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

STATE OF WASHINGTON, Respondent, v. KIETH W. PARKINS, Appellant.	No. 30176-1-III UNPUBLISHED OPINION

Sweeney, J. —This appeal follows convictions for a number of armed robberies that were committed over the course of a few days. The eyewitnesses could identify the defendant in some cases but not clearly in others. A police investigator testified that video images were of the defendant. We conclude that the separate evidence of each robbery was sufficient to support the convictions. We conclude that the court did not abuse its discretion by refusing to grant a mistrial based on the testimony of the investigator or the possibility that prosecution witnesses saw the defendant in handcuffs. And we affirm the convictions.

FACTS

Kieth Parkins committed a series of robberies in Spokane, Washington, between October 25 and October 28, 2007. Eyewitnesses described him as a white male with a beard, wearing a nylon stocking over his face, and driving an older white boxy pickup.

A police dispatcher advised Officer Paul Buchmann that the Fairco Mini Mart in Spokane had just been robbed. The dispatcher reported the robbery to Officer Buchmann on October 28, 2007, at 2:32 a.m. An eyewitness described the suspect as a white male with a beard, wearing a nylon stocking over his face and a green sweatshirt with lettering on the back. Officer Buchmann drove toward the Mini Mart. He saw an older white boxy truck drive away from an area near the scene of the robbery. Officer Buchmann pulled in behind the truck and the driver accelerated and drove away. Other officers joined Officer Buchmann in the chase. They eventually stopped and seized the driver—Mr. Parkins. They then searched his truck and found money, a nylon stocking, a knife, and gloves.

The State charged Mr. Parkins with five counts of second degree robbery, three counts of first degree robbery, two counts of attempted second degree assault, and attempt to elude a police vehicle.

Mr. Parkins moved to suppress evidence. He argued that police did not have

grounds to stop him.

Officer Buchmann testified at the hearing and spelled out the information he had that prompted the chase and eventual arrest of Mr. Parkins. He was on patrol in the early morning hours of October 28, 2007. His dispatcher reported an armed robbery at the Fairco Mini Mart. An eyewitness described the suspect as a white male wearing a green sweatshirt and a nylon stocking over his head. The suspect entered the store with a weapon. The suspect left in an older white boxy pickup in bad condition. Officer Buchmann drove north on Ash street in Spokane. He saw a white boxy style pickup traveling south on Ash street. The truck was, at that time, "a reasonable distance" from the location of the robbery. Officer Buchmann pulled alongside the truck. He saw a white male in a green shirt with a beard and messy hair, hair consistent with having worn a tight fitting cap. The driver appeared nervous. Officer Buchmann pulled behind the driver. He called police dispatch and told them that he thought he had a suspect. Mr. Parkins then quickly turned right and accelerated. Officer Buchmann activated his emergency lights. Mr. Parkins sped off. Mr. Parkins reached speeds of 80 miles per hour in a 25-mile-per-hour zone. Officers gave chase but eventually had to use a PIT (pursuit immobilization technique) maneuver to stop Mr. Parkins.

The trial judge apparently believed Officer Buchmann's testimony and made the

following findings:

> (1) during roll call, Officer Buchmann had been advised of robberies at gunpoint in the north side of town,
> (2) the suspect was described by eyewitnesses as a white male with a beard and a nylon stocking pulled over his head,
> (3) eyewitnesses saw the suspect getting into an older white boxy truck,
> (4) while on patrol, Officer Buchman was informed by dispatch that the Fairco Mini Mart had been robbed at 2:32 in the morning by a white male with a beard, wearing a nylon stocking and a green sweatshirt,
> (5) Officer Buchmann observed a nervous white male with disheveled hair wearing a green sweatshirt driving a white older boxy pickup,
> (6) as the officer pulled in behind the driver, the driver accelerated and drove away,
> (7) the officer activated his emergency lights and attempted to stop the driver.

Report of Proceedings (RP) at 70-71.

Based on these findings, the court concluded that Officer Buchmann had reasonable and articulable suspicion to conduct a *Terry*[1] stop.

The case proceeded to trial. Most of the witnesses were able to identify Mr. Parkins in court. The quantity and quality of those eyewitness accounts play a part in the resolution of Mr. Parkins' assignments of error here on appeal. And so we will deal with them in our discussion of the issues.

Detective Marvin Hill testified at the close of the State's case. He testified that he

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

had been assigned to investigate the robbery that occurred at the Fairco Mini Mart. The prosecutor asked him if he recognized exhibit 77. Detective Hill responded,

> This is a piece of photo paper that has six separate images on it. Each one of the images is from a different robbery that had occurred. Each one of them shows the defendant, Mr. Parkins, facing forward at the camera, so he's looking at the camera.

RP at 713.

Defense counsel objected. The court sustained the objection. Defense counsel moved for a mistrial. Counsel argued that the detective's testimony invaded the province of the jury and that a curative instruction would only exacerbate the problem. The court concluded that the testimony was improper but, nonetheless, concluded that it could be cured by an appropriate instruction to the jury. The judge noted that the detective's statement came at the end of the trial and after there had already been a significant amount of evidence identifying Mr. Parkins as the culprit. The court struck Detective Hill's statement and instructed the jury to disregard it.

The jury found Mr. Parkins guilty of five counts of second degree robbery, two counts of first degree robbery, and attempting to elude a police vehicle. The court imposed a life sentence under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570.

DISCUSSION

Mistrial – Detective's Testimony

Mr. Parkins contends that the court abused its discretion when it refused to grant a mistrial based on Detective Hill's testimony.

We review a trial court's denial of a mistrial for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Here we consider "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will receive a fair trial. *Id.* at 920-21. "Only errors affecting the outcome of the trial will be deemed prejudicial." *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Generally, a witness may not offer an opinion regarding the defendant's guilt; those opinions invade the province of the jury. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). We will assume that the officer's testimony here carried a special aura of reliability with a jury. *Demery*, 144 Wn.2d at 765.

Mr. Parkins relies on *State v. Olmedo* and *State v. Montgomery* for his assertion

that Detective Hill's identification of him in the videos was an improper opinion of guilt that invaded the province of the jury. *State v. Olmedo*, 112 Wn. App. 525, 530-31, 49 P.3d 960 (2002); *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). He claims that "Detective Hill told the jury not only that Mr. Parkins was guilty, but that he was guilty of all six robberies shown in the surveillance videos." Br. of Appellant at 17-18. Mr. Parkins contends that the resulting prejudice could not be cured by an instruction because identity was the main issue and the jury respected the detective.

In *Montgomery*, police officers and a forensic chemist testified that the defendant bought ingredients to manufacture methamphetamine and opined that he "possessed [pseudoephedrine] with intent." *Montgomery*, 163 Wn.2d at 588. The court ruled that the officers' testimony was improper because it explicitly commented on the defendant's intent and "went to the core issue" in the case. *Id*. at 594-95. In other words, the police witness drew an ultimate conclusion reserved for the jury—whether the defendant intended to manufacture methamphetamine.

In *Olmedo*, an expert witness testified that certain storage tanks were illegal under standards set by the Department of Transportation (DOT). The State had charged Mr. Olmedo with unlawful storage of anhydrous ammonia. *Olmedo*, 112 Wn. App. at 533. The ultimate question for the jury was whether the propane tanks were approved by the

DOT or not. And that required application of law—the DOT requirements for tanks—to the specific facts. *Id.* at 534-35. The court did not instruct the jury on the legal requirements for DOT approval of a tank. *Id.* at 535. The jury was left with nothing but a layman's opinion on the legal requirements necessary to convict. That testimony amounted to an improper legal conclusion. *Id.* at 534.

But that is not what we have here. Detective Hill did not offer an opinion that Mr. Parkins was guilty of the six robberies; that is, that Mr. Parkins satisfied the legal criteria necessary to convict of robbery or that he intended to rob these businesses. He identified Mr. Parkins in the six photos. Ultimately, this detective expressed his opinion that the guy in the surveillance video was Mr. Parkins. He then like any other witness to a crime was subject to examination on how he could do so given the condition of the video, the use of a stocking and hat (significantly, each were later discovered in Mr. Parkins' boxy white truck), and the detective's obvious participation in all of this exclusively on behalf of the State starting with his investigation. He did not express a personal belief about guilt or offer an ultimate finding that required a legal conclusion. Indeed, the testimony was not so different from any other witness identification in the setting of criminal prosecutions.

Also, on this point, the court struck the comment and told the jurors that it was

doing so and instructed them to disregard it: "Who was facing the security video is and must be exclusively determined by you, the jury, and only after you have heard all of the evidence and have heard closing argument." RP at 738. Now, Mr. Parkins has a point when he suggests that these steps by the court do little to undo whatever prejudice might attend the comments. We, nonetheless, must assume that the jurors follow the court's instruction to disregard improper evidence. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

Detective Hill's testimony was also cumulative of other evidence that is not challenged here on appeal. The court noted that the detective was the last State's witness. By the time the jury heard his testimony, it had viewed numerous surveillance video recordings and listened to the testimony of the other State's witnesses, most of whom were able to identify Mr. Parkins in photomontages or in court.

The court correctly chose to let the matter proceed to verdict.

Prosecutorial Misconduct

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The defendant bears the burden of establishing the impropriety of the statements. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice

exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We pass on a prosecutor's conduct by examining it in the context of the total argument, the evidence presented, the issues in the case, and the jury instructions. *Monday*, 171 Wn.2d at 675.

Mr. Parkins objected to the prosecutor's argument during trial so the question here on appeal is whether there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012).

Here are the comments at issue: "[t]he concept of reasonable doubt, it is not beyond all doubt. It is beyond a reasonable doubt *and it should be a reason that you can explain and articulate to your fellow jurors*." RP at 77 (emphasis added).

Mr. Parkins objected, arguing that "jurors can have a reasonable doubt for any reason, they don't have to name a specific reason." RP at 78. The court was puzzled by the objection, and stated that it did not know what statement defense counsel referred to. Defense counsel responded that it was located on a screen in front of the jury. The court did not see the challenged language but responded, "I hear the argument is a reason. If you have a reasonable doubt, a reasonable doubt is a reason that you have a reason for." RP at 79.

Mr. Parkins contends the court is wrong. He relies primarily on *State v. Evans* and

State v. Venegas to argue that the prosecutor's rebuttal argument improperly shifted the burden of proof by implying that the defendant had the burden of providing a reason for the jury's doubt. *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011); *State v. Venegas*, 155 Wn. App. 507, 524-25, 228 P.3d 813 (2010).

In *Evans*, the prosecutor argued, "'what you should be able to say, "I have a doubt about, okay, element X, and it's because of this reason" fill in the blank, okay? And it should be a reason that comes from evidence or lack of evidence.'" *Evans*, 163 Wn. App. at 641-42. Division Two of this court concluded that the "fill in the blank" argument "subverts the presumption of innocence by implying that the jury has an initial affirmative duty to convict and that the defendant bears the burden of providing a reason for the jury not to convict." *Id.* at 645.

In *Venegas*, the prosecutor similarly argued, "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank.'" *Venegas*, 155 Wn. App. at 523. The court held that this argument was improper: "'[b]y implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to.'" *Id.* at 524 (emphasis omitted) (alterations in original) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220

P.3d 1273 (2009)).

We assume for purposes of our analysis here that the comment was improper. But that does not end the inquiry. Courts in this state have concluded that similar comments were not incurably prejudicial when the State's case is strong and the jury has been given the presumption of innocence instruction. *See State v. Emery*, 161 Wn. App. 172, 196, 253 P.3d 413 (2011) (finding no prejudice where the State presented multiple witnesses and evidence corroborating the victim's version of events), *aff'd*, 174 Wn.2d 741; *Anderson*, 153 Wn. App. at 432 n.8 ("the untainted evidence against Anderson was overwhelming"). And the comments here were the argument of an advocate. The court instructed the jury that the comments of counsel are not evidence and that the court would instruct the jury on the law.

We conclude that like the facts in *Emery* and *Anderson*, the evidence here of guilt against Mr. Parkins was overwhelming. Multiple witnesses testified and surveillance videotapes corroborated their version of events.

What makes these remarks troublesome is that they appear to be unnecessary to the outcome and yet the prosecutor chose to make the remarks despite case authority that suggests their impropriety. We cannot, however, conclude that the statement affected the verdict. And, of course, the jury was instructed that the State "has the burden of proving

each element of the crime beyond a reasonable doubt" and that the defendant "has no burden of proving that a reasonable doubt exists." Clerk's Papers (CP) at 83. The court instructed the jury that a defendant is presumed innocent and "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." *Id.* These instructions minimized the potential negative impact of the prosecutor's statement.

Terry Stop

Mr. Parkins next contends that the court erred by denying his motion to suppress the evidence found in his truck. He challenges the stop that led to the discovery of the evidence, and argues that Officer Buchmann lacked a reasonable suspicion of criminal activity. The State responds that the issue of an unlawful *Terry* stop is a "red herring" because "the officer never stopped the defendant or even attempted to stop the defendant." Br. of Resp't at 18.

The factual circumstances surrounding the stop are essentially undisputed. The only question is whether those facts support the conclusion that the stop was justified. We will review that question of law de novo. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

Police officers may conduct an investigatory stop if they have a reasonable and articulable suspicion that an individual is involved in criminal activity. *State v. Sieler*, 95

Wn.2d 43, 46, 621 P.2d 1272 (1980). That is, if they suspect "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986). We, of course, consider the totality of the circumstances known to the officer at the time of the stop. *State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991). And the determination of reasonable suspicion "'must be based on commonsense judgments and inferences about human behavior.'" *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

Here Officer Buchmann had been informed of a series of robberies on the north side of town. The suspect had been described as a white male, with a scruffy beard, wearing a nylon stocking over his head, and driving an older white boxy pickup truck. Later in his shift, Officer Buchmann received a report from police dispatch of an armed robbery that had just occurred at the Fairco Mini Mart. The description of the suspect matched the one provided earlier in the day at the police roll call. He was also advised that the suspect was wearing a green sweatshirt. Officer Buchmann drove toward the mini mart. He saw a white boxy style truck traveling "a reasonable distance from the scene of the robbery." RP at 32. Mr. Parkins matched the description of the suspect. The officer also noticed that the driver's hair was in disarray—like he had had a net over

his head. The officer pulled behind the truck. The driver accelerated and sped off.

We are led to conclude that Officer Buchmann had a reasonable suspicion that Mr. Parkins was engaged in, or had just engaged in, criminal activity and therefore had legally sufficient reasons to stop Mr. Parkins.

Mr. Parkins also contends that the stop was invalid because there was no evidence the informant who described Mr. Parkins and his truck was reliable. He argues, that "[a]bsent any evidence of the identity of the informant, his or her reliability, and the basis for the information, the State did not prove the tip had sufficient indicia of reliability to support the stop." Br. of Appellant at 28-29. He did not make this argument in the trial court. There he limited his argument to whether there were sufficient grounds for the *Terry* stop, and for good reason. The test for a *Terry* stop is totality of the circumstances. *Lee*, 147 Wn. App. at 921-22. Officer Buchmann was not applying for a warrant to seize or search Mr. Parkins. *Id.* He was trying to evaluate and take action on reports of an immediate crime that Mr. Parkins was fleeing from.

Sufficiency of the Evidence Count II (Divine's Gas Station), Count IV (Zip Trip)

Mr. Parkins contends that the evidence is insufficient to support his second degree robbery convictions in counts II and IV. He specifically contends the evidence was insufficient to identify him as the perpetrator of the crimes.

The question is whether there was substantial evidence necessary to support these convictions. *State v. Dolan*, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003). The standard is modest: "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). Mr. Parkins admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence, by his challenge. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Our concern here is whether the State has produced enough evidence to support the elements of robbery; we are not concerned with how persuasive that evidence was. *State v. Henjum*, 136 Wn. App. 807, 810-11, 150 P.3d 1170 (2007).

To convict Mr. Parkins of second degree robbery in counts II and IV, the State was required to prove that Mr. Parkins unlawfully took property from Aischa Bartleson (count II) and Jason Beagle (count IV) by use of force. RCW 9A.56.190.

Mr. Parkins contends that the State failed to show that he was the person that robbed Ms. Bartleson or Mr. Beagle because neither was able to positively identify him as the culprit.

Ms. Bartleson testified that she was working at Divine's gas station at about 6:30

in the morning when a man holding a knife and wearing a dark cap with a nylon over his face, appeared and ordered her to open the till. She stated that he took off with money and cigarettes, but that she "didn't see what he looked like." RP at 76. Mr. Beagle was working as a manager at Zip Trip on the night the store was robbed and could not conclusively identify Mr. Parkins.

There was, however, other evidence including Mr. Parkins' performance recorded by the video surveillance cameras. Mr. Parkins argues that the videos are "grainy" and the robber was disguised. Br. of Appellant at 34. And that is a fine jury argument on how persuasive this evidence should have been. But we are not concerned with how persuasive this evidence was. That was for the jury. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Here, the jury viewed the videos relating to counts II and IV and apparently concluded that they adequately established Mr. Parkins' identity. The evidence was then sufficient for a rational trier of fact to find that Mr. Parkins was the person who committed the robberies in counts II and IV, given the video, the cap, the nylon stocking, the knife, the truck, and the inferences a jury could reasonably draw from all of this. The evidence here easily meets the modest standard, substantial evidence.

Double Jeopardy

Mr. Parkins contends that the court violated his Fifth Amendment right to be free

from double jeopardy by failing to instruct the jury that it had to find a separate and distinct act for three identically charged counts of second degree robbery in counts I, II, and III and identically charged counts in counts IV and VI. He asserts that the redundant convictions should be vacated. The State responds that Mr. Parkins' failure to object to the instructions precludes appellate review unless he can establish "manifest error affecting a constitutional right" under RAP 2.5(a)(3).

A double jeopardy challenge implicates a constitutional right and may be raised for the first time on appeal. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). We review claims of constitutional error de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

A criminal defendant is constitutionally protected against multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Mr. Parkins correctly points out that when the State presents evidence of multiple acts that could support more than one of the crimes charged, the trial court should instruct the jury that each count must be based on a separate and distinct act. *State v. Mutch*, 171 Wn.2d 646, 662-63, 254 P.3d 803 (2011); *State v. Noltie*, 116 Wn.2d 831, 846, 809 P.2d 190 (1991). If the instructions do not inform the jury that each count must be based on a separate and distinct act, then we must

determine whether the evidence, arguments, and instructions made the separate acts requirement "manifestly apparent to the [jury]." *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

Here, the elements instructions for counts I, II, and III, related to events on October 25, 2007, and the instructions on counts IV and VI, related to events on October 26, 2007. They included identical language that instructed the jury in part that it had to find that the defendant "unlawfully took personal property from the person or in the presence of another" with the intent to commit theft of the property and "[t]hat the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person." CP at 92, 94, 98, 101, 102. The jury was not instructed that each count must be based on a separate and distinct act. The instructions are then deficient. But that does not end our inquiry. *State v. Newman*, 63 Wn. App. 841, 851-52, 822 P.2d 308 (1992).

We have reviewed this trial record. Each count was supported by the testimony of five different witnesses at different locations and at different times. As to count I, Leonard Johnson testified that Mr. Parkins entered a Zip Trip located at 7902 North Division on October 25, 2007, at about 1:40 a.m. and demanded money from Mr. Johnson. The jury was shown a surveillance videotape of the incident and Mr. Johnson

was able to make a positive in-court identification. Ms. Bartleson (count II) testified that she was working at Divine's gas station on October 25, 2007, when a masked man entered the store about 6:30 a.m. and demanded money from the till. The jury was shown a separate surveillance videotape of the incident. As to count III, Melody Roper testified that on October 25, 2007, at about 10 p.m., she was working as a cashier at a Zip Trip located at 2005 North Hamilton when a man entered and demanded money from the till. RP at 193. Ms. Roper made a positive in-court identification and the jury was shown a surveillance video of the incident.

The robberies that occurred on October 26, 2007, were separately supported by the testimony of two different witnesses. Iwalani Arquero testified that on October 26, 2007, at about 11:00 p.m. she was working at Hollywood Video when a man entered the store and demanded money from the cash register. And Mr. Beagle testified that early in the morning on October 26, 2007, he was working at a Zip Trip on Wellesley when a masked man entered the store and demanded money. Finally, during closing argument, the prosecutor discussed all five charges separately, carefully outlining the independent evidence for each separate charge.

We are led to conclude then that the State made clear to the jury that each count was based on a separate act. Mr. Parkins' convictions did not place him in jeopardy

twice for the same acts.

Mistrial—Witnesses Saw Defendant in Handcuffs

Mr. Parkins next contends that the court abused its discretion by denying his motion for a new trial after he was "'paraded' in front of the State's witnesses in handcuffs outside the courtroom." CP at 141-42. Citing *United States v. Emanuele*, he asserts that this court should remand for an evidentiary hearing to determine whether this was an impermissibly suggestive procedure that created a substantial likelihood of misidentification by witnesses who had not previously identified him from a photomontage. *United States v. Emanuele*, 51 F.3d 1123, 1127, 1130 (3d Cir. 1995).

A court may grant a new trial "when it affirmatively appears that a substantial right of the defendant was affected." CrR 7.5(a). One basis for a new trial is a trial irregularity that prevented the defendant from having a fair trial. CrR 7.5(a)(5). We review the court's decision to deny a motion for a new trial for abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). A court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Here, Mr. Parkins filed a motion for a new trial based on a claim that the State's witnesses saw him in handcuffs while being transported into the courtroom. He argued

that this "impermissibly suggestive procedure" deprived him of a fair trial. The court denied the motion, finding "no substantial right of the defendant was materially affected." CP at 199.

Mr. Parkins relies primarily on *Emanuele*, which held that an in-court identification by witnesses who did not make a prior positive identification would be impermissibly suggestive. *Emanuele*, 51 F.3d at 1127. In *Emanuele*, the witnesses were bank tellers who observed a bank robbery. Neither could identify the robber from a photomontage. *Id.* at 1126. While waiting to testify, they saw the defendant being led out of the courtroom in manacles. The two witnesses spoke with one another and said, "'it has to be him.'" *Id.* The court held that the witnesses's failure to identify the defendant despite the opportunity to observe, combined with the impermissibly suggestive "viewing of the defendant in conditions reeking of criminality, bolstered by the comments of another witness," rendered the in-court identification unreliable. *Id.* at 1131. That did not happen here.

So *Emanuele* does not help. First, Mr. Parkins does not identify the witnesses who he claims saw him in handcuffs outside the courtroom or how this may have deprived him of a fair trial. Next, nothing in the record suggests that any of the witnesses's in-court identifications were based on anything other than their observations at the time of the

crimes. Nor apparently was there any inquiry by counsel about the details of the view and what role, if any, it may have played in the testimony.

The State also makes an argument that tends to support the court's refusal to grant a mistrial. The State urges that it is difficult to see how any hallway observations would taint identification any more than the testifying witness observing a single defendant at counsel table. Apart from the suggestiveness inherent in the witnesses knowing that Mr. Parkins was the sole defendant charged with the robberies, nothing in the record indicates that any of the in-court identifications were unreliable. The court did not abuse its broad discretion in denying Mr. Parkins' motion for a new trial.

Right to Jury Trial—Prior Strikes

Mr. Parkins argues that his constitutional rights under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution were violated when the trial court, not the jury, found the existence of his prior two strikes for sentencing purposes under the POAA. He points to the recent decision in the case of *State v. Witherspoon*, 171Wn. App. 271, 286 P.3d 996, 1017 (No. 40772-8-II, filed Oct. 16, 2012). And Mr. Parkins asks us to look the other way on recent Washington State Supreme Court precedent and extend *Apprendi*. *Apprendi* held that a jury must determine every element of the crime with which the defendant is charged.

Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged. But these protections do not apply to determining the existence of prior convictions. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *Apprendi*, 530 U.S. at 490 ("[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added)). Our state Supreme Court has rejected the argument that a jury must determine the existence of prior convictions. *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

So the court's imposition of the persistent offender sentence did not violate Mr. Parkins' Sixth Amendment or due process rights.

Persistent Offender Finding Rational Basis

Mr. Parkins next contends that the POAA violates his equal protection rights under the Fourteenth Amendment because it distinguishes between different classes of recidivists without a rational basis. Br. of Appellant at 52-53. He points out that when proof of a prior conviction operates to elevate a crime, the State must prove the

conviction beyond a reasonable doubt to a jury, but that the use of the same conviction to elevate a felony to an offense requiring a life sentence under the POAA, requires the State to merely prove it by a preponderance of the evidence to a judge. Mr. Parkins argues that "[t]his classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely." Br. of Appellant at 55 (alterations in original).

The equal protection clauses of the Fourteenth Amendment to the United States Constitution and of article 1, section 12 of the Washington Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive equal treatment. *State v. Williams*, 156 Wn. App. 482, 496, 234 P.3d 1174 (2010). Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification. *Id.* at 496-97. Here, Mr. Parkins asserts a liberty interest; therefore, we evaluate whether the statutory claim has a rational basis. *Id.*

We rejected a similar equal protection claim in *Williams.* There we noted that a defendant challenging the legislature's differing treatment of two classes of defendants must show that the differing treatment rests on "'grounds wholly irrelevant to the achievement of legitimate state objectives.'" *Id.* at 497 (quoting *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)). We found that the purpose of the POAA was "to

protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the public trust in the criminal justice system." *Id.* at 498. Similarly, Division One of this court has rejected equal protection challenges to the POAA, holding "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." *State v. Langstead*, 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010). In view of this precedent, Mr. Parkins' equal protection challenge to the POAA fails.

Statement of Additional Grounds for Review

Mr. Parkins contends that his Sixth Amendment right to confront the witnesses against him was violated by the introduction of photographs of his truck taken by Deb Rowles, who did not testify at trial. He relies on *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) to argue that Ms. Rowles' photographs are testimonial and that therefore he should have been allowed to cross-examine her.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. But the objection must be made in the trial courts to preserve the error for

appeal. *State v. O'Cain*, 169 Wn. App. 228, 235, 279 P.3d 926 (2012) ("[t]he right to confrontation must be asserted at or before trial or be lost"); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 313-14, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (claim of error premised on the confrontation clause must be asserted at or before trial or be lost). Here, the State notified counsel that it intended to use Ms. Rowles' photographs at trial. Mr. Parkins then had to object and request Ms. Rowles' presence at trial. By failing to do so, Mr. Parkins has waived the right to assign error here on appeal.

We affirm the convictions.

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

Sweeney, J.

WE CONCUR:

Siddoway, A.C.J.

Brown, J.