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NO. 69439-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC PULEGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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2013 MAY 10 PM 3:13
COURT OF APPEALS DIV 1
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A. ISSUES PRESENTED

1. An out-of-court identification procedure satisfies due process if it is not so impermissibly suggestive as to give rise to “a substantial likelihood of irreparable misidentification.” Here, one of the patrol officers pointed to Pulega as a possible suspect before the victim positively identified Pulega as the man who robbed him. Where the victim had already ruled out another individual, also pointed out by an officer, and where that victim spontaneously identified Pulega as the man that robbed him even before Pulega was detained by police, did the trial court act within its discretion in finding that the identification was reliable?

2. Under ER 803(a)(2), a statement is not excluded as hearsay if it is an excited utterance “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Here, the victim was punched from behind and knocked to the ground by Pulega, who then took his money. The victim chased Pulega for several blocks before calling 911 to report the robbery which had occurred moments earlier. Was the victim’s 911 call properly permitted as an excited utterance?

3. Evidence is relevant if it is of consequence to the outcome of the action and makes the existence of the identified fact more or less probable. Here, the jury was presented with surveillance videos of the robbery and with a patrol car video of Pulega's detention at the scene. Where the State was required to prove the identity of the robber, was the video taken of Pulega's detention minutes after the robbery more relevant than prejudicial?

4. A police officer's testimony describing the context and background of a criminal investigation can be relevant. Here, Officer Hilton said that his job was to "apprehend bad guys" and that the reason multiple officers arrived on the scene was because robberies are "inherently violent." Where Officer Hilton's statements were generally and colloquially describing the role of patrol officers and accurately describing the reason why multiple police officers respond to a robbery dispatch, were they relevant? If they were not relevant, were they harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Eric Pulega was charged with one count of robbery in the first degree for punching Neil Spencer from behind and stealing his

money while Spencer withdrew cash from an Automatic Teller Machine (ATM) at a Chase bank in downtown Seattle. CP 6. After a jury trial, Pulega was convicted of the lesser-included charge of robbery in the second degree and was sentenced within the standard range to 13 months in custody. CP 61, 96.

2. SUBSTANTIVE FACTS

On April 21, 2012, Neil Spencer was using an ATM at the Chase Bank on 4th and Union in downtown Seattle. 3RP 300.¹ It was early on a Saturday morning and he was withdrawing \$20 from his checking account to buy his girlfriend breakfast. 3RP 304. Eric Pulega, stood alongside him, attempting to withdraw money from the adjacent ATM using an EBT card, which Spencer recognized as the sort of ATM/food stamp card that he had also used in the past. 3RP 306. Suddenly, Pulega punched Spencer from behind, striking his ear and knocking him to the ground; then Pulega grabbed the \$20 from the ATM Spencer was using, and ran away. 3RP 317. Spencer chased after Pulega for a few blocks until he lost him running through the lobby of the nearby Red Lion Hotel. 3RP 331.

¹ This briefing will refer to the successively paginated Verbatim Report of Proceedings as follows: 1RP (9/4/12); 2RP (9/5/12); 3RP (9/6/12); 4RP (9/10/12); 5RP (9/11/12); 6RP (9/12/12); 7RP (9/21/12).

Spencer returned to the bank and called 911 on his cell phone; police arrived seconds later. 3RP 340-41.

When police arrived, they saw that Spencer's face was bleeding and he appeared upset and out of breath. 3RP 221. Spencer identified Pulega a few minutes later as the man who had robbed him, and Pulega was arrested. 3RP 251-57; 4RP 449-57. As he was being arrested, Pulega told his nearby girlfriend to "take her \$20" back. Exhibit 32.² An EBT card and a single \$20 bill were found on Pulega's person. 4RP 457. Surveillance cameras from the bank captured the robbery as it occurred and dash-mounted cameras on the police cars captured the arrest. Exhibit 32, 33.³

C. ARGUMENT

1. SPENCER'S IDENTIFICATION OF PULEGA AT THE SCENE IS ADMISSIBLE.

Pulega argues that Spencer's identification of him as the robber at the scene of Pulega's arrest was impermissibly suggestive and should have been suppressed. He relies on the fact that Spencer may have overheard a police radio broadcast

² Exhibit 32 is the video of Pulega's arrest from Officer McDonald's dashboard camera.

³ Exhibit 33 is surveillance video from Chase Bank.

indicating that they may have “spotted” the suspect and that Spencer may have seen a police officer gesture toward Pulega prior to the identification. But Spencer’s identification of Pulega was spontaneously made independent of any suggestion by police. His identification, therefore, was reliable and admissible.

a. Relevant Facts.

After unsuccessfully chasing Pulega, Spencer called 911 and described the robbery. Ex. 37.⁴ In that call, Spencer said that the robber was either “Black or Hispanic,” in his early twenties, and skinny. Ex. 37 at 01:30-02:00. Spencer said that the robber was wearing all black clothing with a “kinky hairdo,” but did not think that he had a ponytail; Spencer added that the robbery “happened real fast.” Ex. 37 at 02:00-02:12.

Seattle Police Officer Michael McDonald testified in a pretrial CrR 3.6 hearing where Pulega sought to suppress the identification of Pulega by Spencer on the night of the robbery. 1RP 12-13. Officer McDonald testified that he was called to the scene at 4th and Union via dispatch. 1RP 12-13. He was told that two 911 callers reported a robbery and provided descriptions of the robber: a Black

⁴ All references to Exhibit 37 refer to track 2, Spencer’s call to 911.

or Hispanic male in his early twenties wearing black or blue pants and sporting long, frizzy hair pulled into a ponytail. 1RP 18. Officer McDonald spoke with Spencer seconds after arriving at the Chase Bank ATM; while they spoke, the police radio broadcasted a notice that police had stopped a "possible suspect in the area." 1RP 25. Spencer told Officer McDonald that he believed that he could identify the man who robbed him, so they drove out looking for the suspect in the officer's patrol car. 1RP 25, 29.

A few blocks away, Officer McDonald and Spencer pulled alongside Seattle Police Officer Miller in her patrol car. 1RP 29. Officer McDonald believed that Officer Miller was indicating a possible suspect nearby, so he asked Spencer if the man in front of Miller's car, who was wearing a blue jacket, was the man who robbed him; Spencer was "very adamant" that the man whom Officer McDonald had pointed to was "not him." 1RP 29, 40. When Officer McDonald relayed this to Officer Miller, she looked at him and raised her arms in a "puzzled look," because she was pretty sure that the person she was following was the "right suspect." 1RP 29.

To clarify, Officer McDonald pointed to the man he had asked Spencer about, and Officer Miller "shook her head," and

pointed farther down the block, to Pulega. 1RP 30. Then Officer Miller pulled her car forward and pointed toward Pulega, who was walking ahead of her patrol car. 1RP 30. Officer McDonald asked Spencer if Pulega was the robber, but Spencer said that he was too far away to tell, so Officer McDonald drove closer to Pulega. 1RP 43.

As Officer McDonald drove closer to Pulega, Spencer began to shift in his seat toward the window and declared, unsolicited, "That's him," pointing to Pulega. 1RP 33. Officer McDonald described Pulega as appearing to be a "Black or Asian male" with a "long pony tail that was frizzy" and wearing "dark clothing." 1RP 45. This is consistent with his appearance on the dash camera video and the surveillance video. Ex. 32, 33.

Following the CrR 3.6 testimony, Pulega moved to suppress his identification by Spencer at the scene, arguing that the gestures by Officer Miller were so impermissibly suggestive as to render the eventual identification of Pulega unreliable. 1RP 120-27. The trial court discussed any possible "taint" to the reliability of the identification created by the officers' gestures back and forth as they attempted to communicate which individual they wanted to present for the show up:

...my notes indicate that Officer McDonald was the one who indicated to Officer Miller that the victim indicated that that wasn't the right guy. In other words, suspect number one, who was not Mr. Pulega, there was – there was some communication between Miller and McDonald about, "Hey, he doesn't think that's the right guy," with Miller gesturing, "Check out down there."

...
...when Officer Miller turned the corner and got past Mr. Pulega, without prompting or any suggestion on the part of law enforcement, Mr. Spencer spontaneously identified Mr. Pulega and said, "that's him. That's him," and indicated later that he was – of his certainty of identifying Mr. Pulega. [sic] So the court fails to see any unreasonable or any unlawful taint on the part of law enforcement that created a suggestibility to the eye witness/victim as to his identification of Mr. Pulega. Therefore, the Court denies the motion to dis – to suppress - and declines exclusion of the requested evidence.

1RP 127-28.

The trial court also entered written findings following the hearing. CP 133. In those findings, the court found that Pulega "strongly resembled the description" of the robber provided by the 911 callers. CP 132-36. In Findings of Fact 6 and 7, the court described the communication between Officers McDonald and Miller that preceded the show up identification:

Communicating with Officer Miller, McDonald was advised that Pulega was walking northbound on Fourth Avenue, just a block and a half away from the crime scene. McDonald followed Miller's patrol car while traveling in the lane of traffic three lanes away

from the west sidewalk (Fourth Avenue is a one-way northbound four-lane road). Hearing Miller refer to a suspect on the west sidewalk, McDonald thought that Miller was referring to a person walking behind Pulega. Spencer said that this person (who was not Pulega) was not the person who robbed him.

...

After Spencer did not make a positive identification of the person walking behind Pulega, McDonald pulled alongside Miller's car and looked at her. Miller raised her arms and shrugged her shoulders, giving McDonald a puzzled look. McDonald interpreted this to mean that Miller was confused about the lack of identification of Pulega. Miller then pointed westbound down Pine Street, in the direction of where Pulega was walking. McDonald turned the corner westbound on Pine Street, and saw Pulega walking briskly toward the bus tunnel. As they pulled closer to Pulega, Spencer looked at Pulega and yelled, unprompted, "That's him," or "That's the guy."

CP 133-34.

In Conclusion of Law 3, the trial judge held the following:

...there was no impermissibly suggestive identification procedure regarding Spencer's identification of Pulega. Spencer spontaneously said, "That's the guy" or "That's him" when he saw Pulega on the sidewalk after Officer McDonald turned left on Pine Street. Spencer's identification of Pulega was certain and was not even in response to a question. Moreover, the court concludes that Spencer's identification was not tainted by any conduct of Officer Miller or Officer McDonald prior to the identification.

CP 135. Finally, the trial judge incorporated his oral findings into his written findings. CP 135.

b. The Identification Was Reliable.

A trial court's determination on a motion to suppress is reviewed for substantial evidence and to see if the findings support the conclusions of law. State v. Schlieker, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person. Id. We review a trial court's conclusions of law de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

An out-of-court identification procedure satisfies due process if it is not so impermissibly suggestive as to give rise to "a substantial likelihood of irreparable misidentification." State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)). A defendant claiming a due process violation must first establish that the identification procedure was unduly suggestive. Id. If this threshold burden is satisfied, the court then determines whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. Id. A trial court's decision to admit evidence of an out-of-court identification is within the sound discretion of the court and subject

to an abuse of discretion standard of review. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001).

The key inquiry in determining admissibility is whether the identification is reliable despite any suggestiveness. State v. Rogers, 44 Wn. App. 510, 515-16, 722 P.2d 1349 (1986) (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Generally, a show up identification held shortly after a crime and in the course of a prompt search for the suspect is permissible. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208 (1981), overruled in part on other grounds by State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

Pulega first contends that Spencer's identification of Pulega was suggestive because Spencer could have overheard a police radio broadcast saying that the police may have apprehended a suspect. Second, Pulega relies on the non-verbal communication between Officers Miller and McDonald indicating that the person Spencer was first shown was not the suspect, and that Pulega was the suspect. But Pulega's contentions are not consistent with the facts in this case.

First, even if Spencer had overheard the radio broadcast saying that a possible suspect had been apprehended, this fact is

no more suggestive than any other show up identification, because by its very nature, a “show up” necessitates the apprehension of a suspect in order to “show” him to the witness shortly after the crime for purposes of identification. The radio broadcast was merely stating the obvious fact that an individual had been “spotted” and was a “possible suspect,” without stating whether or not the “correct” suspect had been spotted. 1RP 25.

This point is evidenced by Spencer’s reaction to the first “suspect” that Officer McDonald asked him to identify. After all, Officer McDonald showed him the wrong “suspect” initially – a stranger on the street in a blue jacket. 1RP 40. Even if Spencer believed that this individual was the “suspect” referred to on the police radio, the man “spotted” as a potential suspect, Spencer did not hesitate to deny that this was the man who robbed him. 1RP 29-31. Had the radio broadcast or the authority of an officer pointing at a potential suspect been truly “suggestive,” it would have *suggested* to Spencer that the man in the blue jacket was the man who robbed him. This did not occur. Instead, Spencer made his identification of Pulega based on his observations of Pulega, independent of external suggestions by police.

Second, while there is nothing in the record to suggest that Spencer even saw the interaction between Officers McDonald and Miller regarding his first identification, that interaction occurred only *after* Spencer had already denied that the first person was the robber, so the affirmation that suspect number one was not the robber would have had no measurable effect on the reliability of his second identification. While Pulega argues that the gestures between the two officers may have suggested to Spencer that Pulega was the actual robber, the only fact that could have been inferred from Officer Miller's gesture was that she believed that Pulega matched the description of the robber. Because Pulega had already been spotted by police and was to be detained for the show up, this was hardly revelatory information that would have been any more suggestive than Spencer being shown Pulega as a possible suspect in the first place.

But where Pulega's argument fails entirely is with respect to how the "show up" here actually occurred. When Officer McDonald first saw Pulega walking ahead of Officer Miller's car, he asked Spencer, "Is that the guy up there?" and Spencer told him "No, I – well, that guy's too far away." 1RP 41. Had Spencer's objectivity been compromised by the interaction between the two officers

immediately preceding McDonald spotting Pulega, Spencer would not have said that the potential suspect was too far away to identify. It is precisely because Spencer was relying on his recent memory of the robbery, and not the exchange between the officers, that he needed to get closer to Pulega before being able to identify him. 1RP 31.

The moment that Officer McDonald drove closer and Spencer had a good look at Pulega, Spencer, unprompted, pointed Pulega out to Officer McDonald as the man who robbed him.

1RP 33. Officer McDonald testified that, prior to the spontaneous identification, Pulega was merely walking down the street and had not yet been detained. 1RP 33. Officer McDonald testified that as they approached Pulega, Spencer began shifting in his seat toward the window, emphatically saying that he saw the man who robbed him: "I never got a chance to say anything to [Spencer] to point out the individual that I was referring to, that I was following... Once we drove alongside the individual, the victim just started yelling, 'that's him.'" 1RP 33. It was only *after* Spencer identified Pulega walking down the street that Pulega was even detained, so in this case there actually was no "show up," at least in the traditional sense of

the term where a suspect is detained and presented to a witness shortly after a crime. 1RP 47.

None of the factors that traditionally make a “show up” identification suggestive were in place when Spencer identified Pulega. Pulega was not handcuffed, he was not surrounded by police, he was not even detained when Spencer identified him.⁵ It is unreasonable to argue that this spontaneous identification, occurring within minutes of the robbery, was the result of a suggestive show up, when no show up had even occurred.

But even if this Court somehow finds that the show up was suggestive, it was not so suggestive as to create a substantial likelihood of misidentification. State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000); Neil v. Biggers, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972). The reviewing court considers five factors to determine whether the suggestiveness of an identification procedure created such a likelihood: (1) the opportunity of the witness to view the suspect at the time of crime, (2) the witness’ level of attention, (3) the accuracy of the witness’

⁵ State v. Guzman–Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987) held that even where a suspect is handcuffed and standing near a police car, this alone is not enough to demonstrate impermissible suggestiveness.

description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. Id.

Here, while Spencer and Pulega were together for only a few moments, Spencer was in close proximity to Pulega – Spencer testified that Pulega was about four-and-a-half or five feet from him when he first entered the ATM area. 3RP 313. After the assault and robbery, Spencer chased Pulega for two blocks before losing him in the Red Lion Hotel restaurant. 3RP 331. Right before the robbery, Spencer exhibited a remarkable attention to detail – he not only observed Pulega, but he saw the type of card Pulega used in the ATM machine. 3RP 306. The EBT card, or a food stamp card, stuck out to Spencer because he had used such a card in the past, and he recognized it. 3RP 306. An EBT card was found on Pulega when he was arrested. 3RP 457.

While Spencer did tell the 911 dispatch team that he did not believe the robber had a ponytail, Spencer described him as either a Black or Hispanic⁶ skinny man in his very early twenties with a “kinky hairdo.” Ex. 37 at 01:30-02:00. Except for the ponytail, the

⁶ The Brief of Appellant points out that on his Judgment and Sentence and in the audio of State's Exhibit 33, Pulega identified as “Asian,” specifically “Pacific Islander,” but this was not something on the record for the CrR 3.6 hearing, nor is the precise race to which Pulega belongs readily identifiable from his appearance, as is evidenced in Exhibit 33.

remainder of Spencer's description, as is evidenced from the dash camera video, is remarkably similar to Pulega's appearance moments later. Ex. 32 and 33. Finally, Spencer's identification of Pulega was spontaneous, absolutely certain, and occurred only a few minutes after the robbery itself (the robbery occurred around 7:40 AM and Pulega was stopped before 7:50 AM). Ex. 32 and 33.

After hearing from Officer McDonald and watching the video of the identification and detention, the trial court failed "to see any unreasonable or any unlawful taint on the part of law enforcement that created a suggestibility to the eye witness/victim as to his identification of Mr. Pulega." 1RP 127-28. Because an analysis of the reliability factors reveals no likelihood that Spencer's identification of Pulega from the patrol car was so impermissibly suggestive as to render the identification unreliable, this Court should affirm his conviction.

2. THE 911 CALL WAS PROPERLY ADMITTED AS AN EXCITED UTTERANCE.

Pulega argues that Spencer's statements on the 911 call do not fall under the excited utterance exception to the hearsay rule under Evidence Rule (ER) 803(a)(2) because, he contends,

Spencer did not “remain under the influence of a startling event.” But Spencer had just been punched from behind, knocked to the ground, and had his money stolen; he chased the thief for two city blocks before calling 911 looking for help precisely because he was robbed – he was clearly still “under the influence of the startling event” when he called the police.

a. Facts Regarding The 911 Call.

The 911 call made by Eric Spencer immediately following the robbery was admitted as State’s Exhibit 37. He began the call by saying “I was just robbed at the Chase bank... the guy came up behind me, I’m doing my transaction, next thing I know I’m getting sucker punched.” Ex. 37 at 0:00-01:20. Spencer sounds out of breath as he tries to answer the various questions from the dispatcher. He says that he “got clocked in the side of the jaw pretty hard – it was a pure sucker punch.” Ex. 37 at 02:30-02:50. During that call, Spencer told the 911 dispatcher that the robber had an EBT card and that the whole assault was “all on video,” referring to the surveillance cameras. Ex. 37 at 02:50-03:20.

Pulega raised a pretrial motion to bar the admission of Spencer’s 911 call, arguing that it was inadmissible hearsay.

1RP 140. The State countered that the call happened only minutes after the robbery and that Spencer had just been beaten, making it an excited utterance. 1RP 144. Pulega's attorney agreed that Spencer sounded "out of breath," but countered that he did not sound "excited." 1RP 144. The trial judge ruled as follows:

In this instance, the Court finds that it was more likely than not that a matter of very few minutes after the alleged incident occurred that Mr. Spencer... made the 911 call... and that Mr. Spencer's calling 911 was a cry for help and statements were subject to his reacting to the startling event to qualify for the excited utterance exception to the hearsay rule, and therefore, the 911 call is admissible.

1RP 146.

During his trial, Spencer said that he was "angry" when he made the 911 call, that his knee had been "messed up" by the assault, and that he made the call "almost right afterwards."

3RP 340-41. The court admitted Exhibit 37 over Pulega's prior objection, raised again during trial, and the State played the four minute 911 call for the jury. 3RP 341.

b. The 911 Call Was Made While Spencer Was Still Under The Stress Of Being Robbed And Beaten And Chasing The Man Who Had Robbed And Beaten Him.

A trial court's decision to admit a hearsay statement as an excited utterance is reviewed under the abuse of discretion standard. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). ER 803(a)(2), a statement is not excluded as hearsay if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In order for a statement to fall under this exception to the hearsay rule, it must satisfy three "closely connected requirements:" (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress or excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 562, 597, 23 P.3d 1046 (2001); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The key to the rule is spontaneity. State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984).

Here, there is no question that Spencer was beaten and robbed (as evidenced on the surveillance bank cameras in

Exhibit 33), which certainly qualifies as a “startling event or condition,” satisfying the first requirement. Nor is there any question that Spencer’s statement reporting the robbery, “related to the startling condition.” ER 803(a)(2). The only question, then, is whether Spencer was “under the stress or excitement” of the startling event when he made the call.

As the trial judge ruled, Spencer made the call to 911 as a “cry for help” after Pulega had robbed and beaten him. 2RP 146. Spencer did not have an opportunity to reflect or fabricate, because the call was made within minutes of the robbery and immediately after Spencer’s pursuit of Pulega through the Red Lion Hotel. 3RP 221. Spencer was still bleeding from the beating, his knee was sore, and he was very “angry.” 3RP 217, 340. While he was able to respond to questions and report that the incident was on camera, there is nothing to suggest that his call was anything more than a response to the robbery and its adrenaline-filled aftermath, a call made while Spencer was still under the influence of the event itself. Ex. 37.

That Spencer was under the stress of the robbery and chase when he called 911 is further evidenced by the fact that the trial court found that even Spencer’s statements to Officer McDonald

when they first met were excited utterances. Officer McDonald testified that Spencer was “talking quick... [h]e was a little bit out of breath, a lot of hand movements,” and the trial court admitted Spencer’s initial statements to the Officer into evidence as excited utterances over Pulega’s objection. 3RP 221. Pulega did not contest this ruling in his Brief of Appellant. If Spencer was still suffering from the stress of the robbery when he spoke with Officer McDonald, then he was certainly suffering from the same a few seconds earlier, when he called 911. The trial court, therefore, acted within its discretion in admitting the 911 call into evidence.

3. THE VIDEOTAPE OF PULEGA’S DETENTION WAS MORE PROBATIVE THAN PREJUDICIAL.

Pulega argues that the trial court erred when it admitted State’s Exhibit 32, the video taken from Officer McDonald’s dashboard camera. But this video captured Pulega as he looked, moved, and dressed minutes after the robbery, and permitted the jury to compare his appearance and movements with that of the man in State’s Exhibit 33, the bank surveillance video; in a case where identity is the central issue, it is hard to imagine more relevant evidence than Exhibit 32.

a. Relevant Facts.

State's Exhibit 32 captured the initial detention of Pulega from Officer McDonald's dash mounted camera. Ex. 32. From the moment the video plays, Pulega can be seen, with an officer at either side, staring straight ahead as the officers remove items from his pockets. Ex. 32. In the first three minutes, he appears incredulous as he shrugs his shoulders and speaks to someone off camera (the audio was not played for the jury). Ex. 32. The resolution is sharp and Pulega's clothes, particularly a bejeweled belt he is wearing, are visible. Ex. 32. Pulega appears to be a slim, dark-skinned male in his early 20's with kinky black hair in a ponytail, a moustache, and black clothing. Ex. 32.

Pulega's attorney objected to the admission of the video, arguing that it was not relevant and was overly prejudicial. 3RP 191-94, 197. She said that the video showed Pulega gesticulating and yelling, and was improper character evidence. 3RP 197. The State argued that the video showed Pulega moments after the robbery, and showed items being taken from him that were relevant to his identification and to proving the robbery, like his EBT card and the \$20 dollar bill he allegedly took from Spencer. 3RP 195. The State also argued that the video captured

Pulega's side profile, which permitted the jury to compare that image with the side profile of the individual in the Chase Bank surveillance video, which captured the same angle. 3RP 195; Ex. 32, 33. Pulega's attorney countered that if Officer McDonald's video was being introduced to show that the items were actually found on Pulega's person, that such evidence was better reserved for rebuttal. 3RP 196-98.

After watching the video, the court ruled as follows:

I'm not clear how this would be character evidence. I don't see any conduct that would show admissibility of guilt or how any of Mr. Pulega's actions while in detention is in conformity with the charged offense of robbery, so it's just – it – I don't see that it even qualifies as any type of improper character evidence.

...

From my perspective, it's actually the best evidence. Yes, officers did testify that these are the items retrieved, but there was always the suggestion that it was – were these items planted? And it's not as though items have never been planted by law enforcement. They have. We know that. And so, from my perspective, this removes that question in the jurors' minds of the credibility of the officers' testimony and corroborates it to a certain degree. I don't really have concerns about Mr. Pulega appearing in a fashion that is highly prejudicial to him. Yes, at one point he raises his hands and the police put them down, but – I mean, I think everyone can understand that that's for officer safety and that's a routine matter.

As far as his yelling, I think the officers can testify and it's consistent with the State's theory of the case that

Mr. Pulega yelled at – towards [his girlfriend] with respect to the issue of “Take your \$20 back.”

It is highly probative of the issue of identification what did Mr. Pulega look like on the date of the incident compared with the videos at the Chase Bank. And we must remember that regardless of what evidence the defense chooses to put on or not put on, the State always has its high burden of proof, and inasmuch, I would find that the video offered by the State is highly probative and not prejudicial to the degree that it substantially outweighs that probativity [sic]. I'll allow the State to show the video. Motion to exclude is denied.

3RP 199-200.

During trial, before the jury saw the video, the court read the following instruction to the jury:

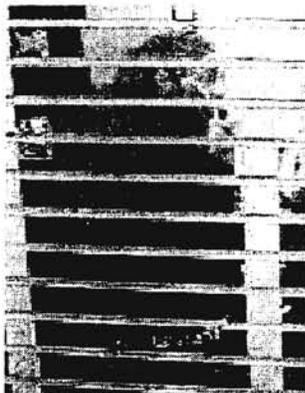
Members of the jury, the evidence which you are about to see, which is a video from Officer McDonald's car, patrol car, is being shown for the limited purpose of the State's offer of identification of the defendant, the location of the Defendant and identification of items in his possession and for no other purpose. You must not consider the evidence for any other purpose.

3RP 257. At the conclusion of the instruction, a juror asked the trial judge to repeat the three purposes for showing the video, and the judge did so. 3RP 258.

b. The Video Was Properly Admitted.

The trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Evidence is relevant if it is of consequence to the outcome of the action and makes the existence of the identified fact more or less probable. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Because the robbery itself was captured on camera, the real issue at trial was the question of the identity of the robber in the surveillance video. While the Chase Bank surveillance video is somewhat blurry, some aspects of the robber are discernible with some certainty, particularly his hair, his build, and his clothing. Exhibit 33. The video from Officer McDonald's car is much clearer, but permits a comparison of the attributes of the known Pulega and the robber at the ATM, as is shown in the examples below:



Ex. 33, Clip 3, 07:34:06 AM.



Ex.33, Clip 3, 07:39:07 AM.



Ex. 32, 7:50:15 AM.

Admitting the video from Officer McDonald's patrol car permitted the jury to compare Pulega's appearance at the time of the arrest with the actual robber a few minutes earlier. The jury could see the differences – the man in the bank videos has on a long-sleeved top and does not appear to be wearing a scarf, and the similarities – the hair, the sparkling silver belt, the physical build, the skin tone – and reach their own conclusion. In fact, during their deliberations, the jurors requested (and were permitted) to view the surveillance video again before rendering their verdict. CP 62, 63.

In Pulega's brief he makes much of the fact that Spencer's identification of Pulega was "cross-racial," and that Spencer told the 911 dispatcher that he believed Pulega was either "Black or Hispanic," when in fact Spencer identified as "Asian/Pacific Islander." Brief of Appellant at 17. But by admitting the video capturing the way Pulega appeared at his arrest and permitting the jury to compare it to the surveillance video, the trial court gave the finders of fact the opportunity to draw their own conclusions regarding the accuracy of Spencer's identification, relying on the evidence itself. For these purposes, then, the video really is the

“best evidence,” and the fact that it is too compelling, or too powerful, is not grounds for a prejudice argument when it is altogether relevant. See State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990). (Rule 403 does not provide a basis for objecting simply because the evidence is “too good” or “too powerful”).

Pulega also argues that McDonald’s video was prejudicial because it showed Pulega being “detained on the hood of a patrol car, surrounded by several police officers, and repeatedly, physically reprimanded to return to a secured position with both hands on the front of the car.” Brief of Appellant at 26. But a review of Exhibit 32 is consistent with the trial court’s ruling regarding the admissibility of the video: “Yes, at one point he raises his hands and the police put them down, but – I mean, I think everyone can understand that that’s for officer safety and that’s a routine matter.” 3RP 199-200. There is nothing particularly prejudicial about Pulega’s detention other than the fact that he was, indeed, arrested; this was something already testified to by the police officers at trial, and something rather ordinary in the scope of a robbery investigation where a suspect is apprehended. The video’s prejudice, if any, was dwarfed by its relevance, because it provided undisputed evidence of Pulega’s appearance at the time

of arrest. This is especially true because the trial judge read the jury a limiting instruction prior to the showing of the video, effectively removing any potential prejudice created by witnessing Pulega's detention. See State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). (Jurors are presumed to follow instructions).

With identity as the only real issue in this case, the trial court's ruling that Officer McDonald's video was "highly probative of the issue of identification" was well-within the court's discretion and is supported by a review of the exhibit.

4. OFFICER HILTON'S TESTIMONY WAS PROPERLY ADMITTED.

Pulega contends that Officer Hilton's statements about arresting "bad guys" and robberies being "inherently violent" were inadmissible – the first because it asserted a moral judgment against Pulega and likened him to "unspecified criminals" and the second because "Officer Hilton's opinion of the offense [of robbery] is irrelevant" and prejudicial. Brief of Appellant at 28. But Pulega provides no authority supporting either contention; Officer Hilton's statements were innocuous descriptions of how he perceives his role and the nature of robbery cases in general. As such, they

were relevant and properly admitted. In any event, any error was harmless.

a. Relevant Facts.

Officer Shawn Hilton was one of the “back up” police officers who responded to the robbery. 3RP 448-51. During his direct examination, he described his role as a patrol officer as driving “a police car around responding to 911 calls, calls for service, quality of life issues, apprehending bad guys.” 3RP 449.

When asked about why he was dispatched to the scene, Officer Hilton said, “Due to the nature of the call, multiple units are going to go just to make sure that we can provide adequate service to that call.” 3RP 451-52. The prosecutor asked him what he meant, and Officer Hilton replied, “I believe the call came out as a robbery that just occurred. Robberies are inherently violent... and so we have multiple officers try to go both to capture a potential suspect, protect the victim, secure the scene, and so forth.” 3RP 451-52.

Pulega’s defense attorney objected to both the “apprehending bad guys” comment and to the response that

"robberies are inherently violent," but the objections were overruled.
3RP 451-52.

b. The Statements Were Relevant In Context.

A police officer's testimony describing the context and background of a criminal investigation can be admissible. State v. Lillard, 122 Wn. App. 422, 437, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005); State v. Post, 59 Wn. App. 389, 392, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596 (1992). A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Evidence is relevant if it is of consequence to the outcome of the action and makes the existence of the identified fact more or less probable. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Hilton was speaking generally about his role as a patrol officer, which, perhaps could have been more artfully described as apprehending *criminals* or *suspects* instead of "bad guys," but the use of the colloquialism to describe the role of police officers is so

common it can hardly be said to have created any real prejudice against Pulega in particular.⁷

Officer Hilton's description of a robbery as "inherently violent" was relevant to explain the need for multiple officers at the scene. It was not any more prejudicial than the jury instruction, based on the statute, informing the jury that the definition of robbery includes "the use or threatened use of immediate force, violence, or fear of injury" to the victim. CP 77; RCW 9A.56.190. Officer Hilton did not say that Pulega acted violently, nor did he opine that Pulega had committed a robbery; he merely explained that the crime he was responding to was reported as a robbery and, because robberies involve violence, "multiple officers" are called to the scene. 3RP 451-52. The testimony was more relevant than prejudicial.

⁷ A Google search of the terms "Police catch 'bad guys,'" resulted in 235,000 results; the first page included: *Toronto Police Catch Bad Guys*, www.linkedin.com/.../Toronto-Police-Catch-Bad-Guys-4511009; *Neighborhood Effort Helps Police Catch Bad Guys*, www.deepsaidwhat.com/; *Play Texas Police Offroad and get ready to catch bad guys*, www.rosegirlsgames.com/texas_police_offroad-1775/Police Using Cameras to Help Catch Bad Guys - in Redlands-Loma, www.redlands.patch.com; *Police tech: How cops use IT to catch bad guys*, www.computerworld.com.

c. Any Error Was Harmless.

Even if this court finds that Officer Hilton's testimony was somehow inadmissible, any error was harmless as the evidence against Pulega in this case was overwhelming: the robbery was caught on video; the robber on the video bears a striking resemblance to Pulega who, minutes after the robbery, was wearing what appears to be the same tell-tale sparkly belt as the robber; Pulega was found within blocks of the scene of the robbery only minutes later; Pulega had one \$20 bill on his person at the time of arrest and the robber took one \$20 bill from his victim; Pulega had an EBT card on him when he was arrested and Spencer said that the robber used an EBT card; Spencer had injuries consistent with the assault, and Spencer spontaneously identified Pulega at the scene and again in the courtroom.

The fact that the jury chose to convict Pulega of robbery in the second degree instead of robbery in the first degree is also indicative of the lack of undue prejudice in this case. CP 61. Had the jury been tainted by Officer Hilton's comments in this case to assert a "moral judgment" against Pulega, it is unlikely they would have found him guilty of only Robbery in the Second Degree when a harsher option was available.

To argue that the verdict would have been different had the trial judge suppressed Officer Hilton's statements that his job was to arrest "bad guys" and that robberies are "inherently violent" ignores the overwhelming evidence here that Pulega was the man who had beaten and robbed Spencer. Any error was harmless.

D. CONCLUSION

For the reasons stated above, this Court should affirm Pulega's conviction for Robbery in the Second Degree.

DATED this 10 day of May, 2013.

Respectfully submitted,

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By: 

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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 Christopher Gibson, the attorney for the appellant, at Nielsen, Broman, & Koch, PLLC, 1908 E. Madison Street, Seattle, WA, 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ERIC PULEGA, Cause No. 69439-1 -I, 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.

Dated this 10 day of May, 2013



Name
Done in Seattle, Washington