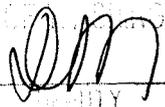


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STATE OF WASHINGTON

BY:   
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Nº. 34309-6-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON  
Respondent,

v.

JAMES S. ANDERSON,  
Appellant.

---

OPENING BRIEF OF APPELLANT

---

Appeal from the Superior Court of Pierce County,  
Cause No. 04-1-05095-4  
The Honorable D. Gary Steiner, Presiding Judge

---

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**ORIGINAL**

**TABLE OF CONTENTS**

	<u>Page</u>
<b>A. ASSIGNMENTS OF ERROR</b> .....	1
<b>B. ISSUES PRESENTED</b>	
1. Did the State present sufficient evidence to convict Mr. Anderson of robbery in the first degree where the only evidence the State presented linking Mr. Anderson to the robbery was the testimony of two informants who were testifying pursuant to plea bargains, who were not present at the time of the crime, did not observe the crime, only learned of the defendant’s involvement in the crime through unsubstantiated hearsay, based their conclusion that Mr. Anderson was involved in the crime because he had a stack of cash, and were unable to consistently identify Mr. Anderson as one of the individuals depicted in pictures taken by surveillance cameras? .....	1
2. Is a defendant denied his right to a fair trial where lay witnesses invade the fact-finding province of the jury by offering lay opinion testimony about the identity of an individual in a surveillance photograph?.....	1
3. Does a trial court abuse its discretion in allowing a lay witness to give opinion testimony identifying the defendant in a surveillance video where the witness has no first hand basis for his knowledge?.....	1
<b>C. STATEMENT OF THE CASE</b> .....	2

**D. ARGUMENT**

1. The State presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Anderson committed robbery in the first degree .....9
2. The testimony of Mr. Brewer and Mr. Hunt regarding the identity of the individuals pictured in the surveillance photographs was a trial irregularity which denied Mr. Anderson his right to a fair trial ..... 11
  - a. *The irregularity allowing the lay opinion testimony was serious* ..... 12
  - b. *The statements of Mr. Brewer and Mr. Hunt were not cumulative of any other evidence* ..... 15
  - c. *No instruction could have cured the prejudice caused by the trial irregularity in this case* ..... 16
3. The trial court erred in denying Mr. Anderson's motion to suppress Mr. Brewer's testimony ..... 16

**D. CONCLUSION** ..... 17

**TABLE OF AUTHORITIES**

Page

**Table of Cases**

Federal Cases

*U.S. v. Saniti*, 604 F.2d 603, *cert. denied* 444 U.S. 969, 100 S.Ct. 461, 62 L.Ed.2d 384 (1979)..... 12-13

Washington Cases

*Hollingsworth v. Washington Mut. Sav. Bank*, 37 Wn.App. 386, 681 P.2d 845 (1984), *review denied*, 103 Wn.2d 1007 (1984), *abrogated on other grounds, Allison v. Housing Authority or City of Seattle*, 59 Wn.App. 624, 799 P.2d 1195 (1990) ..... 13

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) ..... 16

*State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987)..... 11

*State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).... 16

*State v. Hardy*, 76 Wn.App. 188, 884 P.2d 8 (1994), *affirmed on other grounds, State v. Clark*, 129 Wash.2d 211, 916 P.2d 384 (1996) ..... 15

*State v. Jamison*, 23 Wn.App. 454, 597 P.2d 424 (1979), *affirmed*, 93 Wash.2d 794, 613 P.2d 776 (1980)..... 14

*State v. Jamison*, 93 Wn.2d 794, 613 P.2d 776 (1980)..... 12, 14

*State v. Post*, 59 Wn.App. 389, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992) ..... 11

*State v. Zakel*, 61 Wn. App. 805, 812 P.2d 512 (1991),  
*affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992) .....9

**Other Authorities**

ER 602.....13

ER 701.....12

Fed.R.Evid. 701 .....12

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Anderson of Robbery in the First Degree.
2. A trial irregularity denied Mr. Anderson his right to a fair trial.
3. The trial court erred in denying Mr. Anderson's motion to suppress Mr. Brewer's identification of Mr. Anderson on the surveillance video.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the State present sufficient evidence to convict Mr. Anderson of robbery in the first degree where the only evidence the State presented linking Mr. Anderson to the robbery was the testimony of two informants who were testifying pursuant to plea bargains, who were not present at the time of the crime, did not observe the crime, only learned of the defendant's involvement in the crime through unsubstantiated hearsay, based their conclusion that Mr. Anderson was involved in the crime because he had a stack of cash, and were unable to consistently identify Mr. Anderson as one of the individuals depicted in pictures taken by surveillance cameras? (Assignment of Error No. 1)
2. Is a defendant denied his right to a fair trial where lay witnesses invade the fact-finding province of the jury by offering lay opinion testimony about the identity of an individual in a surveillance photograph? (Assignments of Error Nos. 2 & 3)
3. Does a trial court abuse its discretion in allowing a lay witness to give opinion testimony identifying the defendant in a surveillance video where the witness has no first hand basis for his knowledge? (Assignments of Error Nos. 2 & 3)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On April 8, 2004, the Safeway store located on Sixth Avenue was robbed. RP 200. Police responded to the scene, but the only evidence recovered was the statements of the two employees in the store and the surveillance video revealing images of the three black males who robbed the store. RP 200-209. The store employees were only able to provide general height and weight descriptions of the robbers. RP 203-204. No fingerprints were recovered from the scene. RP 416.

At trial, neither store clerk could identify any person in the courtroom as one of the men who had robbed the store. RP 237, 264. Jerry Medacco, one of the clerks (RP 219) was shown a photomontage by the police but did not recognize any of the individuals depicted. RP 241, 359-360.

From late March into May of 2004, a string of robberies were committed in Tacoma. RP 356-357. During the course of investigating these robberies, the police concluded that the same people were committing the robberies based on the descriptions of the perpetrators. RP 358. At one crime scene the police recovered a fingerprint which led them to believe a certain individual had committed that crime. RP 358-359. The fingerprint belonged to Terrance Tadford and Mr. Anderson was a

known associate of Mr. Tadford. RP 381. Prior to the discovery of this fingerprint, Mr. Anderson was not suspected to be involved in any of these robberies. RP 359.

The police officers had compiled a list of names of people the police believed were involved in the robberies. RP 361. Mr. Anderson was not one of those people. RP 361. Several of these individuals were arrested during a traffic stop, but Mr. Anderson was not in the vehicle. RP 361.

The police questioned the individuals arrested in the traffic stop about the series of robberies. RP 361. Several individuals refused to talk to police, but two others, Robert "Jimmy" Hunt and Marlon Brewer (RP 364), admitted participation in the robberies and provided the police with more information. RP 362.

During the initial interviews, Mr. Anderson's name was not mentioned. RP 362. However, street names and nicknames were given. RP 362. The names given to the police by Mr. Hunt and Mr. Brewer matched the names given to police through Crime Stoppers tips. RP 362-363.

During the course of the police investigation prior to Mr. Hunt and Mr. Brewer talking to the police, the police had determined that the individual with the street name of "Murdock" was Mr. Anderson. RP 367.

Mr. Anderson was suspected to be involved with the robbery of the Safeway only. RP 367.

Mr. Brewer was shown a series of still pictures taken from the Safeway surveillance cameras and identified "Murdock" as one of the individuals in the pictures. RP 366-367. Mr. Brewer was shown a booking photo of Mr. Anderson and identified him as "Murdock." RP 367. Mr. Brewer did not know Mr. Anderson's real name, but knew him only as "Murdock." RP 368.

Mr. Hunt was shown the exact same photographs as Mr. Brewer. RP 370-371. Mr. Hunt identified the photograph of Mr. Anderson as Mr. Anderson and informed police that Mr. Anderson went by the street name of "Murdock" or "Dock." RP 370-371.

Mr. Hunt and Mr. Brewer were inconsistent in identifying which individual in the surveillance photographs was Mr. Anderson. RP 375-376.

Mr. Brewer and Mr. Hunt were not present at the Safeway robbery. RP 382, 457. Some other suspects had told Mr. Brewer about the Safeway robbery. RP 382. When the police asked Mr. Brewer if Mr. Anderson had told him about the robbery, Mr. Brewer told the police that he "didn't really have communication with him like that." RP 382-384, 403-404. Mr. Brewer got his information about the Safeway robbery from another

suspect, Mr. Antoine Goolsby, also known as "Jody." RP 384, 403-404. Mr. Anderson never had any conversations with Mr. Brewer, and Mr. Anderson never told Mr. Brewer that he was involved in the Safeway robbery. RP 458. Mr. Brewer never robbed anything with Mr. Anderson, Mr. Brewer never saw Mr. Anderson rob anything, and what Mr. Brewer told the police was hearsay. RP 385-386. Mr. Hunt also did not participate in the Safeway robbery at issue. RP 388.

Mr. Brewer first met Mr. Anderson at the MJD Deli after the Safeway had been robbed. RP 437-438. Mr. Brewer was not introduced to Mr. Anderson, and never spoke to Mr. Anderson, but was told by Mr. Goolsby that Mr. Anderson was "Dock." 438-439. Mr. Goolsby got out of the car Mr. Brewer was in and spoke to Mr. Anderson. RP 441. Mr. Anderson did not have any distinguishing characteristics, other than a "rugged" or scruffy beard. RP 441. Mr. Brewer observed Mr. Anderson for ten minutes. RP 471.

The only basis for Mr. Brewer's knowledge of the robbery of the Safeway was what Mr. Goolsby told him about it. RP 441-442. Mr. Goolsby did not tell Mr. Brewer about the robbery of the Safeway store until some point after the robbery had occurred. RP 443. Mr. Brewer was only told about the Safeway robbery one time (RP 445), Mr. Anderson was not present when Mr. Goolsby told Mr. Brewer about the Safeway

robbery (RP 444), and Mr. Brewer could not remember where he was when Mr. Goolsby told him about the Safeway robbery. RP 446. The State conceded that Mr. Brewer was unable to keep track of events based on time, date, and place. RP 453.

Mr. Hunt testified that he first met Mr. Anderson at some apartments on 38<sup>th</sup> St. on the 1<sup>st</sup> or 2<sup>nd</sup> of April, 2004. RP 495-496, 514-515. Mr. Hunt had never seen Mr. Anderson before this meeting. RP 497. Mr. Hunt testified that when he first saw Mr. Anderson, Mr. Anderson had a “low” beard and mustache and “low” hair. RP 498-499. At trial, Mr. Anderson was bald and clean shaven. RP 499.

While at the apartment, Mr. Hunt had a conversation with Mr. Anderson and Mr. Goolsby wherein Mr. Hunt complained he was not making enough money selling dope. RP 501. Mr. Goolsby invited Mr. Hunt to join him in performing robberies. RP 501.

Several days later, Mr. Hunt saw Mr. Anderson at a car wash. RP 502. Mr. Hunt did not speak to Mr. Anderson regarding any robberies while at the car wash. RP 503.

Two or three days after seeing Mr. Anderson at the car wash, Mr. Hunt saw Mr. Anderson at Carmen’s house. RP 503. Mr. Goolsby, an individual named “Mitch-Mitch”, an individual named “BG”, and Carmen were there. RP 503. The other people present were talking about

committing robberies, including the robbery of the Safeway. RP 504-505.

Mr. Hunt could not recall if Mr. Anderson said anything about the robbery, only that there was discussion about the robbery. RP 506.

Mr. Hunt was not present at the robbery of the Safeway, was not involved in the robbery of the Safeway, and based his conclusion that Mr. Anderson had been involved in the robbery on Mr. Anderson showing Mr. Hunt some money. RP 509.

The only evidence the police had tying Mr. Anderson to the robbery of the Safeway was the statements of Mr. Hunt and Mr. Brewer. RP 391.

During the investigation of the robbery, Mr. Anderson was in California. RP 395.

From April 1 to April 6, 2004, Mr. Anderson was incarcerated in the Los Angeles County Jail. RP 550. Mr. Anderson spent all day on April 7, 2004, with his girlfriend, Ms. Hasani Ballard-Martinez in Lancaster, California. RP 532-533. On April 8, 2004, Mr. Anderson was in bed with Ms. Ballard until 11 or 11:30. RP 533-534.

On November 2, 2004, Mr. Anderson was charged with robbery in the first degree based on the April 8, 2004 robbery of the Safeway store. CP 1-5.

Mr. Anderson represented himself at trial. RP 3.

Prior to trial, Mr. Anderson moved to suppress the statements of Mr. Brewer identifying Mr. Anderson as one of the people depicted in the surveillance photographs. RP 42-46, CP 54-58. Mr. Anderson moved for suppression of Mr. Brewer's statements on grounds that Marlon Brewer had no first-hand factual knowledge or observations about the robbery and therefore could not offer testimony about Mr. Anderson's presence at the robbery. RP 43. The trial court denied the motion. RP 45-46.

At trial, Mr. Brewer and Mr. Hunt observed pictures taken from the surveillance camera at the Safeway and testified that they recognized one of the people in the photographs as Mr. Anderson. RP 459-467, 510-513. Mr. Brewer initially identified one person in the photographs as Mr. Anderson, but after a short recess changed his mind and identified someone else as Mr. Anderson because the person initially identified by Mr. Brewer as Mr. Anderson was wearing rings in the picture, and Mr. Goolsby was known to Mr. Brewer to wear lots of rings. RP 459-467. Mr. Brewer identified the individual wearing a white hat in plaintiff's exhibit 30 as Mr. Anderson. RP 466. Mr. Hunt identified the person wearing the white hat in plaintiff's exhibit 30 as "Mitch-Mitch," not Mr. Anderson. RP 510-511.

The jury found Mr. Anderson guilty of robbery in the first degree. CP 99. Notice of appeal was timely filed on January 13, 2006. CP 123-134.

D. ARGUMENT

1. **The State presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Anderson committed robbery in the first degree**

Challenges to sufficiency of evidence are reviewed by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

Here, the only evidence presented by the State linking Mr. Anderson to the robbery of the Safeway was the statements of Mr. Brewer and Mr. Hunt. RP 391. Neither Mr. Brewer nor Mr. Hunt were present at or participated in the robbery, and neither had any first-hand knowledge of the robbery. RP 382-388, 457, 509. Mr. Brewer's knowledge about the robbery came from the unsubstantiated hearsay statements of Mr. Goolsby (RP 441-442) and Mr. Hunt based his conclusion that Mr. Anderson had

been involved in the robbery on the facts that Mr. Anderson had a stack of cash and other people claimed to have robbed the Safeway. RP 509.

Mr. Brewer and Mr. Hunt gave conflicting testimony regarding the identity of the individuals pictured in the surveillance photographs, calling the accuracy of their testimony into doubt.

Mr. Anderson's girlfriend testified that Mr. Anderson had been in prison on April 1 and 2, 2004, the dates Mr. Hunt claimed to have met Mr. Anderson for the first time. Further, Mr. Anderson's girlfriend testified that Mr. Anderson was in bed with her in California at the time the robbery was committed.

The State presented no physical or eyewitness testimony which would link Mr. Anderson to this crime. The only evidence that presented by the State that Mr. Anderson participated in the robbery of the Safeway was the inconsistent in-court identification of Mr. Anderson as one of the men in the surveillance photographs, the unsubstantiated hearsay statements of Mr. Goolsby presented through Mr. Brewer, and the presumption by Mr. Hunt that Mr. Anderson had robbed the Safeway because he had a stack of cash. As Judge Steiner stated, "the information in all these cases comes substantially from Mr. Goolsby, an accomplice that did not testify but provided the information of which these folks testified." RP 562. Judge Chushcoff echoed this sentiment when he

stated, "the evidence in this case is based upon the testimony of two folks who weren't there who, basically, said Goolsby told us this." RP 654.

Judge Chushcoff stated that there was a "relative scarcity of information linking Mr. Anderson" to the robbery. RP 655.

A reasonable jury would not have found that the scant uncorroborated evidence presented by the State was sufficient to convict Mr. Anderson.

**2. The testimony of Mr. Brewer and Mr. Hunt regarding the identity of the individuals pictured in the surveillance photographs was a trial irregularity which denied Mr. Anderson his right to a fair trial.**

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court examines the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

*State v. Escalona*, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

Here, the trial irregularity was the court allowing the introduction of the testimony of Mr. Brewer and Mr. Hunt identifying Mr. Anderson as one of the men in the surveillance photographs.

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999).

*a. The irregularity allowing the lay opinion testimony was serious*

Generally, where witnesses have no special skill, experience, or education concerning the subject matter of their testimony, they must state facts, and not draw conclusions or give opinions. This rule need not be adhered to, however, if the subject matter of the testimony cannot be reproduced and described to the jury precisely as it appeared to the (lay) witness. In such cases, a witness who had had some means of personal observation may relate the basis of his observation and then state his opinion, conclusion, and impression formed from such facts and circumstances as came under his observation. The controlling principle is whether the opinion evidence will assist the jury in correctly understanding matters that are not within their common experience.

*State v. Jamison*, 93 Wn.2d 794, 798, 613 P.2d 776 (1980) (internal citations omitted).

Under both Washington ER 701 and Federal ER 701, “[o]pinion testimony by lay witnesses may be admitted if the opinion is ‘(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue.’” ER 701, Fed.R.Evid. 701, *U.S. v. Saniti*,

604 F.2d 603, 604-605, *cert. denied* 444 U.S. 969, 100 S.Ct. 461, 62 L.Ed.2d 384 (1979).

ER 602 mandates that, “(a) witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” “Stated negatively, [ER 602] bars testimony which purports to relate facts, but which is based only on the reports of others.” *Hollingsworth v. Washington Mut. Sav. Bank*, 37 Wn.App. 386, 393, 681 P.2d 845 (1984), *review denied*, 103 Wn.2d 1007 (1984), *abrogated on other grounds*, *Allison v. Housing Authority or City of Seattle*, 59 Wn.App. 624, 799 P.2d 1195 (1990).

In *Jamison*, a surveillance camera took pictures of two men who robbed an all-night convenience store. This led the police to focus their investigation on Jamison. Police officers ultimately went to the juvenile detention center where Mr. Jamison was housed and showed the pictures to two resident counselors. The counselors told the police that they believed the picture was of Mr. Jamison who had been a resident in the center for over 6 months. At Mr. Jamison’s trial, a Tacoma police officer testified that Mr. Jamison had admitted he was the individual in the photographs and had confessed to committing the robbery. The State also called the two counselors who had identified Mr. Jamison as the individual in the picture and, over Mr. Jamison’s objections, the counselors testified

that they believed the person in the photograph to be Mr. Jamison based on the similarity between the shirt the individual in the photograph was wearing and a shirt Mr. Jamison owned.

On appeal, Mr. Jamison argued that the trial court erred in allowing the testimony of the two counselors since their testimony required no special expertise or knowledge and thus amounted to an impermissible opinion on an ultimate fact within the province of the jury, specifically, the identity of the robber. The Court of Appeals held that “[t]he purpose of the evidence was to assist the trier of facts to clarify a matter not entirely within the common knowledge of the juror.” *State v. Jamison*, 23 Wn.App. 454, 459, 597 P.2d 424 (1979), *affirmed*, 93 Wash.2d 794, 613 P.2d 776 (1980).

Noting that no parties had asserted that the counselors’ opinion testimony was not based on some expertise that would implicate the rules governing expert opinion testimony, the Washington Supreme Court held that the counselors’ knowledge of Mr. Jamison’s appearance placed them in no better position to make the determination of whether the photographs depicted Mr. Jamison, and that the counselors’ testimony was therefore an impermissible invasion of the jury’s province. *Jamison*, 93 Wn.2d at 798-799, 613 P.2d 776.

*Jamison* was decided prior to the adoption of the Washington Rules of Evidence in 1980. At least one court, *State v. Hardy*, 76 Wn.App. 188, 884 P.2d 8 (1994), *affirmed on other grounds*, *State v. Clark*, 129 Wash.2d 211, 916 P.2d 384 (Wash. May 09, 1996), has held that *Jamison* no longer controls the issue of whether or not a lay witness may give an opinion as to the identity of a person in a photograph. However, *Hardy* is a Division One Court of Appeals case and therefore neither overrules *Jamison* nor is binding authority on this court. The Supreme Court opinion affirming the Court of Appeals did not address *Jamison* or lay opinion testimony. Further, *Hardy* is factually distinguishable from the instant case since in *Hardy* the objectionable testimony was given by a witness who was present when the video depicting the defendant was made.

This case is like *Jamison*. The identification of Mr. Anderson as the man in the pictures by Mr. Brewer and Mr. Hunt required no special expertise or knowledge. Mr. Brewer and Mr. Hunt were in no better position than the jury to make the determination of whether the photographs depicted Mr. Anderson. As in *Jamison*, Mr. Brewer's and Mr. Hunt's testimony was an impermissible invasion of the jury's province.

Further, ER 701 barred Mr. Brewer's and Mr. Hunt's testimony since neither Mr. Brewer nor Mr. Hunt was present when the surveillance video was taken. Any opinion as to whether or not Mr. Anderson was the individual depicted in the surveillance video would not have been based on the perception of the witness as required by ER 602. Mr. Brewer's and Mr. Hunt's testimony was improper lay opinion testimony which invaded the province of the jury and lacked the factual basis required by ER 602.

*b. The statements of Mr. Brewer and Mr. Hunt were not cumulative of any other evidence*

The testimony of Mr. Brewer and Mr. Hunt was not cumulative of other evidence. Mr. Brewer's and Mr. Hunt's identification of Mr. Anderson as one of the men depicted in the surveillance video was the only evidence presented by the State that Mr. Anderson was present at or committed the robbery. The jury could have viewed the surveillance video and photographs and decided for themselves whether or not Mr. Anderson was present.

*c. No instruction could have cured the prejudice caused by the trial irregularity in this case*

The trial irregularity in this case was the admission of the statements of Mr. Brewer and Mr. Hunt that Mr. Anderson was the individual depicted in the surveillance videos. An instruction to the jury to disregard the testimony that Mr. Anderson was the individual pictured

in the surveillance photographs would not have cured the prejudice to Mr. Anderson since the jury's interpretation of the photographs would be tainted and the jury would be predisposed to interpret the photographs as depicting Mr. Anderson.

**3. The trial court erred in denying Mr. Anderson's motion to suppress Mr. Brewer's testimony**

The Court of Appeals reviews the trial court's decision to deny a motion to suppress evidence for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

As discussed above, ER 602, ER 701, and Washington case law prohibit the introduction of precisely the type of testimony the trial court allowed – lay opinion testimony which is not based on the first-hand knowledge of the witness and which invades the fact-finding province of the jury.

Mr. Anderson specifically objected to the introduction of Mr. Brewer's testimony on grounds that Mr. Brewer had no first-hand knowledge of the robbery on which to base his testimony. This testimony is clearly barred by both ER 602 and ER 701.

In denying Mr. Anderson's motion to suppress Mr. Brewer's statements, the court reasoned that it would be up to the jury to determine if Mr. Brewer was lying or not, and that his testimony should therefore be allowed. RP 45-46. The trial court failed to even consider whether or not Mr. Brewer had a factual basis for his testimony and whether or not that testimony invaded the province of the jury.

The trial court's decision that Mr. Brewer's testimony was admissible because the jury could determine Mr. Brewer's credibility was based on untenable grounds and was in error. As discussed above, this testimony was highly prejudicial and deprived Mr. Anderson of a fair trial and was inadmissible under both ER 602 and ER 701.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Anderson's convictions and dismiss the case. Alternatively, this court should vacate Mr. Anderson's conviction and remand for a new trial where the testimony of Mr. Brewer and Mr. Hunt is barred.

DATED this 22<sup>nd</sup> day of August, 2006.

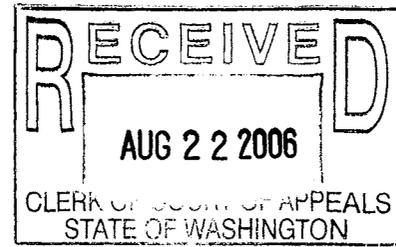
Respectfully submitted,



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Reed Speir, WSBA No. 36270  
Attorney for Appellant

CERTIFICATE OF SERVICE



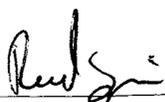
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 22<sup>nd</sup> day of August, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. James Anderson DOC# 890665  
Washington Corrections Ctr.  
P.O.Box 900  
Shelton, WA 98584

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office  
930 Tacoma Avenue South  
Tacoma, WA 98402

Signed at Tacoma, Washington this 22<sup>nd</sup> day of August, 2006.

  
\_\_\_\_\_  
Reed Speir, WSBA No. 36270

# **APPENDIX**

Westlaw

Federal Rules of Evidence Rule 701, 28 U.S.C.A.

©  
UNITED STATES CODE ANNOTATED  
RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES  
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

**→Rule 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Amendments received to 06-01-06

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