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

STATE OF WASHINGTON,

Respondent,

v.

LARRY EUGENE DEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-01033-2

BRIEF OF RESPONDENT

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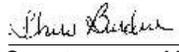
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether counsel was ineffective for failing to object to identification testimony?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Larry Eugene Dee was charged by information filed in Kitsap County Superior Court with two counts of second degree identity theft. CP 1-2. A first amended information was later filed maintaining the two counts of second degree identity theft but changing the charging language and adding a special allegation to each count that the crimes were committed against a particularly vulnerable victim. CP 39-40.

After trial, Dee was convicted as charged. CP 100. The jury gave affirmative answers as to both counts on the special verdict asking whether Dee knew or should have known that the victim is particularly vulnerable. CP 101-02.

Based on the jury's findings on the special verdict, the trial court imposed an exceptional sentence upward. CP 106. On a standard range of 2 to 5 months, Dee was sentenced to 12 months and a day on each count, concurrent. CP 107. Written findings of fact and conclusions of law for exceptional sentence were entered. CP 116.

B. FACTS

Visiting Angels Caregiving is a business that provides in-home care services, including running errands, shopping, bathing, and putting the clients to bed. RP 52. John Ross was a client of the service. Id. Caregiver Christina Diefel provided Mr. Ross with care. RP 53. A second caregiver, Christina Salt, also worked with Mr. Ross. Id. Ms. Diefel and Ms. Salt were not well acquainted. Id.

Ms. Diefel picked up medications for Mr. Ross. RP 54. She would pay for the medication with Mr. Ross's debit card. Id. For this purpose, Mr. Ross provided Ms. Diefel with the debit card pin number. Id. Regarding this case, Ms. Diefel had gone to Walgreen's pharmacy to pick up Mr. Ross's prescriptions, using the debit card to pay. Id. When she returned, she placed the debit card on the dining room table. Id.

Three days later, Mr. Ross again asked Ms. Diefel to get his medication. RP 55. But the two could not find the debit card. Id. Upon inquiry, it was discovered that money was missing from Mr. Ross's account and the police were called. Id.

Mr. Ross has multiple sclerosis and is confined to a wheelchair. RP 62. He requires a caregiver to help him with day-to-day activities. Id.

During the relevant time-period, Mr. Ross got care from Christina Salt in the morning. RP 63. The caregivers are necessary because Mr. Ross can hardly do anything. RP 64. They dress him, place him in his chair, sign things for him, and go to get his medication. Id. If he was short of cash, Mr. Ross would give the caregivers his debit card to pay for the errands. Id. The pin code was provide so the caregivers could use the card. RP 65.

On April 21, Mr. Ross had Ms. Diefel pick up prescriptions with the debit card. RP 65. She brought back the medication and put the debit card on the kitchen table. Id.

The next morning, April 22, Ms. Salt was providing care. RP 66. Ms. Salt asked for permission to have her boyfriend, Larry Dee, bring her some coffee. Id. Dee came but Mr. Ross did not see him. Id. He heard Ms. Salt say thanks for the coffee and assumed that Dee was there. RP 77. Mr. Ross's mother had seen Dee drop off coffee once but could not remember the exact day. RP 91. Mr. Ross had met Dee once before, hearing his voice when he, Dee, had help move some things at Mr. Ross's house. RP 67.

Mr. Ross was going out and looked for his card. RP 68. The card was not on the table where Ms. Diefel had left it. Id. When Mr. Ross inquired about the card he was advised that \$2000 was missing. RP 69. The card had been used to withdraw money on April 22. RP 69-70. On April 23, the card was again used to withdraw money. RP 70.

When shown a photo lineup, Mr. Ross was unable to identify Dee. RP 73. When shown a video from a grocery store, Mr. Ross said he thought he recognized the person as Dee from his walk. RP 74. Mr. Ross's mother was shown the grocery store video. RP 93. Although she could not identify the person in the video, she did recognize the car seen in the video as one that had been at her house with Ms. Salt. RP 93-94.

Ms. Salt was going to be terminated in part because of Dee going to Mr. Ross's house. RP 98. This was prohibited because Dee had not been background checked. *Id.* But Ms. Salt quit before she was fired and sent Dee to the company office to return a company phone. RP 99. The office manager conversed with Dee and got a good look at him. RP 100. Dee was wearing a red Chicago Bulls hat. RP 101. She had also seen pictures of Dee on Facebook. RP 103-04.

The office manager was shown the grocery store video by police. RP 102. She identified Dee as the person in the video. RP 103. She was 100 percent sure of this identification. *Id.* She recognized the red Chicago Bulls hat that she had seen on Dee at her office and which the person in the grocery store video was wearing. RP 104.

The grocery store video was retrieved from Winco Foods by police. RP 126. Surveillance from two days, April 22 and April 23, are shown. The video shows the same person making withdrawals from Mr. Ross's account at an ATM on each days. RP 130, 131. The Chicago

Bulls hat is worn by the subject on both days. RP 131, 132.

The police officer who got the videos was able to pause the video and take a close look at the subject. RP 135. The officer had also reviewed other pictures of Dee. Id. The officer compared the paused high-resolution video and the other pictures and concluded that the man in the store was Dee. Id.

III. ARGUMENT

A. COUNSEL WAS NOT INEFFECTIVE BECAUSE THE IDENTIFICATION TESTIMONY THAT HE DID NOT OBJECT TO WAS NOT OPINION TESTIMONY AND IN ANY EVENT PROPERLY ADMITTED.

Dee argues that his counsel was ineffective for failing to object to identification evidence. This argument is bottomed by the supposition that the identification testimony constituted improper opinion evidence. Since there was no improper opinion evidence in the case, this claim is without merit. Moreover, even if considered to be opinion testimony, the evidence was properly admitted.

First, the factual basis of Dee's issue is stilted. That is, while assailing the admissibility of the identifications from the Winco Foods surveillance video, Dee takes little note of the totality of the evidence. No

evidence was received from the defense. The state's case provided opportunity with at least circumstantial evidence that Dee was at Mr. Ross's home delivering coffee at a time contemporaneous with the disappearance of the debit card. Mr. Salt's mother had seen Dee deliver coffee but could not remember the day. There is consistency in Dee's dress: he wears a red Chicago Bulls hat and it was established that he is originally from Chicago. Mr. Ross's mother was unable to identify Dee from the video but did recognize the car, which car was found to be registered to Dee's girlfriend, Christina Salt. RP 93-94.

I. Ineffective Assistance

To show ineffective assistance of counsel, Dee must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Dee must "overcome a strong presumption that counsel's performance was reasonable." *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011).

Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that

determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Further, Dee "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel." *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

2. Admissibility of Identification Evidence

Had there been an objection, the trial court's ruling on the admissibility of lay opinion testimony would be reviewed for abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Generally, ER 701 permits a lay witness to give opinion testimony if the opinion is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of ... the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." Subsection (a) is like ER 602, which rule requires that there be foundation demonstrating that the witness has "personal knowledge of the matter" to which she testifies. The rationality of the opinion can then be judged from

the personal knowledge, perception, of the witness. *See State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999) (“So-called “lay” opinion is simply opinion based on personal knowledge (i.e., on knowledge derived from the witness' own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion).”); *review denied* 140 Wn.2d 1022 (2000).

The word “so-called” in the immediately above quote have import. It is not clear in this matter that we are dealing with opinions at all. In *State v. Blake*, 172 Wn. App. 515, 298 P.3d 769 (2012), a challenge to the admissibility of certain testimony was asserted on the ground that the testimony involved improper opinion on guilt or innocence. The court noted the distinction between opinions and inferences

Because the witnesses' testimony stemmed from their own sensory perceptions, the jury was free to disbelieve either or both witnesses and reach a finding of not guilty. Consequently, the testimony in question did not constitute opinions at all; rather, the testimony was to “inferences from the evidence.”

172 Wn. App. at 525-26, *quoting City of Seattle v. Heatley*, 70 Wash.App. 573, 578, 854 P.2d 658 (1993). The *Blake* court found cases where testimony alleged to be opinions were not opinions because based upon specific or direct observations of the witnesses and because the jury remained free to reject the testimony. *Id.* at 526, *citing State v. Mason*, 160 Wash.2d 910, 932, 162 P.3d 396 (2007); *Heatley, supra*, 70

Wash.App. at 581, 854 P.2d 658; *State v. Sanders*, 66 Wash.App. 380, 388–89, 832 P.2d 1326 (1992).

The present case is one in which, given all the evidence, it can be seen that the witnesses provided no opinions but merely reported what they knew from personal knowledge. Defense counsel knew that the office manager had had recent face-to-face contact with Dee. He knew that the office manager had already been contacted by law enforcement and her assertion from this that she was paying particular attention to Dee when he came into her office. He knew that she had even undertaken to see Dee's picture on Facebook. To wit, defense counsel knew that this was no opinion but rather testimony based on the office manager's own knowledge and perception. Thus he knew that there was no objection to the evidence.

Similarly, the deputy's testimony is not received in a vacuum. He was well advised of the circumstances of the case. This included Dee's opportunity to take the card. It included the ubiquitous red hat. It included reference to Ms. Salt's car. Moreover, the deputy knew that the video being seen was of someone using Mr. Ross's card, not some random event at some random ATM. The officer provided foundation for his personal knowledge of Dee's appearance with the testimony that the deputy had independently viewed pictures of Dee. The officer's

identification is completely consistent with the context in which it was made. Defense counsel knew these things and by them knew the evidence was not objectionable.

The *Blake* court summarized that case with regard to the allegation that opinions as to guilt had been admitted:

The challenged testimony did not concern an opinion on Blake's intent. The challenged testimony did not concern the veracity of any witness. And the challenged testimony was not a statement of the witnesses' belief as to Blake's guilt. Thus, the challenged testimony was not of a type categorically excluded by *Montgomery* or *Demery*.

172 Wn. App. at 527. In the present case, neither witness testified as to Dee's intent, the veracity of any other witness, or Dee's guilt. In this light, then, the testimony was admissible and there was no likelihood that an objection to it would be sustained.

Thus the circumstances of the present case demonstrate that even if there was a basis to object to the allegedly offending testimony, it was a very thin basis. Witnesses may testify as to their perceptions even though they may, as here, go directly to the ultimate issue in the case. ER 704. But if the testimony may be considered opinions, it should be reviewed under the Supreme Court's test: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal

quotation marks omitted).

Number five, other evidence in the case, is addressed above. Beginning with Dee's opportunity to take the card, all of the evidence rather inexorably points to Dee as the perpetrator. Similarly, number two, the nature of the testimony, has been addressed; this is testimony identifying a person from a picture. When closely considered, the testimony does not even look much like an opinion. Moreover, as noted, the testimony does not entail the veracity of witnesses, Dee's intent, or Dee's guilt.

The nature of the charges in this case, factor number three, does not seem to impact the analysis. Except that identity theft is well established if it is shown that the individual who unlawfully took or possessed the access device and/or pin number is seen actually using that card.

Arguably, factors number one and four may militate in Dee's favor. Factor one asks of the type of witness. Here, one of the two witnesses was a law enforcement officer. Further, the deputy provided his identification testimony under an appeal to his experience and training. This may raise the notion that the testimony may be considered the more credible because of its law enforcement source. *See, e.g., State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) However, if not an opinion, the

deputy's testimony is like any other witness reciting perceived facts. If an opinion, that opinion is more than adequately supported by the corroborating circumstances and the corroborating testimony of the office manager, who of course viewed the same images and was 100% certain that she was looking at Dee. *See State v. Hardy*, 76 Wn. App. 188, 191-92, 884 P.2d 8 (1994) (corroboration by other witness "sufficient to ensure that the trial outcome would have been the same regardless of Maser's testimony"). On this record, it is doubtful that even if the deputy's testimony was objectionable, its admission caused enduring prejudice to the defense. It could have been completely disregarded and more than sufficient evidence of guilt would remain.

Regarding Ms. Stevens, she is a lay witness with no imprimatur of credibility. She simply provides her perception after having viewed Dee and the images of him. Her testimony was subject to adversarial testing and the jury retained the power to disregard it.

As stated here and below, the defense of the case was identity. Thus issues going to identification may influence the admissibility calculus. But the defense was unavailing on this record. Dee had no rebuttal for the evidence of his opportunity to initially take the card. He had no rebuttal for the fact that an individual that at minimum closely matched his description was seen twice using the same card. His identity

defense consisted of saying the witnesses were wrong; he advanced no alternative theory. No evidence was adduced as to Dee's whereabouts or activities during the relevant time period, i.e., no alibi was raised. Merely asserting that the defense is identity is not sufficient to render the identification testimony of the witnesses inadmissible.

Finally, cases dealing with the particular type of testimony found in this case do not support Dee. In *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1194) the court considered a claim that a lay witness should not be allowed to opine as to the identity of the defendant taken from the viewing a photograph or videotape. *Id.* at 190. The rule is that

A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph 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.

76 Wn. App. at 190.¹ There, the evidence was a moving picture and the witness, who had known the defendant for several years, was more able than the jury to assess mannerisms and body movements than the jury, "who has only seen Hardy motionless in court." *Id.* at 191. Moreover, the *Hardy* court was unmoved by the argument that the identification invaded the province of the jury because the jury was free to disbelieve the evidence. *Id.*

¹ The rule is drawn from a long line of federal cases cited in *Hardy*. This is permissible because Federal Rule of Evidence 701 is identical to Washington's ER 701.

Next, Dee relies on *State v. George*, 150 Wn. App. 110, 206 P.3d 697 (2009). There, the issue is breached with the court's understanding that the allegedly offensive testimony resulted from a "poor quality surveillance tape." 150 Wn. App. at 115. The witness could not make out facial features and purported to identify the suspects by build, carriage, movements, clothing, subsequently talking to them. *Id.* The Court of appeals concurred that facial features could not be seen in the video. *Id.* at 119 (footnote 5). The police witness had seen defendant George twice the day of the crime. *Id.* at 115.

The rule from *Hardy, supra*, was posited. The court held that the witness's contacts with one of the suspects were insufficient to allow the identification. 150 Wn. App. at 120.

In the present case, both the office manager and the deputy perceived Dee in circumstances that the jury did not share. Ms. Stevens compared the face she saw on the surveillance video to the man with whom she had only recently had a 15 minute face-to-face conversation. Further, Ms. Stevens knew of the investigation at the time and paid particular attention to Dee. This jury had no opportunity for such a close and casual encounter with Dee. This jury had no ability to compare the person in the surveillance video to Dee in real life as Ms. Steven's did. Her testimony was admissible and the jury was free to reject it if the jury

was given a reason to do so.

The deputy's testimony was also admissible. Here, as opposed to *George*, there is no evidence that the Winco Foods surveillance video was of such poor quality that facial features could not be seen. In fact, the deputy testified that he was able to see the video in high definition. Thus his testimony was that he could see Dee better with the technology available to him in the sheriff's office than the jury could with the in-court technology. That technology differs in various settings is hardly remarkable. But here the gravamen of the issue is that there is no reason to suppose that the deputy was incorrect when he asserted that his available viewing technology was better than that available to the jury. Certainly the defense did not rebut this testimony. Moreover, it should be recalled that the deputy's identification is consistent with all the other evidence in the case.

The evidence was admissible. As such, an objection to it would have been overruled. There was no deficient performance in this connection. This claim fails.

IV. CONCLUSION

For the foregoing reasons, Dee's conviction and sentence should be affirmed.

DATED March 27, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name below.

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