NO. 92717-1
COA NO. 46572-8-II
Cowlitz Co. Cause NO. 14-1-00193-0

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAM CHARLES BOUCK,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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HALL OF JUSTICE
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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the December 15, 2015, unpublished opinion of the Court of Appeals in *State v. Bouck*, COA No. 46572-8-II. This decision upheld the petitioner's conviction for one count of second degree robbery.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that the trial court did not infringe Bouck's constitutional rights or abuse its discretion in limiting closing argument.

III. STATEMENT OF THE CASE

On November 20, 2012, Scott Taggart was working as a cashier at a Safeway in Longview, Washington, when he observed a man moving quickly from the produce section to the front door, carrying a basket with items in it. RP 69. He approached the man to ask if he could help him or check out his items, but the man continued outside the store at a quick pace. RP 70. Mr. Taggart then grabbed the basket the robber was holding and there was a "tug of war" with the basket. RP 71. The robber then jumped into a van and drove away. RP 75.

The robber was wearing a black hat during the altercation which fell off in the scuffle. RP 76. Another witness to the altercation called police, who came to the Safeway and took possession of the hat as part of their investigation. RP 84.

The hat was sent to the crime lab to be tested for DNA. RP 137. David Stritzke of the WSP crime lab swabbed the sweat band of the hat for DNA. RP 215. The DNA profile obtained from the hat was consistent with having come from two different people. RP 216. The major component matched the DNA profile of Bouck. RP 217. The probability that the DNA came from someone other than Bouck was estimated as one in 27 quintillion. RP 217. Mr. Stritzke explained that it is not unusual to find a mixture of DNA on clothing and that, in order to find a person to have been the major contributor of the DNA that person's DNA would have to have been at least 75 percent of the total. RP 217–18. In other words, Bouck's DNA constituted 75 percent of the DNA that was found on the hat, indicating that he had had more contact with the hat than any other person. RP 207, 214.

Bouck was arrested and ultimately charged with Robbery in the Second Degree. CP 13–14. One the day prior to trial, the prosecuting attorney showed Mr. Taggart two photos of Bouck, and he said that the man photographed looked like the robber. CP 29. The defense filed a motion in

limine to prohibit the in-court identification of Bouck by Mr. Taggart, arguing that the out-of-court identification was impermissibly suggestive. CP 28–30. In response to this motion, the State opted to not ask Mr. Taggart to identify Bouck in court. RP 63.

Prior to closing arguments, the State moved the court to prohibit defense counsel from arguing a lack of evidence from the absence of any in-court identification of Bouck by Mr. Taggart. RP 252. Specifically, the State moved to preclude the defense from saying "The State never asked Mr. Taggart if he could identify the defendant here in court." RP 254. The court granted this motion, mentioning that the question was never asked and there was a reason the question was not asked – namely, the defense's motion in limine. RP 255. The defense was, however, permitted to discuss that there was no in-court identification of Bouck by the eye-witness. Bouck was convicted of Robbery in the Second Degree. He appealed and the court of appeals upheld the conviction.

IV. ARGUMENT

The Court of Appeals properly held that the trial court's limitation on Bouck's closing argument did not infringe his constitutional rights, and that the trial court did not abuse its discretion by limiting the closing argument.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (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 decision of another division 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. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The holding also does not raise a significant question of law or involve an issue of substantial public interest.

1. There was no violation of Bouck's constitutional rights.

A presiding judge has great latitude in controlling the duration and scope of closing arguments. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550 (1975). Closing arguments must be "restricted to the facts in evidence and the applicable law." *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). The trial court judge therefore has discretion to limit closing arguments. However, a limitation on closing arguments can violate a person's constitutional rights in certain circumstances. A trial

court could infringe a person's constitutional rights by limiting closing "argument as to any fact necessary to constitute the charged offense." *State v. Frost*, 160 Wn.2d 765, 771, 16 P.3d 361 (2007). Such a violation was not present here.

The Washington Court of Appeals has overturned cases based on limitations on closing argument when those limitations are much more stringent than the one in this case. For example in *Devries*, the trial court prevented the defense from presenting any closing argument at all. *State v. Devries*, 109 Wn.App. 322, 323, 34 P.3d 927 (2003). On appeal, the court held that the complete denial of closing arguments is unconstitutional. *Id.* In this case, on the other hand, the defense was allowed to give closing argument, and was permitted to argue that there was a lack of evidence stemming from the lack of an in-court identification by either of the eye-witnesses to the crime. RP 294. *Devries* is therefore distinguishable.

Second, in *Frost*, the trial court precluded the defense from arguing both duress and that the State failed to meet its burden as to accomplice liability. 160 Wn.2d at 770. The trial court's decision was based on an erroneous interpretation of existing case law. *Id.* at 774. The Washington Supreme Court therefore found that precluding the defense's closing was an abuse of discretion because it was based on an erroneous interpretation of the law. *Id.* at 779. Conversely, in this case, the trial court's ruling was

not based on an incorrect interpretation of the law, or any other untenable reason. The trial court's decision was based on the defense's own motion in limine and ensured fairness to both parties. Therefore, there was no abuse of discretion in this case.

2. There was no abuse of discretion.

An appellate court reviews a trial court's decision to limit the scope of closing arguments for abuse of discretion. *Frost*, 160 Wn.2d at 771; *Perez-Cervantes*, 141 Wn.2d at 474. An abuse of discretion will only be found if "no reasonable person would take the view adopted by the trial court." *Frost*, 160 Wn.2d at 771. There was no abuse of discretion in this case, as the trial court properly limited closing arguments to the facts in evidence and the applicable law.

First, the defense in this case filed a motion in limine to prohibit the in-court identification of the defendant by Scott Taggart, the victim of the robbery. CP 28. This motion was made due to the defense's belief that the prior, out-of-court identification, was impermissibly suggestive. *Id.* In response to that motion, but without conceding that the out-of-court identification was suggestive, the State opted to avoid asking Mr. Taggert to identify the defendant in court. RP 63. Therefore, the defense's motion was granted, and the State avoided asking Mr. Taggert to identify the defendant in court. RP 67–90 (no identification of the defendant).

Prior to closing arguments, the State moved the court to prohibit defense counsel from arguing a lack of evidence from the absence of any in-court identification of Bouck by Mr. Taggart. RP 252. Specifically, the State moved to preclude the defense from saying "The State never asked Mr. Taggart if he could identify the defendant here in court." RP 254. The court granted this motion, mentioning that the question was never asked and there was a reason the question was not asked – namely, the defense's motion in limine. RP 255. The defense was, however, permitted to discuss that there was no in-court identification of Bouck by the eye-witness. Therefore, the defense was allowed to argue the lack of evidence by discussing the fact that none of the eye-witnesses identified the defendant in court. This is exactly what the defense did argue, and it was proper. RP 294. What the defense was prevented from doing was arguing a fact that was not in evidence – basically that, because the witness did not identify the defendant in court, there was reasonable doubt as to the robber's identity. The trial court's ruling was proper, especially given the defense's motion in limine. A reasonable person could take the view adopted by the trial court, so there is no abuse of discretion.

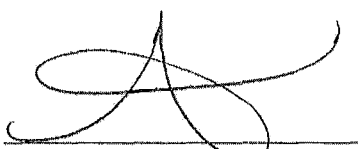
There is no significant question of law or public interest, and the petition should be denied.

V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 8th day of February, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By: 

AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504
supreme@courts.wa.gov

and, sent to the Appellant by US Mail to:

ADAM C. BOUCK
1255 9TH Ave. # 3
Longview, WA 98632

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 8th, 2016.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
Subject: RE: PAs Office Scanned Item Adam C. Bouck, 92717-1, Response to Petition for Review

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From: Sasser, Michelle [mailto:SasserM@co.cowlitz.wa.us]
Sent: Tuesday, February 09, 2016 9:51 AM
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Subject: FW: PAs Office Scanned Item Adam C. Bouck, 92717-1, Response to Petition for Review

Attached, please find the Response to Petition for Review regarding the above-named Petitioner with Certificate of Service.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
Sent: Monday, February 08, 2016 6:05 PM
To: Sasser, Michelle <SasserM@co.cowlitz.wa.us>
Subject: PAs Office Scanned Item