

67843-4

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NO. 67843-4-I

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

STATE OF WASHINGTON

Respondent

v.

JAMES R. HOLMES,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Should the Court consider the defendant's proposal to adopt a new procedure for determining admissibility of evidence of eyewitness identification?

2. Did the State produce sufficient evidence that the defendant or an accomplice was armed with a deadly weapon?

3. Was there a sufficient record for the trial court to find the defendant's prior Texas drug conviction was comparable to a Washington felony drug offense?

4. If the record was not sufficient is the remedy to remand for a new hearing to permit the State to submit additional records supporting inclusion of that offense in the defendant's offender score?

II. STATEMENT OF THE CASE

1. The Robbery And Investigation.

On August 21, 2007 Jessica Brevig and Jay Shelton lived in a home located on 112th Street in Everett, Washington. Ms. Brevig and Mr. Shelton were home on that evening along with Ms. Brevig's

twin sister Jennifer Tame¹ and her then boyfriend Bryan Johnstone who were visiting. 10-4-11 RP 29-30;10-5-11 RP 87-88, 134; 10-6-11 RP 331-32.

About 10:00 p.m. Mr. Shelton left the home to go to the store. At the time Ms. Brevig was in the upstairs living room while Ms. Tame and Mr. Johnstone were downstairs watching television. Mr. Shelton saw three black men walking up his driveway. As they passed Mr. Johnstone's truck one of the men looked inside. Mr. Shelton did not know the men. He asked if he could help them, but they did not respond. Instead they continued up the drive until they got to the deck. Once there the three men stood in front of Mr. Shelton. One of the men pulled a gun out and stuck it in Mr. Shelton's stomach. The man ordered Mr. Shelton not to move or Mr. Shelton would be killed. Mr. Shelton noticed the man wore gold framed glasses, a blue sweatshirt and a hat. He was thinner and about the same height as Mr. Shelton. A second man asked Mr. Shelton who was in the house. Mr. Shelton told them Ms. Brevig, Ms. Tame, and Mr. Johnstone was inside. The men then pushed

¹ Ms. Tame married between the time of the robbery and the time of trial. 10-5-11 RP 87. For the sake of clarity Ms. Tame will be referred to by her married name although she was known by the surname Brevig at the time of the incident.

Mr. Shelton back inside and entered the home. 10-6-11 RP 333-35.

Mr. Shelton went to the top of the stairs where the man with the gun pushed him down. Ms. Brevig was at the top of the stairs when they came in, and she too was pushed down by the man who again threatened to kill them. One of the other men demanded to know if anyone else was in the house. Ms. Brevig told them her sister and her sister's boyfriend was downstairs. Two of the men then went downstairs looking for them. 10-4-11 31-33; RP 10-6-11 RP 335.

Downstairs Ms. Tame and Mr. Johnstone noticed two men in the doorway. One of the men had a gun. They ordered Ms. Tame and Mr. Johnstone upstairs. Once upstairs the men had the four victims sit on a sofa and ordered them not to look at the men. One time when Mr. Johnstone looked up one of the men hit him in the mouth with the gun. One of the men repeatedly struck Mr. Shelton in the head with the butt of a gun. 10-4-11 RP 34; 10-5-11 RP 91-93, 137; 10-6-11 RP 336.

The three men demanded to know where the money was. Ms. Brevig offered money in her purse. One of the men took her wallet and keys out of her purse. The men brought Ms. Brevig, Ms.

Tame, and Mr. Shelton around the house looking for car keys and money. One of the men threatened to kill Ms. Brevig if Mr. Shelton did not give him the keys, even though the men were told that they did not have any keys to the safe. One man put a gun in Ms. Brevig's mouth and one held a gun to Mr. Shelton's head in an attempt to coerce them into revealing the location of the safe key. One of the men who had a gun brought Ms. Team downstairs where he stole her wallet, keys, and cell phone from her purse. 10-4-11 RP 34-39; 10-5-11 RP 96, 137; 10-6-11 RP 336-337.

Eventually the men tied the victim's up with miscellaneous electrical cords. They then overturned a sofa and a coffee table on the victims before leaving. After the victims were sure the men were gone they untied themselves. Mr. Shelton went to a neighbor's house to call the police. After police arrived Mr. Johnstone learned that approximately \$40,000 in cash that he had with him for his business had been stolen. 10-4-11 RP 40-42; 10-5-11 RP 97-98, 100, 133, 137-143; 10-6-11 RP 337-339.

When the police arrived they noticed that Ms. Brevig and Ms. Tame were visibly shaken and crying. Mr. Shelton had a bleeding injury to his head. When police did a sweep of the house they noticed that the furniture had been overturned and the house was

in disarray. There were two irons on the front landing, one with blood on it. There was a large pool of blood on the living room carpet and in the kitchen. 10-4-11 RP 19-20, 23-24; 10-5-11 RP 80-82.

During the course of the investigation detectives found two pieces of latex glove fragments upstairs, as well as some cords. The gloves had not been in the house before the break-in. Detective Fortin seized the items for future DNA testing. Detective Fortin sent those items to the Washington State Patrol for testing on September 5. 10-5-11 RP 72, 160-61, 168.

On August 23 Detective Fortin interviewed Ms. Brevig and Mr. Shelton at the police department. Police had no suspect information at that time. Ms. Brevig and Mr. Shelton agreed to help with a composite sketch. Police used the sketch to try to determine the identity of one of the suspects. 5 RP 166-68, 194-99.

In October police received a tip from Ms. Brevig about a possible suspect. Based on that and some other information police put together two different photo montages including photos of two possible suspects. The montages were shown to Ms. Brevig and Mr. Shelton individually after being given a set of instructions.

Neither witness identified anyone in either montage. Ex. 61, 62; 10-5-11 RP 166-173, 176-77, 194-195; 10-6-11 RP 268-71, 343.

In June 2009 Detective Fortin received information from the Washington State Patrol Crime lab that DNA found on one of the glove fragments located at the crime scene matched DNA from the defendant, James Holmes, which was in the CODIS system². Detective Fortin located a photo of the defendant that was taken approximately three weeks before the robbery. He was not able to contact Ms. Brevig or Mr. Shelton to view a montage. 10-5-11 RP 176-77.

In February 2010 Detective Callaghan took over the case. He arranged to have police specialist Richardson prepare a photomontage with the defendant's photo in it. She prepared the montage using photos of men who matched certain of the defendant's characteristics. The photo she was asked to use showed the defendant wearing wire framed glasses. She was only able to find two other photos of men with characteristics similar to the defendant wearing wire framed glasses. The other three men in the montage had characteristics similar to the defendant, but were not wearing glasses. Before showing the montage to either

witness the detective separated them and gave them the same instructions they had been given in the previous two montages. One of the instructions was that the suspect may not be in the montage. They were also instructed not to discuss the montage with each other when they left. Ms. Brevig did not select anyone from the montage. Mr. Shelton picked the defendant's photo within 30 seconds of viewing the montage. 10-5-11 RP 53, 210-217; 10-6-11 RP 219-220, 343; Ex. 49, 58, 65.

On August 2, 2010 the State charged the defendant with one count of First Degree Robbery with a firearm allegation, First Degree Burglary with a firearm allegation, and four counts of Second Degree Assault each with a firearm allegation. The State filed a motion to compel the defendant to provide a DNA sample pursuant to CrR 4.7(b)(vi) which the court granted. A DNA sample from the defendant was obtained and submitted to the crime lab for comparison. The DNA profile from the defendant's known sample was compared to the DNA profile obtained from one of the glove fragments found at the scene. The DNA located on the interior of the glove matched the defendant's known DNA sample. The

² The DNA was in the CODIS system as a result of the defendant's Texas Conviction from 2008. Ex. 8, 9-22-11 suppression hearing. 1 CP 97, n. 1.

estimated probability of selecting an unrelated individual at random from the population of the United States was 1 in 6.6 quintillion, far greater than the population of the earth.³ 10-6-11 RP 269-277; 1 CP 179-181, 186-187.

2. Pre-Trial Motions And Trial.

The defendant filed a motion to suppress any identification made of the defendant either in or out of court. The defendant argued that the identification should be suppressed under the test for admission of eyewitness identification articulated in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401(1972) and Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2253, 53 L.Ed.2d 140 (1977). 1 CP 138-149. The trial court held a hearing on the motion. It considered the testimony from police specialist Richardson, Dr. Jennifer Devenport, a professor of psychology at Western Washington University, and the defendant. 9-22-11 RP 3-64; 2 CP 188-189.

³ The forensic examiner also located a mixture of three persons DNA from the exterior of the glove, one of which was identified as the defendant's DNA and two other unknown sources. Because of the number of contributors the statistical number was much smaller; approximately 1 in 120 persons were a potential contributor to that mixture. 10-6-11 RP 275-76.

At the conclusion of the hearing the court found the montage used was not impermissibly suggestive. It therefore denied the motion to suppress. 9-22-11 RP 76-80; 2 CP 198-200.

After a jury trial the defendant was convicted of the robbery and burglary counts and two counts of assault second degree. The jury further found the defendant was armed with a firearm during the commission of each of these offenses. The jury was unable to reach a verdict as to the remaining two counts of assault second degree. 1 CP 37-50.

At sentencing the State alleged the defendant had one point for a prior Texas conviction. In support of that argument the State relied on documentation that had previously been submitted to the court in connection with the motion to compel the DNA sample, the motion to suppress identification evidence, and an exhibit consisting of the relevant law in Texas. 10-20-11 RP 11-12, 3 CP ____ (sub 29 NCIC report under seal), Ex. 8 to motion to suppress, Ex. 1 to sentencing hearing. The court found the Texas conviction was comparable and included it in the defendant's offender score. 10-20-11 RP 12; 1 CP 6.

III. ARGUMENT

A. THE COURT SHOULD NOT ADOPT A NEW TEST FOR EYEWITNESS IDENTIFICATION WHEN THE SUPREME COURT HAS ADOPTED THE FEDERAL TEST AND WHEN THE DEFENDANT HAS NOT RAISED THIS ISSUE IN THE TRIAL COURT.

1. Washington Has Adopted The Federal Standard Which Satisfies Due Process.

The standard for admissibility of out of court and in court identification evidence is fairness as required by the Due Process clause of the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98, 113, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). A defendant who seeks to suppress pretrial and in court identification evidence must first establish that the identification was impermissibly suggestive. Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). If he meets this burden then the court considers whether under the totality of the circumstances the suggestiveness resulted in a substantial likelihood of irreparable misidentification. Brathwaite, 432 U.S. at 114. To make that determination the court considers five factors: (1) the witnesses' opportunity to view the criminal at the time of the crime, (2) the witnesses' degree of attention, (3) the accuracy of the prior description given by the witness, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length

of time between the crime and the confrontation. Id. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 410 (1972). However, if he fails to show the identification was impermissibly suggestive, the inquiry ends, and the court does not proceed to consider the Biggers factors. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 48 (2002).

Washington has adopted that framework for admissibility of eyewitness identification evidence. Id., State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984). Pretrial photographic identification is not impermissibly suggestive when the witness' identification is based on a group of photos of people of the same gender and race, with similar features, and where the witness is not told the suspect's name or whether he is in the montage. State v. Hewett, 86 Wn.2d 487, 495, 545 P.2d 1201 (1976). Variations between photos such as background or different clothing do not make a montage impermissibly suggestive where they are features that would not unduly draw the witnesses' attention to a specific photo. Vickers, 148 Wn.2d at 118-119. In contrast a montage was impermissibly suggestive when the suspect was described as a blond male, and the defendant was the only blond male depicted in the montage. State v. Traweck, 43 Wn. App. 99, 103, 715 P.2d 1148 (1986),

review denied, 106 Wn.2d 1007 (1986) disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The trial court employed this framework when it considered the defendant's motion to suppress evidence that Mr. Shelton identified him as one of the robbers. The defendant assigns error to a number of the court's factual findings related to its decision to admit that evidence. Assignments of error 1-8, BOA at 3-4. He provides no argument in regard to how those factual findings were unsupported by the evidence. This Court should refuse to consider whether those findings are unsupported by the evidence. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554, review denied, 164 Wn.2d 1015 (2008).

2. This Court Must Follow The Decisions Of The Supreme Court Adopting The Brathwaite/Bigger Test. The Defendant Has Not Preserved The Question Of Whether The Court Should Adopt A New Framework For Admissibility Of Identification Evidence For Review.

The defendant urges this Court to abandon the long line of authority establishing the framework for determining the admissibility of eyewitness identification in favor of a more rigid standard. He does not argue that Due Process dictates this change. Rather he suggests that this Court should drastically alter the test employed for over forty years on the basis of developments

in the field of social science. This Court should reject that suggestion.

First, the Brathwaite/Biggers test was adopted by the Supreme Court of this State as the test for admissibility of eyewitness identification. Vickers, supra, Vaughn, supra. The Court of Appeals is obligated to follow those decisions. State v. Schmitt, 124 Wn. App. 662, 669 n. 11, 102 P.3d 856 (2004).

Secondly, the defendant has failed to preserve this issue for review. The defendant challenged admissibility of identification evidence under the framework outlined above. 1 CP 138-49⁴. He did not argue that the framework was out of date in light of developments in the field of social science. He did not ask the court to adopt the frame work he now advocates. The Court does not generally consider arguments on appeal that were not raised in the trial court. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Although RAP 2.5(a) may permit a party to raise an issue that constitutes manifest constitutional error for the first time on

⁴ The defendant did cite findings from some studies on eyewitness identification. He compared those findings to Mr. Shelton's identification in this case to argue under the Biggers factors the identification was not reliable. 1 CP 149-162. That is a different argument from the one raised on appeal where the defendant urges the court to abandon the 2 step process outlined by the United States Supreme Court and adopted by the Washington State Supreme Court.

appeal, “it does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not ‘manifest’.” Id.

On appeal the defendant relies heavily on a decision from the New Jersey Supreme Court, State v Henderson, 27 A.3d. 827 (NJ 2011). In Henderson the court remanded the case to a Special Master who presided over a lengthy and in depth hearing before rendering a decision. Id. at 217-18. No such record was produced in this case. Absent any record to show the test currently used to measure whether identification continues to meet the requirement of fairness inherent in the Due Process clause, the Court should decline to consider the issue.

In addition, to the extent the defendant did develop a record below, it would not support the conclusion that the current test does not continue to provide defendants the protection afforded by the Due Process clause. In Brathwaite the Court identified two concerns when considering whether a totality of the circumstances test met Due Process requirements, or whether a strict per se test was required. One concern was to deter police from engaging in unnecessarily suggestive procedures. Another was to ensure identification evidence was reliable. Brathwaite, 432 U.S. 110-14.

At the suppression hearing the defense expert testified that research has been done on various factors that can affect a witness's memory. Some factors were within the control of the police, and some were not. Cross racial identification, lighting, and the timing of the confrontation are not within the police control. How the montage is constructed and what statements are or are not made to the witness are within police control. As to those factors that are within the police control the Department of Justice had put out guidelines for police line ups. Many of the guidelines were followed in this case. As to the factors that are not in police control the expert did not think that should be a basis for excluding the evidence. 9-22-11 RP 23-25, 43, 48-40, 52, 54, 57, 58-59.

On this record the evidence shows that police are striving to avoid impermissibly suggestive lineups when attempting to identify a suspect by avoiding procedures that research has shown can corrupt an identification. The procedures employed show that the results obtained were reliable.

3. The Current Test Adequately Addresses The Dual Concerns That Identification Evidence Is Fair To The Defendant, And Is Not Unreasonably Excluded From Consideration By The Jury.

In addition to this Court's obligation to follow Vickers and Vaughn, the arguments in support of the defendant's position

should be rejected on their merits. The defendant justifies his arguments on the basis that trial courts act as evidentiary gate keepers whose role is to keep out unreliable evidence. The Brathwaite/Biggers test does just that by excluding evidence when it is obtained in an impermissibly suggestive manner that leads to the great probability that any subsequent identification will be irreparably tainted. The examples the defendant provides to illustrate his point do not change that result.

Two of the examples, hypnotically refreshed memory and polygraphs, are presumptively unreliable because they do not meet the Frye standard for general acceptance in the relevant scientific community. State v. Coe, 101 Wn.2d 772, 785, 684 P.2d 668 (1984), State v. Woo, 84 Wn.2d 472, 473, 527 P.2d 271 (1974). There is no suggestion by any of the memory experts the defendant relies on that there is general acceptance in the relevant scientific community that all eyewitness identification is unreliable.

The third example, child hearsay, is likewise different from the evidence at issue here. Child hearsay is a subset of hearsay which is generally excluded by court rule. ER 801, 802. It is only admissible pursuant to statute which specifically requires the court to find the "time, content, and circumstances of the statement

provide sufficient indicia of reliability” RCW 9A.44.120(1). No such statute or court rule proscribes admission of eyewitness identification. Rather that type of evidence falls under the general rules for relevance, just as evidence challenging the credibility of the identification would. ER 401, 402, 403.

The defendant argues eyewitness identification is problematic because it is frequently wrong. To support his first premise he quotes this court’s statement that “mistaken eyewitness identification is a leading cause of wrongful convictions.” State v. Allen, 161 Wn. App. 727, 734, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011). That is not the same thing as saying all eyewitness identification is mistaken, or that the vast majority of cases involving eyewitness identification result in wrongful convictions. He provides no information that shows that eyewitness identification is always, or even more often than not, unreliable.

The defendant points out that 75% of cases that have been overturned as a result of post conviction DNA testing involved eyewitness identification. BOA at 16.⁵ He uses that statistic to

⁵ The defendant references an article written in 2008 for that statistic. According to the Innocence Project website 300 people have been exonerated in the 20 year history of that organization. The website continues to maintain that 75% of convictions overturned by DNA testing involved eyewitness identification. www.innocenceproject.org.

urge that it makes “the problem of eyewitness misidentification more pressing than ever.” BOA at 19. Considered in isolation that figure is not helpful in assessing whether the current standards are inadequate to address the concerns outlined by the court through the procedures currently in place. It does not say anything about the number of cases based on eyewitness identification where DNA testing or other relevant evidence confirmed the eyewitness account, as it did in this case. Nor does it say anything about the number of cases where the accused has been acquitted through the mistaken rejection of eyewitness testimony. Without answers to these questions the statistic quoted by the defendant is meaningless when assessing whether the current test continues to meet Due Process requirements.

The defendant also argues this type of evidence is problematic because it nevertheless has great persuasive appeal to juries and that cross examination will be ineffective against a witness who is confident in his identification. BOA at 19-20. He supports the assertion in part by reference to this Court’s decision in Allen, 161 Wn. App. at 734. A careful reading of that portion of the opinion shows this Court was not adopting that position, but merely reciting the defendant’s arguments. He also relies on a

statement from a social scientist taken from a textbook and quoted by the Court in a Utah case, State v. Clopten, 223 P.3d 1103, 1109 (UT 2009). The claim that cross examination is ineffective against a confident witness is supported by reference to this Court's decision in Allen, but again the Court was stating the defendant's arguments, not necessarily adopting that position. Allen, 161 Wn. App. at 741. The statement was made by an attorney employed by the Innocence Project in a law review article. Neither source relied on by the defendant to support his claim give any substantive reason to believe that current test for admission of eyewitness identification evidence is flawed. Nor does it support the conclusion that the traditional methods for evaluating that evidence if it is admitted are ineffective.

Cross examination and the jury's ability to evaluate the evidence should not be dismissed as ineffective when considering this question. The persuasiveness of any eyewitness' identification is still affected by the facts and circumstances of the case, and the court's instructions to the jury that it is the sole judge of each witness's credibility. As Courts have recognized face to face confrontation of an eyewitness is vital because of its central role in determining the truth. State v. Rohrich, 132 Wn.2d 472, 477, 939

P.2d 697 (1997). It is held in such high regard that one court describe it as “the ‘greatest legal engine ever invented for the discovery of the truth.’” California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) citing 5 Wigmore §1367. When considering what weight to give that testimony jurors are instructed that they may consider “the opportunity of the witness to observe or know the things he or she testified about; the ability of the witness to observe accurately” as well other factors juror believe are important. WPIC 1.02. Jurors are presumed to follow the court’s instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

The defendant also argues that the Brathwaite/Biggers test for admissibility of eyewitness identification is inadequate because experts are not always available to testify on behalf of defendants due to lack of money and lack of qualified experts, referring to this Court’s comment in Allen. Allen, 161 Wn App. at 742-42. That statement was supported by reference to the ABA Criminal Justice Section Report to the House of Delegates. (http://www.abanet.org/moratorium/policy/2000s/2008_AM_OneHundredFourD.pdf.) The statement was used to explain why the committee favored a jury instruction on cross-racial identification rather than relying

solely on expert testimony. The defendant has not shown that the concerns in that report are a problem in Washington. Certainly the record in this case does not support that concern. Here the defendant was provided two experts at State expense who testified on his behalf. 3 CP ____ (sub 97 and 99).

Finally, the defendant argues the Court should adopt a new procedure because the Brathwaite/Biggers framework does not deter practices that guard against wrongful convictions. In Brathwaite the Court considered two approaches to identification testimony in existence at the time. The per se approach excluded an out of court identification whenever it was obtained through unnecessarily suggestive confrontation procedures, without regard to whether the identification was reliable. Brathwaite, 432 U.S. 110. The second approach relied on the totality of the circumstances. It permitted evidence of identification even if the confrontation procedure was suggestive, if the identification possessed features of reliability. Id. The Court found both approaches served the interest in deterring unnecessarily suggestive police procedures. It concluded that the totality of the circumstances approach satisfied Due Process concerns and was preferable because the per se approach went too far and ultimately produced Draconian results

“since it denies the trier reliable evidence, it may result, on occasion, the guilty going free.” *Id.* at 112-13. The observations of the Court 35 years ago remain true today.

The defendant faults the current test because it does not require the State to show that the procedure used was necessary; i.e. that no less suggestive procedure was available. BOA at 24. However the relevant question is whether a given montage so strongly suggested a particular individual to the witness that the witnesses’ memory of the true perpetrator is forever tainted. Whether the police could have used different photographs or presented the montage under different circumstances suffers from the same problem as the per se approach discussed in Brathwaite. It creates a rigid test that keeps otherwise reliable evidence from the trier of fact.

The defendant further argues the Biggers reliability factors actually reward suggestive police practices. But the court does not address those factors unless the montage first meets the threshold of impermissible suggestiveness. The police here were cognizant of that requirement when they constructed a montage taking into account the defendant’s sex, race, height, weight, and facial features, and used photos with the same background. 9-22-11 RP

6-18. Moreover, Henderson, relied on by the defendant, has recognized that across the nation law enforcement has taken note of the research and taken measures to enhance the reliability of eyewitness identification. Henderson, 27 A.3d at 912. Clearly that trend, and the actions taken by the Everett Police Department in this case, indicate that law enforcement actively work to avoid suggestive practices in order to identify the true perpetrator of the crime.

The defendant's proposed framework for admission of eyewitness identification should be rejected. The factors identified in studies which affect the reliability of an identification are the very factors which are relevant for a jury to assess the credibility of the identification. However, as demonstrated by this case, if they are the benchmark for admissibility, they have the great potential for depriving the jury of relevant, reliable information. Some of the factors identified by the defendant bearing on the question, such as lapse of time before confrontation and stress caused by the presence of a gun did not result in an inaccurate identification here. Ms. Brevig selected no one in any of the three montages she was shown. Mr. Shelton did not select any of the first 12 men shown to him. Although the third montage was viewed more than two years

after the robbery, he confidently picked the defendant as one of the robbers. His selection was verified by DNA testing.

4. Courts Which Have Departed From The Federal Test Have Done So Based On State Constitutional Grounds. Washington's Due Process Clause Is No More Protective Than The Federal Due Process Clause.

The defendant urges this Court to follow the lead of a minority of other states in abandoning the Brathwaite/Biggers test in favor of a per se rule that excludes identification evidence unless the State shows there was no less suggestive procedures that were reasonably available to the police. BOA at 32. Those States adopted the more rigid standard based on their state constitutional Due Process clauses. State v. Hubbard, 48 P.3d 953, 963-64 (UT 2002), People v. Adams, 53 N.Y.2d 241, 245, (NY 1981), State v. Dubose, 699 N.W.2d 582, 596-97 (WI 2005)⁶, Commonwealth v. Johnson, 650 N.E.2d 1257, 1259-60 (MA 1995), Henderson, 27 A.3d at 919, n. 10.⁷ Washington's Due Process clause does not afford greater protection than the Fourteenth Amendment. State v.

⁶ Dubose was concerned with show ups, not photo montages or line up identifications. A show up involved the witness observing the suspect alone, unaccompanied by others who looked like him. Dubose, 699 N.W.2d at 586.

⁷ The defendant also cited State v. Hunt, 69 P.3d 572 (KS 2003). Hunt retained the Brathwaite/Biggers test but expanded the reliability factors set out in Biggers to consider additional factors, following Utah's decision in State v. Ramirez, 817 P.2d 774 (UT 1991). Hunt, 69 P.3d at 576. The court did not indicate whether it was basing its decision on State constitutional grounds or for some other reason.

McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009), In re Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). That authority should not govern the standard for admissibility of evidence in Washington.

Nor should the Court consider whether the State Due Process clause provides greater protection than its federal counterpart here. The defendant has not addressed the Gunwall⁸ factors in an effort to show in this context that provision does provide greater protection. Nor has he shown that the Court has previously considered whether the State Due Process clause provides greater protection when considering admissibility of evidence. In the absence of a Gunwall analysis the Court should conclude the provisions are coextensive in this circumstance. Dyer, 143 Wn.2d at 394.

Finally, even Henderson, which the defendant relied on heavily to support his position, did not go as far as the defendant urges this Court to go. Henderson rejected the per se test urged by the defendant here for the very reason that the Court did in Brathwaite; that standard would lead to the loss of a substantial amount of reliable evidence. Id. at 922. Instead it ordered a three part test which shifted the burden of proof at each stage. The

defendant had the initial burden to show the procedure was suggestive based on factors within the control of the police. If the court concluded the claim is baseless no further inquiry is required. If the court concludes there is a basis for the claim the burden shifts to the State to show the proffered evidence is reliable. The defendant bears the ultimate burden to prove a substantial likelihood of irreparable misidentification. The court considers that question based on the totality of the circumstances, and excludes the evidence only if the defendant bears his burden of proof. *Id.* at 920. Thus, even when a court has carefully created a record, and considered it in light of the State constitutional provisions, it still retained reliability under the totality of the circumstances as the “linchpin for admissibility.” *Brathwaite*, 432 U.S at 114.

5. Other Evidence Was Sufficient To Prove The Defendant Was One Of The Robbers.

The defendant asks this Court to remand the case to the trial court for a new hearing on the identification employing the procedure he urges the Court to adopt. He argues that if under that new procedure the identification should be suppressed, then admission of the evidence was not harmless. BOA at 42-44.

⁸ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

For the reasons outlined above the Court should not adopt the new procedure urged by the defendant, and accordingly should not remand to the trial court for a new hearing. However, even if at some point the Court concludes admission of the evidence was error, it was at best harmless, and the defendant's conviction should be affirmed. Constitutional error is harmless if the Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986).

Mr. Shelton did not know the defendant before he committed the home invasion robbery. There is no independent source for his identification. Had the montage been suppressed, Mr. Shelton's in court identification would have been suppressed as well. State v. Hilliard, 89 Wn.2d 430, 439-40, 573 P.2d 22 (1977).

Mr. Shelton's in court identification and montage pick were not the only evidence tying the defendant to the robbery. Mr. Shelton did work with a sketch artist to draw a picture of the robber. That sketch does look somewhat like the defendant. There is no argument that procedure should be subjected to the same revised test the defendant proposes for montage identification.

More significantly, the defendant's DNA was found on a glove found in the victim's living room. The statistical probability that another random person would have contributed to the DNA found in that glove assured that it was in fact the defendant's DNA and not some other potential suspect. His DNA would not have been there had he not been one of the robbers. A jury would have concluded the defendant was the robber, even without Mr. Shelton's identification.

The DNA test was performed at the Washington State Patrol Crime Lab, an accredited lab with a number of quality control procedures in effect. Both the forensic examiner who performed the tests and the defense expert testified to some errors that had been done. The errors testified to did not affect the tests performed on the unknown samples from the glove fragment or the known sample from the defendant.⁹ The test would not have produced the defendant's DNA profile on the unknown sample unless his DNA

⁹ The reference samples for Mr. Shelton and Ms. Brevig resulted in inconsistent gender profiles leading the forensic examiner to perform a second test on each known sample. In the same test an error occurred in typing incorrect information into the testing instrument for one of three control samples. When examining the defendant's known sample the examiner typed in the wrong date. A second sample was loaded into the control sample when the defendant's known profile was run. The error was corrected by re-running the defendant's sample. Other errors occurred in unrelated cases. 10-6-11 RP 266, 281-83, 304, 307-09, 311-15, 319, 323-25

had been in the laboratory at the time of the test. There was no evidence the defendant's DNA had been in the laboratory before the forensic examiner tested the evidence which produced the profile later matched to the defendant's profile. 10-6-11 RP 249-50, 256-58, 321, 325-29.

The defense expert, Dr. Riley's testimony did not undermine any of the evidence presented by the examiner who performed those tests. Dr. Riley had limited forensic DNA work experience. He calculated an error rate that was based in part on speculation regarding the number of errors actually made. Some of the errors included in his error rate involved errors that he conceded would not lead to an incorrect profile conclusion. He admitted that an error rate for one case should not be applied for an entire lab. He found no errors on samples the forensic examiner re-ran. He found no problems with the test conducted on the unknown sample from the glove, or any indication that the defendant's DNA was in the lab before the glove was tested. He agreed the profile from the glove matched the defendant's profile. 10-7-11 RP 85-86, 88-89, 92, 96-99.

The DNA evidence presented was compelling. There were no gloves in the home like the ones with the defendant's DNA on it

before the robbery occurred. The victims did not know the defendant before that date. 10-4-11 RP 72; 10-6-11 RP 335. The strong circumstantial evidence established that the defendant left the glove fragment at the victim's home when he fled from the robbery. Even without Mr. Shelton's testimony identifying the defendant as one of the robbers, a rational trier of fact would have concluded beyond a reasonable doubt that the defendant was one of the men who broke into the victim's home and robbed them.

B. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT OR AN ACCOMPLICE WAS ARMED WITH A FIREARM.

The defendant next challenges the sufficiency of the evidence to support the firearms enhancement. Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence

as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

In order to prove the sentencing enhancement the State was required to show the defendant or an accomplice was armed with a firearm. 1 CP 75. "A 'firearm' is a weapon or device from which a projectile may be fired by an explosive such as gunpowder." Id. Applying the standards outlined above there was sufficient evidence for a rational trier of fact to find the guns used in the robbery met the definition of a "firearm."

All of the victims described being threatened by one or more guns. The robbers used the guns to coerce the victims to go where they wanted them to go. One robber threatened to shoot Ms. Tame's dog if she did not get the dog to quiet down. One of the robbers gave Mr. Shelton five seconds to tell them where the

money was or he would kill Mr. Shelton. The robber held a gun to Mr. Shelton's head and began a countdown. Mr. Shelton is familiar with guns. He described the gun held to his head as hard metal. The gun felt "absolutely real" to him. When the robber got to two in the countdown Mr. Shelton jerked his head away. 10-4-11 RP 32-34, 37-39; 10-5-11 RP 90, 94, 135; 10-6-11 RP 334-337.

This evidence shows the robbers knew they had real guns. The victim's reactions, by complying with the robbers' commands and taking evasive action to avoid being shot show they had a substantial reason to believe the robbers had real guns. The direct and circumstantial evidence proved beyond a reasonable doubt the robbers were armed with firearms as defined by statute.

The defendant claims this evidence was insufficient relying on State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010). There the evidence was that the intruder was holding "what appeared to be a gun." Id. at 705. It was dark at the time because the intruder shined a flashlight at the victims. The victims covered their heads as directed by the intruder. Id. The Court held this was insufficient to prove the firearm was operable at the time of the offense. Id. at 714. The court suggested sufficient evidence could include bullets found, gunshots heard, or muzzle flashes. Id. n. 11. Based on this

language the defendant argues the evidence was insufficient because no gun or bullets was recovered and there was no evidence of a gunshot.

To read the footnote in Pierce as limiting the type of evidence that may be considered when determining whether there was sufficient evidence to support the firearm enhancement ignores the standard by which sufficient evidence is evaluated. Firing the gun is direct evidence that it is a real gun. However circumstantial evidence is equally probative. Reading Pierce in the manner argued by the defendant would exclude consideration of relevant and probative circumstantial evidence.

Pierce should also not be read to require actual operation of the firearm in order to prove the firearm enhancement because it is inconsistent with prior case authority. The defendant supports his interpretation of Pierce by relying on Rencuenco and Pam for the proposition that the State must show the firearm was capable of being fired under the statutory definition in order to uphold the enhancement. State v. Rencuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), State v. Pam, 98 Wn.2d 748, 753-54, 649 P.2d 454 (1983), overruled on other grounds, State v. Brown, 111 Wn.2d 12, 761 P.2d 588 (1988).

The issue in Rencuenco was not whether the evidence was sufficient to support a firearm enhancement. Rather the issue was whether the court could sentence the defendant to that enhancement when he had been charged and found guilty of a deadly weapon enhancement. To the extent the Court discussed the necessary proof for a firearm it was dicta. State v. Forhan, 59 Wn App. 486, 489, 798 P.2d 1178 (1990) (statements which are unnecessary to the court's decision are dicta and does not constitute a rule the courts are bound to follow).

Rencuenco relied on Pam. In Pam the Court considered whether the trial court erred when it submitted a special verdict form asking whether the defendant was armed with a deadly weapon, and in failing to instruct on the burden of proof for the deadly weapon enhancement. Pam, 98 Wn.2d at 751. The Court held the State must prove the presence of "a weapon in fact". Id. at 753. Evidence was insufficient if it showed only that he was armed with a "gun like, but nondeadly, object". Id. The Court considered this language when interpreting the statute in State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998). The Court concluded the statute did not limit the definition of a firearm to guns which were capable of being fired during the commission of the crime. Rather it

included firearms that were unloaded or malfunctioning. Id. at 380-81.

If a gun were malfunctioning or unloaded there would not likely be evidence of bullets or a gunshot. Nevertheless there could be evidence that was sufficient to show that the gun was real, and not a toy. This case is one where the evidence was sufficient to support the firearm enhancements.

C. THE DEFENDANT'S PRIOR DRUG CONVICTION WAS LAWFULLY INCLUDED IN HIS OFFENDER SCORE.

At sentencing the State argued the defendant's prior conviction for drug possession should be included in his offender score. To prove the prior conviction the State pointed to information submitted to the court in pre-trial hearings. The State submitted a NCIC report showing the defendant had been convicted of possession of controlled substance in violation of the Texas Health and Safety Code section 481.115(b). The defendant submitted a multiple page certified copy of his record from Dallas County Texas showing that he was in prison on that charge. The prosecutor also supplied the court a multiple page document containing the Texas criminal code as it related to controlled substances. The prosecutor argued that under that code the

offense was comparable to Washington's controlled substance law. 1-14-11 RP 4-6; 1-20-11 RP 4; 3 CP ____ (sub 29); 9-22-11 RP 63-64, Ex. 7, 8; 10-20-11 RP 11-12.

The defendant stated that the court could count the conviction as long as it had information before it that showed the defendant was convicted of the charge in Texas, and that it was comparable to a Washington offense. The court did find based on the evidence before it that the defendant was the person who had been convicted of the charge and that it was comparable to a Washington offense. 10-20-11 RP 12.

The defendant now argues that the prior Texas conviction should not be included in his offender score. Out of state convictions are included in a defendant's offender score if the State establishes the comparability of the offenses. State v. Walters, 162 Wn. App. 74, 85, 255 P.3d 835 (2011). The State typically does that by proving the out of state conviction exists and providing the foreign statute for the court. Id.

To determine if the foreign conviction is comparable to a Washington crime the court first compares the elements of the out of state offense with the elements of a potentially comparable Washington crime. State v. Jordan, 158 Wn. App. 297, 241 P.3d

464 (2010). If the elements are substantially the same as a Washington offense they are comparable and properly included in the offender score. Id. at 300. If not the court then looks to whether the defendant's conduct would be factually comparable to a Washington offense. Id.

The defendant does not challenge the existence of his prior Texas conviction. Rather he argues it is not legally comparable to possession of a controlled substance in Washington because if the charge is based on possession of marijuana it could be a felony or misdemeanor depending on the quantity of marijuana possessed. He argues the record does not support the conclusion that the conviction is factually comparable because there were no records showing that he was convicted of more than 40 grams of marijuana. BOA at 49.

The record before the court shows the defendant was convicted under Texas Controlled Substances Act section 481.115 in the 363rd District Court of Dallas, case number F-0854671. See NCIC report 3 CP __ (sub 29), Ex. 8 to motion to suppress hearing

held 9-22-11¹⁰. That code section states that except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice. TX HEALTH & S § 481.115

Neither marijuana nor THC is one of the drugs prohibited under penalty group I. See Texas Health and Safety code § 481.102. The drugs listed in penalty group I appear to all be contained in Schedule I or II of Washington's Uniform Controlled Substances Act, 69.50 RCW. Any violation of the Texas statute would be a felony violation of RCW 69.50.401.

If this Court finds the documentation before the court was not sufficient to establish the Texas conviction was comparable the defendant argues the State should be precluded from supplementing the record relying on State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). In Lopez the State alleged the defendant

¹⁰ The certified copy of the defendant's arrest history in Exhibit 8 from the suppression hearing held 9-22-11 is a multi-page document. The relevant documents are on page 20-21. The record shows the defendant was originally charged with three counts, one of which was possession of marijuana less than 20 grams. That count was dismissed.

had prior criminal history, but provided no documentation to support it. The Court recognized that remand for an evidentiary hearing was appropriate when the defendant failed to specifically object to the state's evidence of the existence or classification of a prior conviction, citing State v. Ford, 137 Wn.2d 427, 485, 973 P.2d 452 (1999). However it held under the circumstances where the defendant had objected to including prior convictions absent proof by a preponderance of the evidence remand on the existing record was the appropriate remedy. Lopez, 147 Wn.2d at 521.

Lopez does not control in this case for two reasons. First the State had provided the court with documentation that it relied on to prove the existence of the prior conviction and its comparability. Although defense counsel initially disputed all criminal history, he clarified that the defense position was that the court could count the prior offense "as long as it has material before the Court that allow it to consider it, that it is comparable to Washington's and that Mr. Holmes is the person that was convicted." 10-20-11 RP 11-12. Thus the defense was not objecting to the court including the prior in the absence of any evidence to prove its existence and comparability.

Secondly, Lopez was decided before RCW 9.94A.525 was amended to permit the court to include prior a conviction on re-sentencing “in order to ensure imposition of an accurate sentence.” RCW 9.94A.525(22). The Legislative intent specifically stated that given the Court’s decisions in various cases including Lopez it found it necessary to amend the provision of the statute to ensure that sentences imposed accurately reflect the offender’s actual, complete criminal history, whether imposed at sentencing or re-sentencing. Laws of Washington 2008, ch. 231, § 1. The Legislature has made it clear that it wants to ensure sentences in Washington are accurate, and do not want defendants to be awarded a windfall in the event the trial court does not include a prior conviction based on an inadequate record before it. It makes no sense to permit additional information to support inclusion of a prior offense at resentencing after appeal when no information was originally provided, and not to permit additional information when the State provided some information that an appellate court later found to be insufficient.

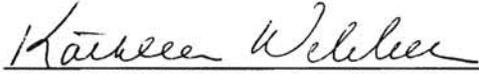
IV. CONCLUSION

For the foregoing reasons the State asks the Court to reject the defendant’s request to abandoned the current test for

admission of eyewitness identification, affirm the firearm enhancement, and affirm the trial court's criminal history determination.

Respectfully submitted on October 9, 2012.

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