

62523-3

62523-3

NO. 62523-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL
THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court abused its discretion in admitting the detective's opinion, which was based on his perceptions and on his experience with burglaries, that three burglaries were committed by the same person and that Smith strongly resembled the person depicted in videos relating to those burglaries.

2. Whether any error in admitting the opinion testimony was harmless as to both Count 1 and Count 4.

3. Whether, by operation of RCW 9.94A.530(2), Smith waived any objection to including all six California burglary convictions in his offender score by failing to object at sentencing.

4. Whether Smith's affirmative acknowledgement of the comparability of four California burglary convictions in the trial court bars his challenge to comparability on appeal.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Tony Smith, was charged by second amended information with four counts of burglary in the second degree. CP 45-47. Count 1 related to a burglary at 568 First Avenue South, Seattle, January 5-7, 2008; Count 2 related to a

burglary at 2106 Second Avenue, Seattle, January 18, 2008; Count 3 related to a burglary at 190 Queen Anne Avenue North, Seattle, September 3, 2006; and Count 4 related to a burglary at 190 Queen Anne Avenue North, Seattle, December 27-28, 2007. CP 45-47.

Judge Jeffrey Ramsdell began the trial in this case and ruled on many motions in limine. 1RP 2; 2RP 13-37.¹ Judge Palmer Robinson presided over the remainder of pretrials and the trial itself. 4RP 1; 5RP 1. On August 29, 2008, the jury found Smith guilty as charged on Counts 1, 2, and 4. 11RP 10-11. The jury was unable to reach a verdict on Count 3. 11RP 8-11.

Smith filed a presentence report agreeing that his score was "nine plus." Supp. CP __ (Sub No. 146, Order Completing Record, 10/9/09). He requested and was granted a Drug Offender Sentence Alternative sentence. CP 89-97; 12RP 4-8.

¹ The Verbatim Record of Proceedings will be cited as follows: 1RP – 8/6/08; 2RP – 8/7/08; 3RP – 8/13/08; 4RP – 8/14/08; 5RP – 8/20/08; 6RP – 8/21/08; 7RP – 8/25/08; 8RP – 8/26/08; 9RP – 8/27/08; 10RP – 8/28/08; 11RP 8/29/08; 12RP – 9/23/08.

2. SUBSTANTIVE FACTS

The charges in this case relate to four separate commercial burglaries.

Count 1, the Freeman Company, January 5-7, 2008

On January 7, 2008, employees of the Freeman Company arrived at work and discovered that their office at 568 First Avenue in Seattle had been burglarized. 7RP 99-100. The door into the building had been pried open, the door into their second-floor office from the stairwell had been pried open, and drawers were pried open. 7RP 100, 113. Nine laptop computers and two digital cameras were missing. 7RP 100, 113.

There was a video surveillance system in the building, which captured footage of forced entry into the building over the midnight hour of January 5-6, 2008. 7RP 126-29; Ex. 45. The video shows a man forcibly entering the building and, just over an hour later, leaving the building with at least two packs, one of them a two-color backpack. Ex. 45.

On January 7, 2008, hours after the burglary was discovered, police found Tony Smith in a motel room at the Seattle Motor Inn, after the registered guests had checked out. 6RP 104-07; 7RP 70-75. There also were backpacks in the room, along

with digital cameras, laptops and other electronic equipment.

6RP 107, 117-22; 7RP 75, 79-80. Smith was wearing a polo shirt with the Freeman Company logo on it. 6RP 115. Smith was arrested for trespass and taken to the police precinct to verify his identity. 6RP 111-12; 7RP 83.

The laptops in the motel room were traced to the Freeman Company, using their service labels. 6RP 113; 7RP 94. Cookie Vigil, a manager with Freeman Company, came to the police precinct that day and identified the laptops and two of the cameras as belonging to Freeman. 6RP 114; 7RP 119. Vigil brought the surveillance video with her. Id. When Seattle Police Sgt. Dianne Newsom told Smith that the police had his picture at the burglary, Smith said, "Was that going in or coming out?" 6RP 116. Sgt. Newsom responded, "Does it matter?" Id. Then Smith said, "Are you happy now that you've got me?" Id.

Vigil identified the polo shirt with the Freeman Company logo that Smith was wearing. 7RP 120. It was one that had been made by the company and had not been offered for retail sale. Id. When the police returned the computers and camera to Vigil after she identified them, the bag that she got back was one that a Freeman Company employee used to carry his laptop. 7RP 121.

Count 2, DSHS building, January 18, 2008

On January 18, 2008, two people walking by the DSHS building at 2102 Second Avenue in Seattle saw a man inside the building. 7RP 20. Mark Harrison saw the man inside banging a trash can on the lower window to an office area. 7RP 22. Harrison called police. 7RP 23.

The man inside was successful in breaking the window and went into the room, coming out within five minutes. 7RP 22-23. The man then kicked and tried to force a door to another office, but could not get in. 7RP 23. He did manage to get into another office area. Id.

When Seattle Police Sgt. Michael Coomes arrived, he saw Smith methodically going through cubicles inside the building. 6RP 14. Finally, Smith noticed Sgt. Coomes, and ran toward the rear of the building. 6RP 15-16. He had to break the handle off of a door to get out of the area. 6RP 16-17.

Hee Lim, arrived at the DSHS building at 6:50 p.m., to do his after hours cleaning. 7RP 10-11. He discovered the window on the back door shattered, and the door open. 7RP 11. He locked the door and went inside. Id. On the second floor, he heard noises downstairs, then saw a man come upstairs. 7RP 12. The man

looked very surprised, then defeated. 7RP 13, 15. That man was Tony Smith. 6RP 20; 7RP 13.

When the police arrested Smith, they found a screwdriver in each of his front pants pockets, and seven more screwdrivers in his backpack. 6RP 20, 46, 83; 7RP 41-43. After advice of his constitutional rights, Smith twice told Seattle Police Officer Michelle Gallegos, "I'm sorry." 6RP 47-48.

Doors and windows in the building had been broken. 6RP 21, 62-64; 7RP 16. Electronics, including video machines, VCRs, and computers had been moved from their normal locations to the hallway to the back door. 6RP 21, 64-65, 95.

Count 3, Seattle Savings Bank, September 3, 2006

On September 3, 2006, employees of Seattle Savings Bank² and Northwest Education Loan Association discovered that their offices at 190 Queen Anne Avenue North, Seattle, had been burglarized. 8RP 6-11. An inside door had been pried open, offices had been broken into, and cabinets pried open. 8RP 6-8, 11-12. Laptops, a projector, a digital camera, and cable were stolen. 8RP 7-9, 11-12.

² This witness refers to the business as Seattle Financial Group, but as most references to this business are to Seattle Savings Bank, the State has adopted the latter.

There was a video surveillance system in the building, which captured footage of the man who had forced entry into the building, carrying stolen equipment. 7RP 141-42; 8RP 12-17; Ex. 56.

Seattle Police Detective Sean Jenkins reviewed the video from the scene and distributed a police bulletin with stills abstracted from the video. 7RP 137-38. Seattle Police Sgt. Nelson contacted Det. Jenkins, indicating that he thought the man depicted was named Goodwin. 7RP 138-39. Det. Jenkins compared a booking photo of Goodwin to the video images and concluded that they did not match. Id.

Count 4, Seattle Savings Bank, December 27-28, 2007

On December 28, 2007, employees of Seattle Savings Bank discovered that the business had been burglarized again. 7RP 57. An inside door from a stairwell had been pried open and cabinets were pried open. 7RP 58; 8RP 19-21. Laptops, cameras, and a sheet of uncut dollar bills were stolen. 7RP 57; 8RP 18. A hammer was left by the intruder. 7RP 58.

There was a video surveillance system in the building, which captured two sets of video surveillance footage of the man who forced entry into the building. 8RP 24-30, 53-57; Ex. 63, 66. Exhibit 63 is video footage of the man in the garage and main

lobby. 8RP 24-30; Ex. 63. Exhibit 66 is video footage of the man on the fifth floor, where the burglarized Freeman Company offices were located. 8RP 17, 53-57.

Exhibit 66 includes images of the intruder entering carrying the same two-tone backpack that was visible in the Freeman surveillance video. 8RP 64; Ex. 45, 66. The video pictures the intruder walking with his head bowed at most times, and at one point walking backwards in an apparent effort to avoid the camera capturing his face. Ex. 66. However, when the intruder walks through the door with his original pack, a second bag, and a boxy item, he turns after he goes through the door, revealing his face to the camera. Id.

Investigation

Seattle Police Detective Wall was assigned the investigation of the second Seattle Savings Bank burglary. 8RP 35. He compared the video surveillance image of the intruder with the image of the intruder in the 2006 Seattle Savings Bank burglary and believed they were the same person. 8RP 36-38. When he saw the video surveillance image of the intruder in the Freeman Company burglary, he believed it also was the same person. 8RP 39.

Detective Wall's opinion that the intruder in all three cases was the same person was based on his careful study of the videos, his view of a photograph of Smith at the time of the burglaries, and his experience investigating burglaries in Seattle, which helped him identify unusual characteristics that these burglaries shared. 8RP 40-45, 59-65.

Detective Wall noticed that a necklace with a round object dangling from it was visible around the intruder's neck in the December 2007 Seattle Savings Bank video surveillance. 8RP 47; Ex. 63. He considered it unusual for a man to wear that type of necklace and unusual that it was worn outside the man's sweatshirt. 8RP 48-49. Detective Wall looked at the property recovered from Smith and discovered a silver ring on a chain. 8RP 47. That necklace had been seized from Smith on January 7, 2008, when he was arrested at the Seattle Motor Inn. 7RP 83-84.

Defendant Smith testified at trial, but only as to the DSHS burglary. 9RP 15-19. At Smith's request, the State was prohibited from cross-examining him about the other three burglaries. 9RP 8-12. Smith testified that he was under the influence of alcohol and drugs the night of the DSHS burglary and went in to the building through an open door, to take a shower. 9RP 16-18, 22. He

admitted that the backpack he had was his own, and claimed that the screwdrivers in the pack were there in case he found work.

9RP 19. He claimed not to remember breaking any glass and he said that he did not know why he had screwdrivers in his pants pockets. 9RP 23-24.

During jury deliberations, the jury asked for a laptop to watch the surveillance videos. 10RP 3. The judge allowed the jurors to watch the videos only once each, from beginning to end, in the courtroom. 10RP 3-6.

C. ARGUMENT

1. THE OPINIONS OF DETECTIVE WALL WERE PROPERLY ADMITTED.

Smith asserts that his convictions on Counts 1 and 4 should be reversed because testimony of Detective Wall as to the identity of the man committing those burglaries was improperly admitted because the detective had not met Smith prior to trial. This claim is without merit. Detective Wall testified that a photograph of Smith strongly resembled a man depicted in surveillance videos related to three burglaries and that the similarities in those burglaries and the person depicted in the videos led him to believe that the burglaries

were committed by the same person. The trial court did not abuse its discretion in admitting that testimony as both lay and expert opinion as to identification, based on the detective's view of a contemporaneous photograph of the defendant, his exhaustive study of the videotapes, and his expertise in burglary investigation. If this Court concludes that the trial court erred in admitting this testimony, the error was harmless.

In its pretrial ruling, the trial court (Judge Ramsdell) ruled that the detective's opinion as to the similarity of the photograph of the defendant to the images in the videotapes was relevant to the course of the police investigation as well as to the determination of a fact in issue, the identity of the burglar. 2RP 30-31.

The Washington rules of evidence explicitly allow the admission of lay opinion "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." ER 701. The rulings of the trial judge admitting this opinion evidence are evidentiary rulings, which will be reversed only for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S.

1008 (1998). Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id.

Expert opinion evidence is admitted pursuant to ER 702, which provides: "If ...specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As with lay opinions, admission of expert opinion evidence is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).

The evidence rules provide that "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704; see, e.g., State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007), cert. denied, 128 S. Ct. 2430 (2008) (presumptive death certificate in no-body murder). While the identity of the person who committed a crime is an ultimate issue, that does not render identification evidence an impermissible intrusion on the jury's determination of that issue.

a. Detective Wall's Testimony.

Detective Wall had been a Seattle police officer for 20 years and a burglary detective for two years. 8RP 31, 80. He testified that he compared the videos from the two Seattle Savings Bank burglaries and the Freeman burglary and believed they each involved the same suspect. 8RP 36-39. He went through the videos very carefully, stopping and viewing each angle, and examining them frame by frame. 8RP 59, 61-62, 64. He explained the many reasons for his conclusion at length, emphasizing that it was the totality of the circumstances that informed his opinion. 8RP 78-79, 88.

The reasons for his conclusion that the three burglaries involved the same suspect began with the appearance of the intruder. The intruder in each was an African-American male, while the race of burglars mirrors the demographics of the community, which, in Seattle, means that the majority of burglars are Caucasian. 8RP 40-41. In each video, the intruder's head was shaved and his facial structure had a protruding jawline, with rounder cheeks. 8RP 42, 64. The detective believed that the shape of the intruder's head in each video also matched. Id.

The same backpack, with a "maroonish panel surrounded by white," was carried in by the intruder in the 2007 Seattle Savings Bank burglary and the Freeman Company burglary. 8RP 64.

The detective testified that other characteristics shared by these three crimes also were unusual. It is unusual for a burglar to spend a great deal of time inside a business, as occurred in each of these incidents. 8RP 41-42. It is unusual for burglars to take as much property as was taken in these burglaries. Id.; 8RP 65. It is unusual for burglars to focus on electronics, which may be hard to dispose of without trace. 8RP 60.

Referring to the two burglaries at the Seattle Savings Bank, Detective Wall testified that it is common for burglars to return to the same business, after they are familiar with the location of cameras and the building routine. 8RP 59-60. The detective also observed that similar businesses (office cubicles) were targeted in each of the burglaries. 8RP 79.

In both of the Seattle Savings Bank incidents, the intruder was wearing white gloves or socks on his hands. 8RP 42-43, 62. In the Freeman Company video, the man approached the building with his hands in his pockets, so there is no way to tell if his hands were covered. 8RP 64. He also approached the Seattle Savings

Bank with his hands in his pockets in the 2007 video. 8RP 64. In all three incidents, tools were used to pry doors open. Id.

Detective Wall testified that when he saw the “very recent” photograph of Smith after his arrest at the motel, it was the detective’s opinion that Smith “strongly resembled” the video from all three burglaries. 8RP 44-45. At the time of his arrest with the property stolen from the Freeman burglary, Smith was wearing a distinctive necklace that matched a necklace worn by the intruder in the 2007 Seattle Savings Bank video. 8RP 47-49.

Asked how he tied the DSHS burglary to the others, Detective Wall emphasized that he formed his opinion after the Freeman burglary (which was before the DSHS burglary). 8RP 65. He said that after Smith was caught inside the DSHS building, “that cemented the deal for me.” Id. He had been informed of the nature of the damage at the DSHS burglary and the items that had been gathered in the hallways. 8RP 65-66.

b. The Testimony Relating To The Identity Of The Person Seen In Surveillance Tapes Was Proper Lay Opinion.

A witness may offer an opinion on a material issue when the witness has special knowledge upon which that opinion is based

and the opinion is helpful to the jury. Detective Wall had special knowledge of the appearance of Smith at a time contemporaneous with the last three burglaries. Detective Wall also had special knowledge of the details of each of the videos, based on his exhaustive review of those videos. Finally, Detective Wall had experience with the characteristics of commercial burglaries. His knowledge of Smith's appearance at the relevant time, his familiarity with the videos, and his experience with commercial burglaries was special knowledge that was not within the common experience of the jurors. His application of that knowledge to the images of the person who committed these crimes was helpful to the jury, so the trial court did not abuse its discretion in admitting it as lay opinion testimony. ER 701.

The conditions for admissibility of lay opinion testimony under ER 701 are that the witness has personal knowledge of matter that forms the basis of the opinion, that the opinion is rationally based on the perceptions of the witness, and that the opinion is helpful to the jury. Ortiz, 119 Wn.2d at 308-09. The principal test is the last—that the opinion is helpful to the jury. Id. The opinion of a law enforcement officer may constitute lay opinion, when the officer's experience investigating crimes provides

knowledge that forms the basis of the opinion that relates to the crime at issue. State v. Russell, 125 Wn.2d 24, 71, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

This Court has stressed that opinion testimony relating to identity is admissible when it is useful to the jury. State v. Collins, No. 61646-3-I (Washington Court of Appeals Division I, Sept. 21, 2009) (2009 Westlaw 2999329), ¶¶ 22-27. The Court noted that identification opinion testimony may be particularly helpful where the witness testifies to the identity of a person in a photographic image that is less than perfect. Id. at ¶ 27.

In State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd sub nom., State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996), the court approved opinion testimony by police officers in two cases in which they identified defendants in surveillance videotapes. The court noted that no previous Washington cases addressed the application of ER 701 to lay witness opinion of the identity of a person in a photograph or videotape. Hardy, 76 Wn. App. at 190. Because Washington ER 701 is identical to Federal Rule of Evidence 701, the court looked to federal cases for guidance. Id. The court held 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." Id. at 190-91.

Federal cases considering the admissibility of testimony on the identification of a person shown in surveillance recordings have considered three factors: the quality of the images, the familiarity of the witness with the defendant, and whether the person in the surveillance photograph is disguised or the defendant has changed his appearance since the time of the crime. Hardy, 76 Wn. App. at 190; United States v. Jackman, 48 F.3d 1, 5 (1st Cir. 1995).

The opinion of the witness is helpful if the images are not "so unmistakably clear or so hopelessly obscure" that the witness is in no better position than the jury to make an identification. Jackman, 48 F.3d at 5; United States v. Wright, 904 F.2d 403, 405 (8th Cir. 1990). The images in the four videos in this case are good quality for surveillance videos. 8RP 36; Ex. 45, 56, 63, 67. They are described by Smith as "relatively high quality." App. Br. at 20. However, each video has only limited images of the intruder's face, sometimes because of the distance of the man from the cameras, most often because the man walks with his face averted from the camera (at one point, walking backwards). Ex. 45, 56, 63, 66.

Detective Wall also had special knowledge of the details of the videos, based on his exhaustive review of those videos. The jury was permitted to see the videos only from the perspective of the jury box, necessarily at varying distances from the display. Only one still picture from the videos was admitted, and that was admitted over objection that it was cumulative. 8RP 60; Ex. 67. Once deliberations began, the jurors were permitted to see each video only once, without stopping. 10RP 3-6.

The familiarity of the witness with the defendant is also relevant to the helpfulness of that opinion, and may include familiarity with the defendant's appearance generally or at the time of the crime. Jackman, 48 F.3d at 5. The photograph that the detective used for comparison was a booking photo taken within days of the Freeman burglary and within weeks of the second Seattle Savings Bank burglary. 8RP 44. That photograph was not shown to the jury because it was a booking photograph. 8RP 33; 9RP 69. The jury did not see any photographs of the defendant from this time period – the trial was more than seven months later. The jurors received no evidence of Smith's appearance at the time of the crimes other than the videos themselves.

Federal courts also consider the defendant's appearance in the photograph to determine whether the witness' testimony would be helpful. The witness' opinion is helpful if the appearance of the defendant in the photograph is obscured by disguise or concealing clothing, or if the defendant has changed his appearance since the crime. United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986), vacated on other grounds, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987); United States v. Towns, 913 F.2d 434, 445 (7th Cir. 1990). Smith's appearance was disguised only to the extent that he was able to turn his face away from the surveillance cameras to avoid the capture of his image.

Perhaps the most important reason that Detective Wall's opinion testimony was helpful to the jury was Detective Wall's familiarity with the characteristics of commercial burglaries. Detective Wall explained his opinion that the man in each of the videos was the same person not only based on the physical characteristics of the man but also based on the unusual characteristics of the burglaries as shown in the videos and via other evidence admitted at trial.

Detective Wall specified the distinctive features of the burglaries. He explained that most burglars do not spend long at

the crime scene, but the burglar did so in each of these cases. 8RP 41-42. He explained that most commercial burglars steal cash, not large amounts of electronics, which were stolen³ in all of these burglaries. 8RP 41-42, 60, 65. He explained other unusual characteristics that these burglaries shared: that the man in the 2007 Seattle Savings Bank and Freeman videos approached with his hands in his pockets; that the man in both Seattle Savings Bank videos had white covers on his hands; that the same backpack appeared in videos related to the 2007 Seattle Savings Bank and Freeman burglaries; and that tools were used to pry open doors and cabinets in each. 8RP 42-43, 62, 64.

In State v. Russell, supra, the Washington Supreme Court approved admission of lay opinion of law enforcement officers, when the officers' experience investigating crimes provided knowledge that formed the basis of the opinions that related to the crimes at issue. Russell, 125 Wn.2d at 71. That case involved the trial of three homicide charges. Based on their past observations of common and uncommon characteristics of homicides, detectives testified that posing of victims by the perpetrator of the three

³ In the DSHS burglary, the electronics had not yet been removed from the building but had been moved to the hallway before the crime was interrupted. 6RP 21, 64-65, 95.

murders on trial was rare. Id. at 70-71. In the case at bar, Detective Wall's experience with burglaries provided helpful information about the burglaries at issue.

The admission of Detective Wall's opinion is not inconsistent with the disapproval of the opinion testimony in State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009). In that case the officer did not know the two defendants but saw them on the day they were arrested shortly after a robbery. Id. at 115. The robbery was committed by three men. Id. at 112-13. The defendants were stopped in a van with seven other men. Id. at 113. The officer reviewed the "very poor quality" surveillance tape of the robbery hundreds of times before trial and identified the two defendants as two of the robbers, based on their body builds, movement, and clothing. Id. at 115-16, 119. It was impossible to see the facial features of either of the robbers in the video. Id. at 119 n.5. Noting that some of the clothing had been changed after the robbery, the court of appeals found simply that the officer did not know enough about the defendants to opine that they were the robbers in the very poor quality video. Id. at 119. Detective Wall's basis of knowledge was substantially greater, as he had a contemporaneous booking photograph to compare to the very good

quality videos in this case, in which Smith's face and features are visible at times, and had his knowledge of burglaries on which to draw.

United States v. LaPierre⁴ is distinguishable on the same basis. In LaPierre the officer had reviewed photographs of LaPierre and witness descriptions of a bank robber, then opined that LaPierre was the robber pictured in surveillance photographs. LaPierre, 998 F.2d at 1465. The court concluded that the testimony was of dubious value and found it had been improperly admitted. Id. In contrast, Detective Wall's perceptions were not based simply on the booking photograph of Smith but on his experience with burglaries and the similarities between the burglaries pictured.

The basis of the witness' perceptions is relevant to the weight of the opinion testimony. United States v. Jackson, 688 F.2d 1121, 1125 (1982), cert. denied, 460 U.S. 1043 (1983). Even a trial court's admission of testimony that a witness who had seen the defendant only once a year earlier at a party recognized him as the bank robber in a surveillance photograph has been affirmed. Id. at 1123-26.

⁴ 998 F.2d 1460 (9th Cir. 1993).

Detective Wall's opinion was based on his familiarity with the details of four surveillance videos relating to three burglaries, and his expertise concerning burglaries. The trial court did not abuse its discretion in finding that it would be helpful to the jury in this case.

c. The Testimony Relating To The Identity Of The Person Seen In Surveillance Tapes Was Proper Expert Opinion.

Detective Wall's experience with commercial burglaries also established an expertise for purposes of ER 702, justifying admission of his opinion as expert opinion. Judge Robinson indicated that the detective's opinion was in the nature of expert opinion. 8RP 50-51.

As with lay opinion, the court has discretion to allow expert opinion evidence if it will assist the jury to understand the evidence or to determine a fact in issue. ER 702. Ortiz, 119 Wn.2d 310. Linkage between crimes is a proper subject of expert opinion. Russell, 125 Wn.2d at 69-70; State v. Yates, 161 Wn.2d 714, 762-63, 168 P.3d 359 (2007), cert. denied, 128 S. Ct. 2964 (2008). In this case the linkage is established by the distinctive characteristics of the burglaries, including the surveillance video images of the man in the buildings.

The methods and techniques involved in particular crimes are a proper subject of law enforcement testimony. Yates, 161 Wn.2d at 764-65; United States v. Pearce, 912 F.2d 159, 163 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991). Knowledge of criminal activity is generally beyond the common knowledge of the average juror. Pearce, 912 F.2d at 163. Even when we assume that the layperson has general knowledge about a topic, expert testimony may still assist the jury in understanding the issue. State v. Heatley, 70 Wn. App. 573, 580, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994).

Smith did not dispute the detective's expertise, or the relevance of the opinion, objecting only that the testimony went to an ultimate fact. 8RP 51. ER 704 explicitly provides that expert opinion "is not objectionable because it embraces an ultimate issue." The court did not abuse its discretion in concluding that the opinions were admissible as expert opinion.

d. The Detective's Testimony Was Properly Admitted As Relevant To The Police Investigation.

During its pretrial rulings, the trial court concluded that the detective's opinion as to the similarity of the photograph of the

defendant to the images in the videotapes was relevant to the course of the police investigation as well as to the determination of identity. 2RP 30-31. Smith argues that the evidence was improperly admitted to explain the police investigation because the investigation was not in dispute. To the contrary, the nature of the investigation was repeatedly challenged by the defense, and the detective's testimony was relevant to this disputed issue.

Smith properly asserts that the State may not volunteer unnecessary explanations for police actions as a means to present otherwise inadmissible evidence. State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992). However, the trial court here noted that the evidence was otherwise admissible as relevant to a fact in issue—the identity of the burglar. 2RP 30-31. Further, the nature of the investigation was vigorously challenged by the defense, and in fact formed a theme of the defense case and the evidence was properly admitted for that reason as well.

Smith challenged the police failure to collect fingerprint evidence at burglary crime scenes. 7RP 53, 62-3; 8RP 72-74. He challenged the failure to collect fingerprint evidence from property recovered from the Seattle Motor Inn after the Freeman burglary. 6RP 124-26; 7RP 92; 8RP 77. Smith cross-examined Detective

Wall about his failure to obtain specific measurements of Smith's visage or the crime scenes. 8RP 77-78, 81. Smith also challenged the failure of the police to investigate the people who had been registered in the motel room. 6RP 131.

Smith argued that it was relevant evidence that an officer saw a crime bulletin with a still image from the 2006 video and contacted the investigator, Detective Jensen, with the name of another man. 7RP 103-05. Detective Jensen compared the photograph of that man with the 2006 surveillance video, and eliminated that suspect based on his opinion that the photograph did not match. 7RP 138-39. The defense attorney argued that this evidence was admissible because it was relevant to Smith's theory that the police "were investigating and making their decision based on their own opinion that a person doesn't look like the person in the video." 7RP 103. After the court agreed that the testimony would be admissible, Detective Jensen testified to this facet of his investigation. 7RP 138-39.

Smith waived opening statement, but argued in closing argument that the investigation was flawed because it relied on the "assumptions, opinions, and speculations" of the police. 9RP 15, 61, 64-65, 67.

e. Any Error Was Harmless.

If the trial court abused its discretion in admitting any of the opinion evidence to which Smith objected, that error was harmless. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Smith recites a standard of review for evidentiary error, that it "is harmless if it is minor in reference to overwhelming evidence as a whole." App. Br. at 20, citing State v. George, 150 Wn. App. at 119. That is an incomplete statement of the standard of review. The Supreme Court in Bourgeois held, "[W]e apply 'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" Bourgeois, 133 Wn.2d at 403 (citations omitted). The next sentence in Bourgeois notes that the error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence. Id. While it is true that evidentiary error is harmless if minor, that statement, standing alone, does not

accurately reflect the standard for reversal established in Bourgeois, supra.

If the opinions of Detective Wall are completely excluded, the two challenged convictions would not have been affected. The detective's testimony about common characteristics of burglars has not been challenged. The evidence as to both of these burglaries was strong. As to both burglaries, there was video surveillance footage showing Smith taking property from the building when the building was closed to the public, including images of his face, and other corroborating evidence that he was the burglar.

The evidence that Smith was guilty of the Freeman burglary, Count 1, was overwhelming. Smith was caught in a motel room a day after the burglary, wearing a Freeman Company polo shirt. 6RP 104-07, 115, 117-22; 7RP 70-75, 79-80. He had laptops, digital cameras, a flash drive, and an employee backpack from the Freeman Company. Id.; 7RP 120-21. When told that the police had his picture, he asked, "Was that coming in or going out?", then said, "Are you happy you've got me?" 6RP 116. There is good quality video surveillance showing the intruder's full body, including his face, which the jury had the opportunity to compare to Smith himself. Ex. 45.

The evidence of the 2007 Seattle Savings Bank burglary also was compelling. There are two surveillance videos that relate to this burglary, Exhibits 63 and 66, and they are of excellent quality. Exhibit 66 includes a fine quality image of Smith's face, including both profiles as he turns after walking through a door with stolen property. A distinctive necklace is visible as the intruder walks toward the camera in Exhibit 63, and a matching necklace was seized from Smith when he was arrested less than two weeks later at the Seattle Motor Inn. 7RP 83-84; 8RP 47. In addition, the same backpack brought in by the burglar in this video is observable in the video of the Freeman burglary,⁵ and the evidence that Smith committed that burglary is overwhelming.

Although Smith argues that special credence may be given to police opinion, it is apparent that the jury in this case did not unquestioningly rely on Detective Wall's opinion, as they did not convict Smith on the 2006 Seattle Savings Bank burglary.

⁵ 8RP 64; Ex. 45, 66.

2. DETECTIVE WALL DID NOT TESTIFY THAT IT WAS HIS OPINION THAT SMITH WAS GUILTY OF BURGLARY.

Smith asserts that Detective Wall testified that it was his opinion that Smith was guilty of the three burglaries with surveillance videos. That claim should be rejected. Detective Wall's testimony was limited to his opinion that the same person committed all three burglaries and that the person in the related videos strongly resembled Smith. That was proper opinion evidence, admitted because the special knowledge of the detective made the identification evidence helpful to the jury.

A witness may not express a personal opinion as to the defendant's guilt. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Nevertheless, testifying to facts that assist in establishing the identity of the person who commits a crime is not an unconstitutional opinion as to guilt. Collins, supra, at ¶ 23. "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." Id. (footnote omitted) (quoting Heatley, 70 Wn. App. at 579).

Detective Wall's testimony relating to the similarities between the burglaries was not an opinion as to Smith's guilt, as it was not premised on the identity of the burglar, though it

incorporated the burglar's physical characteristics. The opinion that the photograph of Smith strongly resembled the man in the videos was not an opinion as to guilt, as it did not even assert that it was the detective's opinion that it actually was Smith.

The meaning of the detective's statement that when Smith was found inside the DSHS building that "cemented the deal" is unclear. 8RP 65. He was asked how he tied the DSHS burglary to the other three, and this answer is nonresponsive. Id. The exchange was:

Q: And, Detective, when – after you had formulated your opinion that the three in the surveillance videos you viewed appeared to be the same subject, how did you then tie that into what you viewed at DSHS?

A: Well, DSHS didn't have any video. It was after the motel arrest and, and I obtained a photograph of Mr. Smith. Then I was able to tie those three together. And plus, with the DSHS arrest, Mr. Smith was actually caught in the building. That cemented the deal for me.

Id. "[T]he deal" appears to refer to the detective's opinion that the same person, who strongly resembled Smith, committed the first three burglaries, because that was referenced in the question asked. Id. If it is construed as an assertion that Smith, who was found inside the DSHS building under similar circumstances as the other buildings, was the man in the surveillance of the first three

burglaries, it is testimony identifying Smith, although it was permissible opinion testimony, as argued supra.

As the Washington Supreme Court has explained, when the basis for the opinion can be explained in terms that are not overly technical, and are the subject of cross-examination, jurors can form their own opinions about the reliability of the witness' conclusions. Ortiz, 119 Wn.2d at 311.

If the court concludes that the opinions of Detective Wall were impermissible opinions as to guilt, that error was harmless beyond a reasonable doubt. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wash.2d 693, 703, 911 P.2d 996 (1996). The evidence of the defendant's guilt in both of these cases is very strong, as summarized in the previous section. The photographic evidence allowed the jurors to see Smith at the scene of the burglaries. Under these circumstances, the same result would have been reached even without the testimony that Smith strongly resembled the man in the videos.

3. SMITH AGREED THAT FOUR CALIFORNIA BURGLARY CONVICTIONS SHOULD BE INCLUDED IN HIS OFFENDER SCORE.

Smith argues that the trial court erred in including six California burglary⁶ convictions in his offender score,⁷ asserting that the State failed to meet its burden of proof as to comparability. That argument should be rejected. Smith did not object to the inclusion of these convictions at sentencing and by operation of statute, that was an acknowledgment upon which the court could rely. Further, Smith affirmatively agreed that his offender score was a nine plus and specifically agreed that a list of four of his California burglary convictions were comparable to Washington burglary convictions, which resulted in an offender score of 14.

The Sentencing Reform Act now provides that failure to object to criminal history presented at the time of sentencing constitutes acknowledgement of that criminal history. RCW 9.94A.530. Specifically, it provides:

⁶ For ease of reference, the State will refer to all of the convictions as burglary convictions, although one of them was an attempted burglary conviction, since all count equally in Smith's offender score. See RCW 9.94A.525(4).

⁷ The argument is couched in terms of a challenge to only two California burglary convictions, and only two need be counted to result in Smith's offender score exceeding nine. App. Br. at 31. The court listed all six California burglary convictions as criminal history used in calculating Smith's offender score. CP 96.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.

RCW 9.94A.530(2).

The most recent version of this statute became effective on June 12, 2008. Laws of 2008, ch. 231, § 4. It applies to the sentencing in this case, which occurred on September 23, 2008.

12RP 1. By failing to object to the criminal history presented by the State at sentencing, Smith is deemed to have acknowledged it.

Smith relies on State v. Mendoza⁸ for his argument that the failure to object to criminal history is not a waiver of that objection. The analysis of Mendoza is inapplicable because it construed the former version of RCW 9.94A.530, which did not provide that a defendant acknowledges criminal history by failing to object to it at sentencing. Mendoza, 165 Wn.2d at 920-30.

In this case, Smith did more than fail to object to the convictions that he attempts to challenge on appeal. In his Defense

⁸ 165 Wn.2d 913, 205 P.3d 113 (2009).

Presentence Report,⁹ he affirmatively stipulated that four of the California burglary convictions properly were included in his offender score. Supp. CP ___ (Sub No. 146, Order Completing Record, 10/9/09). He explicitly stated that the California convictions were comparable to Washington burglary convictions. Id. (Presentence Report at p. 2). He agreed that his offender score was above nine in his Presentence Report and at sentencing. Id.

Even under law interpreting the former statute, that affirmative acknowledgement was sufficient for the court to include those four California burglary convictions as criminal history in Smith's offender score. As the Court explained in Mendoza, in State v. Ross, "We reiterated our holding in Ford¹⁰ that once a defendant acknowledges the existence and comparability of prior convictions, no further proof is necessary." Mendoza, 165 Wn.2d at 927 (citing State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004)). By agreeing to his offender score, Smith waived his right to challenge the comparability of the convictions included. State v.

⁹ The Defense Presentence Report was not filed at the time it was presented to the court to be considered at sentencing. It was made a part of the record after the Appellant's Brief was filed, by order of the trial court. Supp. CP ___ (Sub No. 146, Order Completing Record, 10/9/09). That order also establishes that the prosecutor specifically stated at the sentencing hearing that the parties agreed that Smith's offender score was "nine plus." Id.

¹⁰ State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

Lucero, No. 57684-4-I (Washington Court of Appeals Division I, Sept. 14, 2009) (2009 Westlaw 2915729) ¶¶10-16.

This Court has held that the California burglary statute is broader than Washington's burglary statute because it does not require proof that the defendant entered or remained unlawfully. State v. Thomas, 135 Wn. App. 474, 478, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009 (2007). The available charging documents in this case do not include an allegation that the defendant entered or remained unlawfully. CP 123-85. There was no factual inquiry on the record.

If this Court concludes that Smith has not waived the sufficiency of proof of comparability of the prior burglary convictions, the State concedes that the record below is insufficient to determine whether they are comparable offenses and the matter should be remanded for a hearing on the issue.

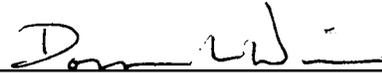
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Smith's convictions and sentences.

DATED this 13th day of October, 2009.

Respectfully submitted,

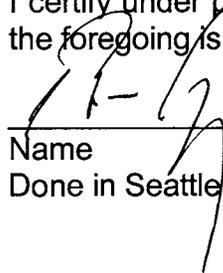
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TONY SMITH, Cause No. 62523-3-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

10/13/2009

Date