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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29239-8-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ANTONIO A. PONCE

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUE

Is there sufficient evidence of identity?

IV. STATEMENT OF THE CASE

The Defendant Antonio Ponce was charged with possessing stolen property in the second degree. CP 68-69.

In May of 2009, Edward Makowski attempted to acquire a protection order against his neighbor Antonio Ponce. RP 45. Mr. Ponce lives in a mobile home across a vacant lot from Mr. Makowski. RP 29. Based on the statements of other neighbors, Mr. Makowski believed that Mr. Ponce had burned his shed, stolen his lawn mower and solar lights, and broken his window. RP 33, 47-48, 50. However, because Mr. Makowski did not present the judge with proof for his suspicions, the petition for order of protection was denied. RP 44.

In October of 2009, Mr. Makowski started to build a fence on his property to put an end to the thefts and vandalism. RP 33. Mr. Ponce approached Mr. Makowski and introduced himself, saying that he was looking for his dog. RP 32, 33, 50. They got to talking and Mr. Ponce said that he was not the bad person people believed him to be. RP 34, 50. Mr. Makowski accepted Mr. Ponce at his word and apologized. RP 34, 50.

Mr. Ponce then offered to build the fence for Mr. Makowski at a good price, and Mr. Makowski agreed. RP 34. But in ten days, Mr. Ponce had only put up three iron poles. RP 34. When Mr. Makowski complained about the delay, Mr. Ponce said he was going to get help from another neighbor with fence-building experience and that they could build the fence for \$600. RP 34. Mr. Makowski agreed. RP 34.

During the week of the fence's construction, Mr. Ponce asked Mr. Makowski to drive him to Spokane to purchase parts at a wrecking yard for his car. RP 35-36. Mr. Ponce explained that he could not order the parts and have them shipped, because he did not have a credit card. RP 36. Instead, Mr. Makowski allowed Mr. Ponce to use his own credit card to order the parts over the

telephone. RP 36, 44. Mr. Ponce told Mr. Makowski the purchase at Spalding Auto would be for \$11.00. RP 37-38.

A few days later, UPS delivered some packages for Mr. Ponce at Mr. Makowski's residence. RP 41-42. Mr. Makowski signed for them, expecting them to be the auto parts from Spokane, but not inspecting the packages. RP 41-42. Mr. Ponce's younger siblings were waiting to retrieve the packages immediately, but Mr. Makowski safeguarded them until Mr. Ponce could claim them himself. RP 41-42.

During the installation of the fence, Mr. Makowski had to repurchase materials that went missing around Mr. Ponce. RP 48. He also learned that Mr. Ponce had tried to inflate the price of materials for the fence in order to pocket the difference. RP 35. Although the fence was eventually completed, Mr. Ponce installed the gate in such a way that anyone could push the gate from the rail and enter the property. RP 34-35. Mr. Makowski had to add a chain on both sides to secure the gate. RP 35.

When Mr. Makowski's bank statement arrived, he noticed a charge from Spalding for \$34.66¹ and a charge from Best Buy for

¹ The transcript at page 37 appears to have a typo. The number should be \$34.66, not \$347.66.

\$797.00, both for October 10, 2009. RP 25-27, 37. Mr. Makowski knew that Mr. Ponce had made the purchase from Spalding. RP 36-37. Because Mr. Makowski had not purchased anything from Best Buy, he became suspicious that Mr. Ponce was responsible for that contemporaneous charge as well. RP 39. Also Mr. Ponce was the only other person who had access to the credit card at the time of the purchases. RP 49. Mr. Makowski recalled that, before returning the card, Mr. Ponce nervously snapped and bent it, creating a deep crease over the numbers. RP 36. When Mr. Makowski commented that he would have to order a new card, because the numbers were no longer readable beneath the crease, Mr. Ponce expressed concern, saying, "you're not gonna change the numbers, are you?" RP 36.

Mr. Makowski made a complaint to the Pasco Police Department and provided his bank statement to Officer Eric Fox. RP 25-28. Mr. Makowski pointed out Mr. Ponce as he was riding his bicycle down the alley between their homes. RP 36. Officer Fox confronted Mr. Ponce in Mr. Makowski's presence at Mr. Ponce's trailer. RP 29, 36. Mr. Ponce admitted the Spalding auto parts purchase and claimed that the \$11.00 purchase must have

been inflated by shipping costs. RP 38. Officer Fox instructed Mr. Ponce to pay the difference, and Mr. Ponce handed Mr. Makowski a \$20 bill. RP 38. However, Mr. Ponce denied the Best Buy purchase and stated that there are many ways to commit fraud and identity theft. RP 29-31.

UPS documentation establishes that the Best Buy purchases were delivered to Mr. Makowski's 1012 street address at 9:23 AM, where Mr. Makowski signed for the Best Buy deliveries before Mr. Ponce took possession of them. RP 41-42, 53, 68-70. The Spalding purchase was delivered directly to Mr. Ponce's 1020 street address at 9:26 AM where a woman accepted the package. RP 53, 57-60, 68-70.

The Best Buy bill was for an Acer laptop and some Nintendo games. RP 54-55. Although Mr. Makowski does not have an email address, the bill provides this information: makowski_edward@yahoo.com. RP 43, 54-55. Mr. Makowski has never used a computer or played a video game. RP 43. He does not know how to make purchases online. RP 43.

Detective Yates contacted Mr. Ponce. RP 60. He admitted the Spalding Auto purchase, but denied the Best Buy purchase.

RP 60. He denied picking up the Best Buy package from Mr. Makowski's address. RP 61. However, he admitted that his father owned an Acer laptop like the one bought by Mr. Makowski's credit card from Best Buy. RP 60-61. (The Defendant was a young man of 21, living with his parents and younger siblings. CP 68; RP 41-42, 70.)

Mr. Makowski, Officer Fox, and Detective Yates testified at trial in the presence of the Defendant who was seated beside his counsel. RP 97 ("that gentleman sitting there, right next to me who has been sitting there this entire trial").

At the close of the State's case, defense counsel challenged the sufficiency of the evidence for identity. RP 91.

I'm not necessarily disagreeing that in terms of the evidence proposed that this jury would be able to find that Mr. Ponce [perpetrated] the crime. But no one, throughout the course of the trial, has identified the Defendant as the Mr. Ponce that allegedly did all the things that occurred in October, through the testimony.

RP 92. The trial court denied the motion. RP 92.

In closing argument, the prosecutor alternated between referring to the "defendant," "Mr. Ponce," or "Antonio." RP 88-90. The prosecutor stated that the evidence showed "the defendant" or

“the defendant, Mr. Ponce” committed the acts. RP 88-90. The defense made no objection.

Defense counsel revisited her challenge to the sufficiency of the evidence for identity in her closing argument to the jury. RP 97-98.

Unpersuaded, the jury convicted the Defendant Antonio Ponce of possessing stolen property in the second degree. CP 2-3, 21-35, 41.

V. ARGUMENT

THERE IS SUFFICIENT EVIDENCE THAT THE DEFENDANT IS THE PERSON WHO COMMITTED THE ACTS.

On appeal, while acknowledging that the law does not require an in-court identification (Appellant’s Brief at 8, citing State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974)), the Defendant challenges the sufficiency of the evidence that he was the perpetrator of the offense.

The State bears the burden of establishing the identity of the accused person who committed the offense. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The standard of review for a sufficiency of the evidence challenge is whether, after viewing evidence in the light most favorable to the state, any rational trier of

fact could have found essential elements of the crime beyond a reasonable doubt. State v. Hepton, 113 Wn. App. 673, 681, 54 P.3d 233 (2002); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also Brooks v. United States, 717 A.2d 323, 327 n.13 (D.C. 1998), quoting Beatty v. United States, 544 A.2d 699, 701 (D.C. 1988) (“the test for the sufficiency of identification evidence ‘is whether a reasonable person could find the identification convincing beyond a reasonable doubt, given the surrounding circumstances.’”). The standard admits the truth of the state=s evidence *and* all inferences that can reasonably be drawn from this evidence in the states favor and interpreted most strongly against the defendant. State v. Hepton, 113 Wn. App. at 681; State v. Schelin, 147 Wn.2d 562, 573, 55 P.2d 632 (2002); Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789.

The Washington Supreme Court addressed the question of sufficient evidence of identity in State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). In that case, Hill was arrested after a police officer observed him in possession of heroin. At trial, the officer was not asked to identify the person who possessed the heroin.

However, the Washington Supreme Court found the evidence of identity sufficient where the officer testified that “the defendant” committed the criminal acts. State v. Hill, 83 Wn.2d at 560. In reviewing such a claim, the court would receive and evaluate “any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person.” Id. Therefore, based on the officer’s mere reference to “the defendant” committing the acts, the court was “satisfied that the evidence as it developed in the instant case was adequate to establish the defendant’s identity in connection with the offense for which he stood accused.” *Id.*

In Brooks v. United States, 717 A.2d 323, 326 (D.C. 1998), the defendant argued that the officers “failed to identify him directly” in court. The court held the evidence sufficient, noting inter alia that the officers used the defendant’s *last name* in their testimony and that the prosecutor repeatedly referred to the defendant by name *without objection*. Brooks v. United States, 717 A.2d at 327. The court also noted that “the fact that none of [the witnesses] pointed out that the wrong man had been brought to trial was eloquent and

sufficient proof of identity.” Brooks v. United States, 717 A.2d at 327, quoting Becker v. State, 768 S.W.2d 527, 529 (Ark. 1989).

In the instant case, the witnesses referred to the Defendant by name, the prosecutor called him the “defendant” without objection, and no witness suggested that the wrong man was being tried.

The mere fact that no witness points out that the wrong man is seated at counsel table is sufficient proof under the Washington standard, because it is “any” “circumstantial” evidence which would “tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person.” State v. Hill, 83 Wn.2d at 560. And, it is unlike the facts in State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005), the rare case where evidence of identity was found to be insufficient.

In State v. Huber, there was no evidence for the jury to identify the defendant as the person named in a no-contact order. There the evidence entirely consisted of documents: “copies of an information charging Huber with violation of a protection order and tampering with a witness; of a written court order requiring Huber to appear in court on July 10, 2003; of clerk’s minutes indicating that

Huber had failed to appear on July 10; and a bench warrant commanding Huber's arrest." State v. Huber, 129 Wn. App. at 501. No witnesses testified. Id. In other words, there were no witnesses to remark on the person seated at defense table.

The instant case is not one in which there was any doubt as to the suspect's identity. Witnesses testified, and this was not a case where the witnesses had little contact or acquaintance with the defendant. See e.g. State v. Johnson, 12 Wn. App. 40, 527 P.2d 1324 (1975) (finding sufficient evidence of identity where victim identified defendant in photo lineup 23 days after being robbed in an alley by a stranger he propositioned for sex).

In the instant case, substantial evidence was presented to the jury so as to conclude that the Defendant had been properly identified. The Defendant was well-known to the testifying witnesses: both the victim and law enforcement.

Mr. Makowski certainly knew Mr. Ponce. They were neighbors. They had lengthy conversations. They had business together. They ran errands together and had a meal together. RP 48. They knew each other so well that the Defendant felt comfortable enough to ask Mr. Makowski to drive him to Spokane

and let him use his credit card. RP 36. Mr. Makowski could even identify the Defendant's younger siblings. RP 41-42.

Officer Fox had no doubt as to the Defendant's identity. Mr. Makowski pointed the Defendant out to him. RP 36. The officer verified the Defendant's address in person. RP 29. He had a conversation about the criminal allegations with the Defendant and Mr. Makowski in the Defendant's own home. RP 29. In Mr. Makowski's presence, the Defendant admitted to Officer Fox that he was the person who had used Mr. Makowski's credit card, and he paid the difference for the price of the auto part. RP 38.

And Detective Yates was certain about the Defendant's identity. When Detective Yates contacted the Defendant at a later date, he admitted again that he was the person who had used Mr. Makowski's credit card. RP 60. The detective verified the Defendant's address as being the delivery location on a UPS receipt. RP 59. The UPS driver verified that he dropped off the auto supply package at the address verified as being the Defendant's. RP 69, 71.

All these three witnesses testified in the presence of the Defendant and made no remark as to his presence. The identities

of the lawyers were apparent, and it is general knowledge that a criminal defendant sits beside his counsel. Two of the witnesses, the law enforcement officers, were professional witnesses (one with twenty years experience – RP 51) whose business it is to observe and who knew exactly who should be sitting at the defense table.

There is very high deference for the conviction, because identity is a question for the trier of fact who is in the best position to see and hear the witnesses, determine credibility, and determine the witnesses' ability to observe and recall. State v. Johnson, 12 Wn. App. 40, 44, 527 P.2d 1324 (1975). The deference is particularly warranted here where the challenge (sufficiency of the evidence for identity) was made directly to the jury. The jury was in a position to see whether the witnesses reacted to the Defendant, whether they looked at him with recognition, whether the witnesses or attorneys gestured at him when speaking, and how the Defendant responded to testimony.

Based on the presence of witnesses and defendant in the same room and their level of acquaintance with each other, there was ample evidence from which a rational jury could conclude beyond a reasonable doubt that the Antonio Ponce in the court

the foregoing was delivered to Antonio A. Ponce, Appellant, #320168, P. O. Box 777, Monroe WA 98272, and to David Gasch, Gasch Law Office, PO Box 30339, Spokane WA 99223-3055, opposing counsel, by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Cari A. Ponce

Signed and sworn to before me this 7 day of June, 2011.

Mair L Johnston

Notary Public in and for
the State of Washington,
residing at Pasco

My appointment expires:

Sept 9, 2014