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Court of Appeals
Division III
State of Washington

33960-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNA DAWN SMITH, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT'S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 6

A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT MS. SMITH COMMITTED THE OFFENSE OF SECOND DEGREE ROBBERY..... 6

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE HENSLEY'S TESTIMONY THAT HE HAD PREVIOUS CONTACTS WITH THE DEFENDANT AND RECOGNIZED HER FROM THOSE PREVIOUS CONTACTS. 12

V. CONCLUSION 16

TABLE OF AUTHORITIES

WASHINGTON CASES

State ex rel Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) 12

State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014)..... 7

State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994)..... 15

State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990)..... 14

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)..... 15

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003) 12

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 6

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 7

State v. Walton, 64 Wn. App. 410, 824 P.2d 533,
review denied, 119 Wn.2d 1011 (1992)..... 7

State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981)..... 7

FEDERAL CASES

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979)..... 6

RULES

ER 401 ..... 12, 15

ER 402 12

ER 403 13

ER 404 ..... 13, 14

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the elements of second degree robbery.

2. The trial court erred when it allowed Detective Hensley to testify about his prior contacts with Ms. Smith in violation of ER 402 and ER 404(b).

II. ISSUES PRESENTED

1. Whether the State presented sufficient evidence that the defendant committed each of the elements of second degree robbery?

2. Whether the trial court erred when it allowed Detective Hensley to testify about previous "contacts" with the defendant?

III. STATEMENT OF THE CASE

The defendant was charged in Spokane County Superior Court with one count of second degree robbery from an incident that occurred on July 30, 2014.[1] On that day, loss prevention officers Matthew McDaniels and John Reynolds were working at the Rite-Aid Franklin Park Store at 5520 North Division in Spokane, Washington. RP 71-74. They were working in the surveillance room of the store, watching the store's cameras. RP 74. On one of the cameras, they observed a female walk into the store,

[1] On July 1, 2016, the State filed a supplemental designation of Clerk's Papers designating the Information. The State anticipates this document will be designated as CP 102.

select a set of headphones (a high theft item), and then walk to the water cooler section of the store. RP 74-75. There, she selected a bottle of water and walked to the candy aisle of the store where she concealed the headphones in her large bag. RP 75.

Once Mr. McDaniels saw her conceal the headphones, he left the surveillance room and positioned himself near the front door of the store, while Mr. Reynolds maintained observation of the woman by the camera system. RP 75. The woman then paid for the water, but did not pay for the headphones. RP 76. Once the woman passed through the security system that detects unpaid-for merchandise, Mr. McDaniels approached the suspect, identified himself as a loss prevention officer, and asked her for the merchandise that "she may have neglected to pay for." RP 76. The woman attempted to move past him, and then tried to push him, saying, "You can't touch me," "You can't stop me," and "Let me go." RP 76-77. She pushed him five or six times in an attempt to get away. RP 80. After being unsuccessful in pushing past Mr. McDaniels, the woman then began yelling for help, and ultimately pushed a set of sliding doors off their hinges to get outside. RP 77.

When the woman exited the store, a male exited an older model Honda parked outside the foyer doors, and approached Mr. McDaniels and the woman. RP 77-78. The male yelled profanities and began to throw

punches at Mr. McDaniels, even though Mr. McDaniels identified himself as a loss prevention officer to that individual. RP 78. The second time the man swung at Mr. McDaniels, he made contact with Mr. McDaniels' chest. RP 79. The unidentified male yelled to the female to get into the car and "go, go, go." RP 79. The female drove away in the car, and the male ran off on foot. RP 79.

Mr. McDaniels was able to get the license plate number from the Honda and immediately called 911. RP 80. Officer Kernkamp responded to the Rite-Aid and ran the license plate number of the Honda. She found that it was registered to a Corey Knudsvig. RP 131-132. The officer tried to locate Mr. Knudsvig, but was unable to do so. RP 140. The officer then found that Ms. Smith was a known associate of Mr. Knudsvig, and that she matched the description of the suspect.[2] Officer Hamilton testified at trial that on a previous occasion he had contacted a number of individuals on an unrelated issue, and Corey Knudsvig and Johnna Smith were among those individuals. RP 146-147.

[2] Officer Kernkamp was not allowed to testify as to how she identified Ms. Smith as a potential suspect at trial, but in pretrial motions, the State indicated that she had searched for known associates of Mr. Knudsvig who matched the description of the robbery suspect. Ms. Smith was one such known associate and matched the description of the robber. RP 50-51, 127- 129.

Detective Hensley testified that he conducted follow-up investigation relating to the Rite-Aid robbery, and based on Officer Kernkamp's identification of a potential suspect, he produced a photomontage which he presented to Mr. McDaniels. RP 154. Detective Hensley testified that Mr. McDaniels picked the photo of Ms. Smith from the photomontage, but Mr. Reynolds was not able to identify anyone. RP 160.[3]

Detective Hensley testified that he also watched the surveillance tape. RP 161. He testified that in 2011 he had face-to-face "contact" with Ms. Smith two times – each occasion lasting about fifteen minutes. RP 161-162. Through those contacts, Detective Hensley stated that he was familiar with the defendant's facial and body features, although she had black hair in 2011. RP 162. Detective Hensley testified that he identified Ms. Smith on the surveillance tape because of both his prior contacts with her in 2011 and because of his involvement in creating the photomontage in this case. RP 162.

[3] Mr. McDaniels testified that he was able to pick a suspect's photo from the montage prepared by law enforcement, and also identified Ms. Smith as the robber during trial. RP 81, 91.

The defense moved to exclude Detective Hensley's testimony that he had previous contacts with Ms. Smith.[4] CP 26; RP 29-30, 42. The State told the court that it would not introduce any details of why Detective Hensley contacted Ms. Smith, but apparently, she had been involved with law enforcement in 2011 as a confidential informant. RP 31, 56.

The court ruled on the admissibility of this testimony before trial began:

> As far as the testimony of Detective Hensley is concerned, it looks like he was the one who was responsible were [sic] putting together the photo montage that a witness used to identify Ms. Smith. It also appears that he has had some contact with her in the past. Maybe she was working as an informant or something of that nature. The argument is that the prejudice of that relationship outweighs the probative value.
>
> **Here identity is an issue**.[5] It looks like he reviewed the video, **possibly** used that to put together the photo montage after he realized who he thought the person in that video depicted. It is prejudicial, but the relevance outweighs the probative – or, the prejudicial value because otherwise any

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[4] It brings into play prior police contacts. And I think the State intends to whitewash those as much as possible, but those kind of situations are going to be blatantly obvious to a jury … And just the contact with law enforcement implies some aspect of – of guilt or involvement in some violation of the law … I think it would be even more prejudicial in the sense that [the testimony] is by a detective who's investigating crimes. That's his job, rather than just infractions or traffic stops.

RP 31.

[5] During motions in limine, Defense counsel told the court, "We contest all elements, but I think [the prosecutor] knows the **primary issue is identity**." RP 25 (emphasis added).

> person who might have had contact with law enforcement in the past would be immune from having that person testify.

RP 32-33 (emphasis added).

The jury convicted Ms. Smith as charged, and she timely appealed her conviction.

IV. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT MS. SMITH COMMITTED THE OFFENSE OF SECOND DEGREE ROBBERY.

Ms. Smith challenges the sufficiency of the evidence supporting her conviction for second degree robbery. The purpose for sufficiency of the evidence review is "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id*. A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id*. In a sufficiency of the evidence

challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id*.

Our Supreme Court has stated:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

On appeal, Ms. Smith takes issue with Mr. McDaniels' identification of her as the individual who robbed the Rite-Aid, and

questions his ability to accurately recall the events of that day, because at trial he was unable to recall what he ate for lunch that day, what day of the week the robbery occurred, or what shoes the suspect wore at the time she committed the robbery.[6] Appellant's Br. at 11; RP 92, 97. However, defendant fails to point out that Mr. McDaniels did recall that she was wearing a yellow barrette in her hair with a yellow flower on it. RP 98.

Defendant also takes issue with the fact that Mr. McDaniels could not remember the woman's eye color, Appellant's Br. at 11, but likewise fails to mention that Mr. McDaniels testified that the woman was wearing sunglasses at the time of the theft and altercation.[7] RP 98.

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[6] It should be noted that the robbery occurred on July 30, 2014, and the case was brought to trial over a year later on November 16, 2015. CP 102; RP at *passim*.

[7] Defendant also tries to mischaracterize Mr. McDaniels as being overeager to assist law enforcement and as willing to "go along" with whatever the police bring him. Appellant's Br. at 11. This statement by Mr. McDaniels should be read in context of the entire line of questioning by defense counsel:

> Q. Now, when the officer brought these pictures to you, the montages in this case, you didn't think the police were wasting your time, did you?
>
> A. No.
>
> Q. You suspected that they had who they believe the suspect in the pictures?
>
> A. I just go along with whatever the officers bring me. If they need help on a case, I offer my assistance as much as possible.
>
> Q. You thought there was a reason for bringing the pictures, right?
>
> A. Could have been multiple reasons. It could have been that they were just looking for a person or they had a person in custody. Didn't matter to me.
>
> Q. Okay. Now, you wanted to help the police, didn't you?
>
> A. Correct.

RP 102-103.

Mr. McDaniels testified that he believed Ms. Smith was the woman he encountered on the day of the robbery:

> Q. Sir, is there any doubt in your mind after getting an up-close personal look at Ms. Smith that that was the lady that committed the robbery that day on July 30th of 2014?
>
> A. I believe that is the person, correct.
>
> Q. Even though she had glasses on, you could see her cheeks, couldn't you?
>
> A. Correct.
>
> Q. Her chin?
>
> A. Correct.
>
> Q. Her forehead?
>
> A. Correct?
>
> Q. Ears?
>
> A. Correct.
>
> Q. Neck?
>
> A. Correct.
>
> Q. Her build? As a matter of fact, you got to see her build again today.
>
> A. Correct.

It is logical that a victim of a robbery, and an employee of a store that suffered a financial loss due to that robbery would want to aid law enforcement in apprehending the suspect. However, that simple fact does not mean that Mr. McDaniels was willing to lie under oath or selected Ms. Smith's photo from the montage for any reason other than the fact that she was, in fact, the woman who robbed the Rite-Aid. Credibility and bias determinations are left to the trier of fact, and should not be addressed on appeal.

> Q. And you got to see her up close again today?
>
> A. Correct.
>
> Q. You saw the video. Her height was approximately your height, is that correct, as shown in the video?
>
> A. Approximately, yes.
>
> …
>
> Q. Mr. Ames asked you if you had based your identification on what you saw in the video. Did you base it on what you saw in the video or what you saw when you were encountering the lady that day at Rite-Aid?
>
> A. I based my identification on what I saw personally that day, not on the video.

RP 112-114.

And, on re-cross examination:

> Q. Are you testifying to this jury that you could not be mistaken about your selection [of Ms. Smith from the photo montage]?
>
> A. I testified that I could be mistaken about some things, but the fact that I am testifying that that is Ms. Smith that I encountered that day, I'm 100 percent.
>
> Q. So you're a hundred percent absolutely positive that it was Ms. Smith?
>
> A. Correct.
>
> Q. And even though you believe that, you don't believe you could possibly be mistaken?
>
> A. I don't believe I could be mistaken on – on the fact that I encountered Ms. Smith that day.

RP 115-116.

Mr. McDaniels' statement to 911 that he estimated the suspect to be an inch taller than he was, when she was apparently an inch shorter than he was, are facts that bear on the weight of the testimony and credibility of the witness, and therefore, are within the province of the jury to determine. Additionally, while the video demonstrated the defendant had a tattoo-like marking on the back of her neck at the time she committed the robbery, and the defendant presented evidence that she did not have a mark the day of trial, it was up to the jury to give whatever weight to that evidence it deemed appropriate.[8] None of these discrepancies are of such a nature that it can be said that the State did not meet its burden in proving that the defendant committed the robbery. Mr. McDaniels testified that he was sure it was Ms. Smith who he encountered that day, and it was up to the jury to believe him or not. The jury viewed the video as well, and, in fact, requested to view it again during deliberations. CP 60. The jury either believed Mr. McDaniels or made its own judgment from the video, and its judgment

[8] Defendant argues that the State was required to adduce testimony at trial that explained the defendant's lack of a tattoo or tattoo removal scar on the back of her neck. Appellant's Br. at 12. It is not the State's burden to explain away every possible discrepancy in the evidence, but even if it was the State's burden, Detective Hensley testified that he did not know what the mark was on the back of Ms. Smith's neck in the video, but that he has "seen plenty of fake tattoos." RP 180. Additionally, he testified "that's all I can tell is there's a mark on the back of her neck. I can't say it's a tattoo, if it's her hair, a necklace. I don't know what it is." RP 181. He further testified that if the marking on her neck was a tattoo, he would not be able to tell whether it was permanent or temporary. RP 182.

should not be disturbed on appeal where there is substantial evidence supporting its verdict.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE HENSLEY'S TESTIMONY THAT HE HAD PREVIOUS CONTACTS WITH THE DEFENDANT AND RECOGNIZED HER FROM THOSE PREVIOUS CONTACTS.

A trial court's decision to admit or exclude evidence is subject to review for abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision based on "untenable grounds" or made for "untenable reasons" is one that rests on facts unsupported by the record or was one reached by applying the wrong legal standard. *Id.*

Defendant has presented challenges at trial and on appeal to Detective Hensley's testimony regarding his prior "contact" with Ms. Smith based on ER 402, ER 403 and ER 404(b). ER 402 provides that relevant evidence is admissible, and evidence which is not relevant is not admissible. ER 401 defines relevant evidence as evidence "having *any* tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added). Relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice." ER 403. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show conformity therewith on a particular occasion; however, such evidence may be admissible for other purposes including "identity." ER 404(b).

Defendant contends that the testimony given by Detective Hensley regarding his two prior contacts with Ms. Smith "create[d] the extraordinarily prejudicial implication that Ms. Smith was the type of person who had frequent run-ins with a detective whose work was focused on major crimes." Appellant's Br. at 14-15. This is simply untrue and unsupported by the evidence. The Detective was not permitted to testify about how he knew Ms. Smith at all – he could have met her as a victim or a witness on an unrelated case, or for all the jury knew, he could have encountered her at a social or church function. Defendant even objected to questions that might have clarified this issue for the jury. RP 162. If the jury drew any negative inference from Detective Hensley's testimony, it was due to the defendant's request that he be prohibited from testifying as to how he

knew her. Invited error is not reviewed on appeal. *See*, *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990).

Even assuming the detective's testimony regarding his "prior contacts" with Ms. Smith qualifies as evidence of "other crimes, wrongs or acts" within the meaning of ER 404(b),[9] this evidence was not proffered to prove Ms. Smith's conformity with those prior "encounters" on this occasion.

The defendant conceded below that the "primary" issue at trial was "identity." RP 25. Her entire defense revolved around whether the State could prove that she and the "tattooed" woman in the video were the same person and she argued that it could not. Where the primary issue in a case is identity, evidence of other crimes, wrongs or acts, to prove identity (a necessary element of a criminal offense) is properly admitted at trial. The detective's testimony was corroborative evidence of the robber's identity, which was the central issue at trial. And, as required by ER 404(b), the trial court properly balanced the probative value of this testimony against its potential prejudicial effect, and while the court found that it was prejudicial, it found that the prejudice did not substantially outweigh its probative

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[9] The simple fact that one person "knows" or "recognizes" another from a previous encounter is not a "crime," "wrong" or "act." In order to evaluate an ER 404(b) claim of error based on such testimony, the court would have to assume that the jury speculated that a crime, wrong or bad act brought Ms. Smith into contact with Detective Hensley.

nature. RP 32-33; *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). No error occurred when the trial court admitted this evidence.

Defendant also alleges that this testimony invaded the province of the jury to determine the identity of the Rite-Aid robber. A witness may give an opinion concerning the identity of a person depicted on surveillance if there is some basis for concluding that the witness is more likely to correctly identify the defendant from that surveillance than is the jury. *See State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). As in *Hardy*, where a police officer was permitted to testify as to the identity of an individual depicted in a videotape based on their past contacts, it was not improper for Detective Hensley to give similar testimony. As the court observed in *Hardy*, this testimony does not invade the province of the jury because the jury was free to disbelieve Detective Hensley's testimony, and the ultimate issue of identification was left to the jury. *Id*. at 191. And, as noted above, the jury requested to view the video during its deliberations, which would indicate that it considered the identification issue on its own.

Defendant's claim that this testimony was irrelevant also fails, because *any* evidence tending to prove identity would be relevant to this hotly contested issue. ER 401. Additionally, it is immaterial that the trial court stated in its ruling that Detective Hensley "possibly used [the video tape] to put together the photo montage after he realized who he thought the

person in that video depicted." RP 32-33. It is possible that the court did not have a full understanding of the chronology of events in the case at the time it issued its ruling, as it was only during Detective Hensley's testimony before the jury that it was established that the detective produced the photomontage based off of Officer Kernkamp's possible suspect identification, presented it to the witness who identified Ms. Smith, and *then* reviewed the video which refreshed his recollection about his past contacts with Ms. Smith. Under either chronology, however, Detective Hensley's testimony would be admissible under *Hardy* to establish evidence of the identity of the robber.

V. CONCLUSION

The State presented sufficient evidence that Ms. Smith was the Rite-Aid robber. The State presented a video surveillance tape, along with the testimony of Mr. McDaniels and Detective Hensley who identified her as the individual involved in the robbery. Furthermore, because identity was the central issue in this case, Detective Hensley's testimony regarding the basis for his knowledge that Ms. Smith appeared to be the individual depicted on the video, their two prior contacts, was properly admitted not as a prior crime, wrong or other act, but as proof of identity. The trial court properly weighed the prejudicial effect of this testimony against its

probative value and properly admitted the evidence. The State requests this court affirm the defendant's conviction.

Dated this 1 day of July, 2016.

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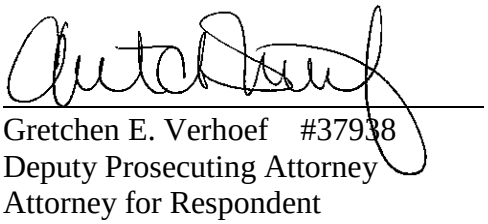

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. JOHNNA DAWN SMITH, Appellant.	NO. 33960-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 1, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Robert Cossey
rcossey@robertcossey.com

7/1/2016	Spokane, WA	
(Date)	**(Place)**	**(Signature)**