NO. 45008-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DANIEL DEMETRIUS ANDERSON, Appellant

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson, DEPARTMENT NO. 13
Pierce County Superior Court Cause No. 12-1-04166-2

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR:

1. Mr. Anderson's conviction for first-degree robbery should be reversed because trial counsel was ineffective.
2. Mr. Anderson's conviction for first-degree robbery should be reversed where the State failed to prove the elements beyond a reasonable doubt.
3. Mr. Anderson is entitled to relief under the cumulative error doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Wash. Const. Art. I, sec. 22.
2. A defendant who fails to receive effective assistance of counsel and meets the two-pronged test set forth by the United States Supreme Court and adopted by the Washington Supreme Court in entitled to relief by new trial.
3. The State has the constitutional duty to prove a criminal charge beyond a reasonable doubt.

4. When the State fails to prove a criminal charge beyond a reasonable doubt, a defendant is entitled to the remedy of dismissal with prejudice.
5. The defendant has the constitutional right to a fair trial that may be denied by the commission of a multiple of errors, none of which alone may require reversal but which in number may.

C. STATEMENT OF THE CASE:

Procedural facts:

The State of Washington charged Daniel Anderson in Pierce County Superior case 12-1-04166-2 with Robbery in the First Degree. CP 1. The matter proceeded to trial before Department 13, the Honorable Katherine Nelson. RP 3.

Mr. Anderson's codefendant entered a guilty plea shortly after the trial started. RP 26. Because the codefendant, DeJuan Antonio Allen, pleaded guilty, there was no need for a CrR 3.5 hearing. RP 27. Mr. Anderson's counsel stated,

> "I think the purpose of the 3.5 hearing was primarily to do with co-counsel's matter. As I explained to Mr. Anderson, I don't really see any issues with the statements. Moreover, the statements that would be given, defense would be seeking to have those admitted in trial because that's basically defendant's story as far as his non-culpability in this case. So for those reasons, defense is seeking to stipulate to the admissibility of those statements." RP 27.

The parties entered a written stipulation that the codefendant's statements had been taken as required by CrR 3.5. RP 36-37; CP 17-20. The State further averred that it intended to offer the statements during its case in chief. RP 37.

At trial, Montes-Boles identified Mr. Anderson as one of the individuals who had robbed her. RP 113. She testified that she knew him because she previously bought drugs from him. RP 113. She also testified that the last time she bought drugs from him, he sold her $60 worth of "peanut" or fake drugs. RP 113. She said this was not a problem for her because she was buying the drugs for someone who could afford it. RP 113-114.

Trial counsel failed to object to any of the foregoing testimony. RP 113-114.

Montes-Boles testified that she had not seen Mr. Anderson since that date. RP 117. When the prosecutor asked her why, she responded, "Why? I'm not smoking crack. I don't need his services, and he didn't sell real crack, so I really didn't need his services, you know." RP 117.

Trial counsel failed to object to this testimony. RP 117.

Montes-Boles provided contradictory testimony regarding her last contact with Mr. Anderson. Montes-Boles claimed that she saw Mr. Anderson at the Hilltop McDonald's in November 2011 .RP 115. She claimed that she approached him and he made the comment, "Bitch, it wasn't even your money. I don't owe you shit." RP 115.

Again, trial counsel failed to object to any of the foregoing testimony. RP 115.

Once again, trial counsel failed to object to this testimony. RP 117.

Montes-Boles testified that on the date of this incident she first had a contact with Mr. Anderson about 3 pm outside the Stop-and-Go where she believed he offered to sell her dope. RP 119. She told Mr. Anderson that she even if she wanted to buy dope, she would not buy it from him because he previously sold her fake dope. RP 119.

Again, trial counsel did not object to this testimony. RP 119.

The prosecutor asked Montes-Boles whether she had seen Mr. Anderson between the time he sold her "bunk dope" and the events of November 3, 2013. RP 163. She responded that she'd seen him a couple of times in passing and one specific time at the bus stop. RP 164.

The prosecutor asked Montes-Boles if she was falsely accusing Mr. Anderson because he had sold her bunk dope in the past. RP 165-166.

On cross-examination of Montes-Boles, trial counsel asked Montes-Boles why she referred to Mr. Anderson and Mr. Allen as "partners." RP 167. This question caused Montes-Boles to render a completely nonresponsive answer and instead to opine about the "logistics of being a drug dealer" and what a drug dealer usually does which requires two individuals. RP 167. She knew this activity as "scouting. Pinning." RP 167. She testified that Mr. Anderson and elicited

testimony from her regarding the "logistics of being a drug dealer." RP 167. Montes-Boles then testified that Mr. Anderson and Mr. Allen had employed this technique on her "until the events that unfortunately ended up happening that day. . ." RP 167. Trial counsel made no effort to ask the court to order Montes-Boles to make a responsive answer to his question, withdraw his question, stop her answer when it became apparent that she was not going to answer it, and to ask for a curative instruction from the court. RP 167-168.

Montes-Boles admitted that she did not tell police that Mr. Anderson initially told Mr. Allen to get her phone. RP 170. She said that she did not know his name. RP 170. She had known him for a couple of years and always called him "D". RP 166.

In closing argument, trial counsel argued that Montes-Boles fabricated the story against Mr. Anderson because she was angry at him. RP 242. The State was so concerned that she had this motive that they asked her on the stand whether she would lie because she received bunk dope instead of real dope. RP 242. She said it was not big deal, however she was angry and upset about it on the stand. RP 242. She testified that every time she had run into him since the bunk dope incident, she had brought up the subject and laid into him. RP 243. She obviously considered it to be a personal issue and her anger did not abate. RP 243. Montes-Boles was inebriated that night – she testified that she was "feeling good." RP 138.

The jury convicted Mr. Anderson of first-degree robbery, as charged. RP 262; CP 49;.

On June 14, 2013, the parties appeared for sentencing. RP 269. The court determined that Mr. Anderson's offender score was five. RP 274, 274-275. The State recommended the high end of standard range, 75 months, with eighteen months of community custody. RP 75-276.

Defense counsel asked for the low end or "near the bottom of the range", noting that although this conviction was for first degree robbery, Mr. Anderson did not use a weapon nor did he inflict serious injury on her or take property of great value. RP 278.

In his allocution, Mr. Anderson protested his innocence. RP 280. He informed the court that on the day on this incident, November 3, 2013, he had an appointment scheduled for Tacoma Community College of November 5, 2013, to meet with his advisor to discuss his financial aid for the quarter. RP 281-282. He also participated in studies at Northwest Kinetics and was scheduled for a three day study for $1,500. RP 282. Mr. Anderson steadfastly maintained that he had nothing whatsoever to do with this incident. RP 282.

The court sentenced Mr. Anderson within the standard range to 70 months in the Department of Corrections with 18 months of community custody. RP 284.

Mr. Anderson timely filed this appeal. CP 66.

Testimonial Facts:

Vicki Montes-Boles lived on Tacoma's Hilltop on November 3, 2012. RP 101, 09. Although Montes-Boles has a lengthy history of drug addiction, she claimed to be off drugs and only drinking beer that day. RP103-109. She asserted that she consumed only three beers that day but that she bought beers for other people throughout the day. RP 109-110.

Montes-Boles had made "probably four" trips to the Stop-and-Go to buy that beer. RP 117-118. In between trips, she was "illegally drinking beer in the alley" with her friends Roach and Greg. RP 118. She was "feeling good." RP 138.

She averred that she first had a contact with Mr. Anderson about 3:00 pm outside the Stop-and-Go where she believed he was offering to sell her dope. RP 119. She told Mr. Anderson that she even if she wanted to buy dope, she would not buy it from him because he sold her fake dope. RP 119.

After leaving the Stop-and-Go, Montes-Boles joined a bunch of people whom she knew. RP 141-142. She knew some of the people. RP 142. One of the girl asked her to make a phone call for her on Montes-Boles' cell phone. RP 142. Montes-Boles made the call for her. RP 142.

Montes-Boles then claimed to have been surrounded by five or six people. RP 142. The next thing she recalled was being hit from on both sides of her head. RP 142-143. Mr. Anderson was not there at that time. RP 143. Mr. Allen likewise was not present. RP 143.

Montes Boles claimed to have heard Mr. Anderson yell, "Get the phone." RP 143. She did not know how or when he arrived. RP 144.

The phone went flying out of her hand and Monte-Boles allegedly heard Mr. Anderson yell, "Get the phone, get the phone." RP 144. Montes-Boles knew there was a third person present who picked up the phone. RP 146.

Mr. Allen was hitting her on the head and Montes-Boles was covering her face. RP 144. Mr. Allen also put his hand down her shirt to get her money. RP 146-147.

She did not ever see Mr. Anderson strike her. RP 145.

Montes-Boles believed that the third person gave the phone to Mr. Allen. RP 147. Montes-Boles then heard Mr. Allen tell the third person to give him the phone. RP 148.

Montes-Boles never saw Mr. Anderson with the telephone. RP 148.

Apparently all of Montes-Boles' friends left the area during this event and there were no witnesses to corroborate her story. RP 148.

Montes-Boles then went to the Safeway store and asked for assistance calling the police. RP 153,

On November 3, 2012, at about 8:00 p.m. Tacoma Police Department PPO [Police Patrol Officer] Malott responded to a call from the Hilltop Safeway store in Tacoma that a woman had come into the store stating that she had been robbed. RP 63, 72, 73. The store was open for business at the time. RP 72.

Malott saw a woman he recognized from the Hilltop. RP 74. He knew her to be sometimes homeless, sometimes in shelters, and sometimes in an apartment. RP 74. He knew her to be "frequently intoxicated." RP 74-75. By the time of trial, he did not recall observing the smell of alcohol on her. RP 75. He knew that her speech was slurred but noted that it is somewhat slurred most of the time. RP 75. Malott knew her as Vicki Montes-Boles. RP 71, 74.

When Malott contacted her that night, he therefore could not tell whether she was intoxicated because she was very worked up. RP 74. She came running out of the store and she was very sweaty. RP 74.

As she described what had happened to her, she provided identifications for three suspects. RP 76. Malott asked Montes-Boles to ride in his police car with him to look for the suspects in the Hilltop area. RP 77.

Montes-Boles told him that the incident actually occurred at South 14th and J in the alley between MLK and J. RP 77.

After driving around for some time and not seeing any individuals who matched her suspect description, Office Malott pointed to two men in an alley and asked, "Hey, what about those people?" RP , 77-78, 86. At that time, the individuals were in front of the patrol car and so all that Malott and Montes-Boles could see were their backs. RP 87.

Even though she was unable to see any faces, Montes-Boles recognized one of them. RP 86, 87. Montes-Boles was in a position to see the men for 15, 20 seconds before making the identification by looking at the men's backs. RP 87.

Montes-Boles was 30'-40' away when she made this 15-20 second identification of the men from their backsides. RP 86, 87, 88.

Montes-Boles thus positively "100 percent" identified the man whose back-side she recognized as her assailant. RP 96-97.

This man was *not* Mr. Anderson. RP 97.

The individual Montes-Boles identified from the back as having been involved in the robbery at Safeway was *not* Mr. Anderson. RP 97. After Montes-Boles identified the suspect by looking at his back, Malott called for other units. RP 86. The suspect wore a dark jacket at that time he was seen in the alley and identified by Montes-Boles. RP 157

After other units arrived and the suspects were detained, Malott and other officers talked to them. RP 88. While they talked to them. Montes-Boles could view them. RP 88. Police talked to the men in a "decently lit" area. RP 88.

After advisement and waiver of his constitutional rights, Officer Keith O'Rourke contacted Mr. Anderson, he asked Mr. Anderson why police were contacting him. RP 196. Mr. Anderson stated that he did not know. RP 195-196. O'Rourke told Mr. Anderson that police were following up on a reported robbery. RP 196. Mr. Anderson replied that he did not know what was going on. RP 196.

Mr. Anderson stated that he met his friend at the Stop-and-Go and then they had been walking up to McDonald's, that he didn't see anything illegal and that he did not participate in anything illegal. RP 91-92, 196 -197. Mr. Anderson stated that he had not participated in any robbery. RP 201. Mr. Anderson stated that he had not witnessed any robbery. RP 201. Mr. Anderson stated that he was walking to meet his buddy. RP 201-202. O'Rourke talked to Mr. Anderson for about three minutes. RP 197.

During the routine police pat-down of Mr. Anderson, police did not find any cell phone. RP 202.

When they did the show-up after talking to Mr. Anderson and the codefendant, they "actually lit them up with [our] spotlight." RP 88-89. Montes-Boles, who had been observing this eight to ten minute interview in "decent" lighting, identified Mr. Anderson as involved in the incident. RP 88, 93, 94. Police did not have the men participate in a "back" line-up, which, of course, had been the initial manner in which Monte-Boles identified the suspects. *Passim.*

After the men were arrested, Malott drove Montes-Boles to her residence and had her write out a statement. RP 98.

Monte-Boles described one of the suspects as wearing a dark-colored jacket. RP 99. Malott described Mr. Anderson's jacket as dark-colored. RP 99.

Police took Mr. Anderson's jacket, a Chicago Bulls jacket, into evidence that night. RP 198, 199, 200. Mr. Anderson was described as wearing a dark

jacket. RP 99. No witness described him as wearing a jacket with the Chicago Bulls logo visible. RP 198-199.

No stolen property was recovered. RP 99-100.

At trial, Montes-Boles identified Mr. Anderson as one of the individuals who had robbed her. RP 113. She testified that she knew him because she had bought drugs from him. RP 113. She also testified that the last time she bought drugs from him, he sold her $60 worth of "peanut" or fake drugs. RP 113. She said this was not a problem for her because she was buying the drugs for someone who could afford it. RP 113-114.

Montes-Boles claimed that she saw Mr. Anderson at the Hilltop McDonald's a couple of weeks before the Safeway incident. RP 115. She claimed that she approached him and he made the comment, "Bitch, it wasn't even your money. I don't owe you shit." RP 115.

Montes-Boles, however, was unsure about the date of that contact and thought maybe it had been "a couple of weeks after he sold [me] the fake dope." RP 116.

Montes-Boles testified that she had not seen Mr. Anderson since that date. RP 117. When the prosecutor asked her why, she responded, "Why? I'm not smoking crack. I don't need his services, and he didn't sell real crack, so I really didn't need his services, you know." RP 117. The codefendant was present all through this encounter. RP 131-132.

At no time did Mr. Anderson make any threats toward Montes-Boles. RP 134. Their encounter lasted less than a minute. RP 134.

The incident at Safeway occurred "quite a while" later, probably as much as two hours later. RP 134, 135.

Montes-Boles had a cell phone with her all day. RP 135. She testified that she is "always on her phone" and that she texts a lot. RP 136. She allows other people to use her phone as long as they are not making drug calls. RP 136.

On November 3, 2012, Montes-Boles allowed the codefendant to use her phone. RP 137. This happened after the encounter at the Stop-and-Go. RP 137.

After the codefendant, Mr. Allen, used the phone, Montes-Boles and her friends walked around and drank beer. RP 137-138. She described herself as "feeling good." RP 138.

When Montes-Boles was making another trip to the Stop-and-Go, Mr. Allen and Mr. Anderson crossed the street. RP 138. Mr. Allen asked to use her phone and she refused to let him. RP 138. Mr. Allen then said to Mr. Anderson, "Get the bitch's phone." RP 138.

At that point, Montes-Boles' "old associate" named Mellow approached her and asked what she was doing. RP 138. When he found out what she was doing, he walked her to the Stop-and-Go. RP 138. They were at the store for five minutes. RP 139.

When they exited the store, Montes-Boles noticed that Mr. Allen and Mr. Anderson were at a nearby bus stop. RP 139. She walked off in a different direction. RP 139-140.

Montes-Boles saw a group of people, some of whom she knew and she decided to stop to talk with them. RP 142. She made a call for a girl. RP 142.

While she made the call, she was surrounded by five or six people and then hit from both sides of the head. RP 142-143. At that time, neither Mr. Allen nor Mr. Anderson were there. RP 143.

Montes-Boles then heard Mr. Anderson yell, "Get the phone, get the phone." RP 143, 144. Mr. Allen hit her many times during this incident. RP 144. Mr. Allen also put his hand down her shirt to take her money. RP 146.

Montes-Boles did not testify that Mr. Anderson ever hit her. RP 145.

Montes-Boles did not know who took her phone. RP 145. She did hear her phone hit the sidewalk. RP 146.

There was a third person who picked up the phone and "gave it to them." RP 147. Mr. Allen got the phone. RP 147.

Mr. Allen then asked the guy who got the phone, "You got a pipe? Come on." RP 147. The three men then walked down the alley. RP 147.

Montes-Boles never saw Mr. Anderson in possession of the phone. RP 148.

Montes-Boles then went to the Safeway. RP 153. Her face was bleeding. RP 153.

She asked people inside to call the police. RP 153.

Officer Malott came to her aid, took a description of the suspects, and then asked her to ride around with him to see if they could find them. RP 154-155.

Montes-Boles eventually recognized Mr. Allen in an alley because he had on a "really weird shirt." RP 157. She did not identify Mr. Anderson, later claiming that she could not do so because he was wearing a black outfit. RP 97, 157. She later concluded that he had turned his coat inside out because he had been wearing a red Bulls jacket. RP 157. At that time, she saw the men from the rear. RP 156-157.

She later saw the men when an officer brought them to the front of the car where she was seated. RP 158. The officer then got into the front seat of the car and said, "Is that him, Vicki?" RP 158. Montes-Boles responded, "Make him put his face up." RP 158. After the officer ordered the man to do so, Montes-Boles identified that man as Mr. Anderson. RP 159. She also identified Mr. Allen as one of the perpetrators. RP 159.

Police took her to her residence where she wrote out a statement. RP 159-160.

Monte-Boles did not tell police about her prior contacts with Mr. Anderson. *Passim.*

C. LAW AND ARGUMENT:

1. TRIAL COUNSEL FAILED TO PROVIDE CONSTITUTIONALLY EFFECTIVE REPRESENTATION TO MR. ANDERSON.

The Sixth Amendment to the United States Constitution[1] and article I, section 22 of the Washington Constitution[2] guarantee the right to effective assistance of counsel. ***Strickland***, 466 U.S. at 685-86; ***State v. Thomas***, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In ***Strickland***, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. 466

[1] Sixth Amendment of the United States Constitution: Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[2] Wash. Const. Art. I, § 22 Rights of the accused: In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

U.S. 668. Under ***Strickland***, ineffective assistance is a two-pronged inquiry:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (alteration in original) (quoting ***Strickland***, 466 U.S. at 687); *see also* ***State v. Cienfuegos***, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) ("Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation.").

Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.

To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. ***McFarland***, 127 Wn.2d at 335.

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." ***Kyllo***, 166 Wn.2d at 863; ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics." (quoting ***State v. Renfro***, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); ***State v. Aho***, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." ***Roe v. Flores-Ortega***, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the prejudice prong of the ***Strickland*** test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." ***Kyllo***, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." ***Strickland***, 466 U.S. at 694; ***Thomas***, 109 Wn.2d at 226; ***Garrett***, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." ***Strickland***, 466 U.S. at 694-95.

Ineffective assistance of counsel is a fact-based determination that is "generally not amenable to per se rules." ***Cienfuegos***, 144 Wn.2d at 229; ***Strickland***, 466 U.S. at 696 ("Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.").

Finally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

In this case, trial counsel was constitutionally ineffective in the following ways:

a. Trial counsel failed to move to exclude evidence of the impermissibly suggestive show-up of Mr. Anderson to Montes-Boles.

Montes-Boles' identification of Mr. Anderson as her robber was the critical issue at trial. Trial counsel failed to challenge inadmissible evidence that State used to "prove" the identification. The defective police show-up of Mr. Anderson to Montes-Boles shortly after police detained and arrested him should have been challenged. Based on the argument below, trial counsel had a sound legal basis for such challenge, which cannot be excused as a legitimate strategy or trial tactic. Obviously had trial counsel prevailed on excluding this show-up, the State's case would have been significantly weaker.

In the instant case, the police "show-up" of Mr. Anderson to Montes-Boles was impermissibly suggestive because it was made after a police officer suggested to her in a leading manner that Mr. Anderson was the suspect, then spoke to Mr. Anderson in a lighted area visible to her for 8 to 10 minutes prior to the show-up, and then displayed Mr. Anderson to her under a spotlight at close distance to her. RP 97, 88-89. 93, 94. All of this occurred after Montes-Boles had failed to identify Mr. Anderson as involved in this incident when she made her "back-side" identification of the perpetrator from the police car shortly before the show-up. RP 157.

An out-of-court identification comports with due process if it is not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. ***Simmons v. United States***, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); ***State v. Maupin***, 63 Wn. App. 887, 896-97, 822 P.2d 355 (1992). A two-step test is used to make this determination.

First, the defendant must show that the identification procedure was suggestive. ***State v. Vaughn***, 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). If there is no evidence of suggestiveness, the inquiry ends and any uncertainty or inconsistency in the identification goes to the weight of the evidence. ***Id.*** at 610.

If the defendant does show that the identification procedure was suggestive, the court must decide whether the suggestiveness created a substantial likelihood of irreparable misidentification. ***Maupin***, 63 Wn. App. at 897. This determination is guided by the judicially imposed factual considerations set forth in ***Manson v. Brathwaite***, 432 U.S. 98, 114-16, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977): (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of any prior description; (4) the witness's level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. *See* , ***State v.***

Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002) ; ***Maupin***, 63 Wn. App. at 897. Application of the four factors affirms that Montes-Boles' identification at the show-up was impermissibly suggestive.

(1) the witness's opportunity to view the suspect at the time of the crime --- Montes-Boles did not see Mr. Anderson do anything at all during the robbery. RP 142-143, 145, 147, 148. He did not take the phone, rather a third person did . RP 145, 147. The third person then tossed the phone to Mr. Allen the codefendant. RP 147. Montes-Boles saw Mr. Allen hit her in the head many times but she did not see Mr. Anderson do anything. RP 144. Montes-Boles also testified that Mr. Allen reached inside her shirt to take her money. RP 144.

(2) the witness's degree of attention --- Montes-Boles had been drinking beer with friends much of the day. RP 109-110, 117-118. She claimed to have consumed "three beers" but had made three-four trips to the Stop-and-Go to buy beer. RP 117-118. They spent the day walking around alleys and drinking illegally. RP 118. She described herself as "feeling good." RP138.

Further, during part of the robbery, she covered her face. RP 144.

Her lack of descriptions attests to her low degree of attention.

(3) the accuracy of any prior description --- Prior to the impermissibly suggestive show-up, Montes-Boles described the robbers as three men. RP 96. When she first saw Mr. Allen and Mr. Anderson and Malott asked her if they were the robbers, she "identified" one of the men by looking at his back-side as he walked in front of the police car in which she was riding. RP 156-157. This man was Mr. Allen, not Mr. Anderson. RP 157.

Her description of Mr. Anderson as wearing a dark coat was used as her explanation for not recognizing his back-side in the alley. RP 157. She stated that "at first, I didn't think it was him because he turned his coat inside out." RP 157. She claimed that he was wearing a "red Bulls jacket." RP 157. There is nothing in the record to show that Montes-Boles ever told police that Mr. Anderson wore a "red Bulls jacket" at any time in her encounter with him. ***Passim.***

Mr. Anderson wore a dark colored jacket when he was picked up by police. RP 90. Mr. Anderson had on a dark jacket during the police show-up. RP 178. Montes-Boles made no mention that he wore a different jacket earlier that night. ***Passim.*** Officer O'Rourke did not remember what Mr. Anderson wore that night. RP 198.

Although Montes-Boles claimed that she recognized Mr. Anderson from his back-side when he walked of her while she was in the patrol car,

she was wrong. RP 87, 97. She claimed to be able to distinguish him from Mr. Allen because Mr. Allen wore such a distinctive shirt. RP 178. However, she could not identify Mr. Allen from his distinctive shirt either. RP . In fact, she identified wrongly identified Mr. Anderson. RP 97.

She later claimed to be able to identify Mr. Anderson after only police spoke to him in a decently lighted area in front of her for 8-10 minutes prior to show-up where he was lit up with the spot-light. RP 88, 93, 94. At that time, it is hardly surprising that she claimed he was one of the robbers. RP 157.

Under these facts, the accuracy of Montes-Boles prior description of Mr. Anderson is unreliable and untrustworthy.

(4) the witness's level of certainty demonstrated at the confrontation --- After the leading questions by police prior to the initial pursuit of Mr. Anderson and then the several minute police conversation with him in the decently-lit area in her vantage point *prior* to the show-up, it is hardly surprising that Montes-Boles identified Mr. Anderson with a high level of certainty.

(5) the length of time between the crime and the identification -- There does not appear to have been a substantial period of time here.

On the other hand, if a pretrial identification created a substantial likelihood of misidentification, an in-court eyewitness identification is

likewise suppressible. ***State v. Williams***, 27 Wn. App. 430, 443, 618 P.2d 110 (1980), *aff'd*, 96 Wn.2d 215, 634 P.2d 868 (1981) (quoting ***Simmons***, 390 U.S. at 384).

b. Trial counsel failed to object to evidence of alleged prior drug-dealing by Mr. Anderson to Montes-Boles.

In this case, trial counsel failed to object to ER 404(b) evidence of Mr. Anderson's alleged prior drug-dealing, offered to prove identification of him as Montes-Boles' assailant.

ER 404(b) provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In this case, trial counsel failed to object to Montes-Boles testimony that not only was Mr. Anderson a dealer of crack cocaine but also that he has a dishonest drug dealer who did not hesitate to sell bunk dope if he thought he could get away with it. RP 113-114. Montes-Boles also testified to contacts with Mr. Anderson after the exchange where she reportedly purchased the bunk dope. RP 115, 119. She even made it part of the instant offense by stating that when she saw Mr. Anderson at the Stop-and-Go, she made a brief comment about the drug exchange. RP 119.

This testimony was inadmissible ER 404(b) evidence and should have been excluded.

Even should the State argue that the testimony regarding the November 3, 2012 encounter at the Stop-and-Go is res gestae, that argument would fail. Under the res gestae rule, evidence of other misconduct is admissible if it so connected in time, place, circumstances, or means employed that it is necessary for a complete description of the of the crime charged, or constitutes proof of the history of the crime charged. ***State v. Tharp***, 96 WN.2d 591, 637 P.2d 961 (1981). In this case, a comment to Mr. Anderson made by Montes-Boles regarding a prior drug sale had absolutely no relevance to the change of first degree robbery. RP 119. The admission of the evidence had only one purpose – that is, to inflame the passions and emotions of the jury to convict Mr. Anderson.

However, trial counsel failed to object to any of the evidence that Mr. Anderson had been dealing crack cocaine on Tacoma's Hilltop for sometime prior to this offense. There is little evidence that could have been adduced that would have painted Mr. Anderson in a worse light.

From this testimony, the jury easily could have considered that a crack dealing drug dealer who ripped off people when he felt like it would also rob a woman when the opportunity presented itself.

An evidentiary error under ER 404 is not harmless if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. ***State v. Jackson***, 102 Wash. 2d 689, 695, 689 P.2d 76 (1984).

Unfortunately for Mr. Anderson, his trial counsel failed to object to any of this poisonous evidence, thereby permitting the jury to convict him based on additional impermissible evidence.

c. Trial counsel was ineffective for adducing testimony regarding the "logistics" of drug dealing where that testimony was irrelevant to this case, exceedingly prejudicial to his client, and completely within his control to stop and/or request a curative instruction for.

There is probably nothing more ineffective than for trial counsel to portray his client as a criminal. It is difficult to fathom how, even assuming that trial counsel could have had a legitimate strategic or tactical purpose for such action, it was reasonable. ***Roe v. Flores-Ortega***, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In this case, trial counsel in fact elicited from the victim an explanation of how a group of men could have and would have committed the robbery against her.

On cross-examination of Montes-Boles, trial counsel asked Montes-Boles why she referred to Mr. Anderson and Mr. Allen as "partners." RP 167. This

question caused Montes-Boles to render a completely nonresponsive answer and instead to opine about the "logistics of being a drug dealer" and what a drug dealer usually does which requires two individuals. RP 167. She knew this activity as "scouting. Pinning." RP 167. She testified that Mr. Anderson and elicited testimony from her regarding the "logistics of being a drug dealer." RP 167. Montes-Boles then testified that Mr. Anderson and Mr. Allen had employed this technique on her "until the events that unfortunately ended up happening that day. . ."RP 167.

Trial counsel made no effort to ask the court to order Montes-Boles to make a responsive answer to his question, withdraw his question, stop her answer when it became apparent that she was not going to answer it, and to ask for a curative instruction from the court. RP 167-168.

This exceedingly prejudicial testimony, elicited by Mr. Anderson's own attorney, set forth a blueprint for the offense and an invitation to the jury to convict.

d. Trial counsel failed to object to the prosecutor's question expressly intended to elicit additional testimony regarding Mr. Anderson's alleged crack-cocaine dealing on the Tacoma Hilltop.

During the redirect examination of Montes-Boles, the prosecutor asked her whether she had seen Mr. Anderson after the sale of the bunk dope. Montes-Boles testified that she had not seen Mr. Anderson after she became "clean and sober" [from crack cocaine, not beer] on September 21, 2012. RP

117. When the prosecutor asked her why, she responded, "Why? I'm not smoking crack. I don't need his services, and he didn't sell real crack, so I really didn't need his services, you know." RP 117.

Trial counsel failed to object to this impermissible question and therefore waived any claim of prosecutorial misconduct. ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

2. MR. ANDERSON'S CONVICTION FOR FIRST DEGREE ROBBERY MUST BE DISMISSED WHERE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HE COMMITTED THE CRIME.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from the evidence. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. ***State v. Walton***, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

For the jury to find Davis guilty of first degree robbery, the State had to prove beyond a reasonable doubt that she (1) unlawfully took personal property from the person of another; (2) by the use or threatened use of immediate force. ***RCW 9A.56.190***.

The sufficiency of the State's case depends of the reliability of Montes-Boles' identification of Mr. Anderson as being involved in the alleged robbery. Consider that her initial "identification" of him was of his backside in a dark alley in response to police officer's question: "Het, what about those people?" RP 86. At that time Montes-Boles was 30' – 40' away when she affirmatively answered "yes". RP 88. She was looking at the back-sides of the men. RP 87.

Montes-Boles identified Mr. Anderson from the back from a distance of 30' – 40' by his dark clothing. RP 99. She articulated no particular features of his dark clothing. ***Passim***.

She did not identify Mr. Anderson as the individual who said "take her phone" until later because she knew him only as "D". RP 166, 170. It is not clear when she learned his real name. ***Passim***. However, she did not hesitate to identify other people by their nicknames, ex., Roach and Meadown. RP 110, 111, 118.

She identified him in an impermissible show-up made after police placed Mr. Anderson and Mr. Allen in her clear line of vision for as long as ten minutes. RP 88, 93, 94.

Apparently much later on someone told her that Mr. Anderson wore a "Chicago Redbull" jacket." RP 157. However, none claimed to have ever seen him with his jacket logo on the outside. RP 198-199. Montes-Boles never saw Mr. Anderson with the telephone. RP 145, 146, 147, 148. Montes-Boles never saw him strike her. RP 144, 145. Montes-Boles could not even testify that Mr. Anderson was present when she was robbed. RP 143. She testified that there were 5-6 men present. RP 142-143.

Because the State failed to prove all the elements beyond a reasonable doubt, Mr. Anderson is entitled to dismissal of this case. If there is insufficient evidence to support a conviction, the Double Jeopardy Clause requires reversal and remand for judgment of dismissal with prejudice." ***Burks v. United States***, 437 U.S. 1, 17-18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

3. MR. ANDERSON IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

A defendant is entitled to a new trial when his trial is rendered unfair because "[a] series of errors, each of which is harmless, may have a

cumulative effect that is prejudicial." This is so because "assuming, arguendo, that the effect of each of the previously discussed errors was harmless, their cumulative effect was not." ***State v Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *See, e.g.*, ***State v. Coe***, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).
In this case, the cumulative error doctrine applies if this court rejects Mr. Anderson's sufficiency of the evidence argument.

Mr. Anderson's ineffective trial counsel ignored significant objections and evidentiary errors which cumulatively deprived him of his right to a fair trial. Mr. Anderson's trial was flawed from impermissible identification which issue should have been litigated prior to trial. Mr. Anderson should have the opportunity for competent counsel to litigate at a new trial. Although Montes-Boles may yet identify Mr. Anderson, new trial counsel may have the benefit of a favorable trial court ruling or at least a developed record with which to deal with this important evidence. Further, Mr. Anderson is entitled to a trial on the crime of first-degree robbery. He should not be on trial as a crack cocaine dealer on Tacoma's Hilltop. The admissibility of this evidence should be litigated prior to

trial. The defendant submits that the evidence is patently inadmissible as it is irrelevant and unfairly prejudice. Evidence that Montes-Boiles had met Mr. Anderson before could be sanitized to omit any reference to controlled substances.

Mr. Anderson is entitled to a fair trial. He did not receive one in this case. Under the cumulative error doctrine this court should grant his a new trial.

E. CONCLUSION:

For the foregoing reasons, Mr. Anderson respectfully asks this court to reverse his conviction for first degree robbery.

DATED this 31st day of March, 2014.

BARBARA COREY, WSBA#11778
Attorney for Appellant

CERTIFICATE OF SERVICE:
I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: That on this date, I delivered via ABC-Legal Messengers a copy of Appellant's Opening Brief to Kathleen Proctor, Sr. Appellate Deputy, Room 949, County-City Building, Tacoma, WA and to Daniel Demetrius Anderson, DOC#302037 Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769 via US mail postage prepaid

03/31/14
Date

Kim Redford, Legal Assistant