

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 45600
 Plaintiff-Respondent,)
) Elmore County Case No.
 v.) CR-2016-2235
)
 MICHELLE RENEE EDMONSON,)
)
 Defendant-Appellant.)
 _____)

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Michelle Renee Edmonson appeals from her judgment of conviction for burglary.

Statement Of The Facts And Course Of The Proceedings

The state charged Edmonson with one count of burglary of the R&R Kids Way (hereinafter “R&R”) daycare, amended to include an aiding and abetting theory. (R., pp. 33-34, 92-93.)

The evidence at trial showed that after some thefts of cash from the daycare, the managers of R&R set up a camera in the office that would activate and alert the managers of persons present in the office. (Tr., p. 135, L. 11 – p. 139, L. 5; p. 151, L. 15 – p.153, L. 15.) On September 20, 2016, the camera recorded someone going through the drawers in the office at R&R after it was closed. (Tr., p. 138, L. 3 – p. 140, L. 7; p. 142, Ls. 1-8; p. 153, L. 16 – p. 155, L. 14; p. 161, Ls. 10-23.) One of the managers saw the burglar in action on her cell phone and captured three screen-shots of her before the thief stole the camera (and thus the video recording). (Tr., p. 155, L. 15 – p. 158, L. 6; State’s Exhibits 1-3.)

The managers of R&R showed the captured photographs to Officer (Detective by the time of trial) Jessup, who recognized Edmonson. (Tr., p. 218, L. 6 – p. 219, L. 6.) When asked if some hypothetical person could look at the photographs and think it was Edmonson’s sister, Vicki Portlock, Detective Jessup testified that “anything’s possible.” (Tr., p. 223, L. 13 – p. 224, L. 1.) Detective Jessup stated that he could tell the difference between Edmonson and her sister, Portlock, and that it was not Portlock in the pictures. (Tr., p. 224, Ls. 9-13.) Officer Griggs, who transported Edmonson to the police

department, testified that he had known Edmonson for about 18 years, also knew her sister, Portlock, and that the person in the captured photographs was Edmonson. (Tr., p. 227, L. 14 – p. 228, L. 23; p. 230, Ls. 6-10.)

Detective (Sergeant at the time of trial) Ogaard interviewed Edmonson. (Tr., p. 166, L. 6 – p. 167, L. 14.) Edmonson initially stated that she had driven Misayo Nakaishi to R&R late at night so Nakaishi could “pop” the door and get milk and coffee creamer from the daycare kitchen. (State’s Exhibit 4, 1:01-4:19.) Edmonson initially claimed she had not entered the building. (Id. at 4:19-4:33.) However, when Detective Ogaard confronted her with the captured photographs and claimed to have video of the event, Edmonson admitted she had been inside the building, specifically to encourage Nakaishi to leave because she was “taking too long.” (Id. at 4:33-6:08.) She denied taking any money, but stated she was “afraid” she was “going to get in trouble.” (Id.) When asked if she was the person in the photographs, Edmonson refused to admit it was her, but also wondered why Nakaishi was not in the photographs because “she was right there.” (Id. at 6:11-6:32.) She stated she knew she should not have been inside R&R but denied taking anything but milk. (Id. at 6:52-7:12; 17:09-17:25)

The prosecution asked Detective Ogaard if he recognized the person in the captured photographs. (Tr., p. 175, Ls. 4-10.) The defense objected on the grounds that such would not help the jury to decide a fact in issue. (Tr., p. 175, Ls. 11-23 (citing I.R.E. 701(b)).) The district court overruled the objection. (Tr., p. 175, L. 24.) Detective Ogaard testified that the person in the photographs was Edmonson. (Tr., p. 175, L. 25 – p. 177, L. 4.)

Edmonson testified that on the date in question she had brown hair and a stud under her left lip, and produced pictures of her sister, Portlock, who she testified was blonde and had no such stud. (Tr., p. 263, L. 16 – p. 271, L. 10; Defense Exhibits D-F.)

The jury returned a guilty verdict. (Tr., p. 308, Ls. 11-19; R., p. 146.) The district court imposed a sentence of seven years with two years determinate, retained jurisdiction, and entered judgment. (R., pp. 156-58.) Edmonson filed a timely notice of appeal. (R., pp. 160-62.)

ISSUE

Edmonson states the issue on appeal as:

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?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Edmonson failed to show the district court abused its discretion when it ruled admissible Detective Ogaard's testimony regarding the identity of the person in the photographs?

ARGUMENT

Edmonson Has Failed To Show The District Court Abused Its Discretion When It Ruled Admissible Detective Ogaard’s Testimony Regarding The Identity Of The Person In The Photographs

A. Introduction

The district court overruled Edmonson’s objection that Detective Ogaard’s testimony regarding who was depicted in the captured photographs would not be of assistance to the trier of fact. (Tr., p. 175, Ls. 11-24.) Detective Ogaard testified that he was able to identify Edmonson in the photograph because of his observation of and interaction with her in the interview. (Tr., p. 174, L. 18 – p. 175, L. 9; p. 176, L. 6 – p. 177, L. 4.) On appeal Edmonson argues the district court abused its discretion because under the “totality of the circumstances” Detective Ogaard was “not more likely to correctly identify the woman in the screenshots than was the jury.” (Appellant’s brief, p. 8.) Edmonson’s argument, which includes one factual error, is unpersuasive. Considering all the circumstances the district court did not abuse its discretion in allowing the testimony.

B. Standard Of Review

“The decision to admit opinion testimony, whether lay opinion or expert opinion, rests within the discretion of the lower court, while the determination of its weight lies with the jury.” State v. Ehrlick, 158 Idaho 900, 923, 354 P.3d 462, 485 (2015) (internal quotation and citation omitted). “The trial court has broad discretion in determining the admissibility of testimonial evidence.” State v. Barnes, 147 Idaho 587, 591, 212 P.3d 1017, 1021 (Ct. App. 2009).

C. The District Court Did Not Abuse Its Discretion By Admitting The Testimony Of Detective Ogaard That Edmonson Was The Person In The Captured Photographs

A non-expert witness may testify “in the form of an opinion or inference” if the opinion 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.” I.R.E. 701. “I.R.E. 701 allows the court to admit opinion testimony of a non-expert or lay witness when that opinion is rationally based on the witness’ perception and is helpful to a clear understanding of his testimony or the determination of a fact in issue.” State v. Johnson, 119 Idaho 852, 855, 810 P.2d 1138, 1141 (Ct. App. 1991).

This same test applies to identification of an individual from a photograph or video: the court applies the totality of the circumstances to determine if the proposed identification testimony would be helpful to the jury. State v. Salazar, 153 Idaho 24, 26, 278 P.3d 426, 428 (Ct. App. 2012); Barnes, 147 Idaho at 594, 212 P.3d at 1024. “Perhaps the most critical factor” in the totality of the circumstances “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.” Salazar, 153 Idaho at 26, 278 P.3d at 428. However, the court should look at a variety of factors such as quality of the image, the witness’s familiarity with the person’s mode of dress, whether the witness knew the person over a period of time and circumstances, whether the person changed his or her appearance, and the witness’s opportunity to observe the person identified. Barnes, 147 Idaho at 593-94, 212 P.3d at 1023-24. Ultimately, admissibility “does not hinge on the presence of any particular factor.” Id. at 594, 212 P.3d at 1024 (quotation and citation omitted). Factors such as “the extent of a witness’s opportunity to observe the defendant” may go to the

“weight of the testimony, not to its admissibility.” Id. at 593, 212 P.3d at 1023 (quotation and citation omitted).

Application of the totality of the circumstances test shows no abuse of discretion. Detective Ogaard testified that he interviewed Edmonson for between 20 and 30 minutes one week after the burglary. (Tr., p. 167, Ls. 9-14; p. 168, Ls. 11-18.) A redacted video of the interview was played. (Tr., p. 171, L. 23; State’s Exhibit 4.) During the interview Detective Ogaard was able to observe Edmonson from “[a]pproximately 3 feet” and “from multiple angles.” (Tr., p. 174, Ls. 18-25.) Also during the interview Edmonson, when shown the captured photographs, changed her story from not entering the building to having entered the building, did not deny she was the person in those photographs, and wondered why Nakaishi was not in the photographs. (State’s Exhibit 4, at 4:33-6:32; see Tr., p. 176, L. 22 – p. 177, L. 4.) Applying the totality of the circumstances, the district court did not err by admitting the evidence.

On appeal Edmonson acknowledges that the quality of the captured photographs weighs in favor of admission of the identification testimony but argues the rest of the circumstances weigh against. (Appellant’s brief, p. 8.) Specifically, Edmonson argues that the state “presented no evidence” that her “appearance had changed between the time of the offense and the trial,” that Detective Ogaard was “barely more familiar” with her than the jury, and that Detective Ogaard did not know her sister, Portlock. (Appellant’s brief, pp. 8-9.¹) This argument fails to show an abuse of discretion.

¹ Edmonson’s brief contains the false factual assertion that the interview lasted 17 minutes. (Appellant’s brief, p. 8; see also Id. at p. 2.) Although Exhibit 4 is 17 minutes and a few seconds long, it also contains several redactions. (State’s Exhibit 4.) Thus the length of the edited video, with portions of the interview redacted, does not reflect the true time of the interview. Edmonson’s claim otherwise is meritless.

First, as Edmonson admits (with the qualifier of “barely”), Detective Ogaard was more familiar with Edmonson than was the jury. (Appellant’s brief, p. 8) He had the ability to observe her in an interview setting from up close and from a variety of angles within a week of the photographs being taken. The jury had the chance to see her only in the courtroom nine months later. Second, although there was no direct evidence Edmonson had changed her appearance such a factor went to weight. Certainly a change of appearance at some point after the photograph or video was taken is not a prerequisite to admissibility of identification testimony, and the jury was in a good position to weigh whether claimed differences in the photographs (dark hair and a lip stud) called the identification into doubt. Third, as noted by Edmonson, the quality of the captured pictures (which are infrared) weighs in favor of admissibility. Edmonson has failed to show that the district court abused its discretion when it concluded that the totality of the circumstances made Detective Ogaard’s identification testimony helpful to the jury.

The district court exercised its discretion when it overruled Edmonson’s objection and admitted Detective Ogaard’s identification testimony. The totality of the circumstances supports the district court’s determination that the testimony would be helpful to the jury. Edmonson has failed to show error by the district court.

D. Any Error Was Necessarily Harmless

If this Court determines that objected-to evidence was erroneously admitted, “the next issue is whether the error was harmless.” State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010). A harmless error “does not require reversal or a new trial.” State v. Hooper, 145 Idaho 139, 146, 176 P.3d 911, 918 (2007). “To establish harmless error, the State must ‘prove beyond a reasonable doubt that the error complained of did not contribute

to the verdict obtained.’” State v. Parker, 157 Idaho 132, 140, 334 P.3d 806, 814 (2014) (quoting State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)). ““In other words, the error is harmless if the Court finds that the result would be the same without the error.’” State v. Montgomery, 163 Idaho 40, 46, 408 P.3d 38, 44 (2017) (quoting State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)).

The record establishes that, even if the admission of Detective Ogaard’s identification testimony were erroneous, any error was harmless. In addition to Detective Ogaard’s identification testimony, two other officers, who had known Edmonson for approximately 18 years and also knew Portlock, also identified Edmonson as being the person in the captured photographs. (Tr., p. 218, L. 6 – p. 219, L. 6; p. 224, Ls. 9-13; p. 227, L. 14 – p. 228, L. 23; p. 230, Ls. 6-10.) Although Edmonson at trial denied being in the photographs (Tr., p. 265, Ls. 20-21), when confronted with the photographs during the interview a week after the burglary Edmonson changed her story (from not being inside R&R during the burglary), admitted her presence during the burglary, wondered why her admitted accomplice was not in the photographs, and refused to deny that she was the person in the photographs. (State’s Exhibit 4.) Moreover, even if Detective Ogaard’s identification testimony was not helpful, the jury was in a proper position to give it appropriate weight, even if that weight was none. The evidence that Edmonson was the burglar was overwhelming and any error in admitting Detective Ogaard’s identification testimony was harmless.

Finally, the evidence that Edmonson was involved in a burglary of R&R was overwhelming even if there were residual doubts as to whether Edmonson was the person in the photographs. Edmonson admitted participating in a burglary with Nakaishi (entering

R&R to take milk and creamer) and her only defense was that she thought Nakaishi, as a former employee, had implicit permission to “pop” the door, enter R&R late at night after business hours, and take milk and creamer. (State’s Exhibit 4.) Her admissions of participating in a burglary with Nakaishi were damning in and of themselves regardless of what weight (if any) the jury gave Detective Ogaard’s identification testimony. Because any error was harmless, Edmonson’s conviction should not be reversed.

CONCLUSION

The state respectfully requests this Court to affirm the district court’s judgment of conviction.

DATED this 14th day of November, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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