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October 5, 2016
Court of Appeals
Division I
State of Washington

No. 74548-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TYLER BOWMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted evidence suggesting Tyler Bowman and his co-defendant were preparing to commit a crime similar to the crime charged.

2. The trial court erred when it permitted a detective to opine the co-defendant, Kevin Everson, was the individual depicted in the surveillance video.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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 appeared suspicious. Given that this evidence was irrelevant and extremely prejudicial, did the trial court commit reversible error?

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, simply observing the individual during an interview is not sufficient. Is reversal required where a detective was permitted to testify the co-defendant was the individual shown in the surveillance video, based only on the fact he had interviewed the co-defendant twice while investigating the case?

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.

D. ARGUMENT

- 1. The trial court erroneously permitted the State to present unfairly prejudicial evidence that Mr. Bowman was preparing to commit a crime similar to the crime charged.**

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.

This Court 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*, this Court reversed after a witness testified the defendant had committed the same or similar crime “again.” 51 Wn. App. at 832. In *Escalona*, this Court 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 been previously convicted of 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.

In addition, the probative value of the evidence was low. Showing the defendants were together three weeks after the burglary did not prove they were together on the night of the burglary. Any inference that could be drawn in the State's favor was substantially outweighed by the risk of unfair prejudice. ER 403; *Beadle*, 173 Wn.2d at 120. When the trial court denied Mr. Bowman's motion to exclude this evidence, it erred.

b. This Court should reverse.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). Where there is a risk of prejudice and

no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

The irrelevant and inflammatory evidence admitted against Mr. Bowman suggested that was guilty of the charged crimes because he was preparing to commit a similar crime only a few weeks later. Given the extremely prejudicial nature of this evidence, the error cannot be deemed harmless. This Court should reverse.

2. The trial court erred when it permitted a detective to identify Mr. Bowman's co-defendant in the surveillance video.

- 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, this Court 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). This 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*, this 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, this 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.* This 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 move 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 than 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. Reversal is required.

The court's error was not harmless. *See George*, 150 Wn. App. at 119. Although two witnesses opined Mr. Bowman was depicted in the images, Detective Slominski was the only individual who identified Mr. Everson as being depicted in the surveillance video. Because other, improperly admitted, evidence demonstrated Mr. Everson and Mr. Bowman knew each other, and spent time together in the early morning hours, Detective Slominski's identification of Mr. Everson significantly prejudiced Mr. Bowman. This Court should reverse.

E. CONCLUSION

This Court should reverse because the trial court erroneously permitted the State to present unfairly prejudicial evidence that Mr. Bowman was later preparing to commit a crime similar to the charged crime. Reversal is also required because the trial court erroneously permitted a detective to identify Mr. Bowman's co-defendant in the surveillance video.

Mr. Bowman is indigent and represented by appointed counsel on appeal. In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5; *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016); *City of Richland v. Wakefield*, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 5344247 at *5 (No. 92594-1, September 22, 2016).

DATED this 5th day of October, 2016.

Respectfully submitted,



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Respondent,)	
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TYLER BOWMAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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