NO. 100038-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DERRI,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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2. Should this Court deny review where the information contained all the essential elements of first-degree robbery, there was more than adequate notice of the charges, and the defendant has failed to demonstrate prejudice?

3. Should this Court deny review where the trial court properly declined to instruct the jury regarding missing evidence that was never in the control of the State and where any error was harmless?

4. Should this Court deny review where the trial court exercised sound discretion in denying a motion for a mistrial or dismissal based on a discovery violation where the defendant suffered no prejudice?

B. STATEMENT OF THE CASE

A full statement of the relevant facts was set forth by the court of appeals and in the State's response below. Those facts are summarized as follows and supplemented in the argument sections herein as they pertain.

Between March 1 and 11, 2017, Christopher Derri robbed three banks in Seattle. Two of the robberies involved the same bank and the

same witness and were committed four days apart. He was identified by name and in photographic montages before the robbery spree ran its course.

The State charged Derri, also known as John Stites,[1] with three counts of first-degree robbery, occurring on March 1, 2017 against Chase Bank; and on March 7 and March 11, 2017, against HomeStreet Bank. CP 310-11; RCW 9A.56.200(1)(b), 9A.56.190. A jury convicted Stites as charged. CP 361-63. The court imposed a standard range sentence. CP 364-73.

C. ARGUMENT

1. REVIEW SHOULD BE DENIED BECAUSE, AS THE COURT OF APPEALS UNANIMOUSLY AGREED, THE IDENTIFICATION PROCEDURE USED DID NOT CREATE A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

a. There Are Significant Discrepancies Between Stites' Recitation Of The Facts And The Evidence At Trial.

Stites claims that impermissibly suggestive identification procedures in the presentation of photo montages to the witnesses resulted

[1] As noted by the petitioner, the parties used these two names interchangeably at trial and the witnesses generally referred to the defendant as "John Stites." Pet. at 1 n.1. Indeed, the defendant was kind enough to provide his name, "John Stites," to one of the witnesses when he visited the HomeStreet bank in late February 2017. That witness provided the name to the police when the defendant returned on March 7, 2017, to rob the bank. The petitioner continues to use "Stites" in his petition for review. Thus, the respondent will as well.

in a substantial likelihood of irreparable misidentification. Pet. at 1. He complains of "glaring inaccuracies" between the witnesses' descriptions of the robber and Stites; "namely: No witness described the robber as having a neck tattoo." Pet. at 9.

Stites' claims are belied by the record of the trial. There are, indeed, "glaring inaccuracies" presented in the petition for review, but they rest with Stites' selective recitation and characterization of the facts, not with the witnesses' identification of him as the robber. Examples abound, but those highlighted below give this Court a flavor of the discrepancies between Stites' version of events and the witnesses' identification of him in the record as the robber.

- Stites' suggestion that he could not be the person who spoke with a teller at the HomeStreet Bank on February 24, 2017 – and who later linked him to the robberies on March 7 and 11 – because he was either at Harborview Medical Center or a respite home at the time the teller testified she met with him. Pet. at 3-4.

The teller, Hannah Amdahl, was uncertain about the February 24 date. She could not recall exactly when Stites walked into the bank in late February and inquired about opening an account. RP 375, 450, 469, 731. Stites fails to mention that although Amdahl made a note of his visit at the time, she only later guessed ("maybe the next week") that it might have been February 24. RP 454. In fact, her notation regarding the date included a question mark ("?") indicating her uncertainty. RP 454; Ex. 11.

It could have been a different day. RP 470. Nevertheless, Amdahl immediately recognized Stites as the person who had spoken to her in late February "right when he was walking up to the teller line" to rob the bank the first time, on March 7. RP 448, 454. "I saw the same face." RP 454, 489. Moreover, she recalled the specifics of their conversation in late-February and even wrote down his full name – "John Stites" – while speaking to him. RP 450-54; Ex. 11.

Also unmentioned by Stites, who claims he was suffering from "[c]hronic and debilitating health problems" when he was released from Harborview to the respite facility on February 24, is Amdahl's testimony that Stites appeared emaciated during his visit to the bank in late-February. In fact, he stated to her "you can probably tell I've been sick lately." Pet. at 3-4; RP 451, 471. In addition, neither Harborview nor the respite center is a lock-down facility. RP 797, 816-17, 848. Despite his claim of ill health, Stites was absent from the respite center without leave several times before being discharged on February 27 because he was not engaging in his care. RP 839-40.

- Stites' claim that "[e]ach witness observed the person who demanded money for only a very brief time during which the person's face was partially obscured." Pet. at 9.

Contrary to Stites' assertion, the witnesses expressed no difficulty in seeing his face during the robberies. When Stites entered the Chase

Bank on March 1, 2017, he was wearing a hooded sweatshirt with the hood up. His face was visible. RP 530. David Fletcher, the bank manager, was able to provide a detailed description of his face: "He had very gaunt, angular features, eyes a little sunken in, you know, high cheekbones, defined chin." RP 530, 548; CP 11. Jacob Price, who also was in the bank that day, stated that Stites' hood "[d]idn't really cover his face too much or anything like that." RP 407-08. He described Stites' face: "sunken-in cheeks," "pale," "just a little bit of a five o'clock shadow." RP 407, 431.

Similarly, Amdahl reported that during the first robbery, on March 7, Stites' face was visible and unobscured despite having his hood up and cinched. RP 448. Andrew Hilen, a bank employee who also was present during the robbery, stated that Stites' face was visible ("all of it"). RP 346.

- The witnesses identified Stites from the montages with an extremely high degree of certainty.

On March 10, Detective Len Carver showed the Chase Bank witnesses an updated montage that included a more recent, and starkly different, photo of Stites than was included in the first montage. RP 657.[2] Fletcher, the Chase Bank manager who had the most contact with Stites on March 1, identified him with 90% certainty and described the photo as a "dead ringer" for the robber. RP 22, 544, 650; Ex. 18; CP 14.

[2] Indeed, the photos of Stites appear to be of two different men. See Brief of Respondent, at 19; cf. Ex. 17 (image 5) and Ex. 18 (image 1).

Amdahl identified Stites' photograph on March 8, the day following the first robbery, with 100% certainty. Ex. 12; RP 458-60. She again immediately recognized Stites during the March 11 robbery. RP 578. Hilen, who was with Amdahl during the March 7 robbery, identified Stites' photo with 98-99% certainty. RP 366.

There is little reason to doubt the accuracy of Amdahl's identification. She had an extended conversation with Stites in late-February regarding opening an account, she recognized him on March 7 when he robbed the HomeStreet Bank the first time, she identified him with 100% certainty the following day, March 8, in the photo montage, and Stites returned three days later, on March 11, to rob the bank a second time. In fact, Amdahl's certainty was such that she activated the silent alarm on March 11 as he was entering the bank, *before* he robbed it. RP 462-67, 578.

At trial, Fletcher, Amdahl, Hilen and Dustin Foss (who was present for the March 11 robbery) all identified Stites as the person who robbed them. RP 340, 449, 528, 581.

- Stites' claim that none of the bank employees who witnessed the robbery of HomeStreet Bank on March 7 or the Chase Bank on March 11 described the man as having a neck tattoo. Pet. at 4.

As noted above, although Stites was wearing his sweatshirt with the hood up and cinched, witnesses had no difficulty seeing his face. The

hood would, however, have covered the tattoo on his lower neck. In fact, "it was pulled tight so that you could only see his face, and his face was sunken in eyes and cheekbones." RP 448 (Amdahl).

b. Stites' Argument That This Court Should Ignore Precedent, His Misreading Of The Concurrence Below And His Reliance On A Dissenting Opinion In A Case Not On Point Render Baseless His Claim That The Identification Procedure Utilized Here Created A Substantial Likelihood Of Irreparable Misidentification.

The State respectfully asks this Court to deny review. As demonstrated below, the Court of Appeals' decision is consistent with, not in conflict with, this Court's statements of the law. To the extent there is a different approach taken by another Court of Appeals, the decision here adheres to this Court's prior rulings. There is no significant question of law under either the federal or State constitutions; indeed, the issues raised by Stites are factual in nature and challenge the trial court's exercise of its discretion to admit evidence. Finally, there is no issue of substantial public interest that compels review by this Court. RAP 13.4.

Despite Stites' claim to the contrary, there simply is no issue of substantial public interest. Pet. at 6. Cf. In re Pers. Restraint of Arnold, 189 Wn.2d 1023, 408 P.3d 1091, 1093 (2017) (adoption of a horizontal *stare decisis* rule is an issue of substantial public interest that merits review under RAP 13.4(b)(4)); In re Pers. Restraint of Williams, 197

Wn.2d 1001, 484 P.3d 445, 447 (2021) (chaos wrought by COVID-19 at heavily affected correctional facilities, and the Department of Corrections' efforts in responding to the constantly changing threat, constitutes an ongoing issue of substantial public interest within the meaning of RAP 13.4(b)(4)); In re Pers. Restraint of Flippo, 185 Wn.2d 1032, 380 P.3d 413, 413-14 (2016) (decision regarding the imposition of legal financial obligations has the potential to affect a number of proceedings and is an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue).

Stites cites to Judge Coburn's opinion below in support of his argument that "the montages unnecessarily highlighted Mr. Stites [and] were impermissibly suggestive[.]" Pet. at 6. Of note, however, Judge Coburn's was a *concurring* opinion and stated, upfront, "I agree with the majority that *under the totality of the circumstances, the photo identification procedures used by law enforcement did not create a substantial likelihood of irreparable misidentification*." State v. Derri [Stites], 17 Wn. App. 2d 376, 412, 486 P.3d 901 (2021). Further, Stites' proposal that this "Court should *also* find that the trial court erred in admitting the identification" misstates Judge Coburn's concurrence. Pet. at 8 (emphasis added). Judge Coburn concluded to the contrary: "Thus, I

concur with the majority that the trial court did not err by admitting evidence of the out-of-court and in-court identifications of [Stites]." Id.

Perhaps Stites' greatest misstep is his reliance upon the dissenting opinion in State v. Scabbyrobe, 16 Wn. App. 2d 870, 482 P.3d 301 (2021). Scabbyrobe involved a claim of ineffective assistance of counsel for failing to object to the victim's identification of her as the person who stole his car. Id. at 872. Applying the factors set forth in Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), the Court of Appeals, Division III, found that the identification procedure was not unduly suggestive. Id. at 875-76. As a result, the trial court would likely have denied any motion to suppress, rendering Scabbyrobe's claim of ineffective assistance of counsel meritless. Id. at 878.

Stites, however, focuses on Judge Fearing's dissent for the proposition that the identifications here were flawed and that the Biggers standard should be abandoned. But Scabbyrobe has virtually no application to the present case. It involved not a photographic montage, but a one-person show-up following the theft of the victim's car. Id. at 873. In addition, Judge Fearing's dissent focused on the issue of cross-racial identification (the victim initially described the Native American defendant as Hispanic), which lends itself to the greater possibility of error. Id. at 879. Cross-racial identification is not an issue in this case.

Even then, Stites overstates Judge Fearing's reasoning. He cites to the dissent, for example, that emotional experiences such as being robbed "impair a person's ability to remember details such as facial features." Pet. at 9 (citing Scabbyrobe, 16 Wn. App. 2d at 897). But Judge Fearing was less dogmatic than Stites suggests, writing that "under circumstances of emergency or emotional stress[,] . . . . [t]he witness' recollection of the stranger *can* be easily distorted by the circumstances.[.]" Scabbyrobe, 16 Wn. App. 2d at 896 (Fearing, J., dissenting) (emphasis added).

Fundamentally, Stites' argument rests upon a claim that the Court of Appeals simply misapplied the factors set forth in Biggers, 409 U.S. 188, in concluding that there was no substantial likelihood of irreparable misidentification. Pet. at 2, 11. As detailed above, however, he supports his argument with factual assertions uncorroborated by the record.

Finally, Stites argues in support of his claim of substantial public interest that this Court should ignore precedent; specifically, "this Court should accept review to craft a different set of factors to protect a person's right to due process. 'Our state constitution's due process clause provides even greater protection of individual rights in certain circumstances.'" Pet. at 12 (quoting State v. Blake, 197 Wn.2d 170, 181, 481 P.3d 521 (2021)). But Blake concerned the general police power of the Legislature to criminalize the unintentional, unknowing possession of controlled

substances. Id. at 183-85. Here, by contrast, the issue is factual in nature and goes to the trial court's exercise of its discretion in admitting evidence. By Stites' reasoning, every case will qualify for review by this Court simply by invoking Blake and the incantation of "greater due process protection" regardless of the circumstances.

Stites' request that this Court abandon long-standing precedent "fails to appreciate the doctrine of *stare decisis*." See State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (concluding that where the State suggested that the court not follow the court's prior decision, the State was not appreciating the doctrine of *stare decisis*). Further, he offers no analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), to support his argument that this Court should abandon the Biggers jurisprudence under the banner of "greater due process protection." Where a party fails to engage in a Gunwall analysis, a reviewing court will consider the claim under federal constitutional law. State v. Fire, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001).

2. REVIEW SHOULD BE DENIED BECAUSE STITES HAD MORE THAN ADEQUATE NOTICE OF THE ELEMENTS OF FIRST-DEGREE ROBBERY AND HAS FAILED TO DEMONSTRATE ANY PREJUDICE.

Stites next argues that "this Court should accept review to resolve the division split over the essential elements of robbery and because [the]

Court of Appeals erroneously held the information was constitutionally adequate[.]" Pet. at 12. Stites' arguments fail.

To satisfy Due Process and afford an accused notice of the nature and cause of the accusation against him or her, all "essential elements" of the crime, whether statutory or non-statutory, must be pleaded in the charging document and proved beyond a reasonable doubt. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The information here, however, was not missing an essential element of the crime. There is no requirement that "force or fear" be pleaded in the charging document.

Stites relies upon State v. Pry, 194 Wn.2d 745, 452 P.3d 536 (2019), for the proposition that "[t]his Court has already held the force or fear element is essential to proving the very illegality of the offense" and therefore must be alleged in the information. Pet. at 14. This reliance is misplaced. As the Court of Appeals recently held, the statutory reference to "force and fear" is definitional and is not an element of first-degree robbery that needs to be charged. State v. Phillips, 9 Wn. App. 2d 368, 373-74, 377, 444 P.3d 51, review denied, 194 Wn.2d 1007 (2019). Moreover, as the court below noted, Pry acknowledged that "[t]he State need not include definitions of elements in the information." [Stites], 17 Wn. App. 2d at 386 (quoting State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014)). Furthermore, Pry was unique. There, "the contents of

that statutory provision were not merely definitional but rather set forth the essential elements of the offense of rendering criminal assistance" because, without more, the charging document merely alleged that the defendant committed the crime of rendering criminal assistance by rendering criminal assistance. Id. at 389.

Stites' attempt to conjure up a "divisional split" regarding "force and fear" is unavailing. In State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005), the issue was not the adequacy of the charging language, but sufficiency of the force used to effectuate an escape, not to commit the robbery itself. [Stites], 17 Wn. App. 2d 390 (cf. Pet. at 14). In State v. Allen, 159 Wn.2d 1, 9, 147 P.3d 581 (2006), the issue was not whether the definitional language of "force or fear" was a statutory element but, rather, the sufficiency of the State's evidence to prove the aggravating factor charged under the facts of that aggravated first-degree murder case. Id. And, finally, in State v. Todd, 200 Wn. App. 879, 403 P.3d 867 (2017), the analysis by Division III rested upon a misreading of this Court's opinion in Allen. [Stites], 17 Wn. App. 2d at 391.

Most important, however, Stites completely ignores well established Washington precedent that when the sufficiency of a charging document is first raised on appeal, it is more liberally construed in favor of validity. Kjorsvik, 117 Wn.2d at 105. The test is: (1) whether the

necessary facts appear in any form in the charging document, or whether they can be found in that document by fair construction; and, if so, (2) whether the defendant can show that he or she was nonetheless actually prejudiced by the inartful language, which caused a lack of notice. Id. at 105-06. The information is "read as a whole, construed *according to common sense*, and [read to] include facts that are necessarily implied." State v. Goodman, 150 Wn.2d 774, 788, 83 P.2d 410 (2004) (citing Kjorsvik, 117 Wn.2d at 109) (emphasis original).

Kjorsvik is remarkably on point. As in the present case, Kjorsvik was charged with robbery in the first degree. He claimed for the first time on appeal that the information was deficient for not including in the charging language a common law intent element of robbery; specifically, "intent to steal." Id. at 102. The Supreme Court noted that although the robbery statute does not include an intent element *per se*, case law has determined that "intent to steal" is an essential element of the crime. Id. at 98. Nevertheless, "it is sufficient to charge in the language of a statute *if* the statute defines the crime with certainty." Id. at 99 (emphasis original). Furthermore, where the information charged that the defendant unlawfully, with force and against the victim's will, took money while armed with a deadly weapon, "[i]t is hard to perceive how the defendant in

this case could have unlawfully taken the money . . . and yet not have intended to steal the money." Kjorsvik, 117 Wn.2d at 110.

Kjorsvik is instructive. Because Stites did not object at trial to the language of the charging document, it is more liberally construed in favor of validity. Each count alleged that Stites "did *unlawfully and with intent to commit theft* take personal property of another, to-wit: U.S. currency, *from the person and in the presence of [another] . . . against his will, by the use or threatened use of immediate force, violence and fear of injury* to such person or his property and to the person or property of another[.]" CP 310-11 (emphasis added). Similar to Kjorsvik, it is hard to perceive how Stites could have taken money "from the person and in the presence of [another] . . . against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property" without employing sufficient "force or fear [necessary] to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]" RCW 9A.56.190. Common sense compels the opposite conclusion.

Finally, the rule of liberal construction can only be overcome if the defendant demonstrates that "he or she was nonetheless *actually prejudiced* by the inartful language which caused a lack of notice[.]" Kjorsvik, 117 Wn.2d at 106 (emphasis added). The primary purpose of the

essential element rule is "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Stites' defense did not relate to when or how he used or threatened force, but rather to the identity of the robber; he argued the State charged the wrong person. RP 912, 917 (defense closing). The to-convict jury instructions for first-degree robbery required that the jury find "that force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 352-57. There is no prejudice where the allegedly missing element is unrelated to the defense and was included in the jury instructions. State v. Kosewicz, 174 Wn.2d 683, 696, 278 P.3d 184 (2012).

Applying the rule of liberal construction in favor of validity and reading the charging document as a whole and in a common-sense manner, the information here adequately informed Stites of all the elements of first-degree robbery. Kjorsvik, 117 Wn.2d at 110-11. Thus, even if "force or fear" were an element of the crime, applying the rule of liberal construction, Stites cannot demonstrate any prejudice in the language of the charging document.[3]

[3] Stites' reference to the Washington Prosecuting Attorneys Association legal roundup as evidence of the "deepening division split" offers him little solace. Pet. at 15 n.4. The

3. REVIEW SHOULD BE DENIED BECAUSE THE TRIAL COURT PROPERLY REFUSED STITES' REQUEST FOR A MISSING EVIDENCE INSTRUCTION.

Stites argues that he was denied his right to present a defense because the trial court refused to instruct the jury on missing evidence consisting of the State's failure to preserve video from the Chase Bank on February 24, 2017, and any video surveillance from the HomeStreet Bank on March 11. Pet. at 16, 18.[4] He urges review because, although the Court of Appeals corrected the trial court's misapprehension that the missing witness instruction does not apply to tangible evidence, the court nevertheless erred in concluding that evidence is not "missing" if the State did not obtain it, or it no longer exists. Pet. at 18.

Stites' reliance on State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), for the proposition that this Court approved a missing evidence instruction even though the evidence in question no longer exists, misses the mark. In Campbell, the evidence at issue, an officer's witness interview notes, was inadvertently destroyed; i.e., the evidence at one time was in the possession of law enforcement. Id. at 18-19. Here, by contrast,

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"split," if there is one, is not between divisions of the Court of Appeals, but between Division III and this Court and Division I.

[4] Again, Stites' recitation of the facts is inconsistent with the trial record. Stites claims that the Seattle Police failed to recover video from the HomeStreet Bank "[d]espite knowing Ms. Amdahl claimed she met with the robber on February 24, approximately two weeks before the robbery." Pet. at 18. As discussed above, Amdahl was never certain of the date when Stites met with her at the bank to discuss opening an account. RP 454, 470.

the videos never existed as evidence in the State's control, a key element of the missing evidence instruction. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The Court of Appeals below was correct in concluding that Stites was not entitled to a missing evidence instruction. [Stites], 17 Wn. App. 2d 404.

4. REVIEW SHOULD BE DENIED BECAUSE STITES HAS FAILED TO ESTABLISH THAT HE SUFFERED ANY PREJUDICE BY ANY ALLEGED MISMANAGEMENT.

Finally, Stites argues that the State's late discovery of a video from Ken's Market violated his right to a fair trial. Further, he urges that this Court should accept review of the Court of Appeals' determination that his claim of prejudice was merely speculative. Pet. at 20.[5]

This issue is not one on which review should be granted. As the Court of Appeals noted, the trial court's decision on a motion to dismiss pursuant to CrR 8.3(b) is reviewed for manifest abuse of discretion. [Stites], 17 Wn. App. 2d 401(citing State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003)). By that measure, there is no basis to find that the trial

[5] "When Mr. Stites learned of the video in the middle of trial, the prosecutor disclosed it." Pet. at 20. The suggestion implicit in that statement – that the State's disclosure was compelled by Stites' discovery of the missing video – is inaccurate. In fact, knowledge of the video came to light during the prosecutor's direct examination of Officer Richard Lima, who canvassed the neighborhood following the robbery on March 11. RP 596, 601, 627, 689. The prosecutor, defense counsel and the court learned of the video's existence at the same time. RP 766-67. The prosecutor obtained a copy and immediately provided it to the defense. RP 689.

court incorrectly determined that the Ken's Market video had little evidentiary value or that Stites' claims of prejudice were anything other than speculative. Id. at 402-03. Most notably, all investigative steps that Stites claims he would have taken, but never did, were available to him regardless of whether the Ken's Market video existed. Id. at 403. He chose not to. In any event, Stites turned down the proffered remedies of a recess or a continuance. RP 773-75.

D. CONCLUSION

The State respectfully asks this Court to deny review. The trial court exercised sound discretion in admitting identification evidence that was not impermissibly suggestive and, based upon the totality of the circumstances, was reliable. The information contained all the essential elements of first-degree robbery and provided more than adequate notice of the charges. The trial court properly declined to instruct the jury regarding missing evidence that was never in the control of the State. The trial court exercised sound discretion in denying a motion for a mistrial or dismissal based on a discovery violation where the defendant suffered no actual prejudice. This case does not present an issue of broad public import as required by RAP 13.4(b)(4).

DATED this 26th day of August, 2021.

Respectfully submitted,

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