

FILED
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STATE OF WASHINGTON
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NO. 103001-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HARRISON,

Petitioner.

**ANSWER TO
MOTION FOR DISCRETIONARY REVIEW**

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A. ISSUES PRESENTED

1. Has Harrison failed to demonstrate any conflict between the Court of Appeals' analysis below and this Court's opinion in State v. Derri, 199 Wn.2d 658, 511 P.3d 1267 (2022)?

2. Did the Court of Appeals apply the correct legal standard to Harrison's ineffective assistance of counsel claim?

B. STATEMENT OF THE CASE

The State relies on the facts contained in the Brief of Respondent as well as the Court of Appeals' unpublished opinion in this case, State v. Harrison, No. 83638-2.

C. ARGUMENT

RAP 13.4(b) governs this Court's review of Harrison's petition. Accordingly, review is appropriate only under the following circumstances:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Harrison relies primarily on RAP 13.4(b)(1)-(2).

Brief of Pet. at 1, 13, 19.

1. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DERRI.

Admission of an identification obtained through a suggestive procedure does not violate due process if it possesses “sufficient aspects of reliability.” Derri, 199 Wn.2d at 674. Reliability is generally assessed using five factors: “(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated at the procedure, and (5) the time between the crime and the identification procedure.” Id. at 674-75 (citing Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)).

Derri supplemented the Biggers analysis by asking courts to consider “widely accepted modern science on eyewitness identification.” 199 Wn.2d at 675. The trial court’s CrR 3.6 ruling in this case occurred before Derri was published.

However, the State acknowledged below that “[a] new rule of criminal procedure applies to all cases pending on direct review at the time the rule is announced.” State v. Wences, 189 Wn.2d 675, 684, 406 P.3d 267 (2017); Brief of Respondent at 28, n.6.

Harrison argues the Court of Appeals failed to follow Derri because it did not incorporate the “widely accepted scientific principle” of “weapon focus” into its analysis of the second Biggers factor.¹ Brief of Pet. at 14-15. But the Court of Appeals did apply the concept of “weapon focus”:

There is no doubt that Moningka was focused on the weapon pointed at him while the robbery was occurring. But to the extent his attention to Harrison’s identity might have been reduced by the stress of being held at gunpoint, Moningka continued to observe

¹ “Weapon focus” is a psychological theory holding that “if there is a weapon...people...will tend to pay attention to the weapon” at the expense of other details. RP 773.

Harrison after the robbery as he moved inside the car and came back from the Foege building. There is no evidence that Moningka's attention was diminished during his later observations.

State v. Harrison, No. 83638-2 at 8-9.

To the extent the Court of Appeals was required to consider "weapon focus," it did so in this case. Id. The panel simply found Moningka's identification reliable regardless of whether "weapon focus" occurred because his observation of Harrison continued *after* the weapon was withdrawn. This factual conclusion does not conflict with Derri's directive to consider scientific principles.

Harrison next claims the Court of Appeals inappropriately analyzed the third Biggers factor when it cited the trial judge's observation of accuracy "with approval" because, under Derri, "[t]his consistency factor should...receive limited weight." 199 Wn.2d at 688; Brief of Pet. at 16. But "limited weight" is not the same as "no weight." Nothing in Derri suggests consideration of this factor was wholly

improper, and the Court of Appeals' analysis did not place undue emphasis upon it. Harrison, No. 83638-2 at 9. Rather, it simply found that the trial court's finding was supported by substantial evidence. Id. This does not conflict with Derri.

Harrison next suggests that the Court of Appeals erred by considering the fourth Biggers factor. Brief of Pet. at 16-17. Derri was indeed skeptical of this factor's value, holding that high levels of certainty "should be given less weight...where it has already been determined that the procedure employed was suggestive."² 199 Wn.2d at 688-89. But nothing in the Court of Appeals' opinion suggests it assigned significant weight to Moningka's certainty; it simply noted that the confidence of his identification was not in dispute. Harrison, No. 83638-2 at 7. This passing treatment does not present any conflict with Derri.

Harrison also claims that Division One has not acknowledged that Derri applies to cases on direct appeal, even

² The State's briefing acknowledged Derri's skepticism of this factor. Brief of Respondent at 24-25.

if the opinion was not available to the trial court. Brief of Pet. at 17. It is well established in Washington that new criminal rules apply to cases still on direct review when the rule is announced. Wences, 189 Wn.2d at 681. The decision below never suggested that Derri did not apply, and in fact cited it extensively. Harrison, No. 83638-2 at 6-9. The State is unaware of any other Division One opinion that contravenes the rule described in Wences. This attempt at manufacturing a conflict does not warrant review.

Finally, Harrison claims the Court of Appeals' harmless error analysis improperly relied on Officer Morris's identification from "*after* the robbery." Brief of Pet. at 18 (emphasis original). But as the State explained below, Officer Morris's identification was significant because Moningka stated that the robber ran to his car, briefly went out of view, and then the *same person* returned to his car before fleeing when police arrived. RP 510, 528, 927; Ex. 9 at 1:25-3:45; Ex. 10. Officer

Morris's identification of Harrison at the car thus strongly supported a finding that he committed the robbery.

Harrison has failed to show any conflict between the decision below and Derri, *supra*. Review is not warranted.

2. THE COURT OF APPEALS CORRECTLY APPLIED ESTABLISHED PRECEDENT WHEN CONSIDERING HARRISON'S INEFFECTIVE ASSISTANCE CLAIM.

The Court of Appeals found the prosecutor "misstated Harrison's testimony" during summation by arguing he did not have money on his person.³ Harrison, No. 83638-2 at 18. However, it also concluded that any error was waived by Harrison's failure to object. Id. at 19.

Harrison separately asserted that defense counsel was ineffective for declining to object to the alleged misstatement. The court rejected this argument, finding that defense counsel

³ For the reasons stated in the Brief of Respondent, the State maintains that no error occurred because the prosecutor was simply arguing the most favorable interpretation of the evidence. Matter of Phelps, 190 Wn.2d 155, 167, 410 P.3d 1142 (2018).

was not deficient because declining to object during summation is “within the wide range of permissible legal conduct,” and because objecting could have “highlight[ed] to the jury that Harrison’s testimony was internally inconsistent.”⁴ Harrison, No. 83638-2 at 21.

Harrison claims the analysis below conflicts with other Court of Appeals opinions holding that “the general presumption of tactical silence is overcome when the evidence commented upon is significant to the State’s case...” Brief of Pet. at 22 (quoting State v. Stotts, 26 Wn. App. 2d 154, 166, 527 P.3d 842 (2023)).

But the opinion below correctly “presume[d] effective representation and require[d] the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.” Harrison, 83638-2 at 20 (citing State v. McFarland,

⁴ The court also held that Harrison had not established prejudice given the strength of the State’s case. Harrison, No. 83638-2 at 21.

127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); Stotts, 26 Wn. App. 2d at 165-66. The court discerned a conceivable legitimate tactic – “that Harrison’s counsel chose not to object to the misstatement rather than to highlight to the jury that Harrison’s testimony was internally inconsistent.” Id. at 21.

Harrison initially testified he had no money on his person, but then later stated he had “personal cash.” RP 855-56. Harrison could not let the first answer stand because it would contradict his claim that he was on his way to buy drugs. A reasonable attorney might have been concerned that Harrison’s revision would seem self-serving and choose not to emphasize it. While Harrison disagrees with the Court of Appeals’ factual treatment, its legal analysis correctly applied this Court’s precedent. Review is not warranted under RAP 13.4(b).

D. CONCLUSION

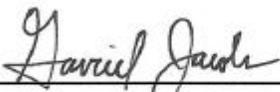
The State respectfully requests this Court deny Harrison’s petition for review.

This document contains 1,467 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

DATED this 15th day of May, 2024.

Respectfully submitted,

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