NO. 46572-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADAM CHARLES BOUCK,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

ASSIGNMENT OF ERROR

Assignment of Error

The trial court denied the defendant the right to present a defense when it granted a state's motion to preclude him from arguing that the state's failure to have the victim of the robbery identify the defendant in the courtroom as the perpetrator constituted reasonable doubt requiring acquittal.

Issues Pertaining to Assignment of Error

In a robbery trial in which the defense concedes the fact of the crime but argues that the defendant was not the perpetrator, and in which the state fails at trial to ask the victim to identify the defendant in the courtroom, does a trial court ruling precluding the defense from arguing that this failure constituted reasonable doubt requiring acquittal violate that defendant's right to present a defense under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

At about 11:30 pm on November 20, 2012, 63-year-old Scott Tagert was working as the sole cashier at a Longview Safeway when he saw a younger white male carrying a basket walk out of the produce department and quickly exit the door without paying for the items in the basket. RP 67-69[1]. Upon seeing this Mr. Tagert left his register and quickly followed the shoplifter out of the store asking if he was going to come back in and pay for the items in the basket. RP 69-71. The shoplifter did not reply and walked across the sidewalk and out into the parking lot. *Id.* As he did Mr. Tagert caught up, grabbed the basket and tried to take possession of it. *Id.* At this point the two of them began a short "tug-of-war" with the basket during which a number of items fell to the ground. *Id.* The shoplifter then said "Do you want some of this," and then took a swing at Mr. Tagert, who leaned away from the blow. RP 72-73 As a result, the shoplifters fist only grazed Mr. Tagert's glasses. *Id.*

At this point Mr. Tagert let go of the basket and the shoplifter then ran to the open back door of a Dodge van, threw the basket in, jumped in after the

---

[1]The record on appeal includes two volumes of continuously numbered verbatim reports of the jury trial held on May 20, 2014, and May 21, 2014, and the sentencing hearing held on July 10, 2014. These verbatim reports are referred to herein as "RP [page #]."

basket, made his way to the driver's seat and drove off. RP 75. A person by the name of Matt Gray saw this happen, called 911, and unsuccessfully tried to follow the van down the street. RP 100-105. Neither Mr. Tagert or Mr. Gray got the van's license number. RP 75, 79, 104-105. After the van drove away, Mr. Tagert and others gathered up the items that had spilled out of the basket and took them into the store. RP 70-71, 76-78, 100-103. A few minutes later the police arrived and took Mr. Tagert's statement, which included his general description of the shoplifter as a white male, scruffy looking and wearing blue jeans, jacket, tennis shoes and a dark hat. RP 72-73, 122, 132-133. Mr. Tagert told the police that the shoplifter was slightly shorter and lighter than Mr. Tagert's height and weight of 5'10½" and 185 pounds. *Id.* Mr. Gray also told the police that the shoplifter was a little lighter than Mr. Gray's 215 pounds. RP 108-109.

While talking to the police Mr. Tagert gave them a hat that either he or another person picked up in the parking lot. RP 78, 123-124. According to Mr. Tagert this was the hat that had apparently come off the shoplifter's head during the "tug-of-war" over the shopping basket. *Id.* Later analysis of the hat showed that it had DNA on it from two different persons at a ratio of 75% from one person and 25% from a second person. RP 210-219. The DNA in the larger percentage matched a sample later obtained from the defendant. *Id.* In addition, after identifying the defendant as a suspect, the

officer who responded to the store put together a photo montage. RP 132-137. When he looked at it Mr. Tagert was unable to identify anyone as the shoplifter, although he did point to the picture of the defendant and say that he looked "like" the shoplifter. RP 93.

Procedural History

By information filed February 13, 2014, the state charged the defendant with first degree robbery and second degree robbery in the alternative. CP 1-2. On the day of trial the state amended this information to only charge second degree robbery. CP 13-14. The case later came on for trial before a jury with the state calling six witnesses, including Mr Tagert, Mr. Gray, the officer who responded to the store and the Washington State Patrol Scientist who did the DNA testing. RP 67, 99, 113, 184, 187, 196. They testified to the facts contained in the prior factual history. *See* Factual History, *supra*. At no point during this testimony did the state ask Mr. Tagert if he could identify the defendant in the courtroom as the shoplifter from the store. RP 67-99, 99-113.

During the presentation of evidence in this case the court addressed a *pro se* motion to dismiss filed by the defendant. CP 15-23. In that motion the defendant argued that on December 18, 2013, he was in the Cowlitz County jail on another matter when Longview Officer Durbin arrested him on the charge in this case. *Id*. However, according to the defendant, the trial

court did not made a determination of probable cause within 48 hours as is required under case law and the Washington State Criminal Rules. *Id.* As a result, the defendant argued that he was entitled to "dismissal with prejudice!" CP 17. The trial court denied this motion, noting that at all relevant times the defendant was held in the jail on his prior conviction, not on the current charges. RP 148-151.

After the reception of evidence in this case the state moved that the trial court preclude the defense from presenting any argument that the state's failure to ask Mr. Tagert if he could identify the defendant in the courtroom as the person with whom he had the "tug-of-war" over the shopping basket constituted reasonable doubt that the defendant was the perpetrator of the offense. RP 255-256. The court granted this motion over the defendant's objection. *Id.* Following instruction by the court and counsels' closing arguments, the jury retired for deliberation and later returned a verdict of guilty. RP 258-268, 268-303, 306-309.

At sentencing in this case the defendant argued that since the state's allegation was that he had committed the current offense prior to committing the offense for which he was currently serving a prison term, that subsequent conviction should not count in his offender score. RP 329-330. The defendant's argument was as follows:

DEFENDANT: Your Honor, I – I respectfully request, due to the

> circumstances and situation that is beyond my control concerning the Superior Court of Cowlitz County, State of Washington, I, Adam Charles Bouck, would like to ask the Court today to grant me a new hearing concerning my prior conviction on Cause Number 13-1-00333-1 whereas the po – point configuration was calculated incorrectly and put my case at a disadvantage at sentencing, and I would like to be resentenced with the correct offender score. And also I want the Court to provide me with a copy of my J&S with correct offender score, making this part of the record. Respectfully requested. Dated July 15th, 2014. Thank you.

RP 329-330.

The trial court ignored the defendant's argument and included his prior conviction (committed after the current offense) in his offender score. RP 330. The court then sentenced him within that standard range and ran the sentence consecutive to his prior sentence (on the offense committed after the current offense). CP 80-91. The defendant thereafter filed timely notice of appeal. CP 94-107.

ARGUMENT

THE TRIAL COURT DENIED THE DEFENDANT THE RIGHT TO PRESENT A DEFENSE WHEN IT GRANTED A STATE'S MOTION TO PRECLUDE HIM FROM ARGUING THAT THE STATE'S FAILURE TO HAVE THE VICTIM OF THE ROBBERY IDENTIFY THE DEFENDANT IN THE COURTROOM AS THE PERPETRATOR CONSTITUTED REASONABLE DOUBT REQUIRING ACQUITTAL.

As part of the due process right to a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, a defendant charged with a crime has the right to present and argue from relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This right derives from the principal that in criminal prosecutions due process requires that the State prove every element of the crime charged beyond a reasonable doubt. *In re Winship*, *supra*; *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). Thus, when a trial court limits the defendant's argument on the effect of the evidence or lack of evidence, that trial court impermissibly reduces the state's burden of proof, thereby violating the defendant's right to due process. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir.1999) (concluding that trial court's action in limiting scope of argument as to element of crime "relieved the prosecution of its burden to prove its case beyond a reasonable doubt").

A trial court's impingement upon a defendant's right to effectively

argue from the evidence or lack of evidence also violates that defendant's right to effective assistance of counsel under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22. *Herring v. New York*, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *State v. Frost*, 160 Wn.2d 765, 768, 161 P.3d 361 (2007). As with other constitutional rights, a defendant denied the right to present or argue from relevant, exculpatory evidence is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not "harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

For example, in *State v. Devries*, 109 Wn.App. 322, 34 P.3d 927 (2003), *rev'd on other grounds*, 149 Wn.2d 842, 73 P.3d 748 (2007), a juvenile defendant convicted of delivery of controlled substances appealed, arguing that (1) the trial court erred when it precluded closing argument, and (2) substantial evidence did not support the conviction. Following the presentation of evidence the trial court informed counsel that the court did not need closing arguments. When defense counsel objected, the court made the

following statement:

> Because, Mr. McCool, I think I am capable of understanding the evidence. I didn't think I needed the assistance. I understand your theories. I don't think anyone has a constitutional procedural right to closing argument. Now maybe you do in front of a jury, and I always let somebody have it in front of a jury. But I didn't think I needed it. And I still don't think I needed it. So you are at the same disadvantage that the State is.

State v. DeVries, 109 Wn.App. at 323.

On review the Court of Appeals reversed, noting that "the trial judge was wrong in asserting Ms. DeVries had no constitutional right to present closing argument. His denial of that right violated her Sixth Amendment guarantee of assistance of counsel, and the conviction must be reversed." *State v. DeVries*, 109 Wn.App. at 324.

While the decision in *DeVries* illustrates the principal that the complete denial of closing argument violates the Sixth Amendment right to the assistance of counsel and the Fourteenth Amendment right to due process, the decision in *State v. Frost*, *supra*, illustrates the principal that the same error occurs when the trial court precludes the defense from presenting a specific argument available under the law and facts.

In *State v. Frost, supra*, the state charged the defendant and two others with a number of burglary and robbery counts arising from five separate incidents in which the defendant was principally alleged to be the driver of the vehicle involved. The case later went to trial and during a discussion on

jury instructions, the defense indicated that it would argue that (1) the defendant was legally excused from criminal liability because he acted under duress, and (2) that in any event the state had failed to present sufficient evidence to prove that he acted as an accomplice. The state objected on the basis that a duress defense required an initial admission of criminal liability and was thus inconsistent with a claim that the state had failed to prove the elements of the crime.

The trial court agreed with the state's objection and ruled that if the defense intended to argue that the state failed to present sufficient evidence to prove that the defendant acted as an accomplice then the court would refuse to instruct the jury on duress. The defendant opted for the duress defense and refrained from making its second argument. Following conviction the defendant appealed, arguing that the trial court's ruling violated both his right to due process and his right to effective assistance of counsel. The court of Appeals affirmed and the defendant obtained review before the Washington Supreme Court.

In its decision the Supreme court first noted that in criminal prosecutions defendants were entitled to argue inconsistent defenses if they are in any way supported by the facts. *See State v. Fernandez–Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). The court then held that since the facts in the case before it did support the presentation of both defenses, the trial court

erred when it precluded the defendant's argument that the state had failed to prove accomplice liability beyond a reasonable doubt. The court held:

> Such constitutional infringements occurred in the present case when the trial court precluded petitioner Joshua Frost's counsel from arguing both that the State failed to prove accomplice liability as to Frost's robbery offenses and that Frost participated in these offenses under duress. Therefore, the trial court abused its discretion.

State v. Frost, 160 Wn. 2d at 768.

Similarly, in the case at bar, the trial court erred when it precluded the defense from arguing that the state's failure to ask Scott Tagert to identify the defendant in the court created reasonable doubt. Thus, the trial court violated the defendant's right to due process and his right to effective assistance of counsel. This error in the case at bar was far from harmless beyond a reasonable doubt, particularly because the defense did not dispute the fact of the crime as alleged by the state's witnesses. Rather, the defense simply argued that the state had failed to prove beyond a reasonable doubt that the defendant was the perpetrator of the offense.

It is true that the state had DNA evidence that linked the defendant to the hat. However that evidence also demonstrated the presence of another person's DNA. The only other evidence on identity was presented through a surveillance video and the testimony of two witnesses. This evidence can fairly be summed up as indicating that the defendant at trial "looked similar to" the person in the video and the person the witnesses saw. Thus, the

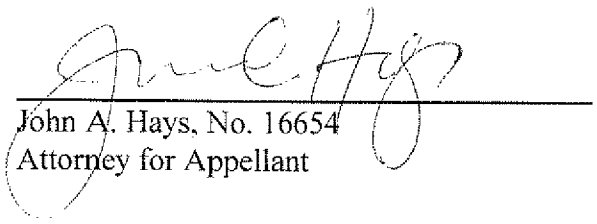
court's error in denying the defendant his constitutional rights to due process and effective assistance of counsel was not harmless beyond a reasonable doubt. As a result this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

For the reasons set out in this brief this court should reverse the defendant's convictions and remand for a new trial.

DATED this 30th day of January, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **Adam Charles Bouck,** **Appellant.**	**NO. 46572-8-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this day, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Ryan Jurvakainen
   Cowlitz County Prosecuting Attorney
   312 SW First Avenue
   Kelso, WA 98626
   sasserm@co.cowlitz.wa.us

2. Adam Charles Bouck, No.366483
   Stafford Creek Corrections Center
   191 Constantine Way
   Aberdeen, WA 98520

Dated this 30th day of January, 2015, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

January 30, 2015 - 2:51 PM

Transmittal Letter

Document Uploaded: 5-465728-Appellant's Brief.pdf

Case Name: State v. Adam Bouck

Court of Appeals Case Number: 46572-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us