

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27367-9-III</b>
	)	<b>Consolidated with</b>
<b>Respondent,</b>	)	<b>No. 28049-7-III; No. 28466-2-III</b>
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>JUSTIN RICHARD HAMMER,</b>	)	
	)	<b>UNPUBLISHED OPINION</b>
<b>Appellant.</b>	)	
_____	)	
	)	
<b>In the Matter of the Personal Restraint</b>	)	
<b>Petition of:</b>	)	
	)	
<b>JUSTIN RICHARD HAMMER,</b>	)	
	)	
<b>Petitioner.</b>	)	
	)	

Brown, J. — After items were found missing from three separate businesses, Justin R. Hammer was charged with and convicted of three counts of second degree burglary, two counts of first degree theft and one count of second degree theft. He appeals, contending (1) the trial court erred in denying his motion to exclude identification evidence and his motion to sever, (2) sufficient evidence does not exist to

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support one of his second degree burglary and first degree theft convictions, and (3) the sentencing court erred by imposing an aggravated exceptional sentence. In his statement of additional grounds (SAG), Mr. Hammer raises multiple contentions, primarily focusing on severance, evidentiary error, illegal detention, and perjury. Mr. Hammer raises the perjury issue again in his first consolidated personal restraint petition (PRP). In his second consolidated PRP, he contends probable cause did not exist for his arrest. Finding no error, we affirm and deny his PRPs.

#### FACTS

On October 31, 2007, a laptop computer and video projector were taken from the Moody Bible Institute located inside Fourth Memorial Church. Video surveillance showed Mr. Hammer at the church, carrying a bag, near the time the items were discovered missing.

On December 14, 2007, an industrial vacuum and computer were taken from the Royal Park Care Center. Video surveillance showed Mr. Hammer at the center near the time the items were discovered missing.

On December 18, 2007, a flat screen television was taken from the Cherrywood Place Retirement Home. An investigating officer showed staff still-pictures from Royal Park's video surveillance. Some staff identified the man in the picture as a man they saw at the retirement center in the past and most recently just 15 minutes prior to the items being discovered missing. Others could not identify him as the suspect. At the

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time, officers did not know the identity of the man in the picture.

The State charged Mr. Hammer with three counts of second degree burglary (one for each business), two counts of first degree theft (Moody Bible Institute and Cherrywood Place) and one count of second degree theft (Royal Park).

Prior to trial, Mr. Hammer asked the court to suppress the identification evidence (both in-court and out-of-court) from Cherrywood staff, arguing the still-pictures amounted to an impermissible, one-person montage. The court denied his request. Mr. Hammer also unsuccessfully requested the six counts be severed into three trials.

The jury was instructed, “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” Clerk’s Papers (CP) at 116.

The jury found Mr. Hammer guilty as charged, including a special finding that “failure to consider the defendant’s prior felony criminal history which is omitted from the offender score calculation results in a presumptive sentence that is clearly too lenient,” and that “the current offense [was committed] shortly after being released from incarceration.” CP at 163. Mr. Hammer’s offender score was a “9+.” CP at 186. The court sentenced Mr. Hammer to a 120-month, aggravated exceptional sentence based on the jury’s special findings. Mr. Hammer appeals.

## ANALYSIS

### A. Identification Evidence

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The issue is whether the trial court erred by abusing its discretion in denying Mr. Hammer's motion to suppress identification evidence from Cherrywood staff members. Mr. Hammer contends the showing of the photographs amounted to an improper, one-person montage.

"Admission of a photo identification or a photomontage is, reduced to its essence, the admission of evidence in a criminal case." *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). It is, therefore, within the trial court's sound discretion to admit it. *Id.* The test then is whether there are tenable grounds or reasons for the trial court's decision.<sup>1</sup> *Id.*

To establish a due process violation, a defendant must show the identification procedure was unduly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). If the defendant fails to make that showing, that is the end of the inquiry. *Id.* Generally, courts have found montages impermissibly suggestive when the defendant is the sole possible choice in light of the witness's earlier description. *State v. Ramirez*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). Nevertheless, even if the identification procedure was suggestive, the evidence may still be admissible if identification contained sufficient indicia of reliability despite the suggestiveness. *Id.* In deciding whether the identification procedure was suggestive, courts consider: "(1)

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<sup>1</sup> Findings of fact and conclusions of law were not entered following the suppression motion because there was no evidentiary hearing. See CrR 3.6 ("If the court determines that no evidentiary hearing is required, the court [only needs to] enter a written order setting forth its reasons.").

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the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation." *Linares*, 98 Wn. App. at 401.

Our case facts are unique because the investigating officers did not generate Mr. Hammer's photograph; rather, they used a photograph from a business involved in a similar crime. Only four days passed between crimes that occurred at similar establishments (i.e., retirement homes). Witnesses at Cherrywood notified the investigating officer that they show an individual hanging around the retirement home. The individual was described as a male with sandy-blond hair and five feet eight inches tall. At least one witness had a conversation with the man, inquiring why he was at the facility. This same witness interacted with the individual just minutes before the television was reported stolen. Based on the above, the identification of Mr. Hammer from the photographs was not unduly suggestive.

Moreover, the situation is comparable to a show-up identification during the course of an investigation. Show-up identifications are not per se impermissibly suggestive. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). Generally, a show-up identification held shortly after a crime and in the course of a prompt search for the suspect is permissible. *State v. Springfield*, 28 Wn. App. 446, 447, 624 P.2d 208 (1981).

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Accordingly, Mr. Hammer has failed to show, under the totality of the circumstances, suggestiveness created a substantial likelihood of misidentification. Thus, the trial court had tenable grounds to admit the identification evidence. There was no abuse of discretion.

#### B. Severance

The next issue is whether the trial court erred by abusing its discretion in denying Mr. Hammer's motion to sever. Mr. Hammer contends he was prejudiced by the similarity and proximity in time between the charges.

We review a trial court's ruling on a motion to sever for an abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Id.* at 718. Relevant factors are, "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately," and this court weighs strongly the concern for judicial economy. *State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

Mr. Hammer's argument is unpersuasive. Each burglary/theft count was based on a different location with different witnesses. The State had either video surveillance or eyewitnesses placing Mr. Hammer at each crime scene. The State's evidence

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related to each occurrence which allowed the jury to compartmentalize the evidence. Lastly, the jury was instructed to decide each count separately and that its decision on one count should not control its verdict on any other count. We presume that juries follow instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Accordingly, tenable grounds exist for the court's severance ruling, so there was no abuse of discretion.

### C. Evidence Sufficiency

The next issue is whether sufficient evidence exists to support Mr. Hammer's second degree burglary and first degree theft convictions relating to the items taken from the Moody Bible Institute. Mr. Hammer contends he did not unlawfully enter the institute to prove burglary and no evidence shows he took the missing items.

Mr. Hammer argues in his brief that sufficient evidence does not exist to support all of his convictions. Yet, he only assigns error to the two convictions relating to Moody Bible Institute. Under RAP 10.3(4)(a), an appellant is to assign error to all issues asked to be reviewed. Therefore, we will limit our review to those convictions assigned error.

We review Mr. Hammer's sufficiency challenge by viewing the evidence in the light most favorable to the State. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). We determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *Id.* Mr. Hammer's insufficiency claim

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admits the truth of the State's evidence and all reasonable inferences from it. *Id.*

Circumstantial evidence is no less reliable than direct evidence. *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991). We defer to the trier of fact on credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

A person commits second degree burglary if, "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030.

Here, Mr. Hammer entered Moody Bible Institute early in the morning through unlocked doors. The institute is an instructional facility located inside a church. Mr. Hammer was not a student at the institute and did not have permission to be inside the church; yet, he entered the building anyway based on video surveillance and eyewitnesses. Viewing the evidence most favorable to the State, he entered or remained unlawfully in a building as contemplated by RCW 9A.52.030. Thus, sufficient evidence supports his burglary conviction.

Turning to the theft conviction, a person is guilty of first degree theft if he or she commits theft of property or services exceeding \$1,500 in value other than a firearm. Former RCW 9A.56.030(1)(a) (1995).<sup>2</sup>

Mr. Hammer argues no evidence shows he took the missing projector and laptop

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<sup>2</sup> The amount in former RCW 9A.56.030 was recently raised to \$5,000. Laws of 2009, ch. 431, § 7 (effective July 26, 2009).

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from the institute. But video surveillance shows Mr. Hammer in the institute carrying a garbage bag. Additionally, an institute employee testified she saw Mr. Hammer in the institute carrying a garbage bag, which appeared to have something heavy in it.

Because circumstantial evidence is as reliable as direct evidence and because the persuasiveness of evidence is left to the trier of fact, sufficient evidence exists to support Mr. Hammer's theft conviction as well.

#### D. Exceptional Sentence

The issue is whether Mr. Hammer's exceptional sentence was clearly excessive.

In determining whether an exceptional sentence is clearly excessive, we review "whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts." *State v. Halsey*, 140 Wn. App. 313, 324, 165 P.3d 409 (2007).

"Stated otherwise, the "clearly excessive" prong of appellate review under the sentencing reform act gives courts near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence." *Id.* at 325 (quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)).

A sentencing court may impose a sentence outside the standard range only if "there are substantial and compelling reasons justifying an exceptional sentence."

RCW 9.94A.535. In RCW 9.94A.535(2), the legislature created a nonexclusive list of aggravating circumstances that constitute substantial and compelling reasons for an

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upward departure from the sentencing guidelines. One of those circumstances is when a defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c); *State v. Newlum*, 142 Wn. App. 730, 732, 176 P.3d 529 (2008).

The sentencing court entered written findings that Mr. Hammer had a high offender score, he had multiple current offenses, and his offender score resulted in some of the current offenses going unpunished. These findings support the trial court's conclusion that there are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535. The trial court did not err in concluding that an exceptional sentence was warranted and ordering Mr. Hammer to serve 120 months total confinement. The special verdict findings resolve any factual questions.

#### E. SAG and PRPs

Mr. Hammer raises several issues in his SAG, most of which have been adequately addressed by appellate counsel. See RAP 10.10(a) (a defendant may file a statement of additional grounds to identify matters he or she believes *have not been* adequately addressed in counsel's brief). His remaining issue involves alleged illegal detention. He contends jail staff misled him regarding the filing of charges and whether 72 hours had passed since arrest.

Under CrR3.2.1(f), the State has 72 hours after arrest to file charges. Nothing in this court's records shows the State failed to comply with CrR 3.2.1(f). The issues

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regarding jail staff involve matters outside our record. If Mr. Hammer wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means is through a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Mr. Hammer contends in his first PRP that he was denied a fair trial based on perjury (he also raises this issue in his SAG). Mr. Hammer argues one of the investigating officers claimed under oath that he submitted certain photographs to the crime laboratory for analysis when actually another officer submitted the photographs.

To prevail on his PRP, Mr. Hammer “has the burden of establishing either error of constitutional magnitude resulting in actual prejudice or nonconstitutional error resulting in a complete miscarriage of justice.” *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 90, 66 P.3d 606 (2003). Mr. Hammer claims his Fourth and Fourteenth Amendment rights were violated. While the document submitted by Mr. Hammer shows a different officer’s name, Mr. Hammer fails to show actual prejudice regarding which officer submitted the photographs. If the petitioner does not demonstrate actual prejudice, his or her petition will be denied. *In re Per. Restraint of Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

In his second consolidated PRP, Mr. Hammer contends there was no probable cause for his arrest. He argues witnesses did not actually identify him.

As stated above, to prevail on his PRP, Mr. Hammer “has the burden of

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establishing either error of constitutional magnitude resulting in actual prejudice or nonconstitutional error resulting in a complete miscarriage of justice.” *Pers. Restraint of Tortorelli*, 149 Wn.2d at 90. Mr. Hammer fails to show any error.

“Probable cause exists when the arresting officer has ‘knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed’ at the time of the arrest.” *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). Here, an investigating officer showed Cherrywood staff pictures from Royal Park’s video surveillance. Some staff identified Mr. Hammer as the man they saw at the retirement center in the past and just 15 minutes prior to the items being discovered missing. This evidence coupled with evidence gathered at the other crime scenes provided probable cause for arrest. Mr. Hammer has failed to meet his burden for relief.

Affirmed; PRPs are hereby denied.

A majority of the panel has determined 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.

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Brown, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.