No. 31077-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

PATRICK K. GIBSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

THE HONORABLE TARI EITZEN

REPLY BRIEF OF APPELLANT

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A. The court erred in making Finding of Fact (FF)14: "the defendant was the perpetrator of the Kid's Fair robbery." CP 337

B. The court erred in making FF 83: "The evidence in this case consists of solid, and as to the clump of fake beard, uncontroverted DNA evidence; the eyewitness testimony from people who did not confer before identification. There is no doubt in the Court's mind that the crime in Coeur D'Alene and the crime in Spokane were committed by the same person." CP 332.

C. The court erred in making Conclusion of Law 1: "Evidence relating to the Kid's Fiar Robbery is admissible under 404(b) for the accepted purposes outlined in 404(b) which include preparation, plan, and identity. In addition, the robbery occurring at Kid's Fir is also admitted under *res gestae* theory as the incident is so connected in time, place, circumstances, and or means employed that evidence

of that robbery is necessary for a complete picture surrounding the robbery/homicide that occurred at Cole's Furniture." CP 338

D. The trial court erred when it allowed in-court identification by witnesses whose out of court identifications were either erroneous or equivocal, and impermissibly suggestive.

E. The trial court abused its discretion when it denied the defense motion to suppress DNA when it was submitted days after the trial began and came as a surprise to the defense.

F. The court erred in making Conclusion of Law 7: "…the Court finds the defendant, Patrick K. Gibson, guilty of the crime of murder in the first degree." CP 334.

II. STATEMENT OF FACTS IN REPLY

Mr. Gibson stands on the facts cited in Appellant's brief and incorporates them by reference. He adds the following clarifications.

White Hair Fibers

In April 2004, Detective Henderson submitted the black ball cap for testing at the Washington State Crime Lab. There was

nothing on the submission request form that indicated there was an envelope with white fibers in the same bag as the ball cap. RP 426-427;972.

On June 13, 2006, Washington Crime Lab Technician James Currie, preparing to test evidence, opened the sealed evidence bag that contained the black ball cap and a small envelope marked "White hair strands from hat". RP 960,962. When the technician opened the envelope, there were no white strands contained inside of it. RP 963.

In a preliminary hearing shortly before trial, the State represented to the trial court there were four items of evidence that came to its attention shortly before trial was to begin, which the State now wanted to test. (RP 64).

> "One of the evidence packaged with the hat, we directed Detective Johnston to open so that we could view the hat. Inside that in a separate package there was a marked exhibit that was not, to our knowledge, and we're still going through this to verify this, but to our knowledge wasn't listed in the property report that indicated two *white* hairs extracted from the hat. So we have that. We have that piece of evidence potentially." (Emphasis added).

The State represented to the court that it had made

arrangements with the State Patrol Crime Lab to test the two white hairs. (RP 88). It also represented that there were two *brown* hairs that were found on Mr. Cole's shirt that were also being sent for DNA testing. (RP 66).

The white hairs removed by officers in 1992 from the black ball cap were never found or tested to determine their source.

Storage Lockers and Access to Disguises

Mr. Gibson testified that he began planning and practicing for bank robberies in August 1992. (RP 1222). Individuals who worked with Mr. Gibson rented and had access to the storage lockers and contents of the lockers. RP 1229-30.

> "When I set up the operation, I was starting out of Oregon. And so I had first two guys I hired to secure cars for me….*they secured a storage facility* for me…
> …Then I found out they were in, and explained I was doing something illegal [bank robberies]. It was a score. Didn't explain what the score was, but that you would be *completely disguised*, if they were interested.
> So as I'm acquiring all this stuff …guns, disguises and everything, I bought about six sets of disguises. …I wasn't sure the storage locker would come back on my name on a credit report because my parole officer runs a credit report once a year. And I later found out they wouldn't, *so I had Tweeker rent this storage unit*." RP 1230.

…And *I put all the disguises in there*. I put hat, sunglasses, gloves, hooded sweatshirt, five or six disguises, a couple of wigs and a couple bags to store the stuff in, police scanner, the headphones, things of that nature in there…" RP 1230. (Emphasis added).

III. ARGUMENT

A. It Was Unfairly Prejudicial To Allow An In-Court Identification Of The Accused When The Out Of Court Identifications Were Either Erroneous Or Equivocal.

Appellant stands on the argument and authorities cited in the opening brief, and incorporates it by reference.

Appellant points out that the description of the perpetrator given by the witnesses never matched a description of Mr. Gibson: Witnesses described the perpetrator as between 5'8" to 5"9", slim, about 160 pounds, between 30 and 35 years old, with blue eyes. The driver's license photo of Mr. Gibson from the same time period is as follows: 6'1", 180 pounds, 40 years old, with brown eyes.

Officers did not follow best practices designed to reduce the likelihood of false identifications when they administered the photo montages. (CP 88; RP 801-807). The main inquiry for determining admissibility of identification is reliability. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Each of the witnesses selected the same person when they made an identification from the photo montage in 1993. At the time, Mrs. Cole said she was 85-90% certain she had identified the perpetrator; Mr. Benner was not positive at that time, but he also picked the same individual, as did Mrs. Benner. That individual who was identified was later cleared as a suspect. (RP 413-418).

In 2011, over eighteen years later, the same witnesses studied another photo montage, which included Mr. Gibson. Mrs. Cole was so unsure about it, the detective did not have her sign off on the picture after she hesitantly picked one. (RP 514). Mrs. Benner was unable to make an identification. (RP 516). Despite Mr. Benner's statement that he had "stared intently at the robber's face", in 1993, he initially chose someone who was later cleared of any involvement, and in 2011, he expressed uncertainty in choosing Mr. Gibson's photo. (RP 517-18).

Notwithstanding the number of years that had passed, the allegedly incorrect initial identification by all the witnesses, and the disparity between the original eyewitness description and Mr. Gibson, the court allowed, admitted, and relied on the in-court identifications. As argued in appellant's opening brief, the initial identification procedure produced apparently flawed results. The

in-court identification was beyond unreliable and by its very nature, suggestive.

B. The Trial Court Abused Its Discretion In Admitting Evidence Pertaining To The Idaho Robbery Under ER 404(b) and *Res Gestae.*

Appellant rests on the arguments and authorities cited in the opening brief, incorporating it by reference and adds the following.

The true test for admissibility under ER 404(b) is whether the other offense is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Tharp,* 96 Wn.2d 591, 596, 637 P.2d 961 (1981). Mr. Gibson maintains that the evidence of the unsolved Idaho incident was unfairly prejudicial, it was neither relevant, nor essential to prove any element of the charged crime.

In its response brief, the State argued as follows:

> "The descriptions of the nearly identical methods of committing both robberies, with eyewitness' identifications of the perpetrator, *plus the discovery of the defendant's DNA at the scene of the charged crimes all linked defendant to the charged crimes in Spokane. (CP 335-340).*
> Brief of Resp. at 6. (Emphasis added).

The record does not support the State's argument. While it is true that all the eyewitnesses described the perpetrator quite similarly, that description did not match Mr. Gibson. Additionally, the forensic evidence recovered from the Idaho scene consisted of a single fingerprint on the metal handcuffs. (RP 302). The recovered fingerprint was entered into the NCIC database. It did not match Mr. Gibson. (RP 302). There was no DNA evidence linking Mr. Gibson to the Idaho robbery.

The court also erred in finding that because the Idaho and Spokane incidents were close in time, location, and character, that admission of the Idaho incident was necessary to complete the picture of the charged crime. (CP 335-340; RP – 404(b) Ruling at 6-7).

As argued in appellant's opening brief, *res gestae* evidence is not evidence of unrelated prior criminal activity. It is itself a part of the crime charged. *State v. Sublett,* 156 Wn.App. 160, 231 P.3d 231 (2010). *Mutchler* held that it was error to admit *res gestae* evidence where the story of the attack on one victim was complete in itself without the second victim's testimony. *State v. Mutchler,* 53 Wn.App. 898, 902, 771 P.2d 1168 (1989). Here, the evidence was not probative of identity, nor relevant to proving any of the essential

elements of the crime charged. The facts of the Idaho incident did not "complete the picture" or give meaningful context to the charged crime. Admission was error.

C. The Trial Court Erred When It Denied The Defense Motion To Suppress DNA Samples That Were Not Submitted for Testing Until After Trial Began.

Appellant's rests on the argument and authorities cited in the opening brief.

D. The Evidence Was Insufficient To Sustain A Conviction For First Degree Murder.

Appellant rests on the argument and authorities cited in the opening brief and includes the following.

In it's response brief, the State has outlined the "evidence" that the court relied on in making its guilty judgment. The court relied on the Mr. Gibson's testimony that he had been planning and practicing for bank robberies during the time he was allegedly robbing Idaho and Spokane stores. (Br of Resp. at 18; CP 328-29). The court's disbelief of Mr. Gibson's statements that the amateurish manner of carrying out the robberies at issue was not something he would do is not substantial evidence. Whether the court was offended or incredulous at Mr. Gibson's testimony about the level of

planning he engaged in for a bank robbery, is not evidence that Mr. Gibson committed a felony murder. (CP 326).

The court also found that it did not believe witnesses who testified as to Mr. Gibson's whereabouts on the date in question. (CP 328-29). While the court as fact finder, determines the credibility of witnesses, disbelief that Mr. Gibson was fishing on the date in question does not amount to guilt for felony murder.

The court also relied on witness identification of the perpetrator. (CP 330). The witness descriptions of the perpetrator never matched Mr. Gibson. The closest in time identification by witnesses, utilizing the photo montage, resulted in a purportedly false identification; the photo montage identification that occurred 20 years later was very equivocal by two witnesses and impossible by another.

The court also relied on the DNA analysis evidence from the fake beard for its conclusion. (CP 331). The small amount of DNA recovered from the 9 cm fake- beard piece yielded only a partial profile. (RP 1051). The lab never tested the remaining portion of the beard. Moreover, while the defense DNA expert agreed that the DNA that was found belonged to the defendant, the State's lab director testified she could not say with 100% certainty that no one

else had worn the fibers that were tested. (RP 1097). In other words, Mr. Gibson's DNA was likely on the beard, but the lab could not rule out that he was the only one who had worn the beard. In its response brief, the State has suggested there was a reasonable inference that only Mr. Gibson had access to his disguises, however, that inference is not supported by the record. (Br. of Resp. at 19).

Finally, the method used to find a DNA profile from the baseball cap was based on an incorrect assumption by the WSPCL lab. Each of the experts testified there were four DNA profiles obtained from the hat. Not only was the fourth contributor never identified, but the very complexity of the mixture did not lend itself to deconvoluting and "subtracting" out known DNA to create four separate profiles. (RP 1065-67; 1145; 1175).

The Due Process Clause of the United States Constitution and the Washington State Constitution require the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Art. 1 §§ 3, 22. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez,* 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Here, as detailed above, the trial court's

findings of fact are not supported by substantial evidence, and those findings do not support the trial court's conclusion of law.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gibson respectfully asks this Court to reverse his conviction for insufficient evidence, and dismiss the charge with prejudice.

Dated this 3rd day of June 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant PATRICK K. GIBSON, Court of Appeals No. 31077--9, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that a true and correct copy of the APPELLANT'S REPLY BRIEF was sent by first class mail, postage prepaid, on June 3, 2013 to Patrick K. Gibson, DOC # 992321, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, and by email per agreement between the parties to: Mark E. Lindsey, Spokane County Prosecutor at: kowens@spokanecounty.org.

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