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Court of Appeals

Division III

State of Washington

No. 30176-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

KIETH PARKINS,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Parkins was deprived of his right to a fair jury trial under the Sixth Amendment and article I, sections 21 and 22 when the lead detective testified that images captured from video surveillance showed him committing the crimes.

2. The prosecutor violated Mr. Parkins' Fourteenth Amendment right to due process by mischaracterizing the burden of proof in rebuttal closing argument.

3. The police officer's stop of Mr. Parkins violated article I, section 7 of the Washington Constitution because it was not based on reasonable suspicion of criminal activity, and the trial court erred in denying the motion to suppress the evidence thereby obtained.

4. The convictions on counts two and four violate Mr. Parkins' Fourteenth Amendment right to due process because the State presented insufficient evidence that Mr. Parkins committed robbery as charged in those counts.

5. Mr. Parkins was deprived of his Fifth Amendment right to be free from double jeopardy because the jury instructions for several counts did not make clear that a separate act was required for each count.

6. It was impermissibly suggestive, in violation of the Fourteenth Amendment right to due process, for officers to escort Mr. Parkins in

handcuffs in front of witnesses who were about to testify on the key issue of identification.

7. The trial court abused its discretion in denying Mr. Parkins' motion for a new trial.

8. The sentencing court violated Mr. Parkins' Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a sentence of life without the possibility of parole based on prior convictions where the existence of the convictions and the identity of the perpetrator were found by a judge by a preponderance of the evidence.

9. The sentencing court violated Mr. Parkins' Fourteenth Amendment right to equal protection by imposing a sentence of life without the possibility of parole based on prior convictions where the existence of the convictions and the identity of the perpetrator were found by a judge by a preponderance of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because it is the jury's role to decide factual questions, a witness who expresses his opinion as to the guilt of the defendant violates the accused's constitutional right to a trial by jury. Where a jury instruction cannot cure the error, a new trial is required. Here, the lead detective testified that six still images taken from surveillance videos of

six different robberies showed Kieth Parkins committing each robbery. Although the trial court sustained an objection and instructed the jury to disregard the testimony, it denied a motion for a mistrial and a post-conviction motion for a new trial. Should this court reverse and remand for a new trial because the extraordinarily prejudicial testimony could not be cured by a jury instruction and deprived Mr. Parkins of a fair jury trial?

2. A prosecutor violates due process by telling the jury it must explain a reason for acquittal. Here, the prosecutor said, "The concept of reasonable doubt, it is not beyond all doubt. It is beyond a reasonable doubt and it should be a reason that you can explain and articulate to your fellow jurors." The court overruled Mr. Parkins' timely objection. Is reversal required because the prosecutor violated Mr. Parkins' right to due process and the trial court exacerbated the problem by overruling Mr. Parkins' objection?

3. Under article 1, section 7, an informant's tip may support an investigative seizure only if (1) the source of the information is reliable, and (2) there is a sufficient factual basis for the informant's tip or corroboration by independent police observation. A police officer stopped Mr. Parkins because at roll call the officer had been told that a person suspected in a series of robberies drove a white boxy pickup and dispatch had just informed him that a white male with a scruffy beard and a green

shirt was suspected of robbing a convenience store. The officer did not know the make, model, or license plate of the suspected vehicle, and no evidence was presented regarding the identity of the informant who reported the convenience store robbery, let alone that person's reliability or basis of information. Did the officer's seizure violate article I, section 7, requiring reversal and suppression of the evidence thereby obtained?

4. For any crime, the State bears the burden of proving the identity of the perpetrator beyond a reasonable doubt. Mr. Parkins was convicted of second-degree robbery in count two but the victim did not identify him as the perpetrator. Mr. Parkins was convicted of second-degree robbery in count four but the victim did not identify him in court and only chose him from a montage because he thought he "could have been" the robber. Although surveillance videos were presented they were grainy and the robber was wearing a disguise. Did the State present insufficient evidence to prove beyond a reasonable doubt that Mr. Parkins committed robbery as charged in counts two and four?

5. Because of the constitutional right to be free from double jeopardy, a court's instructions must clearly inform the jury that each crime requires proof of a different act. In this case, the "to convict" instructions for counts one, two, and three all told the jury it had a duty to convict Mr. Parkins if it found he committed the elements of robbery on

October 25, 2007, and the “to convict” instructions for counts four and six told the jury it had a duty to convict Mr. Parkins if it found he committed the elements of robbery on October 26, 2007. The instructions did not distinguish counts based on victims or locations, and there was no separate instruction telling the jury it had to agree on a separate and distinct act for each count. Did the three convictions for robbery on October 25 and two convictions for robbery on October 26 violate Mr. Parkins’ Fifth Amendment right to be free from double jeopardy?

6. It is impermissibly suggestive for law enforcement officers to escort a defendant into or out of court in handcuffs in front of witnesses who will testify about the identity of the perpetrator. Where such a procedure creates a substantial likelihood of misidentification, the witness’s testimony must be suppressed. Over Mr. Parkins’ objections, the trial court allowed officers to transport Mr. Parkins in handcuffs in front of key identification witnesses. Should this court remand for an evidentiary hearing to determine which witnesses saw Mr. Parkins being escorted in handcuffs and whether the procedure created a substantial likelihood of misidentification?

7. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court

violate Mr. Parkins' constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. Parkins had twice before been convicted of most serious offenses?

8. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are not necessary to further a compelling government interest. The government has an interest in punishing repeat offenders more harshly than first-time offenders, but for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others – like those at issue in the Persistent Offender Accountability Act – the existence of prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Does the Persistent Offender Accountability Act violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

C. STATEMENT OF THE CASE

Between October 25 and October 28, 2007, a series of robberies occurred in Spokane. At about 2:30 a.m. on October 28, Officer Paul Buchmann responded to a call regarding an alleged robbery at FairCo

Mini Mart on West Francis. Pretrial RP 30.¹ As Officer Buchmann drove toward that location, he saw a white boxy pickup truck driving the other way. Pretrial RP 31. Officer Buchmann turned around because he remembered being told at roll call that a white boxy pickup truck had been involved in recent robberies. Pretrial RP 32. He eventually stopped the truck, which was driven by Kieth Parkins. Pretrial RP 34-40. Mr. Parkins was arrested and eventually charged with three counts of first-degree robbery, five counts of second-degree robbery, two counts of second-degree attempted assault, and one count of attempt to elude a police vehicle. CP 20-22.

Detective Martin Hill was a lead investigator in the case. 5 RP 682, 684. At trial, he testified that he had been a law enforcement officer for 27 years, had been promoted several times, and had received training on "advanced" investigative techniques. 5 RP 683-84.

Detective Hill told the jury that he had viewed the six store videos from this case and concluded "that the same person had done all of the robberies." 5 RP 712. The prosecutor then handed the Detective exhibit 77, and asked him what it was. Detective Hill responded:

¹ The volume of transcripts for March 7, 8, 9, and 10 of 2011 will be cited herein as "Pretrial RP." The volume of transcripts for closing arguments will be cited as 3/23/11 RP. All other volumes will be cited according to the volume number on the cover (e.g. "1 RP" for volume I).

This is a piece of photo paper that has six separate images on it. Each one of the images is from a different robbery that had occurred. Each one of them shows the defendant, Mr. Parkins, facing forward at the camera, so he's looking at the camera.

5 RP 713. Mr. Parkins objected. The court sustained the objection. 5 RP

713. Mr. Parkins moved for a mistrial on the basis that the detective invaded the province of the jury. 5 RP 716. He noted that a jury instruction could not cure the problem because "I don't think you can unring a bell and I think all the instruction would do would be to exacerbate the problem even worse." 5 RP 716.

When a law enforcement official who, if you will, bears the prestige of the State, someone that the jury is going to probably highly respect based on his 28 years or 26 years of training or experience, they're going to accept what he said and that's not his function, that's their function. He's invaded their function and I think the only reasonable remedy is a mistrial.

5 RP 716-17. The prosecutor argued that she did not deliberately elicit this response, but Mr. Parkins noted that the statement was before the jury regardless. 5 RP 717. He further explained:

[T]he problem is that [Detective Hill] didn't even qualify it by saying in my opinion this is a person who has substantial similarities and features. There was absolutely no qualification. It was just flat out, these are pictures of Mr. Parkins, and you can't unring that. There's no limiting instruction that will unring that.

5 RP 717-18. "In all due respect, I just think in order for the system to work properly this Court has to declare a mistrial." 5 RP 718.

The court agreed the statement was improper but said, "This jury knows the State believes that's Mr. Parkins in the video. There's no doubt about that, that's why they brought the charges." 5 RP 719.

Mr. Parkins pointed out that identity was the main issue in the case, and it was one for the jury. He reiterated, "we're not saying [Detective Hill] deliberately did it but that doesn't change what happened and it can't be cured by an instruction." 5 RP 729.

The court recognized that Mr. Parkins had no opportunity to object prior to the statement, and that the statement was inadmissible and should not have been made. 5 RP 731-32. But the court ruled the error was not "sufficiently significant to warrant a mistrial." 5 RP at 733. The court instead gave a limiting instruction. 5 RP 738.

When the court instructed the jury, the "to convict" instructions it provided for second-degree robbery were exactly the same for counts one, two and three. CP 92, 98, 101. All three told the jury it had to find Mr. Parkins committed robbery on October 25, 2007. The counts were not distinguished based on victim, location, or any other alleged fact. Similarly, the "to convict" instructions for counts four and six both included a date of October 26, 2007, and did not specify victims or

locations. CP 93, 102. There was no instruction explaining to the jury that it had to agree unanimously on a separate and distinct act for each count. CP 77-113.

During rebuttal closing argument the prosecutor told the jurors that if they thought they had reasonable doubt they had to “explain and articulate” the reason to their fellow jurors. 3/23/11 RP 77. The trial court overruled Mr. Parkins’ timely objection to the comment, stating, “If you can’t explain the reason I don’t know where we go with that so I’m at a loss.” 3/23/11 RP 79.

The jury convicted Mr. Parkins of two counts of first-degree robbery, five counts of second-degree robbery, and one count of attempting to elude a police vehicle. CP 203-04.

Mr. Parkins moved for a new trial on several bases, including the prosecutor’s misconduct, the fact that some of the witnesses saw Mr. Parkins in shackles prior to testifying, and Detective Hill’s improper statement that Mr. Parkins was the perpetrator of the six robberies shown on surveillance videos. Mr. Parkins noted:

[N]one of the physical evidence submitted to the jury in the form of pictures and videos ever clearly showed a face for purposes of absolute identification. When coupling that obscuring of the face with the various height and weight descriptions – anywhere from 5’8” to 6’2”, and anywhere from 160lbs to 250lbs. – it can hardly be fair to characterize

the identification of evidence of the defendant herein to be overwhelming.

CP 151. Mr. Parkins also reminded the court that one of the eyewitnesses who identified Mr. Parkins in court had also identified another individual as the robber with 70% certainty on the day of the event. CP 151.

Mr. Parkins' attorney submitted an affidavit stating that during post-trial interviews "the jury made it extremely clear that they were very favorably impressed with Detective Hill." CP 131, 155. He argued Mr. Parkins could not receive a fair trial after the jury heard "Detective Hill, a man they obviously highly respected, utter the phrase that the person looking into the camera in these 6 photos was the defendant, Kieth Parkins." CP 155. The court denied the motion for a new trial. CP 199.

At sentencing, the State submitted certified copies of Mr. Parkins' prior convictions, and requested imposition a life sentence without the possibility of parole under the Persistent Offender Accountability Act ("POAA"). CP 167-94; 7 RP 968-69. The prosecutor expressed some misgivings about the mandatory sentence, stating, "we had several weeks of trial in this case and Mr. Parkins presented himself as a very respectful and pleasant person and it is a shame that we come to this portion, especially considering I believe he's cleaned up his life and gotten off drugs." 7 RP 968.

Mr. Parkins objected to the court's use of his prior convictions to impose a life sentence, and requested sentencing within the standard range. 7 RP 971. The court denied the request, found by a preponderance of the evidence that the State had proved the prior convictions, and sentenced Mr. Parkins to life without the possibility of parole. 7 RP 972-73.

Additional pertinent facts are set forth in the relevant argument sections below.

D. ARGUMENT

- 1. This Court should reverse the robbery convictions because Mr. Parkins was deprived of his right to a fair jury trial when the lead detective testified that images captured from video surveillance showed Kieth Parkins committing the crimes.**

Detective Hill testified that images from six different surveillance videos each showed Kieth Parkins committing the robberies at issue. The statement invaded the province of the factfinder and violated Mr. Parkins' constitutional right to a trial by jury. Although the court properly sustained Mr. Parkins' objection and issued a curative instruction, it denied his motion for a mistrial and post-conviction motion for a new trial. This court should reverse because this serious, prejudicial violation could not be cured by an instruction and deprived Mr. Parkins of a fair trial.

- a. The detective's testimony that Kieth Parkins committed six robberies invaded the province of the jury and violated Mr. Parkins' constitutional right to a trial by jury.

The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. Id. at 591. Witnesses "may not testify as to the guilt of defendants, either directly or by inference." State v. Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). Such testimony invades the province of the jury and violates the defendant's constitutional right to a trial by jury. Id. at 533.

In this case, Detective Hill violated Mr. Parkins' constitutional right to a trial by jury by testifying to his opinion regarding exhibit 77:

This is a piece of photo paper that has six separate images on it. **Each one of the images is from a different robbery that had occurred. Each one of them shows the defendant, Mr. Parkins, facing forward at the camera, so he's looking at the camera.**

5 RP 713 (emphases added).

- b. Because the violation was serious and incurable by an instruction, a new trial is required.

The trial court recognized that the detective's testimony was improper and instructed the jury to disregard it. However, as Mr. Parkins explained, the detective's testimony regarding his guilt was a "bell that could not be unrung." The statement was a serious violation of Mr. Parkins' right to a fair jury trial and was extremely prejudicial because identity was the main issue in the case and the jury had a high level of respect for the detective who identified Mr. Parkins as the perpetrator.

Courts evaluate three factors to determine whether an error warrants a new trial: (1) the seriousness of the error; (2) whether the improper statement was cumulative of evidence properly admitted; and (3) whether the error could be cured by an instruction. State v. Perez-Valdez, 172 Wn.2d 808, 856, 265 P.3d 853 (2011). This Court reviews the denial of a motion for mistrial for an abuse of discretion. Id. at 858.

The trial court abused its discretion in denying the motions for a mistrial and for a new trial. The error was extremely serious, was not cumulative, and was too prejudicial to be curable by an instruction.

First, there can be no question that the error was serious. See Perez-Valdez, 172 Wn.2d at 858 (finding "serious" irregularity where social worker vouched for victims' credibility). As explained above, it is

well-settled that a witness violates the defendant's constitutional right to a jury trial by testifying to the defendant's guilt, even indirectly. Here, the testimony was direct. The error was orders of magnitude more serious than in other cases because the detective told the jury Mr. Parkins was the one shown in six different videos, committing six strike offenses.

Compare Olmedo, 112 Wn. App. at 529 (reversing conviction for unlawful storage of anhydrous ammonia where crop advisor testified he did not believe the propane tanks at issue were approved for storage of the compound).

Second, the statement was not merely cumulative. The detective was the only witness who told the jury Mr. Parkins was guilty of all six robberies captured on video. Otherwise the identification testimony as to each separate crime varied greatly. The victims of some robberies described the perpetrator as only 5'8", while the victims of other robberies described the perpetrator as 5'11", and the victims of another robbery described the perpetrator as 6'2". 1 RP 11, 82; 2 RP 196; 3 RP 364, 410. The victims of some robberies described the perpetrator as clean-shaven, while the victims of other robberies described the perpetrator as having a gray or "light blond" beard, while yet another described the perpetrator as having a red beard. 2 RP 228, 244, 289, 343. Although some witnesses identified Mr. Parkins as the perpetrator in court, the victims of some

robberies did not. 1 RP 19, 78; 2 RP 204, 293; 3 RP 369, 394, 412. And the victim of at least one robbery could not identify anyone as the perpetrator either in a montage or at trial. 1 RP 72-83. Yet Detective Hill told the jury the perpetrator was the same for all six robberies, and that it was Mr. Parkins.

Third, the error could not be cured by an instruction. Improper testimony regarding a defendant's guilt is particularly prejudicial if uttered by a law enforcement officer, because an officer's statement carries an "aura of reliability." Montgomery, 163 Wn.2d. at 595 (quoting State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Indeed, this jury told Mr. Parkins' attorney post-trial that they had a great deal of respect for Detective Hill. CP 131, 155. Such respect is not improper, but it means the testimony is all the more prejudicial.

The State argued, and the trial court agreed, that "[t]his jury knows the State believes that's Mr. Parkins in the video. There's no doubt about that, that's why they brought the charges." 5 RP 719. But our supreme court has rejected such reasoning:

The State argues the officers' opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit opinions on [guilt].

Montgomery, 163 Wn.2d at 595. Furthermore, the fact that jurors tend to give more weight to police testimony is particularly problematic when police testify that the defendant is guilty, because “police officers’ opinions on guilt have low probative value.” Id. “[T]heir area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt.” Id.

The Supreme Court’s decision Reed is instructive. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). There, in addition to making improper emotional appeals, the prosecutor called the defendant a liar during closing argument and expressed his opinion regarding the defendant’s guilt, stating, “He’s a cold murder two. It’s cold. There is no question about murder two.” Id. at 144. The trial court sustained the defendant’s objection and struck the improper comments, but the Supreme Court held a new trial was required anyway because of the prejudice caused by the comments. Id. at 144, 146; see also State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (reversing for improper comment by detective because even though there is “a possibility that a curative instruction can mitigate the taint, the bell is hard to unring”). The same is true here.

The testimony in this case was especially prejudicial because Detective Hill told the jury not only that Mr. Parkins was guilty, but that

he was guilty of all six robberies shown in the surveillance videos. The jury acquitted Mr. Parkins of one of the two robberies for which there was no surveillance video. It may well have acquitted him on additional counts if Detective Hill had not told them Mr. Parkins was the person committing those crimes.

For instance, Aischa Bartleson, the victim of the Divine's Gas Station robbery, testified that the perpetrator of that robbery was only 5'8" or 5'9". 1 RP 82. She did not identify Mr. Parkins as the perpetrator, either in court or in a montage. 1 RP 78. The State introduced the surveillance video as an exhibit, but the robber wore a dark cap and a nylon over his face. 1 RP 76, 78.

As to robbery of the Zip Trip on North Hamilton, victim Melody Roper selected two different people from the photographic montage, and said she was only 70-75% sure that Mr. Parkins was the perpetrator. 2 RP 205. She also said that unlike Mr. Parkins, the person who robbed her store had a red beard. 2 RP 228.

Jason Beagle said that the person who robbed his Zip Trip store on Wellesley and Monroe was only 25-35 years old and had no facial hair. 2 RP 244, 250. At the time of that robbery, Mr. Parkins was almost 39 years old and had a "scruffy beard." CP 203; 3 RP 523. Mr. Beagle did not identify Mr. Parkins as the perpetrator in court, and said he chose the

person in the montage who he thought "could have been" the robber. 3 RP 249.

When the victim of the Hollywood Video robbery, Lani Arquero, saw the photographic montage, she said that two of the people had "eyes similar to the suspect," but "I really can't pick out anyone who is the suspect." 2 RP 295.

The various eyewitnesses of the Wall Street Diner robbery (count seven) also provided different descriptions of the robber. Although Jessica Walton identified Mr. Parkins as the perpetrator, Clifton Hardee, Diana Hardee, and Dawn Rayburn did not. 2 RP 335, 344; 3 RP 369, 385.

Clifton Hardee described the perpetrator as 6'2" with light blond facial hair. 2 RP 343. Dawn Rayburn said the robber was 5'10". 3 RP 382.

Justin Patchin said he was 70% sure a person in a photomontage who was not Mr. Parkins was the robber. 3 RP 459-60.

In light of the above, the jury may well have acquitted Mr. Parkins on some or all of these counts absent Detective Hill's improper and prejudicial testimony. Accordingly, the trial court abused its discretion in ruling that Detective Hill's testimony that Mr. Parkins was the person who committed the six robberies was not "sufficiently significant to warrant a mistrial." 5 RP at 733. The testimony was a serious violation of Mr. Parkins' right to a fair trial by jury, and was extraordinarily prejudicial.

This Court should reverse all of the robbery convictions and remand for a new trial.

2. This Court should reverse the robbery convictions because the prosecutor violated Mr. Parkins' right to due process by telling the jurors they had to "explain and articulate" a reason in order to acquit.

- a. The prosecutor mischaracterized the reasonable doubt standard but the trial court overruled Mr. Parkins' timely objection.

During rebuttal closing argument, the prosecutor said, "The concept of reasonable doubt, it is not beyond all doubt. It is beyond a reasonable doubt and it should be a reason that you can explain and articulate to your fellow jurors. A reason..." 3/23/11 RP 77. At this point Mr. Parkins objected. He noted that Division Two of this Court had held that such argument constituted prosecutorial misconduct. 3/23/11 RP 77-78. He alerted the court that the prosecutor had put up a PowerPoint slide with the same improper message. 3/23/11 RP 78. He reiterated that that this Court had held, "the jurors can have reasonable doubt for any reason, they don't have to name a specific reason." 3/23/11 RP 78.

The prosecutor claimed the argument was proper, and mentioned that she learned it at some sort of prosecutors' school. 3/23/11 RP 78. The court overruled Mr. Parkins' objection, stating, "If you can't explain the reason I don't know where we go with that so I'm at a loss." 3/23/11

RP 79. The court subsequently denied a motion for a new trial on this basis. 7 RP 963-65; CP 199.

b. The prosecutor's argument constitutes flagrant misconduct and violates due process.

Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is misconduct for a prosecutor to suggest a shift in the burden of proof during a criminal trial. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney "would not have overlooked any opportunity to present admissible, helpful evidence"). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A prosecutor commits flagrant misconduct by telling jurors that in order to acquit they have to "be able to explain or specify a reason for their doubt." State v. Evans, 163 Wn. App. 635, 645, 260 P.3d 934

(2011); accord State v. Johnson, 158 Wn. App. 677, 684-86, 243 P.3d 936

(2010), review denied 249 P.3d 1029 (2011); State v. Venegas, 155 Wn.

App. 507, 524-25, 228 P.3d 813 (2010), review denied 245 P.3d 226.

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find the defendant not guilty, the prosecutor made it seem as though the jury had to find the defendant guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper.

Venegas, 155 Wn. App. at 524. The argument “subvert[s] the presumption of innocence” and shifts the burden of proof by implying “that the defendant bore the burden of providing a reason for the jury not to convict him.” Johnson, 158 Wn. App. at 684.

Here, as in Evans, Venegas, and Johnson, the prosecutor committed misconduct and violated Mr. Parkins’ right to due process by telling the jurors they had to “explain and articulate” a reason if they thought there was reasonable doubt as to Mr. Parkins’ guilt. Furthermore, the prosecutor exacerbated the problem by purporting to accept the burden of proof just before shifting the burden and undermining the presumption of innocence. The prosecutor said, “The State has the burden of proof and we accept that burden of proof.” 3/23/11 RP 77. But shortly thereafter, she engaged in the misconduct described above. As in Evans, the prosecutor here “cleverly mixed requests for the jury to hold me to the

burden of proof exactly with subtle twists of the jury's role and the State's burden of proof." Evans, 163 Wn. App. at 646. As in Evans, the prosecutor's conduct here "overstepped the bounds of ethical advocacy." Id.

c. The prosecutorial misconduct prejudiced Mr. Parkins, requiring reversal of the robbery convictions.

Because the prosecutor violated Mr. Parkins' constitutional right to due process, the State must bear the burden of proving beyond a reasonable doubt the error did not contribute to the verdict obtained. State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995). As to the robbery convictions, the State cannot meet its burden. As explained above, the eyewitness descriptions of the robber varied significantly in terms of height, weight, and hair color. Several witnesses chose other people as possible perpetrators when presented with a montage of suspects. Given the conflicting evidence on identity, the State cannot show its misconduct was harmless.

The prejudice was compounded by the trial court's refusal to sustain Mr. Parkins' objection. The court's endorsement of the prosecutor's statement that the jurors should "explain and articulate" a reason for acquittal placed the authority of law behind the misstatement. The case therefore stands in contrast to Warren, in which the trial court

sustained an objection and provided a curative instruction. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

The prosecutor in Warren had told the jury that the beyond-a-reasonable-doubt standard does not mean you give the defendant the benefit of the doubt. Id. at 27. The Supreme Court held the comment constituted flagrant misconduct that undermined the constitutional right to the presumption of innocence and proof beyond a reasonable doubt. Id. The court affirmed only because the trial court “interrupted the prosecutor’s argument to give a correct and thorough curative instruction.” Id. at 28. But here, the court did not interrupt to give a curative instruction. Indeed, the court seemed surprised when Mr. Parkins’ attorney interrupted in order to object. Thus, unlike in Warren, the prejudice was not cured by the trial court and reversal is required. See also Evans, 163 Wn. App. at 646-46 (reversing even though no objection below where prosecutor “essentially told jurors that they had to be able to explain or specify a reason for their doubt”); Johnson, 158 Wn. App. at 686 (same).

3. The evidence taken from Mr. Parkins’ car should have been suppressed because it was obtained pursuant to an unconstitutional seizure.

As a result of a Terry stop, police obtained numerous pieces of evidence from Mr. Parkins’ car, including cash, cigarettes, a beanie hat

with pantyhose inside it, a pair of pantyhose with a leg cut off, a pair of gloves, and a CO₂ cartridge. 5 RP 684-704. Mr. Parkins moved to suppress the evidence, but the trial court denied the motion. CP 23-36; Pretrial RP 20-71. This Court should reverse because the police officer who stopped Mr. Parkins did not present specific articulable facts sufficient to create reasonable suspicion to support the stop as required under the Fourth Amendment and article I, section 7.

- a. Under both the state and federal constitutions, the Terry stop is an exception to the warrant requirement, and as such must be jealously and carefully drawn.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). One narrow exception to the warrant requirement is the Terry stop. See Terry v. Ohio, 392 U.S. 1, 21, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Under Terry, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based

on specific articulable facts, that the individual is engaging in criminal activity. Id.

As an exception to the warrant requirement, the Terry stop must be narrowly construed and “jealously and carefully drawn.” State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The Terry exception must be limited to those situations in which there is a “substantial possibility” that a crime has been committed and that the individual detained is the offender. Martinez, 135 Wn. App. at 180; 4 Wayne R. LaFave, Search and Seizure § 9.5(b) at 489 (4th ed. 2004). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” State v. O’Cain, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” Martinez, 135 Wn. App. at 180; State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997).

The Terry exception is more narrowly construed under our state constitution than under the Fourth Amendment. See State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure by clear and convincing

evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

An appellate court reviews the constitutionality of a warrantless stop de novo. Martinez, 135 Wn. App. at 179.

- b. Where a Terry stop is based on an informant's tip, the State must prove the informant and information provided are reliable.

Although the Terry case involved a stop based on the personal observations of police officers, in some circumstances an informant's tip may create the required reasonable suspicion. Adams v. Williams, 407 U.S. 143, 146-47, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972). This occurs only if the tip exhibits sufficient indicia of reliability. Alabama v. White, 496 U.S. 325, 326-27, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990); State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). Under our state constitution, "indicia of reliability" means: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation. State v. Jones, 85 Wn. App. 797, 799-800, 934 P.2d 1224 (1997) (citing Sieler, 95 Wn.2d at 47-49). In other words, under article I, section 7, the State must prove that both "(1) the informant is reliable, and (2) the informant's tip is reliable." State v. Hart, 66 Wn. App. 1, 8, 830 P.2d 696 (1992) (citing Sieler, 95 Wn.2d at 48) (emphases in original).

- c. The Terry stop was unconstitutional because there was no evidence that either the informant or the tip was reliable and the fact that Mr. Parkins was driving a “white boxy pickup” is insufficient to create reasonable suspicion of criminal activity.

Officer Buchmann testified that as he was driving toward the FairCo MiniMart to respond to a call reporting a robbery, he turned around because he saw a “white boxy pickup” driving the other direction. Pretrial RP 31. At roll call that morning, he and his colleagues had been told that a man who drove such a vehicle was suspected in a string of robberies. Pretrial RP 62. This information alone, of course, would not have been sufficient to seize Mr. Parkins. Officer Buchmann did not know the make, model, or license plate of the car suspected in the robberies – only that it was “an older boxy style white pickup.” Pretrial RP 45, 62.

Officer Buchmann testified that he also stopped Mr. Parkins’ car because dispatch had informed him that the FairCo robber was a white male with a scruffy beard wearing a green shirt, and Mr. Parkins matched that description. Pretrial RP 30-31, 59. But the State presented no evidence whatsoever regarding who provided this information, whether that person was reliable, or the basis of the information provided to dispatch. Presumably the information was obtained from a 911 call, but no 911 call was offered during the CrR 3.6 hearing. Absent any evidence

of the identity of the informant, his or her reliability, and the basis for the information, the State did not prove the tip had sufficient indicia of reliability to support the stop.

This Court has reversed in several cases with similar facts. In Walker, a police dispatcher reported two individuals going door-to-door asking for people who did not live in the area. State v. Walker, 66 Wn. App. 622, 624, 834 P.2d 41 (1992). The dispatcher described the race, gender, and clothing of the suspects. Id. When a police officer responded to the area, he saw someone who matched the description provided by dispatch. That person appeared nervous when he saw the officer. The officer asked the man some questions, frisked him, and found stolen jewelry later used to convict the man of burglary. Id. at 624-25.

This Court reversed the conviction because the seizure was unconstitutional. The court noted that “dispatch did not identify the informant,” id. at 625, and did not indicate the basis of the informant’s information. Id. at 628. Furthermore, “[t]he only corroborative observation made by the officer was that the defendant appeared startled when he saw the officer and attempted to evade him by turning onto a deadend street.” Id. at 629.

Given the informant’s unknown trustworthiness, the absence of observations corroborating the tip, and the vagueness of the tip itself, we hold that the informant’s tip

lacked sufficient indicia of reliability to provide the police with the requisite reasonable suspicion to justify the investigatory stop.

Id.

This Court similarly reversed for an unconstitutional seizure in State v. Vandover, 63 Wn. App. 754, 822 P.2d 784 (1992). There, officers responded to a radio report that “a man in a gold colored Maverick was brandishing a sawed-off shotgun” in front of a restaurant. Id. at 755. The report was based on an anonymous telephone tip. Id. When officers responded to the scene, they saw a man getting into a similar car, which they followed and eventually stopped. The police found a shotgun in the car, in addition to 13 grams of cocaine. Id. at 756. The defendant was convicted of possession with intent to deliver, but this Court reversed. This Court noted, “The record is completely devoid of any evidence as to what the basis of the anonymous tipster’s knowledge was, nor does it contain any evidence showing that this basis was otherwise reliable.” Id. at 759-60. Furthermore, “[t]he police officers made no corroborative observations pointing to the existence of criminal activity.” Id. at 760. Thus, the investigatory stop was unreasonable, and the evidence should have been suppressed. Id.

Here, as in Walker and Vandover, no evidence was presented regarding the identity of the informant, his or her reliability, or the basis of

the tip. Also as in these cases, the police officer observed only innocuous facts, not criminal activity. Accordingly, as in Walker and Vandover, this Court should reverse and remand for suppression of the evidence.

The State argued that even if the above facts did not justify the seizure, the seizure was justified by Mr. Parkins' attempt to elude the officer. But the attempt to elude occurred after the officer had already effected a seizure by activating his lights and sirens. State v. Young, 135 Wn.2d 498, 505-10, 957 P.2d 681 (1998) (rejecting federal rule that seizure does not occur until suspect submits to show of authority); Cf. State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (arrest occurred when officer told suspect he was under arrest, even though suspect subsequently fled and was not physically detained until later). A seizure must be justified at its inception, not by post hoc actions. State v. Hopkins, 128 Wn. App. 855, 865, 117 P.3d 377 (2005).²

In sum, Officer Buchmann's seizure of Mr. Parkins was unconstitutional because it was not based on reasonable suspicion of criminal activity. This Court should reverse all of the robbery convictions and remand for suppression of the evidence obtained from Mr. Parkins' car.

² For the same reason, neither the plain-view exception nor the subsequent warrant can cure the unconstitutional intrusion.

4. The State presented insufficient evidence to support the convictions on counts two and four.

- a. Due process requires the State to prove each element of the offense charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Winship, 397 U.S. at 364. A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (internal citations omitted). "[I]t is critical that our criminal law not

be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned.” Id.

b. The State failed to prove Mr. Parkins committed robbery as charged in counts two and four.

Mr. Parkins was convicted of second-degree robbery in count two for the robbery of Divine’s Gas Station and Convenience Store. CP 10-21, 204. He was convicted of second-degree robbery in count four for the robbery of the Zip Trip on Wellesley and Monroe. CP 21, 204.

Insufficient evidence supports these convictions.

Mr. Parkins does not deny that the State presented sufficient evidence that someone robbed these stores. However, the State failed to prove Mr. Parkins was the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

As to count two, Aischa Bartleson testified that she was the victim of a robbery when she was working at Divine’s. 1 RP 72-75. However, she could not identify the perpetrator. She said, “he had a dark cap and nylon over his face, dark sweatshirt and gloves. And so I didn’t see what he looked like.” 1 RP 76. She said she would not be able to recognize the robber if she ever saw him again. 1 RP 78.

As to count four, Jason Beagle said that the person who robbed his Zip Trip store on Wellesley and Monroe was only 25-35 years old and had no facial hair. 2 RP 244, 250. At the time of that robbery, Mr. Parkins was almost 39 years old and had a "scruffy beard." CP 203; 3 RP 523. Mr. Beagle did not identify Mr. Parkins as the perpetrator in court, and said he chose the person in the montage who he thought "could have been" the robber. 3 RP 249.

Although surveillance videos were admitted as exhibits for both counts, they were grainy and the robber was wearing a disguise. 1 RP 76, 80; 2 RP 246-47; 3/23/11 RP 83. The State failed to present sufficient evidence to prove Mr. Parkins committed robbery as charged in counts two and four.

c. The remedy is reversal and dismissal with prejudice.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Parkins committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)

(citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the failure of proof is dismissal of the convictions on counts two and four.

5. The jury instructions violated Mr. Parkins' Fifth Amendment right to be free from double jeopardy because they allowed the jury to convict Mr. Parkins of multiple counts for the same act.

The "to convict" instructions for second-degree robbery were exactly the same for counts one, two and three. CP 92, 98, 101. All three told the jury it had a duty to convict if it found Mr. Parkins committed robbery on October 25, 2007. The counts were not distinguished based on victim, location, or any other alleged fact. Similarly, the "to convict" instructions for counts four and six both included a date of October 26, 2007, and did not specify victims or locations. CP 93, 102. There was no instruction explaining to the jury that it had to agree unanimously on a separate and distinct act for each count. CP 77-113. The erroneous instructions violated Mr. Parkins' Fifth Amendment right to be free from double jeopardy, requiring reversal of two of the three convictions for October 25 robberies, and one of the two convictions for October 26 robberies.

- a. To protect the constitutional right to be free from double jeopardy, a court's instructions must clearly inform the jury that each count requires proof of a different act.

The Fifth Amendment to the United States Constitution provides, "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution states, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9.

A defendant's right to be free from double jeopardy is violated if he is convicted of offenses that are identical both in fact and in law. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

Because of the constitutional right to be free from double jeopardy, a court's instructions must clearly inform the jury that each crime requires proof of a different act. State v. Mutch, 171 Wn.2d 646, 663, 254 P.3d 803 (2011) (citing State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). Where multiple counts are alleged, the jury must be provided "sufficiently distinctive 'to convict' instructions or an instruction that each count must be based on a separate and distinct criminal act." Id. at 662

(citing State v. Carter, 156 Wn. App. 561, 567, 234 P.3d 275 (2010); State v. Berg, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008)).

A double-jeopardy violation is a manifest error affecting a constitutional right which may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). This Court reviews challenges to jury instructions de novo. Berg, 147 Wn. App. at 931.

In the absence of proper jury instructions, reversal is required unless it was “manifestly apparent” that the conviction for each count was based on a separate act. Mutch, 171 Wn.2d at 664 (emphasis in original). Review is “rigorous” and it will be “a rare circumstance” where the appellate court should affirm despite deficient jury instructions. Id. at 664-665.

- b. Mr. Parkins’ right to be free from double jeopardy was violated because the jury instructions did not make clear that each count required proof of a separate act.

The instructions in this case were deficient, and it is not manifestly apparent that the jury convicted Mr. Parkins based on separate acts for each count. The “to convict” instructions for second-degree robbery on counts one, two, and three were nearly identical. Each instructed the jury to convict Mr. Parkins if it found he committed the elements of robbery on

October 25, 2007. The instructions did not inform the jury that it had to find a separate robbery for each count, and did not include any distinguishing characteristics like victim or location.

The instruction for count one provided:

To convict the defendant of the crime of robbery in the second degree, under Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 25, 2007, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 98 (Instruction 19). Similarly, the instruction for count two provided:

To convict the defendant of the lesser crime of robbery in the second degree, under Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 25, 2007, the defendant unlawfully took personal property from the person or in the presence of another;

- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 92 (Instruction 13). And the instruction for count three stated:

To convict the defendant of the crime of robbery in the second degree, under Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 25, 2007, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 101 (Instruction 23). Similarly, the instructions for counts four and six both specified a date of October 26, 2007, and did not distinguish themselves based on victim or location. CP 93 (Instruction 14, count six); CP 102 (Instruction 24, count four).

Not only are the “to convict” instructions themselves insufficiently distinct, but there was no separate instruction telling the jury it had to find unanimously that Mr. Parkins committed a different act for each count. CP 77-113. And although the information properly distinguished each count based on victim and location, the information was not filed as an exhibit for the jury to view during deliberations. Even if it had been, the “to convict” instructions did not reference the information by, for example, describing the counts “as charged”. The problem here was even worse than in other cases, because in contrast to Mutch, Borsheim, and Berg, the jury here was not even given the following instruction:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 77-113; see Mutch, 171 Wn.2d at 662-63. Accordingly, this is not the “rare” case where the deficient instructions can be said to be harmless. See id. at 665. Because it is not manifestly apparent that the jury

convicted Mr. Parkins based on a separate act for each count, the convictions on two of the counts for October 25 and one count for October 26 should be reversed. See Berg, 147 Wn. App. at 935.

6. This Court should remand for an evidentiary hearing to determine whether Mr. Parkins' right to due process was violated when witnesses saw him in shackles prior to identifying him as the perpetrator.

- a. Law enforcement officers escorted Mr. Parkins to court in shackles in front of witnesses who subsequently identified him at trial as the perpetrator.

On the second day of trial, Mr. Parkins' attorney objected to officers taking Mr. Parkins in and out of the courtroom in handcuffs in front of witnesses who were about to testify regarding the identification of the perpetrator. 2 RP 303. He said during the short breaks he wanted Mr. Parkins to remain in the courtroom to avoid having witnesses see him in shackles being escorted by law enforcement officers. 2 RP 303. The court responded that if the transport officers needed a break, they should be able to take their break and take Mr. Parkins with them. 2 RP 303-04. Mr. Parkins emphasized that it did not matter if witnesses saw him in handcuffs after they testified, but if they saw him in handcuffs before they testified "[i]t provides a stronger psychological motive for a witness to take the stand and now say they recognize him when, you know,

previously they couldn't out of a photo ID a couple of days after the incident." 2 RP 304.

The court said, "I'm simply not aware of any need to exclude witnesses from the corridors while the defendant is being escorted to or from." 2 RP 305. Mr. Parkins could not cite a case off the top of his head but stated "it just certainly makes me uncomfortable." 2 RP 305. The court responded, "I'm not going to tell the witness based on comfort factor of counsel that there's an issue that means they're going to stay somewhere excluded from the general common areas of the court." 2 RP 305.

After he was convicted, Mr. Parkins filed a motion for a new trial on multiple grounds, one of which was that law enforcement officers escorted him in shackles in front of witnesses who were about to testify at trial on the critical issue of identification. CP 141-42, 145; 7 RP 941. The court said, "The logistics are such that the way they bring them is the way they're brought and the way they are brought is in keeping with the safety concerns in the common ways of all kinds of people in the courthouse." 7 RP 960. The court clarified, "I'm not saying that any of the officers or persons in the courthouse would have been at risk of Mr. Parkins. The point is there is a way to do it, that is the way to do it, and I don't think

that's a question the Court has any concern about or reason to be concerned about." 7 RP 960-61.

- b. It was impermissibly suggestive to allow witnesses who were about to testify about the identity of the perpetrator to view Mr. Parkins in shackles escorted by police officers.

"It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). Restraints "abridge important constitutional rights, including the presumption of innocence." State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). Because restraints imply guilt, it is impermissibly suggestive for law enforcement officers to escort a defendant in shackles before key identification witnesses. United States v. Emanuele, 51 F.3d 1123, 1130 (3d Cir. 1995). Such witnesses must not be allowed to testify regarding the identification of the perpetrator if the impermissibly suggestive confrontation created a substantial likelihood of misidentification. Id.

In Emanuele, government witnesses sitting outside the courtroom "saw defendant led from the courtroom in manacles by U.S. Marshals." Id. at 1127. The court held, "to walk a defendant – in shackles and with a

U.S. Marshal at each side – before key identification witnesses is impermissibly suggestive.” Id. at 1130.

Here, as in Emanuele, the escort procedure was impermissibly suggestive. According to Mr. Parkins, he was repeatedly “paraded in front of the State’s witnesses in handcuffs outside the courtroom.” CP 141-42; see also CP 159. Mr. Parkins believed “this happened to him in the presence of the majority of the State’s witnesses.” CP 142.

The trial court erred in dismissing Mr. Parkins’ initial objection and denying the motion for a new trial on the basis that this is simply the way it is done. The judge acknowledged that Mr. Parkins posed no safety threat. But shackling must be based on individualized determinations of danger. Hartzog, 96 Wn.2d at 400-01. If there were safety concerns, the court was required to impose the least restrictive alternative to having armed officers parade Mr. Parkins in shackles before identification witnesses. See id. at 401; Finch, 137 Wn.2d at 855 (“There is no indication in the record why the Defendant could not have been brought in and out of the room outside the presence of the jury”). The court did not give an adequate reason for why the witnesses could not be told to wait somewhere other than the place the officers were escorting Mr. Parkins, or why Mr. Parkins could not have been escorted at a time when witnesses were not present. The court was required to implement an alternative

solution because having law enforcement officers escort a shackled defendant in front of identification witnesses is impermissibly suggestive. Emanuele, 51 F.3d at 1130.

- c. This Court should remand for an evidentiary hearing on whether the impermissibly suggestive confrontation created a substantial likelihood of misidentification.

Because the trial court incorrectly ruled this procedure was not impermissible, it did not reach the second step of the analysis: whether the impermissibly suggestive confrontation created a substantial likelihood of misidentification. The analysis must be performed for each witness. In Emanuele, for example, the court determined that the impermissibly suggestive procedure of escorting the handcuffed defendant before witnesses created a substantial likelihood of misidentification with respect to the witness who had not previously chosen the defendant from a photographic montage, but not as to the witness who had previously identified him with almost 100% certainty. Emanuele, 51 F.3d at 1131-32. This Court should remand for an evidentiary hearing on the issue in this case. See Finch, 137 Wn.2d at 855 (Supreme Court remanded for hearing on extent to which jury could see that defendant was physically restrained). On remand, the trial court should determine which witnesses saw Mr. Parkins escorted in handcuffs before they testified, whether these

witnesses had previously selected Mr. Parkins as the perpetrator with a high level of certainty, and, for each witness, whether the impermissibly suggestive procedure created a substantial likelihood of misidentification. Based on these findings, the court should evaluate whether a new trial is warranted on one or more counts.

7. The court violated Mr. Parkins' Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the court's finding, by a preponderance of the evidence, that Mr. Parkins had twice previously been convicted of "strike" offenses.

- a. Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Winship, 397 U.S. at 364. The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment – whether or not the fact is labeled an “element.” Apprendi, 530 U.S. at 490.

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. (internal citations omitted).

[A]ny possible distinction between an “element” of a felony offense and a “sentencing factor” was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (internal citations omitted). Here, the prior convictions found by the court which increased Mr. Parkins’ sentence to life without the possibility of parole were elements of the offense which were required to be proved to a jury beyond a reasonable doubt .

- b. Because Mr. Parkins’ prior convictions increased his maximum sentence, he had a right to have a jury determine beyond a reasonable doubt that he committed the prior offenses.

Absent the court’s finding, by a preponderance of the evidence, that he committed “strike” offenses on two prior occasions, Mr. Parkins would not have been subject to a sentence of life without the possibility of parole. The jury verdict alone does not support a life sentence. Because the facts used to impose the sentence were not found by a jury beyond a

reasonable doubt, Mr. Parkins' Sixth and Fourteenth Amendment rights were violated.

The State may argue that the facts that increased Mr. Parkins' sentence fall within a "prior conviction exception." See Appendi, 530 U.S. at 489. This argument overlooks important distinctions and developments in United States Supreme Court jurisprudence.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).³ In Appendi, the Court recognized that there was no need to explicitly overrule Almendarez-Torres in order to resolve the issue before it, but stated, "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. The Appendi Court described Almendarez-Torres as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a

³ Mr. Parkins understands that the Washington Supreme Court has declined to apply Appendi in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules Almendarez-Torres. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); State v. Wheeler, 145 Wn.2d 116, 117, 34 P.3d 799 (2001). Mr. Parkins respectfully contends the time to do so has arrived and urges this Court to take the first step. See, e.g., State v. Anderson, 112 Wn. App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions).

reasonable doubt each fact that exposes the defendant to an increased penalty. Apprendi, 530 U.S. at 487.

Justice Thomas, a member of the 5-justice majority in Almendarez-Torres, later changed his mind. His Apprendi concurrence was a dissertation on the historical practice of requiring the State to prove every fact, “of whatever sort, including the fact of a prior conviction,” to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, “a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.” Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring).

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. First, in Almendarez-Torres, the defendant had admitted the prior convictions. 530 U.S. at 488. Mr. Parkins did not admit his prior convictions. 7 RP 971. Second, the issue in Almendarez-Torres was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 488; Almendarez-Torres, 523 U.S. at 247-48. Third, Almendarez-Torres dealt with the “fact of a prior conviction.” Apprendi, 530 U.S. at 490. But it was not the simple “fact” of the prior convictions that increased Mr. Parkins’ punishment; it was the “types” of prior

convictions that mattered. In order to impose a life sentence under the POAA, the State must prove the defendant has been convicted of “most serious” offenses on two prior occasions. RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the Almendarez-Torres court noted the fact of prior convictions triggered an increase in the maximum permissive sentence: “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Accordingly, even if Almendarez-Torres were still good law, it would not apply here.

In a recent Division Two case Judge Quinn-Brintnall recognized that U.S. Supreme Court precedent requires the State to prove prior “strike” offenses to a jury beyond a reasonable doubt. State v. McKague, 159 Wn. App. 489, 525-35, 246 P.3d 558 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part) review granted and affirmed on other grounds, 172 Wn.2d 802. Although the Washington Supreme Court has rejected the argument Mr. Parkins makes here, Judge Quinn-Brintnall noted that subsequent U.S. Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in Apprendi and

invalidated our State's intervening caselaw. McKague, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting) (citing Blakely, 542 U.S. at 303-04, and Cunningham v. California, 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)). Under recent U.S. Supreme Court cases, the "prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." Id. at 535. This Court, like Judge Quinn-Brintnall, should follow U.S. Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

- c. Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range.

The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Mr. Parkins. The imposition of a sentence not authorized by the jury's verdict requires reversal. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). Mr. Parkins asks this Court to reverse his sentence and remand for imposition of a standard-range sentence.

8. The classification of the persistent offender finding as a “sentencing factor” that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

- a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. amend. XIV; Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. “[T]he most elemental of liberty interests [is] in being free from physical detention by one’s own government.” Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541; Cf. In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of

due process challenge, because civil commitment constitutes “a massive curtailment of liberty”).

- b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146,

52 P.3d 26 (2002). And defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some “elements” and others “sentencing factors.”

Where prior convictions which increase the maximum sentence available are classified as “elements” of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn. App. 456, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

But where, as here, prior convictions which increase the maximum sentence available are classified as “sentencing factors,” they need only be proved to the judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers “elements,” the legislature has never labeled the fact at issue here a “sentencing factor.” Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating “penalty” for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years “shall be punished under RCW ch. 9.94A”); State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (purpose of POAA is to “reduce the number of serious, repeat offenders by tougher sentencing”).

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts, because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might

be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for precisely the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offense of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprived Mr.

Parkins of this basic liberty; it subjected him to life in prison without the possibility of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

As the Supreme Court explained in Apprendi, “merely using the label ‘sentence enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.” Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” Skinner, 316 U.S. at 542. This Court should hold that the trial judge’s imposition of a sentence of life without the possibility of parole, based on the court’s finding the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

E. CONCLUSION

For the reasons set forth above Mr. Parkins asks this Court to reverse.

DATED this 7th day of March, 2012.

Respectfully submitted,


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Attorney for Appellant

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

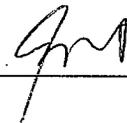
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 30176-1-III
)	
KIETH PARKINS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] KIETH PARKINS 984437 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF MARCH, 2012.

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