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Division II
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COA NO. 49810-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE BROOKS,

Appellant.

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

The Honorable Gretchen Leanderson, Judge

REPLY BRIEF OF APPELLANT

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A. **ARGUMENT IN REPLY**

1. **IMPROPER POLICE TESTIMONY ABOUT THE CONTENT OF THE PHOTOGRAPHS REQUIRES REVERSAL OF THE CONVICTIONS.**

- a. **The ER 701 and ER 1002 errors are preserved for review because the nature of the objection was apparent from the context.**

Police officer testimony describing the content of photographs violated the best evidence rule under ER 1002 and constituted improper expert testimony under ER 701.

The State contends defense counsel's foundation objection was insufficient to preserve an ER 1002 error for review. Brief of Respondent (BOR) at 11. A foundation objection, however, can preserve an evidentiary error for review when viewed in context. See In re Detention of Pouncy, 144 Wn. App. 609, 623, 184 P.3d 651 (2008) (foundation objection, viewed in context, raised an ER 702 objection to expert testimony), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010). Counsel objected to Office Thirty's testimony about the content of the photos because the photos were not in evidence and foundation was not laid (1RP 194), and to Thirty's "opinion as to what the photos depict" because "the photos ought to be - come in upon proper foundation, and it should be a jury question." 1RP 216. Those objections were overruled. As argued in the opening brief, the nature of the objection is apparent from the context and

reasonably raises a best evidence issue as well as an issue involving improper expert testimony on an issue of fact that should be reserved for the jury.

The best evidence rule is a foundation issue. See State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (gas station's tally sheet was inadmissible under best evidence rule when the "only foundation laid for admission of this hearsay evidence was the manager's testimony that such a tally sheet was kept."). Counsel's objection to insufficient foundation and the photos not being in evidence captures the best evidence rule. "The propriety of an evidence ruling will be examined on appeal if the specific basis for the objection is 'apparent from the context.'" State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

State v. Christian, 44 Wn. App. 764, 766, 723 P.2d 508 (1986), in which a foundation objection did not preserve an ER 1002 challenge for appeal, is distinguishable. In that case, counsel made a naked foundation objection with no surrounding explanation. Id. In Brooks's case, counsel coupled the foundation objection to officer testimony about what was depicted in the photos with the explanation that the photos had not been admitted into evidence. This best evidence objection is apparent from the context because the rule "generally requires that 'the best possible

evidence be produced." Fricks, 91 Wn.2d at 397 (quoting Larson v. A.W. Larson Constr. Co., 36 Wn.2d 271, 279, 217 P.2d 789 (1950)). In this case, the best possible evidence was the photos themselves, not officer testimony about what the photos showed.

Improper police testimony about what a photo or surveillance video depicts is also a foundational issue under ER 701 because the State must establish the witness is more likely than the jury to correctly identify the defendant before the testimony can be admitted. State v. George, 150 Wn. App. 110, 119, 206 P.3d 697 (2009); State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994). Otherwise, the testimony impermissibly invades the province of the jury on an issue of fact. Id.

Viewed in context, including the context of the previously overruled objections to Thiry's testimony, it is apparent that defense counsel's objection to Tiffany's testimony based on lack of foundation and lack of admission of the photo also raised a best evidence error and an ER 701 expert testimony error. 1RP 384-85. And even if it didn't, the trial court's rationale for overruling the earlier objections against Thiry's testimony shows the same objections would have been overruled for Tiffany's testimony and thus futile. The law does not require counsel to repeat an objection that had already been shot down at an earlier stage of

the proceeding to preserve the error for review. State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012).

b. Testimony provided by officers Thiry and Tiffany describing the content of the digital photographs violated the best evidence rule.

The State does not contest Thiry's testimony violated the best evidence rule under ER 1002. It does claim Tiffany's testimony did not violate the rule because he was not asked to testify about the content of the photo. BOR at 13-14. The record does not support this claim.

The prosecutor first elicited Tiffany's testimony that Thiry showed him Coe's photos and that he expanded the photos to get a clear view of the license plate. 1RP 354-56. By this time, Thiry had already testified about who and what he saw in the zoomed-in photos. 1RP 194-95, 215-16. There was no question about the point the prosecutor was trying to make by traveling down the same road with Tiffany. The prosecutor later elicited Tiffany's testimony that the photos taken by Coe were taken from a distance and it was difficult to distinguish individual details of the driver. 1RP 384. The prosecutor asked how Tiffany was able to see the distinguishing features. 1RP 384. Counsel's objection was overruled. 1RP 384-85. Tiffany answered, "It was zoomed in" and then, over further defense objection, identified Brooks in court as resembling the man from the photos. 1RP 386-87. Tiffany relied on the "distinguishing" features of

the person in the zoomed-in photo as the basis to identify Brooks in court as the person depicted in the photo. The record shows Tiffany testified about the contents of a zoomed-in photo that was never admitted into trial, thus violating the best evidence rule under ER 1002.

c. Reversal is required because there is a reasonable probability that the error affected the outcome.

Brooks stands by the argument made in his opening brief that the evidentiary error under ER 701 or ER 1002 or both prejudiced the outcome.

B. CONCLUSION

For the reasons stated above and in the opening brief, Brooks requests reversal of his convictions, reversal of the discretionary LFO, and correction of his sentence.

DATED this 22nd day of January 2018

Respectfully Submitted,

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