IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FRANCISCO AMEZCUA-PICAZO, Appellant.	No. 37331-9-II UNPUBLISHED OPINION

Van Deren, C.J. — Francisco Amezcua-Picazo appeals his convictions for two counts of first degree assault for an August 14, 2007, shooting in Centralia, Washington. He argues that the evidence was insufficient to prove that he was the shooter or that he intended to inflict great bodily harm on one of the two victims. He also argues that the trial court abused its discretion in admitting evidence of gang affiliation and in failing to suppress evidence of an unduly suggestive photomontage. Finally, he argues that his counsel was ineffective for failing to object to certain testimony. We affirm.

BACKGROUND

I. Factual History

On August 14, 2007, Joseph Haviland drove Aaron Malone and Robert Huey to the Logan District in Centralia so the three men could purchase marijuana. Haviland and Malone

gave Huey money and dropped him off at the intersection of Kearny and B Streets. Huey intended to go to Brandon McDaniel's home on Kearny Street. While waiting for Huey, Haviland "drove around the block" by driving past McDaniel's house, through the alley behind McDaniel's house, and circling back onto Kearny Street. II Report of Proceedings (RP) at 18. He passed McDaniel's house again and proceeded to the next intersection. There, Haviland stopped at the stop sign, where a man was waiting to cross the street. The man was wearing a hooded sweatshirt with the hood up covering the upper part of his face; he approached the passenger side window and asked Malone's name. Malone saw the man raise a gun and yelled to Haviland to drive away. Haviland "hit the gas" and "ducked down and drove blindly." II RP at 24. Five to seven shots were fired at the vehicle; one of the shots hit Malone in the back. Huey was on McDaniel's front lawn when the shots were fired. After the shooting, he ran, following Haviland's vehicle. He passed a man in a hooded sweatshirt in the alley behind McDaniel's house.

Haviland and Malone met Huey at a nearby gasoline station so he could return their money. Malone asked Huey what had happened and Huey told Malone that the shooter was Amezcua-Picazo. Amezcua-Picazo was McDaniel's sister's boyfriend; she resided with McDaniel and other family members in the house on Kearny Street.

Malone was bleeding and in pain. Haviland drove Malone to the Chehalis Police Department, where Malone told the police that Amezcua-Picazo shot him. The police administered emergency aid and then an ambulance took Malone to the local hospital. Shortly after the shooting incident, police arrested Amezcua-Picazo and the State charged him with two counts of first degree assault.

At trial, the State produced evidence that Amezcua-Picazo was a member of a gang and

that his street name was Cyclone. Centralia Police Sergeant Patrick Fitzgerald testified that the Little Valley Loquitos (LVL) gang "[wa]s the primary Hispanic gang in the community" at that time. II RP at 132. Centralia had another gang, The True Blue Crips (TBC), with primarily Caucasian members. Fitzgerald testified that there was animosity between the TBCs and the LVLs in Lewis County.

Huey and Malone both testified about an incident between Amezcua-Picazo and Malone that happened one to two months before the August 14 shooting. Malone was driving around with his friend Cory Hall, who is a member of the TBC gang,[1] and another acquaintance, Ryan Smith. At that time, Hall was involved in "mass beefs" with members of the LVL gang. II RP at 168. Hall received a telephone call and the three men drove to McDaniel's house. "[Hall] jumped out of the car when [they] made it to the house and ended up smashing out the windows of . . . [Amezcua-Picazo's] girlfriend's car." II RP at 169. Malone testified that he knew it was her car because "[Amezcua-Picazo's] name was tagged[2] all over it." II RP at 169. "There were other people there and it was, I guess, a gang incident. . . . They were inside, some were out. But when it all happened, they came piling outside, that's when everybody took off." While Hall attacked the girlfriend's car, Malone "ducked down [in the back seat of Smith's car] trying to keep his face out of the scene." II RP at 170.

Centralia Police Officer Buddy Croy testified that, at approximately 10:20 pm on August 14, 2007, he and other police officers responded to a call reporting shots involving two vehicles at the 300 block of Kearny Street in Centralia. When the police reached the scene, they "checked

[1] Malone is not a gang member.

[2] Malone identified "tagged" as, "Graffitti. He had spray painted all over the car." II RP at 169.

with some people in the area [who] said they didn't hear anything." I RP at 80. Approximately 30 minutes later, Croy received another call from dispatch informing him that the Chehalis Police Department was in possession of a vehicle that had been "shot up with bullets." I RP at 80. Croy went to the Chehalis Police Department "because the vehicle description . . . was similar to what had been put out in the earlier call." I RP at 81. When he arrived, an aid unit was treating Malone. Croy testified that Malone identified the shooter as Amezcua-Picazo.

Croy and fellow Centralia Police Officer Douglas Lee interviewed Haviland at the Chehalis Police Station shortly after the shooting. Lee testified that Haviland was shaking and "definitely was very nervous, very scared." II RP at 69. "[Haviland] was concerned about repercussions against him and his safety for providing a statement to law enforcement in regard to the incident." II RP at 69. The day after the shooting, Centralia Police Detective Sergeant David Ross went to Haviland's house and showed him a photomontage. Haviland told Ross that he "didn't recognize any of the folks because [he] didn't see the guy's face" and that he could only tell Ross the basic build of the shooter. II RP at 35. Haviland "did pick somebody that [he] thought was around the basic build of the guy" but he did not circle or initial the photograph. II RP at 37. Ross testified that Haviland did not make a positive identification at that time.

On a subsequent day, Haviland went with his mother to the Centralia Police Department to look at the photomontage again. Centralia Police Officer Michael Lowery showed Haviland the same montage. After looking at it for approximately 10 seconds, Haviland identified Amezcua-Picazo and initialed his photograph. Haviland identified Amezcua-Picazo because "out of all the people on that lineup that [photograph] looked closest to him." He testified that this was "[b]ased on what [he] did see." III RP at 95.

On August 16, Centralia Police Detectives Carl Buster and Beall[3] drove Malone from the Chehalis Police Department to the Centralia Police Department for an interview. During the drive, they passed Amezcua-Picazo and another man on the street. Buster slowed the vehicle down because he thought the two men might be involved in another case he was investigating and the two men "started throwing gang signs" and "walking towards [the] car." III RP at 77-78. Buster testified that Malone "freaked out," "ducked down," and told Buster to "[']get out of here, get out of here.[']" Buster asked Malone "[']right now, yes or no, is that the guy who shot you[?'] [Malone] said, [']yes, just get me out of here.[']" III RP at 79. "[Malone] was visibly shaken, he was ducked down in the seat." III RP at 79-80. "[H]e was extremely afraid." III RP at 80. At the Centralia Police Station, Malone told Buster and Beall that Cyclone shot him. Malone told Buster and Beall that he "got that information [that Cyclone was the shooter] because Robbie Huey told [him] that." II RP at 197.

Malone testified that he could not see the shooter's face "because he was that close. His head was cutoff from [sic] the top of the car." II RP at 173. The State asked Malone whether he saw the man "when he was walking up to the car and before his head went out of [Malone's] view." II RP at 174. Malone answered, "No, he had his hood up, it was dark. . . . I got a vague look at him." II RP at 174-75.

> [The State:] Did you know it was Cyclone or not at the time?
> [Malone:] I don't know. I don't know to this day. I know when I did get in touch with [Huey] that he said it was Cyclone.
> . . . .
> [The State:] So you didn't know for sure if it was Cyclone at that point when you were shot?
> [Malone:] No.
> [The State:] Did you think it was anybody other than Cyclone?
> [Malone:] I didn't really think of anybody in particular. I thought, yes, there

[3] Detective Beall's first name does not appear in the appellate record.

> was a very good possibility because it was his girlfriend's car this whole thing had revolved around. He would be the only one to be upset about the situation.

II RP at 175-76.

Huey testified that, from his location in McDaniel's yard, he observed the man shoot at the vehicle but could not recognize the shooter. After the shots were fired, Huey ran after the vehicle.

> [Huey:] The shooter had ran [sic] from the corner through the yard up to the alleyway.
> [The State:] The alleyway as you drew in the diagram?
> [Huey:] The alleyway that goes behind [McDaniel's] house. We passed each other as we were running kind of, I didn't see the face.
> [The State:] Was the hoody up or down?
> [Huey:] The hoody was up. I couldn't tell who it was, but [I] could have been mistaken. If you didn't know him, I wouldn't guess who it was if I wouldn't have known the person, but I figured it was who it was.
> [The State:] Are you afraid to say it? Can you just say it?
> [Huey:] Yeah, it [wa]s Cyclone.

III RP at 30. On cross-examination, Huey testified:

> [Defense Counsel:] Did you see [Amezcua-Picazo] the night of the 14th?
> [Huey:] The night of the 14th, no.
> [Defense Counsel:] The night the shooting occurred, did you see my client?
> [Huey:] No.
> [Defense Counsel:] Isn't that what you told the police, you didn't see him that night?
> [Huey:] Yeah. I didn't see him before that, no.
> [Defense Counsel:] Did you see him at all the day of the 14th?
> [Huey:] No.

III RP at 30-31.

II. Procedural History

Before trial, the State filed a motion in limine to allow Fitzgerald's gang testimony. Amezcua-Picazo argued that, because neither Malone nor Haviland were members of a gang, the

trial court should suppress any gang evidence. The State argued that the evidence was relevant to "witness credibility, the motive for the crime[, and] aspects of intimidation." I RP at 56. The trial court allowed the State to present the gang evidence, noting that the State could "establish their motive however they want to." I RP at 57. The court then stated:

> I don't see that necessarily that gang affiliations, at least here in Lewis County, has yet reached a level that hearing ["]gangs["] you find guilt. So . . . I'm going to balance the evidence pursuant to evidence rule 403. I'm going to find that its probative value outweighs the danger of unfair prejudice.

I RP at 57.

On the second day of trial, Amezcua-Picazo unsuccessfully moved "to suppress any identification from the photo montages [sic] from Mr. Haviland" on the basis of "irregularity in the way the photo montages [sic] were presented." II RP at 1, 4. He argued that, because Haviland was presented with the same photomontage twice, it was unnecessarily suggestive, since Haviland indicated the suspect was heavy set and "in this particular photo montage [sic] there [are] four skinny guys and two overweight guys." II RP at 5.

The jury found Amezcua-Picazo guilty of both counts of first degree assault and two special verdicts that he was armed with a firearm during both counts. Amezcua-Picazo appeals.

ANALYSIS

I. Sufficiency of Evidence

Amezcua-Picazo argues that the evidence was insufficient for a rational jury to find: (1) that he committed the crimes and (2) that he had the requisite intent to commit first degree assault against Haviland. We disagree.

A. Standard of Review

We review a claim of insufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

The State must prove beyond a reasonable doubt the identity of the defendant as the individual who committed the offense. *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097 (1994). Identity is an issue of fact the jury determines. See *State v. Hendrix*, 50 Wn. App. 510, 515, 749 P.2d 210 (1988). We defer to the jury on issues of the credibility of witnesses, resolving issues of conflicting testimony, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). "Circumstantial evidence and direct evidence have equal weight." *State v. Beasley*, 126 Wn. App. 670, 689, 109 P.3d 849 (2005).

B. Identity

Amezcua-Picazo first argues that the evidence was insufficient to show that he was the shooter. He argues that the testimony of the three witnesses—Malone, Haviland, and Huey—was inconsistent. He further argues that the only other evidence indicating that Amezcua-Picazo was the shooter was "the fact that [Amezcua-Picazo] might have somehow found out that a number of months previous Aaron Malone was hiding in the back seat of a vehicle out of which another person had exited in order to vandalize [Amezcua-Picazo's] girlfriend's car." Br. of Appellant at

17. At oral argument, Amezcua-Picazo argued that the three witnesses' failure to see the shooter's face was a fatal flaw in the State's evidence.

Here, all three witnesses identified Amezcua-Picazo as the shooter. Haviland identified the shooter as someone with a medium build but could not identify the shooter when he first saw the photomontage. When showed the photomontage a second time, Haviland took 10 seconds, then pointed to the photograph of Amezcua-Picazo and said, "[T]hat's him." II RP at 94. As he was being treated for a gunshot wound at the Chehalis Police Department, Malone identified his attacker and he also told Officer Buster that Amezcua-Picazo was the one who shot him based on what Huey told him. Huey testified that, from his vantage point in McDaniel's yard, he could not identify the shooter but he "figured it was" Amezcua-Picazo when he passed him in the alley. III RP at 30.

All three witnesses conceded that they did not see the shooter's face. But facial identification is not necessary. It is within the jury's province to consider the credibility of witnesses and the weight of the evidence, especially when it is inconsistent or uncertain. *Thomas*, 150 Wn.2d at 874-75. Here, only Malone rested his identification on what someone else told him. Haviland, although not initially identifying Amezcua-Picazo, picked him out on his second viewing of the photomontage. Huey admitted to the imperfect conditions under which he saw the shooter both on direct and cross-examination but his identification was based on his closer view of the shooter when they passed in the alley. His identification did not waiver. The jury heard all of this evidence before reaching its verdict.

Because identity is an issue of fact for the jury, *see State v. Hendrix*, 50 Wn. App. 510, 515, 749 P.2d 210 (1988), and because we defer to the jury on issues of the credibility of

witnesses, resolution of conflicting testimony, and the persuasiveness of the evidence, *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004), and because "circumstantial evidence and direct evidence have equal weight," *State v. Beasley*, 126 Wn. App. 670, 689, 109 P.3d 849 (2005), we hold that the evidence here was sufficient to support the jury's conclusion that Amezcua-Picazo was the shooter on August 14, 2007. His argument fails.

C. Assault on Haviland

Amezcua-Picazo also argues that the evidence was insufficient to prove that Amezcua-Picazo committed attempted assault against Haviland, due to a lack of evidence that Amezcua-Picazo intended to shoot Haviland. He argues that under the State's theory of the case, Amezcua-Picazo's motive to shoot at the vehicle was retaliation for the previous incident in which Malone was a passenger in Hall's vehicle. He seems to argue that Amezcua-Picazo's intent to shoot Malone could only have attached to Haviland if Haviland had been injured.

The State responds that "'once the intent to inflict great bodily harm is established, . . . the mens rea is transferred under RCW 9A.36.011 to any unintended victim.'" Br. of Resp't at 8 (alteration in original) (quoting *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)).

The "to convict" instruction involving Haviland read:

> To convict [Amezcua-Picazo] of the crime of Assault in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 14, 2007, [Amezcua-Picazo] assaulted Joseph Haviland;
>
> (2) That the assault was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death;
>
> (3) That [Amezcua-Picazo] acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington.

Clerk's Papers at 28. RCW 9A.36.011(1)(a) states, in relevant part, "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm[, a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."

Both parties rely on *Wilson*, where Wilson threatened two women in a tavern. Moments later, after being told to leave, Wilson fired three shots into the tavern; neither shot hit the threatened women but two of the bullets hit two men. *Wilson*, 125 Wn.2d at 215. Our Supreme Court held that first degree assault requires specific intent but that "it does not, under all circumstances, require that the specific intent match a specific victim." The court held that Wilson assaulted the two men "when, with an intent to cause great bodily harm to [the threatened women], Wilson discharged bullets from a firearm" and struck the men. *Wilson*, 125 Wn.2d at 218. It held that the doctrine of transferred intent was unnecessary to convict Wilson, because he was guilty of assaulting the two men "[u]nder a literal interpretation of RCW 9A.36.011."[4] *Wilson*, 125 Wn.2d at 219.

Amezcua-Picazo argues that, unlike the two unintended victims in *Wilson*, Haviland did not suffer actual injury. But this issue was recently decided by our Supreme Court in *State v. Elmi*. Elmi shot at his estranged wife while she sat in her living room with three children but no one was injured. *Elmi*, 166 Wn.2d at 166 Wn.2d 209, 212, 207 P.3d 439 (2009). "The State charged Elmi with attempted murder and four counts of first degree assault with a firearm

[4] "Transferred intent is only required when a criminal statute matches specific intent with a specific victum. RCW 9A.36.011 does not include such a rigid requirement." *Wilson*, 125 Wn.2d at 219.

enhancement." *Elmi*, 166 Wn.2d at 212. The court held that the doctrine of transferred intent is actually "encompasse[d]" in RCW 9A.36.011, because the statute requires (1) "'intent to inflict great bodily harm'" and (2) the assault on "'another'"; it does not require specific intent and, therefore, no transfer is necessary.[5] *Elmi*, 166 Wn.2d at 218 (emphasis omitted) (quoting RCW 9A.36.011(1)(a)).

Thus, to find Amezcua-Picazo guilty of first degree assault against Haviland, the State needed only to prove that Amezcua-Picazo intended to inflict great bodily harm against someone and that he assaulted Haviland. Amezcua-Picazo concedes in his brief on appeal "that the [S]tate did have substantial evidence that the shooter had th[e] requisite intent toward Aaron Malone." Br. of Appellant at 26. To prove assault against Haviland, therefore, the State needed only to have shown that Amezcua-Picazo placed Haviland in reasonable apprehension and imminent fear of bodily injury.

Clearly, the evidence was sufficient to prove that Haviland feared bodily injury. Haviland sped away from the hooded man with a gun, heard shots fired at his car, and ducked down—driving blindly for several blocks. Even without specific intent to harm Haviland and without actual injury to Haviland, there was sufficient evidence for a rational jury to find Amezcua-Picazo guilty of first degree assault of Haviland in count II. Amezcua-Picazo's argument fails.

II. Propensity Evidence

Amezcua-Picazo further argues that the trial court violated his right to a fair trial when it admitted evidence that he was a gang member. He argues that the trial court abused its discretion

[5] The court noted, "*Wilson* is distinguishable to the extent that the case involved an actual battery . . . upon intended victims, where it was simple to specify the victims. But read as a whole, *Wilson* does not limit intent to that which was aimed at a person wounded as a result of the assault." *Elmi*, 166 Wn.2d at 217.

because the gang evidence was not necessary to prove motive for the shootings. We disagree.

A. Standard of Review

Evidence of prior bad acts and misconduct is inadmissible to prove the defendant's character and to show his general propensity for misconduct. Such evidence, however, "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ER 404(b). The list of other purposes in ER 404(b) is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). We review the trial court's admission of ER 404(b) evidence for an abuse of discretion. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

B. No Abuse of Discretion

In this case, Amezcua-Picazo objected to admission of testimony about gang affiliation. The State argued that the evidence would be used to show three things: (1) motive, (2) witness credibility, and (3) intimidation of witnesses. The trial court granted the State's motion, allowing the State to "establish [its] motive however [it] want[s] to." I RP at 57.

Evidence of gang affiliation is considered prejudicial and is admissible only upon a showing of a nexus between the gang activities and the charged crimes. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009); *State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). In *Scott*, Division Three of this court noted, "Courts have regularly admitted gang affiliation evidence to establish the motive for a crime" as long as there was "a connection between the gang's purposes or values and the offense committed." 151 Wn. App. at 527. The

court listed motive, threats, and explanation of "refusal to initially identify the assailants" as "proper bases for admitting gang evidence." *Scott*, 151 Wn. App. at 527-28.

Here, the State elicited testimony from Lowery, Malone, and McDaniel's sister that Amezcua-Picazo was a member of the LVLs and that his nickname was Cyclone. Fitzgerald testified that there was a rivalry between the LVL gang and the TBC gang and that gang membership involved retaliation, intimidation, and violence. The State also presented evidence that Malone was involved in a previous encounter where Malone's friend, Hall, a member of the TBC gang, attacked Amezcua-Picazo's girlfriend's vehicle on Kearny Street when Malone was present. Malone, Haviland, and Huey all testified that they were frightened of retaliation against them for cooperating with the police and for testifying against Amezcua-Picazo. Various police officers— including Lee, Lowery, and Buster—testified that Malone and Haviland appeared frightened of retaliation for their cooperation. Finally, there was testimony that McDaniel was affiliated with LVL gang members; that he resided on Kearny Street; that Haviland, Malone, and Huey drove to this area on the night of August 14; and that the shooting occurred on Kearny Street.

Under these circumstances, the trial court did not abuse its discretion in allowing gang evidence. The State presented a sufficient nexus between gang membership and the August 14 incident, i.e., Malone's presence during Hall's attack on Amezcua-Picazo's girlfriend's car; Hall's membership in the TBC gang; the rivalry between the TBC gang and the LVL gang; and Malone, Haviland, and Huey's fear of retaliation for testifying about the August 14 incident. Further, the trial court found that the probative value of the evidence, particularly with regard to motive, outweighed its prejudicial effect. Because the trial court did not admit the evidence on untenable

grounds or for untenable reasons, we hold that it did not abuse its discretion.

III. Photomontage

Amezcua-Picazo next argues that the "admission of unduly suggestive photo montage [sic] identification evidence violated [his] right to a fair trial." Br. of Appellant at 36 (emphasis omitted). He argues that the photomontage procedure was unduly suggestive because only two of the individuals pictured in the photomontage fit Haviland's physical description of the shooter and because Haviland was shown the same photomontage more than once.

The State argues that the photomontage did not "direct[] undue attention to a particular photograph" and, therefore, Amezcua-Picazo cannot make "the preliminary showing that the photomontage was impermissibly suggestive." Br. of Resp't at 23. The State further argues that "any inconsistencies or uncertainty in the identification of [Amezcua-Picazo] goes to the weight of the testimony and not its inadmissibility, and is thus a matter for the jury." Br. of Resp't at 24. We agree with the State.

A. Standard of Review

"An out-of-court photographic identification violates 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) (quoting *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)). A defendant bears the initial "burden of showing that the identification procedure was impermissibly suggestive." *Vickers*, 148 Wn.2d at 118. "[A] suggestive procedure is one that directs undue attention to a particular photo." *State v. Eacret*, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). "If [the defendant] proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created

a substantial likelihood of irreparable misidentification." *Vickers*, 148 Wn.2d at 118.

B. Photomontage Not Impermissibly Suggestive

On the second day of trial, Amezcua-Picazo moved to suppress any mention of Haviland's identification of Amezcua-Picazo's photograph. He argued that the procedure the police used was irregular because police showed Haviland the photomontage twice and because the photomontage was suggestive. The trial court denied his motion, stating, "I don't find [the photomontage] is obviously impermissibly suggestive." II RP at 12.

Haviland testified that he was shown the photomontage twice. But Ross testified that Haviland did not positively identify any of the photographs when he first viewed them. Haviland told Ross that he could only identify the build of the shooter because he "didn't see the guy's face." II RP at 35. On a subsequent day, Haviland went to the Centralia Police Department with his mother and asked to look at the photomontage again. On that occasion, Haviland identified Amezcua-Picazo after approximately 10 seconds and initialed Amezcua-Picazo's photograph.

We hold that this photographic identification procedure was not unduly suggestive. First, Haviland did not positively identify any of the individuals during his first look at the photomontage. He subsequently asked to look at the photomontage again and then identified Amezcua-Picazo with little hesitation. Furthermore, a photomontage with only two photographs meeting the description of the shooter's build does not "direct[] undue attention to a particular photo." *Eacret*, 94 Wn. App. at 283. Amezcua-Picazo failed to meet his initial burden of showing that the photographic identification procedure was unduly suggestive and his argument fails.

IV. Ineffective Assistance of Counsel

Finally, Amezcua-Picazo argues that his trial counsel was ineffective because he failed to object to (1) Malone's speculation about the shooter's identity as a violation of ER 602 and as an improper opinion of guilt and (2) various instances of hearsay testimony regarding out-of-court identifications. The State responds that Malone's speculation "was a 'statement of identification' and any equivocation or 'waivering' [sic] by Malone . . . goes to the weight given to the testimony, not the admissibility of such testimony."[6] Br. of Resp't at 30.

A. Standard of Review

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, an appellant must show both deficient performance and prejudice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Varga*, 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Prejudice occurs when, but for deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). There is a strong presumption that counsel was effective and counsel's conduct cannot support a claim of deficient performance if the conduct can be characterized as a legitimate trial strategy or tactic. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

To establish ineffective assistance of counsel for failure to object, the defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Counsel's choice of whether to object "is a classic example of trial

[6] The State incorrectly lists Amezcua-Picazo's second argument as "his counsel was ineffective for failing to object to admission of the testimony regarding gangs." Br. of Resp't at 29. The State addresses this basis and does not address Amezcua-Picazo's argument that his counsel was ineffective for failing to object to hearsay testimony.

tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Only where the testimony was central to the State's case will failure to object constitute deficient performance. *Madison*, 53 Wn. App. at 763.

It is improper for a witness to express a personal opinion regarding the guilt of the accused. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes an independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 935-37, 155 P.3d 125 (2007). Furthermore, under ER 602, a witness may only testify concerning facts within his personal knowledge. ER 602; *State v. Vaughn*, 101 Wn.2d 604, 611, 682 P.2d 878 (1984).

B. Malone's Testimony

The State asked Malone whether he "[thought] it was anybody other than Cyclone" that shot at the vehicle. II RP at 175. Malone responded, "I didn't really think of anybody in particular. I thought, yes, there was a very good possibility because it was his girlfriend's car this whole thing had revolved around. He would be the only one to be upset about the situation." II RP at 175-76. Thus, when the State asked Malone whether he thought someone else, not Amezcua-Picazo, was the shooter, Malone explained why it probably was not someone else.

The State's question was meant to elicit the identity of other possible suspects, not to implicate Amezcua-Picazo. Furthermore, Malone's response did not include a statement of Amezcua-Picazo's guilt, but only a statement of his reasoning for identifying Amezcua-Picazo as the shooter. At best, the statement weakened Malone's statements identifying Amezcua-Picazo, because it showed lack of confidence in his identification.

But even if the question and answer included improper opinion testimony, defense counsel's failure to object did not rise to the level of ineffective assistance. There is a strong presumption that counsel was effective and this is especially true when considering an attorney's decision not to object to a question or answer that weakens a witness's identification of his client, the alleged perpetrator. *McNeal*, 145 Wn.2d at 362. Because Amezcua-Picazo has not shown that counsel's decision was not a legitimate trial tactic, his argument fails.

C. Hearsay Testimony

Amezcua-Picazo raises objection to hearsay testimony without citing to specific instances of hearsay testimony. We do not speculate about the basis of objections on appeal but, here, defense counsel's decision not to object to testimony regarding uncertain identification of the shooter was clearly a legitimate trial tactic. Throughout the trial, Malone, Haviland, and Huey gave weak and sometimes inconsistent statements regarding the shooter's identification. Had defense counsel chosen to object to the statements that Amezcua-Picazo was the shooter, it may have lessened the impact of the inconsistent statements and put unnecessary emphasis on those statements identifying Amezcua-Picazo. It would also have allowed the State to attempt to strengthen or rehabilitate the witnesses' testimony in response to objections. Because Amezcua-Picazo fails to show that his counsel's decision was not a legitimate trial tactic, his argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Bridgewater, J.