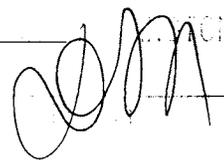


NO. 34309-6

COURT OF APPEALS

NOV 11 11:52

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**



STATE OF WASHINGTON, RESPONDENT

v.

JAMES S. ANDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 04-1-05095-4

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in permitting lay opinion testimony regarding the identity of the person in surveillance photographs where the lay witnesses knew defendant previous to trial, the photographs were of poor quality, the defendant's appearance was obscured by a hat, and defendant had changed his appearance since the time of the photo? (Appellant's Assignment of Error No. Two and Three)..... 1

2. Did the State prove beyond a reasonable doubt that the defendant was guilty of robbery in the first degree where defendant was identified from surveillance photographs taken at the crime and was with other defendants a day following the robbery where they discussed the robbery and the defendant had money from the robbery? (Appellant's Assignment of Error No. One). 1

B. STATEMENT OF THE CASE..... 1

1. Procedure 1

2. Facts..... 2

C. ARGUMENT..... 13

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING LAY OPINION TESTIMONY REGARDING THE IDENTIFICATION OF DEFENDANT IN POOR QUALITY SURVEILLANCE PHOTOGRAPHS WHERE DEFENDANT'S IDENTITY WAS OBSCURED BY A HAT, THE WITNESSES KNEW THE DEFENDANT AT THE TIME THE PHOTOGRAPH WAS TAKEN AND DEFENDANT'S APPEARANCE HAD CHANGED SINCE THE TIME OF THE INCIDENT. 13

| | | |
|----|--|----|
| 2. | THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED THE CRIME OF ROBBERY IN THE FIRST DEGREE WHERE HE WAS IDENTIFIED IN SURVEILLANCE PHOTOGRAPHS OF THE SCENE, WAS SEEN WITHIN A DAY OF THE ROBBERY WITH WADS OF CASH, AND SPOKE WITH OTHERS ABOUT DETAILS OF THE ROBBERY. | 19 |
| D. | <u>CONCLUSION</u> | 23 |

Table of Authorities

Federal Cases

| | |
|---|----|
| <u>United States v. Allen</u> , 787 F.2d 933, 936 (4 th Cir. 1986), vacated on other grounds by 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987)..... | 17 |
| <u>United States v. Beck</u> , 418 F.3d 1008 (9 th Cir. 2004)..... | 17 |
| <u>United States v. Jackman</u> , 48 F.3d 1, 4-5 (1 st Cir. 1995)..... | 17 |
| <u>United States v. Pierce</u> , 136 F.3d 770, 774 (11 th Cir. 1998)..... | 17 |

State Cases

| | |
|---|------------|
| <u>In re Seago</u> , 82 Wn.2d 736, 513 P.2d 831 (1973) | 20 |
| <u>Nissen v. Obde</u> , 55 Wn.2d 527, 348 P.2d 421 (1960) | 20 |
| <u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 923, 1033, 767 P.2d 572 (1988) | 19 |
| <u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... | 20 |
| <u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987) | 20 |
| <u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)..... | 20 |
| <u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)..... | 19 |
| <u>State v. Guloy</u> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986)..... | 14 |
| <u>State v. Hardy</u> , 76 Wn.App. 188, 192, 884 P.2d 8 (1994), aff'd, 129 Wn.2d 211, 916 P.2d 384 (1996)..... | 14, 15, 16 |
| <u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)..... | 19 |
| <u>State v. Hopson</u> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) | 14 |
| <u>State v. Jamison</u> , 93 Wn.2d 794, 798, 613 P.2d 776 (1980)..... | 16, 17, 18 |

| | |
|---|----|
| <u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993) | 19 |
| <u>State v. Rempel</u> , 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) | 19 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) | 19 |
| <u>State v. Tharp</u> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981) | 18 |
| <u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981) | 19 |
| <u>State v. Weber</u> , 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)..... | 14 |

Statutes

| | |
|------------------------------|-------|
| RCW 9.41.010 | 1 |
| RCW 9A.56.190..... | 1, 21 |
| RCW 9A.56.200(1)(a)(ii)..... | 1 |
| RCW 9A.56.210..... | 21 |

Rules and Regulations

| | |
|------------------------------------|--------|
| ER 103 | 14 |
| ER 701 | 15, 17 |
| ER 702 | 15 |
| ER 704 | 15, 16 |
| Federal Rule of Evidence 701 | 15 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in permitting lay opinion testimony regarding the identity of the person in surveillance photographs where the lay witnesses knew defendant previous to trial, the photographs were of poor quality, the defendant's appearance was obscured by a hat, and defendant had changed his appearance since the time of the photo? (Appellant's Assignment of Error No. Two and Three).

2. Did the State prove beyond a reasonable doubt that the defendant was guilty of robbery in the first degree where defendant was identified from surveillance photographs taken at the crime and was with other defendants a day following the robbery where they discussed the robbery and the defendant had money from the robbery? (Appellant's Assignment of Error No. One).

B. STATEMENT OF THE CASE.

1. Procedure

On November 2, 2004, the State charged JAMES S. ANDERSON, hereinafter defendant, with the crime of robbery in the first degree, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(ii), while armed with a firearm contrary to RCW 9.41.010. CP 1-5.

On February 7, 2005, the matter came before the Honorable Bryan Chushcoff on defendant's motion to suppress evidence. The court considered argument from defendant to suppress all scene surveillance still photographs because, according to defendant, they did not depict him, and to suppress statements from Marlon Brewer identifying him in the photographs. RP 43. The court denied the motion, finding they were based on issues of relevance, not on issues pertaining to the legal obtaining of this information. RP 45, 46.

On March 30, 2005, the matter came before the court on defendant's motion to sever his case from codefendants. RP 92. The State agreed with the defendant's motion and the matter was severed. RP 93-94.

Defendant represented himself at trial with attorney John Burgess as stand-by counsel. RP 192-193.

Defendant was convicted as charged and received a standard range sentence of 140 months plus a 60 months firearm enhancement. RP 138-150.

This timely appeal follows. 123-134.

2. Facts

a. State's Case.

On April 8, 2004, Tacoma Police Officer Joshua White responded to the Safeway Store at 6201 6th Avenue, Tacoma, regarding an armed

robbery. 198, 200. Officers immediately set-up a perimeter, or box around the store, to see if they could catch any suspects; a canine unit was also deployed but lost the scent in the parking lot short of the street. RP 201, 297. Officer White immediately viewed a surveillance tape with a female clerk, who identified three to four African American male subjects on the tape as they walked into the store. RP 203. One of the leaders of the group was wearing a Gilligan's Island type fishing hat, gray coat and dark pants, and was labeled as suspect No. 1. RP 205-207, 210. Suspect No. 2 was wearing a white colored coat, dark pants and a green baseball cap. RP 207. Suspect No. 3 had a white baseball hat, blue hooded sweatshirt and blue pants. RP 207. The witnesses description of clothing matched what was on the surveillance tape. RP 207. The scene was processed for fingerprints, including the shopping cart and food items, but no prints were recovered. RP 416.

Safeway clerk Jerry Medacco was working the nightshift on April 8, 2004, at about 4:00 a.m. when the robbery occurred. RP 219, 240. He saw three young black males come into the store and grab a shopping cart. RP 221. Approximately 15-20 minutes after their arrival two of the suspects confronted him. RP 221. The suspect put a revolver to his back and said, "This is a robbery." RP 222, 227. It was hard to get a clear view of his face because he had it pointed downward. RP 223. One of the other suspects came in through the meat department and said, "Let's go up to the front." RP 222.

Medacco went to the front of the store where there was another suspect with nine millimeter gun shoved in his pants at the register and one by the door. RP 223-224, 227. Medacco overheard the guy at the register tell store manager Patty to open up the register and observed Patty's hand remove at least \$1,000 from the till. RP 224, 227-28. He then took her over by the safe located in a small office and said, "If you don't open the safe, we're going to take you with us." RP 224. As Patty went to the safe, Medacco stayed by the register where he observed the third suspect walk towards the door where the fourth suspect was standing lookout. RP 225. Neither Patty or Medacco knew the combination to the safe and the defendants were unable to retrieve money from the safe. RP 228.

The defendants ordered Patty and Medacco down one of the aisles and directed them to "Go to the back." RP 229. At first Patty didn't go down the aisle and Medacco heard her scream. RP 229. Patty came running down the aisle saying they hit her with something and she had an injury to her arm and wrist. RP 229.

Medacco and Patty waited approximately five minutes before they called the police. RP 230.

Medacco was able to describe suspect No. 1 as about six foot, 200 pounds, with a blue jacket and hat; suspect No. 2 as about five-ten and 160 pounds, with a big blue bulky jacket; and a white golfer's style hat;

suspect No. 3 was about five-eight and 130 pounds with a white jacket, blue pants and pig tails in his hair. RP 232.

Medacco was unable to identify defendant Anderson at trial or in a photo montage. RP 237, 241, 360.

Head night stocker Patty Delespine recalled working the morning of the robbery. RP 245-46, 248. Patty noticed three men in the store, grabbing a basket and acting like they were shopping. RP 248. She recalled the respective sizes of the suspects as a “stair-step” of short, medium, and tall. The shorter guy who held her was stockier, there was a thin one with braids and a tall one with the jacket. RP 251-52, 268.

Patty only recalled seeing three men that night. RP 270.

She became suspicious when they began to hover over the meat and watched them as they walked over to the door. RP 249. She saw a car running and feared that the men may try to run with the meat out to the car. RP 249, 251. Patty continued on with her work and noticed the three men disappear. RP 252. She searched for them and found them at the other end of the store. RP 252. One of the men asked if he could still buy liquor and she explained that they could not purchase liquor at the store. RP 252. She lost sight of them again for a moment and when he reappeared she asked if he was ready to check out. RP 253. He replied, “Yeah,” and walked over to the check stand where he pulled a gun on her and said he was robbing her. RP 253-54. The man demanded all of the money and she complied, placing approximately \$1,800 in a plastic bag.

RP 255, 256. He then demanded money out of the safe and said if she could not get the money he was going to take her hostage and throw her in the car. RP 255. Defendant then grabbed her arm, walked her to an aisle and told her to keep going down the aisle. RP 257. As she delayed walking away the man with braids hit her on the hand and arm with something hard that she believed to be a gun. RP 257. He hit her hand so hard that her hand swelled up and she was unable to bend it. RP 265.

Patty waited a few moments and then called police. RP 259. She later reviewed video surveillance tapes but at trial was certain she would be unable to identify the three men even if they were standing in front of her. RP 264.

Tacoma Police Detective Baker worked with the surveillance tapes in this case to digitize the videos. RP 310-314. He was then asked to select certain images from the video and print them. RP 313. He isolated all images of the people that were of interest to the police, but explained to the jury that when working with surveillance videos it is “garbage in garbage out,” and the quality of photos can vary depending on a variety of factors. RP 319, 322. Exhibits 26 through 44, depicting still images of the suspects were admitted at trial without any objection from defense. RP 323. During Detective Baker’s review of the tapes he observed only three suspects. RP 351. Exhibit 30 shows images of people at the cash register. RP 326. Ex. 31 shows three individuals and from the tape surveillance two of the men had come from the aisles and the third person

is joining them. RP 327. Ex. 32 is a full shot, from head to toe of all three individuals. RP 327. Ex. 38 shows an individual in a white hat walking down the frozen food aisle. RP 328. As the detective was reviewing the videotape he noted that this defendant appeared to be talking into some sort of device and Ex. 38 depicted this. RP 328. Ex. 39 shows one of the three individuals along with one of the employees standing to the right of that defendant. RP 329. No. 40 also shows one of the suspects with one of the employees. RP 329. No. 41 depicts the service counter with what appears to be a female employee and behind her is the person with the white cap and the antenna and device. RP 329. Ex. 42 is an isolated image that zeros in on one of the suspects face. RP 330. Ex. 43 depicts the same individual with a hat with some sort of logo on the hat. RP 332. Ex. 44 is a close up of one of the suspects with a two-tone hat with a logo on it. RP 332.

During the months of March thru May Tacoma Police Detective Reidburn was investigating a chain of robberies throughout Pierce County. RP 356-357. The robberies all involved a group of individuals entering businesses, spreading out to case the area, looking for customers and employees, and once they established who was there they would produce handguns and corral everyone up and conduct a robbery. RP 357. The case involved approximately 12 robberies with investigating agencies Lakewood, University Place, and Pierce County all involved. RP 357. Officers were finally able to recover a fingerprint from one of the

robberies and identified a particular individual from that print. RP 359. Once they were able to focus on a single identified suspect they were able to investigate his associates and defendant, Anderson's, name came up. RP 359.

Eventually a group of suspected individuals in the robberies was stopped in a traffic stop and arrested. RP 361. Anderson was not part of this arrest. RP 361. Police were able to recover a .380 at the time of the traffic stop of the individuals as well as a revolver that was used in other robberies. RP 530-31. Antoine Goolsby was identified as the provider and keeper of the weapons used in the robberies. RP 379.

Some of the individuals agreed to an interview and they gave the names of other people involved. RP 362. Two of these suspects, Robert aka Jimmy Hunt and Marlon Brewer came forward with information regarding the robberies. RP 364.

Detective Reidburn questioned Marlon Brewer and he was able to give specific details that the general public would not have about the robberies. RP 366. The detective showed him some video surveillance stills taken from the Safeway robbery and Brewer was able to identify several people on there, including "Murdock" aka James Anderson. RP 366-67. Brewer identified defendant as being only involved in the Safeway robbery and not the other spree of robberies. RP 367. After determining that the information Brewer had to offer was reliable, the

detectives made a deal with Brewer and had him commit his statement to a recorded statement. RP 369.

Mr. Brewer testified for the state. RP 424. During the month of April, 2004, Brewer was involved in a spree of robberies. RP 426. Also involved were Antoine Goolsby, Jimmy Hunt, his little brother Monteece, Terrance Tadford, Ardelle, Phillip Patrick, and Josh Sesuetta. RP 427. Brewer was arrested in May and charged with felony charges arising from the robberies. RP 427-28. During the robberies approximately eight guns were used, and at least two were revolvers. RP 428-29.

Brewer decided to cooperate with detectives because “there is no sense in running, you know . . . because there is pictures. Everything is on tape. Sooner or later somebody was going to break down.” RP 431. When he first met with detectives following his arrest there were no offers or promises extended to him in exchange for information. RP 432. Brewer admitted his own involvement in some of the robberies and pled guilty to two counts of robbery in the first degree and was awaiting sentencing at the time of trial. RP 432, 435. As part of his plea bargain he agreed to be truthful during testimony. RP 436. Brewer identified Anderson in court. RP 436-37. Brewer first met Anderson sometime following the Safeway robbery when Anderson was driving around with Goolsby. RP 438, 439. They stopped by the MJD Deli in Tacoma and when Goolsby saw Anderson he identified him as his cousin. RP 439.

Brewer was able to identify people involved in the Sixth Avenue robbery from still photographs. RP 458. Brewer identified Plaintiff's Ex. 27 as BG, standing to the right and either Jody or Dock standing to the left but he believed it was Jody. RP 459, 460. Brewer identified Plaintiff's Ex. 30, as depicting two individuals, the one in the white fisher hat as Dock aka James Anderson and the other one as BG. RP 460-61, 464. Upon further review, Brewer clarified that the person in the white fisher hat was not Anderson, but Jody, and he was sure based on their rings Jody wears. RP 466-67. He also clarified that Plaintiff's Ex. 27 showed a picture of BG and Dock aka Anderson. RP 464, 467.

Robert Hunt also cooperated with police and was a known associate of Anderson. RP 370, 371. The same procedure detectives used with Hunt was followed with Brewer and after determining that the credibility of his information Hunt was also offered a deal. RP 370. When shown the same still from the Safeway robbery Hunt was able to identify the suspect as James Anderson, aka Murdock. RP 371. Other suspects in the case, included Antoine Goolsby, Terrance Pree, Terrance Tadford, Jimmy Hunt, Marlon Brewer, Monteece Brewer, and "Mitch-Mitch." RP 371-72.

Mr. Hunt testified for the State and was able to identify Anderson in court. RP 485, 495. In April of 2004, Hunt was involved in a series of robberies in the Tacoma/Pierce County area. RP 487. Also involved were Dock aka James Anderson, Jody aka Antoine Goolsby, BG, aka Terrance

Pree, Marlon Brewer aka Mack, Monteece, Ruckus aka Josh, Angel, Mitch-Mitch, and Phillip Patrick aka PJ. RP 487-89. Hunt was arrested and charged for his involvement in the robberies. RP 489. The robberies all involved the use of guns, approximately 12 of them, mostly handguns but some revolvers. RP 490-91. Hunt first met with detectives in the fall of 2004, to clear matters up since he had been implicated in some robberies that he was not involved in. RP 492. At this time no offers were made to Hunt. RP 492. Ultimately Hunt agreed to plead guilty and as part of his plea agreement he promised to tell the truth and testify for the State. RP 494.

Hunt first met Anderson sometime in the beginning of April when he went over to Goolsby's house to have some work done on his car, approximately sometime on the first or second of April, but possibly later. RP 496, 515, 525. Hunt and Anderson talked about the fact that Hunt was making money too slow selling dope. RP 501. Goolsby suggested that Hunt come do robberies with them. RP 501. A few days later Hunt ran into Anderson at the car wash with Goolsby, Mitch-Mitch and BG, and again a several days later with the same men at Carmen's house. RP 502, 503. The amount of time elapsed between the first meeting of Anderson and the meeting at Carmen's house was one week. RP 525-26. When they were at Carmen's house, the other guys started asking Hunt if he had ever made \$1,000 in five minutes. RP 504. They then revealed information about the robberies. RP 504. Anderson and BG talked about

a robbery on Sixth Avenue that occurred the day before. RP 505, 506. Anderson, BG's and Goolsby were all holding a stack of money. RP 505. At Carmen's house there was an array of hats and sweats belonging to Goolsby and available for people to use in the robberies so they can change the description. RP 513. People would switch clothing from robbery to robbery. RP 514.

Hunt said he knew Anderson and BG were involved in the robbery at Highland Hill Safeway on Sixth Avenue because they showed him the money. RP 509. He also knew Mitch-Mitch was involved because he knows what he looks like. RP 509. Hunt identified BG and Dock aka Anderson as being in Plaintiff's Ex. 27, BG was with one with the hat with the "T" and Anderson was the other individual. RP 510. Hunt identified BG and Mitch-Mitch as being in Plaintiff's Ex. No. 30; Mitch-Mitch was in the white fishing hat and the person behind him is BG. RP 510, 511. Hunt also identified Anderson in Plaintiff's Ex. 43 and 44. RP 512. Hunt later identified Anderson in Defendant's Exhibit 5. RP 524.

Hunt recalled defendant's hair at the time of the offense as "low" or short, and a stubby beard and mustache. RP 498, 499. Hunt explained that defendant's appearance had changed since the time of the robbery and he no longer had his mustache and beard and he was now bald. RP 499. Hunt identified Plaintiff's Ex. 27, 47, and 48 as Dock aka James Anderson. RP 499, 500.

b. Defense Case

Ms. Martinez, defendant's girlfriend, testified that in the early morning hours of April 8, 2004, the defendant was asleep in bed with her in Lancaster, California. RP 533. She cooked dinner for him that evening and the next day they drove to LA to see her mother. RP 534. Ms. Martinez reported that she and the defendant had exchanged letters while he was in jail and he let her know that April 8th was an important date. RP 547. According to Ms. Martinez defendant Anderson was in Los Angeles County Jail from April 1st through April 6th. RP 550.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING LAY OPINION TESTIMONY REGARDING THE IDENTIFICATION OF DEFENDANT IN POOR QUALITY SURVEILLANCE PHOTOGRAPHS WHERE DEFENDANT'S IDENTITY WAS OBSCURED BY A HAT, THE WITNESSES KNEW THE DEFENDANT AT THE TIME THE PHOTOGRAPH WAS TAKEN AND DEFENDANT'S APPEARANCE HAD CHANGED SINCE THE TIME OF THE INCIDENT.

Defendant attempts to frame the issue before the court as one of trial irregularity. (See Opening Brief of Appellant at 11). But "trial irregularity" pertains to obvious errors that occurred at trial where the issue before the court is whether the trial court abused its discretion in the grant or denial of a mistrial (e.g. a witness blurting out defendant's

criminal history, an officer's passing remark on defendant's exercise of a right to remain silent or juror misconduct). See State v Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (holding trial court did not abuse its discretion in the denial of a mistrial where the trial irregularity was a witness's statement revealed he knew the defendant three years before he went to the penitentiary the last time). This is why one of the factors in determining whether a known trial irregularity deprived a defendant of a fair trial is whether a cautionary instruction could have cured the error. See State v Hopson, at 284, citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). Here, there was no trial irregularity to speak of, much less a motion for a mistrial, and the State will treat this issue as the simple evidentiary issue it presents.

Admission of evidence lies within the sound discretion of the trial court and will not be reserved absent a manifest abuse of discretion. State v. Hardy, 76 Wn. App. 188, 192, 884 P.2d 8 (1994), aff'd 129 Wn.2d 211, 916 P.2d 384 (1996), *citations omitted*. ER 103 requires all objections to be timely and specific. Failure to object at trial waives the issue on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Here, because defendant only objected to the admission of Brewer's opinion, and not Hunt's opinion, the defendant only preserved the issue of Brewer's testimony. RP 43.

ER 701 permits lay opinion testimony where the opinion or inferences 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 based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701 is identical to the Federal Rule of Evidence 701, and federal cases are illustrative. Hardy, 76 Wn. App. at 190. ER 704 further provides that testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

“A lay witness may 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.” Hardy, at 190-91, *citations omitted*. Admission of such testimony does not invade the province of the jury and the jury is still free to reach its own conclusion regarding the identity in the photograph. Id.

In the instant case the trial court properly exercised its discretion in admitting the testimony of Brewer and Hunt.¹ Both individuals had met defendant in person. RP 438, 439, 525, 504. Both individuals were

¹ The State still maintains the position that only Brewer's testimony is before the court, but will lay out the analysis for the admission of both witness's testimony in case this court determines the issue is preserved.

familiar with the other suspects involved and particular identifying marks, (e.g. rings on fingers). RP 466-67, 487-489. Hunt was familiar with the clothing used to disguise each of the robbers. RP 513-14. Both identified Anderson aka Dock in Plaintiff's Exhibit # 27. RP 464, 467, 510. This testimony was helpful to the jury because only someone familiar with the defendant and the other suspects would be able to evaluate these grainy, poor quality surveillance photos that depicted only a portion of defendant's face. Like the witness in Hardy the testimony aided the trier of fact, but the jury was still free to disregard this testimony considering the potential for bias of these codefendant witnesses.

Defendant relies on State v. Jamison for support that a witness may not identify a defendant in a surveillance photograph because it invades the province of the jury. See (Opening Brief of Appellant at 12, citing State v. Jamison, 93 Wn.2d 794, 798, 613 P.2d 776 (1980)). But Jamison predates Washington's adoption of the Rules of Evidence, including ER 704 which provides that testimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Hardy, 76 Wn. App. at 190, f.n. 1; ER 704. Also, the opinion of the court in Jamison limits it to the facts of the case before it:

In reaching this conclusion, however, we do not suggest that opinion testimony of identification based on knowledge of a defendant's appearance at or near the time of taking a surveillance photograph necessarily is inadmissible . . . Here there was no evidence that for example, the photographs failed to clearly or accurately depict the

robber, or that defendant's appearance had changed or had been altered prior to trial or that he had certain peculiarities not readily comparable under trial conditions.

93 Wn.2d at 799, *citations omitted*.

Federal law under ER 701 has followed a similar approach for determining when lay opinion testimony regarding photo identification is admissible. See United States v. Pierce, 136 F.3d 770, 774 (11th Cir. 1998) (listing a number of factors for admissibility including witness's general familiarity with defendant's appearance and familiarity at the time the photograph was taken, and whether defendant had disguised his appearance at the time of the offense, and whether the defendant had altered his appearance prior to trial); United States v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995) (upholding the admission of lay opinion identification where all the surveillance photographs of the robber are somewhat blurred and showed only a portion of the robber's face); United States v. Allen, 787 F.2d 933, 936 (4th Cir. 1986), vacated on other grounds by 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 132 (1987) (upholding admission of lay opinion testimony where surveillance photographs depicted individuals with hoods or hats over head and blurred profiles); United States v. Beck, 418 F.3d 1008 (9th Cir. 2004) (holding that a court should consider a variety of factors, including familiarity with defendant's appearance at the time the crime was committed, whether defendant has disguised his appearance during or since the offense, and whether the

witness knew the defendant over time and in a variety of circumstances, but that absence of a single factors does not render the testimony inadmissible).

This case presents the very facts the court contemplated in Jamison and federal courts have looked to in supporting the admission of this testimony. The photographs in this case were of poor quality, recovered from a grainy surveillance camera, and made into stills. RP 322, 330. The defendant had changed his appearance prior to trial, including shaving his mustache, beard, and head, and the witnesses knew the defendant at the time the photograph was taken. RP 438, 439, 499, 501. Defendant's appearance was also severely obscured by the positioning of a hat and the camera angle. Plaintiff's Ex. 27. Taken these factors together, the court did not abuse its discretion in admitting the testimony.

Even assuming any error, this error was harmless. See State v. Jamison, 93 Wn.2d at 799-800. Where the error is nonconstitutional, the error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Here the admission of Brewer's identification was cumulative of Hunt's identity testimony which came in without objection. There was also evidence that defendant was seen within days of the robbery with one of the leader's of the robberies – Goolsby, and that defendant was seen a day following the robbery with Goolsby and others, talking of the robbery and

displaying cash. RP 501, 503-506. Given this additional evidence any error in the admission of Brewer's testimony was harmless.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED THE CRIME OF ROBBERY IN THE FIRST DEGREE WHERE HE WAS IDENTIFIED IN SURVEILLANCE PHOTOGRAPHS OF THE SCENE, WAS SEEN WITHIN A DAY OF THE ROBBERY WITH WADS OF CASH, AND SPOKE WITH OTHERS ABOUT DETAILS OF THE ROBBERY.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990), *citations omitted*. Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 923, 1033, 767 P.2d 572 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this

evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said: great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of robbery in the first degree if the person commits the crime of robbery² and in the commission of a robbery or in immediate flight therefrom he displays what appears to be a firearm or other deadly weapon. RCW 9A.56.210.

Here, the State presented both direct and circumstantial evidence of defendant's commission of the robbery. Defendant was a known associate of a group of individuals involved in a string of robberies in the Spring of 2004. RP 359, 367, 426, 438, 496, 502-504. Defendant was sighted within days of the robbery with one of the main organizers – Goolsby. RP 501. As Hunt recalled, he saw Anderson sometime in the beginning of April at defendant Goolsby's house. RP 501. At that time Hunt talked with Anderson about the fact that he was not making enough money selling dope and Goolsby suggested Hunt come do robberies with them. RP 501. A few days later Hunt again saw Anderson at a car wash with other suspects in the robberies, including Antoine Goolsby, Mitch-Mitch, and BG. RP 502-503.

² Under RCW 9A.56.190 robbery is defined as when a person:

[U]nlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Defendant was also seen a day following the robbery talking about the robbery and flashing cash at Carmen's house with Goolsby, Mitch-Mitch and BG. RP 503, 506. At that time the other guys started asking Hunt if he had ever made \$1,000 in five minutes and they revealed their involvement in robberies. RP 504. Defendant Anderson and BG talked about the robbery on Sixth Avenue and Hunt saw a stack of money on Anderson, BG's, and Jody's possession. RP 505. At that time Hunt also saw displayed an array of hats and sweats that were available for people to use in the robberies. RP 513.

Finally, both Hunt and Brewer identified defendant Anderson as depicted in the surveillance photograph in Plaintiff's Ex. 27.

Defendant argues that the evidence is not overwhelming because the defendant had an alibi, his girlfriend. While it may be true that defendant was not released from LA County Jail until April 6, 2004, this was still two days before the robbery occurred. RP 550. Defendant asks this court to review the evidence in the light most favorable to him. Defendant also points to the inconsistent testimony at trial regarding photograph identification. However, both Brewer and Hunt identified Dock aka Anderson in Plaintiff's Ex. 27, and both witnesses identified him to detectives based on surveillance photographs. RP 366-67, 371, 464, 467, 510. Both also testified that BG was depicted in Plaintiff's Ex. 30. RP 460-61, 464, 510-11. The only inconsistency was whether Plaintiff's exhibit #30 also depicted Jody aka Goolsby or Mitch Mitch.

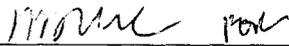
RP 466-67, RP 510-511. The jury was aware of this inconsistency, was available to see the witness's demeanor when testifying, and chose to believe the strength of the State's evidence, not defendant's.

D. CONCLUSION.

The trial court properly allowed opinion testimony that was helpful to the trier of fact regarding a key issue in the case – identity. This court should uphold the trial court's ruling and the jury's verdict of guilty for robbery in the first degree.

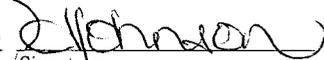
DATED: November 6, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/7/06 
Date Signature

FILED
COURT REPORTERS
06 NOV -8 PM 1:52
STATE OF WASHINGTON
BY 