33169-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

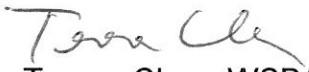
RAMÓN MORFÍN, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the Defendant receive effective assistance of counsel where counsel did not object to admissible identification testimony?
2. Did the Defendant receive effective assistance of counsel where counsel did not object to testimonial hearsay in order to make tactical use of this information to discredit the State's main witness and where the admission of the evidence would be harmless error?

IV. STATEMENT OF THE CASE

The Defendant Ramón Morfín was convicted at bench trial of two counts of assault in the first degree. CP 3, 17, 33. He challenges

foundational testimony and testimony describing the detective's identification of the Defendant from a video as impermissible "opinion testimony" and questions his trial counsel's tactical use of hearsay.

On August 29, 2011 at around 11 PM, Paula Villarreal and her family went to the Motel 6 in Pasco to rent a room. RP 13-14, 71. Her children José and Debbie went to check in, but returned to the car running, saying, "We got to go. We got to go." RP 71. A bullet struck Paula Villarreal in her cheek. RP 71-72, 74-75. They drove off as more bullets hit the car. RP 72, 112.

Paula's daughter Debbie Villareal is a member of the 18th Street gang. RP 118-19. She has been a victim of rival gang shootings on at least two occasions. RP 118.

Pasco police officers responded to the motel and interviewed about a dozen people, focusing on rival gang members. RP 27-29, 34. Among the people interviewed were four Florencia gang members: Apolonia Alejandro, David Martinez, José Segura, and the Defendant. RP 14-15, 18-20, 34, 102-03, 108-10, 111-13, 116-19, 123. Florencia and the 18th Street gang have been rivals from 1990 to the present, with a long history of assaults between each other and even a couple homicides. RP 119-20.

Before joining rival gangs, the Defendant and Debbie Villareal had been childhood friends. RP 77-79. Even as young adults, they corresponded when the Defendant was incarcerated. RP 78. Expert crime analyst Dave Reardon opined that this cross-boundary friendship would have put pressure on the Defendant to demonstrate to his gang that his loyalty to them was superior to his loyalty to an old friend in a rival gang. RP 120-21. Any failure to stand up for his gang could result in loss of street reputation and discipline "usually by being beat up." RP 122.

When questioned, the Defendant admitted that he had been present but denied being involved. RP 15. Police observed that he was wearing a gray, long-sleeved shirt and long, dark shorts. RP 16. No one was cooperating, and police had to release them. RP 32.

Police detained Manuel Ramirez at the scene on an unrelated matter. RP 14, 34. Mr. Ramirez was unknown to police. RP 59. He described himself as a transient from Arizona, but he was apparently friends with the Defendant and his group. *Id.* Mr. Ramirez did not know the Defendant's real name, but only his street moniker. *Id.*

Afterward, Detective Nebeker reviewed footage from several security cameras. RP 16-17, 25. In the videos, several people

congregated at Ms. Alejandro's Mercedes and then "start[ed] to scramble." RP 18-19, 22, 109. The shooter leaned over the Mercedes to steady his arm as the muzzle fires flashed. RP 18. After the shooter left, Manuel Ramirez could be seen in the footage moving Ms. Alejandro's car after the shooting. RP 18, 22-23, 38, 56.

The shooter in the video was dressed identically to the way the Defendant had been dressed when police questioned him. RP 23. No other person whom police interviewed or who was pictured in the footage was dressed in this particular color combination. RP 16, 35-36, 46.

Detective Nebeker has had multiple contacts with the Defendant over eleven years, so as to be able to identify him with confidence. RP 30, 31 ("I know Ramón, and I know his face, and that's who I talked to that night. I even talked to him about his girlfriend who later had his child."), 57-58. Although the Defendant looks like his brother, the Defendant does not have a mole on his face, like his brother. RP 14-15, 30. The detective recognized the Defendant as the shooter in the video by his face, clothing, hair style, and body shape. RP 30, 36, 58. He immediately realized that he had released the shooter by releasing the Defendant. RP 25, 58, 60.

Sergeant Gregory also reviewed the surveillance footage, in which the shooter stands next to Mercedes to fire and then runs off to the guest rooms. RP 127-28. He "could clearly see" the Defendant was the shooter. RP 128-29.

Because Manuel Ramirez was already in custody, the detective questioned him about the shooting. RP 37. Mr. Ramirez and everyone who had been gathered around the Mercedes immediately prior to the shooting could be considered an accomplice to the crime. RP 48. They would have reasons to cover their tracks, and indeed Mr. Ramirez moved the Mercedes away from the shell casings. RP 48, 128. RP 18, 23, 38, 56. In the video, he appears to pick something up from the passenger side of the car before returning to the motel. CP 35. The pistol was never found. RP 53.

The detective told Mr. Ramirez that he could not identify the shooter from the videotape alone. *Id.* This was not true. RP 37, 60-61. It was a ruse to get Mr. Ramirez's reaction. RP 37-38, 60-61. Mr. Ramirez confirmed the shooter's identity. RP 25, 62.

The Defendant had to be extradited from Mexico on these charges. RP 114. He waived his jury right. CP 45.

At the bench trial, in laying a foundation before offering the

video exhibit for admission, the prosecutor asked the detective to describe the subject matter of the video. RP 17. The detective explained that the video contained footage around the motel from different angles, different cameras. *Id.* He summarily explained the relevance of the information captured in each camera angle.

> In one angle you can see when the Villarreals, José and a female, I think his girlfriend, walk inside the hotel to the front desk. You see the white Cadillac back out and head to the first entrance over by Oregon Avenue, and then it flips around this arborvitae hedge, and you can see where a trunk pops open and someone gets out, and then you see it speed off and then later go back out on or Oregon Avenue.
>
> From another camera angle you can see on the it'd be the south side of the complex you can see two, two males in white clothing running off toward the cemetery from the hotel, and there's another camera angle where you can see the eastern side of the complex by Oregon Avenue, and you can see a group of people hanging around a vehicle that I've known to belong to Mrs. Alejandro, a black Mercedes. And you can see people start to kind of scramble. You can see who I identify as Mr. Morfín lean over the car, and you can see the fire from the muzzle as shots go out. Then can you see people run and scramble, and then a different person in a dark shirt I believe to be Manuel Ramirez run back to the Mercedes and park it over on the south side, and it goes back into view of that camera over there.

RP 17-18.

The prosecutor made a motion to admit the exhibit. RP 21.

The judge then viewed the admitted exhibit while the detective testified. RP 21-22.

The detective identified the cars and parties visible in the video. RP 22-23. And he identified the shooter.

> You can see one of those persons [several males gathered around the black Mercedes] starting to lean over the top of the car. Those are the blasts from the muzzle of the gun. And he's wearing the same attire as Mr. Morfín when I interviewed him.

RP 23.

> It wasn't until I saw that video that I saw it was Ramón, and he had left. We had already released him.

RP 25, 58.

Sergeant Gregory was familiar with the players at the scene of the shooting. He knew David Martinez from the Boys and Girls Club and various other contacts. RP 108. He knew David's brother Jose. RP 108. Although less familiar with the Defendant than with the Martineces, the sergeant had known him prior to the shooting investigation. RP 108-09.

The sergeant contacted the Defendant the night of the shooting and observed how he was dressed. RP 129. When asked how it was that the sergeant was able to identify the Defendant, he

explained: "Body style, clothing. It was clearly him." RP 129.

> ... I looked at the video, I looked at the people we were talking to that night, and it appeared to me that it was Mr. Morfín that was standing over the vehicle firing the shots.
> ....
> Having contacted all of the people that were there that night plus the people that we'd identified, it was clearly not any of them. And it clearly matched Mr. Morfín.

RP 130.

On cross-examination, the sergeant testified that he could not distinguish facial features or tattoos from the video. RP 130. He explained that his identification was based on a comparison of the video with all contacted parties. RP 130.

The Honorable Judge Ekstrom explained that from the video itself, the judge could perceive the difference in the color of clothing and the general size and carriage of people. RP 165. However, in finding the Defendant guilty beyond reasonable doubt, he relied "upon the identification of the individuals who observed all the folks present." RP 165.

V. ARGUMENT

A. COUNSEL'S PERFORMANCE IS NOT DEFICIENT FOR FAILING TO OBJECT TO ADMISSIBLE TESTIMONY.

For the first time on appeal, the Defendant challenges the law enforcement witnesses' identification testimony as impermissible "opinion testimony," admitted only due to trial counsel's failure to object. Brief of Appellant (BOA) at 2, 11.

Generally, appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). "Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." *State v. Mohamed*, 187 Wn. App. 630, 650, 350 P.3d 671, 680 (2015). This rule encourages the preservation of error where a timely objection would have given the trial court the opportunity to prevent or cure error. *State v. Kirkman*, 159 Wn.2d at 926.

In order to "avoid this preservation requirement," sometimes an appellant will reframe the challenge as a constitutional error. *Id.* And this is what the Defendant does here, reframing the admission of testimony as ineffective assistance of counsel. He argues that his

counsel should have objected to the police officers' identification of the Defendant as the shooter.

Standards of Review: To prevail on a claim of ineffective assistance, the defendant has the burden of showing, first, that his counsel's performance was deficient by falling below an objective standard of reasonableness and, second, that this error was so serious as to prejudice his defense and deprive him of a fair trial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

The courts strongly presume that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d at 33. To rebut this presumption, a defendant must demonstrate that "there is no conceivable legitimate tactic explaining counsel's performance." *Id.,* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). To satisfy the prejudice prong, the defendant must establish that but for counsel's deficient performance, the outcome of proceedings would have been different." *State v. Grier*, 171 Wn.2d at 34.

Counsel's performance was reasonable. First, the Defendant cannot challenge testimony offered for foundational purposes. Because the determination of admissibility is a preliminary question,

the rules of evidence do not limit the evidence that can be offered for authentication. ER 104(a); *Passovoy v. Nordstrom, Inc.,* 52 Wn.App. 166, 170, 758 P.2d 524 (1988). Second, witness testimony identifying the perpetrator is not inadmissible opinion testimony.

Opinion testimony is frequently admitted. Any witness may testify as to their perceptions based on their firsthand observations and as to their opinions or inferences rationally based on those perceptions. ER 701. The trial court will admit such testimony at its discretion if it is helpful to the fact finder's clear understanding of the testimony. 5B Wash. Prac. §§ 701.4 - 701.5.

There is a line of cases which would prohibit opinion testimony as to the guilt or veracity of the defendant as an "invasion of the province of the jury." *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Such "empty rhetoric" will not elevate the challenge to a constitutional plane. *City of Seattle v. Heatley*, 70 Wn. App. at 583, n.5. It is impossible to usurp the jury's function, because even if there is uncontradicted expert testimony on the victim's credibility, the jury is not bound by it.[1] *Id.*; *State v. Middleton*, 657

[1] Jurors "are the sole judges of the credibility of the witnesses and of what weight is

P.2d 1215, 1219 (Or. 1982). "Jurors always remain free to draw their own conclusions." *City of Seattle v. Heatley*, 70 Wn. App. at 583 n.5.

Although it is questionable whether a law enforcement officer's identification testimony is imbued with an aura of reliability[2], it "has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact." *Gerberg v. Crosby*, 52 Wn.2d 792, 795-96, 329 P.2d 184 (1958); ER 704. "[T]he mere fact that the opinion of an expert covers the very issue which the jury has to pass upon does not call for its exclusion." *State v. Ring*, 54 Wn.2d 250, 255, 339 P.2d 461 (1959).

A detective, just like any other witness, may offer an inference based on his or her observations. *State v. Stark*, 183 Wn. App. 893, 904-05, 334 P.3d 1196 (2014). The fact that the opinion supports a conclusion of guilt makes the opinion relevant and material, and not an improper opinion on guilt. *State v. Stark*, 183 Wn. App. at 905; *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009) (testimony

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to be given to the testimony of each." WPIC 1.02. Jurors "are not required" to accept even an expert witness' opinion, but rather "determine [for themselves] the credibility and weight to be given" to the witness' opinion. WPIC 6.51.

[2] *State v. Montgomery*, 163 Wn.2d 277, 291, 183 P.3d 267 (2008); *State v. Rafay*, 168 Wn. App. 734, 806, 285 P.3d 83 (2012).

is not objectionable simply because it embraces an ultimate issue that the trier of fact must decide).

The Defendant acknowledges that "[a] lay witness may give opinion testimony as to the identity of a person in a surveillance photograph." BOA at 13. The Defendant questions, however, whether the law enforcement witnesses had "sufficient prior contacts" with him in order to testify as to his identity. BOA at 11.

The Defendant relies on *State v. George*. BOA at 14-19. There, the opinion held that the testimony would only be admissible if "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photographs than is the jury." *State v. George*, 150 Wn. App. at 118. *See also State v. Hardy,* 76 Wn.App. 188, 190, 884 P.2d 8 (1994), *aff'd and remanded by State v. Clark,* 129 Wn.2d 211, 916 P.2d 384 (1996). The facts in that case, however, are not at all similar to those here.

In *State v. George*, the detective only knew the defendants from his arrest of them on the day of the robbery. *State v. George*, 150 Wn. App. at 113. After three men fled a Fife Days Inn in a red Ford Bronco with cash and a flat screen television, police stopped a dark red van with nine occupants. *Id.* In the van, police recovered the hotel's

television, a roll of dimes, and a gun. *Id.* The detective did not know the defendants, but based his identification of the subjects in the surveillance video only on the defendants' build, clothing, and a comparison of subjects. *State v. George*, 150 Wn. App. at 115-16, 119. Although the error was ultimately harmless, the appellate court found that the lower court abused its discretion in permitting the identification testimony where the detective could not see any faces in the surveillance video and had only met the defendants when he arrested them. *State v. George*, 150 Wn. App. at 118-19.

The facts in our case are more similar to those in *State v. Hardy.* There Officer Maser testified to the identity of the defendant in a video of a drug transaction. *State v. Hardy*, 76 Wn. App. at 189. The court of appeals found the testimony permissible. *State v. Hardy*, 76 Wn. App. at 191. Officer Maser had known Hardy for several years so to be in a better position than the jury to identify the defendant from grainy video. *Id.* Because Maser knew Hardy "in motion" and was "familiar with his mannerisms and body movements," he was "certainly in a better position to identify him than the jury, who has only seen Hardy motionless in court." *Id.*

As in *Hardy,* our law enforcement witnesses knew the

defendant from previous contacts as opposed to the arrest only. Such testimony is admissible.

In our case, the fact finder was a judge, not a jury. The judge had no familiarity with the Defendant. RP 165. The witnesses, on the other hand, had significant familiarity with the Defendant. The Defendant misstates the record to say that the detective and sergeant based their identification "solely on his build and clothing." BOA at 11. Both witnesses had met the Defendant before the night of the shooting.[3] Their previous contacts were not akin to a mere a glimpse in profile under a streetlight. They knew him. The detective had known the Defendant for eleven years through numerous contacts. The sergeant had met the Defendant before and knew his gang members sharing the Defendant's room quite well. Both the detective and sergeant had been involved in interviewing the Defendant that very night so as to know how he looked, not just generally, but in the moments after the shooting.

Defense counsel tested the reliability of each identification in

[3] The Defendant unfairly characterizes the sergeant's testimony to be that he "had no prior contact" with the Defendant or, inconsistently, "only" that he "might have seen [the Defendant] before." BOA at 19. The sergeant testified that he didn't know the Defendant "well enough" to identify his gang affiliation, because, while he knew Morfín, he hadn't "actually dealt with him" as he had the Martineces. RP 108-09.

extensive cross-examination. RP 30-51, 54-56, 60-61, 129-31. Because the finder of fact was "free to disbelieve" the witnesses, the ultimate issue of identification was left to the judge. *State v. Hardy*, 76 Wn. App. at 191. The testimony was admissible.

It is not unreasonable to fail to object to testimony that is admissible. BOA at 20 (deficient performance is only established when counsel fails to object to *inadmissible* evidence). Defense counsel's performance was not deficient.

B. COUNSEL'S FAILURE TO OBJECT TO TESTIMONIAL HEARSAY WAS TACTICAL AS WELL AS HARMLESS ERROR.

The State concedes that a reference to some statement by Manuel Ramirez which confirmed the detective's identification of the Defendant challenges is inadmissible testimonial hearsay. However, the Defendant does not challenge its admission, but only his attorney's tactical use of the statement. It is apparent that trial counsel used this testimony to undermine the detective's credibility. RP 60.

Counsel suggested that it was not the detective, but Manuel Ramirez, who identified the Defendant.

> ... you didn't really have that aha moment, because you needed to use at the very least a "ruse" to verify your aha moment. Is that right?
> ....
> ... that exact statement you made to Manuel saying, "I think I have enough for probable cause for Ramón, but I'd like to strengthen it."

RP 61.

The trial attorney's tactic was reasonable and cannot be grounds for ineffective assistance of counsel.

It bears mentioning that the allusion to Manuel Ramirez's statement would be harmless error. Confrontation clause violations are subject to a harmless error analysis. *State v. Koslowski*, 166 Wn. 2d 409, 431, 209 P.3d 479, 491 (2009). The error is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt.

In determining the sufficiency of the evidence, Judge Ekstrom does not appear to have used the allusion to Manuel Ramirez's statement as substantive evidence that the Defendant was the shooter. His only reference to this statement is as defense counsel intended, i.e. to assess whether the detective was telling the truth as to the independence of his own identification of the shooter. RP 164.

However, even if the judge had relied upon the hearsay

evidence, there is overwhelming untainted evidence of the Defendant's identification as the shooter.

Two law enforcement officials identified the Defendant. Det. Nebeker has known the Defendant for eleven years so as to be able to identify him with confidence. He immediately identified the Defendant as the shooter in the video, not only from clothing, but by his face, movement, hair style, and body shape. Sergeant Gregory also testified that he could clearly identify the Defendant as the shooter in the surveillance tape.

The allusion to Manuel Ramirez's statement was harmless error. The conviction should be affirmed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 29, 2015.

Respectfully submitted:

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Affidavit of Service	Dana Nelson Nielsen, Broman & Koch, PLLC 1908 E Madison Street Seattle WA 98122 mayovskyp@nwattorney.net	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated 29th, October 2015, Pasco WA Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 29th day of October, 2015 Notary Public and for the State of Washington residing at Pasco. My appointment expires: September 9, 2018		