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

BRIEF OF RESPONDENT

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Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in ER 404(b) factual finding #13 that "defendant was the perpetrator of the Kid's Fair robbery."

2. The trial court erred in making general factual finding #83 regarding that:

> evidence...consists of solid...uncontroverted DNA evidence...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.

3. The trial court erred in ER 404(b) legal conclusion #1 that:

> evidence regarding the Kid's Fair robbery is admissible under ER 404(b) for the accepted purposes outlined in ER 404(b) which include preparation, plant, and identity. In addition, the robbery at Kid's Fair is also admitted under Res Gestae since the incident is so connected in time, place, circumstances, and or other means employed that evidence of that robbery is necessary for a complete picture surrounding the robbery/homicide at Cole's Furniture.

4. The trial court erred when it admitted into evidence the in-court identifications by witnesses where there out-of-court identifications were equivocal and impermissibly suggestive.

5. The trial court abused its discretion in denying defendant's motion to suppress DNA evidence that was submitted after trial began and perpetrated a surprise upon defendant.

6. The trial court erred in making general legal conclusion #7 that "the court finds defendant...guilty of first degree murder."

II.

ISSUES PRESENTED

A. Did the trial court abuse its discretion allowing in-court identification of defendant by witnesses when their out-of-court identifications were erroneous and equivocal?

B. Did the trial court abuse its discretion by admitting evidence of the Idaho Kid's Fair robbery under ER 404(b)?

C. Did the trial court erroneously deny defendant's motion to suppress DNA evidence that was submitted after trial had begun and was a surprise to defendant?

D. Was the evidence produced sufficient to support the first degree murder conviction?

III.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case for the purposes of this appeal.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED THE EYEWITNESS TESTIMONY AND PERMITTED THE IN-COURT IDENTIFICATIONS OF DEFENDANT AS THE PERPETRATOR OF THE CHARGED CRIME.

Defendant moved the trial court to suppress the identifications of defendant as the perpetrator of the robbery and murder charged herein that were made by eyewitnesses via a photographic montage and while testifying in court at trial. Defendant argued that the identifications were impermissibly suggestive and inherently unreliable, yet failed to meet its burden of proof from the record that the trial court committed error. The trial court denied those motions noting that the defendant's arguments addressed the weight such evidence should be given, not its admissibility. RP 1379.

On appeal, defendant assigns error to the trial court factual findings: that defendant was the perpetrator of the Kid's Fair robbery; and

that the evidence consisted of "solid...uncontroverted DNA evidence... eyewitness testimony from people who did not confer before identification;" and that "the crime in Coeur d'Alene and Spokane were committed by the same person." RP 1381-1382; CP 312-334. A trial court's denial of a suppression motion is reviewed to determine whether substantial evidence supports the challenged factual findings and whether those findings support the legal conclusions made therefrom. *State v. Garvin,* 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Here, the trial court provided quite a detailed set of factual findings and legal conclusions based upon the extensive record that was developed during the pre-trial and trial of this case. RP 1369-1401; CP 312-334 and 335-340. The trial court denied the defendant's motion to suppress the in-court identifications by the eyewitnesses based upon the testimonies from their personal memories of the incidents. RP 1378-1379; CP 312-334. Finally, the trial court considered the testimony of the defendant's eyewitness expert, Dr. Devenport, in making its decision. RP 1379.

The trial court denied the defendant's motion to suppress the eyewitness identifications of defendant made by Michele Cole, Steven Benner and Teresa Benner using a photo montage based upon the defendant's failure to prove that the procedures used were impermissibly suggestive. RP 1374-1377. Nevertheless, the trial court made the effort to

analyze the evidence presented in light of the five factors set forth in *Manson v. Braithwaite,* 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). RP 1374-1376. The trial court considered the testimony of the defendant's eyewitness expert, Dr. Devenport, in making its decision. RP 1375-1376. The record clearly establishes that the trial court had a tenable basis for its legal conclusion based upon its analysis which included the *Braithwaite* factors. Finally, it is noteworthy that the evidence offered by Dr. Devenport that individuals "fill in" their memories also applied in evaluating the weight and credibility to be accorded defendant's alibi witnesses and defendant who admitted not having independent memories that the fishing trip occurred on November 7, 1992, absent doing internet research. Accordingly, the trial court factual findings and legal conclusions regarding the eyewitness and in-court identifications of defendant were supported by substantial evidence.

B. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S PARTICIPATION IN THE IDAHO ROBBERY THAT WAS CLOSE IN TIME AND METHOD TO THE CHARGED CRIMES.

On appeal, the defendant challenges the trial court's legal conclusion that evidence of the robbery in Idaho was admissible under ER 404(b) to show, preparation, plan, identity, and under *res gestae*

because the incident was so connected in time, place, circumstances and or the means employed that evidence of that robbery is necessary for a "complete picture" surrounding the robbery or homicide at Cole's Furniture. CP 335-340. The Legal conclusions entered by a trial court following a suppression hearing are reviewed *de novo*, yet carry great significance for the reviewing court. *State v. Collins,* 121 Wn.2d 168, 174, 847 P.2d 919 (1993).

Defendant's contention that evidence of the Idaho incident was unfairly prejudicial because it was neither relevant nor essential to prove the charged crime is not supported by the record. As the trial court properly noted, evidence of preparation, a plan, are all enumerated exceptions to the prohibition to admission set forth in ER 404(b). Here, the relevance, materiality, and probative value of the ER 404(b) evidence is in the descriptions of the methods used by perpetrator in both robberies. CP 335-340. The descriptions of the nearly identical methods of committing both robberies, with eyewitnesses' 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. Alternatively, the State proffered the evidence from the Idaho incident pursuant to *res gestae* due the strikingly similar methods

used to commit the two crimes in a relatively short time and within a short distance of one another.

Defendant argues that even if the same person committed both robberies, the only tangible evidence that tied him to the Idaho incident was the "dubious" eyewitness identifications. The record reflects that the trial court focused on the fact that the perpetrator of both robberies used a disguise. The consistency of the descriptions is in the use of a disguise in conjunction with the other common aspects of the two crimes of methods of commission and identifications. The discovery of the defendant's DNA at the scene of the Spokane incident coupled with the means of commission, and the identifications corroborated that the trial court properly denied the motion to suppress.

Defendant's contention that the trial court abused its discretion in admitting evidence of a common scheme or plan is unsupported by the record. Defendant relies upon the decision in *State v. Foxhaven*, 161 Wn.2d 168, 163 P.3d 786 (2007), for the holding that evidence of a prior act to show identity merely because it is similar is not admissible. However, ER 404(b) only prohibits the admission of evidence of other crimes, wrongs, or acts when offered *to prove the character of a person in order to show action in conformity therewith.* Here, the trial court characterized the intent of the rule as prohibiting the State from offering

evidence of the defendant doing a bad thing before, then arguing that defendant did the bad thing charged this time. RP- Court's Ruling on 404(b) at 4. ER 404(b) further provides that such evidence may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Here, the trial court admitted evidence of the Idaho incident to show a commonality of preparation and plan with the robbery in Spokane because there was such a specific set of common facts. CP 335-340; RP-404(b) Ruling at 5-7.

Alternatively, the trial court admitted the evidence of the Idaho incident pursuant to *res gestae* as an entirely different and distinct basis. Specifically, the evidence of the Idaho incident was admitted because the two incidents were so close in time, location, and character of commission 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.

Here, defendant has not established that the trial court abused its discretion in admitting the evidence of the Idaho incident pursuant to either ER 404(b) or under *res gestae* doctrine. The record provides substantial evidence to support the trial court's factual findings and those findings support the legal conclusion that the evidence was admissible.

C. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE DNA SAMPLES UNDER ER 404(b).

Defendant contends that the trial court erred in denying defendant's motion to suppress the DNA evidence that was submitted for testing after the trial began. At the pre-trial motion hearing on May 17, 2012, the trial court expressed serious concerns about proceeding with the trial and discovering later that an item of evidence that was important should have been tested. RP 67. The trial court advised:

> we're going to stay on track...find out if there is anything ...that should have been tested and the results, or, if not, could it be tested before trial starts. If not, we're going to have to start talking about continuing the trial long enough to get materials tested...don't want anybody to feel rushed... we're going to do this right and take the time...find out what's going on with the DNA...

RP 67-72.

At the pre-trial motion hearing on May 29, 2012, defense counsel moved to exclude DNA evidence from the clump of hair-like fibers found at the murder scene because no witness could testify that those fibers came from the fake beard worn by the suspect. RP 83-84. The State responded that a witness to the murder would testify that during the struggle between the murder victim and suspect the hat the suspect was wearing was found next to a clump of hair-like fibers attached to a bit of padding supporting the reasonable inference that the hair-like fibers came from the fake beard

since those fibers were not on the floor prior to the robbery. RP 85-86, 391-394, 400. At that point the trial court denied the defendant's motion to suppress the DNA evidence from the hair-like fibers found at the scene of the murder. RP 87-88. Thereafter, the State advised the trial court that there were scheduling issues regarding potentially new exhibits that had been discovered and needed DNA testing. RP 88. The State further advised that the Crime Lab had advised that it could have the DNA test results completed by the week of June 18, 2012, and that the parties had agreed to seek a recess in the trial. RP 88-89. The trial court advised:

> Court: Here are the options: pull the plug right now, pull the plug if we get to that point and it's not ready, or exclude the evidence...you all have to start talking about what you want to do... knowing that I may not give you a lengthy recess in the middle of trial to get those results, are there any motions? ...for the record...I've counted...that would be the 12th day of trial...so you're telling me on the first day of trial that on the 12th day of trial you may not have evidence and want a lengthy continuance. It doesn't work that way...either we stop this right now and reset it, or you know that we're going to go through this trial and if you don't get it in time, you're not going to get it in...I'm going to leave the bench and let you all talk about what you want to do...
> Prosecutor: We were able to call...Crime Lab and speak with Lorraine Heath...she indicated could have testing done and trial-ready by 6/11, so...the parties' preference & speaking with defense...is to commence trial, put on as much testimony as we can, holding off on the DNA testimony until the 11th. Defense already had an expert scheduled for the Thursday prior to the 11th...

> Court: Ms. Blumhorst…agreement?
> Defense Counsel Blumhorst: Yes…we had scheduled our eyewitness identification expert for next Thursday…

RP 89-91.

On June 1, 2012, after the testimony of several witnesses, defense counsel reiterated its motion to suppress DNA evidence. Counsel advised that after the trial had recessed for the day, the State informed them that the DNA samples had been collected from the three people, who had touched the hat recovered from the crime scene, had been submitted to the Lab for comparison or elimination. RP 560. Counsel admitted knowing that the hat had been handled by virtue of having seen such on the video from the TV show, but that they were surprised that DNA had been collected from those individuals for testing. RP 562-564. Nevertheless, defense counsel argued that they were surprised by the new information and were not sure how to proceed, so they asked the trial court to suppress those DNA items. RP 564-565. Counsel argued that they had prepared their defense based upon the statistical probability that there was a 1 in 2 chance that defendant was a contributor to the DNA mixture on the hat and now they were three days into trial with the possibility that the comparison results would change so much for the defense. RP 571-573. Finally, counsel opined to one way that the additional DNA evidence

would hurt their defense is that they would not have sufficient time to allow their DNA expert to make the same comparison. RP 576.

At that point, the trial court advised:

> Okay. So that's the answer I was wanting to know. So, what's the remedy?...if that's the harm...I think that's legitimate; we didn't have time to prepare...***you remember when we started this case, I was very concerned not getting DNA results on some things until the middle of trial...but everybody insisted they wanted to go ahead***... we have 3 possible remedies here...because I do agree... this could...be new evidence that could potentially affect the way you prepare your case and...defense...you need time to figure out how you're going to handle it and it may affect your strategy...we can't really reel it back in if it changes the defense... the remedy...then, has to be either suppressing the evidence or mistrial, because we can't back up & let them start preparing for trial again based on something that might have changed how they would defend their case...what's the Court of Appeals going to say if they get this record where we let in something that...if this gentleman is convicted, they're going to argue we wouldn't have done our defense this way if we had known this was going to happen...so we have to figure out a way to fix this to make this a fair trial...if that means a mistrial, I will do that...if it means the defense wants a lengthy recess, I will do that...I want you to say on the record...if you want a mistrial, back up and regroup, just tell me.

RP 576-579, 588. At that point, both defense counsel responded that they did not want a mistrial. RP 588. Accordingly, the trial proceeded on June 4, 2012, with testimony.

On June 7, 2012, the State addressed the trial court regarding the results of the Lab comparisons of the DNA of the three people to the DNA

mixture found on the hat. Defense Counsel objected that proffering those results to the trial court would violate the ruling on the admissibility of those items. RP 885. Upon further inquiry, the trial court discovered that it had misinterpreted the evidence that formed the basis for its prior ruling that excluded the DNA comparison results. RP 891. The evidence established that Detective Henderson had extracted the hair-like fibers from the hat when it was initially placed in the property facility in 1992 (RP 664-665), and that the hat had not been touched by the other two people from the TV show until 1993. RP 892-89. The trial court realized the mistake it had made in its ruling excluding the DNA comparison results. RP 893. Now, the known DNA profiles of the three people who had touched the hat after it had been in the property room could be excluded from the probability statistical calculations regarding the defendant. RP 893. The trial court articulated the mistaken basis for its prior ruling and concluded the DNA comparison evidence was admissible. RP 895, 906. Defense counsel argued that the DNA comparisons and new probability results was new evidence that rendered this a "trial by surprise." RP 895-896. The trial court reminded counsel that the court had expressed extreme concern that the defense was willing to start a trial without all of the DNA evidence. RP 896. Counsel conceded that the defense had wanted to start the trial without knowing the DNA results

from the other items and had taken a calculated risk in forming its defense strategies. RP 896-899. Finally, counsel advised the trial court that the defense would need a few weeks to consult with their DNA expert. RP 904-905.

The trial court then inquired whether declaring a mistrial would be appropriate. RP 905. Defense counsel immediately responded that he did not think that was required. RP 905. The trial court then advised:

> I feel on a personal level badly...that was a wrong ruling...so I think I have to let...the DNA results on the hat in under either rebuttal or just because I flat out made a wrong ruling. Then the issue is how much of a disadvantage did I put the defense...and what's the remedy for that...a continuance... or does the defense want a mistrial and we start over with a jury and get rid of all of these issues?...I'm reversing my ruling on the admissibility of the hat evidence of the DNA...then I leave it in the hands of the defense as to what your request is going to be for a remedy...tell me how you want to do it. I'm not saying I will do it that way, but I want to know from you what you think is going to make this so that my reversal on that ruling doesn't create an unfair trial for you...

RP 905-906.

On June 11, 2012, the trial court responded to the defense motion that it reconsider the ruling denying the exclusion of the DNA comparison results. The trial court advised:

> ...this isn't about retesting the hat...the DNA profile on the hat is the DNA...from that hat, the analysis is what it is. That was done from samples taken from the hat after the hat had been handled by people that probably shouldn't have

been handled the hat...so had a hat...had it sent out to America's Most Wanted to be used in a reenactment... then...samples were taken...so the contamination was already there...so this isn't about retesting the hat. It's for the 1st time getting the DNA profiles from the other people who touched the hat before it was tested. I did not understand that sequence the first day I ruled on this issue...I made the ruling thinking that the sequence was different than it was...Judges have to be able to say they made a mistake and reverse themselves... on evidentiary rulings...I made an evidentiary ruling based on my misunderstanding of the sequence of events...then...reversed it...what we're talking about is getting the 3 profiles from the 3 people that apparently touched the hat before it was tested to compare those to profiles to the existing DNA results on the hat. That's all it is...(1) I've gone through all of my notes...some of the transcript, & in relying on my memory...there are 2 things that are absolutely clear in my mind...the 2 baseline things that you always look at in analyzing whether there is a fair trial – (1) has there been prosecutorial misconduct? No...there has been no prosecutorial misconduct – (2) has there been ineffective assistance of counsel? – Absolutely not...these defense counsel are on the top end prepared and diligent for criminal cases that I've tried...2 defense counsel instead of one...there is absolutely no scintilla of any indication that this defense team didn't think this whole thing through and wasn't prepared for whatever happened. I'm absolutely comfortable with the defense in this case...(3) when a Judge reverses a prior ruling, the inquiry is not...from an appellate standpoint...I really didn't understand the sequence of events. I just got it wrong...I reread the transcript...it was me...I was hearing you & I think when I reread it, I can see what Mr. Hazel was trying to tell me...I didn't get it at the time...even setting that aside, a Judge has a right to reverse an evidentiary ruling...the issue comes in later...as to whether ruling was right...I'm not bound by those prior evidentiary rulings except to the extent I need to look and see how it affects everybody being able to present their case...I am not reversing my reversal... the new profiles on the DNA of the three individuals, HENDERSON, WALSH & St.JOHN...are in evidence...I'm going to be

> really curious to see what the experts say...defense counsel knew and realized the hat was being used in the TV show or had been used in the TV show before State did...State didn't think about it when they watched the video, but Ms. Blumhorst did...any ramifications of that hat being used as a prop for the TV show...goes to the weight via the testimony of the people who handled the hat & the DNA experts...so we're going to have as long a recess within reason as the defense wants...because that's fair...want to give you the chance...for a reasonable period so you can regroup & decide what you want to do in terms of recall witnesses...you disclose them right away & give the State a chance to interview them. So I don't see how there could possibly be any prejudice if we back it up and let you recess, regroup, recall witnesses and all new witnesses...that's how we're going to deal with it. That's my ruling...
> Defense Counsel: ...would ask for the 9th...July...may call other witnesses...
> Court: ...recess to July 9th...

RP 919-929.

The standard of review for a trial court's evidentiary ruling is abuse of discretion. *State v. Brown,* 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, *i.e.*, if the court relies on unsupported facts or takes a view no reasonable person would take; the standard is violated when the trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Hudson,* 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). As noted, the defendant's claimed error is not supported by the trial record.

D. SUFFICIENT EVIDENCE WAS PRESENTED FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE CONCLUDED THAT THE DEFENDANT COMMITTED MURDER IN THE FIRST DEGREE.

The defendant claims there was insufficient evidence to support the jury verdict finding him guilty of murder in the first degree. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in the State's favor and are interpreted most strongly against the defendant. *State v. Partin,* 88 Wn.2d 899, 906-07, 567 P.2d 1136(1977).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 83 P.3d 970 (2004). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Here, as noted by the trial court, to convict the defendant of felony murder in the first degree, the State must show that defendant committed or attempted to commit robbery in the first degree, "and in the course of or in furtherance of such crime or immediate flight therefrom, he…or another participant, cause[d] the death of a person other than one of the participants." RCW 9A.32.030(1)(c). Defendant contends that the trial court's guilty verdict was based on only a single piece of remotely reliable evidence, the DNA of defendant discovered on the fibers from the fake beard torn from his face during the struggle at Cole's Furniture Store. Defendant argues that the State Crime Lab could not say with 100% certainty that no one else had worn the fake beard.

The record reflects that the trial court had much more evidence upon which to base its verdict than merely the DNA of the defendant on the beard fibers. The trial court's extensive factual findings reflect that the verdict was based upon the broad spectrum of evidence offered by the State, including the defendant's own testimony and his recorded telephone conversations with his brother and sister-in-law to set up his claimed alibi. The trial court found the defendant's contention that the robberies at issue herein were beneath defendant because of the level of planning and sophistication demonstrated in his bank robberies less than persuasive. The record reflects that defendant's own testimony had him planning bank

robberies in August 1992; aborting his first attempt at bank robbery in October 1992; and not successfully completing his first bank robbery until December 1992. The DNA of the defendant was extracted from the fake beard torn off his face during the Cole's Furniture store robbery on November 7, 1992, almost a month prior to his first successful bank robbery. RP 1222. Defendant offered great detail of his successful bank robbery career; however, defendant failed to place the fake beard used on November 7, 1992, on anyone else's face prior to that date. "When I set up the operation, I was starting out of Oregon...so the first two guys I hired to secure cars." RP 1229. "A lot of times I was a lone robber...on five occasions I had other people in the bank with me..." RP 1222. The defendant testified that his "recons" for bank robberies and his eventual robberies were concentrated in Oregon and California. RP 1228, 1244-1245. The reasonable inference from defendant's own testimony is that he trusted no one with his plans, disguises, tools of his trade so no one that the defendant hired to assist with the bank robberies even had access to the fake beard prior to November 7, 1992.

Additionally, the trial court had the direct and circumstantial evidence developed during the investigation. The witness descriptions and identifications of the defendant as well as the defendant's statement that he did not remember whether the fishing trip that was the basis for his

alibi actually occurred on November 7, 1992. Ex. 140B. The record reflects that sufficient evidence was produced to support the trial court's verdict.

V.

CONCLUSION

For the reasons stated, the verdict rendered herein by the trial court should be affirmed.

Respectfully submitted this 3rd day of May, 2013.

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