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

BRIEF OF APPELLANT

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A. The court erred in making Finding of Fact 14: ”The defendant was the perpetrator of the Kid’s Fair robbery.” CP 337.

B. The court erred in making Finding of Fact 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 Fair 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 Fair 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 who's 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 evidence that was submitted after 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.

Issues Related To Assignments Of Error

1. Did the trial court abuse its discretion when it allowed in-court identification of Mr. Gibson by witnesses who's previous out of court identifications were first erroneous and later, equivocal?
2. Did the trial court abuse its discretion in admitting evidence relating to the Idaho robbery under 404(b)?
3. Did the trial court err when it denied the defense motion to suppress DNA evidence that was submitted after trial began and came as a surprise to the defense?
4. Was the evidence insufficient to sustain the conviction for first-degree murder?

INTRODUCTION

On May 2, 2011, Patrick Gibson was charged with murder in the first degree: that on November 7, 1992, he attempted to commit a first-degree robbery, at Cole's Furniture Store in Spokane, WA, and in the course of that crime, caused the death of Brian Cole. CP1. He was found guilty after a bench trial. CP 300.

Mr. Gibson challenges the conviction on four bases: the court's decision to allow impermissibly suggestive out of court and unreliable in-court identification; the trial court's abuse of discretion in allowing admission of a similar robbery under ER 404(b); the admission of unreliable DNA evidence, which was lately submitted for analysis; and the sufficiency of the evidence.

II. STATEMENT OF FACTS

PRETRIAL HEARINGS

1. ER 404(b) Hearing

In a pretrial hearing, the defense objected to the State's motion to admit evidence of an unsolved robbery that occurred in Coeur D'Alene, Idaho, some three hours earlier than the Cole's Furniture store event. RP 27-56. Contending that admission was

proper under *res gestae,* the State argued that the manner of the robbery and description of the perpetrator were almost identical to the Spokane event and thus, necessary to establish context. RP 28,32. The defense objected on the bases of relevance and unfair prejudice. RP 41.

The court reserved ruling until all the testimony and evidence on the both robberies had been presented. RP 53. After hearing all the evidence, the court ruled that evidence admissible and relevant to show preparation, plan, and identity; or in the alternative, *res gestae*. RP 912; CP 337-339. It held:

> "The defense opened the door to other prior offences and conduct unrelated to the Kid's Fair [Idaho] incident as the Defendant attempted to use his criminal history to negate his culpability as a trial strategy following the state's presentation of evidence which included DNA evidence. This strategy employed by the defendant/defense to bring out his criminal history was made knowingly, purposely, and intelligently. This court carefully balanced the probative aspects of the evidence with any prejudicial effects before considering that evidence even when such evidence originated from the defendant. This court finds that the probative value of the evidence regarding the defendant's prior crimes, convictions, and past conduct outweighed any prejudicial effect and was highly probative in showing opportunity, preparation, plan, identity, and as a defense theory as to how the defendant's DNA became present on the items introduced by the state. Moreover, the Defense opened the door and [sic] this evidence." CP 338.

2. <u>Admission Of DNA Evidence</u>

a. White Hairs/ Fluid Evidence

A second pretrial issue was the submission of two pieces of evidence for DNA analysis that would not be completed until 12 days after trial began. RP 63-65. The evidence consisted of two white hairs extracted from a baseball cap and some fluid extracted from sunglasses, both recovered from the crime scene. Concerned that the testing would not be completed in a timely way, the court stated:

> "And let me say this, for the record, that I've counted and that would be the 12th day of trial. 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 you may want a lengthy continuance. It doesn't work that way. So 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 time…..I can't bifurcate a murder trial."

RP 90-91.

Both parties agreed that a break would not be necessary and the defense further agreed those items submitted for testing could be consumed. RP 91; 560-61.

b. Reference DNA Samples

On the fourth day of trial, the State notified the court that it yet again lately submitted items for DNA analysis, this time after trial began. It submitted reference DNA samples from three individuals who had potentially touched a hat recovered from the

Spokane crime scene. RP 563-64. The alleged handling occurred in 1992. DNA testing on the hat, conducted in 2004, resulted in a 1 in 2 probability that Mr. Gibson was not excluded. Essentially, the DNA information was irrelevant because it could belong to almost anyone. RP 568. Objecting to the late testing, defense counsel moved for suppression of any inculpatory DNA results. RP 565.

The State explained that when it earlier viewed the episode of America's Most Wanted featuring the Spokane crime, it did not fully realize that Detective Henderson of the Spokane Sheriff's Department, John Walsh, and an actor named Trevor St. John, had handled the actual hat. RP 567. Once they realized it, they elected to obtain the DNA of those three individuals to see if it was possible to identify more accurately the contributors to the DNA. RP 573-74.

Discussing potential prejudice to the defense, the court was aware there was no time to allow a defense expert to make the same comparison. RP 576. The court reasoned "there is not one person here who can argue with a straight face that the evidence, this hat, wasn't mishandled. …People making a TV show touched the hat. It was checked out for a period of days. We don't know what the chain of custody was. Okay. So we all agree probably

anything on that hat is very questionable." RP 582. The court went on:

> "That doesn't make the hat inadmissible. I mean, the hat is the hat. It's just the DNA on the hat and any results of the DNA testing on the hat that are, just based on what you're all telling me today, very questionable, probably shouldn't be admitted. Okay.
>
> Also, the case doesn't hinge on the DNA on the hat. That's not a key component in this case, unless somebody is going to come up with something next week that I don't know about now, and I'm sure a lot of that will happen now it has to do with the DNA on the hat.
>
> **Here's what we're going to do: We're going to proceed. If, only if, the defense, as part of their defense, raises the issue of the hat being contaminated,** … **if the defense raises as a defense that the hat was contaminated, then the State in rebuttal can bring in their DNA evidence about the DNA of Detective Henderson, John Walsh, and the actor, St. John. If the defense doesn't raise any issue about the contamination of the DNA on the hat, there's no need**." RP 582-83. (Emphasis added).

In clarifying the court's ruling, the court understood that it was the DNA from Henderson, Walsh and St. Trevor that was sent out for analysis, to compare it against DNA previously obtained

from the hat. RP 586-587.

On June 7, the State again raised the issue of the new DNA testing. The defense objected based on the court's earlier ruling. RP 885. The court reiterated its understanding:

> "Let me repeat what I thought was going on here… We're talking about the hat and at some point remote in time from now, but closer to the time of the offense, there was this America's Most Wanted episode. And Detective Henderson checked out the hat from property…and either gave the hat to John Walsh or someone connected with that program and supervised its use…John Walsh had the actual hat in his hands and was handling it on the show, and the actor…wore the actual hat in the reenactment…
>
> And the State, a few days ago, said, well, we're going to…get DNA profiles on Detective Henderson, Mr. Walsh, and Mr. St. John. …And it was the Court's surmise that the purpose of that was to be able to counter any assertions by the defense that none of, that the DNA evidence was so contaminated as to be not admissible. And so I said, well, if the defense stands up with a defense that the DNA results on the hat are contaminated, then the State could bring in as rebuttal evidence excluding Henderson, St. John, and Walsh.

RP 887.

It was clarified, once again for the court, that the contamination occurred in 1993, the DNA hat sampling occurred in 2004; and not until May 30, 2012, had the State sent the reference samples for comparison. RP 889-891; 920. The defense objected to the introduction of any DNA evidence from the hat, arguing the State had mismanaged the case, did not disclose the exclusionary analysis until after trial began, and several witnesses had already been subject to direct and cross examination. RP 902; CP 313. The court recognized the defense was at an unfair disadvantage. RP 902.

Determining that its original ruling had been based on a misunderstanding of the sequence of events, the court reversed itself and ruled that the new profiles on the DNA of the three individuals were admissible. RP 923. There was a break in the trial between the dates of June 11 and July 10, 2012 to allow the defense to review and respond to the new evidence. RP 927-28.

TRIAL TESTIMONY

On November 7, 1992, Steve and Teresa Benner were closing their Coeur d'Alene area retail shop, Kid's Fair, around 4:30 p.m. RP 98. Mrs. Benner went to the front of the store to flip the sign, and as she headed back to the counter, a male entered the

store. He wore a baseball cap, sunglasses, and a costume beard. RP 99. He told them "You're being robbed" and showed them a small silver pistol. RP 99. He told them, "Nobody is going to get hurt." RP 231.

He used metal handcuffs to secure Mr. Benner and then used flex cuffs to secure Mrs. Bennett and employee Kathy Ward together. RP 100. He demanded cash, debit cards, and PIN numbers. RP 101. When he attempted to remove the handcuffs from Mr. Benner, he broke the key in the lock. RP 257. No one was injured, he took the money, and left. Mr. and Mrs. Benner gave police officers a physical description of the robber as between 5'8" to 5'9" tall and about 160 pounds. RP 110; 283. Officers retrieved a fingerprint from the metal handcuff and submitted it to the Idaho state lab. The print was never matched to anyone. RP 302.

Later, in the early evening, eighteen-year-old Heather Bender was driving with a friend. RP 141,144-45. Stopped at a red light alongside the Cole's furniture store in Spokane, she observed a man walking down the sidewalk at a quick pace. He was wearing a hat, sunglasses, and a fake beard. He also carried a backpack. She saw him enter Cole's Furniture Store. RP 144-45. She later

described him as 5'8" or 5'9" tall, between 30 and 35 years old, and although not overweight, he had a beer belly. RP 150-51. At trial, she could not identify Mr. Gibson as the individual she saw enter the store that evening. RP 149.

About 8 p.m., that same evening, Michele and Brian Cole were closing up their furniture store in Spokane. Mrs. Cole, who has multiple sclerosis, was getting her scooter out from behind the counter. RP 160-62. A man came in the front door and said, "This is a stick up." RP 163. He wore a fake beard, a baseball type cap, and was not wearing glasses. RP 163. She recalled that she looked straight into his eyes and that his eyes were blue. RP 189.

The man wanted their cash, credit cards, and PIN numbers. RP 165. He ordered them to the back of the store. RP 168. Mrs. Cole drove her scooter to the back of the store and then heard furniture falling and a gunshot. She turned her scooter around and saw her husband and the robber struggling. RP 169. She heard a second gunshot. RP 170. The man left the store, leaving behind sunglasses, a piece of a fake beard, and the baseball cap. RP 188-89. Mrs. Cole call 911. RP 171-72. She described the robber as 5'8" or 5'9" tall, thin, and around 30 years old, with a baby face.

RP 183;312;433; 436;759. Mr. Cole succumbed to his injuries and expired at the hospital that evening. RP 173.

a. Eyewitness Identification

Officers showed the four witnesses hundreds of pictures from "mug shot" books. RP 120; 131; 182; 230. In December 1993, Spokane officers compiled a photo montage for Mrs. Cole, Mr. and Mrs. Benner, and Kathy Ward. RP 413; CP 81. Mrs. Cole picked the individual listed as number 4, and said she felt 80-90% she had identified the perpetrator. Mr. Benner picked the same person, although was not fully positive. Mrs. Benner picked the same person. RP 415-418. That individual was later cleared as a suspect. RP 418.

In 2007, Detective Lyle Johnston from the Spokane County Sheriff's Office was assigned the case. RP 504. In December 2010, he submitted a 9 centimeter length of hair-like fiber recovered from the fake beard for DNA analysis. RP 508;1081. A very small amount of DNA was detected on the fibers, and in April 2011, he received notification that the DNA on the fiber matched Mr. Gibson. RP 508; 1083. The remaining fake beard fibers were never tested. RP 1083-84. He created a photomontage,

which included Mr. Gibson's 1994 driver's license photo and showed it to each of the witnesses. RP 511; CP 85.

Mrs. Cole studied the montage and said she did not know- as it had already been 18 years since the event. RP 514. She went through a process of elimination and then said, "I don't know if I can." Then she hesitantly identified Mr. Gibson, as possibly the perpetrator. RP 514; 532. The next day, the officer showed the same montage to the Benners. Mrs. Benner was unable to identify anyone in the photomontage. RP 227. Mr. Benner stated that it had been so long that it was very difficult: he was not able to positively identify anyone, but hesitantly thought Mr. Gibson looked like the man. RP 517;532. Kathy Ward was unable to positively identify anyone, but picked a possible individual, not Mr. Gibson. RP 262; 518.

Despite the original physical descriptions given by every witness, the passage of time, and difficulty identifying the robber in a photo montage, Mrs. Cole, Mr. Benner, and Mrs. Benner each identified Mr. Gibson, in court, as the person who robbed them in 1992. RP 111,167, 219. Mr. Gibson's 1994 driver's license description is: 6'1", 180 pounds, with brown eyes and 40 years old. RP 526; CP 83.

Dr. Jennifer Devenport testified as an expert witness in eyewitness identification behavior for the defense. RP 799-801. She testified about evidenced- based best practices to reduce false identifications. RP 806. She pointed out that in contrast to best practices, the Spokane detective presented the photos simultaneously rather than sequentially, and that because he was associated as a detective in the case he should not have been the individual who administered the photo montage. RP 806-07.

Dr. Devenport testified that the higher the level of violence and stress in the interaction, the poorer the memory and more inaccurate the identification. Further, when a weapon is displayed, a phenomenon known as "weapon focus" occurs, whereby the witnesses can later describe the weapon in detail, but at the expense of being able to describe the perpetrator accurately. RP 813. When a perpetrator wears a disguise, even simply wearing a hat, it reduces a witness' ability to accurately identify the perpetrator later and increases false identification rates. RP 816.

Lastly, she testified that studies have shown that the amount of time that lapses between the event and the identification is a significant factor in eyewitness identification. Research has shown that identifications made three days after the event were eighty-

three percent accurate, with no false identifications. Five months after the event, zero percent were accurate and thirty-six percent of the participants made a false identification. RP 840. The photomontage identifications conducted in April 2011 occurred over 6,700 days after the incidents. RP 817.

b. The Ball Cap And DNA Expert Testimony

In December 1992, a re-enactment of the Spokane crime was filmed by America's Most Wanted TV show. RP 994. With permission, Detective Henderson checked the ball cap recovered from the scene out of the evidence property room and brought it to the filming. RP 994. The hat was handled and worn by an actor, Trevor St. John. RP 995.

In late January 1993, he again checked the ball cap and the sunglasses out of evidence. He took the items to Washington DC for the second segment of filming. RP 991.

In April 2004, Detective Henderson submitted the same hat and sunglasses to the Washington State Patrol Crime Lab (WSPCL) for DNA analysis. RP 418. On June 13, 2006, forensic specialist James Currie swabbed the hat for DNA. RP 960. He determined that the DNA that was present was from *at least* three contributors, but could not make any interpretations beyond that.

RP 961. (Emphasis added). The result was not entered into a database, but rather, maintained on site in the Seattle lab. RP 962.

Lorraine Heath of the WSPCL reviewed Mr. Currie's work. RP 1064. She testified she could say with certainty that there were at least 3 people that put more DNA on the hat, and one person that put less DNA on it. The fourth contributor was never identified. RP 1067. Comparing fresh buccal swabs from Mr. Gibson in 2011 with the DNA profile from the ball cap, she determined Mr. Gibson was included as a 1 in 2 potential DNA contributor. RP 1061; CP 202. In a report dated August 12, 2011, under the "remarks" section of her report, Ms. Heath wrote, "Assuming a contribution from Patrick Gibson, a partial profile from a second contributor from the ball cap was deduced." CP 203.

On May 30, 2012, she received DNA reference samples of John Walsh, Trevor St. John, and Detective John Henderson. RP 1064. Comparing the new profiles, she concluded that John Walsh was excluded, but Henderson and St. John were included. RP 1065. Despite the analysis showing an unidentified fourth contributor, the process the lab used was to "subtract" out the DNA of the two known contributors. She testified this left Mr. Gibson

included as a contributor, with an estimated probability of a random matching profile of 1 in 10 million. RP 1065-67.

Dr. Ruth Ballard testified as an expert in DNA for the defense. RP 1117. In her review of the findings of WSPCL with respect to the hat, she also concluded there were *at least* three DNA profiles present. RP 1145. However, she testified it was an incorrect forensic assumption to take two individuals who touched the hat and to " attempt in that situation to pull people out of the profile." In her expert opinion, the WSPCL overstated their ability to deconvolute the mixture into 4 separate profiles. RP 1175. Even using the theory put forward by the WSPCL, the complexity of the mixture still resulted in a calculation that 1 in 2 people would be similarly included with Mr. Gibson as a DNA contributor. RP 1164.

c. Alibi and Defendant Testimony

Mr. Gibson's defense testimony was two pronged: first that he was not in the Spokane area on November 7, 1992. RP 1212. Recently released from prison, he lived in Everett, Washington in 1992. RP 1212;1217. Ken Houser and Michael Gibson testified that the weekend of the crimes they were fishing with Mr. Gibson on Puget Sound. RP 729-732. Photographs memorializing the weekend of chum fishing were introduced. RP 730.

Second, that beginning in August 1992, he planned and executed bank robberies, not retail store robberies. RP 1221-22. He was later suspected of committing 14 bank robberies, and eventually pleaded guilty to one count. RP 1219-20. He always wore a full disguise: fake beard and mustache, wig, hat, hooded sweatshirt, headphones, gloves, sunglasses, and he used a .380 automatic. RP 1223-24; 1231.

He reported that he kept his numerous disguises hidden in a storage locker and practiced with them. Over time, up to eight individuals assisted him in the bank robberies. RP 1229-30. He contended, based on the eyewitness descriptions of the perpetrator, that one of those individuals had taken and used one of his disguises to perpetrate the robberies and homicide in the Spokane area. RP 1229.

Mr. Gibson was convicted of murder in the first degree. CP 300. He makes this timely appeal. CP 294-95.

III. ARGUMENT

A. The Trial Court Abused Its Discretion When It Allowed In-Court Identification Of Mr. Gibson By Witnesses Who's Previous Out Of Court Identifications Were Either Proven Erroneous Or Equivocal.

On appeal, Mr. Gibson argues that the pretrial and in court identifications were impermissibly suggestive and inherently unreliable in view of the failure by law enforcement to follow best practices, the early misidentification, and the uncertain pretrial identifications. The admission of evidence is reviewed under the abuse of discretion standard. *State v. Kinard,* 109 Wn.App. 428, 435, 36 P.3d 573(2001).

"Mistaken eyewitness identification is a leading cause of wrongful conviction, as recognized by Washington courts…. 'the vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect'". *State v. Sanchez,* 171 Wn.App. 518, 572, 288 P.3d 351 (2012) reconsideration denied Jan. 2013. (Alteration in the original; internal citations omitted).

Impermissibly Suggestive Identification

An out of court photographic identification meets the standard of fairness, as required by due process, if it is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Eacret,* 94 Wn.App. 282, 285, 971 P.2d 109 (1999). If the procedure gives rise to a substantial likelihood of irreparable misidentification, the

court must then review the totality of the circumstances: (1) the opportunity of the witness to observe the perpetrator at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of his prior description of the perpetrator; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Braithwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). "The key inquiry in determining admissibility of an identification is reliability." *Id.*

Identity of the perpetrator was the main issue in this case. Law enforcement officers admittedly did not follow best practices to reduce the likelihood of false identifications. Best practices, as defined by research and adopted by the Spokane Police Department (CP 88) suggest the officer composing and the officer presenting the photo array not be an officer involved in the investigation. Here, the investigating detective compiled and presented the montages to each of the witnesses. They also presented the photos simultaneously, rather than sequentially. Because Mrs. Cole was able to eliminate three of six photos as the individuals did not match the original description she had given, reducing the functional size of the display to only three photos: hardly sufficient to make a fair test of a witness' ability to make an

identification, most especially after 18 years had already passed. RP 514; 810-812.

The reliability of the identification here is further suspect when considering the 5 *Brathwaite* factors. First, although all the witnesses had the opportunity to view the perpetrator at the time of the crime he, wore a disguise. A fake beard, sunglasses, and a baseball cap, limited their ability to observe him.

Second, Mrs. Cole and the Benners[1] were under a great deal of stress at the time of the robberies. The Benners had their two young children in the office area. Mr. Benner was very focused on the weapon. RP 100, 103, 106. Also, despite his claim that he started directly at the perpetrator, to "burn his image" into his mind, Mr. Benner misidentified the perpetrator in the first photo montage, and was very unsure in choosing Mr. Gibson from the second montage. Mrs. Cole admittedly was distracted, getting her purse and wallet, moving her scooter from behind the counter, and driving it with her back to the perpetrator. When she did turn around, her focus was on her husband and the struggle.

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[1] Without conceding that same individual perpetrated both the Spokane and Coeur d'Alene crimes, that Mr. Gibson was that individual, or that the Coeur d' Alene incident was admissible under ER 404(b), the eyewitness testimony analysis will be applied to each of the witnesses who testified as to identity.

Third, the accuracy of the prior description of the perpetrator varied remarkably from Mr. Gibson's actual appearance. Mr. Gibson's 1994 driver's license description lists him as 6'1", 180 pounds, with brown eyes and 40 years old. Each of the witnesses described the perpetrator as between 5'8" or 5'9" or up to 5'10", slim, about 160 pounds, 30 – 35 years old; and most especially, Mrs. Cole remembered quite clearly that the perpetrator's eyes were blue. Additionally, in viewing the first photo montage, a year after the incident, Mrs. Cole and the Benners picked an individual by the name of Hugh Knuttgen. Mr. Knuttgen was subsequently cleared of any involvement.

Fourth, the level of certainty demonstrated by the witnesses at the second photo montage procedure was equivocal at best. Over eighteen years after the robberies, Mrs. Cole was very hesitant to make an identification. In fact, she handed the montage back to the detective and said, "I don't know if I can." He put the montage away as she said, "I hesitate because I don't want to possibly accuse an innocent person, but number 4 [Mr. Gibson] looks like the man." Her response was so qualified the detective did not even circle the picture or have her sign off on it. RP 514. Although he told the detective that "he stared intently at the

robber's face, " Mr. Benner also expressed great uncertainty in choosing Mr. Gibson. RP 517-18. Mrs. Benner was unable identify any of the pictured individuals as the perpetrator. RP 516.

Fifth, almost twenty years had passed between the time of the crime, the second photo montage procedure and the in court identification. Research demonstrates that the greater the time lapse between crime and confrontation, the higher the incidence of false identifications and a zero percent incidence of correct identifications. (RP 840).

Impermissible suggestiveness in an identification procedure, alone, does not constitute a violation of due process, rather, the procedure must have created "a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.,* 390 U.S. 377, 384, 88 S.Ct. (1968). The issue is whether the witness' identification is reliable. *State v. McDonald*, 40 Wn. App. 743, 746, 700 P.2d 327 (1985). Here, despite the above factors demonstrating utter unreliability of the eyewitness identification, and the remarkable variance between the eyewitness's description of the perpetrator and Mr. Gibson's actual appearance, and the almost two decades since the confrontation, the court admitted the in-court identifications.

Further, "[A]n in court identification of the defendant as perpetrator is inherently suggestive. By its very nature, of course, a one-on-one show-up is suggestive, just as 99 out of every 100 judicial or in-court identifications are suggestive. (It is always a good bet that the person the witness is being asked to identify is the guy sitting at the trial table who is not dressed like a lawyer.)." *Wood v. State*, 196 Md. App. 146, 159, 7 A.3d 1115, 1122 (2010).

Even if, on review, this Court determines the identifications were admissible and went only to weight, on balance, applying the five reliability factors to the facts more than suggests the trial court should not have relied on them in making its findings.

B. The Trial Court Abused Its Discretion In Admitting Evidence Pertaining To The Idaho Robbery Under 404(B).

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Id.* A trial court's decision is manifestly unreasonable if it "adopts a view that no reasonable person would take; it is based on untenable grounds or for untenable reasons if the trial court applies

the wrong standard or relies on unsupported facts. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

1. Admissibility Based On Preparation, Plan and Identity.

The court here admitted the Idaho robbery evidence, citing preparation, plan, and identity. The true test of admissibility of unrelated crimes is not only whether they fall into any specific ER 404(b) exception, but also, whether the evidence is relevant and necessary to prove an essential element of the crime, and its probative value outweighs its prejudicial value. *State v. Tharp,* 96 Wn.2d 591, 596, 637 P.2d 961 (1981). Here, evidence of an uncharged crime, by an unknown assailant, whose description did not match Mr. Gibson, was neither relevant nor essential to proving the charged crime. Further, admission of the evidence was unfairly prejudicial to Mr. Gibson.

Generally, evidence of another crime may be admissible to prove identity only when there is tangible evidence linking the defendant to crime charged. Tegland, § 5 Handbook Washington Evidence 2012-13 Edition 404(b). Here, the State sought to prove identity in the Washington case based on the testimony of Idaho witnesses. Each of the witnesses from both crime scenes described a small man, wearing a fake beard, sunglasses, and a

hat, and carried a small gun. The description of the male perpetrator did not, by any stretch of the imagination, match Mr. Gibson.

Even if the same individual committed both robberies, the only tangible evidence that tied Mr. Gibson to the Idaho robbery was the dubious eye -witness identifications. In fact, the only piece of forensic evidence recovered from the Idaho store was the perpetrator's fingerprint lifted from the metal handcuffs. The fingerprint was entered into NCIC. It did not match Mr. Gibson.

Under ER 404(b), evidence that is admitted under common scheme or plan is generally used when the occurrence of the crime or intent are at issue, not when identity is the issue. *State v. Foxhoven,* 161 Wn.2d 168, 179, 163 P.3d 786 (2007). In *Foxhoven,* the defendants were charged with numerous counts of malicious mischief. Before trial, they moved to exclude any evidence of prior bad acts, specifically a criminal history of graffiti and photos seized from Foxhoven's home that depicted the graffiti which bore his particular signature "tag". *Id.* at 172. The reviewing Court held that the existence of common scheme or plan, for ER 404(b) purposes, is only relevant to the extent that it shows the charge crime occurred. Since there was no dispute that the

buildings were graffiti sprayed, or that the vandal intended to paint the grafitti, it was an abuse of discretion to allow the evidence admissible under the common plan or scheme exception. *Id.* at 179.

Similarly, here, there was no dispute that both robberies occurred, or that the perpetrator intended to rob both establishments. Like *Foxhoven,* identity was the issue, and it was an abuse of discretion to rule the challenged evidence admissible under the plan exception.

2. Admission of Evidence Under Res Gestae

Facts regarding the Coeur d'Alene robbery were also admitted under a res gestae theory, as necessary for a complete picture. CP 338. This was error. Under the res gestae exception, evidence of other crimes or misconduct is admissible to complete the "crime story" by establishing the immediate time and place of its occurrence. *State v. Brown,* 132 Wn.2d 529, 571, 940 P.2d 546 (1997). "Where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible 'in order that a complete picture be depicted for the jury. " *Id.* (quoting *Tharp*, 96 Wn.2d at 594).

In *Mutchler,* the Court referred to res gestae as "same transaction evidence," that is, the other acts should be inseparable parts of the whole deed or criminal scheme. *State v. Mutchler,* 53 Wn.App. 898, 771 P.2d 1168 (1989). The reviewing Court held that Mutchler's encounters with his victim were not part of the attack on a second victim and did not describe events that helped to explain the circumstances of the attack. Holding the story of the attack on one victim was complete without the second victim's testimony it was error to admit the testimony as res gestae or "same transaction" evidence. *Id.* at 902. Similarly, the robbery of the Idaho store was not part of the robbery at Cole's. The story of the Cole's robbery was complete without the testimony of Mr. and Mrs. Benner. Like *Mutchler,* it was error to admit the testimony as res gestae. The caution is that *res gestae* evidence is not evidence of an unrelated prior criminal activity. Rather, it is itself a part of the crime charged. *State v. Sublett,* 156 Wn.App. 160, 231 P.3d 231 (2010).

In a recent Division II case, the Court denied the defendant's motion to exclude evidence of her earlier activities of making threatening statements and showing aggressive behavior toward the victim. *State v. Grier,* 168 Wn.App. 635, 647-48, 278 P.3d 225

(2012). There, the evidence was relevant because it showed the two had spoken, that she possessed a gun, that others had tried to take the gun away, and contradicted her self-defense argument. *Id.*

Here, there is no such connection between the two events. The admitted evidence did not make any consequential facts more probable and added nothing to a more complete factual context of the alleged crime. Moreover, admission of the evidence under *res gestae* was unfairly prejudicial to Mr. Gibson because the primary issue was that of identity. There was no tangible evidence linking him specifically to the Idaho robbery. The one fingerprint left by the perpetrator did not match Mr. Gibson's fingerprint, and the eyewitnesses misidentified, equivocated, or simply could not identify the robber. The trial court erred when it admitted the evidence; it was not probative or relevant, and unfairly linked not only the two robberies but created a mini-trial, finding Mr. Gibson as the perpetrator of both.

C. The Trial Court Erred When It Denied The Defense Motion To Suppress DNA Samples That Were Submitted For Testing After Trial Began.

The standard of review for evidentiary rulings made by the trial court is abuse of discretion. *State v. Ellis,* 126 Wn.2d 498, 504, 963 P.2d 843 (1998).

Here, the State was well aware that the ball cap had been found at the scene in 1992. Information that Detective Henderson had removed the hat and transported it to both filming sites of America's Most Wanted was available in the evidence/property logs. Moreover, in preparation for trial, the State watched the 1993 America's Most Wanted episode - twice. The show host stated he was holding the actual hat in his hands. RP 573.

The State had the 2007 inconclusive DNA report on the hat and forwarded that information to the defense. In 2011, it forwarded a report that there was a 1 in 2 probability that Mr. Gibson's DNA was on the hat. In showing governmental misconduct, a defendant is not required to show the conduct was dishonestly motivated- simple mismanagement is sufficient. *State v. Michielli,* 132 Wn.2d 229, 245, 937 P.2d 587 (1997). Respectfully, there was no excuse for the State's dilatory conduct in obtaining and testing the reference samples until the middle of trial.

Under Washington case law, in situations where the State inexcusably fails to act with due diligence, and material facts are

thereby not disclosed to the defendant until shortly before a crucial stage in the litigation, there are several dangers. A defendant's right to a speedy trial may be jeopardized, or his right to be represented by counsel who has had adequate opportunity to prepare a material part of his defense, may be impermissibly prejudiced. *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980). If a defendant proves by a preponderance of the evidence that the interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights, a trial court may dismiss a criminal prosecution. *Id.* Dismissal of criminal prosecution is an extreme measure, and not one to be lightly taken.

Here, the court was initially mindful of the prejudice to Mr. Gibson. The court expressed its concern that any new evidence could potentially affect the defense case strategy and as a result, be reversed on appeal. The court laid out three options for insuring a fair trial: suppression of the new evidence, a mistrial, or a lengthy recess to allow preparation by the defense. RP 577-579. Initially, the court ruled suppression was apropos, fully understanding that the DNA being tested was the reference samples. RP 886.

After the State received the results on the DNA comparison, and again raised the issue with the court, the court became confused. It appears that the court reasoned that because it had not fully understood that the hat had been contaminated in 1993 and a sample of DNA was not taken until 2007 that somehow meant the State had not mismanaged the case. The court seriously considered declaring a mistrial. It then ruled the evidence was admissible. RP 905. The remedy the court offered was a month long recess for the defense to respond to the late interjection of evidence by the State.

A trial court has broad discretion to determine the appropriate sanction: generally when evidence improperly surprises a defendant, the court may choose to grant a continuance to allow investigation of and response, or the court may suppress the evidence. *State v. Hutchinson,* 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), *cert. denied,* 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999); *State v. Linden,* 89 Wn.App. 184, 195-96, 947 P.2d 1284 (1997).

Exclusion is an extraordinary sanction that should be narrowly applied. *Hutchinson*, 135 Wn.2d at 882-83. Factors to be considered in determining whether to impose the exclusion remedy

include (1) the effectiveness of less severe sanctions; (2) the impact of exclusion on the evidence at trial and the outcome of the case; (3) the extent of surprise or prejudice; and (4) whether the violation was willful or in bad faith. *Id.* at 883. Here, the court did not undertake a *Hutchinson* analysis, and this was prejudicial error.

As to the first *Hutchinson* factor, the effectiveness of less severe sanction, a continuance of 30 days, in the middle of trial, after several witnesses had already testified was not a particularly effective sanction in terms of alleviating prejudice to the defendant. It meant the defense had thirty days to have an expert review the evidence and then re-engineer the defense strategies.

Second, "the impact of exclusion on the evidence and trial and the outcome of the case" was a necessary consideration. The State relied heavily on the DNA from the 9cm hair like fiber, as well as the eyewitness identifications. Any DNA results from the hat was not essential to the case. Even more significantly, there were at least three and likely four potential contributors to the DNA found on the hat. The method the lab used to deduce Mr. Gibson's DNA profile as one of the four, with one contributor remaining an unknown, was at best ambitious and at worst, unfairly prejudicially wrong. However, excluding the evidence did not change the

State's case at all, the trial would have continued in a timely fashion, and without the additional evidence, the outcome remains an unknown.

The third factor is the extent of the surprise or prejudice. Here, there is no question but that the defense was caught completely by surprise. The court made much of the fact that the defense had noticed, from the America's Most Wanted segment, that John Walsh announced on television that he was holding the "actual" hat. That awareness, however, did not impute an obligation to the defense to explain the original irrelevant DNA results, or lessen the degree of surprise when the State presented the new findings. Further, the defense was obviously prejudiced because it needed extra time for the expert to review the results, halting the trial to prepare.

Finally, the court should have considered the fourth factor, "whether the violation was willful or in bad faith". Here, whether the failure to prepare the reference samples at an earlier date was done in bad faith, it certainly was prosecutorial mismanagement. The State had the evidence for years, as well as the report from the lab that testing was inconclusive, the evidence logs about where the hat had been, and lastly, whether it was mindful of it or not,

there was the information from the America's Most Wanted tape of which they could and should have been aware of. The State could have avoided the late submission of the samples. There was no reasonable excuse and the evidence should have been excluded.

Moreover, in the pretrial hearing, the court was very clear that there had been plenty of preparation time for both sides- and the late submission of DNA that could cause the need for a recess would not be tolerated. The defense prepared their expert witness and their case in the belief that the court would not change its ruling midway through trial. Mr. Gibson was unfairly prejudiced by this and it was inexcusable.

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

The Due Process Clause of the Fourteenth Amendment and Article 1, §§ 3,22 of 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; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The same standard applies regardless of whether the case is tried to a jury or to the court. *See State v. Little,* 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

On appeal, this Court reviews whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *State v. Vickers,* 148 Wn.2d 91, 116, 59 P.3d 58 (2002). 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). Whether evidence is sufficient to support a conviction is an issue of law. *State v. Knapstad,* 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986). This Court reviews conclusions of law *de novo. Spokane County v. City of Spokane,* 148 Wn.App. 120, 124, 197 P.3d 1228 (2009).

To convict Mr. Gibson of first -degree murder, the State was required to prove beyond a reasonable doubt that he committed an armed robbery, and in the course of that robbery caused the death of Brian Cole, who was not a participant in the crime of robbery. Based on the previous arguments discussed above, there was only one piece of remotely reliable evidence presented by the State to

possibly sustain the conviction: the small amount of DNA on the 9cm clump of hair-like fiber from the fake beard.

The lab tech testified he swabbed the 2x2 inch size hair like fibers and the one-centimeter square matrix area from the clump. RP 1050;1057. He was only able to develop a partial profile because of the small size and inability to obtain all the genetic information. RP 1051. Further, the entire hair like fiber clump found at the scene was actually larger than the 9cm sent for testing. The remainder of the clump was never tested. RP 1083. The lab director testified that she could not even say with 100% certainty that no one else had worn the fibers that were tested. RP 1097.

In testimony, the lab director identified other items that had been submitted for DNA testing: threads found on the sunglasses left at the scene, as well as blood from Mr. Cole's fingernail clippings. RP 1072-73. The DNA found on the threads belonged to an employee of the WSPCL, who had collected the items in 1992. Some of the DNA found in the fingernails belonged to a second employee of the WSPCL. RP 1073. The director could offer no explanation of how the lab workers had contaminated the forensic items. RP 1073.

Given the small amount of DNA recovered from the hair fibers and the undisputed facts of contaminated evidence, and less than 100% certainty that Mr. Gibson's DNA was the only DNA on the beard, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. The trial here was infected with error with the admission of (1) irrelevant and unfairly prejudicial evidence under ER 404(b), (2) unreliable and impermissibly suggestive eyewitness identification, and (3) prosecutorial mismanagement – all of which unfairly prejudiced Mr. Gibson.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gibson respectfully asks this Court to reverse his conviction with prejudice based on insufficiency of the evidence. In the alternative, he requests a new trial.

Respectfully submitted this 13th day of March 2013.

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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 BRIEF was sent by first class mail, postage prepaid, on March 13, 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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