

FILED
Court of Appeals
Division II
State of Washington
1/25/2018 4:35 PM

NO. 50965-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LARRY DEE,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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ASSIGNMENT OF ERROR

Assignment of Error

Trial counsel's failure to object when the state called upon two witnesses to render their opinion that the person shown in surveillance videos was the defendant and when the state argued from this evidence in closing denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

Is a defendant denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if a trial counsel fails to object when the state calls upon witnesses to render their opinion that the person shown in surveillance videos is the defendant when the jury is equally well placed to view the video and determine whether or not the person identified is the defendant and when that failure caused prejudice?

STATEMENT OF THE CASE

Factual History

In April of 2016, Christina Diefel and Christina Salt worked as in-home care-givers for Bremerton Resident John Ross. RP 52-54, 97.¹ Mr. Ross has multiple sclerosis and is physically incapable of performing most routine tasks such as dressing himself or getting out of bed. RP 61-62, 65. Ms. Diefel worked a shift from 6:00 to 10:00 pm, while Ms Salt worked a shift from 8:00 am to noon. RP 52-54. Although they were both employed by Visiting Angels In-Home Care Service, their shifts did not overlap they had never met. RP 56-57. Ms. Salt's boyfriend is defendant Larry Dee. RP 76-77, 98-99. On one occasion in March he had gone to a storage facility at Mr. Ross's request and moved some boxes to the house Mr. Ross shared with his mother. RP 65-67. However, on that occasion, Mr. Ross did not get a very good look at the defendant. RP 67.

During her shift on the evening of April 21st, Ms. Diefel had occasion to goto a local Walgreens to get some medication for Mr. Ross. RP 52-54. She paid for that medication with one of Mr. Ross's debit cards. *Id.* Mr.

¹The record on appeal includes two volumes of verbatim reports. The first has the transcript of the trial held on 9/5/17, 9/6/17, 9/7/17, 9/8/17, 9/11/17, and 9/12/17. It is referred to herein as "RP [page #]." The second has the transcript of the 9/29/17 sentencing hearing and is referred to herein as "RP 9/29/17 [page #]."

Ross had given both Ms. Diefel and Ms. Salt the pin number to that card so they could use it to make purchases for him. 55-56. At the time it had a balance of approximately \$2,500.00. RP 67-70. Mr. Ross had not given the pin number to anyone else, including his family members. RP 79-80. After returning from Walgreens with the medication Ms. Diefel left the card on the kitchen table with two ten dollar bills that Mr. Ross had asked her to get on top of the card. RP 54, 81.

On the morning of April 22nd during Ms. Salt's shift she asked if Mr. Ross would mind if she had her boyfriend Larry Dee stop by the house to bring her some coffee. RP 65-67. He stated that he did not mind. *Id.* Although Mr. Ross did not see the defendant come to his house, he did hear Ms. Salt say "thanks for the coffee" to someone he assumed was the defendant. *Id.*

Three days later when Ms. Diefel came in for her next evening shift, Mr. Ross again asked her to get his debit card from the counter and use it to purchase some medication for him. RP 55-56. Ms. Diefel looked on the table for the card but was unable to find it. *Id.* She and Mr. Ross then performed a detailed search of the home but were unable to find the card. *Id.* Eventually Ms. Diefel used an older card Mr. Ross had for the same account and purchased the medication. *Id.* Upon reviewing his account Mr.

Ross was able to determine that on April 22nd and April 23rd someone had used his card at a cash machine at a Bremerton Winco Store and withdrawn \$1,000.01 on each occasion. RP 69-70. Upon learning this information Mr. Ross and Ms. Diefel called the police to report the theft as Mr. Ross had not authorized these withdrawals from his account. RP 55-56, 71-71.

Within a few days the police were able to obtain surveillance tapes from the Bremerton Winco where the unauthorized withdrawals had been made. RP 48-51. The officers then showed those tapes to Mr. Ross and his mother. RP 153-154. Although they were unable to identify the person making the withdrawals, Mr. Ross did say that the person in the surveillance videos appeared to walk in the same manner that he had seen the defendant walk for a few steps when he delivered boxes for him a few weeks previous. RP 73-74, 153-154.

The police later showed the video to Emily Stevens, who was the office manager for Visiting Angels In-Home Care Service and both Ms. Diefel and Ms. Salt's supervisor. RP 97, 102-103. Ms. Stevens looked at the video and stated that the person making the withdrawals was the defendant. *Id.* She based this opinion on the fact that she had met the defendant once for a few minutes when he stopped by the office to turn in Ms. Salt's employee cell phone after she quit her job with Visiting Angels about a week after Mr.

Ross reported the illegal use of his debit card. RP 96-111. According to Ms. Stevens, at the time she met him the defendant was wearing a Chicago Bulls hat, as the person in the surveillance videos appeared to be wearing. RP 100.

Procedural History

By information filed August 23, 2017, and later once amended, the Kitsap County Prosecutor charged the defendant Larry Eugene Dee with two counts of identity theft. CP 1-8, 39-42. The state also alleged that during the commission of each of these offenses, the defendant “knew or should have known that the victim of the . . . offense was particularly vulnerable or incapable of resistance, contrary to RCW 9.94A.535(3)(b).” *Id.* This case later came on for jury trial with the state calling eight witnesses: Ms Diefel, Mr. Ross, Mr. Ross’s mother, Emily Stevens, three investigating officers, and a Winco Security Employee who provided the surveillance tapes to the police. CP 48, 52, 61, 83, 96, 111, 118, 124. These witnesses testified to the facts contained in the preceding factual history. *See Factual History, supra.*

One of the investigators the state called in this case was Bremerton Police Officer Kenny Davis. RP 124. During his testimony over two days he explained how he had obtained surveillance videos from the Bremerton Winco for the times on April 22nd and April 23rd when Mr. Ross’s cards were

used. RP 127. Although these videos were admitted into evidence during the trial and played for the jury, Officer Davis testified repeatedly without objection from the defense that he had viewed both videos and that in his opinion the person who made both of the withdrawals was the defendant. RP 129-130, 131, 132, 135, 147. In rendering this opinion Officer Davis did not claim that he was acquainted with the defendant or that he had seen him on any occasion prior to his investigation in this case. RP 124-135, 144-157. However, he did claim that the videos were of better quality when he first viewed them and that the person in the video appeared to be wearing a Chicago Bulls hat. RP 130-131. His last opinion on this factual issue was given as follows:

Q. And based on your training and experience in your comparison I think that you said yesterday that you believe that Larry Dee was the person in the video?

A. Correct.

RP 147.

In addition, during Ms. Stevens' testimony the state also asked her to give the jury her opinion on the identity of the person in the two surveillance videos. RP 102-103. Without objection from the defense, she also rendered an opinion that the person in the video was the defendant, whom she had previously met on one occasion for a few minutes. RP 100,

102-103.

Following the presentation of the state's case the defense rested without calling any witnesses. RP 157-158. The court then instructed the jury without objection from either party. RP 161-165, 168-182. During closing argument the state stated the following concerning Ms. Stevens and Officer Davis's opinions that the person in the surveillance videos was the defendant:

So you have an officer who has some training and experience in doing this type of stuff who viewed it, had the opportunity to view it, pause it, look at photos of Larry Dee and analyze it closely on a much better resolution screen than the projector where I showed it to you, and he made his determination.

Then you had Emiley Stevens, and think about her motivation in this case. If Emiley Stevens -- what we know she says it is Larry Dee, okay? If she says it's Larry Dee in that video, does that help her out in any way?

. . . .

So you have two people that have viewed this video and told you they believe this is Larry Dee in the video, but you also have -- each of you have your own eyes, and you can view it yourself.

RP 189-190.

After closing arguments the jury retired for deliberation and eventually returned verdicts of guilty on both counts. RP 183-209, 213-218; CP 100-102. The jury also returned the two interrogatories with findings

that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 101-102. The court later imposed an exceptional sentence of 12 months plus one day in prison on a standard range of 2 to 5 months on each count. CP 105-115; RP 9/29/17 1-14.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE CALLED UPON TWO WITNESSES TO RENDER THEIR OPINION THAT THE PERSON SHOWN IN SURVEILLANCE VIDEOS WAS THE DEFENDANT AND WHEN THE STATE ARGUED FROM THIS EVIDENCE IN CLOSING DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state called upon two witnesses to render their opinions that the person shown in surveillance videos was the defendant because the jury was equally well placed to make that determination as were the witnesses, and when the state argued this evidence in closing. The following sets out this argument.

A witness at a trial may only testify to facts based on personal knowledge and a witness may only give opinion testimony if two factors are met: (1) the opinion must be rationally based on the perception of the witness, and (2) the opinion must be helpful to a clear understanding of the facts at issue before the court or jury. ER 602 & ER 701; *see also*, *State v. Hardy*, 76 Wn.App. 188, 190, 884 P.2d 8 (1994). Although a witness may not offer an opinion on a defendant’s guilt or innocence, testimony is not

necessarily objectionable simply because it touches upon an ultimate issue the trier of fact must decide. *See State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); ER 704.

Specifically, in the context of this case, a lay witness may give opinion testimony as to the identity of a person in a surveillance photograph or video 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.” *State v. Hardy*, 76 Wn.App. at 190-191. When determining whether or not to admit this type of evidence, the trial court should be aware of the fact that testimony identifying individuals from surveillance photos or videos has a natural tendency to run “the risk of invading the province of the jury and unfairly prejudicing [the defendant].” *U.S. v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir.1993) (finding that officer’s identification testimony was not helpful to the jury because the officer had never seen the defendant in person).

In *Hardy, supra*, which included two consolidated cases, officers testified to the identities of the defendants after viewing surveillance of videos of drug transactions. In the first case, the officer testified he had known the defendant for several years prior to viewing the video. In the second case the officer testified that he had known the defendant for six or

seven years. Based upon these contacts the court affirmed the convictions, finding that the officers were more likely to correctly identify the defendants than were the juries and that the trial court did not err when it admitted this evidence.

By contrast, in *State v. George*, 150 Wn.App. 110, 118, 206 P.3d 697 (2009), two defendants convicted of first degree robbery at a Days Inn motel appealed, arguing that the trial court had erred when it allowed a police officer to testify that he had viewed a poor quality video of the robbery many, many times, and that in his opinion, the defendant's were the persons in the video committing the robbery. Although the officer was not acquainted with the defendants, he had helped arrest them the day of the robbery and the state argued that this contact was sufficient to put the officer in a better position than the jury, who viewed the same video at trial. The Court of Appeals disagreed with this argument, holding as follows:

Here, [the officer] observed George as he exited the van and ran away and at the hospital that evening. [The officer] observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. [The officer] based his surveillance video identifications 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 on the day of the crime. These contacts fall far short of the extensive contacts in *Hardy* and do not support a finding that the officer knew enough about George and Wahsise to

express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing [the officer] to express his opinion that George and Wahsise were the robbers shown on the video.

State v. George, 150 Wn.App. at 119.

In the case at bar both Officer Davis and Ms. Stevens had less contact with the defendant prior to their in-court opinion evidence on identity than did the officer in *George*. Thus, in the same manner that the trial court in *George* erred when it allowed the in-court opinion evidence on identity, so the in-court opinion evidence on identity from Officer Davis and Ms. Stevens in the case at bar was equally inadmissible.²

As was revealed in both the defendant's opening statement and closing argument, the case at bar rested on one fact: identity. The state argued that the person using Mr. Ross's debit card was the defendant and the defense argued that reasonable doubt existed on this issue before the jury. The defense did not dispute any other factual or legal claim by the state. In such a case no reasonably prudent defense attorney would fail to

²It is true that Officer Davis claimed that he had viewed the video on better equipment than the equipment used to show the video to the jury. However, the decision to use the lower quality video, if indeed it was lower quality, rested with the prosecutor. The state should not now be allowed to claim that Officer Davis's opinion testimony on identity was admissible because the state chose to show what it believed to be a lower quality video to the jury.

object to the state's strongest evidence on identity when that evidence was inadmissible. This was no trial tactic. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney.

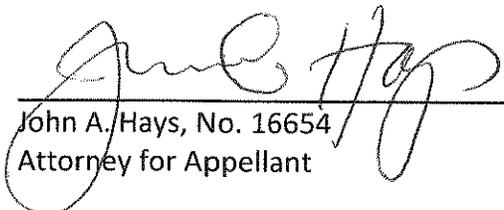
In addition, while there was circumstantial evidence that pointed to the defendant as the possible culprit, without the improper opinion evidence from Ms. Stevens and Officer Davis, there is a significant likelihood that the jury would have found reasonable doubt and acquitted the defendant. Consequently, trial counsel's failure to object created a reasonable probability sufficient to undermine confidence in the outcome of the case and thereby denied the defendant effective assistance of counsel under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22.

CONCLUSION

This court should reverse the defendant's convictions and remand for a new trial based upon trial counsel's failure to object when the state improperly called two witnesses to render opinions upon the identity of the defendant.

DATED this 25th day of January, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

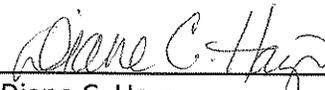
COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, Respondent,	NO. 50965-2-II
vs.	AFFIRMATION OF SERVICE
LARRY DEE, Appellant.	

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Tina R. Robinson
Kitsap County Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366
kcpa@co.kitsap.wa.us
2. Larry Dee, No.402615
Peninsula Work Release
1340 Lloyd Parkway
Port Orchard, WA 98367

Dated this 25th day of January, 2018, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

January 25, 2018 - 4:35 PM

Transmittal Information

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Appellate Court Case Number: 50965-2
Appellate Court Case Title: State of Washington, Respondent v. Larry Dee, Appellant
Superior Court Case Number: 16-1-01033-2

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