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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45600
Plaintiff-Respondent,)	
)	ELMORE COUNTY NO. CR 2016-2235
v.)	
)	
MICHELLE RENEE)	
EDMONSON,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ELMORE**

**HONORABLE JONATHAN MEDEMA
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

During Michelle Edmonson's jury trial for burglary, the district court allowed Sergeant Ogaard to identify Ms. Edmonson as the person in a series of screenshots taken during the burglary. That was an abuse of discretion. This Court should vacate Ms. Edmonson's conviction and remand for a new trial.

Statement of Facts and Course of Proceedings

The State charged Ms. Edmonson with burglary for allegedly going into a daycare to commit theft, or aiding and abetting a friend who went into the daycare to commit theft. (R., pp.92–93.) Ms. Edmonson maintained her innocence and took the case to trial. The main issue for the jury to decide was whether the woman in screenshots taken during the burglary was Ms. Edmonson. (Tr., p.131, Ls.11–12.)

At trial, the daycare managers testified that the daycare had installed a motion-sensing security camera after some of their cash went missing. (Tr., p.135, L.10–p.137, L.21, p.152, Ls.6–17.) The camera went live a little after 10:00 pm on September 20, 2016, sending an alert to the cell phone of one of the managers, Ms. Jewett. (Tr., p.138, L.7–p.139, L.5, p.153, L.16–p.154, L.15.) Ms. Jewett watched the live feed of a blonde woman digging around the daycare's office, and she took a handful of screenshots on her cell phone at the same time. (Tr., p.154, L.17–p.156, L.22, p.198, Ls.16–23.) Ms. Jewett then went to the daycare to find \$20 and the video camera were missing. (Tr., p.155, Ls.15–19, p.163, Ls.11–14.)

Three officers also testified, primarily to identify Ms. Edmonson as the woman in photos that they had taken of the screenshots. (*See* State's Exs. 1–3¹; Tr.165, p.165, Ls.8–15.) Sergeant

¹ The images included in this brief are cropped and resized versions of the trial exhibits.



State's Exhibit 1



State's Exhibit 2



State's Exhibit 3

Ogaard testified that he interrogated Ms. Edmonson about the alleged burglary for twenty to thirty minutes on September 27, 2016. (Tr., p.167, L.9–p.168, L.18; *see also* State's Ex. 4 (interrogation video, which totals seventeen minutes and seventeen seconds).) Based on his observation of Ms. Edmonson during the interrogation, he said he would be able to recognize a photo of her. (Tr., p.174, L.18–p.175, L.3.) The prosecutor asked Sergeant Ogaard who was in the screenshots, and defense counsel objected to the testimony as an improper lay opinion under I.R.E. 701. (Tr., p.175, Ls.11–16.) When pressed to be more specific, defense counsel said subsection (b) was not met. (Tr., p.175, Ls.21–23.) The court overruled the objection, and Sergeant Ogaard opined that the screenshots were of Ms. Edmonson. (Tr., p.175, L.24–p.176, L.5.) He went on to elaborate on that conclusion:

I've been doing police work, now, for going on 18 years. As a police officer it's relatively important, not only for my job, but the safety of others, to quickly recognize and to train my mind to look at and—and remember incidents, people, things of that effect.

It's what we call in the industry and often times refer to as the trained observer. And throughout my 18 years as a police officer, I've had a lot of opportunities to view photos just like this and apply—apply that same training to identifying.

Using that, that training, that knowledge and experience, I'm able to look at these photos and identify the defendant in these photos.

(Tr., p.176, Ls.8–21.) Sergeant Ogaard also said he also believed that the screenshots were of Ms. Edmonson because he asked Ms. Edmonson about the screenshots during the interrogation, and she would not say whether they were of her. (Tr., p.176, L.22–p.177, L.4.) Finally, he acknowledged that he never asked Ms. Edmonson about coloring her hair, even though the woman in the screenshots had blonde hair and Ms. Edmonson had brown hair both during the interrogation and at trial. (Tr., p.198, L.14–p.199, L.8; *see* State’s Exs. 1–3; Defendant’s Exs. A–B (still photos of the interrogation video); Tr., p.163, Ls.6–10.)



Defendant’s Exhibit A

Defendant’s Exhibit B

Defendant’s Exhibit C

Detective Jessup testified that he had various contacts with Ms. Edmonson over the last seventeen years, and identified the woman in the screenshots as Ms. Edmonson. (Tr., p.217, L.3–p.219, L.6.) He also knew Ms. Edmonson’s sister, Ms. Portlock. (Tr., p.223, Ls.16–19.) When asked if someone could think the screenshots were of Ms. Portlock, he responded, “I guess; anything’s possible.” (Tr., p.223, L.19–p.224, L.1.) He went on to testify that, when he saw the screenshot, he thought it was of Ms. Edmonson. (Tr., p.225, Ls.7–8.) But he said Ms. Jewett thought it was “one of two people.” (Tr., p.225, Ls.2–6.)

Officer Griggs testified that he had known Ms. Edmonson for eighteen years, and that he also knew Ms. Portlock. (Tr., p.227, Ls.14–20.) He went on to identify the woman in the screenshots as Ms. Edmonson. (Tr., p.228, Ls.4–23.) However, he acknowledged that he hesitated to identify State’s Exhibit 2 as Ms. Edmonson, and said that the only reason he did is because it followed, and was a blown up version of, State’s Exhibit 1. (Tr., p.229, Ls.11–18.)

The State called Ms. Portlock to the stand as its last witness, and simply asked for her name. (Tr., p.236, L.19–p.237, L.9.)

Ms. Edmonson then testified in her own defense. She first said that the screenshots were not of her. (Tr., p.265, Ls.9–21.) She introduced three photos of Ms. Portlock, and testified that they were fair and accurate representations of how she looked in September 2016. (Tr., p.267, L.8–p.270, L.25; Defendant’s Exhibits D–F.) Ms. Edmonson discussed the stud she has worn in the piercing below her left lip since 2013 (Tr., p.265, L.22–p.266, L.25), and said that Ms. Portlock does not have any piercings on her face (Tr., p.267, Ls.1–7). Finally, she testified that she had brown hair in September 2016, while her sister had blonde hair at that time. (Tr., p.271, Ls.1–10.)



Defendant’s Exhibit D



Defendant’s Exhibit E



Defendant’s Exhibit F

The jury found Ms. Edmonson guilty. (R., p.146.) The court later sentenced her to seven years, with two years fixed, and retained jurisdiction. (R., pp.156–58.) After a successful rider, the court placed Ms. Edmonson on probation. (Aug.,² pp.1–9.)

Ms. Edmonson filed a notice of appeal timely from her judgment of conviction. (R., pp.160–62.)

² Ms. Edmonson filed a motion to augment concurrently with this brief.

ISSUE

Did the district court abuse its discretion when it allowed Sergeant Ogaard to testify that Ms. Edmonson was the woman in the screenshots taken during the burglary?

ARGUMENT

The District Court Abused Its Discretion When It Allowed Sergeant Ogaard To Testify That Ms. Edmonson Was The Woman In The Screenshots Taken During The Burglary

Idaho Rule of Evidence 701, which governs lay opinions, provides:

If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.³

(Footnote added). When deciding whether to admit a photo identification under Rule 701, the ultimate question is whether 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. Barnes*, 147 Idaho 587, 592 (Ct. App. 2009). To make that determination, courts look at the totality of the circumstances, including:

the quality of the image. That is, if the image is either unmistakably clear or hopelessly obscure, the witness will be no better suited than the jury to make the identification. A second factor is whether the defendant's appearance has changed since the date the image was taken. When there is evidence that the defendant's appearance has changed between the time of the photo's creation and the time of trial, identification testimony from a witness familiar with the defendant's prior appearance is more likely to be helpful to the jury. Perhaps the most critical factor is the witness's level of familiarity with the defendant, which makes the witness better able than the jury to discern whether the person in the photo is the defendant.

State v. Salazar, 153 Idaho 24, 26 (Ct. App. 2012) (citing *Barnes*, 147 Idaho at 592–594)

(internal citations omitted).

³ Although not objected to below, Sergeant Ogaard's claim that he is essentially an expert at seeing things, what he deemed a “trained observer,” is problematic given that his testimony identifying Ms. Edmonson came in under I.R.E. 701, which explicitly excludes expert opinions. (See Tr., p.176, Ls.8–21.)

This Court reviews a district court's decision to admit testimonial evidence for an abuse of discretion, which considers: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Barnes*, 147 Idaho at 590; *State v. Moore*, 131 Idaho 814, 819 (1998).

Considering the totality of the circumstances, Sergeant Ogaard was not more likely to correctly identify the woman in the screenshots than was the jury. The district court thus abused its discretion when it allowed Sergeant Ogaard to testify that Ms. Edmonson was the woman in the screenshots taken during the burglary because it did not act consistently with the applicable legal standards and did not reach its decision by an exercise of reason.

The only consideration favoring the admissibility of Sergeant Ogaard's testimony is the quality of the screenshots, which were neither unmistakably clear nor hopelessly obscure. *See Salazar*, 153 Idaho at 26; State's Exs. 1–3. The remaining circumstances strongly cut against admitting Sergeant Ogaard's testimony. The State presented no evidence that Ms. Edmonson's appearance had changed between the time of the offense and the trial, while Ms. Edmonson testified that she had brown hair and a lip piercing in September, just as she did at trial. *See Salazar*, 153 Idaho at 26; Tr., p.265, L.22–p.266, L.25, p.271, Ls.1–10. More critically, Sergeant Ogaard was barely more familiar with Ms. Edmonson than was the jury; his only interaction with Ms. Edmonson was during the seventeen-minute interrogation which took place a full nine months before the trial. *See Salazar*, 153 Idaho at 26; State's Ex. 4; Tr., p.167, L.9–p.168, L.18; *see generally* Tr., p.166, L.15–p.214, L.24. Finally, Sergeant Ogaard did not know Ms. Edmonson's sister, Ms. Portlock, and thus was in no better position than the jury to

determine whether the woman in the photo was Ms. Edmonson or Ms. Portlock. *See Salazar*, 153 Idaho at 26; *see generally* Tr., p.166, L.15–p.214, L.24. The court should not have permitted Sergeant Ogaard’s testimony.

The Court of Appeals’ decisions in *Barnes* and *Salazar*, which both condoned the photo identification testimony at issue, do not dictate otherwise. The Court of Appeals in *Barnes* held that various Subway employees could identify Barnes, who regularly visited his girlfriend during her shift, as the man in photos taken by surveillance cameras. 147 Idaho at 192–95. There, the photos were not a “model of clarity”; Barnes had changed his haircut and lost weight since the burglary; and the employees had seen Barnes in the Subway for thirty minutes to an hour, multiple times a week, over the course of two months. *Id.* at 594–95. In *Salazar*, the Court of Appeals held that a detective could testify that Salazar was the man seen in still photos taken from a grocery store security video of a stabbing. 153 Idaho at 27. The photo in that case was “neither unmistakably clear nor hopelessly obscure”; both the man in the photo and Salazar when he met with the detective had a shaved head and goatee, but at trial Salazar had long hair, wore a full mustache, and had gained weight; and the detective had one twenty-minute interaction with Salazar approximately three and a half months after the stabbing, as well as “multiple additional contacts . . . which were not described to the jury in order to avoid undue prejudice to Salazar.” *Id.* at 26–27. In short, the witnesses making the photo identification in *Barnes* and *Salazar* had spent more time observing or interacting with the defendant, and, unlike here, both Barnes’ and Salazar’s appearance had changed between the time of the offense and the trial. *Barnes* and *Salazar* thus do not support the district court’s decision to admit Sergeant Ogaard’s testimony.

The only consideration in favor of admitting Sergeant Ogaard’s testimony is the quality of the screenshots. The remaining considerations show that Sergeant Ogaard was not more

likely to correctly identify the woman in the screenshots than was the jury: He had only a short interaction with Ms. Edmonson nine months before trial, he had never met Ms. Edmonson's sister, and Ms. Edmonson's appearance had not changed between when the screenshots were taken and trial. Because the district court did not act consistently with the applicable legal standards and did not reach its decision by an exercise of reason, it abused its discretion.

CONCLUSION

This Court should vacate Ms. Edmonson's judgment of conviction and remand this case for a new trial.

DATED this 27th day of August, 2018.

/s/ Maya P. Waldron
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

MPW/eas