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No. 70296-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HAFF,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence as a matter of law that the crime was committed "within" a bank, as required to support a conviction for first-degree robbery as charged.

2. The admission of Casey Montgomery's in-court identification of Mr. Haff as the perpetrator violated Mr. Haff's right to due process under the Fourteenth Amendment to the United States Constitution.

3. The admission of Casey Montgomery's in-court identification of Mr. Haff as the perpetrator violated Mr. Haff's right to due process under article I, section 3 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Haff was charged with first-degree robbery under the alternative that the crime was committed "within and against a financial institution." The crime was committed against U.S. Bank, but not within a U.S. bank branch. Rather, it was committed within an Albertson's grocery store, where U.S. Bank had a counter. Did the State fail to prove first-degree robbery as charged, requiring reversal of the conviction and dismissal of the charge with prejudice?

2. The Due Process Clause of the Fourteenth Amendment prohibits the admission of eyewitness identifications which are (1) obtained pursuant to impermissibly suggestive procedures and (2)

unreliable under the totality of circumstances. In this case, a teller was robbed in a 20-second span of time by a person with a hat pulled down over half of his face, and the teller's focus was on a note the robber gave him and on the cash drawer. A few days after the robbery, the teller could not select the perpetrator from a montage that included Mr. Haff's picture. Yet, a year and a half later, the teller was permitted to testify at trial that he was 100% certain that Mr. Haff – who was the only defendant in the courtroom – was the robber. Did the admission of this identification violate Mr. Haff's Fourteenth Amendment right to due process, requiring reversal of the conviction and remand for a new trial?

3. Article I, section 3 of the Washington Constitution has been held to be more protective than the Fourteenth Amendment in prohibiting the introduction of unreliable evidence. Did the admission of the in-court identification described above violate Mr. Haff's right to due process under article I, section 3?

C. STATEMENT OF THE CASE

In August of 2011 there was an Albertson's grocery store in Marysville with a U.S. Bank counter inside it.[1] RP (2/19/13) 145; ex. 4. On August 9, a tall, thin white man with a scruffy face wearing a North Face jacket and dark hat approached the counter and dropped a note in

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[1] The store apparently does not exist anymore. RP (2/19/13) 145.

front of teller Casey Montgomery. RP (2/19/13) 146-47. Mr. Montgomery looked down at the note and read it. RP (2/19/13) 147, 159. The note said:

> My partner is in the parking lot with a police radio. If you hit the alarm, he will know and start shooting. I am armed as well. You have 30 seconds to get me a hundred thousand dollars in $100 bills. No marked bills, dye packs, or tracking devices. You can call the cops 5 minutes after I leave. If you call before then, my partner will know and start shooting. Give me this note back. Your time starts now!

RP (2/19/13) 135. The teller was scared and gave the person all of the money from his top drawer, which amounted to around $2,000. RP (2/19/13) 147-49. The robber took the money and left. RP (2/19/13) 150. The encounter lasted about 20 seconds. RP (2/19/13) 156.

Based on video surveillance and a thumbprint on the note, detectives suspected Stephen Haff of the crime. CP 113. A detective created a montage of six photographs, including Mr. Haff's, and showed it to Casey Montgomery on August 17, eight days after the robbery. RP (2/20/13) 303. Mr. Montgomery did not select anyone in the montage as the robber. RP (2/20/13) 304. Another teller who had been present that day, Tyson Farley, selected Mr. Haff from the montage. RP (2/20/13) 304. However, he was only 70% sure Mr. Haff was the perpetrator. RP (2/20/13) 308.

The State charged Mr. Haff with first-degree robbery, alleging he committed the crime "within and against a bank." CP 114. For various reasons, including competency concerns and difficulty securing the presence of the other suspect, trial did not begin until a year and a half later. CP 82-87, 107-09.

At trial, Mr. Haff's defense was that his onetime friend and roommate, Daniel Aaron Stickney, was the actual perpetrator. Mr. Haff pointed out that Mr. Stickney had a motive to rob the bank because he had depleted his funds earned from fishing by buying drugs and partying. Mr. Stickney easily could have planted evidence including using paper with Mr. Haff's fingerprints and putting one of Mr. Haff's hairs in a hat that was suspiciously "discovered" on the Stickney property more than a year after the robbery. RP (2/19/13) 12-13, 128-33; RP (2/20/13) 218, 239-57, 274-75, 286-93; RP (2/21/13) 491-508.

Defense counsel pointed out that Mr. Haff and Mr. Stickney looked a lot alike and it was not clear from the surveillance videos and photographs who the perpetrator was. RP (2/21/13) 497. Mr. Stickney's family members, in contrast, claimed that the surveillance photographs showed that Mr. Haff was the perpetrator. RP (2/20/13) 215-16, 233.

Consistent with his statement shortly after the crime, teller Tyson Farley testified he was 70% sure Mr. Haff was the robber. RP (2/19/13)

175. Over Mr. Haff's objections, victim Casey Montgomery was permitted to testify that he was 100% certain Mr. Haff was the robber, even though a year and a half had passed since the event, Mr. Haff was the only defendant in the courtroom, and Mr. Montgomery did not select Mr. Haff from a montage eight days after the crime. RP (2/19/13) 154-58; CP 98.

The jury convicted Mr. Haff as charged, and he was sentenced to 48 months in prison. CP 6-8.

D. ARGUMENT

1. The State presented insufficient evidence to prove that the crime was committed "within" a bank, as required by RCW 9A.56.200(1)(b).

a. Issues of statutory construction are reviewed *de novo*, and the plain language of the statute governs.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack,* 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction

only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Where, as here, the sufficiency of the evidence turns on the meaning of a statute, it is a question of law this Court reviews *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

"Statutes are construed as written." *State v. Chester*, 133 Wn.2d 15, 17, 940 P.2d 1374 (1997). Thus, in determining the meaning of a statute, courts look first to the text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute does not define its terms, the words are given their ordinary dictionary definition. *Chester*, 133 Wn.2d at 22.

Statutes may not be construed in a manner which renders words meaningless or superfluous. *Ervin*, 169 Wn.2d at 823. Furthermore, "[t]he court may not add language to a clear statute, even if it believes the

Legislature intended something else but failed to express it adequately." *Chester,* 133 Wn.2d at 21.

Criminal statutes must be strictly construed in favor of the accused, because violations result in a serious deprivation of liberty. *State v. Jacobs*, 154 Wn.2d 596, 601-02, 115 P.3d 281 (2005) (explaining and applying rule of lenity).

b. Under the plain meaning of the word "within," the crime at issue here was not committed within a financial institution, requiring reversal of the conviction and dismissal of the charge.

The State charged Mr. Haff with first-degree robbery in violation of RCW 9A.56.200(1)(b). CP 114. The statute provides, "A person is guilty of robbery in the first degree if [h]e or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060." RCW 9A.56.200(1)(b); *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007).

There is no dispute here that a robbery was committed *against* a financial institution. *See* RP (2/21/13) 469-70 (stipulating that U.S. Bank was a financial institution). But the statute demands more. The word "within" must not be rendered superfluous. The robbery at issue in this case occurred "within" an Albertson's grocery store, but it did not occur "within" U.S. Bank.

"Within" means "inside something." http://www.merriam-webster.com/dictionary/within (viewed 6/12/14). It is "used as a function word to indicate enclosure or containment." *Id.* Under this ordinary dictionary definition, the first-degree robbery statute does not apply to the events at issue in this case, and the State should have charged second-degree robbery.

As the tellers testified and the exhibits showed, the U.S. Bank branch at issue here was little more than a counter inside an Albertson's. Exs. 4, 7, 8; RP (2/19/13) 144-45; RP (2/19/13) 161. The clearest evidence of the layout was provided in video exhibit 4. The video has been designated, but for the Court's convenience, the following are representative screenshots:

Digital Video Snapshot
Site: Pacific Division/Northwest Region/WA/8252 North Marysville Albertsons
Camera Group: 8252 North Marysville Albertsons
Camera Name: 02 Tellers 1 and 2
8/9/2011 5:28:28 PM (Pacific Daylight Time)

Digital Video Snapshot
Site: Pacific Division/Northwest Region/WA/8252 North Marysville Albertsons
Camera Group: 8252 North Marysville Albertsons
Camera Name: 02 Tellers 1 and 2
8/9/2011 5:29:43 PM (Pacific Daylight Time)

Although the teller described it as also having an office and a small vault, the robbery did not occur within those enclosed areas. RP (2/19/13) 145-50; ex. 4. Thus, as a matter of law the State failed to prove first-degree robbery as charged.

Engel is instructive. There, the defendant was charged with second-degree burglary, which required entering or remaining in a "building." *Engel*, 166 Wn.2d at 574 (citing RCW 9A.52.030). The statutory definition of building included "fenced area." *Id.* (citing RCW 9A.04.110(5)). One third of the property at issue in the case had a chain link fence with barbed wire and a locked gate. *Id.* The rest of the property was bordered by steep hills. *Id.* at 574-75.

The defendant argued that the property was not a "fenced area" under the statute because it was not "totally enclosed by a fence." *Engel*, 166 Wn.2d at 578. The State, in contrast, argued that "the common understanding of fenced area includes an area partially enclosed by a fence, where topography and other barriers combine with the fence to close off the area to the public." *Id.* The Supreme Court agreed with the defendant, noting that although "fenced area" was not defined in the statute, the dictionary defined "fence" as "to surround, separate, or delineate with ... a fence: [to] erect a fence around or along (as a field or boundary)." *Id.* at 579 n.5 (quoting Webster's Third New International

Dictionary 837 (2002)). The Court accordingly reversed the defendant's conviction for insufficiency of the evidence under a properly construed statute. *Id.* at 581.

This Court should do the same here. The robbery at issue was not committed "within" a financial institution as required to elevate the crime to robbery in the first degree. The remedy is reversal of the conviction and dismissal of the charge with prejudice. *Engel*, 166 Wn.2d at 581. The Court need not reach the alternative arguments below.

2. The trial court violated Mr. Haff's constitutional right to due process by admitting the teller's in-court identification of Mr. Haff as the perpetrator.

a. The teller could not identify the perpetrator in a montage that included Mr. Haff, but was allowed to testify at trial that he was 100% certain that Mr. Haff, who was the only defendant in the courtroom, was the perpetrator.

A few days after the robbery, detectives showed photographic montages to both the teller who interacted with the robber, Casey Montgomery, and the other teller, Tyson Farley. RP (11/9/12) 4. There were six photographs in the montages, including one of Mr. Haff. Mr. Montgomery could not identify anyone in the montage as the robber. RP (11/9/12) 5-6; RP (2/19/13) 154. Mr. Farley selected the picture of Mr. Haff, and said he was 70% certain that Mr. Haff was the robber. RP

(11/9/12) 6-7. He could not be 100% sure because the robber had worn a hat pulled down low. RP (2/19/13) 163; ex. 4.

Trial occurred a year and a half later. Before trial, Mr. Haff moved to suppress, *inter alia*, any in-court identification of Mr. Haff by Casey Montgomery.[2] CP 98. The trial court denied the motion. RP (11/9/12) 27. Thus, despite not having been able to identify Mr. Haff as the perpetrator in a photo montage shortly after the robbery, Mr. Montgomery was permitted to testify a year and a half later that Mr. Haff – who was the only person in the defendant's chair – was the robber. RP (2/19/13) 154-55, 157. He testified that he was "100% certain" that Mr. Haff was the perpetrator. RP (2/19/13) 157, 159.[3]

b. <u>The admission of the in-court identification violated Mr. Haff's right to due process under the Fourteenth Amendment</u>.

Courts have long recognized that eyewitness identifications are often unreliable. *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926,

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[2] Counsel also moved to suppress both the photographic identification and in-court identification by the other teller, Mr. Farley. Mr. Haff is not challenging the denial of that motion on appeal, but is challenging the admission of Mr. Montgomery's in-court identification of Mr. Haff as the perpetrator.

[3] Mr. Farley testified, consistent with his interview shortly after the robbery, that he was only 70% sure that Mr. Haff was the robber. RP (2/19/13) 175.

18 L.Ed.2d 1149 (1967). "The identification of strangers is proverbially untrustworthy." *Id.* at 228.

Suggestive procedures increase the likelihood of misidentification. *Id.*; *Neil v. Biggers*, 409 U.S. 188, 199, 193 S.Ct. 357, 34 L.Ed.2d 401 (1975). A witness's recollection of a total stranger can be easily, and unintentionally, distorted by the circumstances. *Mason v. Brathwaite*, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and his susceptibility to suggestion is the greatest." *Wade*, 388 U.S. at 229.

An identification procedure violates the Fourteenth Amendment right to due process if it is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); U.S. Const. amend. XIV; *see Brathwaite*, 432 U.S. at 114; *Biggers*, 409 U.S. at 199. Thus, an identification must be suppressed if (1) the identification procedure is impermissibly suggestive, and (2) the totality of the circumstances indicates that the identification is unreliable. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). Courts evaluate reliability by considering the following factors: (a) the opportunity of the witness to view the perpetrator at the time of the crime, (b) the witness's degree of

attention, (c) the accuracy of the prior description given by the witness, (d) the level of certainty demonstrated by the witness at the confrontation, and (e) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. A court must then weigh the corrupting effect of the suggestive identification itself against these factors. *Brathwaite*, 432 U.S. at 114.

With respect to the first prong of the test, "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997); *accord United States v. Archibald*, 734 F.2d 938, 941, 943 (2d Cir. 1984). "Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor." *Archibald,* 734 F.2d at 941. Thus, it is necessary to address the second prong: whether the identification is reliable despite suggestive procedures. *Rogers,* 126 F.3d at 658.[4]

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[4]Although the suggestive procedure in the courtroom is not orchestrated by the police, it is still, of course, state action, and therefore the Fourteenth Amendment applies. *See Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 727, 181 L.Ed.2d 694 (2012) (alternately discussing "police-designed lineups," identifications "compelled by the State," and "the manner in which the prosecution presents the suspect to witnesses"). *See also Shelley v. Kraemer*, 334 U.S. 1, 13-14, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (holding that enforcement of private racially

The first of the five factors to be considered under the second prong is "the opportunity of the witness to view the perpetrator at the time of the crime." *Biggers*, 409 U.S. at 199-200. In this case, the entire interaction lasted only about 20 seconds. RP (2/19/13) 156. Also, the perpetrator wore a hat pulled down, had "some sort of scruff on his face," and kept his head down. RP (2/19/13) 147, 159, 163. Thus, this factor cuts against reliability. *See Rogers*, 126 F.3d at 658 (concluding this factor cut against reliability under similar circumstances).

As to the second factor, "degree of attention," the teller's attention was diverted to the note and the cash drawer and away from the robber's face. RP (2/19/13) 147. He said, "I was more focused on the note and making sure that I was safe, so giving him the money." RP (2/19/13) 159. He was also understandably scared. RP (2/19/13) 148. Accordingly, the "degree of attention" factor also cuts against reliability. *See Rogers*, 126 F.3d at 659 (fear weighs against reliability under this factor).

The third factor is the accuracy of the prior description given by the witness. *Biggers*, 409 U.S. at 199-200. It is not clear how Mr. Montgomery originally described the robber, as the affidavit of probable cause simply states "Witnesses described the robbery suspect as a 6'2"

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restrictive covenants violated Fourteenth Amendment and constituted state action because of the involvement of the courts).

white male with dark brown hair wearing a blue hat and black jacket." CP 112. At trial, Mr. Montgomery described the robber as "wearing a dark hat, North Face Jacket, and kind of some scruff on his face, white." RP (2/19/13) 147. Other than the race, none of that description was true of Mr. Haff during trial. When prompted, Mr. Montgomery also said the robber was tall and slender. RP (2/19/13) 147. Mr. Haff was tall and of medium build. CP 115. Of course, the most notable fact relevant to this prong is that Mr. Montgomery did **not** choose Mr. Haff from a montage just a few days after the robbery. This prior determination that Mr. Haff was not the robber means the third factor cuts strongly against reliability.

Turning to the fourth factor, Mr. Montgomery's expressed level of certainty was 100%, and therefore under *Biggers* this factor cuts in favor of reliability. However, this factor should be given very little weight because intervening studies and cases recognize that there is no correlation between an eyewitness's level of certainty and the accuracy of the identification. *See, e.g., Brodes v. State*, 614 S.E.2d 766, 770-71 (Ga. 2005) (gathering cases); *State v. Long*, 721 P.2d 483, 490-91 (Utah 1986) (gathering scholarly articles). *See also State v. Lawson,* 352 Or. 724, 745, 291 P.3d 673 (Or. 2012) ("Under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"); *State v.*

Henderson, 27 A.3d 872, 889 (N.J. 2011) ("accuracy and confidence may not be related to one another at all.").

As to the fifth factor, the time between the crime and the in-court identification was a year and a half. RP (2/19/13) 157. This interval cuts strongly against reliability – especially in light of the fact that just a few days after the robbery, Mr. Montgomery did not identify Mr. Haff as the robber when presented with an opportunity to do so.

In sum, an evaluation of the relevant factors compels the same conclusion reached in *Rogers*: that the admission of the in-court identification violated due process.

> [T]he only factor that weighs in favor of reliability of the identification is the witness's level of certainty. [His] conviction cannot be enough to outweigh the factors that undercut its reliability in light of the circumstances under which [he] came to identify the defendant. Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime. Due process precludes sending evidence of such questionable credibility to a jury. Accordingly, we find that this identification was impermissibly suggestive and posed a very substantial risk of irreparable misidentification and, therefore, should not have been admitted.

Rogers, 126 F.3d at 659.

c. The admission of the in-court identification violated Mr. Haff's right to due process under article I, section 3.

Even if the identification were admissible under the Fourteenth Amendment, it is inadmissible under article I, section 3 of the Washington Constitution. This Court should hold that article I, section 3 is more protective than the Fourteenth Amendment in this context, and that our state constitution prohibits the admission of unreliable identifications. This Court should hold that the factors to be considered in this analysis are those determined to be relevant to reliability and accuracy in scientific studies and court decisions since *Biggers.* Many other states have updated their standards in light of current scientific data, and this Court should do the same. *See, e.g., Lawson,* 352 Or. 724; *Henderson*, 27 A.3d 872; *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005); *State v. Hunt*, 69 P.3d 571 (Kan. 2003); *Commonwealth v. Johnson*, 650 N.E.2d 1257 (Mass. 1995); *State v. Ramirez*, 817 P.2d 774 (Utah 1991); *People v. Adams*, 423 N.E.2d 379 (N.Y. 1981).

i. *The Gunwall factors show an independent state constitutional analysis is appropriate.*

To find that a state constitutional provision supplies different or broader protections than its federal counterpart, courts analyze six nonexclusive criteria. These are: (1) the text of the state constitutional

provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

As to the first two factors, the language of the federal and state due process clauses are identical. Both prohibit the deprivation of "life, liberty, or property without due process of law." U.S. Const. amend. XIV; Const. art. I, § 3. This does not end the inquiry, however.

> The dissent erroneously asserts that it is improper to construe our state constitution as more protective of individual rights than the federal constitution when the pertinent provisions are similarly or identically phrased. Only if constitutional decisions by federal courts are "logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

State v. Davis, 38 Wn. App. 600, 605 n.4, 686 P.2d 1143 (1984) (quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977)).

In addition, "[e]ven where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions

of the state constitution may require that the state constitution be interpreted differently." *Gunwall*, 106 Wn.2d at 61.

> While textual similarity or identity is important when determining when to depart from federal constitutional jurisprudence, it cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary. The people of this state shaped our constitution, and it is our solemn responsibility to interpret it.

Dubose, 699 N.W.2d at 597.

With respect to the third *Gunwall* factor, there does not appear to be any legislative history from the constitutional convention that sheds light on whether the state due process clause should be interpreted differently from the federal one. *See State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992) (citing *Journal of the Washington State Constitutional Convention, 1889*, at 495-96 (B. Rosenow ed. 1962)).

Regarding the fourth factor, pre-existing state law, the Washington Supreme Court has held that the reliability-of-evidence standard embodied in the state constitution's due process clause provides broader protection than the federal due process clause, and it has never retreated from this holding. *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (citing *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) ("*Bartholomew II*")). In *Bartholomew I*, the Court held that certain provisions of Washington's death penalty statute

violated the federal due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of its reliability. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) ("*Bartholomew I*"). The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). On remand, the state supreme court declined to rely solely on the federal constitution.

> [I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause. *Olympic Forest Prods., Inc., v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Pestel, Inc. v. County of King*, 77 Wn.2d 144, 459 P.2d 937 (1969).

Bartholomew II, 101 Wn.2d at 639. The Court held that the statute violated article I, section 3, declaring, "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.* at 640. The Court stressed that "the independent state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached." *Id.* at 644.

This independent interpretation of article I, section 3 was not an anomalous result. In *Davis*, the trial judge inferred guilt from the defendant's post-arrest silence. This did not violate the federal due process clause because the defendant had not been read *Miranda*

warnings. *Davis*, 38 Wn. App. at 604 (citing *Fletcher v. Weir*, 455 U.S. 603, 71 L.Ed.2d 490, 102 S.Ct. 1309 (1982)). But this Court held that article I, section 3 required a different result. *See id.*

Thus, pre-existing state law addressing both the fairness of procedures in state courts and the specific question of whether article I, section 3 provides greater protection against the admissibility of unreliable evidence in a criminal trial unequivocally favors an independent constitutional analysis with respect to identification testimony.

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state or local concern, *id.*, as is the fundamental fairness of trials held in this state. *Bartholomew II*, 101 Wn.2d at 643-44. An application of the six *Gunwall* factors shows that article I, section 3's greater concern for the reliability of evidence requires renunciation of the federal standard for admissibility of identification evidence.

ii. *This Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence.*

This Court should hold that article I, section 3, prohibits the admission of unreliable identification evidence. Admissibility should not turn on whether state action resulted in suggestive identification procedures, because our constitution is more concerned with reliability and fairness than with deterrence. *See Bartholomew II*, 101 Wn.2d at 640 ("We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability"); *cf. State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (unlike federal fourth amendment, primary purpose of article I, section 7 of Washington Constitution is not to deter police misconduct, but to protect privacy). Indeed, the same was true under the federal constitution until this year. *See Perry*, 132 S.Ct. at 731 (Sotomayor, J., dissenting) (majority opinion "recasts the driving force of our decisions as an interest in police deterrence, rather than reliability"); *Manson*, 432 U.S. at 114 ("reliability is the linchpin in determining the admissibility of identification testimony"). Thus, the existence of suggestive circumstances surrounding the identification – whether employed by a private or state actor – should be just one factor in the totality-of-circumstances analysis. *See* Recent Case, *Evidence – Eyewitness Identifications – New Jersey Supreme Court*

Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications. – State v. Henderson, 27 A.3d 872 (N.J. 2011), 125 Harv. L. Rev. 1514 (2012) (praising New Jersey Supreme Court's update of standards but lamenting requirement of police misconduct; "The court should have treated equally all factors that might undermine the reliability of an identification").

The other factors to be considered in determining whether an identification is reliable should be updated based on the decades of scientific research that has occurred since the U.S. Supreme Court adopted the five *Biggers* factors. On this point, the Court should follow the lead of the New Jersey Supreme Court. *See Henderson,* 27 A.3d 872. In *Henderson*, the court revised the reliability factors to include those determined to be relevant in scientific studies.

After appointing a Special Master to evaluate scientific evidence about eyewitness identifications, the court concluded that the federal standard "does not offer an adequate measure for reliability" and "overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." *Henderson*, 27 A.3d 878. The court found that "misidentifications stem from the fact that human memory is malleable." *Id.* at 888. It noted that "accuracy and confidence may not be related to one another at all." *Id.* at

889 (citing *State v. Romero*, 922 A.2d 693 (N.J. 2007)). Yet, to a jury, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (1979)).

The New Jersey Supreme Court further recognized that "studies have shown consistently that high degrees of stress actually impair the ability to remember." *Henderson*, 27 A.3d at 894. Additionally, "retained memory can be unknowingly contaminated by post-event information." *Id.* The *Henderson* court also found that one-person showups like that which occurred here "are suggestive" when they occur more than two hours after the incident. *Id.* at 903. The *Henderson* court updated its admissibility standard to incorporate all of this evidence, as well as additional relevant factors. *See id.* at 920-22.

Like New Jersey, the Oregon Supreme Court in *Lawson* jettisoned its outdated test for assessing the reliability and admissibility of eyewitness identifications – a standard which mirrored the process set forth by the U.S. Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). *Lawson*, 352 Or. at 738. Like the New Jersey Supreme Court in *Henderson*, Oregon's high court recognized

that in the past three decades, "there have been more than 2,000 scientific studies conducted on the reliability of eyewitness identification." *Id.* at 739. The studies show that numerous factors must be considered in determining the reliability of an eyewitness's identification. Those factors include stress, witness attention, duration, viewing conditions, and witness and perpetrator characteristics. *Lawson*, 352 Or. at 744-45.

The Oregon standard does not condition exclusion of eyewitness identification on police misconduct or any state action. *Id.* at 747 (distinguishing the federal standard under *Perry*, 132 S.Ct. at 730). The state supreme court held that as a matter of Oregon law, "there is no reason to hinder the analysis of eyewitness reliability with purposeless distinctions between suggestiveness and other sources of unreliability." *Id.* The same is true under Washington law.[5]

In light of the scientific evidence and article I, section 3's paramount concern for fair trials using reliable evidence, this Court should adopt a standard similar to that of the New Jersey and Oregon Supreme Courts. This Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence, and that reliability should

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[5] The Oregon Supreme Court relied on that state's rules of evidence, which are substantially similar to Washington's. In Washington, however, our Due Process Clause mandates the same result because reliability is of paramount concern under our constitution. *See Bartholomew*, 101 Wn.2d at 639.

be determined based on consideration of the following nonexclusive list of factors:

- Whether the circumstances of the identification were suggestive (blind administration, pre-identification instructions, lineup construction, feedback, multiple viewings, showups, other identifications made, etc.);

- Level of stress during the event (moderate stress produces more accurate memories and high stress produces less accurate memories);

- Weapon focus;

- Duration;

- Distance and lighting;

- Witness characteristics (was the witness under the influence of alcohol or drugs; was age a relevant circumstance?);

- Perpetrator characteristics (was the perpetrator wearing a disguise?);

- Memory decay (how much time elapsed between the crime and the identification?);

- Race bias (does the case involve a cross-racial identification?).

See Henderson, 27 A.3d at 921; *Lawson*, 352 Or. at 744-45. Additional factors may be considered as scientific understanding of eyewitness perception and memory evolves. *Henderson*, 27 A.3d at 922; *Lawson*, 352 Or. at 741.

In sum, this Court should hold that article I, section 3 prohibits the admission of unreliable identification evidence, and that the above factors – derived from decades of scientific study – should guide the reliability determination.

iii. *The identification in this case was unreliable and should have been suppressed.*

As explained in section 2(b) above, Casey Montgomery's identification of Mr. Haff as the robber is unreliable based on a consideration of the relevant factors. These factors include: (a) the situation was highly stressful; (b) the perpetrator was wearing a hat concealing half of his face; (c) the event lasted only 20 seconds; and (d) Mr. Montgomery's attention was on the note and cash drawer. Most importantly (and probably because of the above circumstances), Mr. Montgomery did not select Mr. Haff from a montage of suspects shortly after the crime. A year and a half later, he confronted Mr. Haff in what was essentially a one-person showup, and then declared he was 100% certain that Mr. Haff was the perpetrator. An analysis of the relevant factors shows the identification is unreliable.

The facts of *Lawson* are instructive. Two cases were consolidated, and the court reversed the admission of an identification in one and affirmed in the other. It affirmed in a case where the witnesses were face-

to-face with the perpetrators for a lengthy period of time and were able to provide detailed descriptions to the police within minutes of the crime. *Lawson*, 352 Or. at 765-66. In contrast, the court reversed in a case where the witness was under tremendous stress at the time of the viewing, only saw the perpetrator for a few seconds, and the perpetrator wore a hat which obscured key features. The witness did not identify the perpetrator in a photographic montage shortly after the event, but identified him "with 100% certainty" much later, after she had seen the defendant at a pre-trial hearing and had been subjected to other suggestive circumstances. *Id.* at 763-65. The Oregon Supreme Court reversed because of "serious questions concerning the reliability of the identification evidence admitted at defendant's trial." *Id.* at 765.

The same should occur here. The teller could not identify the robber shortly after the event and did not choose anyone from a montage in which Mr. Haff was included, presumably because the interaction was quick, the robber wore a hat pulled down low, the teller was afraid, and his focus was directed at a note and a cash drawer and not at the robber's face. The identification of Mr. Haff as the robber a year and a half later under circumstances amounting to a one-person showup is unreliable and should be held inadmissible under article I, section 3. This Court should reverse and remand for suppression of the identification and for a new trial.

d. <u>The remedy is reversal of the conviction and remand for a new trial</u>.

Constitutional errors require reversal unless the State proves beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). The State cannot meet that burden here.

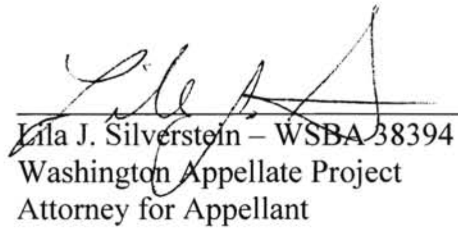
Although the second teller identified Mr. Haff as the perpetrator, he was only 70% sure. Members of the Stickney family identified Mr. Haff as the robber, but they had a motive to say Mr. Haff was the perpetrator in light of the fact that the other suspect was Daniel Aaron Stickney. Although Mr. Haff's fingerprints were on the note given to the teller, Mr. Haff lived with the Stickneys, and it is possible that Daniel Aaron Stickney set Mr. Haff up as Mr. Haff's attorney implied to the jury. In sum, the State cannot show beyond a reasonable doubt that the erroneous admission of Casey Montgomery's in-court identification made no difference in the outcome. This Court should reverse and remand for suppression of the identification, and for a new trial.

E. CONCLUSION

Mr. Haff asks this Court reverse his conviction and remand for dismissal of the charge with prejudice. In the alternative, the conviction should be reversed and the case remanded for a new trial.

DATED this 18th day of June, 2014.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70296-3-I
	)	
	)	
STEPHEN HAFF,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X]	STEPHEN HAFF 365410 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 18TH DAY OF JUNE, 2014.

X

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