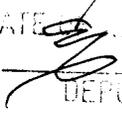


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DIVISION II

No. 41287-0-II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH ANDREW SORTLAND,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-01145-7
The Honorable Katherine Stolz, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Kenneth Sortland's motion to dismiss after a State's witness disobeyed the court's order that no witness should identify Kenneth Sortland as the man in a photograph taken at the time the charged crimes likely occurred.
2. The State failed to present sufficient evidence to prove the essential element of identity.
3. The State failed to present sufficient evidence to prove that Kenneth Sortland personally committed the crimes charged.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the only piece of evidence that potentially linked Kenneth Sortland to the charged crimes was a photograph taken by a witness to the incident, and where the trial court specifically ordered that none of the State's witnesses should testify that Kenneth Sortland is the man in the photograph, did the trial court err when it denied Kenneth Sortland's motion to dismiss after a State's witness disobeyed the court's order and testified that Kenneth Sortland is the man in the photograph? (Assignment of Error 1)

2. Where the only eyewitness to the incident did not identify Kenneth Sortland as the man he saw loading a red truck outside the victim's house, and where no physical evidence tied Kenneth Sortland to the house, to the items taken from the house or to the red truck, did the State fail to present sufficient evidence to prove the essential element of identity? (Assignment of Error 2)
3. Where none of the State's witnesses saw the man with the red truck actually break the basement door of the house or go inside the house, and where none of the State's witnesses testified that the items in the red truck matched the items taken from inside the house, did the State fail to present evidence to prove that Kenneth Sortland personally committed the charged crimes? (Assignment of Error 3)

III. STATEMENT OF THE CASE

Susan Woodstock owned a home located at 714 North Warner in Tacoma, Washington. (TRP 33)¹ She rented the home to a man and his sons for nearly 10 years, but after learning that

¹ The transcript volumes containing the trial proceedings on July 12 thru 21, 2010, will be referred to as "TRP." The transcript containing the sentencing hearing on October 8, 2010 will be referred to as "SRP." The transcript of the pretrial hearing on June 29, 2010 is not referred to in this brief.

the tenants were not taking adequate care of the house, she evicted them in June of 2008. (TRP 33-34, 35) The tenants had caused a significant amount of damage to the house, so Woodstock hired contractors and painters to do extensive repair work throughout the house. (TRP 34, 61-62)

By June of 2009, the home was ready to rent, so Woodstock put a "for rent" sign in the front yard, and placed an advertisement on an online classifieds website. (TRP 36, 61) Woodstock showed the house to approximately 10 people. (TRP 60-61) Each time, she toured the entire home and nothing was missing, damaged or out-of-place. (TRP 38-39, 41)

Between five and six o'clock in the morning of June 15, 2009, Woodstock's neighbor, Dan McCormack, heard noises in the alley behind their houses. (TRP 68-69) McCormack has a view of Woodstock's backyard from his own bathroom window, so he looked out that window to see what was causing the noise. (TRP 69, 71) McCormack saw a red truck parked next to Woodstock's house, and inside the truck he saw a shop-vac vacuum and several doors. (TRP 73) He noticed a thin, Caucasian, 40 to 50 year-old man with short red hair putting items into the truck. (TRP 73, 74)

McCormack is a professional photographer, and because he

thought it was strange that an unfamiliar man would be loading a truck that early in the morning, he used one of his cameras to take pictures. (TRP 74, 75; Exh. 14, 20, 23) But he did not contact the police or Woodstock until later that day, when he walked past the house and noticed that the basement door appeared to have been broken. (TRP 78, 79)

After receiving McCormack's call, Woodstock went to the house. (TRP 39) She discovered that the back door had been kicked in, and the door frame and surrounding molding had been damaged. (TRP 40) All the tools that she stored in the basement, including her shop-vac, were missing. (TRP 42, 49) And the doors to the master bedroom and bathroom, which were vintage solid wood doors with crystal handles and brass fittings, were also missing. (TRP 42, 43) Woodstock did not recognize the man in McCormack's photographs, and had not given the man permission to enter her home and take the missing items. (TRP 57-58)

Tacoma Police officer Damion Birge responded to McCormack's 911 call. (TRP 98, 99) McCormack described the suspect to Birge, and gave Birge copies of the pictures he had taken. (TRP 100, 103) Both the Pierce County Sheriff's Department and Crime Stoppers created and circulated a bulletin

about the incident, which included the picture of the suspect taken by McCormack. (TRP 118, 120-21, 122; Exh. 19A) But there was no immediate response to the bulletin. (TRP 121) A crime scene technician also processed Woodstock's home for fingerprints, but was unable to lift any usable prints. (TRP 135, 136)

While on duty on March 13, 2010, Sheriff's Deputy Jerome Duray saw a photograph of Kenneth Andrew Sortland. (TRP143) He thought that Sortland looked similar to a man he had seen in a recent Crime Stoppers bulletin. (TRP 144) He located the bulletin, which had been created following the break-in at Woodstock's house, and noticed several similarities between Sortland and the man pictured in the bulletin. (TRP 144) Duray showed the two photographs to another Deputy, who also believed that Sortland bore a strong resemblance to the man pictured in the bulletin. (TRP 111, 113)

The State subsequently charged Sortland with one count of residential burglary (RCW 9A.52.025), one count of second degree malicious mischief (RCW 9A.48.080), and one count of first degree theft (RCW 9A.56.020, .030), all in connection with the Woodstock break-in. (CP 5-6)

At trial, Sortland called several witnesses who all testified

that he worked at a job doing construction and carpentry from six o'clock in the morning until four or five o'clock in the evening Monday thru Friday, throughout the month of June. (TRP 155, 156, 157, 162-63, 164, 172, 173) Sortland also did not drive, and none of these witnesses ever saw Sortland in a red truck. (TRP 156, 165) Sortland also had long hair that summer, and did not cut it short until July. (TRP 155, 173, 174)

A jury found Sortland guilty of residential burglary and malicious mischief, and of the lesser included offense of second degree theft. (CP 72-76; TRP 240) The trial court sentenced Sortland within his standard range to a term of confinement totaling 84 months. (SRP 13; CP 105, 108) This appeal timely follows. (CP 115)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ERRED WHEN IT DENIED SORTLAND'S MOTION TO DISMISS, BECAUSE A DETECTIVE'S TESTIMONY THAT SORTLAND WAS THE MAN IN MCCORMACK'S PHOTOGRAPH WAS IN DIRECT VIOLATION OF THE COURT'S PRETRIAL ORDER AND WAS HIGHLY PREJUDICIAL.

Before trial, Sortland moved to exclude any witnesses from specifically testifying that Sortland and the man in McCormack's photograph are the same person. (TRP 8-9) The State agreed, and the court ordered that the witnesses testimony would be

limited; the witnesses could not testify that the photographs “matched” or were of the same person, but the witnesses could say that they observed a resemblance or similar characteristics. (TRP 10-11)

However, when Tacoma Police Detective Al Calitis was asked by the prosecutor if he noticed any similarities or whether “anything stood out” when he compared Sortland’s picture to McCormack’s photograph, he testified: “To me, it looked like it was the same person.” (TRP 123) Defense counsel objected and requested that the answer be stricken. (TRP 123) The court sustained the objection, but did not admonish the jury to disregard Detective Calitis’ answer. (TRP 123)

Sortland subsequently moved for a mistrial, arguing that the detective had been warned not to testify in that manner, but did so anyway, and that it was prejudicial and warranted a new trial. (TRP 147-48, 149) The court denied the motion, finding that it was not prejudicial enough to warrant a new trial, and stating that “[t]he Court sustained the objection, and the jury was instructed to disregard the answer. I think that probably, in and of itself, is sufficient.” (TRP 149)

A mistrial should be declared when an improper remark or

question, viewed against the backdrop of all the evidence, is so prejudicial to the jury that a defendant is denied the right to a fair trial. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In looking at a trial irregularity to determine whether it may have prejudiced the jury, a court should consider several factors: (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. Escalona, 49 Wn. App. at 254. In this case, an analysis of the three factors shows that Detective Calitis' testimony was prejudicial and not harmless.

First, the seriousness of the irregularity is immense. A witness may not offer opinion testimony by a direct statement or by inference regarding the defendant's guilt. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); ER 704. Opinion on the guilt of the defendant may be reversible error because it violates the defendant's "constitutional right to a jury trial, which includes the independent determination of the facts by the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

A lay witness may give opinion testimony as to the identity of a person in a photograph as long as “there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.” State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994) (citations omitted). Opinion testimony identifying individuals in a surveillance photo runs “the risk of invading the province of the jury and unfairly prejudicing [the defendant].” U.S. v. La Pierre, 998 F.2d 1460, 1465 (9th Cir.1993) (finding that officer's identification testimony was not helpful to the jury because the officer had never seen the defendant in person).

Such opinion testimony may be appropriate, however, when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. See La Pierre, 998 F.2d at 1465.

For example, in the two consolidated cases at issue in Hardy, officers testified to the identities of the defendants shown in videos of drug transactions. 76 Wn. App. at 190-92. In one case, the officer testified he had known the defendant for several years. 76 Wn. App. at 191. In the other case, the officer testified that he had known the defendant for six or seven years. 76 Wn. App. at

192. The Appellate court affirmed the trial court's finding that the officers were more likely to correctly identify the defendants than were the juries. 76 Wn. App. at 192.

In the consolidated case of State v. George, the State charged Lionel George and Brian Wahsise with the theft of a flat-screen television from a Days Inn. 150 Wn. App. 110, 206 P.3d 697 (2009). Employees of the Inn reported seeing multiple suspects leave the scene in a red van. A similar van was later spotted and stopped by police. 150 Wn. App. at 112-13.

Detective Jeff Rackley testified at trial that he observed George as he exited the van and ran away and at the hospital later that evening. George, 150 Wn. App. at 115, 119. Rackley testified that he also observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. 150 Wn. App. at 115, 119. The State introduced a poor-quality surveillance video taken at the Days Inn during the incident, and Rackley identified two of the men in the video as George and Wahsise. 150 Wn. App. at 115.

On appeal, George and Wahsise challenged the trial court's decision to allow Rackley's identification testimony. George, 150 Wn. App. at 117. This Court agreed with the appellants, finding

that:

These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

150 Wn. App. at 117. In the current case, there was absolutely no evidence that Detective Calitis had any contact whatsoever with Sortland. Therefore, it was completely improper for Calitis to give his opinion identifying Sortland as the man in McCormack's photograph.

After determining that Rackley's identification testimony was improper, the George court then addressed whether the error was prejudicial. The court found that, as to appellant George, it was not:

[The victim] identified George as the gunman in the robbery. George was driving the red van with the stolen television set. He initially failed to stop for the police and then, after the first stop, drove off again. He also fled on foot after exiting the van. Finally, Huynh described the gunman as a heavyset man; according to the booking information, George was 5'11" and weighed 280 pounds. We are satisfied that Rackley's improper testimony did not affect the jury's verdict.

George, 150 Wn. App. at 119-20.

However, the Court found that the error was not harmless as to Wahsise:

[Other than the gunman, the victim] could not identify [any] of the men who took the television set. And no physical evidence linked Wahsise to the robbery. . . . [A]ccording to the State, Wahsise fit the general physical description of one of the men who took the television. . . . Finally, the other van occupants can be eliminated, according to the State, because at least one was a woman and the other men were so intoxicated they had difficulty exiting the van and walking. We conclude that this evidence is not sufficient for us to find Rackley's testimony harmless error as to Wahsise[.]

George, 150 Wn. App. at 120.

Similarly here, no witness identified Sortland as the man seen outside Woodstock's house. No physical evidence linked Sortland to the house or to the items taken. Sortland generally matched the physical description given by McCormack, but unlike Wahsise, Sortland was not connected to the vehicle used in the theft and was not associated with any other persons involved with the theft. Detective Calitis' identification testimony was not harmless in this case, just as the identification testimony was not harmless in Wahsise's case.

Moreover, both parties and even the trial judge all acknowledged that the jury's verdict rested almost entirely on

whether the jury believed that the man in McCormack's photograph is Sortland. Before closing arguments, the trial court stated that the case "is going to rise and fall on what the jury determines those photographs represent." (TRP 194) During its closing statement, the prosecutor told the jury: "where you're going to get the argument, the disagreement between Defense and myself; and that is where it is going to be up to you to take a look at [the photograph] and reach that conclusion beyond a reasonable doubt that the individual who was photographed by Mr. McCormack is, in fact, the defendant[.]" (TRP 208) And defense counsel also told the jury that: "The picture, that's all the evidence the State has that implicates Mr. Sortland in any of these crimes, a picture and nothing else." (TRP 215)

It was quite clear to all of the parties that the photograph was the most important piece of evidence at the trial, and that the jury's determination of guilt or innocence rested on whether it believed that Sortland is the man in the photograph. The testimony of a law enforcement professional identifying Sortland as the man in the photograph is therefore highly prejudicial. Accordingly, the first factor, which requires an assessment of the seriousness of the error, is clearly met in this case. Escalona, 49 Wn. App. at 254

The second factor is also met, as the identification testimony was not cumulative of any other testimony in this case. Escalona, 49 Wn. App. at 254. The only eyewitness, McCormack himself, testified that the man in his photograph was the man he saw at Woodstock's house that morning, but even he did not identify Sortland as the man in the photograph or as the man he saw at the house. (TRP 76, 77-78) In fact, not a single witness identified Sortland as the man responsible for the break-in at Woodstock's house. No physical evidence tied Sortland to the house, to the stolen items, or to a red truck. The *only* potential link was the photograph.

Finally, the irregularity was not and could not be cured by an instruction to disregard the remark. Escalona, 49 Wn. App. at 254. Defense counsel asked the court to instruct the jury that the testimony should be disregarded, but the court did not do so. (TRP 123) Later, when the court denied Sortland's motion to dismiss, the court incorrectly recalled that it had admonished the jury to disregard the answer. (TRP 149) Regardless, such an instruction would not have cured the prejudice caused by the officer's remark, because it would have simply drawn the jury's attention back to the testimony and because, as argued above, the testimony was so

highly improper and prejudicial, that no instruction could have cured the prejudice it caused.

The trial court's denial of Sortland's motion for mistrial was improper and an abuse of discretion, and Sortland's convictions must therefore be reversed. See Escalona, 49 Wn. App. at 254-55.

B. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT OF IDENTITY, OR THAT THE MAN IN THE PHOTOGRAPH PERSONALLY BROKE THE BASEMENT DOOR AND ENTERED THE HOUSE, OR THAT THE ITEMS IN THE TRUCK CAME FROM INSIDE THE HOUSE.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State bears the burden of establishing beyond a

reasonable doubt the identity of the accused as the person who committed the charged offenses. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). In this case, the State failed to present sufficient evidence of identity.

None of the State's witnesses had any prior contact with Sortland, so none of these witnesses had any basis for testifying that Sortland was the man in the photograph. Only McCormack witnessed the incident, but he did not identify Sortland as the man he saw at Woodstock's house. No physical evidence tied Sortland to the house, the items taken from the house, or the red truck. The State simply presented insufficient evidence from which the jury could conclude beyond a reasonable doubt that Sortland was the man McCormack saw loading items into the red truck outside Woodstock's house.

But even if the State's evidence did establish that Sortland is the man in the photograph, the State still failed to establish additional elements of each crime. To convict Sortland of residential burglary, the State had to prove that Sortland personally entered or remained inside the home. RCW 9A.52.025. To convict Sortland of malicious mischief, the State had to prove that Sortland personally kicked in the basement door. RCW 9A.48.080. And to

convict Sortland of theft, the State had to prove that Sortland personally took Woodstock's shop-vac, tools and doors. RCW 9A.56.020.

But the State failed to present sufficient evidence from which the jury could find that Sortland personally committed these acts. McCormack did not see the red truck arrive, and did not know whether more than one person initially exited the truck. (TRP 82-83) McCormack did not see who kicked in the door, and he never saw the man in the photograph actually enter or exit the house. (TRP 82, 83) The State presented no fingerprints or other physical evidence showing that Sortland was ever personally inside the house. (TRP 135, 136) And finally, a shop-vac and doors are visible in one of McCormack's photographs, but Woodstock never identified these items as being identical or similar to those taken from her home. (Exh. 14, 20)

The State failed to meet its burden of proving beyond a reasonable doubt the identity of the man in the photograph, and failed to prove that the man in the photograph was the same person who broke Woodstock's basement door and entered the house, and failed to prove that the items in the red truck were the same items taken from inside the house. Accordingly, Sortland's

convictions should be reversed and the charges dismissed with prejudice.

V. CONCLUSION

Detective Calitis' testimony that the man in the photograph is Sortland, which was given despite trial court's specific order that such testimony was inadmissible, was highly improper and highly prejudicial. Moreover, the State failed to meet its constitutional burden of proving all of the elements of the crimes beyond a reasonable doubt. For these reasons, Sortland's convictions should be reversed.

DATED: February 28, 2011

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CERTIFICATE OF MAILING

I certify that on 02/28/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Kenneth A. Sortland, DOC#994497, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

Stephanie Cunningham

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