

NO. 46611-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES STERLING TURNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00470-1

BRIEF OF RESPONDENT

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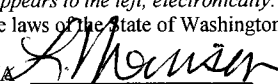
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DATED May 26, 2015, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it denied the defendant's request to present other suspect evidence to the jury where the only witness said this other suspect was not the man who robbed her but could have been his brother, the police had ruled the other suspect out, and the defendant was still able to cross-examine the eyewitness as to the physical similarity this man had to the robber?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Sterling Turner was charged by information filed in Kitsap County Superior Court with robbery in the first degree. CP 1-2. Prior to trial, Turner was arraigned on an amended information filed to reflect the correct incident date of the crime but otherwise leaving the crime charged as robbery in the first degree. CP 31-33, RP 3-4. Following trial by jury, Mr. Turner was convicted of the single count of robbery in the first degree. RP 354-57, CP 88. He was sentenced to 66 months in prison. CP 97-107, 108. This appeal follows.

B. FACTS

On October 11, 2013, gas station convenience store cashier Latishia Larson prepared to close up the Central Valley Texaco in Silverdale just prior to 11 p.m. RP 71-76. A man walked in as she was in

the process of closing and went back to the store's beer section. RP 76. He was wearing gloves, blue jeans, a black hoodie and a baseball cap. RP 79. The man grabbed a beer and then came up to the register and asked Ms. Larson for two packs of cigarettes. RP 76. While Ms. Larson reached for the cigarettes, the man pulled out a gun and told her to give him the money from her till. RP 76. She replied, "Are you fricking serious?" RP 76. The man responded, "Times are hard." RP 76. Ms. Larson gave him \$240 from the till. RP 77. He grabbed the cigarettes off the counter, took the money, and walked out of the store. RP 78. Ms. Larson called 911 and reported the robbery. RP 79.

Kitsap County sheriff's deputies responded within minutes. RP 79, 127-28, 157. K-9 handler Deputy Daniel Twomey immediately began tracking the robbery suspect with his canine partner, Heiko. RP 127-29. The trail of the robbery suspect ended a few hundred yards up the road where Heiko lost the scent of the suspect because he had likely left the scene in a vehicle. RP 130. Deputy Jason Hedstrom took down Ms. Larson's description of the robber. RP 160. Ms. Larson described the gun the man carried as a nine-millimeter pistol. RP 77. Ms. Larson recalled the robber as being short in stature. RP 79-80, 132. The most distinctive thing Ms. Larson noticed about the robber was his teeth. RP 81. She described his teeth as having a gap in the middle upper row of teeth and as

his lower teeth being “jig-jagged around a little bit.” RP 81.

After taking a statement from Latishia Larson, Deputy Hedstrom reviewed the video surveillance of the store during the robbery. RP 159, 161. Deputy Hedstrom viewed the suspect approaching the store counter, pulling a weapon out, and communicating with the clerk. RP 162. The video surveillance revealed that the robber, prior to entering the store, smoked a cigarette just outside the store. RP 162. Deputy Hedstrom observed the suspect on video smoking and discarding the cigarette just prior to entering the store. RP 162. Deputy Hedstrom walked outside the store and located a cigarette on the sidewalk that matched the location where had observed the suspect on video discard the cigarette. RP 165. This cigarette was an all white cigarette with a picture of a camel on it and blue and green stripes. RP 165. It was located approximately one foot from a newspaper vending machine. RP 171. Deputy Hedstrom also noticed a tan cigarette at the base of this newspaper vending machine. RP 167, 173. These were the only cigarettes observed by the deputy. RP 169. He recovered both of the cigarettes as evidence and later sent them off to the state crime lab for DNA testing. RP 175, 180-81, 185-86.

After collecting the cigarette evidence, Deputy Hedstrom put together a photo montage to show to Latishia Larson. Based on information that a particular person and a vehicle associated with him had

been seen in the area sometime prior to the robbery, Deputy Hedstrom included that person's photograph in the photo montage. RP 132, 187. Deputy Hedstrom showed the photo montage to Latishia Larson. RP 107, 187. She told him that the guy that robbed her looked like the guy in the bottom right-hand corner but that the guy in the picture was not him. RP 107. She checked the box on the montage form that stated: "I cannot identify any of the persons in the photographs." RP 107, 189-90. She then handwrote the following: "The guy looks like the bottom right." RP 108. Ms. Larson was consistent that she did not believe the person pictured on the bottom right was the robbery suspect, but she believed that the person did look like the robbery suspect. RP 108, 189.

On October 14, 2013, Detective Tim Keeler of the Kitsap County Sheriff's Office took over the lead role in investigating the Central Valley Texaco robbery. RP 192, 209. Based on Ms. Larson's response that the person on the bottom-right of Deputy Hedstrom's photomontage looked like the robbery suspect but was not the robbery suspect, Detective Keeler decided to investigate that person a bit further. RP 211. He spoke to the individual and took pictures of his mouth and face to show to Latishia Larson. RP 211. On October 15th, Detective Keeler met with Ms. Larson and showed her the pictures. RP 212. She told him the man's teeth did not look like the robber's teeth. RP 213. She recognized the man's face

as that of a regular customer at the store. RP 109-110, 213. Ms. Larson said that he was not the person that committed the robbery. RP 109-110, 213. Based on Ms. Larson's statement, Detective Keeler no longer considered the man in the bottom-right hand of Deputy Hedstrom's photo montage to be a suspect or person of interest in the Central Valley Texaco robbery. RP 213.

Jennifer Venditto, a DNA forensic scientist with the Washington State Patrol Crime Laboratory, was assigned the task of identifying whether any DNA could be obtained from the cigarette evidence submitted by Deputy Hedstrom. RP 253-270. Ms. Venditto was able to extract DNA from both cigarettes. RP 269-71. Prior to uploading the extracted DNA samples into the FBI's CODIS database, Ms. Venditto contacted Deputy Hedstrom and Detective Keeler to verify that both samples were associated with a suspected criminal. RP 271-72. State permission to use the FBI's CODIS database is conditioned on only uploading samples that are believed to come from crime suspects rather than victims or random people off the street. RP 271-272, 274-75. After speaking with Deputy Hedstrom and Detective Keeler, Ms. Venditto only uploaded the DNA extracted from the white cigarette into the CODIS database. RP 273-274. She chose to upload only the DNA from the white cigarette based on conversations with the investigating officers and the

fact that the white one appeared to have been flattened while the tan cigarette was not. RP 232, 274.

On March 4, 2014, Detective Tim Keeler received a report from Jennifer Venditto indicating that she had determined that the DNA extracted from the flattened white cigarette matched the DNA in the CODIS database of a James Clark, date of birth 11/28/1980. RP 214, 275-278. James Clark was an alias for the defendant, James Turner. RP 214. Detective Keeler interviewed the defendant, James Turner, on March 12th concerning the Central Valley Texaco robbery that occurred in October. RP 215. On March 28th, Detective Keeler obtained a saliva sample from Mr. Turner in order to have Ms. Venditto conduct a follow-up DNA comparison of Turner's DNA with the suspect's DNA on the discarded cigarette. RP 215-216, 279-281.

With James Turner now identified as a suspect in the Central Valley Texaco robbery, Detective Keeler reviewed local police reports that mentioned Turner's name. RP 218. He located several from an incident involving Turner in November 2013 that piqued the detective's interest. RP 218-219, RP 143-45, 150, 205-06. On November 5, 2013, during a criminal trespass investigation, Deputy Brittany Gray located a backpack belonging to James Turner that had an apparent firearm inside. RP 144. Further investigation revealed that the firearm was actually a

pellet gun replica of a Smith & Wesson MMP 40, semi-automatic pistol. RP 143-145, 152-53. The backpack contained James Turner's identification inside. RP 143-44. When interviewed by a detective a couple of days later, Turner admitted that he was the owner of the replica BB gun as well as the backpack that was found in the home as described by Deputy Gray during her trespass investigation. RP 150, 143-45.

In June 2014, Detective Keeler took photographs of James Turner's teeth and face to show to Latishia Larson. RP 220. Ms. Larson agreed that Turner's teeth looked like the robber's teeth except she did not recall the missing lower tooth that Turner had. RP 110-111, 223. Ms. Larson said that Turner's face looked like the robber's face but at the time of the robbery he did not have facial hair. RP 223-24. In July, Detective Keeler reviewed the cigarette and video evidence in the Central Valley Texaco robbery case again and confirmed that the white flattened cigarette was the one discarded by the robbery suspect. RP 232-33. Jennifer Venditto's test of James Turner's saliva DNA against the DNA from the flattened white cigarette came back as a match. RP 281. She estimated the probability of selecting an unrelated individual at random from the U.S. population with a matching profile as one in 41 quadrillion. RP 282.

Prior to Turner's trial, the State moved in limine to prevent the defense from introducing evidence of another suspect. CP 36, RP 5-14.

Specifically the defense wanted to bring up Antonio Diaz as the other suspect, the man whose photograph was in the lower right-hand corner of Deputy Hedstrom's photo montage. RP 5-8, 12-13, 235. After hearing the parties' arguments on the issue, the trial court recessed to review the relevant case law. RP 32-33. The following day, the trial court granted the State's motion in limine:

There is some evidence that, perhaps at least at the outset, there was some evidence that perhaps Mr. Diaz was involved in this. There was the issue of his possible connection to a car that was seen in and around the area at the time of the robbery. There was also an initial photo montage to the clerk in which she indicated that the person who committed the robbery looked most like Mr. Diaz, but that ultimately she indicated that it was not Mr. Diaz.

And so in looking at *Mak*, I think that the language is pretty strong in terms of what has to be established in order for the Court to admit other suspect evidence, specifically, that such a train of facts -- those are the words they use -- such a train of facts or circumstances as tend to clearly point out someone besides the accused as the guilty party. And I'm not finding that there is clear evidence to point out that someone other than Mr. Turner as the accused could be the guilty party, I guess, in using the language of *Mak*, to the offers of proof that were presented yesterday. So while there, at least at the outset, there was a possibility Mr. Diaz was involved, and as Ms. Taylor points out, a reasonable possibility, I'm not finding that that possibility clearly establishes someone other than the accused, which is the test under *Mak*. So I'm granting Motion in Limine No. 7.

RP 36. When the State indicated its witnesses might inadvertently bring up the subject of Mr. Diaz, the trial court indicated it was granting the

motion but recognized that testimony related to Mr. Diaz may go to witness credibility:

So what I'm prohibiting at this point is the defense from raising the issue of other suspect evidence, but to the extent that there may be other reasons why the information can come in, that would be permissible, I would think.

So I guess I would just say, Mr. Davy, it's up to you in terms of, it's your case in chief, you will start, and to the extent that certain information is elicited that may open the door, so be it. But I guess we will have to address it as it comes.

RP 37-39.

At James Turner's trial, the witnesses testified in accordance with the narrative above. In addition, the parties agreed to have a stipulated fact read to the jury by the judge during the State's case-in-chief: "That defendant, James Sterling Turner, lost his lower front tooth after October 11, 2013." RP 242. Mr. Turner took the stand in his defense. RP 298-301. He testified that he was five feet, eight inches tall and that he smoked Camel Crush brand cigarettes. RP 300. Turner explained that the user "squishes" the cigarettes filter to release menthol into the cigarette. RP 300. On cross-examination, Turner acknowledged that the white cigarette in evidence was his cigarette: "I think it's been proven that that's my cigarette, yes." RP 300-301. Turner never denied robbing the Central Valley Texaco on October 11, 2013, nor did he offer any explanation for

how his cigarette came to be there. RP 298-301.

III. ARGUMENT

- A. **TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING OTHER SUSPECT EVIDENCE WHERE SOLE WITNESS TO THE CRIME CONSISTENTLY DENIED THAT THE OTHER SUSPECT WAS THE PERPETRATOR, POLICE RULED OUT OTHER SUSPECT EARLY ON IN THEIR INVESTIGATION, AND OTHER SUSPECT WAS SHOWN TO MERELY HAVE OPPORTUNITY TO COMMIT CRIME BUT NO OTHER EVIDENCE WAS PROFFERED TO TIE OTHER SUSPECT TO THE CHARGED CRIME.**

Turner argues that the trial court erred in not allowing the defense to present other suspect evidence. This claim is without merit because the defendant's proffer failed to connect the other suspect to the robbery itself except to show that he had the opportunity to be the perpetrator because he or a car associated with him was possibly seen in the area on the day in question. Mere opportunity alone has never been held sufficient to place other suspect evidence before a jury. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004)

This court has previously stated:

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. Nonetheless, the admission or refusal of evidence lies largely within the sound discretion

of the trial court; its decision will not be reversed on appeal absent an abuse of discretion. An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court.

State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied* 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993)(internal citations omitted); *Accord State v. Thomas*, 150 Wn.2d 821, 856-857, 83 P.3d 970 (2004). “Washington permits a criminal defendant to present evidence that another person committed the crime when he can establish “a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.”” *State v. Hilton*, 164 Wn.App. 81, 99, 261 P.3d 683 (2011)(citing *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1(1932); *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied* 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993)).

“When there is no other evidence tending to connect another person with the crime, such as his bad character, his means or opportunity to commit the crime, or even his conviction of the crime, such other evidence is irrelevant to exculpate the accused.” *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004)(citing *State v. Downs*, 168 Wash 664, 667, 13 P.2d 1 (1932); *State v. Maupin*, 128 Wn.2d 918, 925, 913 P.2d 808(1996)). “Mere opportunity to commit the crime is not enough as such evidence is “the most remote kind of speculation.”” *State v. Thomas*,

150 Wn.2d 821, 857, 83 P.3d 970 (2004)(citing *Downs*, 168 Wash. at 668, 13 P.2d 1). Motive alone is also insufficient. *State v. Kwan*, 174 Wn.528, 533, 25 P.2d 104 (1933); *State v. Condon*, 72 Wn.App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031, 877 P.2d 694 (1994). The United States Supreme Court has cited approvingly the Washington standard for admitting third party perpetrator evidence. *State v. Hilton*, 164 Wn.App. 81, 99, 261 P.3d 683 (2011)(citing *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

In this case the initial suspect, Anthony Diaz, was placed in a photo montage by Deputy Hedstrom because he or a car associated with him was seen nearby. RP 133, 187. That is, evidence was presented that Anthony Diaz might have merely had an opportunity to commit this crime. There was no showing whatsoever that Diaz may have additionally had a motive to commit the robbery, or owned a gun similar to the one used in the robbery, or had previously committed a similar robbery. *Cf. State v. Franklin*, 180 Wn.2d 371, 372, 325 P.3d 159 (2014)[other suspect had motive, means, and prior history of threatening the victim]. In fact, the lone witness to the crime repeatedly disavowed any notion of Diaz's participation in the robbery. RP 107, 108, 110, 189, 190, 213. Like the defendant in *Downs*, who wanted to put into evidence that a known burglar was in Seattle on the evening the defendant was accused of

committing a burglary, this type of other suspect evidence that establishes only suspicion is inadmissible. *See State v. Downs*, 168 Wash. 664, 667-668, 13 P.2d 1 (1932); *Accord State v. Franklin*, 180 Wn.2d 371, 380, 325 P.3d 159 (2014).

The defendant points to a number of factors that it argues demonstrate evidence beyond motive and opportunity. App's Br. at 15-16. The first factor can only be described as opportunity. App's Br. at 15[that the other suspect was in the vicinity...]. Factor two is also evidence only of opportunity in that Diaz was placed in the photo montage because he was seen in the vicinity. Apps. Br. at 15-16, RP 133, 187. Factors three, four, and five all concern Diaz's physical similarity to the person Ms. Larson said robbed her. Apps. Br. at 16. All three persist, however, in minimizing the most essential fact when it comes to the proffered other suspect evidence in this case: Ms. Larson repeatedly and consistently told police that Diaz was not the man who robbed her. RP 107, 108, 110, 189, 190,213; *See State v. Strizheus*, 163 Wn.App. 820, 832, 262 P.3d 100 (2011)[no nexus tying other suspect to crime where there was no physical evidence or eyewitnesses tying other suspect to crime and where the victim never identified the other suspect as her attacker despite numerous opportunities to do so]. A foundational showing that it was merely *possible* for the third party to have committed

the crime is insufficient. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992)(emphasis in original), *cert. denied* 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993).

The defendant relies heavily on *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014). App's Br., 13-17. *Franklin* is distinguishable, however, because the trial court in this case did not make the twin errors identified by the *Franklin* court and the other suspect evidence offered up in *Franklin* demonstrated the other suspect had not only motive as well as means but also had a prior history of threatening the victim. *State v. Franklin*, 180 Wn.2d 371, 372, 325 P.3d 159 (2014). The trial court in *Franklin* erroneously considered the strength of the state's case against the defendant and applied a per se standard to exclude other suspect evidence. *Franklin*, 180 Wn.2d at 373. The trial court in the instant case did neither of these things. RP 35-39. It simply cannot be said that no reasonable person would take the position adopted by the trial court. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *cert. denied* 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). It necessarily follows that the trial court did not abuse its discretion in prohibiting Turner from presenting Mr. Diaz as a third party suspect in this case.

IV. CONCLUSION

For the foregoing reasons, Turner's conviction and sentence should be affirmed.

DATED May 26, 2015.

Respectfully submitted,
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A handwritten signature in black ink, appearing to read 'S.M.L.', written in a cursive style.

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