

65715-1

NEK  
65715-1

NO. 65715-1-I

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

REC'D  
FEB 22 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DEVON D. LAIRD,

Appellant.

Handwritten initials and markings on the right side of the page.

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

The Honorable Cheryl B. Carey, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
C. <u>ARGUMENT</u> .....	8
1. THE TRIAL COURT VIOLATED LAIRD'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE ABOUT AN UNNECESSARILY SUGGESTIVE SHOW-UP IDENTIFICATION.....	8
2. LAIRD'S TENNESSEE CONVICTION FOR ASSAULT WITH INTENT TO COMMIT MURDER IS NOT COMPARABLE TO A WASHINGTON "STRIKE" OFFENSE.....	17
3. THE PERSISTENT OFFENDER SENTENCE VIOLATES LAIRD'S RIGHTS TO A JURY TRIAL AND DUE PROCESS.....	24
D. <u>CONCLUSION</u> .....	26

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Cadwallader</u> 155 Wn.2d 867, 123 P.3d 456 (2005).....	17
<u>In re Personal Restraint of Lavery</u> 154 Wn.2d 249, 111 P.3d 837 (2005).....	16, 17, 18
<u>State v. Booth</u> 36 Wn. App. 66, 671 P.2d 1218 (1983).....	13
<u>State v. Burrell</u> 28 Wn. App. 606, 625 P.2d 726 (1981).....	8, 12
<u>State v. Calle</u> 125 Wn.2d 769, 888 P.2d 155 (1995).....	13
<u>State v. Hanson</u> 46 Wn. App. 656, 731 P.2d 1140 review denied, 108 Wn.2d 1003 (1987).....	9, 16
<u>State v. Hilliard</u> 89 Wn.2d 430, 573 P.2d 22 (1977).....	8
<u>State v. Mathe</u> 102 Wn.2d 537, 688 P.2d 859 (1984).....	14
<u>State v. Maupin</u> 63 Wn. App. 887, 822 P.2d 355 review denied, 119 Wn.2d 1003 (1992).....	9
<u>State v. McDonald</u> 40 Wn. App. 743, 700 P.2d 327 (1985).....	9, 13, 16
<u>State v. Morley</u> 134 Wn.2d 588, 952 P.2d 167 (1998).....	17, 18

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Poulsen</u> 45 Wn. App. 706, 726 P.2d 1036 (1986) .....	18
<u>State v. Rogers</u> 44 Wn. App. 510, 722 P.2d 1349 (1986) .....	9, 12
<u>State v. Shea</u> 85 Wn. App. 56, 930 P.2d 1232 (1997) .....	10, 11, 12
<u>State v. Smith</u> 150 Wn.2d 135, 75 P.3d 934 (2003) <u>cert. denied</u> , 541 U.S. 909 (2004) .....	23
<u>State v. Springfield</u> 28 Wn. App. 446, 624 P.2d 208 (1981) .....	13
<u>State v. Stockwell</u> 159 Wn.2d 394, 150 P.3d 82 (2007) .....	18
<u>State v. Taylor</u> 50 Wn. App. 481, 749 P.2d 181 (1988) .....	9, 14
<u>State v. Thiefault</u> 160 Wn.2d 409, 158 P.3d 580 (2007) .....	16
<u>State v. Thomas</u> 135 Wn. App. 474, 144 P.3d 1178 (2006) <u>review denied</u> , 161 Wn.2d 1009 (2007) .....	17, 24
<u>State v. Thorkelson</u> 25 Wn. App. 615, 611 P.2d 1278, 94 Wn.2d 1001 (1980) .....	13
<u>State v. Vickers</u> 107 Wn. App. 960, 29 P.3d 752 (2001) .....	10
<u>State v. Warden</u> 133 Wn.2d 559, 947 P.2d 708 (1997) .....	21

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Wheeler</u> 145 Wn.2d 116, 34 P.3d 799 (2001) <u>cert. denied</u> , 535 U.S. 996 (2002) .....	24

**FEDERAL CASES**

<u>Almendarez-Torres v. United States</u> 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) .....	24
--	----

<u>Apprendi v. New Jersey</u> 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) .....	23
--	----

<u>Blakely v. Washington</u> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) .....	23
---	----

<u>Griffith v. Kentucky</u> 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) .....	8
--	---

<u>Manson v. Brathwaite</u> 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) .....	8
---	---

<u>Shepard v. United States</u> 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) .....	24
---	----

<u>Simmons v. United States</u> 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1983) .....	8
--	---

<u>Stovall v. Denno</u> 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) .....	8
---	---

<u>United States v. Wade</u> 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) .....	10
--	----

**TABLE OF AUTHORITIES (CONT'D)**

Page

**OTHER JURISDICTIONS**

<u>Drye v. State</u> 184 S.W.2d 10 (Tenn. 1944).....	20, 21
<u>State v. Abrams</u> 935 S.W.2d 399 (Tenn. 1996).....	22
<u>State v. Croscup</u> 604 S.W.2d 69 (Tenn. Cr.App. 1980).....	19, 20
<u>State v. Davis</u> 28 S.W.2d 993 (Tenn. 1930).....	20, 21
<u>State v. Hall</u> 958 S.W.2d 679 (Tenn. 1997).....	22
<u>State v. Phipps</u> 883 S.W.2d 138 (Tenn. Crim. App. 1994).....	21, 22
<u>State v. Shelton</u> 854 S.W.2d 116 (Tenn. Crim. App. 1992) .....	20, 21
<u>State v. Taylor</u> 645 S.W.2d 759 (Tenn. Crim. App. 1982) .....	8, 19

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 3.6.....	10
former RCW 9A.36.020 .....	19
Persistent Offender Accountability Act .....	2, 3, 6, 16, 23, 25
RCW 9.94A.030 .....	16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.94A.505 .....	16
RCW 9.94A.570 .....	16
U.S. Const. amend. V .....	8
U.S. Const. amend. VI .....	23
U.S. Const. amend. XIV .....	8, 23
Wash. Const. art. 1, § 3 .....	8

A. ASSIGNMENTS OF ERROR

1. The trial court violated Devon D. Laird's due process rights by admitting evidence of a show-up identification that was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

2. The trial court erred by denying Laird's motion to suppress the show-up identification.<sup>1</sup>

3. The trial court erred by finding "the show up was not impermissively suggestive." CP 129 (Finding of Fact (kk)).

4. The trial court erred by finding "the show up identification procedure . . . did not violate the defendant's right to due process." CP 129 (Finding of Fact (kk)).

5. The trial court erred by concluding "the out of court identifications . . . were not so impermissively suggestive as to give rise to a substantial likelihood or irreparable misidentification." CP 129 (Conclusion of Law (a)).<sup>2</sup>

6. The court erred by finding Laird had previously been convicted of two "most serious" offenses.

---

<sup>1</sup> The trial court entered written Findings of Facts and Conclusions of Law as required by CrR 3.6. CP 126-130 (attached as Appendix A).

7. The court erred by sentencing Laird to life in prison without the possibility of release.

8. Laird's life sentence without possibility of release is unconstitutional.

Issues Pertaining to Assignments of Error

An African American man approached an elderly man as he sat in his car with the door open, took his wallet by force, and fled. Aside from the elderly man, two bystanders witnessed parts of the incident and followed behind the assailant for some distance as he fled. Each bystander called 911 and provided descriptions of the man, who was found hiding in some bushes within a few blocks of the elderly man's car.

1. Was the one-person show-up identification of the detainee – Laird -- impermissibly suggestive and did those suggestive circumstances create a substantial likelihood of misidentification where the witnesses had limited opportunity to observe the robber and provided differing descriptions?

2. Did the trial court err by denying Laird's pretrial motion to suppress evidence of the show-up identifications?

---

<sup>2</sup> Laird assigns error to conclusions of law (b) – (e) as well.

3. Out of state convictions do not count as “strikes” under the Persistent Offender Accountability Act (POAA) unless they are legally comparable to a Washington most serious offense. Laird was convicted of assault with intent to commit murder in Tennessee in 1984, where diminished capacity was not at the time a defense available to negate the element of intent, as it would have been in Washington. Did the court err in finding Laird’s Tennessee conviction legally comparable?

4. Under the POAA, the court imposed a sentence of life in prison without parole based on prior convictions not proved to a jury beyond a reasonable doubt. Does Laird’s sentence violate the Sixth and Fourteenth Amendments?<sup>3</sup>

B. STATEMENT OF THE CASE

Charles Aramaki was sitting in his parked car with the door open when a man approached him and asked for a light for a cigarette. Aramaki told the man he did not have one. 6RP 75-76, 83.<sup>4</sup> The man then grabbed

---

<sup>3</sup> Our state Supreme Court has held there is no right under our either our state constitution or the federal constitution to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). To preserve the issue for federal review in the event the law changes, however, Laird raises the issue herein.

<sup>4</sup> Laird refers to the 11-volume verbatim report of proceedings as follows: 1RP – 10/8/09, 10/19/09; 2RP – 11/10/09; 3RP – 11/12/10; 4RP

Aramaki's neck, reached into his jacket pocket, and removed his wallet. 6RP 77, 83. He tried to force the car door closed on Aramaki's leg and then fled. 6RP 77-78, 83.

Michael Patrick saw the man try to pinch Aramaki with the door and heard Aramaki scream. As Patrick walked to Aramaki's car, the man let go of the door and backed away. 8RP 102-05. Aramaki told Patrick the man took his wallet. Patrick dialed 911 and followed the man, who began running through a parking lot. 8RP 105-09. He continued to follow while he described events and the man to the 911 operator. 6RP 108; 8RP 8, 75, 109-13.

Alicia Anderson had a different view as she sat in her car parked near Aramaki's vehicle. 7RP 87, 90-92. She saw Aramaki struggling to get in or out of his car. 7RP 90, 92, 97. Patrick stood near Aramaki's car speaking excitedly on his cell phone. 7RP 92-93, 112. Anderson then saw a man calmly walk past her car. 7RP 92, 97-98, 113-14.

Suspecting something was wrong, Anderson turned her car around, called 911, and followed the man until he crossed into an area she could

---

– 11/16-17/09; 5RP – 1/25/10; 6RP – 1/26/10; 7RP – 1/27/10; 8RP – 1/28/10; 9RP – 2/8/10; 10RP – 2/9-10/10; 11RP – 2/11-12/10, 2/16/10; 6/25/10.

not drive into. 7RP 94-96, 106-07, 114-16. She then went back to check on Aramaki and spoke with him until medics arrived. 7RP 96-98, 108-10.

Meanwhile, police officers were responding to dispatches of the incident. 8RP 8, 75-76. One officer drove up to Patrick, who pointed him in the direction of the man's flight. 8RP 8-11, 25-26, 113-15. Officers found Devon D. Laird, lying atop Aramaki's wallet in some bushes within minutes. 8RP 13-15, 19-22, 76-79.

Aramaki, Patrick, and Anderson identified Laird as the assailant shortly thereafter in separate one-on-one "show-up" procedures near the scene. 6RP 81-82, 85, 108-13; 7RP 11-13, 67-69, 99-105, 111-12; 8RP 16, 80-82, 115-16, 119-20, 9RP 43-45. Two officers flanked Laird, who was also handcuffed, during the show-ups. 6RP 109-11, 8RP 15-17, 27-28, 80-81, 97-98.<sup>5</sup>

Aramaki was not asked to make an in-court identification. Anderson testified she was not certain Laird was the man she followed. 7RP 105-06. With "a lot of qualifications," Patrick identified Laird in-court as the assailant. 8RP 118-19. He acknowledged, however, his in-

---

<sup>5</sup> Laird moved to suppress the identification pretrial. CP 12-16. After a pretrial hearing conducted under CrR 3.6, the trial court denied the motion. CP 126-30; 3RP 91-99. Facts adduced at the hearing are set forth in Laird's challenge to the trial court's ruling.

court identification was based on events that happened after the incident. 8RP 119, 128.

King County jurors found Laird guilty of the charged crime of second degree robbery. CP 10-11, 34. The jury also returned a special verdict finding that Aramaki, who was 89 years old and of small stature at the time of the incident, was particularly vulnerable. CP 35, 6RP 71-72.

In a post-verdict penalty phase proceeding, a federal probation officer testified Laird was officially "released" from custody 47 days before committing the crime against Aramaki. 11RP 38-41. Jurors later returned a special verdict finding Laird committed the crime "shortly after being released from incarceration." CP 57.

At sentencing, the trial court concluded there was sufficient evidence to support the jury's special verdicts. CP 139-41; 11RP 132-34, 137-39. Additionally, the prosecutor requested the court find Laird's 1984 Tennessee conviction for assault with intent to commit second degree murder was a "most serious" offense for purposes of the Persistent Offender Accountability Act (POAA). 11RP 120-21. In support, the prosecutor presented a packet of documents from Tennessee, one of which, a judgment, read that Laird "did assault Vernell Wright with the intent to commit murder in the second degree with a shotgun." 11RP 121;

Sent. Ex. 5. The prosecutor contended the offense was comparable to second degree assault in Washington. 11RP 121.

Laird's counsel argued the Tennessee conviction was not comparable to second degree assault in Washington because at the time Tennessee did not recognize diminished capacity as a means to negate specific intent. CP 100-02.

The trial court rejected Laird's argument. Noting Laird's conviction was based on the use of a shotgun, the court found it comparable to Washington's strike offense of second degree assault. 11RP 126-27. As a result, the court imposed a third-strike sentence of life imprisonment without parole. CP 131-38; 11RP 119-20, 126-27.

The state also charged Laird with second degree possession of stolen property for being in possession of a credit card issued to a Bruna Ballestrusse on the day he was arrested for taking Aramaki's wallet. CP 11. The state alleged as aggravating sentencing factors that Ballestrusse was particularly vulnerable and that Laird committed the offense shortly after being released from incarceration. CP 11.

Laird pleaded guilty as charged and acknowledged the existence of the aggravators. CP 61-88, 6RP 5-16. The trial court departed from the

standard range of 14 months to 18 months and imposed a statutory maximum 60-month sentence. CP 131-41.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED LAIRD'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE ABOUT AN UNNECESSARILY SUGGESTIVE SHOW-UP IDENTIFICATION.

After detaining Laird on suspicion of robbing Aramaki, police used a suggestive show-up procedure to obtain positive identifications from three witnesses. None had a good opportunity to view Laird, two significantly different descriptions emerged, witness Patrick fully expected the detained individual to be the robber, and witness Anderson immediately noticed the detainee was handcuffed. When considering the totality of the circumstances, the trial court erred by admitting evidence of the identifications at trial.

Due process protections apply to pretrial identification proceedings. U.S. Const., amends. 5 and 14; Const., art. 1, § 3; Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled on other grounds by, Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); State v. Burrell, 28 Wn. App. 606, 609, 625 P.2d 726 (1981). Evidence of a show-up identification violates due

process when the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Hilliard, 89 Wn.2d 430, 438, 573 P.2d 22 (1977) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1983)).

Reliability is the key element in determining the admissibility of pretrial identifications, however, and reliable identifications can overcome the taint of a suggestive identification procedure. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). In determining whether an identification is admissible, this Court determines whether the procedure was impermissibly suggestive and, if so, whether the totality of the circumstances indicates the suggestiveness has rendered the identification unreliable. Taylor, 50 Wn. App. at 485; State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

Contrary to the trial court's ruling here, the show-up identification of Laird was unnecessarily suggestive. Although a single-suspect identification is not per se invalid, it is disfavored. State v. Hanson, 46 Wn. App. 656, 666, 731 P.2d 1140, review denied, 108 Wn.2d 1003 (1987). Single-suspect show-ups are suggestive "because the very act of

showing the witness one suspect indicates that the police have focused their attention on that person." Hanson, 46 Wn. App. at 666; see also, State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (one-photograph identification procedure inherently suggestive as matter of law), review denied, 119 Wn.2d 1003 (1992); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986) (practice of showing suspects singly for the purpose of identification "has been widely condemned").

As the Supreme Court stated more than 40 years ago,

And the vice of suggestion created by the identification . . . was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police").

United States v. Wade, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Police officers in Laird's case employed a "widely condemned" show-up procedure to obtain witness identifications. Officers flanked Laird, who was handcuffed, while Aramaki, Patrick, and Anderson were individually taken to view the suspect. 2RP 25, 60-61, 71, 135-36, 138-39, 150, 157-58, 163-65, 169-72; 3RP 49-50.

Show-up procedures are not necessarily suggestive merely because the suspect is handcuffed and standing near a patrol car or surrounded by

police officers. See, e.g., State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997), abrogated on other grounds, State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001). But at Laird's CrR 3.6 hearing, the trial court had the benefit of testimony by Dr. Geoffrey Loftus, recognized by many courts as an expert in human perception and memory. 2RP 73-74. Dr. Loftus testified a witness' decision to identify the only suspect in a show-up procedure is likely influenced by factors other than memory, such as: (1) the expectation the person he or she is viewing is the perpetrator; (2) any social pressure to identify the person; (3) any desire to identify someone and provide some resolution to the crime he or she witnessed; and (4) the witness' general inclination to say yes or no in such situations. 2RP 89.

Patrick testified at the hearing that he was "very eager to go [to view the detainee] because it pretty much followed my prediction about how easily the guy was going to be apprehended." 3RP 48. In other words, Patrick expected the man in the show-up would be the assailant.

When asked what she saw at the show-up, Anderson testified she first observed a police car near where the "other police officer was." 3RP 26. Another thing Anderson "immediately noticed" was that "there was handcuffs involved." 3RP 26. "And then, the gentleman standing there

and they had him in handcuffs. So his hands were behind his back at that point." 3RP 26. Next, "then an officer next to him; an officer I didn't know." 3RP 26. This testimony indicates that, contrary to the general rule articulated in Shea, here the presence of the officers and use of handcuffs had a demonstrated influence on Anderson's show-up identification.

Under these circumstances, as well as the inherent suggestiveness of a show-up, the trial court erred by finding the show-up procedure was not suggestive in Laird's case.

This Court must, therefore, determine whether the suggestive procedure caused a substantial likelihood of irreparable misidentification.

Factors include:

the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated at the confrontation; and the time between the crime and the confrontation.

Shea, 85 Wn. App. at 59

In Laird's case, the witnesses had limited opportunities to view the robber. Aramaki said an African American man (Laird) came up to him, asked for a light, grabbed his neck, took his wallet, tried to close the car door, and left. 2RP 55-57.

Patrick saw Laird push the car door onto Aramaki's leg, back away as he approached Aramaki, linger for "a couple seconds," and quickly walk away. 3RP 36-37. Laird was no closer than about 10 to 15 feet away before leaving. 3RP 58. Patrick followed Laird -- never getting closer than 75 feet or farther than about 100 yards -- as he spoke with the 911 officer. 3RP 37-40.

Anderson saw Laird walk past the front of her car. 3RP 12-16. She turned her car around and followed some distance behind him for a short time before having to turn back. 3RP 16-20.

Opportunity to observe is often measured in minutes. See Rogers, 44 Wn. App. at 516 (approximately 20 minutes socializing with defendant); Burrell, 28 Wn. App. at 611 (two witnesses observed defendant for five minutes under street lights, and one witness had a second encounter); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (1981) (police reserve officer involved in a six minute face-to-face confrontation with his assailant), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995); cf. McDonald, 40 Wn. App. at 747 (five to six minutes not sufficient when witness's view obstructed for half of the duration of the crime). A fleeting glimpse of the criminal is not sufficient. State v. Thorkelson, 25 Wn. App. 615, 619, 611

P.2d 1278, 94 Wn.2d 1001 (1980); cf. State v. Booth, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983) (45-second observation period is sufficient in case where identification went to an automobile and corroborating evidence was found in the automobile).

Aramaki, Patrick, and Anderson viewed Laird's face for only a few seconds. For Anderson, the sequence of events happened "very quick[ly]." 3RP 12. Patrick viewed Laird the longest, but mostly from behind and from a great distance. Compared to the above cases, the witnesses' time to observe Laird was brief. The "opportunity to observe" factor thus militates against the trial court's decision.

The degree of attention witnesses' gave to Laird's appearance, as reflected in the accuracy of their descriptions, weighs against the trial court's decision as well. Officers received three descriptions leading up to Laird's detention. The first was "[b]lack male 20's, 5'8, heavy, black jacket with white sleeves[.]" 2RP 31; PT Ex. 3 (trial exhibit 15). In the second, the suspect was described as "[b]lack male 5'8, 5'9, heavy, black coat, white sleeves, short hair, dark pants." 2RP 31-32; PT Ex. 3. The final description was different: "[d]ark skinned black male 20's, 5'7, thin, curly, short hair; light brown vest-type jacket, dark grey unknown type shirt; dark

pants." 2RP 31-32; PT Ex. 3. Both Patrick and Anderson had called 911. 2RP 33-34, 132-33, 146; 3RP 21, 36-37, 40-43.

During the suppression hearing, Aramaki described his assailant as an African-American man who may have worn a black jacket. 2RP 55-58. Furthermore, Aramaki had experienced a stressful and frightening event. He was bleeding from the head/neck area and acted as if was "kind of in shock." 3RP 21. Fear or stress can affect perception, and Washington courts have recognized the relevance of these factors for accuracy of identification. See e.g., State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984) (witness identifications found reliable where they initially viewed defendant in a non-stressful situation at the time of the crime); State v. Taylor, 50 Wn. App. 481, 487, 749 P.2d 181 (1988) (expert testimony regarding effects of stress, including fear, on human perception and memory is relevant to reliability of eyewitness testimony).

Anderson testified the man who walked closely past the front of her car was a "normal size guy." 3RP 14. She did not remember the exact colors of his jacket; it had "stripes of color, blocks of color in it. Whether it was black and white or red and, you know, green or whatever it was, it was a jacket you would notice." 3RP 15-16.

During the show-up, Aramaki viewed Laird from about 10 feet away within about 10 minutes from the initial dispatch of the incident. 2RP 24-27. He testified he was "pretty sure" Laird was the robber. 2RP 60. Anderson drove up to within a car length of Laird. She immediately noticed he was handcuffed with his hands behind his back. 3RP 26. She was "150 percent sure" Laird was the man who walked in front of her car. 3RP 27. Her positive identification came about 11 minutes from the first call. 2RP 27. Patrick identified Laird with "100 percent" certainty as the man he saw at Aramaki's car within 7 minutes of the first dispatch. 2RP 22; 3RP 49.

Finally, none of the three witnesses identified Laird in court during the suppression hearing as the robber. Aramaki was not asked for an in-court identification. Anderson could not say for sure Laird was the same man. 3RP 32. Patrick could say only that Laird was of the same race and had the same general physical characteristics as the suspect. 3RP 52.

When considering these circumstances, the suggestiveness of the show-up identification created a substantial likelihood of irreparable misidentification. The trial court erred in concluding otherwise and in denying Laird's motion to suppress the identification. The remedy is reversal and remand for a new trial, without admission of the unreliable

identification. Hanson, 46 Wn. App. at 664; McDonald, 40 Wn. App. at 747-48.

2. LAIRD'S TENNESSEE CONVICTION FOR ASSAULT WITH INTENT TO COMMIT MURDER IS NOT COMPARABLE TO A WASHINGTON "STRIKE" OFFENSE.

The trial court sentenced Laird to life in prison without the possibility of parole under the POAA after concluding a 1984 Tennessee conviction for assault with intent to commit second degree murder was comparable to Washington's offense of second degree assault. But when Laird was convicted, Tennessee – unlike Washington -- did not recognize diminished capacity could negate the required element of intent. The trial court thus erred by finding the Tennessee conviction was a "strike."

The POAA mandates a life without parole sentence when an offender has previously been convicted of two “most serious offenses.” RCW 9.94A.030(31), (36); RCW 9.94A.505(2)(a)(iii); RCW 9.94A.570. Convictions from other jurisdictions are included only if they are both legally and factually comparable. State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007); In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The State bears the burden of proving by a preponderance of the evidence the existence of prior strike offenses for purposes of the POAA. In re Personal Restraint of Cadwallader, 155

Wn.2d 867, 876, 123 P.3d 456 (2005). Review is de novo. Thiefault, 160 Wn.2d at 414.

The legal portion of the comparability test consists of comparing the elements of the out-of-state crime with the elements of the purportedly comparable Washington statute in effect at the time the out-of-state crime was committed. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998).

If the elements of the foreign crime are not substantially similar to the Washington crime, or if the foreign offense is more broadly defined, a sentencing court may analyze the factual comparability of the convictions. Lavery, 154 Wn.2d at 255. A court may look at the defendant's conduct, as shown by the out-of-state charging document, to determine if the conduct itself would have violated a comparable Washington statute. Lavery, 154 Wn.2d at 255.

The “key inquiry” is whether the same conduct would have violated the arguably comparable Washington statute. State v. Thomas, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009 (2007). But even when a court examines the record of a foreign conviction, “the elements of the charged crime must remain the cornerstone of the comparison.” Morley, 134 Wn.2d at 606.

Importantly, “when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction . . . the elements may not be legally comparable.” State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007) (citing Lavery, 154 Wn.2d at 256-57). In Lavery, the Court held a federal robbery offense was not legally comparable to its Washington counterpart. 154 Wn.2d at 256-57. The Court reasoned the federal crime was broader than the Washington offense because the federal offense required proof of only general intent, while in Washington, robbery requires specific intent to steal. Id. Because of the different required intent, diminished capacity and other defenses would be recognized in Washington, but would not be available for the federal robbery. Id. The court then concluded the elements of the offenses were not substantially similar. Id.

The same is true in Laird's case. At the time of Laird's Tennessee conviction, diminished capacity was available as a "defense" to second degree assault in Washington. See State v. Poulsen, 45 Wn. App. 706, 708-09, 726 P.2d 1036 (1986) (evidence of diminished capacity is admissible to defend against a charge of second degree assault under former RCW 9A.36.020 if it is relevant to disprove requisite mens rea element).<sup>6</sup>

---

<sup>6</sup> Laird attaches a copy of former RCW 9A.36.020 as Appendix B.

Tennessee law, in contrast, did not recognize the concept of "diminished capacity" when Laird was convicted. In State v. Taylor, 645 S.W.2d 759 (Tenn. Crim. App. 1982), the appellant argued the trial court erred by refusing his request to provide a diminished capacity jury instruction. The court disagreed:

Although he says *there is little authority in this state* for his position, he urges us to approve his requested instruction. The defense of diminished capacity is not recognized in this state. State v. Croscup, 604 S.W.2d 69 (Tenn. Cr.App. 1980). The court did not err in declining this request.

Taylor, 645 S.W.2d at 759-60 (italics added). Language in Croscup suggests there was *no* such authority:

He complains because the court declined to charge his special requests on the defense of "diminished capacity." Although *he concedes that these requests do not reflect present Tennessee law*, he requests that we adopt that doctrine. This we decline to do.

Croscup, 604 S.W.2d at 72.

In 1989, well after Laird's conviction, the Tennessee Supreme Court in State v. Taylor verified this state of the law with respect to diminished capacity. The defendant there contended he was entitled to an instruction stating he could be guilty of a lesser offense than murder if, because of mental impairment, he could not form the necessary mental state elements of malice and premeditation. Taylor, 771 S.W.2d 387, 398 (Tenn. 1989). The court observed, "This is the so-called limited defense

of diminished capacity, which it is commonly said is not recognized in Tennessee." Id. The court held that because the trial court provided instructions for first degree and second degree murder and all lesser included offenses, "the absence of an instruction on 'diminished capacity' did not preclude the jury's finding defendant guilty of a lesser offense." Id.

It was not until 1992 that questions about Croscup began to emerge. Relying on a 1930 case, the court in State v. Shelton declared the bar on the diminished capacity defense was "subject to dispute." 854 S.W.2d 116, 122 (Tenn. Crim. App. 1992). That 1930 case is State v. Davis, 28 S.W.2d 993 (Tenn. 1930). Davis, however, is a "heat of passion" case with a scope far narrower than indicated at first glance.

Davis held only that a defendant who kills "while under the influence of passion and agitation produced by" information that the deceased had debauched the defendant's wife, may be found guilty only of voluntary manslaughter rather than murder. 28 S.W.2d at 996; see also Drye v. State, 184 S.W.2d 10, 12-13 (Tenn. 1944) (defendant who killed his wife, "a woman without regard for her marital vows," while under influence of passion aroused by her stated intention to date whom she desired, did not form premeditated deliberation required to find first degree murder).

These old cases thus recognized a narrow subset of diminished capacity, "heat of passion," available only to a scorned spouse who kills either the despoiler or the despoiled. Washington's notion of diminished capacity is much broader. "Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). It need not -- as in Tennessee -- be the result solely of provocation caused by passion.

Even after considering Davis, Drye, and Shelton, the law regarding diminished capacity in Tennessee was "not so clear" a decade after Laird's conviction. State v. Phipps, 883 S.W.2d 138, 146 (Tenn. Crim. App. 1994). The Phipps court recognized Tennessee courts had "never fully analyzed" diminished capacity or "its relationship to the admissibility of evidence tending to negate specific intent." Phipps, 883 S.W.2d at 146. The court concluded evidence to show a defendant's mental state was admissible in Tennessee "to negate the elements of specific intent." Id., 883 S.W.2d at 149.

A full dozen years after Laird's conviction, the Tennessee Supreme Court agreed with Phipps that "evidence of a defendant's mental condition can be relevant and admissible in certain cases to rebut the mens rea

element of an offense." State v. Abrams, 935 S.W.2d 399, 402 (Tenn. 1996). Still, noting that "evidence of the defendant's mental condition was not proffered, and the jury instructions at issue in Phipps are not at issue here," the court left for another day "whatever further development may be warranted for the rule of 'diminished capacity[.]'" Id.

One year later, in 1997, the Tennessee Supreme Court announced, "Another day has arrived." State v. Hall, 958 S.W.2d 679, 688 (Tenn. 1997). The Hall court endorsed Phipps, but cautioned that "[t]o avoid confusion," expert testimony that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state should be presented as relevant to negate the existence of the requisite culpable mental state, "not . . . as proof of 'diminished capacity.'" Hall 958 S.W.2d at 690.

In other words, 13 years after Laird was convicted of assault with intent to commit murder, the Hall court for the first time made available to Tennessee defendants what in Washington is commonly called the "diminished capacity" defense. But when Laird pleaded guilty, as the aforesaid presentation of Tennessee cases plainly illustrates, no such method of negating a required mental state existed. For that reason, under Lavery Laird's Tennessee conviction was not comparable to a "most

serious offense" in Washington. The trial court erred by concluding otherwise. This court should therefore vacate Laird's life without parole sentence under the POAA and remand for a new sentencing hearing.

3. THE PERSISTENT OFFENDER SENTENCE VIOLATES LAIRD'S RIGHTS TO A JURY TRIAL AND DUE PROCESS.

A jury must determine any fact, other than the fact of a prior conviction, which increases the penalty beyond the standard range. U. S. Const. amends. 6, 14; Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The State did not prove Laird's prior convictions or his identity beyond a reasonable doubt to a jury. Nonetheless, the court sentenced him as a persistent offender to life without parole based on judicially determined facts. Therefore, that sentence is invalid because it violates Laird's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process.

This court has held that there is no right, under our either our state constitution or the federal constitution, to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). However, Apprendi's "fact of a prior conviction," exception to the rule requiring jury verdicts originated

in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), a decision which has since been criticized by a majority of the United States Supreme Court. See Shepard v. United States, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring) (“[A] majority of the Court now recognizes that Almendarez-Torres was wrongly decided.”); Apprendi, 530 U.S. at 490; State v. Wheeler, 145 Wn.2d 116, 124-37, 34 P.3d 799 (2001) (Sanders, J., dissenting), cert. denied, 535 U.S. 996 (2002).

Because the Almendarez-Torres exception should be rejected, the sentencing court lacked authority to impose a persistent offender sentence without a jury finding that Laird had constitutionally valid prior "strikes." Laird's persistent offender sentence therefore should be vacated and the matter remanded for a standard range sentence.

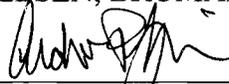
D. CONCLUSION

The trial court erred by denying Laird's motion to suppress the identifications. This Court should reverse Laird's robbery conviction and remand for a new trial. In any event, the trial court erred by finding Laird's 1984 Tennessee conviction for assault with intent to commit murder was comparable to a Washington second degree assault conviction. This Court should vacate the trial court's POAA sentence and remand for resentencing.

DATED this 22 day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



---

ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX A

**FILED**  
KING COUNTY, WASHINGTON

**JUN 25 2010**

SUPERIOR COURT CLERK  
**KIM C. PHIPPS**  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DEVON LAIRD,

Defendant,

*(Signature)*  
No. 07-10896-0 KNT

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.6  
MOTION TO SUPPRESS PHYSICAL,  
ORAL OR IDENTIFICATION  
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held between November 10, 2009 and November 12, 2009, before the Honorable Judge Cheryl Carey. After considering the evidence submitted by the parties and hearing argument, to wit: the briefing of the parties, the testimony of Charles Aramaki, Alicia Anderson, Michael Patrick, Dr. Geoffry Loftus, Officer Mark Coleman, Officer Paul Stratford, Sgt. Paul Cline and officer Mark Humphries, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. FINDINGS OF FACT:

a. In the late morning hours Mr. Aramaki, in King County, Washington went to the Rite Aid store to have photos developed. He parked in a disabled parking space. While waiting in his car with his car door halfway opened he was approached by a, by a black male asked if he had a light. Mr. Aramaki said no.

b. At this point the black male grabbed Mr. Aramaki by the neck, stuck his hand in Mr. Aramaki's jacket and took his pocketbook. Mr. Aramaki tried to push the car door open.

c. Ms. Alicia Anderson was in the parking lot with her son, taking him to the trading card store next to Rite Aid. That's reflected in State's exhibit 14 which shows the location of Ms. Anderson's car in relation to Mr. Aramati. Aramati.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

**ORIGINAL**

Daniel T. Satterberg, Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

*1088*

1 d. Ms. Anderson has a handicap. It was a clear day, not raining, no need for sunglasses.  
2 She observed Mr. Aramati as he was parked in the handicap parking space in front of the Rite  
Aid. It appeared he was falling forward. Because of her own disability she paid close attention.

3 e. She observed a man talking on a cell phone later I.D. as Mr. Patrick nearby.

4 f. She looked forward right in front of her car visible through the front windshield and  
was staring right back at her was a black male. She described the man as not too tall, not too  
5 skinny. He stood about the height of her car. Medium height to her is anywhere from 5'7 to  
6 5'10.

7 g. The man had a hand inside his coat about chest way down. He walked away. She  
whipped her car around in the direction where the suspect was walking. She observed the  
8 direction he was heading as noted in exhibit 16. Considering all of this information she called  
9 911.

10 h. She pulled her car right up to Mr. Aramaki's car. She observed blood on his head and  
neck area. He struggled with telling her what happened. She waited for an ambulance.

11 h. Mr. Patrick was exiting the Rite Aid store he observed a black male pushing the  
driver's door shut on a car parked in front of the Rite Aid crushing Mr. Aramaki's legs.

12 i. Mr. Patrick started to advance towards the car. The suspect looked over at Mr. Patrick  
where both looked at each other.

13 j. Mr. Patrick noticed that Mr. Aramati had been scratched.

14 k. Mr. Aramati said he's got my purse. The suspect stood for a few seconds and started  
15 to move away as Mr. Patrick was calling 911.

16 l. Mr. Patrick followed after the suspect while he continued to communicate to 911. Mr.  
Patrick provided his location while in pursuit of the suspect, as well as a description of the  
17 suspect, black male, 20...20's to 30's, 5'8, heavy, black jacket with white sleeves.

18 m. Officer Humphries and Strafford were responding to the call that came out through  
dispatch. Both officers were in separate cars.

19 n. Officer Strafford went up to Benson Road beyond the hillside, exited his car, his  
patrol car looking for the suspect. He was looking for anyone who should not be there. And one  
20 who matched the description given. This was a heavy bushed area including blackberry bushes.  
It is not a common area where people travel.

21 o. Officer Strafford found a suspect matching a similar description that has been  
provided by several witnesses. The suspect was found lying in the bush.

22 p. Mr. Aramaki's wallet with his identification inside was later found in the bushes  
where the defendant was located.

23 q. Officer Humphries contacted Mr. Patrick who had followed the suspect to Sam's Club.  
When approached by Officer Humphries, Patrick was still on his cell phone with dispatch.  
24 Humphries took Patrick to the area where the suspect was being held.

r. Officer Humphries told Patrick that he had no obligation to make an I.D. and if he was  
not was not sure whether this was the same person that he saw at Rite Aid just say so. He also  
indicated that failing to I.D. the suspect was fine. The suspect was handcuffed and standing by  
an officer. Without specification Mr. Patrick advised Officer Humphries that the suspect was the  
person he had been following from the Rite Aid and the person who was trying to shut Mr.  
Aramaki in the car door.

s. Commander Cline responded to the dispatch call as well. He has been in law  
enforcement for 32 years. While en route too Rite Aid Commander Cline heard over the radio  
that suspect had been detained and identified by witness.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2

Daniel T. Satterberg, Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

1 t. He responded to the location where the suspect was detained. He was approximately  
2 1/3 mile from the Rite Aid store. It was approximately four minutes from the time of the 911  
3 dispatch to the time the suspect was found in the bushes.

4 u. Commander Cline left the area where the suspect was being detained and proceeded to  
5 the Rite Aid where he met with Mr. Aramaki.

6 v. Mr. Aramaki was able to give a description of the person who took his pocketbook  
7 and stated that if he saw that person again he would be able to I.D. him.

8 w. Commander Cline placed Mr. Aramaki into the passenger seat of the vehicle. He  
9 indicated to Mr. Aramaki that they have a person who may or may not be the suspect. Would he  
10 take a look to see whether he could make an identification. No one else was in the vehicle  
11 except Commander Kline and Mr. Aramati. Mr. Aramati had no knowledge whether others may  
12 have or may not have identified the suspect.

13 x. On arrival the suspect was in the presence of two officers and Mr. Aramaki  
14 immediately identified the suspect stating "that's him." He did so within one to two seconds.  
15 Commander Cline asked ~~ask~~ him what? Mr. Aramati said that it was the man that took his  
16 pocked book at the Rite Aid. The suspect matched the description that Mr. Aramaki had  
17 previously given.

18 y. Ms. Anderson was asked whether she believed she could I.D. the suspect. She knew  
19 quote "150 percent" that she could identify the person. Because of her handicap she drove her  
20 own car to the location of the show up. She followed officer Humphries to the location. She  
21 was one car length from the suspect. There was no doubt in her mind at the time that the person  
22 she <sup>saw</sup> ~~way~~ back at Rite Aid was the person standing in front of her.

23 z. None of the witnesses were aware that others made a suspect identification before making  
24 their own. Each person's identifications were independently of the others and of other  
information.

aa. Later in time witnesses learned that others had selected the same person as the  
suspect and two of the witnesses (Patrick and Anderson) were given a commendation by the  
chief of that police department for their assistance with the case.

bb. Mr. Patrick, Ms. Anderson and Mr. Aramaki did not make in court identifications of  
the defendant. The incident occurred over two years ago and both Mr. Anderson and Ms.  
Patrick stated concern about misidentification in this courtroom as the defendant was the only  
black male here. Both testified that he met the general description.

cc. Dr. Loftus testified as an expert in perception and memory. He testified to general  
principle to human perception. When we experience real world events we only do so partially or  
in fragments that our memory changes over time. Information gets added which is called post-  
event information. As memory over time changes it does not become more accurate. Much of  
his testimony was about post-event information and how memory can change over time.

dd. Given the facts in this case ~~how~~ such testimony is only relevant when testing the  
witnesses credibility in trial while testifying to their conditional identification of the suspect on  
October 14, 2009. The fact that the witnesses did not make and will not make an in court  
identification renders much of Dr. Loftus's testimony ~~where~~ <sup>is</sup> post-event information very  
interesting, but in this case, marginally relevant.

ee. Dr. Loftus' argument, as I understand it, is that witnesses testimony today and in trial  
regarding certainty of identification of the defendant on October 14<sup>th</sup> could have been made with  
greater certainty because of information that these witnesses have obtained since their initial  
identification of the suspect.

1 ff. Three different witnesses affirmatively identified the suspect within 10 to 15 minutes  
2 of the arrest. Mr. Patrick's id was made within 6 minutes of the arrest. Each witness had the  
3 opportunity to see the suspect very clearly. The lighting conditions were good. The witnesses'  
4 descriptions although not identical were very similar.

5 gg. Mrs. Anderson saw the suspect right through the front of her window. At that time  
6 she knew she would be able to recognize the suspect and in fact did so. At the time there was no  
7 doubt in her mind.

8 hh. Mr. Aramaki was approached by the suspect <sup>Armed</sup> asked for a light. Mr. Aramaki looked  
9 at the person while there was nothing unusual taking place. Then the suspect grabbed Mr.  
10 Aramaki's neck. Mr. Aramaki identified the suspect without hesitation. Upon arrival he  
11 immediately stated "that's him."

12 ii. Mr. Patrick approached the suspect from the parking lot where they looked right at  
13 each other. Mr. Patrick then pursued the suspect. Mr. Patrick stopped in the Sam's parking lot  
14 and within minutes the suspect was found in the bushes. The suspect was found right where Mr.  
15 Patrick knew he would be. Mr. Patrick also identified the suspect and was completely certain  
16 that the suspect found lying in the bushes was the same man who pushed on Mr. Aramaki's car  
17 door.

18 jj. The witnesses were all focused on the conduct of the suspect and the suspect. The  
19 description, although not identical, but were all very similar, black male, 5'10, medium to heavy  
20 build, dark if not black jacket and white sleeves. Exhibit three shows where the suspect was,  
21 where the suspect was heading and that is exactly where they found him.

22 kk. This all happened in a relatively short period of <sup>time,</sup> somewhere around 15 minutes.  
23 Each person identification was certain and without any doubt. Therefore the show up was not  
24 impermissibly suggestive. The show up identification procedure in this case did not violate the  
defendant's right to due process.

ll. Each of the law enforcement officers that testified in this hearing positively identified  
the defendant as the individual identified by the civilian witnesses.

4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE OUT OF COURT IDENTIFICATIONS SOUGHT TO BE SUPPRESSED:

a. The court finds that the ~~the~~ out of court identifications in this case were not so  
impermissibly suggestive as to give rise to a substantial likelihood of irreparable  
misidentification.

b. The fact that the suspect was handcuffed and in the presence of at least one police  
officer does not render the show up identification impermissibly suggestive.

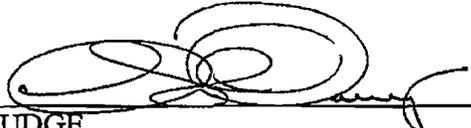
c. The procedure did not create a substantial likelihood of irreparable misidentification.

d. The show up identification procedure in this case did not violate the defendant's right  
to due process.

e. The out of court identifications of the defendant made by the three civilian witnesses  
in this case are admissible at trial.

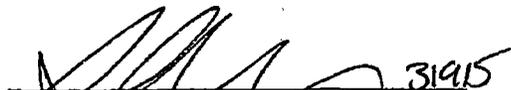
1 In addition to the above written findings and conclusions, the court incorporates by  
2 reference the testimony from the 3.6 hearing as well as its oral findings and conclusions.

3 Signed this 3 day of June, 2010.

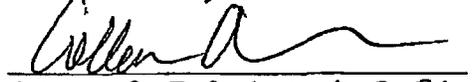
4  
5   
6 JUDGE

7 Presented by:

CHERYL B. CAREY

8   
9 Deputy Prosecuting Attorney 31915

No objection as to form:

10   
11 Attorney for Defendant # 20265

12   
13 Attorney for # 2027  
14 Defendant

## APPENDIX B

hindered rather than aided commission of crime, defendants could be separately punished for first-degree assault they committed upon victim in addition to robbery. State v. Prater (1981) 30 Wash. App. 512, 635 P.2d 1104.

Wilson (1980) 25 Wash.App. 891, 611 P.2d 1312.

In prosecution for rape, kidnapping and assault, crimes of kidnapping and assault, which resulted in no injury independent of or greater than injury of rape, and which were crimes for which, without additional proof of rape, defendant could have been convicted, became merged in completed crime of first-degree rape when proof of such crimes was accepted by the jury; as cumulative punishments were not imposed, striking of defendant's convictions for kidnapping and assault would remedy any injustice to defendant. State v. Johnson (1979) 92 Wash.2d 671, 600 P.2d 1249, certiorari dismissed 100 S.Ct. 2179, 446 U.S. 948, 64 L.Ed.2d 819.

Defendant, who alleged that delay of state in filing second-degree assault charges after he had been charged with first-degree assault prejudiced him because it resulted in his receiving consecutive sentence terms, rather than concurrent terms he alleged he would have received if the two assault cases had been tried together, failed to show that such delay prejudiced him or violated his due process rights in that defendant's assertion was mere speculation. State v.

**9A.36.020. Assault in the second degree**

*Text effective until July 1, 1988*

(1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

(a) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon; or

(c) Shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(d) Shall knowingly assault another with intent to commit a felony.

(2) Assault in the second degree is a class B felony.

Enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.36.020. Amended by Laws 1975-76, 2nd Ex.Sess., ch. 38, § 5; Laws 1979, Ex.Sess., ch. 244, § 9, eff. July 1, 1979.

*For text effective July 1, 1988, see § 9A.36.021, post*

**Historical Note**

Laws 1975-76, 2nd Ex.Sess., ch. 38, § 5, at the end of former subsec. (1)(e), deleted "shall be guilty of assault in the second degree".

Laws 1979, Ex.Sess., ch. 244, § 9, deleted a former subsec. (1)(e), which read:

"With criminal negligence, shall cause physical injury to another person by

SEATTLE WA COBINC

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 65715-1-I
	)	
DEVON LAIRD,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

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

THAT ON THE 22<sup>ND</sup> DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]    DEVON LAIRD  
         DOC NO. 707995  
         WASHINGTON STATE PENITENTIARY  
         1313 N. 13<sup>TH</sup> AVENUE  
         WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*

2011 FEB 22 10:14:25