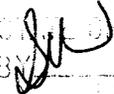


APPELLATE DEPARTMENT  
COURT OF APPEALS  
BY  DEPUTY

NO. 38821-9-II  
Cowlitz Co. Cause NO. 08-1-01174-7

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

**STATE OF WASHINGTON,**

Respondent,

v.

**JESSE RYAN MCMILLAN,**

Appellant.

**BRIEF OF RESPONDENT**

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## **I. PROCEDURAL HISTORY**

The appellant was charged by information with robbery in the first degree and trafficking in stolen property in the first degree. The appellant proceeded to jury trial on January 14, 2009 before the Honorable Judge James Stonier. On January 16, 2009, the jury returned verdicts of guilty on both counts. The appellant was subsequently sentenced to concurrent high-end sentences of seventy-five months for the robbery and twenty months for the trafficking charge. The instant appeal timely followed.

## **II. STATEMENT OF THE CASE**

### **a. CrR 3.5 Hearing**

Prior to trial, a hearing was held pursuant to CrR 3.5 to determine the admissibility of certain statements made by the appellant. At the hearing, Officer Brian Clark of the Kelso Police Department testified that he had stopped a car driven by the appellant on October 16, 2008, for failure to yield. 2RP 56-57. When Officer Clark asked the appellant for his driver's license, the appellant stated he did not have it with him but verbally identified himself as David W. Sari with a date of birth of October 13<sup>th</sup>, 1987. 2RP 57. Officer Clark attempted to find a record under that name and date of birth, but found no record for this information. Officer Clark then pulled up a photo of David Sari using his mobile computer system, and immediately saw that the appellant was not Mr.

Sari. At that point, Officer Clark returned to the appellant's vehicle and arrested him for providing a false name. 2RP 57. The appellant's probation officer from the Department of Corrections then arrived at the scene and found drugs in the trunk of the vehicle the appellant had been driving. 2RP 61.

Subsequently, the appellant was taken to the police station. 2RP 58. Detective Damon Blain, who was investigating this case, was on duty and learned that the appellant had been detained by Officer Clark. 2RP 63. Det. Blain attempted to interview the appellant at the Kelso police station. Det. Blain read the appellant his Miranda warnings and had a brief conversation with him. 2RP 64. During the conversation, Det. Blain informed the appellant that he was investigating a robbery at the Kelso Safeway from 2007. Det. Blain also presented the appellant with a copy of a crime lab DNA report indicating the appellant's DNA had been found on an item of clothing worn by the robber. 2RP 66. This interview ended when the appellant requested an attorney. Id.

After Det. Blain's meeting with the appellant, Officer Clark drove him across the Cowlitz River to the jail. During this trip, the appellant asked Officer Clark if he had ever thought the appellant was actually David Sari. Officer Clark replied that he had thought this until he viewed a photograph of Mr. Sari. The appellant then stated that the reason he gave

the false name was because “he had been looking at a lot of time.” 2RP 59-60.

The appellant then testified for the purposes of the CrR 3.5 hearing, and admitted that he gave a false name to Officer Clark on October 16<sup>th</sup>. 2RP 71. The appellant testified that he knew his probation officer had found drugs in the car’s trunk and that he was out on bail on two other pending felony drug charges at the time. 2RP 72. The appellant claimed that he made the “looking at a long time” statement because he believed that the discovery of the new drugs would result in more time for the pending cases. 2RP 73, 2RP 76-77.

After hearing this testimony and the arguments of the parties, the trial court ruled that the appellant’s statements were admissible. The trial court found that the appellant’s giving of a false name because he was “looking at a lot of time” was probative on the issue of guilt, and was not unfairly prejudicial. 2RP 81-84. The trial court recognized that the appellant had an alternate explanation for this statement, but noted that this was an issue of fact for the jury. 2RP 82.

#### **b. Trial Testimony**

Around 6:00 p.m. on January 29, 2007, Shelly Crimmins had finished shopping for groceries at the Safeway in Kelso, Washington. Ms. Crimmins had loaded her groceries into her Mercedes Sport Utility

Vehicle, and left the door to the vehicle open as she returned her shopping cart. As Ms. Crimmins was walking the short distance to return her cart, she noticed a young white man wearing a jacket with a fur fringed hood walking towards her car. Ms. Crimmins turned around in time to see the man reach into her SUV and take her purse from the front seat. 2RP 88-95. Ms. Crimmins yelled at the man to stop, but he instead began to run away. Ms. Crimmins gave chase and was able to catch up to the man briefly and grab the hood of his coat, causing the hood to come loose and fall to the ground. 2RP 97.

Ms. Crimmins chased the thief around the parking lot, and the man eventually entered an older white car and began to back out of the space where he was parked. The driver's side window was open, and Ms. Crimmins reached into the car to stop the man and retrieve her purse. The man then accelerated rapidly, and Ms. Crimmins was forced to cling to the car to avoid falling. The man then rammed Ms. Crimmins into the side of nearby van, effectively scraping her off the side of the car. 2RP 99-103. Ms. Crimmins suffered substantial bruising, and was also treated at a local hospital for acute cervical strain. 2RP 107, 4RP 262.

Shortly after the robbery, Ms. Crimmins took stock of the property that had been inside her stolen purse. Ms. Crimmins attempted to call one of her two cell phones that had been inside the purse when it was taken,

and succeeded in making contact with a man later identified as Adam Pastorino. Ms. Crimmins contacted the Kelso Police Department (KPD) and a sting operation was conducted to recover her phone. A police officer impersonated Ms. Crimmins and a meeting was arranged with Mr. Pastorino. 2RP 110, 136. At the meeting, Mr. Pastorino attempted to sell the stolen phone back to Ms. Crimmins, and was then arrested. 3RP 158. Ms. Crimmins viewed Mr. Pastorino at the scene and stated he was not the robber as he was too short and stocky. 2RP 111.

Mr. Pastorino testified that he had received the phone from a man named James Repperger. 2RP 135. Mr. Repperger in turn testified that on January 29, 2007, the date of the robbery, the appellant came to his home in Kelso between 7:00 and 7:30 p.m. 2RP 130. Mr. Repperger stated the appellant brought two cell phones and offered to sell them to him. Mr. Repperger bought one of the phones for twenty dollars, and then passed that phone on to Mr. Pastorino. 2RP 128-129.

KPD Detective Damon Blain became aware that the appellant was the suspect in the robbery of Ms. Crimmins. Det. Blain was also aware that Ms. Crimmins had described the car driven by the robber as a sporty white import, similar to a Toyota Celica or Honda Prelude. 2RP 100, 122, 128. Det. Blain went to the appellant's residence and photographed the appellant's car, a white two-door Plymouth Colt. 3RP 173-175. At the

time Det. Blain photographed the car after the robbery, the rear window was broken out. 3RP 193. However, KPD Officer Sarah Hoffman had stopped the Colt on January 10, 2007, when the appellant was driving the car with expired license tabs. 3RP 215. On that date, the rear window was intact. 3RP 216.

The hood from the robber's jacket was recovered at the scene by KPD and was submitted to the Washington State Patrol crime laboratory for DNA analysis. 3RP 176. Laboratory analysis of the hood found that there was a mixed DNA profile present on the hood, consistent with originating from two different people. 3RP 235. The mixed profile was comprised of a major contributor, individual A, and a minor contributor, individual B. A contributor is "major" if he constitutes at least 67% of the profile. 3RP 236-237. However, it is possible that a major contributor may constitute more than 67% of the profile. 3RP at 237. The minor profile was a trace amount of DNA, which could not be used to identify the minor contributor. 3RP 238.

On September 17, 2008, the crime laboratory was notified that a match had been found for individual A, the major contributor to the profile from the robber's hood. Individual A was found to match the appellant's unique DNA profile. 3RP 239-240. Further analysis found the odds of

picking a random individual from the United State's population with the same profile were 1 in 46 trillion. 3RP 248.

On October 15, 2008, Det. Blain received the report from the crime lab indicating that the appellant's DNA had been found on the robber's hood. 3RP 177. The next day, KPD Officer Brian Clark stopped a car driven by the appellant for failure to yield. 3RP 220. When Officer Clark asked the appellant for his driver's license, the appellant stated he did not have it with him and verbally identified himself as one David W. Sari with a date of birth of October 13<sup>th</sup>, 1987. 3RP 221. Officer Clark attempted to find a record under that name and date of birth, but was unable to do so. Officer Clark then pulled up a photo of David Sari using his mobile computer system, and immediately saw that the appellant was not Mr. Sari. 3RP 222-223. At that point, Officer Clark returned to the appellant's vehicle and arrested him for providing a false name. Id.

Det. Blain was on duty at this time, and learned that Officer Clark had the appellant in custody. Det. Blain requested the appellant be brought to KPD for questioning regarding the robbery of Ms. Crimmins. At the station, Det. Blain met with the appellant. Det. Blain told the appellant he was investigating a robbery that occurred at the Kelso Safeway. 3RP 178. Det. Blain further mentioned to the appellant that he had the results of a

DNA test with him. Id. At the end of the interview, Det. Blain informed the appellant he was going to be booked into jail for robbery. 3RP 179.

After Det. Blain confronted the appellant, he requested Officer Clark transport the appellant to jail. Officer Clark drove the appellant from KPD to the jail. During this drive, the appellant asked Officer Clark if he had believed that the appellant was actually David Sari. Officer Clark responded that he had believed the appellant until he viewed a photo of Mr. Sari. The appellant then said that he had to give a false name because “he was looking at a lot of time.” 3RP 224-225.

The appellant testified at trial, and denied robbing Ms. Crimmins. 4RP 276. The appellant stated that two years ago, in 2007, he had owned a coat that had a “very similar” hood to that worn by the robber. 4RP 269. The appellant testified that he did not believe he was wearing this coat on the date of the robbery. The appellant further testified that Mr. Repperger had been to his house on a few occasions, and that he “imagined” that the coat was present when Mr. Repperger visited. 4RP 270.

On cross-examination, the appellant admitted that he owned the Plymouth Colt in January of 2007. The appellant also admitted that he gave a false name when stopped by Officer Clark. 4RP 272. The appellant further admitted that he told Officer Clark that he had lied about his name

because he was facing a long time, and that he had made this statement after Det. Blain told him he was going to be booked for robbery. 4RP 273.

### **III. ISSUE PRESENTED**

1. Did the Trial Court Err by Admitting Evidence of the Appellant's Guilty Conscience?

### **IV. SHORT ANSWER**

1. No.

### **V. ARGUMENT**

#### **I. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of the Appellant's Guilty Conscience.**

The appellant argues the trial court abused its discretion by admitting evidence he gave a false name to Officer Clark because he was "looking at a long time." The appellant relies heavily upon State v. Freeburg, 105 Wn.App. 492, 20 P.3d 984 (2001). However, Freeburg is distinguishable and the appellant's arguments are unavailing.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Evidence of a defendant's guilty conscience or attempts to evade arrest and prosecution may be admissible under ER 404(b) if they allow a "reasonable inference of consciousness of guilt of the charged crime." Freeburg, 105 Wn.App. at 497-498, State v. Bruton, 66 Wn.2d 111, 401 P.2d 340 (1965). Such evidence includes the use of an alias or false name by the defendant when contacted by the police. State v. Allen, 57 Wn.App. 134, 143-144, 787 P.2d 566 (1990); State v. Chase, 59 Wn.App. 501, 507-508, 799 P.2d 272 (1990).

In Freeburg, the defendant was charged with fatally shooting a man in 1994. After the killing, the defendant fled to Mexico and later traveled to Canada. Three years later, the defendant was arrested in Canada and was found in possession of false identity papers and a loaded pistol. 105 Wn.App. at 496. The court found admission of the pistol was error and was prejudicial, as there was nothing to connect the gun found at the time of arrest to the murder three years prior. Id. at 500. The court found this evidence was especially improper; as without any specific connection to the crime charged, testimony the defendant carried firearms could easily be regarded as proof he was a dangerous or bad man. Id. at fn. 21.

Here, the evidence at issue was the appellant's use of a false name and his statement he was "looking at a long time." This evidence does not

carry with it the same concerns as possession of a loaded pistol did in Freeburg.<sup>1</sup> There is no reason to fear a jury would conclude from this evidence that the appellant was a generally dangerous or vicious man.

Also, unlike Freeburg, there was a connection between the giving of the false name and the robbery charge. The appellant told Officer Clark, after the interview with Det. Blain where he was confronted with the robbery investigation and the DNA results, that he gave the false name because he was “looking at a long time.” This was also after Det. Blain had informed the appellant he was going to be booked for robbery. 3RP 179. Thus, there was a clear logical and temporal connection between the statements and the crime.

At its core, the appellant’s argument is that the trial court erred by admitting this evidence because the appellant had an alternate explanation for the conduct that did not involve the robbery. Unsurprisingly, the appellant offers no authority to support his theory that evidence is inadmissible if the defense offers another, non-incriminating, explanation for it. Quite to the contrary, the courts have repeatedly rejected such arguments.

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<sup>1</sup> The prejudice in Freeburg was doubtlessly enhanced because the defendant there was charging with shooting a man. Thus, the fact he later was found in possession of another gun immediately gives rise to propensity concerns. These concerns do not exist in the instant case, as the evidence admitted was not of the same character as the crime charged.

In State v. Burkins, 94 Wn.App. 677, 973 P.2d 15 (1999), the trial court admitted into evidence a rope found at the scene of the crime. The State's theory was that the defendant had bound the victim with the rope, while the defendant had denied doing so. The forensic evidence was, at best, inconclusive as to whether the rope had been used to bind the victim. 94 Wn.App. at 693. Nonetheless, the court upheld admission of the rope, noting that under ER 401 evidence "need only have a tendency to make the existence of a fact that is of consequence to the determination of the action more probable." Id.

Similarly, in State v. Quigg, 72 Wn.App. 828, 866 P.2d 665 (1994), the trial court admitted into evidence, a story the defendant had written describing various acts of sexual intercourse with a child. This story bore a marked similarity to the crimes the victim testified to. The defendant objected, and claimed that the story had nothing to do with the case but was in fact written many years prior. 72 Wn.Ap. at 838. The court rejected this argument, noting that this claim by the defendant did not render the evidence irrelevant. Id. at 838-839.

Finally, in State v. Hebert, 33 Wn.App. 512, 656 P.2d 1106 (1982), the trial court admitted into evidence the fact the defendant resisted arrest and fled the police. The defendant claimed that he fled because he was a parolee in possession of marijuana, not because he had committed the

burglary he was charged with. On appeal, the defendant claimed the admission of the fact he fled and resisted arrest unfairly required him to either introduce before the jury the fact he was on parole or not offer any explanation at all for his conduct. 33 Wn.App. at 515. The court again rejected such a claim, holding that the defendant's flight was admissible as it could "reasonably be considered probative of his consciousness of guilt." Id.

When these cases are considered, it becomes apparent that evidence of consciousness of guilt, such as the appellant's statements in this case, are not inadmissible simply because the appellant has an alternative explanation for them. While it is true the appellant's version that he gave a false name due to his other pending drug cases was a difficult explanation to give to a jury, this version was no more problematic than the choice facing the defendant in Hebert.<sup>2</sup>

Instead, the trial court properly admitted the evidence because the circumstances gave rise to a strong and reasonable inference that the "looking at a long time comment" related to the robbery case the appellant had just been confronted with. As noted by the trial court, whether this statement actually referred to the robbery was a question of fact for the jury to decide. 2RP 83. It is not the role of the trial court to weight two

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<sup>2</sup> In fact, the appellant chose not testify to this explanation during the actual trial.

explanations or inferences and pick the one it believes or finds the most compelling. This decision is entrusted to the jury as the finder of fact. Given the record and the applicable law, it cannot be said that the trial court abused its discretion or based the admission of the evidence on manifestly unreasonable grounds.

Finally, even if this Court should find the trial court erred by admitting the statements, such error was harmless in light of the other evidence against the appellant. When the trial court commits an evidentiary error, such an error only justifies reversal if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is without prejudice, or harmless, where the evidence is of minor significance compared with the overwhelming evidence as a whole. State v. Yates, 161 Wn.2d 714, 766, 168 P.3d 359 (2007).

Here, there was ample evidence in addition to the statements the appellant complains about. The appellant's DNA was found on the hood worn by the robber, the appellant's car matched the general description given by the victim, the appellant matched the general description given by the victim, and a witness, James Repperger, testified the appellant sold him the cell-phone shortly after the robbery. Finally, the appellant's testimony was implausible and failed to explain how a third party had obtained his clothing, or why Mr. Repperger was accusing him of selling

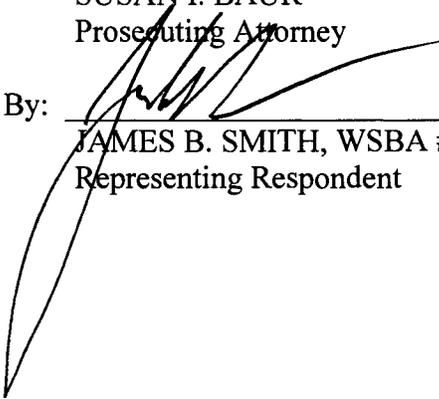
the cell-phone. Given the overwhelming evidence arrayed against the appellant, any error cannot be said to have prejudiced him significantly.

## VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to affirm the trial court's admission of evidence that showed the appellant's consciousness of guilt. The trial court properly exercised its discretion, and the appellant has produced no authority that would indicate the trial court erred. As such, the appellant's convictions should stand.

Respectfully submitted this 25<sup>th</sup> day of September 2009.

SUSAN I. BAUR  
Prosecuting Attorney

By: 

JAMES B. SMITH, WSBA #35537  
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	NO. 38821-9-II
	)	Cowlitz County No.
Respondent,	)	08-1-01174-7
	)	
vs.	)	CERTIFICATE OF
	)	MAILING
JESSE RYAN MCMILLAN,	)	
	)	
Appellant.	)	
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COPIES OF PROCEEDINGS  
STATE OF WASHINGTON  
BY: [unclear]  
[unclear]

I, Michelle Sasser, certify and declare:

That on the 25<sup>th</sup> day of September, 2009, I deposited in the mails,

of the United States Postal Service, first class mail, a properly stamped  
and address envelope, containing Brief of Respondent addressed to the  
following parties:

Court of Appeals  
950 Broadway, Suite 300  
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Catherine E. Glinski  
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I certify under penalty of perjury pursuant to the laws of the State  
of Washington that the foregoing is true and correct.

Dated this 25<sup>th</sup> day of September, 2009

  
MICHELLE SASSER