

FILED
COURT OF APPEALS
DIVISION II

08 DEC -3 AM 11:19 NO. 37137-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO
BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DAVID SMASAL,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT SMASAL OF MALICIOUS DAMAGE TO RAILROAD PROPERTY.

- a. The State concedes it was required to prove Smasal "endangered the safety of any engine, motor, car, or train, or any person thereon."

In its response, the State spends two pages arguing two jury instructions -- specifically the "to convict" instruction for malicious damage to railroad property and the instruction defining railroad property -- were correct and sufficient. Brief of Respondent (BOR) at 6-7. Smasal, however, never asserted any error in the "to convict" instruction, and instead simply noted that under the "law of the case" doctrine the State had the burden to prove beyond a reasonable doubt that Smasal "endangered the safety of any engine, motor, car, or train, or any person thereon." Brief of Appellant (BOA) at 11-13. The State appears to concede this point by arguing for several pages that it met this burden at trial. BOR at 8-10. This Court should accept the State's concession.

- b. Whether Smasal personally damaged the signaling system is critical because that is how the State attempted to prove "endangerment" at trial.

The State maintains it was not required to prove damage to the signaling system because the jury instruction required only proof Smasal

"tamper[ed] with or obstruct[ed] a switch, rail, roadbed, structure, or appliance. . . ." BOR at 8, citing CP 43 (Jury Instruction 21). The State, however, had to prove Smasal "endangered the safety of any engine, motor, car, or train, or any person thereon,"¹ and the only means of "endangering" proposed by the State at trial was that Smasal endangered trains or persons by damaging the signaling system. If Smasal personally did nothing to damage the signaling system, then no one was endangered; ergo the crime was not committed. The State disregards this point.

The State also ignores the complete lack of accomplice liability instructions, or even any reference to "the defendant or an accomplice" in the instructions. The State talks briefly about former codefendant Bradley Johnson and implies a connection between Johnson and Smasal; however the word "accomplice" appears nowhere in the State's brief. Presumably, the State therefore acknowledges it had the burden to prove Smasal personally committed all the elements of the crime, not that anything Bradley Johnson did could be imputed to Smasal. Contrast State v. Teal, 152 Wn.2d 333, 335-36, 96 P.2d 974 (2004) (defendant could be convicted as an accomplice because jury instructions included definition of "accomplice liability").

¹ CP 43 (Jury Instruction 21).

The State cannot prevail here because it produced no evidence Smasal personally damaged the signaling system. Though the State's witnesses saw Bradley Johnson manipulating live wires, they never saw the person identified as Smasal manipulating anything but the dead overhead wires, which had been bypassed because of previous damage. 2RP 15-16; 3RP 13-16, 19-20; 4RP 86-90, 97, 102, 104.²

Again, the State studiously ignores this fact, although it does take time to assert that Smasal still "interfered with the rail" because Ford had to stop building his train, had to report the situation to his yardmaster, and then remain with his train at the Fife Rail Yard for the next two hours due to the police activity; the State thereby implies Smasal still somehow endangered someone or something even if he did not damage the signaling system. BOR at 8-9. Nonetheless, if Smasal did not damage the signaling system, it is hard to comprehend how Ford's having to stop to file a police report "endangered the safety of any engine, motor, car, or train, or any person thereon."

Similarly, the State asserts that because live wires "have the potential for electrocution," Smasal endangered the trains and/or the persons thereon.

² As noted in the Brief of Appellant, there was one live communications line at the top of the poles, a line which looked bigger than the other lines. 4RP 97, 104. But this single live line was undamaged during this incident and worked perfectly afterwards. 4RP 97.

BOR at 9. Again, however, because there is no proof Smasal cut or broke a live line, there is no proof he "endangered" anyone with electrocution.

Because the evidence established that Smasal personally only damaged an old, offline system, the State failed to prove Smasal "endangered the safety of any engine, motor, car, or train, or any person thereon." The evidence was therefore insufficient to convict Smasal of malicious damage to railroad property.

c. The State's incorrect definition of "endanger" cannot salvage its argument.

In his opening brief, Smasal noted that even if the State had proved damage to the signaling system, it failed to prove anyone was actually "endangered" because it neither showed: 1) the extraordinary fail-safes inherent in the system failed, nor 2) that anyone other than Ford was in the area or affected by the outage. BOA at 16-18. The State responds by citing the definition of "endanger" as to "create a dangerous situation," then argues that Smasal could have created a dangerous situation by interfering with the system. BOR at 9. The State references Webster's Third New International Dictionary, but does not cite the year of publication or page number, or a web page. Id.

Appellate counsel nonetheless located the State's definition, only to discover that the State had given the definition for "endanger" as an

intransitive verb -- a verb with no object. In contrast, the use of "endanger" in the jury instruction and statute is plainly that of a transitive verb: Smasal had to "endange[r] the safety of any engine, motor, car, or train, or any person thereon." CP 43; RCW 81.69.070.

The current Merriam-Webster's definition for "endanger" follows:

transitive verb : to bring into danger or peril <recklessly endangering innocent lives>

intransitive verb : to create a dangerous situation <driving to endanger>

<http://www.merriam-webster.com/dictionary/endanger> (Merriam-Webster's Online Dictionary). The State, by citing only the unused intransitive form, misleads the Court.

In fact, the jury instruction requires a defendant to endanger someone or something: specifically, "the safety of any engine, motor, car, or train, or any person" on the railroad. CP 43. Here, the State produced no proof that Smasal endangered any given person or object, only that he might arguably have done so, if someone happened to be in the area and was somehow endangered by the loss of the signaling system, despite the extensive safeties built into it. This is insufficient to find Smasal guilty.

did not prove Smasal attempted to steal something worth more than \$1500 or caused \$1500 in damage.

3. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO SUPPRESS JEFFREY FORD'S IDENTIFICATION.

- a. No strategic reason justified trial counsel's failure to attempt suppression.

The State claims trial counsel's failure to request a CrR 3.6 hearing regarding the identification procedure could have been strategic. BOR at 15-16. This is wrong because Jeffrey Ford's identification of Smasal was the only evidence tying him to the crime.

Had the show-up identification been suppressed for suggestiveness, the likelihood Ford would have been able to make an independent identification from the stand is doubtful. See United States v. Wade, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (when identification is improperly suggestive, burden will be on the State to prove in-court identification had independent origin); State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 110 (1980) (same). The case was over 18 months old, Ford saw the person at the railroad tracks for a only few minutes before the person turned and walked away, and, at best, Ford never saw the person from closer than 80-100 feet away. 3RP 10, 19-20, 22-24. The idea that Ford could make an independent identification at trial under such

circumstances is highly implausible. The failure of trial counsel to attempt to suppress the identification therefore makes no sense as a strategic decision.

b. Suppression was the most likely result.

The State also argues Ford's show-up identification would not have been suppressed. BOR at 16. The State's argument, however, discounts the suggestiveness of the identification and the impact of the Brathwaite³ factors, as reviewed below.

i. *The showup was impermissibly suggestive.*

A show-up identification is not per se impermissibly suggestive. See BOA at 33 (citing State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987)); but see State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986) (showups are "widely condemned"); United States v. Wade, 388 U.S. at 234 (Court said of show-up in handcuffs: "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police"). It is difficult, however, to imagine a showup more suggestive than the procedure followed here.

³ Manson v. Brathwaite, 432 U.S. 98, 107-114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Smasal was in handcuffs, standing or sitting by a police cruiser, clearly in police custody with two officers standing by him. 3RP 54-55, 58-59; 4RP 30-32. Ford had been "requested to identify" Smasal, or else told "to identify the guy that he saw running." 3RP 27; 4RP 7. Finally, the only description given to officers was that of "a white man in a tan jacket," and Smasal was the only person fitting that description at the scene of the showup. 3RP 52, 57; 4RP 28. The State does not respond to any of these issues.⁴ The only circumstance that could be more "suggestive" would be an actual statement by police to Ford that this was the person he had seen. Under these circumstances, the show-up was "suggestive."

ii. *The Brathwaite factors indicate Ford's identification was unreliable.*

Once an identification is shown to be "unnecessarily suggestive," the State agrees the Brathwaite factors should be reviewed to determine if the eyewitness's identification is reliable. See BOA at 57; BOR at 16-17. Those factors are:

- (1) the witness' opportunity to view the criminal at the time of the crime;

⁴ The State does argue in this section that Ford identified Smasal due to other factors and within a short period of time. BOR at 18. This argument, however, goes to "reliability," not "suggestiveness." As such, it is addressed in the "reliability" section.

- (2) the witness' degree of attention;
- (3) the accuracy of the witness' prior description of the criminal;
- (4) the level of certainty of the identification; and
- (5) the length of time between the crime and the confrontation.

Brathwaite, 432 U.S. at 114.

The State argues all five factors favor reliability. BOR at 18-19. The State, however, ignores a multitude of facts that do not support its argument, as pointed out individually below. In fact, only the last factor -- the timing of the identification -- favors reliability. The four others do not.

(1) The witness' opportunity to view the criminal at the time of the crime -- As noted in the opening brief, Ford was highly inconsistent about the distance from which he saw the person at the railyard. BOA at 37-38. Ford first testified the man was 80-100 feet away, then "no closer than 100 feet," then more than 200 feet away. 3RP 19, 24, 26. The State pointedly ignores these cites and asserts merely that Smasal was 80-100 feet away from Ford. BOR at 18.

The State also never responds to any of the comparative cases cited by Smasal. In State v. Rogers, for example, the witness had a lengthy conversation with his assailant before his glasses were knocked off, and

still spent 20-25 minutes in the same room with him afterwards. 44 Wn. App. at 512-13. And in State v. Shea, although the lighting was not ideal, the witness observed the suspects during the crime for about five minutes from about 15 feet away. 85 Wn. App. 56, 60-61, 930 P.2d 1232 (1997), overruled on different grounds, State v. Vickers, 107 Wn. App. 960, 967 n.10, 29 P.3d 752 (2001). The State does not respond to the citations to these and other cases,⁵ but by any reasonable comparison with other show-ups, Ford did not have a good opportunity to view the person at the railyard under the first Brathwaite factor.

(2) The witness' degree of attention -- Although Ford was alert and attentive at the time of the incident, he was dividing his attention between two suspects who were approximately 200 feet apart from each other. 3RP 26. The State correctly notes Ford watched the second suspect until he turned the corner, then "turned back to Johnson." BOR at 19. But the State never addresses the wide spacing of the suspects or how Ford could have watched both suspects at the same time. It is inconceivable that Ford would have simply stopped watching the trespasser very close to his

⁵ The State similarly never addresses the fact that the police car carrying Ford to the show-up never got closer than 75 to 100 feet from Smasal. 3RP 28, 56. The police officer standing next to Smasal did not even know Ford had arrived until he was told by radio to take Smasal into custody. 3RP 55-56.

train in order to exclusively watch the trespasser who was further away. Moreover, Ford had to take a moment to radio his dispatcher and inform him there was a second suspect on the property. 3RP 21-22. Therefore, Ford's attention must have been divided for some time, and he had little time to view the second suspect anyway.

(3) The accuracy of the witness' prior description of the criminal
-- The State claims "Ford's descriptions of defendant were consistent." BOR at 19. It is true that his descriptions remained consistent over time, but they were not "consistent" with Smasal's actual appearance, therefore this factor cannot favor reliability.

The State points only to the fact that Johnson had a slow gait, slouched shoulders, and unkempt hair. BOR at 19. The State overlooks the fact that Smasal's alleged slow gait and slouched shoulders are established nowhere in the record.

The State dismissively indicates Ford "did not get the age of defendant [sic] exactly correct," but this ignores the broad spread: Ford described the suspect as in his "late 20's to early 30's," while Smasal was 53 years old. 3RP 44; CP 82. The State also ignores the testimony that Ford was "very sure" the suspect was "at least six feet tall," because Ford

himself was six feet tall; Smasal was actually only 5'10." 3RP 44; CP 82. Ford's description was therefore significantly inaccurate.

(4) The level of certainty of the identification -- The State overlooks the fact that in the courthouse while waiting to testify, Ford misidentified someone else in the hallway as the second suspect. 3RP 45-49. Ford's alleged certainty about the identification is belied by his complete misidentification of another person on the very day of trial. In such a circumstance, this factor cannot favor reliability.

Four out of the five Brathwaite factors therefore indicate the showup identification was unreliable. The suggestive identification therefore would have been suppressed, and counsel's failure to move for suppression prejudiced Smasal.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse and dismiss Smasal's convictions because the State failed to prove any of the charges beyond a reasonable doubt. In the alternative,

this Court should reverse Smasal's convictions because of ineffective assistance of counsel and remand for a new trial.

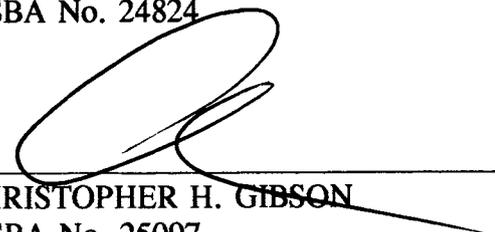
DATED this 2nd day of December, 2008.

Respectfully Submitted,

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

STATE OF WASHINGTON)

Respondent,)

vs.)

DAVID SMASAL,)

Appellant.)

COA NO. 37137-5-11

STATE OF WASHINGTON
BY
DEPUTY

COFFED-3 11/11/09

COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF DECEMBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF DECEMBER 2008.

x Patrick Mayovsky