

62523-3

62523-3

No. 62523-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

ELAINE L. WINTERS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

FILED  
2009 JUN 10 PM 4:41  
COURT OF APPEALS  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

A. STATEMENT OF THE CASE ..... 1

B. ARGUMENT IN REPLY ..... 1

    1. THE POLICE DETECTIVE’S IDENTIFICATION OF MR. SMITH AS THE PERSON SEEN IN SURVEILLANCE PHOTOGRAPHS FROM THREE BURGLARIES WAS INADMISSIBLE WHERE THE DETECTIVE HAD NEVER MET MR. SMITH AND THUS WAS IN NO BETTER POSITION TO IDENTIFY HIM THAN THE JURY ..... 1

    2. MR. SMITH’S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE POLICE DETECTIVE OFFERED HIS EXPERT OPINION THAT MR. SMITH WAS GUILTY OF THE BURGLARIES..... 8

    3. MR. SMITH WITHDRAWS ASSIGNMENT OF ERROR FOUR..... 13

C. CONCLUSION..... 14

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	8
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	12
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	8
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	11, 12

### **Washington Court of Appeals Decisions**

<u>State v. Collins</u> , ___ Wn.App. ___, 216 P.3d 463 (2009) .....	3-4, 12
<u>State v. George</u> , 150 Wn.App. 110, 206 P.3d 697, <u>rev. denied</u> , 166 Wn.2d 1037 (2009) .....	2
<u>State v. Hardy</u> , 76 Wn.App. 188, 884 P.2d 8 (1994), <u>aff'd sub.</u> <u>nom.</u> , <u>State v. Clark</u> , 129 Wn.2d 211, 196 P.2d 384 (1996).....	2, 5
<u>State v. Hernandez</u> , 58 Wn.App. 793, 794 P.2d 1327 (1990), <u>rev. denied</u> , 117 Wn.2d 1011 (1991) .....	11

### **Federal Decisions**

<u>United States v. Allen</u> , 787 F.2d 933 (4 <sup>th</sup> Cir. 1986), <u>vacated on</u> <u>other grounds</u> , 479 U.S. 1077 (1987) .....	4, 6
<u>United States v. Contreras</u> , 536 F.3d 1167 (10 <sup>th</sup> Cir. 2008), <u>cert. denied</u> , 129 S.Ct. 942 (2009).....	3
<u>United States v. Henderson</u> , 68 F.3d 323 (9 <sup>th</sup> Cir. 1995).....	3
<u>United States v. Jackman</u> , 48 F.3d 1 (1 <sup>st</sup> Cir. 1995).....	4, 5

United States v. Towns, 913 F.2d 434 (7<sup>th</sup> Cir. 1990)..... 5

United States v. Wright, 904 F.2d 403 (8<sup>th</sup> Cir. 1990)..... 5

### **Decisions From Other States**

Commonwealth v. Pleas, 49 Mass.App.Ct. 321, 729 N.E.2d 642  
(Mass.App. 2000), rev. denied, 733 N.E.2d 1066 (Mass. 2000)  
The..... 3

State v. Barnes, 147 Idaho 587, 212 P.3d 1017, 1022-24  
(Idaho 2009) ..... 3

### **Evidence Rule**

ER 701 ..... 1, 2, 3

A. STATEMENT OF THE CASE

Since the filing of the Brief of Appellant, the superior court granted the State's motion to clarify the record on appeal. SuppCP 186-89. The order adds to the record the Defense Presentence Report, which was provided to the trial court but never filed in the superior court file. SuppCP 187-89. The order also changes a sentence transcribed as "inaudible" to reflect defense counsel agreed Tony Smith's offender score was nine or above. SuppCP 187.

B. ARGUMENT IN REPLY

1. THE POLICE DETECTIVE'S IDENTIFICATION OF MR. SMITH AS THE PERSON SEEN IN SURVEILLANCE PHOTOGRAPHS FROM THREE BURGLARIES WAS INADMISSIBLE WHERE THE DETECTIVE HAD NEVER MET MR. SMITH AND THUS WAS IN NO BETTER POSITION TO IDENTIFY HIM THAN THE JURY

The trial court permitted the investigating detective to testify that Tony Smith strongly resembled the person depicted in surveillance videos and photographs from three burglaries. This evidence was inadmissible under ER 701 because it was not helpful to the jury, who saw Mr. Smith in person in court, because the detective had not met Mr. Smith and based his opinion only

upon his comparison of the viewable surveillance tapes with a booking photograph of the defendant.

A witness may express an opinion only if the opinion will assist the jury in either understanding the witness's testimony or the facts at issue in the case. ER 701.<sup>1</sup> A lay witness may testify as to the defendant's identity as the person shows in surveillance photography or video tape only if there is a reasonable basis to conclude the witness is more likely to correctly identify the defendant than the jury. ER 701; State v. George, 150 Wn.App. 110, 118, 206 P.3d 697, rev. denied, 166 Wn.2d 1037 (2009); State v. Hardy, 76 Wn.App. 188, 190-91, 884 P.2d 8 (1994), aff'd sub. nom., State v. Clark, 129 Wn.2d 211, 196 P.2d 384 (1996). In determining if a witness may testify as to the identity of an individual depicted in surveillance pictures, courts look to factors such as the quality of the photographic images, the witness's familiarity with the defendant, and whether the person depicted is disguised or the defendant had changed his appearance since the

---

<sup>1</sup> ER 701 reads:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not knowledge based on scientific, technical, or other specialized knowledge within the scope of rule 702.

time of the crime. State v. Barnes, 147 Idaho 587, 212 P.3d 1017, 1022-24 (Idaho 2009); Commonwealth v. Pleas, 49 Mass.App.Ct. 321, 729 N.E.2d 642, 645-46, 646 n.4 (Mass.App. 2000) (reviewing cases from federal courts and states like Washington with similar evidence rule), rev. denied, 733 N.E.2d 1066 (Mass. 2000). The most important factor is that the witness have some prior familiarity with the defendant's appearance. Barnes, 212 P.3d at 1023; United States v. Contreras, 536 F.3d 1167, 1170 (10<sup>th</sup> Cir. 2008), cert. denied, 129 S.Ct. 942 (2009). "We require a lay witness to have sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful." United States v. Henderson, 68 F.3d 323, 326 (9<sup>th</sup> Cir. 1995).

This Court similarly interpreted ER 701 in State v. Collins, \_\_\_ Wn.App. \_\_\_, 216 P.3d 463 (2009). There the State introduced photographs from a taxi cab security camera showing a passenger shoot the driver, and faculty members and security guards from the defendant's high school identified him as the shooter in the photographs. Id. at 464-65. This Court held the trial court properly admitted the identification testimony because the witnesses were acquainted with the defendant and the testimony was based upon

their knowledge of the defendant's appearance at the time of the crime. Id. at 467-68.

The Collins Court explained its decision was consistent with case law holding identification testimony is helpful when the witness is more familiar with the defendant than the jury and the photographs are susceptible to interpretation.

[T]he weight of authority . . . holds that identify testimony is helpful "at least when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is not better-suited than the jury to make the identification." Human features develop in the mind's eye over time. Witnesses who have interacted with the defendant in a variety of circumstances, in a way the jury could not, may have a great advantage over the jury's limited exposure to the defendant in a sterile courtroom setting.

Collins, 216 P.3d at 467 (quoting United States v. Jackman, 48 F.3d 1, 4-5 (1<sup>st</sup> Cir. 1995), citing United States v. Allen, 787 F.2d 933 (4<sup>th</sup> Cir. 1986), vacated on other grounds, 479 U.S. 1077 (1987)).

Here, the detective's identification of Mr. Smith as the person seen in surveillance footage was based on his review of a booking photograph of Mr. Smith rather than any special familiarity with Mr. Smith, who he had never met. 8/26/08RP 44, 88. In addition, the

surveillance images are clear enough that the jury could make its own observations. Ex. 45, 56, 63, 66; 8/26/08RP 36 (detective refers to surveillance footage from Seattle Savings Bank/Seattle Financial Group as “better than average”); Brief of Respondent at 22-23 (referring to surveillance tapes as “very good quality videos”).

Although the State argues the detective’s testimony was helpful to the jury and admissible, the cases the State relies upon do not support its position. See Hardy, 76 Wn.App. at 191 (police officers who knew each of two defendants for several years properly identified them in videotape of crime); Jackman, 48 F.3d at 2-3, 5 (defendant’s ex-wife and two acquaintances familiar with his appearance at time of bank robbery properly identified defendant; bank surveillance photos blurred and showed only part of robber’s face); United States v. Towns, 913 F.2d 434, 445 (7<sup>th</sup> Cir. 1990) (defendant’s former girlfriend who observed him on day of robbery testified he was person in bank surveillance photos; defendant shaved mustache prior to trial); United States v. Wright, 904 F.2d 403, 405 (8<sup>th</sup> Cir. 1990) (witnesses who knew defendant through criminal justice system, including parole officer, identified him in bank surveillance photograph; photograph not clear, robber’s face partially covered by mask, defendant had grown beard since time of

incident); Allen, 787 F.2d at 935-37 (parole officer and police officer who had known defendants for many years testified to their identity in bank surveillance photographs that were “less than clear”). Here, in contrast, the detective identified Ms. Smith from a single photograph and the surveillance tapes in evidence provide a fairly clear view of the burglars. The jury in this case was as equipped as the detective to formulate an opinion as to the likeness in the surveillance videos and still photographs.

The State attempts to distinguish the case law concerning identification by arguing the detective’s identification was also based upon his “familiarity with the characteristics of commercial burglaries,” and was therefore helpful to the jury.<sup>2</sup> Brief of Respondent at 20-21, 23. Logically, however, the detective’s purported knowledge of burglaries makes him no more capable of identifying someone from a surveillance photograph or video than any juror. Certainly none of the cases addressing this type of opinion hold as the State suggests.

The State thus argues the detective’s identification of Mr. Smith as the person in the surveillance footage was expert

---

<sup>2</sup> Mr. Smith’s argues separately that Detective Wall’s testimony constituted an improper opinion on Mr. Smith’s guilt. Brief of Appellant at 22-31.

testimony.<sup>3</sup> Brief of Respondent at 24-25. While the detective's conclusions about commercial burglaries may have been a subject for expert testimony, his opinion that Mr. Smith was the person in the exhibits was not. The detective did not testify as to any expertise in identifying people; he had no more expertise than any other citizen or juror.

The trial court abused its discretion by permitting Detective Wall to identify Mr. Smith as the person depicted in the surveillance photographs because the detective had not personal knowledge or familiarity with Mr. Smith that made him more capable of making such an identification as the jurors. Moreover, to the extent his identification of Mr. Smith was based upon his conclusions that the burglaries were so uniquely similar that they were committed by the same person – Mr. Smith – his testimony was, as argued below, an impermissible opinion on Mr. Smith's guilt.

---

<sup>3</sup> The trial court did not admit the identification as expert testimony, but to show why the detective acted as he did. 8/7/08RP 30-31.

2. MR. SMITH'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE POLICE DETECTIVE OFFERED HIS EXPERT OPINION THAT MR. SMITH WAS GUILTY OF THE BURGLARIES

Detective Wall testified that the burglaries in this case shared unusual characteristics, that the same person was depicted in the surveillance footage of three of the burglaries, and Mr. Smith "strongly resembled" the person caught by the surveillance cameras. His testimony, taken as a whole, presented his opinion that Mr. Smith was guilty. In a criminal case, however, a witness may not opine the defendant is guilty because the opinion may violate the defendant's constitutional right to a jury trial and the jury's duty to independently determination of the facts and assess the defendant's guilt. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Detective Wall's testimony was an improper opinion on Mr. Smith's guilt.

The State claims that the detective was simply providing the jury expert testimony about commercial burglaries and not his ultimate opinion as to Mr. Smith's guilt. A review of Detective Wall's testimony, however, shows he was providing the jury a road

map of his decision making process, leading to his conclusion that Mr. Smith committed all of the burglaries.

The detective told the jury that he compared the video tapes from the Seattle Financial Group burglaries in 2007 and 2006 and concluded it was the "same suspect." 8/26/08RP 37-38. He then reviewed surveillance videos from the Freeman Company burglary and "believed them all to be the same suspect." 8/26/08RP 39, 64. The detective then compared Mr. Smith's photograph with the surveillance photos from the burglaries and concluded "the suspect they had booked in the jail strongly resembled the prior video evidence." 8/26/08RP 44-45. Detective Wall also opined that when Mr. Smith was arrested at the DSHS office, he immediately "realized he'd been arrested again for burglarizing a different business downtown." 8/26/08RP 46. The detective's opinion was based upon:

- The majority of burglars in King County are Caucasian and Mr. Smith is black. 8/26/08RP 40-41.
- Burglars usually want to get out of the building quickly, but the suspect here spent a "great deal of time" in the businesses. 8/26/08RP 41, 42.
- The suspect took a lot of property in the Freeman and Seattle Savings Bank burglaries, which is unusual. 8/26/08RP 41.

- The time frame of the Seattle Savings Bank burglary suggested the suspect did not have a vehicle, which was “confirmed” when Mr. Smith was arrested at the motel. 8/26/08RP 41.
- The three looked like “the same person,” as they shared a similar head shape and a shaved face. 8/26/08RP 42.
- The person in both Seattle Financial Group burglaries had something white on his hands. 8/26/08RP 42-43, 62.
- Burglars “like to go back to the same location” where they are familiar with the security system, and the suspect in the second Seattle Financial Group burglary appears to know where the cameras are located. 8/26/08RP 59-60, 63.
- Sergeant Newsom told the detective she believed Mr. Smith was the person pictured in the Freeman Company burglary, and Mr. Smith was found with electronic equipment from the burglary and wearing a Freeman Company shirt. 8/26/08RP 43-44.
- The suspect in the Seattle Financial Group burglaries was wearing a necklace with a object on it outside his sweatshirt, this was ‘unusual,’ and a necklace with a ring was taken from Mr. Smith when he was arrested. 8/26/08RP 47-49.
- Electronic equipment was taken in all burglaries. 8/26/08RP 65-66.

On re-direct, the detective summarized that his opinion that Mr.

Smith was the suspect who committed all of the burglaries was

based upon “the totality of all the evidence.” 8/26/08RP 88-90.

Through his testimony, Detective Wall clearly conveyed to the jury

that Mr. Smith was guilty of all four burglaries.

The State argues the detective was an expert who properly used his expertise and experience to develop an expert opinion, analogizing to expert and lay testimony in State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995), linking three separate murders by the unusual posing of the murder victims. Brief of Respondent at 21-22. Russell does not support the State's argument in this case.

The Russell Court upheld the admission of testimony concerning the rarity of posed murder victims because, among other things, the jury did not have experience in serial crime scene analysis. Russell, 125 Wn.2d at 69-70. Here, the average juror is likely to understand how a commercial burglary is committed and be able to make an independent determination of whether Mr. Smith was pictured in any of the exhibits. Moreover, the Russell Court explained evidence of other crimes is relevant concerning identity "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes," like a signature. Russell, 125 Wn.2d at 66-67 (quoting State v. Hernandez, 58 Wn.App. 793, 799, 794 P.2d 1327 (1990), rev. denied, 117 Wn.2d 1011 (1991) and citing State v.

Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)). Unlike Russell, the burglaries in this case were hardly “signature” crimes.

Even more importantly, the Russell Court rejected the defendant’s argument that the detectives’ opinion constituted an unconstitutional opinion on guilt only because the testimony was invited by the defendant himself. Russell, 125 Wn.2d at 71-73. Thus, Russell provides no authority to support the State’s argument that Detective Wall did not unconstitutionally opine that Mr. Smith was guilty.

In contrast, this Court did address whether the witnesses’ identification of the defendant was a prohibited opinion on the defendant’s guilt in Collins. 216 P.3d at 466-67. The court concluded the testimony was not an opinion on guilt because “it was based solely on the witnesses’ perceptions and their familiarity with Collins.” 216 P.3d at 467. Here, the opposite is true.

Detective Wall’s testimony went beyond saying that Mr. Smith resembled the persons depicted in the surveillance footage and told the jury he believed Ms. Smith was guilty. His testimony went to the only disputed element in three of the burglaries – identity – and the only disputed element in the DSUS burglary – intent. Additionally, he was an experienced law enforcement

officer whose opinion the jury would respect. The State cannot demonstrate beyond a reasonable doubt the error in admitting a respected detective's opinion that Mr. Smith was guilty of all the charged crimes was harmless, and his convictions must be reversed and remanded for a new trial.

### 3. MR. SMITH WITHDRAWS ASSIGNMENT OF ERROR FOUR

In the Brief of Appellant, Mr. Smith argued the trial court improperly included California burglary and attempted burglary convictions in the computation of his offender score without undergoing a comparability analysis, resulting in the incorrect sentence range. Brief of Appellant at 1, 34-40. Since the filing of that brief, the State corrected the record to show that Mr. Smith's attorney agreed his offender score and the inclusion or all or part of these convictions in its computation. SuppCP 186-89.

Mr. Smith therefore withdraws Assignment of Error 4 and Argument 3. Instead, he requests permission to file a Supplemental Brief of Appellant arguing his constitutional right to effective assistance of counsel was violated by his attorney's agreement to these convictions.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, two of Mr. Smith's three burglary convictions must be reversed and remanded for a new trial because Detective Wall offered his opinion that Mr. Smith was guilty and was permitted to identify Mr. Smith in surveillance videotapes even though the detective had never met Mr. Smith.

DATED this 16<sup>th</sup> day of November 2009.

Respectfully submitted,



---

Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62523-3-I
v.	)	
	)	
TONY SMITH,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> TONY SMITH 865893 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

FILED  
STATE OF WASHINGTON  
2009 NOV 16 PM 4:41

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710