**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| **STATE OF WASHINGTON,** | | **No. 27690-2-III** |
| | ) | |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **MIGUEL SOLIS, JR.,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |
| | ) | |

Sweeney, J. — This appeal follows convictions for attempted first degree murder, unlawful possession of a firearm, and unlawful imprisonment. The defendant assigns error to the trial judge's decision to admit statements of the victim identifying the defendant as his assailant. The statements were properly admitted pursuant to ER 801(d)(1)(iii). That rule permits a witness to relate eyewitness identification if the declarant testifies. The criteria for admission were met here. The defendant also challenges the sufficiency of the evidence to support the knowing restraint element of unlawful imprisonment. We conclude that the State produced sufficient evidence of that element. And we affirm.

FACTS

Miguel Solis Jr. and three companions invited Raul Hernandez-Vasquez to a party. Mr. Hernandez-Vasquez accepted the invitation even though he feared Mr. Solis.

Mr. Hernandez-Vasquez, Mr. Solis, and his three companions got into a car and began driving to the party. Mr. Solis called Mr. Hernandez-Vasquez a snitch and fired a gun out the car window while the car was moving. The car's driver then stopped at a remote rest area after 30 minutes, at about 2:30 a.m.

Mr. Solis got out of the car and motioned with the gun for Mr. Hernandez-Vasquez to get out of the car. Mr. Hernandez-Vasquez complied and stood next to the car. Mr. Solis then asked him where he wanted to die. Mr. Hernandez-Vasquez begged Mr. Solis not to kill him. Mr. Solis responded, "You're going to die, you rat snitch," and he shot Mr. Hernandez-Vasquez in the neck. Report of Proceedings (RP) at 605. Mr. Hernandez-Vasquez began to run from the car and was shot again in the shoulder. He managed to continue running and hours later found a wildlife service bunkhouse. A wildlife refuge manager took Mr. Hernandez-Vasquez to the Othello hospital.

Detective Dale Wagner went to the hospital and asked Mr. Hernandez-Vasquez who shot him. Mr. Hernandez-Vasquez told the detective that the assailant was a man he knew as Spiderman and that Spiderman lived in Moses Lake and had a brother named Jose. Mr. Hernandez-Vasquez was then airlifted to a hospital in Spokane. There, he viewed a photo lineup and identified a

photo of Mr. Solis as the man who shot him.

The State charged Mr. Solis with first degree kidnapping, attempted first degree murder, and unlawful possession of a firearm in the first degree. At trial, Detective Wagner testified about his conversation with Mr. Hernandez-Vasquez:

> Q. Yeah. What information did the victim give you regarding identification of the individuals who had allegedly assaulted him?
> A. Okay. At the time [Mr. Hernandez-Vasquez] had told me that he only knew these people as the names that he gave. One was Spiderman, one was Jose, and there was another individual who he didn't know.
> Q. Okay. Did he give you any further information on Spiderman, Jose or their relationship to each other?
> A. He stated that Spiderman and Jose were brothers, and they had another brother named Augustine that lived in Pasco. And he also stated that the two, Spiderman and Jose, resided in Moses Lake.

RP at 298. Mr. Solis objected to the testimony as hearsay, but the trial court admitted it as prior statements by a witness under ER 801(d)(1)(iii) (identification of a person). Mr. Hernandez-Vasquez testified at trial, but Mr. Solis did not cross-examine him.

A jury found Mr. Solis guilty of attempted first degree murder, unlawful possession of a firearm in the first degree, and unlawful imprisonment.

## DISCUSSION

### Hearsay

Mr. Solis contends that the rule relied on by the trial judge to admit the testimony of Deputy Wagner, ER 801(d)(1)(iii), applies only to statements made at lineups of one form or another. He relies on several cases

from federal and foreign jurisdictions to support his position.[1] And he urges that the trial court, then, erred by admitting what he concludes is hearsay.

We review a trial court's interpretation of a rule of evidence de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). We review the court's decision to admit evidence for abuse of discretion. *Id.* We rely on and give effect to an evidence rule's plain language and meaning if its text is clear on its face. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001).

The trial court concluded that Deputy Wagner's testimony was not hearsay. ER 801(d)(1)(iii) provides that

> [a] statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person.

The language does not limit the scope of this rule, as Mr. Solis suggests. It does not limit or specify the place where a statement of identification must be made. And we

---

[1] Mr. Solis relies on the following cases for support: *United States v. Brink*, 39 F.3d 419 (3d Cir. 1994); *United States v. Marchand*, 564 F.2d 983 (2d Cir. 1977); *United States v. Thomas*, 41 M.J. 732 (N.M. Ct. Crim. App. 1994); *United States v. Kaquatosh*, 242 F. Supp. 2d 562 (E.D. Wis. 2003); *Puryear v. State*, 810 So. 2d 901 (Fla. 2002); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988); *State v. Shaw*, 705 N.W.2d 620 (S.D. 2005); *State v. Hester*, 746 So. 2d 95 (La. Ct. App. 1999); *People v. Sykes*, 229 Mich. App. 254, 582 N.W.2d 197 (1998). These cases do not apply here because the courts therein either admitted statements made without viewing a lineup (*Brink*, *Marchand*), excluded the statement under a different rule (*Kaquatosh*), or interpreted the federal version of the rule differently than Washington courts interpret the state rule (*Sykes*, *Puryear*, *Hester*, *Shaw*, *Swafford*, *Thomas*).

will not read such a restriction into the rule. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). ER 801(d)(1)(iii) provides that all statements of identification of a person made after perceiving the person are not hearsay, period. *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (allowing statements identifying physical characteristics of a person perceived by a testifying witness); *State v. Grover*, 55 Wn. App. 252, 256, 777 P.2d 22 (1989) (admitting victim's statement identifying assailant by name made minutes after crime occurred and without any type of lineup); *United States v. Murphy*, 149 Fed. App'x 709, 711 (9th Cir. 2005) (reversing convictions because district court erroneously excluded alien's prior declaration to border inspector that a "fat Mexican man" put her in defendant's van to be smuggled into United States). It does not matter whether the witness makes the statement of identification after seeing the person commit the crime at the crime scene or after seeing the person at a lineup or showup. A statement identifying the culprit is a statement identifying the culprit. Robert H. Aronson, The Law of Evidence in Washington 801-28, 801–29 (4th ed. 2008).

Here, Mr. Hernandez-Vasquez saw Mr. Solis (a/k/a "Spiderman") at the crime scene. He saw Mr. Solis shoot him with a gun. Hours later, he identified "Spiderman" to Detective Wagner as the person who shot him. This was a statement of identification of a person "after perceiving the person." ER 801(d)(1)(iii). The rule requires that Mr. Hernandez-Vasquez also testify at trial, and he did so. The trial court, then, properly interpreted the rule and did not abuse its

discretion by admitting Detective Wagner's testimony as a prior statement by a witness.

Moreover, even were we to assume error, any error would not require reversal here. An error is prejudicial only if it is reasonably likely that the trial's outcome would have been different had the error not occurred. *State v. Everybodytalksabout,* 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). We would conclude that the admission of this testimony probably was harmless. *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007) (defining harmless error). Detective Wagner's testimony is not the only evidence linking Mr. Solis to these crimes. The State also produced evidence that Mr. Hernandez-Vasquez picked Mr. Solis's photograph out of a photo lineup and identified Mr. Solis as the shooter. Based on this evidence, it is not likely that the jury would have acquitted Mr. Solis had the court excluded Detective Wagner's testimony.

Substantial Evidence – Unlawful Imprisonment – "Knowing Restraint"

Mr. Solis contends that the State failed to produce evidence that showed he knowingly restrained Mr. Hernandez-Vasquez's movements. We review a challenge to the sufficiency of the evidence to support an element of a crime for substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). We view the evidence in the light most favorable to the State and afford the State all reasonable inferences. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Saunders*, 132 Wn. App. 592, 600, 132 P.3d 743 (2006).

The State here had to show that Mr.

Solis "knowingly restrain[ed] the movements of [Mr. Hernandez-Vasquez] in a manner that substantially interfere[d] with [his] liberty[, that] was without legal authority and [that] was without [his] consent or accomplished by physical force, intimidation, or deception." Clerk's Papers (CP) at 224 (unchallenged jury instruction 37). Sufficient evidence of knowing restraint exists where a defendant threatens a victim with death if the victim tries to escape and suggests that the defendant has access to guns. *State v. Lansdowne*, 111 Wn. App. 882, 889, 46 P.3d 836 (2002).

Here, Mr. Solis not only made threatening statements to Mr. Hernandez-Vasquez, he also brandished a gun. Mr. Hernandez-Vasquez was riding in a car with Mr. Solis and his three companions. Mr. Solis called Mr. Hernandez-Vasquez a snitch and fired his gun out the window. He then ordered Mr. Hernandez-Vasquez out of the car at gunpoint while they were stopped at a remote rest area at 2:30 a.m. And he asked him where he wanted to die. A jury could easily infer from this that Mr. Solis intended to restrict Mr. Hernandez-Vasquez's movements by intimidation and without authority. The evidence is, then, sufficient proof of knowing restraint. *See id*.

Mr. Solis argues, nonetheless, that his acts cannot support the knowing restraint element of unlawful imprisonment because they were incidental to the crime of attempted first degree murder. We disagree. Unlawful imprisonment is not a specific element of premeditated first degree murder. RCW 9A.32.030(1)(a); CP at 204 (unchallenged jury instruction 17). The State did not have to

show that Mr. Solis restrained Mr. Hernandez-Vasquez to prove that he attempted to murder him with premeditated intent. The acts, then, can and do support Mr. Solis's conviction for unlawful imprisonment.

Statement of Additional Grounds

Mr. Solis contends he was denied the right to view original witness statements to police, to interview all witnesses, and to cross-examine them in violation of his right of confrontation. He argues that these violations should be punished by dismissing this case under CrR 8.3(b) (dismissal on court's motion)[2] or CrR 4.7(h)(7)(i) (sanctions for discovery violations).[3]

Except for Mr. Hernandez-Vasquez, Mr. Solis does not identify which witnesses he was unable to confront. The record does not show that Mr. Solis was precluded from cross-examining any witness. It also does not show that the trial court was made aware of the alleged discovery errors. CrR 4.7(h)(7)(i) and CrR 8.3(b) then do not apply. And we find no error.

Mr. Solis next contends he did not have enough time to prepare for cross-

---

[2] "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b).

[3] "[I]f at any time during the course of the proceedings *it is brought to the attention of the court* that a party has failed to comply with an applicable discovery rule . . . the court may . . . dismiss the action." CrR 4.7(h)(7)(i) (emphasis added).

examination. He argues that the State made only Mr. Hernandez-Vasquez available for interview but not until September 22, 2008. His trial began on October 16, 2008. And, even assuming Mr. Hernandez-Vasquez was not available until September 22, twenty-four days was a sufficient amount of time to interview Mr. Hernandez-Vasquez and to prepare to cross-examine him. *State v. Firven*, 22 Wn. App. 703, 706, 591 P.2d 869 (1979) (concluding 15 hours is enough time to prepare for cross-examination). Moreover, the record here does not indicate that the State failed to make its other witnesses available for interview by the defense. Mr. Solis's contention, therefore, lacks merit.

Mr. Solis further suggests that the State failed to establish his guilt because it did not produce evidence of gunshot residue, fingerprints, footprints, or hair on the guns, on Mr. Solis, or in his car or house. "Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient." *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). And Mr. Solis does not contend that the State's circumstantial evidence was insufficient to support his convictions. We, therefore, defer to the jury's findings of guilt.

Mr. Solis also alleges Mr. Hernandez-Vasquez told the court that Mr. Solis never shot him. He says Mr. Hernandez-Vasquez's statement undermines his convictions. The record, however, does not support this allegation. Even if it did, we defer to the jury on issues of conflicting testimony. *State v.*

*Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). And the jury here found that Mr. Solis shot Mr. Hernandez-Vasquez. *See* CP at 200, 230.

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_______________________________
Sweeney, J.

WE CONCUR:

_______________________________
Brown, J.

_______________________________
Korsmo, J.