guarantee's a defendant's "right to appear and defend in person."

Issues Pertaining to this Error

1. Was the defendant's request to proceed pro se made clear to the court?

2. Was the defendant's request a knowing, intelligent and voluntary waiver of his right to counsel?

3. Does the trial record indicate that the defendant's request for pro se status was made with an improper motivation, such as unjustifiable delay, or in order to disrupt proceedings?

4. Was it made clear during colloquy that Sortland was aware of: (1) The nature of the charges; (2) the maximum possible penalty; and (3) the disadvantages of self-representation?

5. Did the trial record adequately identify a legitimate reason to deny Sortland's pro se status?

II. Summary of the Facts

Susan Woodstock owned a home located at 714 North Warner in Tacoma, Washington. (VRP 33) She rented the home to a man and his sons for nearly 10 years, but after learning that the tenants were not taking adequate care of the house, she evicted them in June 2008. (VRP 33-35) The tenants had caused a significant amount of damage to the house, and extensive repair was required throughout the house. (VRP 34, 61-62) The house remained vacant and tenantless from June 2008 thru June 2009.

By June of 2009, the home repairs were complete and the home was again "ready to rent." An advertisement was placed on an online classified website. (VRP 36,61) Woodstock showed the house to approximately 10 people (VRP 60-61)

At approx. six o'clock, on the morning of June 15th, 2009, Woodstock's neighbor, Dan McCormack, heard noises in the alley behind his house. (VRP 68-69) McCormack looked out his window to see an unfamiliar red truck parked next to Woodstock's rental home (VRP 73)

McCormack is a professional photographer, and because he felt the circumstances were suspicious, he used one of his cameras to take pictures of the driver of the red truck. (VRP 74,75; Exh. 14,20,23)

McCormack did not immediately contact the police. Later that same day McCormack walked past the rear of the house and noticed that the basement door appeared damaged. He then contacted Woodstock. (VRP 78)

After receiving McCormack's call, Woodstock went to the house. (VRP 39) She discovered that the basement door had been broken into, that two interior doors were missing, as was her shop-vac, and that some other tools may have also been missing. (VRP 40,42,43,49)

McCormack contacted 911 and Tacoma Police Officer Damion Birge was dispatched to McCormack's 911 call. (VRP 98,99) McCormack gave Birge copies of the pictures he had taken. (VRP 100, 103 Both the Pierce County Sheriff's Department and CrimeStoppers created and circulated a bulletin about the incident, which included the picture of the suspect taken by McCormack. (VRP 118, 120-21, 122; Exh. 19A) For approx. ten months there was no response to the CrimeStoppers bulletin. (VRP 121 On June 16th, 2009, a crime scene technician processed Woodstock's home for fingerprints, but was unable to lift any usable prints. (VRP 135-36)

While on duty, on March 13th, 2010, Sheriff's Deputy Jerome Duray saw a photograph of Kenneth Sortland. (VRP 143) He thought Sortland resembled the suspect from the CrimeStoppers bulletin. (VRP 144) Duray showed the photograph to another Deputy, who also believed Sortland bore a resemblance to the man pictured in the bulletin. (VRP 111, 113)

The State subsequently charged Sortland with one count of residential burglary (RCW 9A.52.025), one count of second degree malicious mischief (RCW 9A.48.080), and one count of first degree theft (RCW 9A.56.020, .030), all in connection with the Woodstock break-in. (CP 5-6)

Trial began July 12th, 2010. (VRP 5) At trial, Sortland called several witnesses who testified that Sortland was employed at a job doing construction, specifically, carpentry, from six o'clock in the morning until four in the evening Monday thru Friday, throughout the month of June, 2009. (VRP 155-157, 162-164, 172, 173)

During trial, the photographs taken by McCormack were admitted

as evidence. (VRP 11) Booking photographs of "mug shots" derived from a yet untried and unrelated charge were also admitted as evidence, over the objection of defense counsel. (VRP 8-12) A "CrimeStoppers" photo was also admitted as evidence, also over the objection of defense counsel. (VRP 8-12)

On July 19th, 2010, during trial, prior to closing, defendant Sortland unequivocally expressed his decision to proceed pro se. (VRP 190) Colloquy certainly occurred. (VRP 190-198) The court denied Sortland his request for self-representation. (VRP 190-198)

Although witnesses had given testimony to support an alibi theory of defense, no jury instruction was provided by defense counsel to the court and the jury was not provided an instruction on the defendant's alibi theory of defense. (VRP 198)

A jury found Sortland guilty of residential burglary and malicious mischief, and of the lesser included offense of second degree theft. (CP 72-76; VRP 240) The trial court sentenced Sortland within his standard range to a term of confinement totaling 84 months. (SRP 13; CP 105,108)

III. Law and Argument

A. The trial court erred when it denied Sortland's motion to proceed pro se, infringing upon his rights under Article I, sec. 22 of the Washington State Constitution, which guarantee's a defendant's "right to appear and defend in person."

On July 19th, 2010, during trial, Sortland moved through his defense counsel, to proceed pro se. (VRP 190) It was clear to all parties that Sortland was attempting to assert his right to proceed pro se. (VRP 190-198) Colloquy between the Honorable Judge Stolz and the defendant occurred. (VRP 190-198) Nevertheless, the trial court denied Sortland's request to self-representation. (VRP 198)

None of the recognized reasons which would justify denial of this right were identified by the court or seem to apply to the facts of this case.

"Criminal defendant's have an explicit right to self-representation under the Washington State Constitution and an implicit right under the Sixth Amendment to the United States Constitution." State v. Madsen, No. 81450-3 (2010); Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Article I, section 22 of the Washington State Constitution provides:

> "In criminal prosecutions **the accused shall have the right to appear and defend in person,** or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify on his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases..."

The context of the "right to appear and defend in person" clause is clear. Article I, section 22 is titled Rights of the Accused. It begins, "the accused shall have the right..." Id. The rights of the accused are then delineated, one after another. Nothing modifies the listed rights. There are no caveats.

Foremost among these rights of the accused is the right to "appear and defend in person." Only one possible conclusion can be drawn: Criminal defendants have the right to appear and defend in person.

The people ratified our constitution. Const. preamble. The understanding of the ratifying public is thus the key to constitutional interpretation. Utter, at 518. "constitutions are not designed for metaphysical or logical subtleties...the people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." 1 Joseph Story, Commentaries on the Constitution of the United States, sec. 451, at 322 (3rd Ed. 1858). Moreover, "If a constitutional provision is plain an unambiguous on its face, then no construction or interpretation is necessary or permissible." State ex rel. Anderson v. Chapman, 86 Wn.2d 189, 191, 543 P.2d. 229 (1975).

What could be plainer or more unambiguous than our "right to appear and defend in person" clause? The only relevant question here is whether the trial court was justified in denying Sortland his unequivocal request to assert his right to appear and defend in person.

Our Constitution proclaims, "We the people of the State of Washington... do ordain this constitution." Const. preamble. It is the people who ratified our constitution, and "the constitution is the expression of the people's will, adopted by them." State ex rel. Albright v. City of Spokane, 64 Wn.2d 767, 770, 394 P.2d 231 (1964) (emphasis added). Therefore, in analyzing the constitutional text, "the intent to be determined is that of the people who ratified the document rather than the intent of the handful of men who wrote it." Robert F. Utter, Freeedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 511 (1984).

Thus, "[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well." Malyon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 :(1997). The people ratified a text so plain its meaning is unmistakable. Admittedly, the meanings of the words may change. Thus, we might rightfully "inquire about the accepted meaning of the words at the time the provision was adopted, "Utter, supra at 509 (citing State v. Brunn, 22 Wn.2d 120, 139, 154 P.2d 826 (1954), because "[c]onstitutions being the result of the popular will, the words therein are to be understood ordinarily in the sense that such words convey to the popular mind," State ex rel. State Capitol Comm'n v. Lester, 91 Wash. 9, 14, 156 P. 858 (1916). But it hardly seems necessary to examine whether the popular meaning of "the right to appear and **defend in person"** has changed over the past hundred-odd years. A textual analysis "includes the words themselves, their grammatical relationship to one another, as well as their context." Malyon, 131 Wn.2d at 799.

Given the value we place on the accused's personal decision-making in this area, we cannot agree that the state constitutional and common law history favor the rejection of a right of self-representation. To the contrary, such history reinforces the textual support for recognition of the right. This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. Faretta, 422 U.S. at 834; State v. Vermillion, 112 Wn.2pp. 844, 51 dP.3d 188 (2002). As the United States Supreme Court has observed:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case, counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Faretta, 422m U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 90 S.Ct. 1057, 25 L.Ed.2d. 353 (1970)(Brennan, J., concurring)).

This reasoning is persuasive where a defendant wants to make his own case at trial. It remains he who bears the personal cost if his bid is unsuccessful. Because the right to self-representation, like other rights enumerated in article 1, sec. 22, must be personally held, the provision as a whole must be construed as guaranteeing a right to self-representation.

"The unjustified denial of this [pro se] right requires reversal." State v. Stenson, Wn.2d. 668, 737, 940 P.2d 1239 (1997).

Having recognized a criminal defendant's right to self-representation, it is also important to recognize that the right is not without limitations, is not self-executing, and that courts must balance this right with other dissonant rights, such as the right to counsel, and, of course, the orderly administration of justice. It is, therefore, out of caution, that "both the United States Supreme Court and this court have held that courts are to 'indulge in every reasonable presumption' against a defendant's waiver of his or her right to counsel." In re Det. of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999)(quoting Brewer v. Williams, 430 U.S. 387, 404,97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)). As a request for pro se status is a waiver of the constitutional right to counsel, appellate courts have regularly and properly reviewed denials of requests for prose status under an abuse of discretion standard. E.g. State v. Hemenway, 122 Wn.App. 787, 792, 95 P.3d 408 (2004). Discretion is abused if a decision is manifestly unreasonable or "rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638)2003)(quoting State v. Rundquist, 79 Wn.App. 7;86, 793, 905 P.2d (1995)).

When a defendant requests pro se status, the trial court must first determine whether the request is unequivocal and timely. Stenson 132 Wn.2d at 737

Sortland's request was unequivocal. Defense counsel informed the court that Sortland "would like to give his own closing." (VRP 190) "What that means is that he wants to represent himself." (VRP 190) The trial court then opined: "It's usually a very stupid thing to do;" (VRP 190) which was immediately followed by the defense counsel's "That's what he wants to do." (VRP 190) The court then asked the prosecution for its position on the matter. The prosecution was opposed to the motion. It was clear to all parties; the trial court, assigned defense counsel, and the prosecution, that Sortland was attempting to proceed pro se. That the defendant's request was plain and clear is also evidenced by the colloquy between the Honorable Judge Stolz and Sortland. (TRP 190-98) The right to represent oneself at trial is not absolute, and the request to proceed pro se must also be timely. State v. DeWeese, 117 Wn.2d 562, 377, 816 P.2d 1 (1991). Closely related to timeliness is the concern that a defendant will use the right to self-representation to obstruct or delay the orderly administration of justice. In this case, there is no evidence in the record which indicates the trial court found the request to proceed pro se was untimely. Neither the State or the trial court suggested that disruption or delay was intended or would occur. Sortland never requested a continuance and had prepared his closing argument in writing, which was available for review, if the court deemed it necessary. All parties were aware this request was an attempt by Sortland to assert his personal right to appear and defend in person. The record does not support a theory that any type of improper motivation lead to Sortland's decision.

"Absent a finding that the request was equivocal or untimely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy." Faretta, 422 U.S. at 835; State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994). Again, the court shall indulge in "'every reasonable presumption' against a defendant's waiver of his or her right to counsel." Turay, 139 Wn.2d at 396 (quoting Brewer, 430 U.S. at 404).

This presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact; the presumption in Turay does not go so far as to eliminate the need for any basis for denying a motion for pro se status. Were it otherwise, the presumption could make the right itself illusory. A court may not deny a motion for self-representation based on grounds that self-representation would be detrimental to the defendant's ability to present his case or concerns that the courtroom proceedings will be less efficient than if the defendant were represented by counsel. "Similarly, concerns regarding a defendant's competency alone is insufficient; it the court doubts the defendant's competency, the necessary course is to order a competency review;" Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (20010; RCW 10.77.060(1)(a). "[n]or do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights...[t]he competence that is required

of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to [effectively] represent himself." Godinez v. Moran, 509 U.S. 389, 399 (19930. Fortunately, in this case, the State itself has provided some insight into the soundness of Sortland's decision-making during trial; where on October 8th, 2010, at sentencing, the State offered this comment: "He did, quite frankly, a very good job throughout the course of the trial in assisting his own attorney in his own defense." (SRP 3-4)

In this case, Sortland's request for pro se status on July 19th, 2010, was unequivocal, timely, voluntary, knowing and intelligently made. He was competent to make the choice. The request was unequivocal in the context of the record as a whole and the choice reflected the defendant's true subjective desire for self-representation. the record reflects that during colloquy the defendant was apprised and already aware of: (1) the nature and seriousness of the charges; (2) the possible and maximum penalties which may be imposed; and (3) the disadvanteges of self-representation

Specifically, during colloquy, the following was revealed: that the defendant has studied law, (in prison); he had recently read Washington Practice, Volumes 4A, 12, 13, Methods of Practice 1A, and about 120 other Appellate Court cases; that the defendant had not actually been to law school; that the defendant had not represented himself before; the nature of the charges against him; that the defendant was already aware, (when asked) of the maximum penalty, (84 months) which could be imposed, based on the maximum of his standard sentencing range-considering his prior criminal history; that "he would be on his own"; that he "could not ask the court for any advise on how to handle closing;" and that "defense counsel would not be giving any advise." (VRP 190-198) The defendant then related to the court his having an issue with an officer's testimony

given in disregard to a prior court order, which the defendant felt was an intrusion on the purview of the jury (See direct appeal, "Can't unring that bell); the court admitted, (regarding the objection): "It was [a] valid one, you know." (VRP 195); the court then stated its erroneous belief that the court had "ordered the jury to disregard that at the time the objection was raised." (Footnote: the objection was sustained; but no corrective instruction was proffered to the jury). And finally, the court asked: "Now why do you want to do your own closing?" (VRP 195) My answer was that I was intent on advancing an alibi theory of defense, which was supported by evidence in the record as opposed to defense counsel's focus on lesser included offenses, which this defendant felt would "undermine the credibility of the alibi theory of defense." (VRP 196-197) The decision whether or not to grant self-representation seemed to turn on the court's belief "that you want to talk to the jury, but you don't want to be subject to cross-examination...," (VRP 197) and, "at this point, letting you do closing argument, I think, is a chance for you to try to out your story forth without being subject to the cross-examination of counsel." (VRP 198) "However, when a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense."...the controlling inquiry in determining whether a request to proceed pro se is valid is whether the defendant has unequivocally asserted the right, not what motivated his desire to assert the right." State v. McCormick, 152 Wn. App. 536, 216 P.3d 475, 477 (2009); State v. Littlefair, 129 Wn.App. 330, 338, 119 P.3d 359 (2005); State v. Contreras, 92 Wn.App. 307, 314, 966 P.2d 915 (1998); State v. Riley, 19 Wn.App. 289, 294, 576 P.2d 1311 (1978).

There appear to be only two reasons, based on the trial court record, to guide us in an analysis of the decision-making processes of the court relating to this issue: (1)" It's usually a very stupid thing to do." (VRP 190) and (2) "[b]ut at this point, letting you do closing argument, I think, is a chance for you to try to put your story forth without being subject to the cross-examination of counsel." (VRP 198) Neither of these reasons are consistent with any of the recognized legitimate reasons for denial of this personal right. "In some instances, we may overlook a court's abuse of discretion, if its decision can be affirmed on any ground within the pleadings and the proof." Rohrich, 149 Wn.2d at 654. But such a rule presupposes that we have some knowledge of the reasons upon which the lower court based its decision, and the rule should not apply where, as here, we have no insight into the lower court's reasoning. See State v. Hampton, 107 Wn.2d a403, 409, 728 P.2d 1049 (1986)("Because the trial court did not provide any [legitimate] reasons for its decision, we cannot say it based its decision on tenable grounds or reasons").

Especially troubling to this defendant, is the court's characterization that the defendant's request to proceed pro se was simply an effort "to try to put forth your story."(VRP 198) Sortland's alibi defense theory was already supported by the testimony of two defense witnesses...First witnesses question: "What time did you drop him off (at work) on June 15th, 2009?" Answer: "It would be by 6:00." (VRP 158) Q. "How do you know that you would have given Mr. Sortland a ride to work if it was a Monday, Tuesday, Wednesday, Thursday or a Friday?" A. "Because I was the one that would take him to work." Q. "And you did that every day?" A. "Yes." (VRP 160) Second witness, employer Robert Kramer: Q. "What hours were you working?" A. "6:00

in the morning until 4:00 in the afternoon." Q. "So what hours was Mr. Sortland working?" A. "6:00 to 3:30, 6:00 to 4:00 around therre." Q. "And 6:00, meaning A.M.?" A. "Yes ma'am." And Q. "Did he always work Monday through Friday?" A. "Yeah every day." (VRP 164) Cross examination by prosecution provides: Q. "What time did Mr. Sortland arrive at work?" A. "He got there at 6:00 A.M. every morning."(VRP 166) The trial court's characterization infers that Sortland possessed an improper motivation while "Trying to put forth you story." and that Sortland was attempting to introduce new evidence into the trial proceedings. This conjecture is KAS unfounded in fact and was mere speculation on the part of the court. That Sortland may have desired to highlight a plausible defense theory, which was supported by evidence already admitted was well within any defendants rights. The prosecution was allowed to provide the jury its theory of the case. In fairness, the defendant should have been afforded an opportunity to advance an alibi theory of defense which was supported by evidence in the trial record. Failure to allow Sortland the opportunity to present his alibi defense resulted in an unfair and incomplete trial. The court's reason is untenable and stands in stark contrast to Sortland's Article I, sec. 22 constitutional right "to appear and defend in person," and is also in contrast with common and decisional law which supports a defendant's personal right to advance a theory of defense which is supported by the evidence introduced at trial.

IV. Conclusion

The only relevant question here, the one the defendant asks the Court of Appeals to determine, is whether Sortland was unjustifiably denied his request to appear and defend in person. How could a constitutional violation by any clearer than this?

Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice. None of the recognized legitimate reasons for denying self-representation were given by the court or seem to apply to the facts of this case. The only permissible conclusion is that Sortland's request was voluntary, knowing and intelligent, and that the trial court's denial of Sortland's request for pro se status was error. Sortland was entitled, as a matter of law, to an order allowing him to defend in person as guaranteed by the Washington Constitution.

No. 41287-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

KENNETH ANDREW SORTLAND,

APRELLANT.

ON APPEAL FROM THE PIERE COUNTY SUPERIOR COURT

CAUSE No. 10-1-01145-7

THE HONORABLE KATHERINE STOLZ, JUDGE

STATEMENT OF ADDITIONAL GROUND FOR REVIEW
ISSUE B

KENNETH A. SORTLAND
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I. ASSIGNMENT OF ERROR

B. THE RELEVANCY AND PROBATIVE VALUE OF MUG SHOTS AND CRIME STOPPERS PHOTOS DID NOT OUTWEIGH THE POTENTIAL FOR UNFAIR PREJUDICE OR MISLEADING OF THE JURY AND OFFENDED DUE PROCESS BY DENYING SORTLAND THE PRESUMPTION OF INNOCENCE WHICH IS TO BE AFFORDED EACH DEFENDANT AT TRIAL.

ISSUES PERTAINING TO THIS ERROR

1. DID THE OBJECTIONS RAISED BY DEFENSE COUNSEL DURING MOTIONS IN LIMINE PROPERLY PRESERVE THIS ISSUE FOR REVIEW?
2. WAS IT AN ABUSE OF DISCRETION TO ALLOW ADMISSION OF MUG SHOTS FROM AN UNTRIED AND UNRELATED CHARGE INTO THIS TRIAL?
3. DID THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGH ITS POTENTIAL PREJUDICIAL EFFECT?
4. WAS THIS HARMLESS ERROR?
5. WAS THE UNTAINTED EVIDENCE BY ITSELF OVERWHELMING?
6. IS IT CLEAR BEYOND A REASONABLE DOUBT THAT THE EVIDENCE COMPLAINED OF DID NOT CONTRIBUTE TO THE DEFENDANT'S CONVICTION?

II. SUMMARY OF THE FACTS RELATED TO THIS ISSUE

ON JULY 12TH, 2010, DURING MOTIONS IN LIMINE, DEFENSE COUNSEL OBJECTED WHEN THE STATE INTRODUCED AS EVIDENCE A BOOKING PHOTO OR "MUG SHOT" WHICH STEMMED FROM AN UNTRIED AND UNRELATED CHARGE AS WELL AS PHOTOS RECOGNIZED AS A "CRIME STOPPERS" BULLETIN. (VRP 6-21) THE PROSECUTION ARGUED THAT THESE PHOTOS WERE "PART OF THE RES GESTAE OF THE CRIME." (VRP 9) THE BOOKING PHOTO AND CRIME STOPPERS BULLETIN WERE ADMITTED AS EVIDENCE AT TRIAL, AND WERE UTILIZED TO SECURE A CONVICTION OF THE DEFENDANT, KENNETH SORTLAND. SEE STATEMENT OF ADDITIONAL GROUNDS, SUMMARY OF THE FACTS, ISSUE A, FOR MORE DETAIL ON THE CASE.

THREE PHOTOS, ONE OF THE ACTUAL SUSPECT, AND THE TWO OTHERS WHICH WERE OBJECTED TO, FORMED THE ENTIRE BODY OF EVIDENCE AGAINST SORTLAND. THERE EXISTS NO OTHER PHYSICAL EVIDENCE OR TESTIMONY OF ANY EYEWITNESS TO THE INCIDENT WHICH LINKS SORTLAND TO THIS CRIME. THAT THIS CASE TURNED SOLELY ON THE ADMISSION OF THESE PHOTOS IS EVIDENCED BY THE COURT'S OWN COMMENT: "[I]T'S GOING TO BE UP TO THE JURY TO DETERMINE.... WHETHER OR NOT THEY THINK THAT'S YOU IN THESE PHOTOGRAPHS. I MEAN, THAT'S WHAT THIS CASE IS GOING TO RISE AND FALL ON." (VRP 197)

III. LAW AND ARGUMENT

B. THE RELEVANCY AND PROBATIVE VALUE OF MUG SHOTS AND CRIME STOPPERS PHOTOS DID NOT OUTWEIGH THE POTENTIAL FOR UNFAIR PREJUDICE OR MISLEADING OF THE JURY AND OFFENDED DUE PROCESS BY DENYING SORTLAND THE PRESUMPTION OF INNOCENCE WHICH IS TO BE AFFORDED EACH DEFENDANT AT TRIAL.

THIS ISSUE WAS PROPERLY PRESERVED FOR REVIEW BECAUSE OF THE FOLLOWING OBJECTIONS RAISED BY DEFENSE COUNSEL DURING MOTIONS IN LIMINE: "YOUR HONOR, I WOULD OBJECT.... [t]HE FACT THAT MR. SORTLAND WAS IN CUSTODY, WHAT HE WAS IN CUSTODY FOR, THE CORRECTION OFFICERS' OPINION THAT HE MAY HAVE BEEN THE SAME PERSON IN THE PHOTOGRAPH IS ALL IRRELEVANT. IT'S EXTREMELY PREJUDICIAL UNDER [ER] 401, 403, AND 404(b)." (VRP 8-9) "ALSO, THE CRIME-STOPPERS BULLETIN, I'D ASK THAT IT BE EXCLUDED. IT INCLUDES ALLEGATIONS THAT ARE HEARSAY: ALSO, JUST THE FACT THAT IT SAYS IT'S A CRIME STOPPERS BULLETIN, IN AND OF ITSELF, MAY BE SOMEWHAT PREJUDICIAL TO THE JURY." (VRP 16-17) ON APPEAL, A PARTY MAY NOT RAISE AN OBJECTION NOT PROPERLY PRESERVED AT TRIAL ABSENT MANIFEST CONSTITUTIONAL ERROR. STATE V. KRONICH, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). WE ADOPT A STRICT APPROACH BECAUSE

TRIAL COUNSEL'S FAILURE TO OBJECT TO THE ERROR ROBS THE COURT OF THE OPPORTUNITY TO CORRECT THE ERROR AND WOULD AVOID A RETRIAL. STATE v. KIRKMAN, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). A PARTY MAY ONLY ASSIGN ERROR IN THE APPELLATE COURT ON THE SPECIFIC GROUND OF THE EVIDENTIARY OBJECTION MADE AT TRIAL. STATE v. GULOY, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). IN THIS CASE, THE ISSUE HAD BEEN PROPERLY PRESERVED FOR REVIEW BECAUSE DEFENSE COUNSEL OBJECTED TO THE ADMISSION OF THE EVIDENCE AND SPECIFIED TO THE COURT THE REASONS: RELEVANCY, HEARSAY AND PREJUDICE.

THE ADMISSION OF EVIDENCE IS REVIEWED FOR ABUSE OF DISCRETION. STATE v. NOLTIE, 116 Wn.2d 831, 852, 809 P.2d 190 (1991). WHEN ITS "PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE," EVEN RELEVANT EVIDENCE MAY BE EXCLUDED. ER 403. THIS DEFENDANT CONTENDS THAT "MUGSHOTS" ADMITTED AS EVIDENCE STEMMING FROM AN UNTRIED AND UNRELATED CHARGE WERE INHERENTLY PREJUDICIAL TO THE DEFENDANT'S RIGHT TO A FAIR TRIAL. THE REASONABLE AND LOGICAL CONCLUSION JURORS WOULD NATURALLY MAKE IS THAT THE MUG SHOTS IN THE POSSESSION OF POLICE WERE EVIDENCE OF A PAST CRIMINAL ACT. AS THE PROSECUTION POINTED OUT: "OBVIOUSLY, THE JURY IS GOING TO KNOW WHERE OFFICER DURAY IS EMPLOYED, HOW HE IS EMPLOYED, WHAT HIS DUTIES

ARE," (VRP 12) AND "WE CAN CRAFT IT SO THAT THE JURY DOES'NT HAVE TO KNOW EXACTLY WHAT HE WAS BEING BOOKED INTO THE JAIL [FOR]..." (VRP 8) WITHOUT A LIMITING INSTRUCTION, THIS EFFECTIVELY TRANSFORMS AN UNTRIED AND UNRELATED CHARGE INTO EVIDENCE OF PRIOR BAD ACTS. "A CRIMINAL DEFENDANT MAY BE HELD TO ANSWER FOR ONLY THOSE OFFENSES CONTAINED IN THE INICTMENT OR INFORMATION." STATE V. FERNANDEZ-MEDINA, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000).

THUS, THE FIRST QUESTION WE MUST ANSWER IS WHETHER INTRODUCTION OF THESE MUG SHOTS WAS PREJUDICIAL OR OFFENSIVE TO DUE PROCESS. ONE WASHINGTON COMMENTATOR HAS URGED THAT UNFAIR PREJUDICE SHOULD NOT BE SEEN AS A MATTER OF EMOTION, BUT OF ERRONEOUS INFERENCES THAT UNDERMINE THE GOAL OF THE RULES TO PROMOTE ACCURATE FACT FINDING AND FAIRNESS. SEE GENERALLY, VICTOR J. GOLD, FEDERAL RULES OF EVIDENCE 403; <u>OBSERVATIONS ON THE NATURE OF UNFAIRLY PREJUDICIAL EVIDENCE</u>, 58 WASH. L. REV. 497 (1983). THE REASON THE PROSECUTION PROVIDED FOR THE ADMISSANCE OF THIS EVIDENCE WAS THAT THE PHOTOS WERE PART OF THE "RES GESTAE" OF THE CRIME: "WHAT I AM MORE INTERESTED IN, IS GIVING THE JURY THE FULL PICTURE....IT'S PART OF THE RES GESTAE OF THE CRIME, AND THE JURY IS ENTITLED TO KNOW THE FULL STORY." (VRP 9) IT IS TRUE THAT THE "RES GESTAE" DOCTRINE WAS RECOGNIZED AT THE TIME

OUR STATE CONSTITUTION WAS ADOPTED. ONE CITED COMMENTATOR AROUND THE TIME OUR STATE CONSTITUTION WAS BEING ADOPTED DEFINED THE TERM AS "EVENTS SPEAKING FOR THEMSELVES, THROUGH THE INSTINCTIVE WORDS AND ACTS OF PARTICIPANTS, NOT THE WORDS AND ACTS OF PARTICIPANTS WHEN NARRATING THE EVENTS." FRANCIS WHARTON, "A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES, SEC. 262, AT 192 (9TH ED. 1884). IT ENCOMPASSES EVERY ACT FORMING THE MAIN EVENT AT ISSUE.

UNFORTUNATELY, COURTS HAVE USED THE DOCTRINE AS A WASTEBASKET CATCHALL TO ADMIT ANY EVIDENCE THAT COULD BE SAID TO HAVE ARISEN OUT OF THE EVENT OR TRANSACTION ITSELF. THIS BOOKING PHOTO DID NOT ARISE OUT OF THE EVENT AT TRIAL. ADMISSIBILITY OF RES GESTAE EVIDENCE IS PREMISED UPON THE FACT THAT THE EVIDENCE ARISES OUT OF THE EVENT ITSELF. BOOKING PHOTOS TAKEN APPROX. 10 MONTHS AFTER THE TRIAL'S CRIME OCCURRED, STEMMING FROM AN UNTRIED AND UNRELATED CHARGE, CANNOT BE SAID TO HAVE ARISEN OUT OF THE EVENT ITSELF, OR TO HAVE ANY ACTUAL PROBATIVE VALUE, OTHER PERHAPS, THAN TO SWAY THE MINDS OF THE JURY. THE BROAD AND UNREFINED USE OF THIS DOCTRINE HAS EARNED THE CRITICISM OF SOME: SEE BLACK'S LAW DICTIONARY, 1423 (9TH ED 2009)("[I]T'S INDEFINITENESS HAS SERVED AS A BASIS FOR RULINGS WHERE IT WAS EASIER FOR THE JUDGE TO INVOKE THIS IMPOSING

CATCHWORD THAN TO THINK THROUGH THE REAL QUESTION INVOLVED.'")(QUOTING JOHN H. WIGMORE, A STUDENTS TEXTBOOK OF THE LAWS OF EVIDENCE, 279 (1935)).

I TAKE THIS OPPORTUNITY TO STAND WITH A HOST OF COMMENTATORS POINTING OUT THE ABSURDITY OF THE RES GESTAE EXCEPTION AS TOO FREQUENTLY APPLIED. PROFESSOR WIGMORE CRITICIZES THE EXCEPTION AS "MOST FREQUENTLY USED MERELY AS A COVER FOR LOOSE IDEAS AND IGNORANCE OF PRINCIPLES." 1A JOHN HENRY WIGMORE & PETER TILLERS, EVIDENCE ON TRIALS AT COMMON LAW, SEC. 218 AT 1888 (1983). BRYAN GARNER, EDITER IN CHIEF OF BLACK'S LAW DICTIONARY, LAMBASTES THE CONCEPT: "THE PHRASE IS ANTIQUATED. BY MODERN JUDGES IT IS BEING GRADUALLY DISCARDED. IT IS SUPERFLUOUS, AND SERVES ONLY TO OBSCURE THE LOGIC OF THE RULE. IT SHOULD BE LEFT TO OBLIVION." BLACK'S LAW DICTIONARY, 1423 (9TH ED. 2009)(QUOTING JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE, 279 (1935)). "RES GESTAE IS PERHAPS THE MOST FAMOUS--AND CERTAINLY THE HARDIEST--JUDICIAL NONREASON OF ALL TIME. IT HAS ENDURED--NO THRIVED UPON--MORE THAN A CENTURY OF ABUSE BY BOTH ITS DETRACTORS AND ITS DEVOTEES." JEROME A. HOFFMAN, RES GESTAE'S CHILDREN, 47 ALA. L. REV. 73, 75 (1995).

GENERALLY, EVIDENCE OF A DEFENDANT'S **PRIOR** MISCONDUCT IS INADMISSIBLE TO DEMONSTRATE THE ACCUSED'S PROPENSITY TO COMMIT THE CRIME CHARGED. ER 404 (b) IT MAY, HOWEVER, BE ADMISSIBLE FOR OTHER PURPOSES, SUCH AS PROOF OF MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT. ER 404 (b). THE TRIAL COURT SEEMS TO HAVE ADMITTED THIS EVIDENCE BASED ON ITS DETERMINATION THAT IT WAS ADMISSIBLE PURSUANT TO 404 (b) TO ASSIST THE JURY IN DETERMINING IDENTITY. LIKE ALL JUDICIALLY CREATED EXCEPTIONS; THE ADMISSIBILITY OF EVIDENCE EXCEPTION IS LIMITED AND NARROWLY DRAWN. THESE LIMITED AND NARROWLY DRAWN EXCEPTIONS ARE LIMITED BY THE REASONS THAT BROUGHT THEM INTO EXISTENCE; THEY ARE NOT DEVICES TO UNDERMINE THE INADMISSIBILITY REQUIREMENT. TO JUSTIFY THE ADMISSION OF **PRIOR ACTS** UNDER 404 (b), THERE MUST BE A SHOWING THAT (1) THE EVIDENCE SERVES A LEGITIMATE PURPOSE, (2) THE EVIDENCE IS RELEVANT TO PROVE AN ELEMENT OF THE CRIME CHARGED, AND (3) THE PROBATIVE VALUE OUTWEIGHS ITS PREJUDICIAL EFFECT. STATE v. DEVRIES, 149 Wn.2d 842, 848-49, 72 P.3d 748 (2003) (CITING STATE v. LOUGH, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). THIS DEFENDANT CONTENDS NONE OF THESE CONDITIONS HAVE BEEN ADEQUATELY MET.

THE PURPOSE OF ER 404 (b) IS TO PREVENT A JURY FROM CONVICTING A DEFENDANT BASED ON PROPENSITY OR CHARACTER EVIDENCE. WE HAVE LONG WARNED OF THE POTENTIAL RISK THIS TYPE OF EVIDENCE HAS IN PREJUDICING THE DEFENDANT AND TO BE AWARE OF SITUATIONS "WHERE THE MINUTE PEG OF RELEVANCY WILL BE OBSCURED BY THE DIRTY LINEN HUNG UPON IT." STATE v. SMITH, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (QUOTING STATE v. GOEBEL, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)); SEE ALSO STATE v. SALTARELLI, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (HOLDING THAT BECAUSE OF THE HIGH RISK FOR PREJUDICE, EVIDENCE OF PRIOR BAD ACTS MUST BE CLOSELY SCRUTINIZED AND ADMITTED ONLY IF CERTAIN CRITERIA ARE MET). THIS CASE PRESENTS AN EXAMPLE OF WHY THIS PROHIBITION EXISTS.

"MUG SHOTS SHOULD BE AVOIDED TO ESTABLISH IDENTITY DUE TO POTENTIAL FOR PREJUDICE; EVEN CLIPPING OFF IDENTIFICATION NUMBERS AND NOT USING THE PHRASE "MUG SHOT" WILL NOT NECESSARILY DISGUISE THE FACT THAT THE PHOTOGRAPH IS, IN FACT, A MUG SHOT." STATE v. YATES, 161 Wn.2d 714, 769-71 (2007); STATE v. FINCH, 137 Wn.2d 792, 812-813 (1999); STATE v. PIRTLE, 127 Wn.2d 628, 653-5 (1995); STATE v. FURMAN, 122 Wn.2d 440, 452 (1993); STATE v. NEWTON, 42 Wn.App. 718 (1986). THE PROPER APPROACH IS TO MAINTAIN NARROW

EXCEPTIONS. "A TRIAL COURT MUST ALWAYS BEGIN WITH THE PRESUMPTION THAT EVIDENCE OF PRIOR BAD ACTS IS INADMISSIBLE." STATE v. DEVINCENTIS, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). THAT IS WHAT ER 404(b) EXPRESSLY COMMANDS. ADMISSIBILITY SHOULD BE ALLOWED ONLY AFTER RECOGNIZING THAT ONE OF THE NARROW EXCEPTIONS APPLIES, AND THAT PROTECTIONS ARE IN PLACE, AND WHERE THE TRIAL COURT BALANCES THE PROBATIVE VALUE OF THE EVIDENCE CAREFULLY WITH ITS PREJUDICIAL EFFECT.

GENERALLY, THIS TYPE OF EVIDENCE IS ALLOWED ONLY TO HELP PROVE THE ACT IN QUESTION ACTUALLY OCCURRED, BUT THE TRIAL COURT WERE FOUND IT WAS ADMISSIBLE. A DEFENDANT IS ON TRIAL FOR ACTIONS TAKEN RELEVANT TO HIS OR HER CURRENT CASE, NOT FOR THE PRIOR WRONGFUL ACTS THAT MAY HAVE OCCURRED IN THE PAST; OR, IN THIS CASE, FOR ACTIONS WHICH WERE YET TO BE ADJUDICATED AND WERE UNTRIED AT THE TIME OF THE DEFENDANT'S TRIAL. ER 404(b) HAS HISTORICALLY BEEN A MECHANISM TO ENSURE THAT THE JURY CONVICTS A DEFENDANT BASED ONLY ON EVIDENCE PROVING THE COMMISSION OF THE CRIME CHARGED. A PERSON SHOULD NOT BE CONVICTED BASED ON BEING THE TYPE OF PERSON WHO IS LIKELY TO COMMIT CRIMES. THE STATE IS REQUIRED TO PROVE, BEYOND A REASONABLE DOUBT THAT THIS PERSON COMMITTED THIS CRIME.

THE WASHINGTON STATE CONSTITUTION ENSURES THIS BY GUARANTEEING CRIMINAL DEFENDANTS A FAIR AND IMPARTIAL TRIAL; INHERENT IN THIS RIGHT IS THE PRESUMPTION OF INNOCENCE AND THAT THEIR GUILT BE PROVED BEYOND A REASONABLE DOUBT. CONST. ART. I, SEC. 3, 22. BY ALLOWING THE ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE OF PRIOR BAD ACTS AT TRIAL, THE JURY HAS A MUCH HIGHER LIKELIHOOD OF CONVICTING AN INNOCENT DEFENDANT BECAUSE OF OTHER CRIMES OR BAD ACTS COMMITTED IN THE PAST.

FURTHER, WE HAVE ALWAYS BEEN EXPLICIT IN OUR REQUIREMENT THAT A PROBATIVE VERSUS PREJUDICIAL BALANCING TEST SHOULD BE CONDUCTED ON THE RECORD BEFORE ALLOWING ADMISSION OF PRIOR BAD ACTS. STATE V. WADE, 138 Wn.2d 460, 463, 979 P.2d 850 (1999) WE SHOULD CONTINUE TO EMPHASIZE THE CONSTRICTION OF ANY EXCEPTION TO ER 404 (b). THE BALANCING TEST MUST BE THOUGHTFULLY AND CAREFULLY CONDUCTED ON THE RECORD, AND IF THERE IS ANY DOUBT AS TO ITS ADMISSION, THE SCALE SHOULD BE TIPPED IN FAVOR OF THE EXCLUSION OF THE EVIDENCE.

THE IMPROPER ADMISSION OF EVIDENCE TO SUPPORT A CRIMINAL CONVICTION MAY BE HARMLESS ERROR. STATE V. FLORES, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008). "A HARMLESS ERROR IS AN ERROR WHICH IS TRIVIAL, OR FORMAL, OR MERELY ACADEMIC, AND WAS NOT PREJUDICIAL TO THE SUBSTANTIAL

RIGHTS OF THE PARTY ASSIGNING IT, AND IN NO WAY AFFECTED THE FINAL OUTCOME OF THE CASE." IN RE DET. OF POUNCY, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (QUOTING STATE v. BRITTON, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

IF A REASONABLE POSSIBILITY EXISTS THAT, IN THE ABSENCE OF THE ERROR, THE VERDICT MIGHT HAVE BEEN MORE FAVORABLE TO THE ACCUSED, IT CANNOT BE HARMLESS. THERE IS NO WAY TO DETERMINE WHETHER THE JURY WOULD HAVE REACHED THE SAME RESULT HAD THE PREJUDICIAL BOOKING PHOTO AND REDUNDANT CrimeStoppers PHOTOS NOT BEEN PRESENTED AS EVIDENCE. THE COURT EMPLOYS AN "OVERWHELMING UNTAINTED EVIDENCE" TEST IN ITS ANALYSIS OF CONSTITUTIONAL HARMLESS ERROR." STATE v. GULOY, 104 Wn.2d AT 426, 705 P.2d 1182 (1986). "UNDER THIS TEST, WE LOOK TO THE UNTAINTED EVIDENCE TO DETERMINE IF THE UNTAINTED EVIDENCE ALONE IS SO OVERWHELMING THAT IT NECESSARILY LEADS TO A FINDING OF GUILT." GULOY, AT 426, 705 P.2d 1182 (1986).

THE CONDITION OF OTHER OVERWHELMING EVIDENCE COULD NOT HAVE BEEN MET WHERE, HERE, THERE WAS NO PHYSICAL EVIDENCE OR EYEWITNESS TESTIMONY LINKING SORTLAND TO THIS CRIME. ARGUENDO, IT WOULD BE ESPECIALLY DIFFICULT FOR THE STATE TO CLAIM OVERWHELMING UNTAINTED EVIDENCE EXISTS WHERE THE ONLY EYEWITNESS TO THE INCIDENT WAS UNABLE DURING TRIAL TO IDENTIFY SORTLAND

AS BEING THE SAME PERSON OR SUSPECT HE HAD PHOTOGRAPHED. "AN ERROR IS PRESUMED PREJUDICIAL UNLESS WE CAN CONCLUDE THE ERROR COULD NOT HAVE RATIONALLY AFFECTED THE VERDICT." STATE V. DERYKE, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003); STATE V. CLARK, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001). "A CONVICTION SHOULD BE REVERSED WHERE THERE IS ANY REASONABLE POSSIBILITY THAT THE USE OF INADMISSIBLE EVIDENCE WAS NECESSARY TO REACH A GUILTY VERDICT." GULOY, 104 Wn.2d AT 426.

A REVIEWING COURT CANNOT DETERMINE WHAT EVIDENCE OR INSTRUCTION INFLUENCED THE JURY'S DECISION. DENNIS J. SWEENEY, AN ANALYSIS OF HARMLESS ERROR IN WASHINGTON: A PRINCIPLED PROCESS, 31 GONZ. L. REV., 277 (1995-96). "NO COURT KNOWS WHAT INFLUENCED A PARTICULAR JURY'S VERDICT OF GUILT IN ANY PARTICULAR CASE." UNITED STATES V. ANTONELLI FIREWORKS CO., 155 F.2d 631, 647 (2ND CIR. 1946) A JURY IS "MADE UP OF HUMAN BEINGS, WHOSE CONDITION OF MIND CANNOT BE ASCERTAINED BY OTHER HUMAN BEINGS. THEREFORE, IT IS IMPOSSIBLE FOR COURTS TO CONTEMPLATE THE PROBABILITIES ANY EVIDENCE MAY HAVE UPON THE MINDS OF THE JURORS." STATE V. ROBINSON, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). WHETHER AND TO WHAT EXTENT AN ERROR INFLUENCED A GIVEN JURY VERDICT IS THEREFORE AN EXERCISE

IN JUDICIAL SPECULATION— PERHAPS PRINCIPLED AND REASONED SPECULATION, BUT NONETHELESS SPECULATION, ABOUT WHAT A JURY WOULD OR WOULD NOT HAVE DONE WITH OR WITHOUT THE OFFENDING EVIDENCE, INSTRUCTION, OR COMMENT. WHILE MUCH HAS BEEN WRITTEN ABOUT WHAT DOES OR DOES NOT INFLUENCE JURIES, WHAT INFLUENCES A PARTICULAR CASE CAN SIMPLY NEVER BE DISCOVERED. "EVIDENCE OF A PRIOR CRIME IS ALWAYS PREJUDICIAL TO A DEFENDANT BECAUSE IT DIVERTS THE ATTENTION OF THE JURY FROM THE QUESTION OF THE DEFENDANT'S RESPONSIBILITY FOR THE CRIME CHARGED TO THE IMPROPER ISSUE OF HIS BAD CHARACTER." U.S. v. ALDRICH, 169 F.3d 526 (8TH CIR. 1999) THERE MAY [BE] SOME QUESTION AS TO WHETHER SUCH ERRONEOUS ADMISSION OF ER 404 (b) EVIDENCE IS OF CONSTITUTIONAL MAGNITUDE. THIS CASE CONCERNS THE ALLEDGEDLY ERRONEOUS ADMISSION OF ER 404 (b) EVIDENCE. IS IT DUBIOUS TO PRESUME THE ERROR IS "MANIFEST?" "AN ERROR IS 'MANIFEST' WHERE IT HAD 'PRACTICAL AND IDENTIFIABLE CONSEQUENCES IN THE TRIAL OF THE CASE.'" STATE v. KIRKPATRICK, 160 Wn.2d 873, 880, 161 P.3d 990 (2007) (QUOTING STATE v. STEIN, 144 Wn.2d 236, 240, 27 P.3d ~~990~~ KAS 184 (2001). "AN ERROR OF CONSTITUTIONAL MAGNITUDE IS PREJUDICIAL UNLESS THIS COURT CAN SAY BEYOND A REASONABLE DOUBT THAT THE ERROR DID NOT CONTRIBUTE TO THE GUILTY

KAS.

VERDICT OR THAT THE UNTAINTED EVIDENCE IS SO OVERWHELMING IT NECESSARILY LEADS TO GUILT." STATE v. ACOSTA, 101 Wn.2d 612, 683 P.2d 1069 (1984).

IV. CONCLUSION

INTRODUCTION OF MUG SHOTS CLEARLY HAS THE POTENTIAL TO VIOLATE A DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL. INTRODUCTION OF THIS TYPE OF INHERENTLY PREJUDICIAL EVIDENCE ISOLATES THE DEFENDANT FROM OTHERS IN THE COURTROOM AND INEVITABLY ASSOCIATES HIM OR HER WITH THE CHARGED CONDUCT, THUS TENDING TO BRAND HIM OR HER IN THE JURORS' EYES WITH AN UNMISTAKABLE MARK OF GUILT.... THE POTENTIAL FOR INFLUENCING JURORS' JUDGEMENT IS PARTICULARLY ACUTE WHEN BOOKING PHOTOS, MUG SHOTS AND OTHER UNFAIRLY PREJUDICIAL EVIDENCE IS USED AT TRIAL. THE "DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, MISLEADING THE JURY, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE (ER 403) WAS NOT OUTWEIGHED BY THE PROBATIVE VALUE OF THE EVIDENCE. THESE MUG SHOTS LIKELY REMAINED PROMINENT IN JURORS MEMORIES AND MAY HAVE DOMINATED THEIR PERCEPTION OF THE DEFENDANT.

"THE PRESUMPTION OF INNOCENCE, ALTHOUGH NOT ARTICULATED IN THE CONSTITUTION, 'IS A BASIC COMPONENT OF A FAIR TRIAL UNDER OUR SYSTEM OF CRIMINAL JUSTICE.'" STATE V. JAIME, NO. 82008-2 (WASH. 05/27/2010); STATE V. FINCH, 137 WN.2d 792, 844, 975 P.2d 967 (1999); QUOTING ESTELLE V. WILLIAMS, 425 U.S. 501, 503, 96 S.CT. 1691, 48 L.Ed.2d 126 (1976).

HERE, THE EVIDENCE WAS SO PREJUDICIAL AS TO WARRANT A REVERSAL OF THE CONVICTION; THE BODY OF EVIDENCE USED TO CONVICT SORTLAND WAS SOLELY THE PHOTOS. TWO OF THE THREE OF WHICH THE DEFENSE OBJECTED TO BECAUSE OF THEIR PREJUDICIAL NATURE. THE TRIAL COURT ABUSED ITS DISCRETION, TAKING AN UNTENABLE POSITION IN ADMITTING THESE PREJUDICIAL PHOTOS INTO THE TRIAL.

IT IS DIFFICULT TO IMAGINE CIRCUMSTANCES TO BETTER DEMONSTRATE A MISCARRIAGE OF JUSTICE THAN HAVING TO GUESS WHETHER A JURY WOULD HAVE IMPOSED THE SAME VERDICT HAD IT NOT BEEN GIVEN INHERENTLY PREJUDICIAL PHOTOGRAPHIC EVIDENCE.

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	
v.	)	**No. 41287-0-II**
KENNETH ANDREW SORTLAND, Appellant.	)	**CERTIFICATE OF SERVICE**

I, Kenneth A. Sortland, appellant, acting pro se in the above entitled cause, do hereby declare that I have served upon the following individuals in the manner indicated:

David Ponzoha--Court Clerk/Administrator
950 Broadway, Suite 300
Tacoma, WA. 98402-4454
(United States Mail, first class, postage prepaid)

Kathleen Proctor--Pierce County Prosecuting Atty Ofc
930 Tacoma Ave. S. Rm. 946
Tacoma, WA 98402-2171

The following documents:

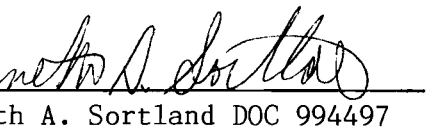
Appellant's pro se Statement of Additional Grounds for Review for Issues A and B.

Deposited in the Unit Officer's Station, by processing as Legal Mail.

I certify, under the penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 31st day of May, 2011.

Respectfully submitted,



Kenneth A. Sortland DOC 994497
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CERTIFICATE OF SERVICE