Supreme Court No. _____
Court of Appeals No. 74548-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER BOWMAN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Tyler Bowman requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Tyler Bowman*, No. 74548-4-I, filed July 10, 2017. A copy of the opinion is attached in an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Evidence must be relevant and more probative than prejudicial to be admitted at trial. Mr. Bowman was charged with two counts of second degree burglary for breaking into two businesses in the early morning hours. At trial, the court allowed the State to present evidence that Mr. Bowman and his co-defendant were later observed near an unrelated business around 3:00 a.m., and they were acting suspiciously. Should this Court grant review where the Court of Appeals' failure to find error in Mr. Bowman's case conflicts with the court's prior reversals based upon the admission of evidence of a defendant's similar crimes? RAP 13.4(b)(2), (4).

2. A lay witness's opinion testimony as to whether a defendant is depicted in a video is admissible only if there is some basis for concluding the witness is more likely to correctly identify the defendant than the jury. While a member of law enforcement may meet this standard where he has a longstanding relationship with the person, the Court of Appeals

previously found that simply observing the individual during an interview is not sufficient. Should this Court grant review where the Court of Appeals, contrary to its prior decision, found it was not error to permit an officer to opine on the identity of an individual in a surveillance video after observing him only during an arrest and subsequent interview?

C. STATEMENT OF THE CASE

Two men were caught on tape burglarizing a Be One Yoga studio and Five Guys restaurant in Kirkland. RP 384, 391. Surveillance video from Five Guys showed the two men attempt to enter the restaurant after 3:00 a.m. without success. RP 391, 523. The men gained access to the Be One Yoga studio, cut a hole through a shared wall, and gained access to the restaurant next door. RP 523. The video showed the men crawling along the floor in the restaurant toward a safe. RP 391. However, their actions triggered an alarm, causing the men to flee. RP 391. After the burglary, the Be One Yoga studio was missing one IPhone, one IPod, and $100 in cash from the register. RP 402-03.

No fingerprints were found at the scene. RP 391. There were no eyewitnesses to the crime. RP 392. However, the men's faces were caught on camera. RP 523, 525. Detective Clayton Slominski, with the Kirkland Police Department, investigated the crime, and reached out to other members of law enforcement for assistance in identifying the

individuals in the video. RP 520. A detective with the Everett police department, and Tyler Bowman's community corrections officer, identified Mr. Bowman as one of the men in the video. RP 535, 539.

An officer with the Bothell police department reported coming into contact with Mr. Bowman and his co-defendant, Kevin Everson, a few weeks after the crime took place. RP 540. Detective Slominski determined Mr. Everson's driver's license photograph matched the images of the second suspect in the surveillance video, and that Mr. Everson owned a make and model of a car matching the one seen in the video. RP 541, 546. The State also alleged a cell phone associated with Mr. Bowman had placed a call at 3:35 a.m. from the area near the burglary. RP 453.

Mr. Bowman and Mr. Everson were each charged with two counts of burglary in the second degree. CP 1. Prior to trial, Mr. Bowman and his co-defendant moved to prevent the State from eliciting the officers' opinions that the individuals depicted in the surveillance video were Mr. Bowman and Mr. Everson. RP 61, 94. The court largely denied the joint motion, limiting the scope of the witnesses' testimony but allowing them to offer an opinion if an adequate foundation was laid. RP 68, 99. At trial, Detective Slominski was permitted to identify Mr. Everson in the surveillance video despite the fact that he only met Mr. Everson during the

course of investigation, and had spent no more than one hour with him while conducting two interviews. RP 525, 568.

The trial court also permitted the State to elicit testimony that Mr. Bowman and his co-defendant were stopped by a police officer, three weeks after the burglary, for suspicious activity. RP 305, 308. The men were seen walking in a parking lot near closed businesses around 3:00 a.m. RP 579.

The jury found Mr. Bowman and Mr. Everson guilty of two counts of second degree burglary. CP 14-15. Mr. Bowman was sentenced to 59.5 months of incarceration. CP 19. The Court of Appeals affirmed. App. at 9.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. The Court of Appeals opinion, which finds no error in the admission of evidence suggesting the defendant was about to commit a crime similar to the one charged, conflicts with its prior decisions and this Court should grant review.

In order for evidence to be admissible at trial, it must be relevant. ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, in order "[t]o be relevant… evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of

consequence to the outcome of the case." *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

However, even relevant evidence may be excluded if it is more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if "its effect would be to generate heat instead of diffusing light, or … where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776 (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

a. Evidence suggesting Mr. Bowman and his co-defendant were preparing to commit another burglary was irrelevant and unfairly prejudicial.

Mr. Bowman and Mr. Everson were charged with burglarizing two businesses after 3:00 a.m. on January 20, 2015. RP 324, 329; CP 1. Over Mr. Bowman's objection, the trial court permitted the State to present

evidence that Mr. Bowman and Mr. Everson were seen together a few weeks after the burglary, on February 12, 2015, at 3:00 a.m., near a store. RP 579. Officer Michael Szilagyi testified both men were walking in the parking lot, which he thought was "a little bit suspicious" because there were "no open businesses in the area at that time." RP 579. He stopped the men and requested identification. RP 580.

Mr. Bowman objected to the introduction of this evidence, explaining it was unfairly prejudicial. RP 304-05. The trial court denied the motion. RP 305. It allowed the State to testify to the date, time, and location of the stop, as well as the fact the officer believed the activity appeared suspicious. RP 307.

This ruling was made in error. First, the evidence was irrelevant. ER 401. The fact that Mr. Bowman and Mr. Everson were seen in a similar location, at the same time of night, as in the commission of the burglary does not tend to prove or disprove any fact that is of consequence to whether Mr. Bowman was guilty of the charged crimes. *Weaville*, 162 Wn. App. at 818. Second, it is extraordinarily prejudicial. As presented to the jury, the evidence suggested the defendants were surveying possible locations to commit a second, similar crime. Such evidence was likely to stimulate an emotional response in the jurors rather than lead them to a rational decision. *Beadle*, 173 Wn.2d at 120.

The Court of Appeals has repeatedly recognized that informing the jury a defendant has completed a crime similar to the one charged may be so prejudicial as to deny the defendant a right to a fair trial. *State v. Wilburn*, 51 Wn. App. 827, 755 P.2d 842 (1988), *overruled on other grounds by Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 905 P.2d 1220 (1995); *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). In *Wilburn*, the Court of Appeals reversed after a witness testified the defendant had committed the same or similar crime "again." 51 Wn. App. at 832. In *Escalona*, the Court of Appeals reversed after a witness testified the defendant, who was charged with second degree assault with a deadly weapon, had previously stabbed someone. 49 Wn. App. at 256.

While the evidence presented at Mr. Bowman's trial did not demonstrate he had previously *committed* a similar crime, it was just as prejudicial as the evidence at issue in *Wilburn* and *Escalona*, if not more so, because it suggested he was preparing to commit a similar crime in the future. The trial court's failure to recognize the extreme prejudice to the defendants was error. RP 307.

b. Review is warranted.

On appeal, the State argued only that the evidence showing the officer observed Mr. Bowman and Mr. Everson together, and obtained identification from Mr. Everson, was relevant. Resp. Br. at 34-35.

Despite the State's concession that the remaining evidence was irrelevant, the Court of Appeals did not address how the additional testimony – regarding the timing and location of the encounter with the officer, and the officer's assessment that the men were acting suspicious – was relevant. App. at 7-8. Instead, the Court of Appeals affirmed based on its determination that the "State used the officer's testimony only as evidence that Bowman and Everson knew each other." Op. at 8.

The problem with the court's holding is that the evidence presented by the State through the officer's testimony was not limited to these facts. Regardless of how the State explicitly addressed this evidence in closing, it was permitted over Mr. Bowman's objection to elicit extraordinarily prejudicial evidence suggesting the men were preparing to commit a similar crime after the crime for which they were charged. The State's use of this evidence, or lack thereof, does not alter the fact that this evidence was before the jury. The court's opinion conflicts with its prior decisions in *Wilburn*, 51 Wn. App. at 832, and *Escalona*, 49 Wn. App. at 256, and raises an issue of substantial public interest. RAP 13.4(b)(2), (4). This Court should grant review.

2. **This Court should grant review because the Court of Appeals opinion, permitting an officer to identify an individual in a surveillance video based on his limited contact with the individual during the arrest, conflicts with the court's prior decision in *State v. Hardy*.**

    a. A lay witness's opinion testimony as to whether a defendant is depicted in a video is admissible only if there is some basis for concluding the witness is more likely to correctly identify the defendant than the jury.

Lay opinion testimony is permitted under the rules of evidence when it is "rationally based on the perception of the witness," and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. When a surveillance video is offered at trial, opinion testimony offered by a witness under ER 701 concerning the identity of a person in the video "is of dubious value." *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Because the jury is able to view the video and reach an independent determination about whether it believes the defendant is depicted, it runs the risk of invading the province of the jury and unfairly prejudicing the defendant. *Id.*

For these reasons, the Ninth Circuit has held:

> while lay opinion testimony of this sort is sometimes permissible, "the use of lay opinion identification by policeman or parole officers is not be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution."

Id. (quoting *United States v. Butcher*, 557 F.2d 666, 670 (9th Cir. 1977)). The Ninth Circuit has upheld the use of testimony under two circumstances: (1) where the witness had "substantial and sustained contact" with the person and (2) where the person's appearance is allegedly different at the time of trial than in the video. *LaPierre*, 998 F.2d at 1465.

Because ER 701 is identical to FRE 701, the Court of Appeals relied on federal cases when first addressing the question of whether a lay witness may be permitted to offer an opinion. *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). The court concluded in *Hardy* that a lay witness is permitted to give his opinion concerning the identity of a person in a surveillance video, but only "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Hardy*, 76 Wn. App. at 190 (relying in part on *United States v. Saniti*, 604 F.2d 603, 604-05 (9th Cir. 1979), in which defendants' roommates were permitted to identify the defendant in bank surveillance photographs) (other internal citations omitted).

In *Hardy*, the court considered two cases in which the same officer was permitted to opine the defendant was the individual on a video recording introduced at trial. 76 Wn. App. at 189. In one case, the officer

had known the defendant "for several years." *Id.* at 191. In the other, the officer had known the defendant "for 6 or 7 years and considered him a friend." *Id.* at 192. Because of the officer's longstanding relationship with each defendant, the court held the trial court did not err in permitting the officer to opine the defendants were the individuals depicted in the recording. *Id.* at 191-92.

In *State v. George*, the officer's contact with the defendants was more limited. He observed one defendant exiting a van, running away, and in the hospital. 150 Wn. App. 110, 119, 206 P.3d 697 (2009). He observed the other defendant exiting a van, being handcuffed, and interviewed at the police station. *Id.* The court determined that permitting the officer to opine that the defendants were the individuals on the video was error, as the contact between the officer and the defendants fell "far short of the extensive contacts in *Hardy*." *Id.*

b. The detective's limited contact with the co-defendant did not provide a basis for concluding he was more likely to correctly identify the co-defendant than the jury.

Prior to trial, both defendants moved to preclude the State's witnesses from opining that the images in the surveillance video depicted the defendants. RP 57, 61; CP 10. The trial court largely denied the defendants' motions. CP 68, 99. While the court prevented the officers from testifying how they knew the defendants, it allowed them to offer an

opinion if the State demonstrated they had sufficient contact with the defendants. RP 68, 99. At trial, Detective Clayton Slominski testified one of the men in the video was Mr. Bowman's co-defendant, Kevin Everson. RP 527. Counsel for Mr. Everson objected, but the court overruled this objection. RP 527. After the State rested, Mr. Everson moved for a mistrial, and Mr. Bowman joined in the motion. RP 674-75.

As Mr. Everson argued in support of his motion, his interaction with the detective was extremely limited. RP 674. Unlike in *Hardy*, where the officer had a longstanding relationship with the defendants, Detective Slominski's contact with Mr. Everson was limited to two interviews he conducted of Mr. Everson. RP 568. These interviews took place after the detective viewed the surveillance video and after another officer identified Mr. Everson as being one of the men in the video. RP 522, 554-55. The interviews lasted no longer than one hour. RP 568.

The trial court denied the motion, finding the detective had spent a sufficient amount of time with Mr. Everson to permit him to opine that that one of the individuals on video was Mr. Everson. RP 693. In making its ruling, the trial court failed to consider whether Detective Slominski was more likely to correctly identify the defendant than the jury. RP 693. The jury sat through five days of trial with Mr. Everson and undoubtedly had a greater ability to closely observe him than the detective.

Thus, as in *George*, the detective's limited contacts with Mr. Everson subsequent to the commission of the crime did not provide a basis upon which to conclude the detective was more likely to correctly identify the defendant then the jury. 150 Wn. App. at 119. The trial court's ruling to the contrary was error. *George*, 150 Wn. App. at 119; *see also State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) (the trial court abuses its discretion when it applies the wrong legal standard).

c. This Court should grant review.

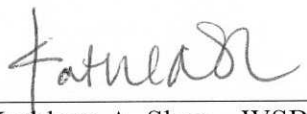
The Court of Appeals found no error in the trial court's admission of the identification because it found there "was some basis for concluding Slominski was more likely to correctly identify Everson than the jury." App. at 7. This decision cannot be reconciled with *Hardy* and *George*, where the court previously drew a distinction between an officer who knew the defendant prior to the arrest and an officer who simply observed the defendant during an arrest and subsequent interview. The court's decision in this case conflicts with the Court's holding in *George*, 150 Wn. App. at 119, and raises an issue of substantial public interest. RAP 13.4(b)(2), (4). This Court should grant review.

E. CONCLUSION

For all of the reasons stated above, this Court should grant review of the Court of Appeals opinion affirming Tyler Bowman's convictions.

DATED this 9th day of August, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN JAMES EVERSON, Defendant, TYLER BAM BOWMAN, and each of them, Appellant.	No. 74548-4-I DIVISION ONE UNPUBLISHED OPINION FILED: July 10, 2017

BECKER, J. — Appellant Tyler Bowman, convicted of burglary along with co-defendant Kevin Everson, alleges two errors in the admission of evidence. A detective was allowed to give his opinion that Everson was the person whose image was captured in a surveillance video of the burglary. Another officer was allowed to testify that Bowman and Everson were seen together shortly after the alleged burglaries under suspicious circumstances. Finding no abuse of discretion, we affirm.

The images of two men were captured by surveillance video as they were burglarizing a yoga studio and a restaurant in Kirkland around 4 a.m. on January 20, 2015. The videotapes showed them approaching the restaurant from the

outside, then crawling along the floor toward a safe. They fled when an alarm was triggered.

Detective Clayton Slominski extracted still frame photographs of the faces of the two men from the video. He had the photographs sent to regional law enforcement agencies to see if anyone might be able to identify the suspects. Everett detective Michael Atwood saw the photographs, recognized Bowman, and contacted Slominski. Slominski then e-mailed the photographs to Staci Rickey, Bowman's community corrections officer, who also recognized Bowman.

Three weeks later, Bothell police officer Michael Szilagyi contacted Slominski and said he had seen Bowman with Kevin Everson. Slominski pulled Everson's driver's license photo and concluded that Everson was the other man in the surveillance video.

Bowman and Everson were each charged with two counts of burglary in the second degree. They were tried together. Neither testified. The primary issue was whether they had been properly identified as the men in the video.

At trial, Atwood and Rickey identified Bowman in the still image taken from the surveillance video. Atwood testified that he recognized Bowman within seconds of seeing the still image. He said he had known Bowman for eight years and met with him about eight times. He said he recognized Bowman's distinctive sharp jawline and cheekbones. Rickey testified that she too recognized Bowman's sunken cheeks and distinct nose and jawline in the still image. She said she had known Bowman for over a year and had met with him eight times, including the day before the charged burglaries.

The jury heard evidence derived from Bowman's cell phone records that his cell phone pinged off a tower one half mile away from the location of the burglaries at 3:35 a.m. the morning of the burglaries.

The jury found Bowman and Everson guilty as charged. Bowman appeals.

IDENTIFICATION OF EVERSON

Before trial, Bowman and Everson moved to prevent the State's witnesses from identifying them in the surveillance video. The court denied the motion.

At trial, in addition to the testimony of Atwood and Rickey identifying Bowman, Detective Slominski testified that Everson was one of the men depicted in the video. Bowman joined Everson's motion for a mistrial alleging that allowing Slominski to make this identification of Everson was prejudicial error. The court denied the motion: "I think that the time spent with the defendant . . . and the close proximity between the defendant and the detective warrant his ability to make a lay opinion about who he believes is depicted in the surveillance video."

Bowman assigns error to this ruling. We review for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

A lay witness may give opinion testimony if it is rationally based on the perception of the witness and helpful to a clear understanding of the testimony or the determination of a fact in issue. ER 701. A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify

the defendant from the photograph than is the jury. State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd, 129 Wn.2d 211, 916 P.2d 384 (1996).

Slominski stated his opinion that Everson was the person pictured after having spent only an hour with Everson in person. The Ninth Circuit has discussed the reasons why such testimony runs the risk of invading the province of the jury:

> Lay opinion testimony of the type given by Miller is of dubious value. The jury, after all, was able to view the surveillance photos of LaPierre and make an independent determination whether it believed that the individual pictured in the photos was in fact LaPierre. Miller's testimony therefore ran the risk of invading the province of the jury and unfairly prejudicing LaPierre. For these reasons we have held that while lay opinion testimony of this sort is sometimes permissible, "the use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977). . . .
>
> . . . There was no evidence that LaPierre's courtroom appearance and his appearance at the time of the robbery were significantly different. Moreover, Miller not only did not know LaPierre, he had never even seen him in person. Miller's knowledge of LaPierre's appearance was based entirely on his review of photographs of LaPierre and witnesses' descriptions of him. We can perhaps imagine a hypothetical scenario in which a witness who knew a defendant only through photographs nonetheless had become sufficiently familiar with his appearance to give lay opinion testimony of this sort. But this is not such a case. Miller's level of familiarity with LaPierre's appearance falls far short of that required by our cases and by Rule 701's requirement of helpfulness. Whether the person sitting before the jury was the one pictured in the surveillance photographs was a determination properly left to the jury.

United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993).

Notwithstanding these concerns, we held in Hardy that an officer's opinion testimony was properly admitted. In Hardy, a consolidated appeal, a police

officer identified two defendants as the individuals shown on a "somewhat grainy videotape" that was introduced at trial. Hardy, 76 Wn. App. at 191. The officer testified that he had known one defendant for "several years" and the other defendant "for 6 or 7 years and considered him a friend." Hardy, 76 Wn. App. at 191-92. Affirming, this court held the trial court did not err in admitting the officer's identification testimony. Because of the officer's longstanding relationship with each defendant, the officer was in a better position than was the jury to determine whether they were the persons shown in the videotape. Thus, the officer's testimony "was helpful to the jury." Hardy, 76 Wn. App. at 191.

Bowman argues that his case is more like State v. George, 150 Wn. App. 110, 206 P.3d 697, review denied, 166 Wn.2d 1037 (2009). In George, the trial court abused its discretion in allowing a detective to identify the two defendants as the individuals depicted in a surveillance video of a motel robbery. George, 150 Wn. App. at 119. The detective had observed one defendant as he got out of a van and ran away, and at a hospital later that evening. The detective had observed the other defendant while he was getting out of a van and being handcuffed and later while he was at the police station in an interview room. George, 150 Wn. App. at 119. It is not clear exactly how long the detective spent observing either defendant. The detective could not make out facial features in the surveillance video. He identified the defendants in the video by "each defendant's build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, and how they compared to the rest of the people in the van, and from speaking with them on the day of the

crime." George, 150 Wn. App. at 119 (footnote omitted). On appeal, the court held that the detective's contacts with the defendants fell "far short of the extensive contacts in Hardy" and did not support a finding that the officer knew enough about the defendants to express an opinion that they were the robbers shown on "the very poor quality video." George, 150 Wn. App. at 119.

Here, Slominski interviewed Everson for about 45 minutes sitting 3 or 4 feet across from him at a small table in a small jail interrogation room. Three days later, Slominski arrested Everson and spent about 15 minutes with him at that time. Slominski had not known Everson previously, but he had a better opportunity to become familiar with Everson's appearance than was the case in George. Another difference from George is that the image Slominski had for comparison showed Everson's facial features fairly clearly. Slominski's face-to-face interview of Everson and his opportunity to observe him at close quarters while arresting him provide a tenable basis for concluding that Slominski was more likely than the jury to correctly identify Everson from the video images.

The jury viewed the surveillance video and the still images captured from the video, and had Everson's driver's license photo to use for comparison as well. In closing, the State asked the jury "to look at the video and make the comparison yourself to the still images that you will have with you in evidence, to that of Mr. Everson." Like in Hardy, the jury was free to disbelieve the detective's testimony and reach its own conclusion on the issue of identification. Like in Hardy, we reject the appellant's argument that the detective's opinion testimony invaded the province of the jury.

Because there was some basis for concluding that Slominski was more likely to correctly identify Everson than was the jury, the trial court did not abuse its discretion in allowing Slominski to identify Everson in the video.

POSTBURGLARY ENCOUNTER

Before trial, Bowman moved to exclude Officer Szilagyi's testimony about his encounter with Bowman and Everson a few weeks after the burglary. The trial court denied the motion.

Officer Szilagyi testified that he was on patrol in Bothell around 3 a.m. on February 12, 2015, when he saw Bowman and Everson walking together through a parking lot of closed businesses. He approached them because "I thought that to be strange. There's no open businesses in the area at that time, and it's not really a pedestrian traffic area. So it seemed a little bit suspicious to me that there would be two people walking through the parking lot at that time." They gave him their names, and he confirmed the names were correct. He testified the men told him they were waiting for a friend so that they could check into a nearby hotel room, and he said there were in fact two hotels fairly nearby. The officer said his entire contact with the men lasted two to three minutes. He said the men were not evasive and did not try to run away.

Bowman argues that Officer Szilagyi's testimony was irrelevant and unfairly prejudicial.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

The State had to prove Bowman and Everson were the burglars pictured on the surveillance video. Apart from the video itself, Officer Szilagyi's testimony was the only evidence linking the two defendants. As the State argued in closing, the officer's testimony showed that the defendants "are not strangers to one another. They know one another, they hang out together." This made it more probable that Bowman and Everson were the two men shown in the surveillance video.

Bowman argues that the evidence was extraordinarily prejudicial because it suggested to the jury that the defendants were surveying possible locations to commit a second, similar crime. Officer Szilagyi did say that finding Bowman and Everson in the parking lot of closed businesses at three in the morning was "a little bit suspicious," but he then testified they did not try to avoid him, they provided proper identification, and they had a plausible reason for being there. The State used the officer's testimony only as evidence that Bowman and Everson knew each other. Because Bowman has not shown that the probative value was substantially outweighed by the danger of unfair prejudice, we find no abuse of discretion in the admission of Officer Szilagyi's testimony.

No costs will be awarded on appeal unless the State provides evidence that Bowman's financial circumstances have significantly improved since the trial court's finding of indigency. RAP 14.2.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74548-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 9, 2017

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