

FILED

MAY 02 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 339602

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

In re:

STATE OF WASHINGTON, Respondent

and

JOHNNA SMITH, Appellant

**APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY**

HONORABLE JOHN O. COONEY

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF ARGUMENT

The State failed to meet its burden to prove the elements of second degree robbery beyond a reasonable doubt; therefore, Ms. Smith's conviction violates due process and must be reversed.

The trial court erred when it allowed a detective to testify to irrelevant and prejudicial and prejudicial prior contacts with Ms. Smith in violation of ER 402 and 404(b).

II. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the elements of second degree robbery.
2. The trial court erred when it allowed Detective Hensley to testify about his prior contacts with Ms. Smith in violation of ER 402 and ER 404(b).

III. ISSUES PRESENTED

- A. Whether the State met its burden to prove the elements of second degree robbery beyond a reasonable doubt.
- B. Whether the probative value of the testimony from Detective Hensley was outweighed by the resulting prejudice to Ms. Smith.

IV. STATEMENT OF THE CASE

On October 14, 2014, the State filed an Information charging Johnna Smith with the crime of second degree robbery.

Prior to trial, Ms. Smith made a motion in limine to exclude testimony by a detective and an officer that they recognized her from prior contacts.

(CP 26.) She argued that the evidence had no probative value and violated ER 404(b) and ER 609. (CP 26.) In oral argument, Ms. Smith's attorney argued that testimony by Officer Hamilton that he had previously come into contact with Ms. Smith "implies some aspect of guilt or involvement in some violation of the law." (RP 31.) He further argued that "it would be even more prejudicial" to allow similar testimony from Detective Hensley whose job does not involve traffic stops or infractions but was limited to investigating significant crimes. (RP 31.) Ms. Smith's attorney argued that there was no reason why Detective Hensley's testimony would be helpful to the jury since his recognition of Ms. Smith on the video was utterly irrelevant given that the jury would be viewing the video themselves. (RP 32.) The trial court confirmed that "[i]t looks like he reviewed the video, possibly used that to put together the photo montage after he realized who he thought the person in that video depicted." (RP 33.) The trial court concluded that Detective Hensley "could use the video to assist him in creating a six-pack," and "assuming that he has a foundation for his testimony, having a detective testify as to what he perceives in a video does not invade the province of the jury...." (RP 66.)

At trial, the State called Matthew McDaniels to the stand. Mr. McDaniels testified that he had formerly worked for Rite Aid as an

undercover asset protection agent, and, at around 6:00 PM on July 30, 2014, he and his partner, John Reynolds, had been working at Rite Aid in the camera room monitoring the high theft areas of the store. (RP 72-74.) On that day, he had observed a woman enter the electronics section and select a pair of headphones, which he testified were a high-theft item at Rite Aid. (RP 74.) After she selected the headphones, he observed her walking up and down the aisle and then exiting that area of the store and moving toward the coolers. (RP 74-75.) The woman then chose a water bottle from a cooler and went to the candy aisle of the store toward the front registers, at which time, Mr. McDaniels observed her conceal the headphones in her bag. (RP 75.) Mr. McDaniels then testified that as soon as he had observed concealment, he exited the camera room and when to the front of the store while his partner stayed in the camera room to observe. (RP 75.) The woman paid for the water, but did not pay for the headphones; she then attempted to exit the store. (RP 76.) Mr. McDaniels then approached the woman and identified himself as an asset protection agent and asked for the merchandise for which she had not paid, but the woman did not return the merchandise and instead attempted to evade Mr. McDaniels by putting her head down and walking around him. (RP 76.) Mr. McDaniels then stepped in front of her again, and she began to push him with her hands five or six times and shouted, "You

can't touch me, and "You can't stop me," and "Let me go." (RP 77; 80.) Mr. McDaniels testified that at no time did he ever place his hands on the woman. (RP 77.) The woman, unable to get around him in order to get out of one set of doors, tried another set of doors and began yelling for help. (RP 77.) She then pushed through the sliding doors on the south side of the building so that the doors came off their hinges and opened up outwards, which allowed her to get out and onto the sidewalk. (RP 77.) Mr. McDaniels testified that he then noticed that there was a man in an old Honda waiting outside the doors on the south side of the store. (RP 77-78.) The man exited the vehicle and approached the woman and Mr. McDaniels, yelling profanities, after which he attempted to punch Mr. McDaniels. (RP 78.) The man continued to swing until he managed to punch Mr. McDaniels in the chest, during which he was yelling at the woman to get in the car and go. (RP 79.) The woman then got into the driver's seat of the car and drove northbound through the parking lot, and the man ran southbound on foot. (RP 79.) Mr. McDaniels then immediately called 911 and read the license plate number directly off of the Honda for the dispatcher. (RP 80.)

At about that time, Mr. Reynolds left the camera room and came to join Mr. McDaniels at the front of the store, arriving just after the man got

away. (RP 80.) Mr. McDaniels then testified that he saw the woman drive up from behind the building and pick up the man. (RP 80.)

Mr. McDaniels described the woman to the police as a white female in her late twenties, about five-foot-eight, thin, and wearing a black tank top. (RP 96.) He described the male as a white male in his late twenties with a beard and a gray t-shirt. (RP 96.) Mr. McDaniels also testified that he was asked to review a photo lineup after the event and that he was able to identify a suspect in that photo lineup. (RP 91.)

Mr. McDaniels told the jury that the woman he had previously seen that day at Rite Aid was presently in the courtroom, after which he identified the defendant, Johnna Smith, as that woman; however, Mr. McDaniels could not recall the day of the week on which the incident had taken place, nor he could not remember the temperature on that day or what he had had for lunch. (RP 81; 92) He similarly did not recall what type of shoes the woman had been wearing nor could he remember the color of her eyes. (RP 97-98.) He admitted that he could not see the woman's eyes, eyebrows, or the upper part of her face. (RP 98.) He confirmed that he had reported the woman as five-foot-eight, or approximately one inch taller than his own height, which was five-foot-

seven. (RP 96.) At trial, Mr. McDaniels stood next to Ms. Smith so that her height could be demonstrated.¹ (RP 111.)

Mr. McDaniels admitted that he had reviewed the video prior to trial at the prosecutor's office where he had also talked with them about the upcoming trial. (RP 98.) He also stated, "I just go along with whatever the officers bring me. If they need help on a case, I offer my assistance as much as possible." (RP 102.)

The State then called Officer Michelle Kernkamp, who testified that in July of 2014, she was serving as a patrol officer, and that she had been on patrol when she responded to the incident at Rite Aid; in fact, she was the first and only officer that responded to Mr. McDaniels' 911 call. (RP 121; RP 135.) She spoke to Mr. McDaniels when she arrived, and she ran the plate number he gave her through the CAD system. (RP 124.) She learned that the vehicle he saw had been registered to a 'Corey K. Knudsvig.' (RP 124.) She then ran that name through the local law enforcement system to see if Mr. Knudsvig had ever been in contact with the police or been a victim of a crime in hopes of discovering information to identify the female suspect. (RP 126.) She next learned that Mr. Knudsvig had previously been in contact with the police in the company

¹ In closing argument, Ms. Smith's attorney confirmed (with no objection by the State) that Ms. Smith was shorter than Mr. McDaniels. (RP 235.)

of a woman who matched the description provided by Mr. McDaniels. (RP 127.) Officer Kernkamp testified that she then went to the address listed in the system for Mr. Knudsvig and tried to contact him or locate his vehicle, but she was unsuccessful. (RP 130.) She confirmed that she had not taken fingerprints from the cooler to identify the woman nor had she collected any other physical evidence. (RP 141.)

The State then called Officer Craig Hamilton who testified that on April 7, 2014, he had been on the K9 shift and had come into contact with four individuals in a Chevrolet at about 2:27 AM in the morning. (RP 146.) Officer Hamilton testified that two of the people in the car at that time were Johnna Smith and Corey K. Knudsvig; however, he confirmed that he had no knowledge about the Rite Aid incident. (RP 147-49.)

The State then called Detective Jerry Hensley, who testified that he worked with the Spokane police department on cases involving robbery, homicide, and unattended death. (RP 151.) He testified that he had been responsible for preparing a photomontage of potential suspects in this case and, that he had asked Mr. McDaniels to review the photomontage and determine whether he could identify a suspect. (RP 154.) Detective Hensley had reviewed Officer Kernkamp's investigation and noted where she had identified a possible suspect and then prepared a photomontage based on the suspect she listed. (RP 154.) He then went to the Rite Aid

store to retrieve the security footage of the incident and to present Mr. McDaniels with the photomontage. (RP 154.) When questioned, Detective Hensley confirmed that he had *not* seen the video prior to creating the photomontage and presenting it to Mr. McDaniels and Mr. Reynolds, but that he watched it later when he went back to his office. (RP 161-62; RP 173.) Detective Hensley explained to the jury that the photographs used in photomontages are randomly selected by the computer system (not him) based on a similarity to the suspect. (RP 158.) He confirmed that he showed the photomontage to Mr. McDaniels and Mr. Reynolds, and that Mr. McDaniels picked number five but Mr. Reynolds was not able to pick any. (RP 160.) Detective Hensley then testified that number five was the defendant, Johnna D. Smith. (RP 160.) Detective Hensley confirmed that even though Mr. Reynolds looked through the photomontage and could not choose any photograph, Detective Hensley failed to put that information in his report. (RP 173.)

Detective Hensley then testified that he had had prior contact with Ms. Smith in 2011 on two occasions, face to face, for about fifteen minutes each time. (RP 162.) He confirmed that through his previous interactions with her, he was familiar with her appearance and had been able to identify her on the video. (RP 162.) Detective Hensley also admitted that

he did not mention in his report that he recognized Johnna Smith from his own experience. (RP 178-79.)

While on the stand, Detective Hensley viewed the security video footage and a still shot photograph from the video footage and confirmed that there was something on the back of the suspect's neck and that there was no such mark on Ms. Smith that day in court. (RP 176-77; RP 179-82.)

The jury returned a guilty verdict. (RP 246-48.)

V. ARGUMENT

A. The State presented insufficient evidence to prove the elements of second degree robbery.

STANDARD OF REVIEW: When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* In a challenge to the sufficiency

of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

SUBSTANTIAL EVIDENCE: Due process requires that the State bear the burden of proving every element of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 796 (1995). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence is not substantial evidence and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973)(quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970). While circumstantial evidence is no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 488, 670 P.2d 646 (1983)

The verdict should be reversed if, after reviewing the evidence, the court cannot conclude that any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

The State charged Smith with violating RCW 9A.56.210 (robbery in the second degree). Under RCW 9A.56.210, the State was required to prove robbery:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

At trial, Mr. McDaniels claimed that he remembered Ms. Smith from 15 months prior, but he could not remember the day of the week, the weather, or what he had for lunch on the same day in question. (RP 81; RP 92.) He admitted that he didn't remember her eyes, her shoes, or any jewelry or piercings she had. (RP 97-98.) He admitted that the whole incident was mere minutes long. He admitted that he wanted to help the police when they showed up a week later with a photomontage and that he

“goes along” with whatever the police bring him. (RP 102.) No one but Mr. Reynolds and Mr. McDaniels saw Ms. Smith that day, and Mr. Reynolds could not identify any suspect. (RP 160.)

Mr. McDaniels admitted that he assessed the height of the robber as an inch taller than himself when, in fact, Ms. Smith is *shorter* than Mr. McDaniels. (RP 96; RP 111.) Officer Hamilton testified that he came into contact with Ms. Smith in a Chevrolet, not a Honda, which was the make of car that Mr. McDaniels had testified to seeing. (RP 80; RP 146.)

None of the witnesses at trial could explain why the robber appeared to have a tattoo on the back of her neck but Ms. Smith had no tattoo or scar from where a tattoo might have been removed.

The State failed to meet its burden at trial.

B. The trial court erred when it allowed Detective Hensley to testify about his prior contacts with Ms. Smith in violation of ER 404(b).

STANDARD OF REVIEW: A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). An abuse of discretion occurs if the court’s decision is manifestly unreasonable or rests on untenable grounds.” *Id.*, citing *State v. Dixon*, 159 Wn.2d 65, 147 P.3d 991 (2006). While trial judges are in the best position to determine relevance and prejudicial impact, a trial court’s balancing of these considerations will be

overturned if no reasonable person could take the view adopted by the court. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007); *State v. Johnson*, 185 Wn.App. 655, 670-71, 342 P.3d 338 (2015).

ER 402 prohibits admission of evidence that is not relevant. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable ... than it would be without the evidence.” ER 403 requires exclusion of evidence, *even if relevant*, if its probative value is outweighed by the danger of unfair prejudice.

“When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). “In doubtful cases, the scale should be tipped in favor of the defendant and the exclusion of evidence.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). The rules of evidence prohibit evidence of prior crimes or wrongs “to prove the character of a person in order to show action in conformity therewith.” ER 404(b).

Where evidence is erroneously admitted under ER 402 and ER 404(b), the question is whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”

State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)(quoting *State v. Smith*, 106 Wn.2d at 780.)

The suggestion that the officers were familiar with Smith because of prior criminal investigations make it less likely for jurors to find reasonable doubt and more likely that they would convict. This is particularly true for Detective Hensley who does not do routine traffic stops or deal with minor infractions. Given that he prepared the photomontage based *solely* on the information provided by Officer Kernkamp and not on any identification of his own, the fact that he *later* recognized Ms. Smith in the video (partially based on his preparation of the photomontage) does *nothing* to confirm Ms. Smith as the robber. At no time was Detective Hensley's personal knowledge or recognition of Ms. Smith relied upon in the investigation of this case, and his recognition of Ms. Smith from her former involvement as a confidential informant was entirely irrelevant, a fact which is confirmed by Detective Hensley's own testimony that the information was not significant enough to include in his own report. (RP 173.) The detective's testimony that he had had several encounters with Ms. Smith in the past provided absolutely *no* relevant information to the jury with respect to this incident and did nothing but create the extraordinarily prejudicial implication that Ms. Smith was the type of person who had frequent run-ins with a detective whose work was

focused on major crimes. Further, the detective's only source of personal knowledge was that he had been in Ms. Smith's presence for a total of 30 minutes at some point in the past. At the time the detective testified, he had had less time in the presence of the Ms. Smith than the jury had; his testimony as to how *he* assessed the evidence essentially put him in the place of the jury and allowed him to encourage them to substitute his judgment for theirs, which is entirely improper.

The trial court's ruling on Ms. Smith's motion in limine was based on a mistaken understanding of the facts. The trial court ruled that "[i]t looks like he reviewed the video, possibly used that to put together the photo montage after he realized who he through the person in that video depicted," (RP 33), but as the evidence shows, this is not the case. The detective assembled the photomontage based entirely on the information provided by Officer Kernkamp and not based on any observation of his own; in fact, the detective did not even view the video until *after* he presented the photomontage to the witnesses. (RP 161-62; RP 173.) Therefore, Dective Hensley's recognition of the witness from prior encounters was entirely irrelevant as well as prejudicial.

VI. CONCLUSION

Because the State failed to meet its burden to prove second degree robbery beyond a reasonable doubt and because the trial court erred by

admitting evidence that was unfairly prejudicial to Ms. Smith, this Court should reverse Ms. Smith's conviction for second degree robbery.

RESPECTFULLY SUBMITTED this 2nd day of MAY, 2016,

A handwritten signature in black ink, appearing to read "Rally", written over a horizontal line.

ROBERT COSSEY WSBA #16481
Attorney for Appellant

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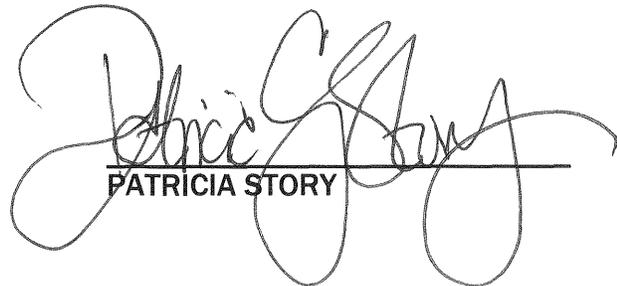
No. 339602

AFFIDAVIT OF SERVICE

I, Patricia Story, under penalty of perjury under the laws of the State of Washington, declare that on May 2, 2016, I personally served the following document to the individual listed in this Affidavit at the below last known addresses: **APPELLANT'S OPENING BRIEF.**

Dale Nagy
Spokane County Prosecuting Attorney
1100 W Mallon
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Dated this 2nd day of May, 2016.



PATRICIA STORY

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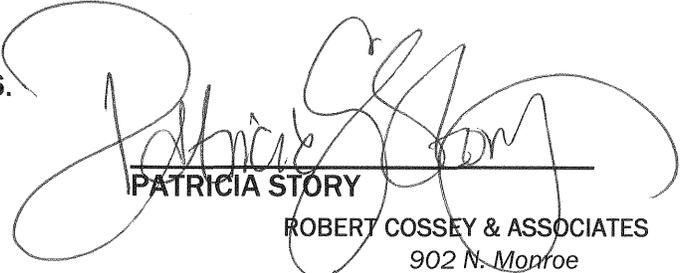
No. 339602

AFFIDAVIT OF MAILING

I, Patricia Story, under penalty of perjury under the laws of the State of Washington, declare that on May 2, 2016, I deposited in the United States Mail, first class postage affixed, by regular mail the following document to the individual listed in this Affidavit at the below last known address: APPELLANT'S OPENING BRIEF.

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Dated this 2nd day of May, 2016.



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