

COA No. 29092-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JOSHUA THOMAS BODEY, Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support a finding of guilt.

### Issue Pertaining to Assignment of Error

1. Was the State's evidence insufficient to prove beyond a reasonable doubt that Joshua Thomas Bodey was the robber? (Assignment of Error A).

## II. STATEMENT OF THE CASE

Mr. Bodey was charged by information with first degree robbery with a deadly weapon enhancement. (CP 1). The case proceeded to jury trial.

On February 4, 2008, Kelsey Lincoln and Elaine Heiser were working at the 50% Off Card Shop at 12111 E. Sprague in Spokane Valley, Washington. (5/4/10 RP 36, 37, 45). At 6:40 p.m., Ms. Heiser told a male customer who came in that they were closing in 20 minutes. (*Id.* at 39). She said he was about 5'8" – 5' 9" and wore a dark hat and dark clothing. (*Id.* at 40). He had no facial hair, but was unshaven. (*Id.*). Ms. Lincoln was suspicious of him. (*Id.*). Ms. Heiser could not identify this person. (*Id.* at 41. She went from the front to the back of the store to see where customers were as it was nearing closing time. (*Id.*). When Ms. Heiser came

back up, Ms. Lincoln said they had been robbed and was on the phone with police, who showed up quickly. (*Id.* at 42). Ms. Heiser did not see the man leave the store. (*Id.*).

Ms. Lincoln recalled the February 4, 2008 incident at the store. (5/4/10 RP at 45). While Ms. Heiser was in the back about 20 minutes to 7 p.m., Ms. Lincoln was robbed. (*Id.*). The robber had on navy blue clothes: sweats, a sweatshirt, gloves, and a hoodie. (*Id.* at 46). She greeted him as he came into the store, but was concerned about how he looked and had a feeling something was going to happen. (*Id.* at 47-48). Ms. Lincoln got a pretty good look at him in the store. (*Id.* at 48).

After she went on break, Ms. Lincoln came back and the robber came up to buy a card and a button. (*Id.* at 49). He handed her a dollar bill and some change, whereupon he said he did not want to buy one of the items because he was short on money. (*Id.*). When Ms. Lincoln started ringing up the sale, the man said he did not want it and just wanted the money. (*Id.*). He pulled out a knife and said, "I want the money." (*Id.* at 50). The knife had a black handle and blade a few inches long. (*Id.*). The man leaned over the counter and pointed the knife at her thigh. (*Id.* at 51). His face was about two feet away from hers. (*Id.*). She gave him the

money from three registers. (*Id.*). The man put the money in his pockets and left. (*Id.* at 53). He went out the front door and turned east. (*Id.*). Ms. Lincoln called the police. (*Id.*).

She wrote a statement at the request of police. (5/4/10 RP 54). Ms. Lincoln gave the police a description of the robber. (*Id.* at 56). She said he “looked like crap” and was just a shorter man, thinner, who did not shave and did not look healthy. (*Id.* at 55). She said Mr. Bodey, who she identified as the robber, looked different in court than he did then. (*Id.*). He now looked clean and his head was shaved. (*Id.* at 55-56). At the robbery, Ms. Lincoln could see his hair through his hat and his hair was longer and dirty blonde/light brown. (*Id.* at 56). The robber did not speak too clearly, like he was slurring his words or had a lisp. (*Id.* at 56, 75). She said he looked like he was on drugs as his cheeks were sunken and had little pock mark scars. (*Id.* at 72, 73, 74). Ms. Lincoln felt the robber was not trying to disguise his identity. (*Id.* at 73).

Ms. Lincoln said the man had not shaved for a couple of days and his nose was a little longer. (5/4/10 RP 57). She believed the robber was in his late 30s or early 40s. (*Id.* at 59). At trial, she said Mr. Bodey looked younger. On April 28, 2008, Ms.

Lincoln had picked Mr. Bodey out from a photo montage as the robber. (*Id.* at 60-62).

The defense called no witnesses. (5/5/10 RP 179). The court permitted amendment of the information on the State's motion to remove the deadly weapon enhancement. (*Id.* at 180-181; CP 90-91). There were no objections to the court's instructions to the jury. (*Id.* at 182).

The jury found Mr. Bodey guilty of first degree robbery. (CP 82). The court sentenced him to a standard range sentence of 40 months. (CP 98-108). This appeal follows.

### III. ARGUMENT

A. The State's evidence was insufficient to prove beyond a reasonable doubt that Mr. Bodey was the robber.

The only issue before the jury was the identity of the robber. (5/4/10 RP 8; 5/5/10 RP 202, 204). The discrepancies between the description of the robber given by Ms. Lincoln, the eye witness to the crime, in February 2008 and Mr. Bodey's physical appearance at trial were so great that her identification cannot prove beyond a reasonable doubt that he was the robber.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any

rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005).

But the question here is not one of credibility. Rather, the issue is whether substantial evidence supports the State's case when no rational trier of fact could find beyond a reasonable doubt that Mr. Bodey was the robber. *State v. McKeown*, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). There is no substantial evidence when an eye witness identification is based on a description that bears no resemblance whatsoever to the suspect before, during, and after the crime. Based on the evidence presented at trial, defense counsel in closing argued:

We told you from the beginning, this is, you know, it's going to be an eye witness case and nothing else, and there was literally no other evidence. . .

What's, also, clearly absent in this case anything about how Mr. Bodey looked in 2008 in February. You heard the detective say that he has access to all the DMV photos, all the RMS photos that exist anywhere. We heard the employer say we've got photos of – I suspect we have photos of him in our employee file.

The State didn't put on any evidence to tell you that in 2008, Mr. Bodey appeared to be strung out on drugs with

sunken face and pock marks on his cheek. No evidence of this at all.

Why not? Do you think the State would have access to that information or would that information be that Mr. Bodey looks exactly as he does now, exactly as he did in the photo in 2004 like he is now with his hair black as it is now, not the dirty blond with hair longer than mine as the witness indicated.

. . . [I]t didn't occur to [Ms. Lincoln] [the robber] was in a disguise or wearing a wig. She thinks that the person she saw is Mr. Bodey, and he's cut his hair. No evidence anywhere that he's ever worn his hair blond or dirty blond or light brown or longer than mine. No.

We don't have any evidence as to his appearance. . . What did she tell me in my interviews and what does she say on the stand about the appearance? Big nose, larger than normal nose, bigger than usual. Every time she said it. Abnormally large nose. Did that appearance change, too?

What about the pock marks? She told the officers pock marks. . . They had indents in the face, pock marks on the face.

I see that in the reports. I wonder what she means by that? I interview her. She tells you I interviewed her. She tells you I asked the questions, wrote down the answers. She tells me in response to what about the pock marks? Scars, they were scars.

. . . Is it clear to her she saw a pock marked face with scars, scar pock marks? I asked can you see them on his face now? Not from here. Look at his face when you come in and out of this courtroom, look at his face. Tell me if you see a blemish anywhere.

. . . When she looked at the photo montage, what does she say? . . .

That's the guy. He looks different, but that's the guy. Well, what about that? Are you convinced that she's correct? Could she have made a mistake?

. . . [Mr. Bodey] has none of the identifying features from the haircut to the big nose to the pock marks that she described, and no evidence that he has ever looked that way. No evidence that he's ever used or abused drugs. No evidence that he's ever had those features or the longer than mine blond hair, which [Ms. Lincoln] says was not a wig, and that he must have cut his hair. You got a picture from 2004 looks just like that. You got him now same appearance.

To reach your conclusion, you would have to assume that he's changed his identity going from what he used to look like to that to back to what he used to look like. All of that is reasonable doubt. Reasonable doubt. . . (5/5/10 RP 204, 205, 206, 207, 208, 213, 214).

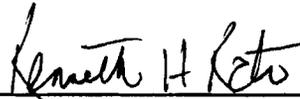
The State's evidence of identity simply established that there was, as argued by defense counsel, reasonable doubt. Even when the evidence is viewed in a light most favorable to the State, no rational trier of fact could find that Mr. Bodey was the robber beyond a reasonable doubt. *Green*, 94 Wn. 2d at 220-21. Indeed, the State's evidence is insufficient if the jury must guess or resort to speculation or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). That is what the jury did here. In these circumstances, Mr. Bodey's conviction of first degree robbery must be reversed.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bodey respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this 10<sup>th</sup> day of January, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on January 10, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260-2043, and Joshua Thomas Bodey, 8201 W. Bruneau, Kennewick, WA 99336.



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Kenneth H. Kato