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

STATE OF WASHINGTON,	)	No. 62163-7-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
CHRISTOPHER C. PURDY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 9, 2009
	)	

Ellington, J. — Christopher Purdy appeals his convictions for attempting to elude a pursuing police vehicle, felony hit and run, driving while license suspended/revoked, and two counts of misdemeanor hit and run. Purdy contends the court erred by denying a mistrial and by allowing certain testimony. Pro se, he further contends the State presented insufficient evidence of identity and that his sentence exceeds the statutory maximum. We affirm, but remand for sentencing clarification.

BACKGROUND

In November 2007, Renton Police Sergeant Craig Sjolin attempted to stop a black Chevrolet Caprice with darkly tinted windows. Rather than pull over, the car accelerated and a chase ensued during which the Caprice collided with three other occupied vehicles.

The first collision was with a car driven by Paula Williams. Williams was stopped at a red light when the Caprice ran into her car head-on. Williams made brief eye contact with the driver, whom she described as a white male or very light-skinned black male, approximately 20 to 25 years old, with dark, curly hair or perhaps wearing a knit hat. Another witness described the driver as a white man with "fuzzy kind of an afro looking hair."[1]

After the Caprice hit Williams' vehicle, it backed up, nearly hitting Sergeant Sjolin on his police motorcycle. At that point, Sjolin could see the driver was male with a "large afro-style hairdo."[2] The Caprice then sped away with Sjolin in pursuit.

Moments later, the Caprice collided with the vehicles of Katherine Webster and Judith Krenzin. Neither Webster nor Krenzin saw the driver.

Sergeant Sjolin and additional patrol vehicles chased the Caprice until they eventually lost sight of it. Sjolin and Officer Leaverton, both on motorcycles, observed the characteristic smell of overheated brake, motor, and transmission oils and a blue haze in the air. Following the odor and haze, they soon located the Caprice in a parking lot at the Sunset View apartment complex. A K-9 unit called to the scene tracked the driver to building N within the neighboring Creston Point apartment complex.

Purdy's sister lived in unit N-304. Officers heard a commotion inside that apartment followed by a noise outside. Purdy was discovered outside the N building.

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[1] Report of Proceedings (RP) (July 28, 2008 Vol. 1) at 43.

[2] RP (July 24, 2008 Vol. 1) at 87.

He was winded, sweaty, and excited, and said he had run because he had a warrant.

Detective Ralph Hyett contacted apartment maintenance worker Justin Chase. Chase told one of the officers he had seen Purdy driving the Caprice earlier that day, picked Purdy out from a photomontage, and indicated he was certain of the identification because he and Purdy had gone to school together.

Chase was uncooperative at trial. Outside the jury's presence, Chase told the court he did not think it was "right" for him to testify against someone he knew.[3] The court ordered him to testify. Upon examination, Chase claimed he did not remember much about that day, but said he "could have" seen Purdy driving the Caprice.[4] The State recalled Detective Hyett to testify about Chase's prior identification of Purdy. Under ER 801(d)(1)(iii), the court ruled the detective could testify about Chase's earlier identification. The court also allowed the detective to repeat the questions he asked Chase to provide context for Chase's answers. Then, over Purdy's objection, the court admitted the photomontage.

Purdy testified next. He acknowledged the Caprice belonged to him, but stated he was not driving it on the day in question. Rather, he claimed he had sent his friend Donnell Neef on an errand in the car. On rebuttal, Neef denied he had been the driver or that he had even seen Purdy in several years.

Toward the end of the trial, Purdy moved for mistrial based upon witness misconduct. Purdy argued Paula Williams had violated the court's witness exclusion

[3] RP (July 28, 2008 Vol. 1) at 65.

[4] RP (July 28, 2008 Vol. 1) at 80.

order by observing a portion of Sergeant Sjolin's testimony. After reviewing Sjolin's and Williams' testimony, the court concluded the violation caused no prejudice and denied the motion.

The jury convicted on all charges.

DISCUSSION

Mistrial

Purdy contends the court's failure to declare a mistrial on the basis of witness misconduct violated his right to due process and a fair trial. We review the decision for abuse of discretion and will reverse only when there is a substantial likelihood that the error prompting the mistrial motion affected the jury's verdict.[5]

Before trial, the court granted the State's motion to exclude witnesses under Evidence Rule (ER) 615.[6] Two signs on the courtroom doors directed witnesses to remain outside the courtroom. Nevertheless, Williams entered the courtroom during Sergeant Sjolin's testimony and remained in the courtroom for 5 to 15 minutes, until a fire drill forced everyone to evacuate the building. Williams testified immediately after Sjolin. Neither the court nor counsel was aware that Williams had been in the courtroom until an officer brought it to their attention following Williams' testimony.

Purdy argued that Williams' opportunity to see him at the defense table before

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[5] State v. Rodriguez, 146 Wn.2d 260, 269–70, 45 P.3d 541 (2002); State v. Schapiro, 28 Wn. App. 860, 867, 626 P.2d 546 (1981) ("Questions concerning the exclusion of witnesses and the violation of that rule are within the broad discretion of the trial court and will not be disturbed, absent manifest abuse of discretion.").

[6] In relevant part, ER 615 provides, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

she testified and to hear Sjolin's description of the Caprice's driver as a "male driver

with a large afro style hairdo" tainted her subsequent in-court identification and was highly prejudicial, especially in light of her inability to identify Purdy on the day of the incident. The State pointed out that Williams' testimony about the driver was virtually identical to the description she gave in pretrial interviews with the prosecutor and defense counsel.

The court denied the mistrial motion after reviewing a transcript of the 15 minutes of Sjolin's testimony preceding the fire drill and comparing Williams' testimony to her pretrial interview:

> So, in any event, the Court does deny the motion for mistrial, although she did hear a portion of Officer Sjolin's testimony. Most of the testimony was not relevant to her testimony. The only thing that was arguably relevant was his description of the driver and her testimony at trial was consistent with her statements made to the defense and prosecutor prior to trial.
>
> She did not offer any elaboration from what she had provided in her pretrial statements to the attorneys or to the police officers. She would have seen the defendant with short hair during this time. So, certainly, that would not have given her more information about what he looked like during the time of the incident, if, indeed, she saw him or thought she had seen him.
>
> And, with respect to her identification of the defendant, I don't see that seeing him from the back and side gave her any advantage than what she had while she was sitting up here and watching him while she was testifying.
>
> So, although she certainly violated the court's rules, this was not precipitated by prosecutorial misconduct and it did not prejudice the defendant in any way. So the court does deny the motion for mistrial.[7]

[7] RP (July 29, 2008) at 28–29.

The purpose of ER 615 is to prevent witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty.[8] Because Williams' testimony was entirely consistent with her pretrial statements, there is no evidence that she tailored her testimony to align with that of Sergeant Sjolin. Further, Purdy conducted an extensive cross-examination of Williams to highlight shortcomings in her description as well as her inability to make an identification on the day of the incident. No prejudice resulted from Williams' violation of the court's order; the court properly denied Purdy's mistrial motion.

Hearsay

A statement is not hearsay when "[t]he declarant testifies at trial and is subject to cross examination concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving the person."[9] On this basis, the court allowed Detective Hyett to testify concerning Chase's earlier identification of Purdy as the person he saw driving the Caprice on the day of the incident. Purdy concedes that some testimony on this point was properly admitted. He contends, however, the court erred by allowing Detective Hyett to further testify that he asked Chase whether he was sure of his identification and that Chase's response was, "Yes, that he went to school with him."[10]

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[8] United States v. Vallie, 284 F.3d 917, 921 (8th Cir. 2002) (citing Geders v. United States, 425 U.S. 80, 87, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (construing the substantially similar Federal Rule of Evidence 615).

[9] ER 801(d)(1)(iii).

[10] RP (July 28, 2008 Vol. 2) at 17.

We review evidentiary rulings for abuse of discretion,[11] and find none here. First, the statement that Chase was certain of his identification because he knew Purdy from school is plainly part of his statement of identification. It is not hearsay under ER 801(d)(1)(iii). Further, even if the statement was not properly admitted, Purdy has shown no prejudice. He argues that "the trial turned on one issue; whether Mr. Purdy was the person driving the black Caprice that hit the three cars and then attempted to flee from the police."[12] But he does not challenge Hyett's testimony that Chase stated Purdy was driving the black Caprice earlier in the day. His challenge must therefore arise from the basis of Chase's ability to identify him—i.e., Chase knew him from school. But Purdy himself testified that Chase knew him and in fact had been in frequent contact with him on the day of and shortly before the incident. Finally, any conceivable prejudice is harmless in light of the fact that Chase's written statement that he "positively identified" Purdy as the person "who was driving his black Caprice when he left before the incident involving police" was admitted as part of the photomontage.[13]

Identification Evidence

In his statement of additional grounds for review, Purdy contends the State failed to prove he was the driving the Caprice when it repeatedly collided with other vehicles and attempted to elude the police.

In assessing the sufficiency of the evidence, we "'view the evidence in the light

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[11] State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009).

[12] Appellant's Br. at 20.

[13] Exhibit 11. Purdy raises no challenge to admission of the photomontage on appeal.

most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'"[14] A challenge to the sufficiency admits the truth of the State's evidence.[15]

Here, three witnesses, including Sergeant Sjolin, described the driver in similar terms.[16] Purdy does not dispute that such description fit his appearance at the time of the incidents. Additionally, Chase saw Purdy driving the Caprice just before the incident with police. And when the police located the Caprice in the parking lot, a K-9 unit tracked Purdy to the N-building, where he was found. A rational trier of fact could easily conclude from this evidence that Purdy was driving the Caprice at the time of the incidents.

Purdy also argues that certain unspecified identification evidence should have been suppressed as impermissibly suggestive. Though Purdy does not indicate which evidence should have been suppressed, he has attached a pretrial motion to suppress in-court identifications by Paula Williams and Lori Giometti, which the court denied. We infer from this that he assigns error to the court's decision.

The admissibility of evidence is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.[17] The court here did not

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[14] State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (2006) (quoting State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)).

[15] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[16] Two witnesses described a man with an afro-style hair style; one said he had curly hair or a fuzzy hat. Contrary to Purdy's argument, none of the witnesses said the driver was a black male, though one said the driver was "a white or light-skinned black man."

[17] State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

consider the in-court identification procedure to be inherently impermissibly suggestive, and concluded that the witnesses' opportunity to observe the driver was sufficient to allow the testimony.[18] Purdy has shown no abuse of discretion.

Excessive Sentence

Purdy also contends the court exceeded its authority by imposing a sentence in excess of the statutory maximum for felony hit and run. The court sentenced Purdy to 60 months on that count, the maximum sentence for the class C felony.[19] Purdy asserts the court also imposed 12 months community custody, though that is not clear from the record.[20] He argues the combined 72 month sentence exceeds the statutory maximum and contends we therefore must remand for resentencing.

Because of the ambiguity in the judgment and sentence, we are unable to review Purdy's claim and remand for clarification. If the court indeed intended to impose community custody in addition to Purdy's term of confinement, it must clarify that the total term of incarceration and community custody cannot exceed the statutory maximum.[21]

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[18] See State v. Vaughn, 101 Wn.2d 604, 611–12, 682 P.2d 878 (1984) (in the absence of unnecessarily suggestive procedures, identification evidence should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had first-hand knowledge).

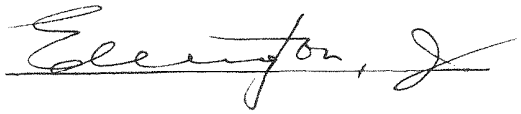
[19] RCW 46.52.020(4)(b); RCW 9A.20.021(1)(c).

[20] Purdy's felony judgment and sentence does not clearly impose any term of community custody. The form provides check boxes corresponding to various community custody statutes. Though none of these check boxes have been marked, the court indicated that conditions of community custody were set out in Appendix H. Our record contains no such appendix. See Clerk's Papers at 122–23.

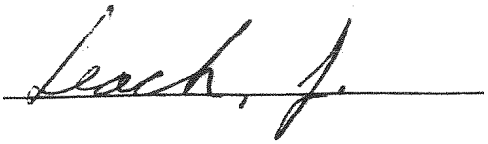
[21] See In re Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009) ("when a defendant is sentenced to a term of confinement and community custody that has the

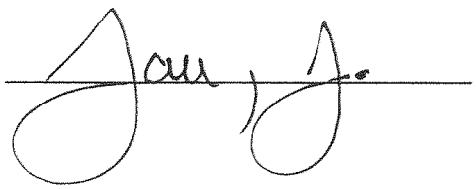
CONCLUSION

Purdy's conviction is affirmed. We remand only for clarification of his judgment and sentence.



WE CONCUR:





potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum").