

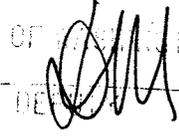
No. 37549-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____



STATE OF WASHINGTON,
Respondent,

v.

JAMARA HUMPHREY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural Background

Defendant Jamara R. Humphrey and co-defendant Priscilla Brager were charged by information as follows: Count 1. Burglary in the Second Degree, alleged to have occurred on April 6, 2007; Count 2. Burglary in the Second Degree, alleged to have occurred on July 12, 2007; Count 3. Organized Retail Theft in the Second Degree, alleged to have occurred on July 12, 2007.

All events occurred at the Aberdeen Wal Mart. Trial commenced on March 11, 2008. The jury returned a verdict of guilty as to both defendants on all counts. Defendant Humphrey was sentenced on March 24, 2008.

The State subsequently filed a Motion for Order to Vacate Count 1, the burglary of April 6 (CP18-19). This Motion was granted following determination that the defendant had, in fact, been in jail in Pierce County on the date of the alleged offense. The Court denied defendant's Motion for a New Trial on Counts 2 and 3. (CP 20-80,81))

Factual Background

In November 2006 Brent Cohen was working as an asset protection coordinator at the Lynwood Wal Mart Store. (RP 3-11-08, p. 41) On November 18, 2006 he went to the Everett store to assist the asset protection officer there, Michael Rowsick. (RP 3-11-08, p. 41) Cohen contacted Jamara Humphrey and Priscilla Brager in order to go through the process of "trespassing" them from Wal Mart stores (RP 3-11-08, p. 44). Cohen first spoke to defendant Brager who had initially identified herself by the name Vanessa Hill. (RP 3-11-08, pp. 44-46) He then spoke to defendant Humphrey. He explained to her that she was no longer welcome on any Wal Mart property and that if she did return she would be charged with criminal trespass and that if she committed any theft she would be committing a burglary. (RP 3-11-08, p. 47)

At the beginning of Mr. Cohen's direct examination, the Court gave a limiting instruction telling the jury that Cohen's testimony could not be considered to prove the character of the defendants or to show that they acted in conformity with some particular character trait. The Court explained that the testimony would be offered only for the limited purpose of determining whether the defendants knew that they were not licensed or privileged to enter Wal Mart premises. (RP 3-11-08, p. 42)

Counsel for the defendant Humphrey pointed out during cross examination that Ms. Humphrey had not been read the entire notice. (RP 3-11-08, p. 50) He also showed Mr. Cohen several other Wal Mart

"alerts", with pictures of other individuals, and attempted to intimate that Cohen had misidentified Ms. Humphrey. (RP 3-11-08, p. 51) Counsel for defendant Brager attempted to establish that perhaps her client might not have understood that she could never again enter any Wal Mart premises. (RP 3-11-08, pp. 54-55) Under cross examination Cohen explained that he had spent approximately five minutes with the two of them. (RP 3-11-08, p. 56) At one point counsel for defendant Brager showed Mr. Cohen one of the trespass notices and was about to ask whether or not it had been signed by defendant Brager. The question was withdrawn after objection from counsel for defendant Humphrey. In fact, the trespass notices had not been signed because both defendants had been handcuffed. (RP 3-11-08, p. 58)

Given these circumstances, the Court found that the defendants, by their cross examination had created an issue "...regarding the extent of the notice imparted to the defendants [and] care used by Mr. Cohen in explaining the contents of the notice to the defendants". (RP 3-11-08, p. 58) Mr. Cohen was allowed to explain that the notices were not signed because the defendants were "...handcuffed in the back of a car". The Court admitted Exhibits 3 and 4, pictures of each defendant taken November 18, 2006, and the trespass notices, Exhibits 5, 6, and 7. (RP 3-11-08, p. 62)

Michael Lacombe, an asset protection coordinator for Wal Mart, testified at trial. Lacombe identified each of the two defendants in the

courtroom and explained that he had previous contacts with them. He identified Ms. Humphrey, down to a mole on her left eyebrow. (RP 3-11-08, pp. 109-110) He explained that he had been in the presence of both defendants for about twenty minutes at the Lacey Wal Mart store in 2005. (RP 3-11-08, p. 110, RP 3-12-08, p. 16)

On April 6, 2007, Michael Lacombe was working in his capacity as an asset protection coordinator at the Aberdeen Wal Mart store. (RP 3-11-08, p. 111) Lacombe saw Priscilla Brager standing in the electronics department at the Aberdeen Wal Mart store. (RP 3-12-08, p. 40) He ran past the location but did not stop as he had been called to another situation. (RP 3-11-08, p. 112) Brager had a blue plastic tote in the shopping cart. It appeared to Lacombe that she was selecting items off the shelf. (RP 3-11-08, p. 112)

Casey Quillman was working at the Aberdeen Wal Mart Store on April 6, 2007. He was made aware of the situation by Michael Lacombe. (RP 3-11-08, p. 65) He went to the housewares department and examined some of the totes that were on the shelf for sale. He lifted the lid off one of them and found forty to fifty DVDs and an empty box from sporting goods that had additional DVD movies in it. (RP 3-11-08, pp. 67-68) He also found a second tote containing DVDs. (RP 3-11-08, p. 70)

When Lacombe returned Brager was gone. (RP 3-11-08, p. 113) At this point he checked the surveillance system. He was able to find video showing Brager and a person he identified as the defendant standing

in the DVD aisle, placing DVDs in the tote in the shopping cart. (RP 3-11-08, pp. 114-115) He was able to capture a still photograph, taken off the video, of the two individuals leaving the store shortly after he had seen Brager. (RP 3-11-08, p. 115) As it later turned out, Lacombe misidentified Brager's companion as the defendant, Jamara Humphrey.

On July 12, 2007, Michael Lacombe was again working at the Wal Mart store in Aberdeen. He received a phone call from a Wal Mart associate at the Lacey store, Kevin Kinder. Kinder explained that defendant Brager had just left the Lacey store with a second female. (RP 79) He gave a description of their vehicle and partial license plate. The initial call came around noon. At trial, Kinder identified Keisha Humphrey, the defendant's cousin, from a photo as the person he saw leave the Lacey store with defendant Brager. (RP 3-11-08, pp. 82-83)

Shortly before 4:00 p.m. Lacombe observed defendant Jamara Humphrey in the Aberdeen Wal Mart store from a distance of about three feet. He had come out of the back room and saw defendant Humphrey standing near the televisions. Defendant Humphrey walked over and talked to another individual who had a small child. The two of them then walked toward the automotive department and then toward the garden center. (RP 3-11-08, pp. 121-122) Lacombe followed them outside and saw them get into the Maroon car as described by Kinder. (RP 3-11-08, p. 123) He also observed defendant Brager in the parking carrying a small child and lot walking toward the car. (RP 3-11-08, p. 123) The car, with

Brager, Humphrey, the third female (presumably Keisha Humphrey) and two small children then left the parking lot heading for Olympia. (RP 3-11-08, p. 124)

Lacombe obtained the surveillance video from earlier in the afternoon. Priscilla Brager and the third individual were seen in the store, with two small children, loading a shopping cart. (RP 3-11-08, p. 127) They were later seen on video in the rear, non-public portion of the store stuffing items under a roll-up door and, throwing items over the fence out into the parking lot. A child was shown on video walking around that back room at Wal Mart. (RP 3-11-08, pp. 126-132) The maroon vehicle was seen pulling around behind the store to the location where the merchandise had been thrown. (RP 3-11-08, p. 126) He also observed the defendant on video as she was leaving the store through the garden center, and later standing outside behind the garden center patio. (RP 3-11-08, pp. 128-129)

Based on the review of the video and the items of merchandise observed in the video Mr. Lacombe was able to establish theft of approximately \$777.00 worth of merchandise. (RP 3-11-08, p. 133)

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The trial court properly excluded evidence of Wal Mart “investigation orders” offered by the defendant.
(Response to Assignment of Error 1)**

During cross examination of Kevin Kinder, counsel for the

defendant showed Mr. Kinder a photograph of Keisha Humphrey and a copy of a Wal Mart “investigation order” containing photos of a number of individuals, including a person identified in the “investigation order” as Keisha Humphrey. (RP 3-11-08, pp. 105-106) Despite suggestion from counsel, Mr. Kinder stated that he was unable to identify the “investigation order”. Kinder testified that he did not know Keisha Humphrey and did not know if any of the photos on the flyer were, in fact, Keisha Humphrey. (RP 3-11-08, pp. 105-106)

Defendant Humphrey’s defense at trial was misidentification. She attempted to establish that the individual in the store on July 12, 2007 was her cousin, Keisha Humphrey. Andrew Powell identified a photograph of Keisha Humphrey. (RP 3-12-08, p. 49). Powell testified that the defendant was with him on July 12, 2007 and that he had dropped her off at a candle party in Lakewood. (RP 3-12-08, pp. 50-51) This testimony was confirmed by other witnesses including her cousin Tayja Humphrey, Keisha Humphrey’s sister. (RP 3-12-08, pp. 63-66) The defendant’s mother explained that this candle party had been at the residence of her sister-in-law, defendant Humphrey’s aunt. (RP 3-12-08, pp. 75-76) The defendant’s mother was likewise asked about Keisha Humphrey. (RP 3-12-08, pp.77-78) She identified a photo of Keisha Humphrey. She testified that Keisha had a three year old child. (RP 3-12-08, p. 77)

The defendant testified at trial. She denied being at the Aberdeen Wal Mart Store on July 12, 2007. She asserted that she was at her aunt’s

candle party. (RP 3-12-08, p. 89) She stated that she was at the party from about 1:30 p.m. until 4:30 p.m. (RP 3-12-08, pp. 89-90) As did the other witnesses, she identified a photograph of Keisha Humphrey. She explained that she, Priscilla Brager, Shenae Humphrey, Keisha Humphrey and Shenise Courtney had all been at the Everett Wal Mart Store in November 2006. She and Ms. Brager had been detained. The others had managed to run off and did not get caught. (RP 3-12-08, p. 91)

The defendant is certainly entitled to attempt to prove that there had been a misidentification and that Keisha Humphrey, and not the defendant, was the individual with Priscilla Brager in the store at the time of the offense. State v. Rehak, 67 Wn.App. 157,834 P.2d 651 (1992). That is exactly what she did.

The defendant was permitted to put on testimony concerning her relationship to Keisha Humphrey. The photograph of Keisha Humphrey was admitted. In fact, Kevin Kinder identified that photo as the person with Priscilla Brager at the Lacey Wal Mart on July 12, 2007. The defendant was even allowed to testify that Keisha Humphrey was with her at the Everett Wal Mart Store when she was detained for shoplifting.

The jury obviously didn't believe the defendant. There were three women stealing from the Aberdeen Wal Mart of July 12, 2007. The evidence certainly supported a finding by the jury that they were Priscilla Brager, Keisha Humphrey and the defendant.

The problem is, that the defendant wanted more than just to prove

misidentification. The defendant wished to prove that Keisha Humphrey was a thief. She wished to prove, through documents that she could not authenticate, that Keisha Humphrey's picture may have been on a Wal Mart flyer identifying her as a person who had previously stolen from Wal Mart. (RP 3-11-08, p. 107) Presumably, if such evidence existed, the defendant could have established through Wal Mart personnel or otherwise, that Keisha Humphrey had been in the Aberdeen Wal Mart Store or, for that matter any other Wal Mart Store. This was never done.

Michael Labcombe was asked if Wal Mart had information on Keisha Humphrey. He stated that he was unaware of whether or not Wal Mart had data on her (RP 03-12- 2008, p.18). Kevin Kinder acknowledged that Keisha Humphrey was one of the individuals that he had seen in the Lacey Wal Mart Store on July 12, 2007. (RP 03-11-2008, pp. 82-83)

In short, the defendant was allowed to make her defense that she had been misidentified. She established through the testimony of Kevin Kinder that he saw Priscilla Brager and Keisha Humphrey leave the Lacey store together on July 12, 2008. She was unable to establish through any testimony that Keisha Humphrey had been arrested or detained on prior occasions on Wal Mart premises. This evidence, in any event, would have been improper character evidence tending to prove Ms. Humphrey's propensity for theft. See Tegland, Washington Practice, Evidence § 404.10

This Assignment of Error must be denied.

**2. The trial court properly allowed the testimony of Michael Lacombe concerning his identification of the defendant.
(Response to Assignment of Error 5)**

Mr. Lacombe identified the defendant in the courtroom. He explained that he had seen her on prior occasions, including a time in Lacey when he was in her presence for fifteen to twenty minutes. Mr. Lacombe prepared the security videos from the July 12, 2008 incident and played them for the jury. The State is unaware of why a witness cannot be asked if he recognizes a person who is depicted in a photograph or video.

Lacombe's testimony is simply a statement of identification. Everyone recognized that the witness was stating his belief concerning the identification. The jury was certainly entitled to conclude, if they chose to do so, that the witness was mistaken. Indeed, they had a photograph of Keisha Humphrey, who the defendant claimed was the person depicted in the video of July 12, 2008. The jury was entitled to take into account all of the circumstances, including the Lacombe's prior opportunity to observe the witness and decide if he is correct. See State v. Hardy, 76 Wn.App. 188, 884 P.2d 8 (1994) In Hardy the court held that a police officer was properly allowed to testify that the person depicted in the surveillance video was the defendant, based upon the officers acquaintanceship with the defendant. The court in Hardy allowed the testimony pursuant to ER 701. Hardy, 76 Wn.App. at p. 190.

The testimony herein was rationally based upon the perception of the witness, including his prior contacts with the defendant and was helpful to an understanding of the witness' testimony and determination of the facts at issue. The admission of such testimony lies within the sound discretion of the trial court.

This assignment of error must be denied.

**3. The trial judge properly admitted testimony of the defendant's prior contact with Wal Mart employees.
(Response to Assignment of Error 2,3, 4)**

The State had the burden of proving beyond a reasonable doubt that the defendant "entered or remained unlawfully" on Wal Mart premises. The situation here is quite unlike an ordinary burglary in which an individual enters a business after hours or breaks into a residence when the family is not home. Ordinarily, Wal Mart premises are open to the public. Absent a showing that the defendant was expressly told that she could not go onto Wal Mart premises, her entry into the store would not constitute an unlawful entry. Evidence of the prior contact between the defendant and Wal Mart employee, Brent Cohen, established the fact that the defendant knew that she could not enter onto Wal Mart premises.

The trial court made a thoughtful and thorough analysis of the issues and made its ruling prior to the testimony of Brent Cohen. (RP 3-11-08, pp. 35-38) The trial court judge; identified the purpose of the

testimony, to prove knowledge and the basis for Cohen's identification. (RP 3-11-08, p. 36) The court found the testimony to be relevant to the issue of whether the defendants "entered or remained unlawfully" on Aberdeen Wal Mart premises. (RP 3-11-08, pp. 36-37) The court ruled, initially that any prejudice could be minimized by disallowing testimony that the defendants were in handcuffs (RP 3-11-08, p. 31) The court's actions were reasonable and done in compliance with State v Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1996) The only information the state was allowed to elicit was that the defendants were "in custody" when Cohen contacted them at the Everett Wal Mart store.

ER 404(b) expressly provides that evidence of other acts or wrong doings may be admissible to prove knowledge or intent. The witness, Brent Cohen, could not testify without giving at least some explanation concerning how he came into contact with the defendant. He obviously did not pick her at random, set her down, and tell her that she was trespassed from Wal Mart premises.

In order to explain that the defendant knew she could not enter Wal Mart premises, the State had to prove that she had been told. In this context, the State cannot imagine a situation in which the jury would not understand that the defendant, on a prior occasion, had been detained by Wal Mart personnel and told that she could not enter the premises even if they were not told that the defednats were "in custody". The State, in its direct examination, was very circumspect concerning what information

was presented to the jury.

Counsel for the defendant and defendant Brager tried to intimate that perhaps there was some misunderstanding. An effort was made to point out that the trespass notices had not been signed. Under these circumstances, it was entirely reasonable for the court to at least allow the explanation that the two of them had been handcuffed and could not sign the notices. The courts have recognized that proof of prior misconduct may be shown to prove knowledge. State v. Donald, 68 Wn.App. 543, 844 P.2d 447 (1993); State v. Essex, 57 Wn.App. 411, 788 P.2d 589 (1990)

Counsel for the defendant complains, apparently, about certain testimony of Brent Cohen. Prior to his testimony there was a lengthy colloquy concerning Mr. Cohen's proposed testimony and a cautionary instruction that the Court proposed to give. (RP 3-11-08, p.p. 28-40) At the beginning of direct examination Mr. Cohen was asked if he had seen either defendant outside of the courtroom. He responded that he had seen "both in alerts that have been...". Counsel for the defendant immediately objected. At this point Court read the cautionary instruction. (RP 3-11-08, p. 42)

The State made no further reference to the alerts. In fact, the question asked of Mr. Cohen was not designed to ask about the alert but, rather, to talk about the events of November 18, 2006 at the Everett Wal Mart store. (RP 3-11-08, p. 43) The State asked no questions concerning

any Wal Mart alerts. It was counsel for the defendant that showed Mr. Cohen copies of Wal Mart alerts. (RP 3-11-08, p. 51)

Cohen's inadvertent remark did not prejudice the defendant. The Court immediately read the cautionary instruction explaining to the jury the limited purpose for which they could consider Mr. Cohen's testimony. The Court acted properly to limit any potential prejudice to the defendants. Any prejudice is outweighed by the probative value of the evidence. The Court gave a proper cautionary instruction.

This Assignment of Error must be denied.

**4. The prosecution did not commit misconduct.
(Response to Assignment of Error 7,8)**

(a) The State did not improperly shift the burden of proof.

The defendant presented a defense of alibi. She claimed that she was at a candle party in Lakewood that was being put on by her aunt on July 12, 2007. The defendant's mother testified that she and her daughter had gone to the party at the sister-in-law's house in Lakewood. The mother explained that her sister-in-law, the defendant's aunt, who was putting on the party, would take orders which would be delivered at a later time. (RP 82) The defendant's mother explained that her sister-in-law continued to live in Lakewood and that she saw her every day. (RP 81,83) The mother explained that she was first asked by her daughter about the events of July 12, 2007, about a week before the trial.

The defendant testified at trial. She also claimed that she had been at the candle party. She explained that her Aunt had been doing these parties for some time and that her Aunt had a catalog showing the various items that were for sale. (RP 3-12-08, pp. 95-96) The defendant testified that she had not purchased anything but was given some merchandise by her aunt. (RP 3-12-08, p. 95)

During final argument the State properly pointed out that the Aunt, who put on the party, and who may very well have had documents, receipts or records concerning the party, was not called as a witness. (RP 122)

Mom remembers that her daughter was there until dark. Ms. Humphrey remembers that she left at 4:00 or 4:30. Ms. Humphrey was pregnant. Mom says, I don't even remember that she was showing at that time.

But here's the significance. The sister-in-law is the one who is friends with the mom, sees her every day, and she wasn't here. The sister-in-law is the one who's selling candles. And you know, I know that some of you at least have been to this kind of party where you go to somebody's house and they have goods that they show you and then - you know, and they give you the receipt and then you come back and you pay the money and then in a week or two you get your goods. And you know the person who's selling them is ordering them from some business somewhere else. The Avon lady, same kind of deal. All right?

The Avon lady has books, documents, receipts, records that would tell you what date you had the party and what she sold and who she sold to and how much. That's not here. And the answer is because there may very well have been a candle party, but it wasn't July the 12th.

The defendant's theory of the case is subject to the same scrutiny as the State's under the missing witness doctrine. State v. Contreras, 57

Wn.App. 471, 476, 788 P.2d 1114 (1990). See State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). Under Blair the State is allowed to point out the absence of a “natural witness” when it appears reasonable that the witness is under the defendant’s control or peculiarly available to the defendant and there is a reasonable inference that the defendant would not have failed to produce the witness unless the testimony were unfavorable.

The “missing witness” doctrine applies if the potential testimony is material and not cumulative, the missing witness is under control of the accused, and witness absence is not satisfactorily explained. State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

The testimony of the Aunt was certainly not cumulative. She is the one person at the party who might very well have a recollection and written documentation, including receipts, catalogs, etc. concerning when the candle party occurred and who was present. For that matter, she might recall giving candles to the defendant. The witness is the defendant’s aunt who the defendant’s mother sees on a daily basis. There was no explanation of any kind why the aunt was not called as a witness.

The Courts have, under circumstances comparable to the case at hand, approved argument by the State concerning why the defendant did not produce a witness. In State v. Russell, 125 Wn.2d 24, 90-91, 882 P. 2d 747 (1994), the defendant was being prosecuted for murder. The State presented evidence that shortly after the victim was murdered the

defendant gave the victim's ring to a friend, Dacia Jubinville. Ms. Jubinville testified at trial that the defendant had told her that he obtained the ring in Canada. The State argued in closing argument, posing the following questions to the defense, Russell, 125 Wn.2d at p. 91:

If Mr. Russell bought that ring in Canada, who did he buy it from?...why didn't they bring somebody down from Vancouver? They could have saved themselves a lot of trouble, just to find the man or woman that sold Mr. Russell the ring. Where is he? Doesn't that make you wonder a little bit?

The Court in Russell found that these comments were entirely appropriate and did not constitute prosecutorial misconduct. Russell, 125 Wn.2d at p. 91. Here, as in Russell, the defendant had clear opportunity to bring in her Aunt who, essentially, was running a business and who, in all likelihood, would have had either personal recollection or records concerning the date and time of this candle party.

The same result was reached in State v. Cheatam, 150 Wn.2d 626, 653, 81 P.3d 830 (2003). In Cheatam the defendant presented an alibi defense to the charge of rape. The Court in Cheatam outlined the testimony presented by the defendant. Cheatam. 150 Wn.2d p. 653.

Evidence here showed that Cheatam worked for his aunt, Sherrie Cheatam. Rocky Garrison (then Shumate) also worked for Sherrie Cheatam. The defense called Sherrie Cheatam, who testified that Rocky had probably called Cheatam at home to wake him for work, thus implying that Cheatam was home at the time of the rape. Ms. Cheatam testified that she had never heard of a day when Rocky was unable to reach Cheatam. The defense did not call Rocky as a witness. The prosecutor mentioned the failure to call Rocky in closing.

The Court in Cheatam held that it was entirely proper for the State to ask the jury why the witness, Rocky, hadn't been called to testify. The Court also pointed that the defendant bears the burden of establishing misconduct and demonstrating that the conduct was prejudicial. The defendant must show a substantial likelihood that the improper argument affected the verdict. Cheatam, 150 Wn.2d p. 652, citing State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

Finally, a similar result was reached in State v Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990). The defendant in Contreras was charged with assault in the second degree. The defendant claimed that he had spent the entire day at the race track with a female friend, Brandy Hoskins, and two other acquaintances, Pedro Lima and John McDaniel. Lima and McDaniel testified at trial. Ms. Hoskins did not. During final argument the prosecutor made the following comment:

Contreras, 57 Wn.App. p. 476

“You have the obvious witness that you would expect to be called not here, and it is not just like she is not around. Something fishy is going on here.”

The Court in Contreras held that such argument was entirely appropriate and did not constitute prosecutorial misconduct.

In short, the State did not commit misconduct. The State asked the obvious question, “why not call the one witness who was present and who could document the date and time of the candle party through documentary evidence?”

Unlike the prosecution in Montgomery, the State's argument was made only one time during final argument. The State made the obvious point. There were records out there concerning this candle party that were in the possession of the defendant's Aunt, a woman who her mother sees every day. It is completely reasonable to expect that if the Aunt had favorable evidence for the defendant that she would have appeared with the documentation or at least testified to her recollection concerning when the party occurred.

There was no misconduct by the State.

(b) The State did not improperly attempt to “draw a cloak of righteousness”.

The entirety of the complained of argument is as follows. (RP 3-12-08, p. 143)

You know, I like to think that the prosecution wears the white hat and that the prosecution is here and I believe it sincerely to seek justice to get the right answer to this question and to get the right answer for the right reason... because you are here to seek the truth, and I'm here to tell you that the truth is that these two defendants, you will find after looking at all the evidence, committed [the] crimes.

Counsel has cited State v Gonzales, 111 Wn.App. 276, 45 P.3d 205 (2002). In the case at hand, the remarks came in without objection. In Gonzales the prosecutor in his argument cast aspersions at the defense attorney saying “I have a very different job than the defense attorney”. Gonzales, 111 Wn.App. at 283

The State did no such thing in this case. The State simply pointed out the obvious, that the jury was there to seek the truth and the truth was

that the defendants had committed the crimes. This was not a situation in which this argument was used to develop the righteousness of the prosecution. The remarks were made briefly, on one occasion, and then not mentioned again.

The Court in Gonzales held that the argument therein was improper. The Court in Gonzales did not determine that the argument required reversal. Even if the remarks herein were improper, this Court cannot determine, based upon the record as a whole, that there was any reasonable likelihood that this argument would have affected the outcome. The defendant has not met the burden of showing prejudice. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

This assignment of error must be denied.

**5. The trial court properly denied defendant's motion to vacate counts 2 and 3.
(Response to Assignment of Error 9)**

The defendant was originally sentenced on March 24, 2008, following the jury's verdict. Subsequently, counsel for the defendant approached the State with information that the defendant may have been in custody on April 6, 2007, the date of the burglary charged in count 1. The State was able to confirm this information. On the State's motion, count 1 of the Information was dismissed. (CP 18-19) The court entered an amended Judgment and Sentence on counts 2 and 3. Thereafter, the defendant moved to set aside the jury verdict on counts 2 and 3 pursuant to CrR 7.8 (b)(5). The trial court denied the motion.

In its ruling, the trial court pointed out a number of factors in support of its decision to deny the motion. In the first instance, this was not newly discovered evidence. This was evidence that was uniquely within the knowledge of the defendant. It could have easily been discovered prior to trial. (RP 6-9-08, pp. 4-5) Additionally, the jury was properly instructed that they were to consider each count separately and that their verdict on one should not govern their verdict on the other. (RP 6-9-08, p. 5)

Finally, the Court pointed to the nature of the eyewitness identification made by Mr. Lacombe as regards count 2 and 3. (RP 6-9-08, p. 5):

Mr. Lacombe made an eyewitness identification of the defendant from a distance of a foot or two. I mean he - he almost collided with each other. He was looking at her face-to-face and recalled distinctive facial features that allowed him to identify the defendant and features that distinguished her from her sister. When the defendant testified at the trial she didn't say, I recognized the person in the photograph from the April count and it's my sister.

Admittedly, the identification made by Mr. Lacombe for the February 6, 2007 incident came only from his review of the video surveillance. While he did see Ms. Humphrey in the store on that date, he did not personally view the defendant. (RP 3-12-08, pp. 112-115) On the other hand, on July 12, 2007, Lacombe almost ran into the defendant. He was acquainted with the defendant. He had met her on a prior occasion and was able to give a description of her right down to the mole on her left

eyebrow. (RP 3-11-08, pp. 109-110)

In short, the nature of the identification made on February 6, 2007, was significantly different than the identification made by Mr. Lacombe on July 12, 2007. The identification made on July 12, 2007, was based upon a much better opportunity to view the defendant.

The standard for review of a post trial motion pursuant CrR 7.8 is abuse of discretion. The ruling of the trial court will not be disturbed absent a showing of a clear or manifest abuse of discretion. A trial court abuses its discretion only when its decision is manifestly unreasonable, based on untenable grounds or reasons, or founded upon an erroneous interpretation of the law. State v. Ashby, 141 Wn.App. 549, 555 (2007)

There certainly was no misapplication of the law. The Judge had a very rational reason for denying the motion. His ruling was not an abuse of discretion.

This Assignment of Error must be denied.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 37549-4-II

v.

DECLARATION OF MAILING

JAMARA HUMPHREY,

Appellant.

DECLARATION

I, _____ hereby declare as follows:

On the _____ day of December, 2008, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund, 203 4th Avenue East, Ste 404, Olympia, Washington 98501-1189 and to Jamara Humphrey, 1214 South A Street, Tacoma, Washington 98408, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent,	No.: 37549-4-II
v. JAMARA HUMPHREY, Appellant.	DECLARATION OF MAILING

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DECLARATION OF MAILING

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