NO. 46572-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADAM CHARLES BOUCK,

Appellant.

RESPONDENT'S BRIEF

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I. REPLY TO ASSIGNMENT OF ERROR

The trial court did not deny the defendant the right to present a defense, as the trial court's ruling limiting the defense argument was a proper exercise of the court's discretion. Furthermore, even if the trial court did err, the error was harmless.

II. STATEMENT OF THE CASE

On November 20, 2012, Scott Taggart was working as a cashier at a Safeway in Longview, Washington, when he observed a man moving quickly from the produce section to the front door, carrying a basket with items in it. RP 69. He approached the man to ask if he could help him or check out his items, but the man continued outside the store at a quick pace. RP 70. Mr. Taggart then grabbed the basket the robber was holding and there was a "tug of war" with the basket. RP 71. The robber attempted to punch Mr. Taggert, but Mr. Taggert was able to avoid being hit, though his glasses were knocked askew. RP 73. The robber then jumped into a van and drove away. RP 75.

The robber was wearing a black hat during the altercation, but it fell off in the scuffle. RP 76. Another witness to the altercation called police, who came to the Safeway and took possession of the hat as part of their investigation. RP 84.

The hat was sent to the crime lab to be tested for DNA. RP 137. David Stritzke of the WSP crime lab swabbed the sweat band of the hat for DNA. RP 215. The DNA profile obtained from the hat was consistent with having come from two different people. RP 216. The major component matched the DNA profile of the defendant, Adam Bouck, a sample of which was obtained pursuant to a search warrant. RP 217, 162. The probability that the DNA came from someone other than the defendant was estimated as one in 27 quintillion. RP 217. Mr. Stritzke explained that it is not unusual to find a mixture of DNA on clothing and that, in order to find a person to have been the major contributor of the DNA that person's DNA would have to have been at least 75 percent of the total. RP 217–18. In other words, the defendant's DNA was 75 percent of the DNA that was found on the hat, indicating that he had had more contact with the hat than any other person. RP 207, 214.

The defendant was arrested and ultimately charged with Robbery in the Second Degree. CP 13–14. One the day prior to trial, the prosecuting attorney showed Mr. Taggart two photos of the defendant, and he said that the man photographed looked like the robber. CP 29. The defense filed a motion in limine to prohibit the in-court identification by the defendant of Mr. Taggart, arguing that the out-of-court identification was impermissibly suggestive. CP 28–30. In response to this motion, the

State opted to not ask Mr. Taggart to identify the defendant in court. RP 63. Prior to closing arguments, the State moved the court to prohibit defense counsel from arguing a lack of evidence from the absence of any in-court identification of the defendant by Mr. Taggart. RP 252. Specifically, the State moved to preclude the defense from saying "The State never asked Mr. Taggart if he could identify the defendant here in court." RP 254. The court granted this motion, mentioning that the question was never asked and there was a reason the question was not asked – namely, the defense's motion in limine. RP 255. The defense was, however, permitted to discuss that there was no in-court identification of the defendant by the eye-witness. The defendant was convicted of Robbery in the Second Degree, and now brings this appeal.

III. ARGUMENT

A. THE TRIAL COURT DID NOT DENY THE DEFENDANT THE RIGHT TO PRESENT A DEFENSE; THE PRECLUSION OF THE DEFENSE ARGUMENT WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION.

A presiding judge has great latitude in controlling the duration and scope of closing arguments. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550 (1975). Closing arguments must be "restricted to the facts in evidence and the applicable law." *State v. Perez-Cervantes*, 141 Wn.2d

468, 474, 6 P.3d 1160 (2000). The trial court judge therefore has discretion to limit closing arguments.

An appellate court reviews a trial court's decision to limit the scope of closing arguments for abuse of discretion. *State v. Frost*, 160 Wn.2d 765, 771, 16 P.3d 361 (2007); *Perez-Cervantes*, 141 Wn.2d at 474. An abuse of discretion will only be found if "no reasonable person would take the view adopted by the trial court." *Frost*, 160 Wn.2d at 771. There was no abuse of discretion in this case, as the trial court properly limited closing arguments to the facts in evidence and the applicable law.

First, the defense in this case filed a motion in limine to prohibit the in-court identification of the defendant by Scott Taggart, the victim of the robbery. CP 28. This motion was made due to the defense's belief that the prior, out-of-court identification, was impermissibly suggestive. *Id.* In response to that motion, but without conceding that the out-of-court identification was suggestive, the State opted to avoid asking Mr. Taggert to identify the defendant in court. RP 63. Therefore, the defense's motion was granted, and the State avoided asking Mr. Taggert to identify the defendant in court. RP 67 – 90 (no identification of the defendant).

Prior to closing arguments, the State moved the court to prohibit defense counsel from arguing a lack of evidence from the absence of any in-court identification of the defendant by Mr. Taggart. RP 252.

Specifically, the State moved to preclude the defense from saying "The State never asked Mr. Taggart if he could identify the defendant here in court." RP 254. The court granted this motion, mentioning that the question was never asked and there was a reason the question was not asked – namely, the defense's motion in limine. RP 255. The defense was, however, permitted to discuss that there was no in-court identification of the defendant by the eye-witness. Therefore, the defense was allowed to argue the lack of evidence by discussing the fact that none of the eye-witnesses, identified the defendant in court. This is exactly what the defense did argue, and it was proper. RP 294. What the defense was prevented from doing was arguing a fact that was not in evidence – basically that, because the witness did not identify the defendant in court, there was reasonable doubt as to the robber's identity. The trial court's ruling was proper, especially given the defense's motion in limine. A reasonable person could take the view adopted by the trial court, so there is no abuse of discretion.

The cases cited in the appellant's brief are distinguishable from the case at bar. First, in *Devries*, the trial court prevented the defense from presenting any closing argument at all. *State v. Devries*, 109 Wn.App. 322, 323, 34 P.3d 927 (2003). On appeal, the court held that the complete denial of closing arguments is unconstitutional. *Id.* In this case, on the

other hand, the defense was allowed to give closing argument, and was permitted to argue that there was a lack of evidence stemming from the lack of an in-court identification by either of the eye-witnesses to the crime. RP 294. *Devries* is therefore distinguishable.

Second, in *Frost*, the trial court precluded the defense from arguing both duress and that the State failed to meet its burden as to accomplice liability. 160 Wn.2d at 770. The trial court's decision was based on an erroneous interpretation of existing case law. *Id.* at 774. The Washington Supreme Court therefore found that precluding the defense's closing was an abuse of discretion because it was based on an erroneous interpretation of the law. *Id.* at 779. Conversely, in this case, the trial court's ruling was not based on an incorrect interpretation of the law, or any other untenable reason. The trial court's decision was based on the defense's own motion in limine and ensured fairness to both parties. Therefore, there was no abuse of discretion in this case. However, even if this court finds that the trial court's ruling was erroneous, the error was harmless.

B. IF THIS COURT FINDS THAT THE TRIAL COURT'S RULING WAS ERRONEOUS, THE ERROR WAS HARMLESS.

Errors affecting the process of a trial are subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Washington has adopted the "overwhelming untainted evidence" test as the standard

for harmless error analysis. *Frost*, 160 Wn.2d at 782, citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under this test, an appellate court looks at the untainted evidence to determine if it is "so overwhelming that it necessarily leads to a finding of guilt." *Id.* There must be proof beyond a reasonable doubt that a reasonable jury would have reached the same result in absence of the error. *Id.* In *Frost*, the Court found that the trial court's action did not taint the evidence at all, because in that case, the trial court limited the defendant's closing argument. *Id.* Similarly, the trial court in this case limited the defendant's closing argument. Therefore, the trial court did not taint any evidence and this Court may consider all the evidence presented at trial in determining whether the trial court's error was harmless.

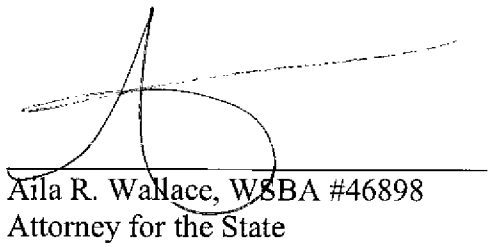
The evidence presented in this case proves beyond a reasonable doubt that a reasonable jury would have convicted the defendant, even in the absence of the trial court's limitation on the defendant's argument. Scott Tagert testified that the robber was around 5'10," and was wearing a hat that fell off during the scuffle and was given to police. RP 72. Matt Gray testified that the robber was around 5'10" and 200 pounds, had a mop of dark hair, and had a hat that fell off during the scuffle. RP 107–109. Most telling, though, is the DNA profile obtained from the sweatband of the black hat that fell off the robber's head during the

scuffle. RP 216. That DNA profile matched a known sample from the defendant, and the probability of selecting another individual with a matching profile is one in 27 quintillion. RP 217. There was another "minor component" to the DNA result obtained from the hat, but the defendant's DNA comprised 75 percent of the DNA obtained. RP 221. This DNA result, combined with the descriptions given by eye-witnesses, is so overwhelming that it necessarily leads to a finding of guilt. Therefore, any error by the trial court was harmless beyond a reasonable doubt. The defendant's conviction should be affirmed.

IV. CONCLUSION

The defendant's conviction should be affirmed as the trial court did not err in precluding the defendant's argument. If this Court finds that the trial court did err, that error was harmless.

Respectfully submitted this 23rd day of March, 2015.



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CERTIFICATE OF SERVICE

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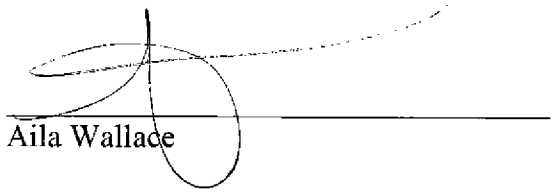
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 3d day of March, 2015.



Aila Wallace

COWLITZ COUNTY PROSECUTOR

March 23, 2015 - 12:56 PM

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