

70905-4

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NO. 70905-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISATOU CEESAY,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SEAN P. O'DONNELL

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A lay witness may give opinion testimony regarding the identity of a person depicted in a 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. Here, the trial court permitted Detective Lofink to identify Isatou Ceesay as the woman depicted in a driver's license photograph previously admitted as an exhibit at trial. Did the trial court abuse its discretion in admitting Detective Lofink's identification testimony over Ceesay's objection? Alternatively, was any alleged error harmless in light of the other evidence presented at trial?

B. STATEMENT OF THE CASE

The State charged Isatou Ceesay with first degree criminal impersonation, forgery, and first degree identity theft. At trial, the State introduced evidence that Ceesay had worked at Alpha Supported Living Services (hereinafter "Alpha") from May 2010 until she was terminated in September 2011. RP (7/31) 9-14; RP (8/1) 22-23. Throughout the time that Ceesay worked at Alpha, she asserted that her name was "Sainabou Hydara." Alpha employees Kristopher Brown, Mary Barrow, and Colleen Heins all worked with

Ceesay, had face to face interactions with her, and knew her as Sainabou Hydara. RP (7/31) 12, 70-71; RP (8/1) 23.

Ceesay's job application and the post-hiring direct deposit slip that she submitted to Alpha stated that her name was Sainabou Hydara. RP (7/31) 21; RP (8/1) 30. The name on the voided check she attached to the direct deposit slip to indicate which bank account should receive payment, however, was Isatou Ceesay and the address was Ceesay's. RP (8/1) 27-31. A section of the paperwork was also initialed with an "I" that was crossed out and "SB" written in. Ex. 2.

The discrepancy between who Ceesay said she was and who she actually was came to Alpha's attention in September 2011. RP (8/1) 25-26. Brown and Barrow met and reviewed the employment file titled "Hydara" in an attempt to resolve the issue. RP (7/31) 33. Brown and Barrow compared the photo on a driver's license issued to Sainabou Hydara with the employee photo of the person they knew as Hydara. RP (7/31) 33-37, 46-47; RP (8/1) 34-36, 37-38. They also compared the signatures on that driver's license with the signatures in the employee file. Id. Brown and

Barrow determined that the photos and signatures did not match, so they called the phone number listed on the application.

Id.; RP (8/1) 25-26. Ceesay answered the phone and they set a meeting. RP (8/1) 25-26. Ceesay, however, failed to attend that meeting and never returned to Alpha. RP (7/31) 15; RP (8/1) 26.

The phone number that Brown and Barrow called was registered to Joseph King. RP (7/31) 87. Ceesay and Joseph King are married. RP (7/30) 29. When Detective Raymond Lofink called the same number during the course of his investigation, a woman who identified herself as "Isatou" answered the phone. RP (7/31) 88-89.

While investigating the case, Detective Lofink took steps to confirm the identity of the person who had applied to Alpha. RP (7/31) 79. In order to confirm identity, Detective Lofink ran records checks for both Hydera and Ceesay and obtained copies of Hydera and Ceesay's driver's license photos. RP (7/31) 79-80. Detective Lofink then compared the photos and other records to the documents that he had received from Alpha and conducted other investigation including comparing the photos. RP (7/31) 79, 82-90.

At trial, the driver's license photos of Hydera and Ceesay were admitted into evidence without objection. RP (7/31) 80-81. During direct examination, the prosecutor asked Detective Lofink whether either of the exhibits bore resemblance to anyone in court. RP (7/31) 81. Detective Lofink indicated that they did and stated: "It is my opinion that the person depicted in exhibit 9, or the driver's license for Isatou Ceesay, is the young lady sitting at the table in front of me." Id. Defense counsel objected to this testimony, claiming it was "improper opinion" that invaded the province of the jury. RP (7/31) 82. The court overruled the objection. Id.

Alpha employees Brown, Barrow, and Heins identified Ceesay in court as the woman they knew only as "Sainabou Hydera." RP (7/31) 12, 70-71; RP (8/1) 23. Another witness, Tammy Baldwin, testified that Ceesay was her former coworker at Camelot Society and that she knew her as "Isatou Ceesay." RP (7/31) 6-7. Baldwin identified Ceesay in court as the woman that she knew as "Isatou Ceesay." RP (7/31) 6.

The jury convicted Ceesay of impersonation and forgery but acquitted her of identity theft. RP (8/2) 9-10.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING DETECTIVE LOFINK'S OPINION.

Ceesay contends the trial court erred in admitting Detective Lofink's testimony that the person depicted in Ceesay's driver's license was "the young lady sitting at the table in front of me." 7/31/13 RP at 81. She argues the testimony constituted an improper opinion that invaded the province of the jury. This claim fails because the trial court acted within its wide discretion and the alleged error was, in any event, harmless. This court should affirm.

This court reviews a trial court's decision to admit lay opinion testimony for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). See also State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (noting that such testimony may have constitutional implications but the standard of review is abuse of discretion). Under this deferential standard, reversal is warranted only when the court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). The court has "wide discretion" when determining the

admissibility of evidence. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

A lay witness may give opinion testimony regarding the identity of a person depicted in a 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, 190-91, 884 P.2d 8 (1994) (citations omitted). Here, Detective Lofink spent time during his investigation examining the photograph he compared to Ceesay in court. Additionally, he had previously compared the same photograph of Ceesay to other images of Ceesay. 7/31/13 RP at 82. While he may not have previously seen Ceesay in person, the detective’s prior experience with the photograph provides a basis from which the court could conclude that Detective Lofink was more likely to correctly identify Ceesay in the photograph than the jury could.

Citing State v. George, 150 Wn. App. 110, 206 P.3d 697 (1997), Ceesay argues that the court erred in admitting Detective Lofink’s testimony because “[Detective] Lofink had no better basis for making that identification than did the jury.” Appellant’s Br. at 4. George is distinguishable from the facts presented here. In George, the officer observed a fuzzy surveillance video and

identified the defendants in the video based on “each defendant’s build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and from speaking with them the day of the crime.” Id. at 118. Here, Detective Lofink identified Ceessay based on a clear photograph of her facial features and other photos he had seen of her during the course of his investigation. Unlike the image the officer looked at in George, the image was not of “very poor quality.” Additionally, Detective Lofink identified Ceessay not based on her build or how she moved, but based on specific facial characteristics that he had experienced in comparing multiple photographs of her. Because of these different facts, George is distinguishable.

2. ANY ERROR WAS HARMLESS.

Even if the trial court abused its discretion by admitting Detective Lofink’s testimony, the error was harmless within reasonable probabilities.

Evidentiary error is grounds for reversal only if it results in prejudice. An error is prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Improper admission of evidence constitutes

harmless error if the evidence is of minor significance in reference to the evidence as a whole.

State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (citation omitted) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Here, any error in allowing Detective Lofink's identification testimony was harmless because overwhelming evidence corroborated the identification testimony.

The photograph that Detective Lofink identified as Ceesay was admitted into evidence without objection and available to the jury during deliberations. The jury was free to view the photograph and compare it to Ceesay's appearance in court. The jury was not bound by Detective Lofink's testimony and the error was, therefore, harmless and not an invasion into the province of the jury. Hardy, 76 Wn. App. at 191 (opinion testimony regarding identity of person in videotape did not invade the province of the jury where the jury viewed the videotape and was free to disbelieve the officer and reach its own conclusion regarding identity).

Moreover, Detective Lofink's testimony was harmless in light of the overwhelming evidence presented at trial. In George, the Days Inn employee who was at the front desk during the robbery identified George as the gunman. State v. George, 150 Wn. App.

at 119. The court found that the employee's identification and other evidence presented was sufficient to render the improperly admitted officer identification testimony harmless. Here, as in George, witness testimony and other evidence corroborated Ceesay's identity. Baldwin identified Ceesay in court as her former coworker at Camelot Society and testified that she knew this woman as "Isatou Ceesay." RP (7/31) 6. Additionally, Ceesay's address, phone number, and checking account number were all contained in the documents submitted to Alpha. RP (7/30) 29; RP (7/31) 87, 88-89; RP (8/1) 27-31. These documents and the employee photo of "Hydara" were all admitted without objection at trial. RP (7/30) 24-26; RP (7/31) 20-21; RP (8/1) 27-29. Three people who had worked with Ceesay at Alpha identified her as the woman they knew as "Hydara." RP (7/31) 12, 70-71; RP (8/1) 23. In light of the overwhelming evidence establishing Ceesay's identity, any improper testimony by Detective Lofink did not materially affect the verdict and constitutes harmless error under Hardy and George.

D. CONCLUSION

For the foregoing reasons, this court should affirm Ceesay's convictions.

DATED this 2nd day of July, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ISATOU CEESAY, Cause No. 70905-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston
Name
Done in Seattle, Washington

7/2/14
Date