Supreme Court No. 97764-0
Court of Appeals No. 36637-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEANDRE BROWN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

Honorable Bernard Veljacic, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Keandre Brown, by and through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Brown seeks review, in part, of the August 15, 2019, unpublished opinion of the Court of Appeals (Appendix A) and the September 10, 2019, Order Denying Motion for Reconsideration (Appendix B) of Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

Where there was no showing a probation officer was more likely than the jurors to correctly identify the person in still photos as Keandre Brown, did the admission of the probation officer's opinion testimony identifying Mr. Brown as the person in the photos improperly invade the province of the jury?

D. STATEMENT OF THE CASE

Two masked, armed men entered the Mill Plain Medical and Pharmacy during business hours. RP2[1] 161, 163, 194; RP3 246, 272. One man grabbed all the oxycodone from the pharmacy safe. RP2 181-83; RP3

[1] The verbatim record – "RP" consists of six consecutively numbered volumes ("RP"). The specific volume referenced follows the RP.

343, 358. The other man held the employees and customers in check by displaying a handgun and making threats. RP2 195, 210; RP3 239-41, 263, 278-79. The two men left through the front door with the drugs from the safe. RP3 281-82; RP4 436.

The pharmacy's surveillance system recorded the occurrence. RP3 312. At times during the occurrence, the masks worn by the men slipped down and revealed parts of each man's face. RP3 247, 268, 273. Hoping to identify the two men, police detectives made still photos from the surveillance tape. RP2 108.

Similar pharmacy robberies in Portland, Oregon, helped the police develop suspect information. RP4 456. Vancouver Police Detective Martin showed the stills from the pharmacy surveillance system photos to Portland Juvenile Probation Officer Harry Bradshaw. RP2 107. Bradshaw identified Keandre Brown as one of the men. RP5 576-77.

The state charged Brown with multiple offenses, including first-degree robbery, assault, and unlawful firearm possession. CP 1-3.

Before trial, Brown moved unsuccessfully to prevent juvenile probation officer Bradshaw from identifying him as the person in the still photos. RP2 97-127.

At trial, over Mr. Brown's objection, Bradshaw identified Brown in the still photos made from the pharmacy surveillance system. RP5 576-77.

The jury found Mr. Brown guilty of the charges and answered "yes" to firearm enhancement special verdicts. CP 5-22.

The court imposed a 360-month sentence. RP6 681-83; CP 33. The court acknowledged Mr. Brown would be in prison for 30 years. RP6 683-84; CP 32.

Mr. Brown timely appealed all portions of his judgment and sentence. CP 44-59. Court of Appeals Division Two administratively transferred the case to Division Three for consideration. Division Three affirmed the convictions in an unpublished 0pinion (Appendix A) and denied Brown's subsequent motion for reconsideration (Appendix B).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The improper admission of opinion evidence identifying Mr. Brown in still photos taken from a surveillance video improperly invaded the province of the jury.

The jury convicted Mr. Brown only because a juvenile probation officer identified Brown in still photos made from the pharmacy surveillance system. But the admission of the still photos and subsequent identification of Mr. Brown was error. Mr. Brown's conviction, made in error, must be reversed. This court should accept review.

Under RAP 13.4, a petition for review will be accepted by the Supreme Court,

> (1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals conflicts 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.

Before trial, Brown moved to exclude testimony from Portland juvenile probation officer Harry Bradshaw. RP2 99-135. The state sought to admit Bradshaw's opinion that Mr. Brown appeared in still photos taken from the pharmacy surveillance system. RP2 115-20. The court allowed Bradshaw's identification testimony over strenuous objection. RP2 122-27. The testimony, admitted in error, invaded the province of the jury. The Court of Appeals erred in affirming the admission of Bradshaw's identification testimony and, consequently, Mr. Brown's convictions.

The state offered evidence that Bradshaw knew Mr. Brown for three to four years. RP5 566. Even though Bradshaw knew of Brown, Bradshaw only interacted with Brown about ten times. RP5 566-57. Each

interaction was short, varying in length from 2-10 minutes and only sometimes included face-to-face conversations. RP5 567. Bradshaw last saw Brown in person in early 2016, and occasionally saw Brown in social media posts. RP5 568

Bradshaw identified Brown in still photos shown to him by a police detective. RP2 105-10; RP5 569, 576-77. Brown argued that allowing Bradshaw to identify him in the still photos invaded the province of the jury. RP2 122-24. Instead, the jurors themselves should compare the surveillance videos and still photos to Mr. Brown in court. RP2 122-25.

The court allowed Bradshaw to identify Mr. Brown as the person in the still photos even though Bradshaw only saw Brown in person a few times over ten years. RP2 126-27, 130; RP5 576-77. The court found that his opinion would be useful to the jury and was therefore admissible under ER 701. RP2 126-27, 134.

Trial courts review the admission of evidence for abuse of discretion. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id*.

Under ER 701, a lay witness may testify to a rationally based opinion if it is based on the witness's perception and helpful to a clear understanding of the fact in issue. *George*, 150 Wn. App. at 117. Opinion testimony identifying persons in a surveillance photograph runs the "risk of invading the province of the jury and unfairly prejudicing [the defendant]." *George*, 150 Wn. App. at 118 (quoting *U.S. v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir.1993)). Such testimony is admissible only where there is "some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *George*, 150 Wn. App. at 118 (quoting *State v. Hardy*, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). Opinion testimony may be appropriate but only if the witness has had sufficient contact with the person or if the person's appearance has changed significantly since photographed. *La Pierre*, 998 F.2d at 1465.

Nothing in the record suggested Mr. Brown's appearance changed between the pharmacy incident and Brown's trial. Bradshaw's contacts with Mr. Brown over many years was only peripheral to Bradshaw's job. RP5 566-69. Brashaw never supervised Mr. Brown. RP5 566.

In *George*, armed robbers entered a motel lobby and stole cash and a television. 150 Wn. App. at 113. The robbers left in a van. *Id*. A poor

quality surveillance video recorded the robbery. The state showed the video, and several video stills, to the jury. A police officer identified two of the people in the video as the defendants by their build, how they moved, what they were wearing, and his impressions from talking to them. *George*, 150 Wn. App. at 115-16.

On review, the court held the trial court abused its discretion in allowing the officer's identification of the defendants. *George*, 150 Wn. App. at 118-19. The officer saw one defendant get out of the van and run away. The officer saw the same defendant later that night at a hospital. *Id*. at 119. The officer saw the second defendant first as he got out of the van and was handcuffed, and again at the police station in an interview room. Id. The court found the two observations fell short of the extensive contacts needed to support a finding that the officer knew enough about the defendants to opine that they were the robbers in the motel video. *Id*. at 119.

In Mr. Brown's case, as in *George*, the trial court abused its discretion in admitting lay opinion regarding the identity of the person in photographs. Over defense objection, Bradshaw opined the surveillance stills depicted Mr. Brown. Bradshaw's encounters with Mr. Brown - brief contacts over the years - were like the officer's observations in *Brown*,

albeit spread over about ten years. RP5 566. Bradshaw was no more likely to correctly identify Mr. Brown from the photos than the jury.

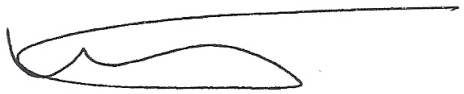
Bradshaw's opinion testimony was an impermissible invasion of the province of the jury. *See State v. Jamison*, 93 Wn.2d 794, 799, 613 P.2d 776 (1980) (close familiarity of lay witnesses with defendant insufficient to permit them to identify defendant in surveillance photo, where jury was able to compare defendant's appearance with photos to make the critical determination).

There is no reason to believe Bradshaw could offer the jury any assistance in determining whether the photographs depicted Mr. Brown. Instead, the opinion served merely to unfairly bolster the state's case by invading the province of the jury. This court should accept review and reverse Mr. Brown's convictions.

F. CONCLUSION

This court should accept review, find Bradshaw's testimony inadmissible, and reverse Brown's convictions.

Respectfully submitted October 10, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Keandre Brown

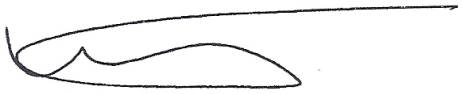
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Keandre Brown/DOC#402919, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

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

Signed October 10, 2019, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Keandre Brown, Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KEANDRE DESHAWN BROWN, Appellant.	)))))))))	No. 36637-5-III UNPUBLISHED OPINION

PENNELL, J. — A jury convicted Keandre Brown of several felonies related to the armed robbery of a pharmacy in Clark County, Washington. We affirm Mr. Brown's convictions, but remand with instructions to strike the criminal filing fee and the use of motor vehicle finding from the judgment and sentence.

FACTS

In the summer of 2016, two masked gunmen entered the Mill Plain Medical and Pharmacy in Vancouver, Washington, demanding oxycodone. While one of the men purloined the drugs from the pharmacy's safe, the other man ordered employees and customers around at gunpoint.

The two men exited the pharmacy through the front door and ran to a vehicle that was backed into a slot of the pharmacy's parking lot. A police officer sitting in traffic nearby saw the two men run to the vehicle and drive away. Although his suspicions were aroused, the officer did not initiate a pursuit because he was not yet aware of any criminal conduct.

The pharmacy's surveillance system recorded the robbery. The footage showed that during the robbery the suspects' masks would sometimes slip down, revealing their faces. Law enforcement retained still images from the surveillance footage to help in their investigation. The photographs were of a high quality and showed a clear view of the suspects' faces.

A probation officer identified Keandre Brown and his cousin as the two men depicted in the surveillance photographs. The officer knew Mr. Brown through his employment and had interacted with Mr. Brown numerous times, including approximately 10 conversations over the course of three and one-half years. The probation officer's last contact with Mr. Brown occurred in early 2016.

The State charged Mr. Brown with first degree robbery with a pharmacy enhancement and two firearm enhancements, four counts of second degree assault, each

with two firearm enhancements, and two counts of first degree unlawful possession of a firearm.

Prior to trial, Mr. Brown moved to prevent the probation officer from identifying him in the surveillance photos. The trial court denied this request, finding the probation officer had sufficient contacts with Mr. Brown to permit an identification. The probation officer identified Mr. Brown in the still photos at trial.

A jury found Mr. Brown guilty as charged and found that both Mr. Brown and his accomplice possessed firearms during the robbery and assaults.

Mr. Brown's attorney filed a memorandum in anticipation of sentencing, requesting an exceptional sentence downward based, in part, on Mr. Brown's youth. The State also filed a sentencing memorandum. The State noted that Mr. Brown's sentencing range, including firearm enhancements, was 549-591 months. The State also noted that current case law would permit an exceptional sentence downward based on mitigating circumstances related to Mr. Brown's youth. However, the State declined to recommend an exceptional sentence downward. Instead, the State asked the court to vacate five firearm enhancements, thereby reducing Mr. Brown's sentencing range to 333-375 months.

At sentencing, the State requested a sentence of 360 months. When asked for the defense position, Mr. Brown's attorney no longer pursued his request for an exceptional sentence downward. Instead, defense counsel explained that the State's favorable sentencing recommendation was the result of the parties' negotiations. As stated by defense counsel:

> Whether this young man at 19 was considered too youthful or too mature for any kind of alternative, the State has determined, after reading the defense's request and argument under case law, that the compounding of the firearm enhancement created an unjust sentencing and has asked for 204 months to be reduced. That was our request. That is our goal.

Report of Proceedings (Oct. 10, 2017) at 681.

After hearing from the parties, the court noted its authority to impose a mitigated sentence based on Mr. Brown's youth. The court commented that the parties' sentencing recommendation reflected an acknowledgement of recent science related to juvenile brain development and the "legal trend" against life sentences for youthful offenders. *Id*. at 682. Had Mr. Brown received a sentence within the range determined by the jury's verdict, the court observed that Mr. Brown would effectively receive a "life sentence." *Id*. But with the parties' recommendation, Mr. Brown would get out of custody at age 50. This was still a "stiff sentence," but the court found it appropriate, given the significant negative impact on Mr. Brown's victims. *Id*. at 683.

In addition to imposing a 360-month sentence, the trial court found a motor vehicle was used during the commission of Mr. Brown's robbery and assault offenses, and that Mr. Brown was subject to a $200 criminal filing fee.

Mr. Brown timely appeals his judgment and sentence. A Division Three panel considered Mr. Brown's appeal without oral argument after receipt of an administrative transfer of the case from Division Two.

ANALYSIS

Mr. Brown makes an evidentiary challenge to his conviction as well as several arguments related to sentencing.[1] Mr. Brown in his opening brief also objects to the trial court's failure to enter findings of fact and conclusions of law after a pretrial CrR 3.5 hearing. Because uncontested findings and conclusions have since been entered, this final contention is now moot and we confine our analysis to the evidentiary and sentencing contentions.

Evidentiary challenge

Mr. Brown claims the trial court abused its discretion in allowing the probation

[1] Mr. Brown has also filed a statement of additional grounds for review, in which he makes two challenges to his conviction. Because both arguments rest on facts outside the appellate record, they must be raised in a personal restraint petition, not on direct review. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

officer to identify Mr. Brown from the surveillance footage and still photos. According to Mr. Brown, the probation officer's testimony unfairly bolstered the State's case by invading the province of the jury. We disagree.

ER 701 permits a lay witness to "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." *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). The evidence here meets this standard. The probation officer testified to extensive contacts with Mr. Brown, occurring over the course of several years. Based on these contacts, the trial court had a tenable basis for determining the probation officer was better equipped to identify Mr. Brown from the surveillance footage than the jury. *Cf. State v. George*, 150 Wn. App. 110, 119, 206 P.3d 697 (2009) (Identification testimony was improper when the testifying officer lacked pre-offense contact with defendants.). There was no abuse of discretion.

Ineffective assistance of counsel at sentencing

Mr. Brown next argues that his counsel provided ineffective assistance at sentencing by failing to follow through on his motion for an exceptional sentence downward. To prove ineffective assistance, Mr. Brown must demonstrate his attorney's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668,

687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). When defense counsel's conduct can be characterized as reasonably strategic, it will not be deemed ineffective. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Defense counsel's conduct here was both effective and strategic. Defense counsel recognized the compelling circumstances relevant to Mr. Brown's sentencing. But rather than wait for the sentencing hearing to take a chance on leniency from the court, defense counsel made the strategic decision to seek a favorable disposition from the State. This effort paid off. The State agreed to reduce Mr. Brown's sentencing range by 15 to 19 years. This saved Mr. Brown from the uncertainty of a contested sentencing hearing involving sympathetic victims. It also protected Mr. Brown from an adverse appeal. Far from providing defective representation, the record indicates that Mr. Brown's attorney provided excellent counsel. No constitutional violation occurred.

Sentencing finding regarding use of a motor vehicle

Mr. Brown contends the trial court erred in finding that he used a motor vehicle in the commission of the robbery and assaults, pursuant to RCW 46.20.285(4). Because this issue involves the application of a statute to a specific set of facts, our review is de novo. *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006).

RCW 46.20.285(4) provides for a one-year revocation of a driver's license for "[a]ny felony in the commission of which a motor vehicle is used." The term "used" as provided in this statute means "'employed in accomplishing something.'" *State v. Batten*, 95 Wn. App. 127, 129, 974 P.2d 879 (1999) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2524 (3d ed. 1966)), *aff'd*, 140 Wn.2d 362, 997 P.2d 350 (2000). This statute is applicable only when a vehicle has been "'employed in accomplishing' the crime." *Id*. at 129-30. There must be a relationship between the vehicle and the commission or accomplishment of the crime. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 228, 340 P.3d 859 (2014) (citing *Batten*, 140 Wn.2d at 365). A vehicle is not used in the commission of a crime where it was incidental to the commission of the crime, or merely used for transport to or from a crime scene. *Id*. at 229-30.

The record here fails to show that a vehicle played more than an incidental role in Mr. Brown's offense conduct. Mr. Brown was not in the car at the time he initiated his crimes against the pharmacy's occupants. And he did not enter the car to leave the scene until after the offenses were complete. Although the crime of robbery can extend past the initial act of obtaining property from a victim, *see* RCW 9A.56.190 (Robbery includes force or fear "used to obtain or retain possession of the property, or to prevent or

overcome resistance to the taking."), that is not what happened here.[2] No one attempted to thwart Mr. Brown's retention of the stolen drugs. As a result, his offense ended upon illegal acquisition of the property. *See State v. Robinson*, 73 Wn. App. 851, 857, 872 P.2d 43 (1994) ("When it is undisputed that the defendant used force to take personal property unlawfully from a person 'or in his presence against his will' but used no additional force to retain the property or to effect an escape, the transactional view [of robbery] has no application."). Because the vehicle was used only during Mr. Brown's post-offense activities, not during the act of robbery or assault, RCW 46.20.285(4)'s license suspension provision is inapplicable.

Criminal filing fee

As the parties agree, recent statutory changes prohibit imposition of a $200 criminal filing fee on a defendant, such as Mr. Brown, who is indigent at the time of sentencing. *See* RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). The filing fee must therefore be struck.

[2] The crime of assault has no such extended application.

CONCLUSION

Mr. Brown's convictions are affirmed. We remand with instructions to strike the $200 criminal filing fee and the use of motor vehicle finding from Mr. Brown's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 36637-5-III
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
KEANDRE DESHAWN BROWN,	)	
	)	
Appellant.	)	

THE COURT has considered appellant Keandre Deshawn Brown's motion for reconsideration of our August 15, 2019, opinion, and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Korsmo, and Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

LAW OFFICE OF LISA E TABBUT

October 10, 2019 - 10:55 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Keandre Dshawn Lamarcus Brown, Appellant
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