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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 339602

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent

vs.

JOHNNA SMITH, Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

REPLY BRIEF OF APPELLANT

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CASES CITED

State v. Vasquez, 309 P.3d 318, 178 Wn.2d 1 (Wash. 2013, *en banc*)2

In re Winship, 397 U.S. 358, 365, 90 S. Ct. 1058 (1970)3

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967)4

Wilson v. Olivetti North America, Inc., 85 Wn. App. 804, 814, 934 P.2d 1231 (1997).....4

State v. Adams, ___ N.C. App. ___, 727 S.E.2d 577, 583 (2012)6

State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996)8

State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)8

Other Citations:

Arkowitz and Linfield, “Why Science Tells Us Not to Rely Upon Eyewitness Accounts,” *Scientific American* (January 2010). 4

Rules:

ER 4017

ER 4047

This is Appellant's *Brief in Reply* to the State's Response. The Appellant thanks the State for its responsible and thoughtful brief in response. Per the appellate rules, Appellant directs the case law and arguments in this Reply solely to test the State's position.

I. ARGUMENT IN REPLY TO RESPONDENT

A). An Appellate Court can and must ask itself whether the jury's conclusions are reasonable.

The State's *Response* sets forth the correct standard for appellate review of claims as to the sufficiency of evidence. Appellant admits that an appeal based upon insufficient evidence carries a heavy burden. It is true that the evidence presented is cast in the light most favorable to the State and that case law states that *all* reasonable inferences from the evidence must be drawn in favor of the prosecution. But, it is critical to note that case law cautions that not all inferences are reasonable. The State's argument seemingly rests, near solely, upon the fact that a witness states he recognized the Appellant. However, the State does little to address whether such testimony could be conceived as reasonable under the circumstances. Recent Supreme Court case law emphasizes the importance that the inferences and conclusions be reasonable.

In *State v. Vasquez*, 309 P.3d 318, 178 Wn.2d 1 (Wash. 2013, *en banc*), our Supreme Court reversed a conviction based upon an insufficient evidence theory. *Vasquez* involved a man charged with using official identification (social security and legal resident status) to defraud employers and the US Government. *Vasquez* 178 Wn2d. at 3. *Vasquez* also started with an investigation instigated by a loss prevention officer who wrote up a customer who used a tube of lotion but set it back without paying. *Id.* The loss prevention employee asked the Defendant to provide identification. *Id.* The Defendant produced his wallet which contained a social security card and a permanent residence card. *Id.* ay 5. The defendant told the loss

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prevention officer that he came to Washington to work in the Yakima area. Later, the Defendant admitted that he had illegally purchased the identification. *Id.* at 4. Follow-up investigation led the federal government to testify that the documents were forgeries. *Id.* Significant evidence existed against Vasquez, including a near admission that the Defendant intended to use the identification to unlawfully secure work or other benefits. The jury convicted the Defendant with the premise there could be no other reasonable reason to carry cards like that.

Had our Supreme Court read its own standard and quickly skimmed the case, it would have upheld the conviction. Instead, our Supreme Court carefully looked at all the evidence in context and found that the prosecution's case rested on the jury inferring that the only reason to carry fraudulent documents was to defraud people. As sensible as the proposition first sounds, the Supreme Court found direct evidence lacking. *Id.* at 7. The case before this Court does not require that the jury make indirect inferences in their determination, but the *Vasquez* matter provides broad guidance as the level of analysis our Supreme Court undertakes in assuring itself that each conviction stands upon constitutionally sufficient evidence.

Our matter involves another simple element – identification. The State notes that Mr. McDaniels said that he had no doubt as to his identification of the Appellant as the person who robbed the store on the date in question. The State then argues that once McDaniel makes his identification ("100% certain") the appellate inquiry is over, because weighing the credibility and accuracy of McDaniel's testimony is for the jury. *State's Brief in Response*, 11.

Appellant respectfully disagrees. The jury in *Vasquez* heard from the people who spoke to the defendant and determined his intent beyond a reasonable doubt. The Supreme Court did

not stop there and ultimately found that the jury answered the wrong question. Appellate courts play a critical role in assuring that each person charged and receiving a guilty verdict has retained their constitutional right to due process throughout. *In re Winship*, 397 U.S. 358, 365, 90 S. Ct. 1058 (1970). The facts in this matter compel a reviewing court to ask, “was McDaniel’s certainty reasonable, even if sincere” and that answer must be “no.”

The State’s responsive briefing emphasizes that one witness, McDaniel, made contact with the robber, and that witness identified the Appellant with a dubious ‘100%’ degree of certainty: *See State’s Brief in Response*, at 9-11. Appellant does not contest that McDaniel testified with certainty, and Appellant is not asking this Court to re-weigh the witness’s sincere nature or motivation.¹ Appellant asks only a review as to whether the witness’s identification in context is reasonable, given all McDaniel could not remember and given all the inconsistencies in his other memories regarding the contact.

The State acknowledges that witness McDaniel misstated the Defendant’s height; stated he saw a tattoo-like marking that was not present at trial; that McDaniels could not have seen the Appellant’s eyes due to the robber wearing sunglasses; that he had significant trouble recalling other facts about the day in question which occurred nearly seventeen months prior, and necessarily based his decision upon seeing someone’s forehead, cheeks, neck and other. *State’s Brief in Response*, at 10-11. The State correctly notes that none of these infirmities, arising in isolation, would rise to the level that can be said that the State did not meet its burden. *Id.* at 11. But, as in *Vasquez*, this law charges this court with the duty to look at the

¹ The reasonableness of the jury’s decision is closely tied to the separate issue addressed in this brief, that being whether the admission of evidence as to prior police contact unfairly prejudiced the Defendant. Appellant attempts to keep the issues as separate as reasonable, and yet asks that this court view the conviction based upon the identification in the context of an arguably overly-prejudicial evidence.

entire context to determine and ask if any reasonable juror could place such faith in a man who puts 10% faith in himself despite the near .500 average.

This case involves one eye-witness and grainy video. There is no merchandise recovered to add weight to the identification, no forensic evidence – only an eyewitness. Cases with convictions based upon one eyewitness identification require thorough review of all facts pertinent to that identification. Appellate Courts do more than verify that the witness identified the defendant.

Among the many reasons that require a probing appellate review is the ever growing awareness that eyewitness identifications have been shown to be less reliable than once thought. Almost fifty years ago, In *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967), the U.S. Supreme Court acknowledged even then that the “vagaries” of witness identification are well-known and that the system is bursting with misidentifications. The science concerning memory and identification continues to refine itself and studies continue to discredit the assumption that eyewitness testimony is the gold standard in reliability. *See generally, e.g.* Arkowitz and Linfield, “Why Science Tells Us Not to Rely Upon Eyewitness Accounts,” *Scientific American* (January 2010).² The Appellant asks no more.

This Court should spend special time assuring itself that the identification was constitutionally sound where, as here, there is only the one witness in contact. There is no merchandise; there is no forensic evidence; and where the jury may have already have been

² Appellant offers the article not as expert testimony, but merely to re-enforce an issue that this Court can surely take judicial notice of: that being the scientific controversies regarding witness identification that has arisen in the last two decades. As put in the article, “The uncritical acceptance of eyewitness accounts may stem from a popular misconception of how memory works. Many people believe that human memory works like a video recorder: the mind records events and then, on cue, plays back an exact replica of them. On the contrary, psychologists have found that memories are reconstructed rather than played back each time we recall them.”

wrongly prejudiced due to needlessly hearing that the Defendant had prior police contacts – “they knew her” - which might lead a reasonable juror to assume that they rounded up one of the usual suspects. That issue is addressed next.

B. Detective Hensley’s testimony provided NO probative value and was therefore irrelevant and left nothing to weigh versus the highly prejudicial impact.

Stated succinctly, Detective Hensley performed a task required in his job. He ran the information gleaned from the plate number through the system’s known contacts to give him a lead on a possible identity. Detective Hensley then created a photo montage to present to Mr. McDaniel. Det. Hensley’s role in this matter *cannot* be expanded beyond those two ably-performed tasks. Testimony touching upon anything other than those two tasks renders Hensley’s testimony irrelevant delay at best, and inadmissibly prejudicial evidence at worst. Distilled to its essence, the trial court allowed Det. Hensley to testify “I have had contact with Ms. Smith in my previous work; I think the video shows Ms. Smith.” This distilled statement reflects its nature as “opinion testimony” on a video which requires no specialized training to interpret. Even more disturbingly, Det. Hensley’s opinion directly invites the jury to conclude that “the usual suspect(s) is involved,” that the “usual suspect did it” and that the Officer “knows that the usual suspect is on the video.” Such a scenario cannot survive review. As our Supreme Court states; “[e]vidence is unfairly prejudicial, and therefore properly excluded, when “it has the capacity to skew the truth-finding process.” *Wilson v. Olivetti North America, Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (1997). Here, the process was not merely skewed, it was nearly subsumed.

The State responsibly notes that “where the primary issue is one of identity, evidence of past crimes, wrongs, acts, to prove identity a necessary element to the offense is properly admitted at trial.” It is true that under 404(b), evidence may be admitted to show that the defendant is the perpetrator of the crime at issue, however the rule contemplates introduction of evidence that defendant committed another act very similar or uniquely similar to the one charged. The similarity in modus operandi informs upon identity. See, e.g., *State v. Adams*, ___ N.C. App. ___, 727 S.E.2d 577, 583 (2012). The State cannot point to any distinctive, unique, individualized or any other “modus-type” evidence here, because it doesn’t exist. Certainly there exists no foundation to support a jury hearing Det. Hensley state (in essence) “I have had past contacts with Ms. Smith and I think it is her on the video tape.”

Det. Hensley’s opinion on identity near defines inserting a witness’s opinion to the jury. Opinion testimony is special testimony, jealously guarded, presumptively excluded, generally allowed only in situations that require an expert to help the jury determine an issue that requires technical sophistication. It is true 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.” *State v. Hardy*, 76 Wn. App. 188, 190 (1994) (cited by State). But, *Hardy* demonstrates that admission of such testimony is the exception, one used in unique situations, such as that in *Hardy* where the police had been involved in an undercover sting for over a year with the accused. Moreover, *Hardy* involved “grainy” surveillance video, often involving many other individuals, thus the jury might better follow the subject in the video by knowing how the accused moved and other highly unique traits one learns over a year. Most

obviously, the jury in *Hardy* could see the exact nature of the contact with the accused – a sting, and thus had the “opinion” in the proper context. The jury in the matter before the Court could only speculate as to why a detective who finds photos of robbery suspects would have a picture and past contact with Ms. Smith.³

In this matter, a jury that could easily speculate that Detective Hensley had seen many similar videos with Ms. Smith and that Hensley’s opinion is likely rooted in seeing Ms. Smith in similar situations in the past. The entirety of the rules of evidence and criminal procedure are set up to guard against the ability to convict someone based largely upon him/her being a “usual suspect”⁴ and yet the door is wide open to such danger here. An all too normal juror could very easily settle lingering doubts as to identity by noting that a professional law enforcement officer believes Smith is depicted in the video, and who is he/she to question a conclusion likely based on things not heard in court.

Most decisive to the issue on appeal, the State cannot point to any probative value to Detective Hensley’s testimony beyond simply buttressing McDaniel’s problematic identification. Det. Hensley had no more personal knowledge as to the robber’s identity than the jury – they both only see the video. It is impossible to properly “weigh” the probative versus prejudicial character of evidence where there is no probative element to weigh. This court must ask,

³ The State notes that the State offered the Defense a chance to explain the contacts – they occurred in undercover operations. However true the claim, stating that one’s client operated as a C.I. in the past would likely lead to worse speculation. Regardless, because the testimony provided no probative personal knowledge, the Defense should never have had to make the decision.

⁴ See e.g. *State v. Wilson*, 144 Wn. App. 166, 176, 181 P.3d 887 (2008). In close cases, prior bad act evidence should be excluded. *Id.* at 177-78 This is because such evidence presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charges, but because of the jury’s overreliance on past acts as evidence of his character and propensities. *Slocum*, 183 Wn. App. at 442.

“What did Detective Hensley witness?” because the question is not easy to answer. The answer drives the decision in this matter.

Both sides noted the abuse of discretion standard which guides challenges to admissibility. Appellate Courts rightly resist micro-managing how trial judges craft each unique proceeding before it. But, Appellate courts will analyze the factors the trial court used in its weighing of probative versus unduly prejudicial evidence.

“The process of articulating the prejudice, and comparing it to probative value, ensures a ‘thoughtful consideration’ of their relative weight.” *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (quoting *Jackson*, 102 Wn.2d at 694). The balancing of potential prejudice against probative value is particularly important in sex cases, “where the prejudice potential of prior acts is at its highest.” *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

Here, the State notes that the trial court stated that it realized the evidence was prejudicial but believed the probative nature outweighed the prejudicial impact. Response Brief, at 16. The trial court did not state which factors weighed in favor of finding the testimony probative, only the conclusions. Simply put, this court cannot determine how the trial court balanced the very prejudicial evidence. The matter must be remanded for a new proceeding, free of such a concerning record. This Court cannot trust that the Appellant received a constitutionally sound proceeding leading to a constitutionally sound conviction.

Last, an evidentiary error does not require a remand when such an error is deemed harmless. Here, the error went to the ultimate fact at issue, and an element with so little other trustworthy evidence to create a trustworthy identification.

II. CONCLUSION

The proceedings that created the record before this court lead to significant concerns that require this Court to intervene and reverse. Appellant understands that such action is not taken lightly. But, Appellant brings two legitimately problematic issues that are so intertwined that separation of each is difficult, and perhaps wrong. Appellant invites this Court to consider the issues as a more encompassing single constitutional error under either theory if this Court deems it will make the decision more clear and instructions that flow from said Decision are easily followed.

Appellant thanks the Respondent for its thoughtful and well-crafted briefing on the matter and looks forward to close examination of the issues before this Court at oral argument.

RESPECTFULLY SUBMITTED THIS 29 day of July, 2016.



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