IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEROME C. PENDER, Appellant.	No. 38012-9-II UNPUBLISHED OPINION

Hunt, J. — Jerome C. Pender appeals his jury conviction for attempted first degree murder with a firearm sentencing enhancement. He argues that the trial court erred when it refused to allow him to present admissible evidence in his defense. The State concedes that the trial court erred when it excluded the challenged evidence under *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988), but it argues that we can affirm despite this error because the trial court could have excluded the evidence as confusing and misleading under ER 401 and 403. In a pro se Statement of Additional Grounds for Review (SAG),[1] Pender further argues that his conviction cannot stand because the charging document sets out both his name and the plaintiff's designations in capital letters. We affirm.

[1] RAP 10.10.

FACTS

I. Background

A. Previous Assault and Threats against Victim

In 2005, victim Marcus Allen Reed was in a relationship with Ashley Babbs. On December 22, 2005, after Reed had ended their relationship, Babbs broke into Reed's brother's apartment, assaulted Reed with pepper spray, and scratched her initials into Reed's car. The police arrested Babbs, and the State filed charges against her. Before her trial, Babbs called Reed repeatedly and threatened to "have some niggers fuck [him] up," if he "[went] to court on her." In January 2007, Babbs was convicted of attempted second degree assault—domestic violence. The court sentenced her on May 30, 2007.

B. Attempted Murder

Just before 7:00 pm, on May 14, 2007, Reed was walking to the work release center on Lakeridge Way in Olympia, when he noticed a tall man standing across the street, wearing a hood, and looking away from Reed. As Reed started to walk down a driveway leading to the work release center, he heard three gunshots, felt something hit him, and ran toward the work release center. As he ran, Reed glanced back and saw the man he had just seen across the street standing nearby, holding something out in front of him with both hands. After hopping a fence and running across a building's roof, Reed ran into the work release office; the staff called 911.

Despite having been shot in the arm and the anterior chest, Reed survived. Surgeons recovered a .38 caliber bullet from Reed's back.[2] This type of bullet could have been fired from a

[2] Although the bullet struck Reed in the anterior chest, it failed to penetrate his chest and travelled around his chest between his skin and the muscle of his chest wall, coming to rest in his back.

.357 Magnum revolver.

Later that same day, while still at the hospital, Reed spoke to Thurston County Sheriff's Office Detective David Haller. Reed initially identified the shooter as white or of a lighter-skinned race.[3]

C. Eyewitnesses

1. Dr. Tate Viehweg

Meanwhile, sometime between 6:50 pm and 7:00 pm, on May 14, Army surgeon Dr. Tate Viehweg was driving southwest on Lakeridge Drive when he heard some gunshots and saw two men running: One man (Reed) ran across a parking lot toward the courthouse; the other man ran along a building and then turned onto Lakeridge Drive.

Viehweg made eye contact with the man who had turned onto Lakeridge Drive as the man ran past. The man was an African-American male in his early 20s, who was six feet to six foot two inches tall and weighed between 175 and 185 pounds. When Viehweg first saw him, the man was wearing a hooded sweatshirt. But, as he ran, the man removed the sweatshirt and tucked it under his arm; there appeared to be something in the sweatshirt's pocket. The man ran across the intersection into a parking lot located between two apartment buildings.

Deciding to follow the man, Viehweg watched him enter a gray four-door car bearing a license plate with the number 924-LYH. Viehweg followed the gray car for a while, but he lost

[3] Reed testified that he told Haller that the shooter was white or "[o]f a lighter gender." From the context of this statement, it is apparent that Reed was attempting to say that he told Haller that the shooter was light skinned or of a lighter-skinned race.

sight of it when it started to go faster than Viehweg thought was safe. Viehweg then turned his car around, returned to where he had heard the gunshots, and contacted a law enforcement officer to report what he (Viehweg) had seen.

2. Lauri Nolan

Lauri Nolan lived in an apartment building across the street from where the shooting occurred. Shortly before 7:00 pm on May 14, she was on the telephone with a friend when she heard several gunshots and then saw a tall, black male with short braided hair and a black sweatshirt tucked under his right arm running up the driveway toward her apartment complex. She lost sight of the man after he ran "off the driveway."

Officers later showed Nolan two photomontages, each containing a different photograph of Pender. Nolan did not identify anyone in the first photomontage. After Nolan failed to select anyone from the first photomontage, Haller determined that Pender's hairstyle in the photograph in the first photomontage was significantly different from his hairstyle on the night of the shooting. Haller then constructed the second photomontage using a photograph of Pender that Hamilton had taken on the night of the shooting. Nolan identified Pender in the second photomontage containing the more current photograph.

D. Stop of Pender's Car; Pender's Statement

Around 9:00 pm, on the night of the shooting, Pierce County officers located and stopped a gray Mercury Marquis with the license plate number 924-LYH. Pender, who was now dating Babbs, was driving the car. Officers later learned that Babbs was the car's registered owner.

Thurston County Sheriff's Detective Steve Hamilton had been investigating the Olympia

shooting[4] when Pierce County officers contacted him and told him that they had located the shooter's car. Hamilton drove to Pierce County and, after advising Pender of his *Miranda*[5] rights, interviewed him. At the time of this interview, Pender's hair was braided in cornrows.

Pender told Hamilton that (1) he (Pender) had had the Mercury Marquis all day; (2) he had worked all day in Fife; and (3) when he left work, he had driven to his mother's house in Lakewood, where he spent several hours. He denied having been in Olympia that day.

Pender allowed officers to search the Mercury Marquis, but they did not find anything related to the shooting. Because Pender did not fit the vague witness descriptions that Hamilton had at that time[6] and because Hamilton did not find in the car any evidence related to the shooting, Hamilton took some photographs, obtained contact information, and released Pender.

E. Additional Investigation and Search

Detective Haller later learned from Pender's parents that Pender (1) was dating Babbs and sometimes stayed at her home; (2) frequently drove Babbs's car; (3) had a concealed weapons permit[7]; and (4) owned a .357 Magnum firearm. Officers obtained a search warrant for Babbs's

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[4] Hamilton's supervisor had sent him to the crime scene at 8:00 pm. Hamilton characterized the situation when he arrived as "very hectic" and stated that he was not able to gather much information before leaving for Pierce County because the investigation had just started.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] Pender did not fit the general description of the shooter that two women, Annalisa Strago and Carrie Johnsons, had given to Hamilton. Strago and Johnson did not testify at either trial, and there is nothing in the record indicating how they had described the man they had seen at the time of the shooting. But it appears that Hamilton was aware that various witnesses had described the shooter as a "black male" and that he had some information about the man's skin tone.

[7] The permit was issued on March 13, 2007.

residence. Executing the search warrant, they found Babbs's Mercury Marquis in the home's garage and a holster for a .357 firearm under the bed; they never located the firearm.

II. Procedure

The State charged Pender with one count of attempted first degree murder, with a firearm sentencing enhancement. Pender moved to suppress the evidence found during the search of Babbs's residence. The trial court denied the motion to suppress the holster.[8] The case went to a jury trial. Pender's first trial ended in a hung jury, and the trial court declared a mistrial.

A. First Trial

During the first trial, State's witness Brandon Franklin testified that at approximately 6:00 pm on May 14, 2007, he was on his way to the Olympia work release building to attend a class when he saw two young men, whom he believed to be Hispanic, sitting on some steps nearby. At some point after Franklin's class started, he and his classmates heard several gunshots. Franklin saw a man jump onto a nearby trailer and over a fence. Reed then appeared in the work release center and informed the officers present that he had been shot. Franklin later identified Pender from a photomontage as one of the men he (Franklin) had seen outside on the Olympia work release steps that evening.

Defense witness Brianna Barker[9] testified that at 5:45 pm on the day of the shooting Pender had picked up a child from the Tacoma daycare center where she worked. In closing,

[8] Pender does not challenge this ruling on appeal.

[9] When Barker testified at the second trial, her last name was Jones. To avoid confusion, we refer to her as Barker throughout this opinion.

defense counsel argued that Franklin's assertion—that he had seen Pender in Olympia around 6:00 pm on May 14—demonstrated that witness identifications could be flawed because Barker's testimony clearly established that Pender had been in Tacoma at 5:45 pm and, therefore, Franklin could not have seen Pender in Olympia at 6:00 pm.

B. Second Trial

1. State's Evidence

The State did not call Franklin as a witness during the second trial. In addition to the facts set out above, the State's witnesses testified about (1) the identity and description of the person they had seen running from the shooting scene, (2) the photomontage process, and (3) how long it takes to drive from Tacoma to Olympia. Pender's former jail cellmate also testified that Pender had confessed to the shooting.

a. Identifications

Viehweg described the man he had seen running from the shooting scene, which general description Pender fit.[10] But neither party asked Viehweg whether the person he had seen running from the scene was in the courtroom during the trial. There was also no evidence that Viehweg had ever identified a photograph of Pender as the person he (Viehweg) had seen the night of the shooting.

As noted above, Nolan identified Pender's photograph in the second of two photomontages that Haller showed her shortly after the shooting. Each montage was a single

[10] Haller testified that Pender was 23 at the time of the shooting and that Pender was about six feet tall and weighed about 175 pounds.

sheet containing photographs of six different men; Pender was the only one included in both photomontages.

b. Timing

In anticipation of Barker's testimony, Haller testified that (1) it would have taken Pender five minutes to pick up a child at the Tacoma daycare and to take the child home; and (2) it generally takes about 35 minutes to travel from the child's home to the shooting location, depending on traffic. Haller did not testify about the specific traffic conditions around the time of the shooting.

c. Jailhouse confession

Norman Field[11] admitted that he had a substantial criminal history and that he had lied to the police on at least one occasion. He testified that while sharing a jail cell with Pender, Pender had said that "he [Pender] had shot an individual that was here in the work release for his girlfriend." Ex. 63 at 154-56. Field testified that Pender said he had shot the individual at his (Pender's) girlfriend's request because he loved her.

[11] Field testified at the first trial, but he was unavailable to testify at the second trial. The trial court allowed the parties to read Field's prior testimony into the record with certain redactions.

2. Defense Evidence

Pender's defense was that he was not in Olympia when the shooting occurred and that the witnesses who identified him were mistaken. To support this defense, Pender presented, (1) Barker's testimony; (2) Alisha Butler's and Jodi Lorenz's testimony indicating that they had seen a Caucasian or Hispanic man running from the shooting scene;[12] and (3) expert testimony regarding the fallibility of expert witness testimony and the risk of misidentification when the identification process used involves the type of photomontage procedures used in this case.

a. Admissibility of Franklin's testimony

On the second day of trial, the State asked the trial court to preclude Pender from presenting both Franklin's and Barker's testimonies. The State asserted that Pender had indicated in opening statement[13] that he intended to call (1) Franklin to testify that he had seen Pender in Olympia at 6:00 pm on the day of the shooting; and (2) Barker to testify that Pender was in Tacoma at 5:45 pm picking up a child from daycare, which demonstrated that Pender could not have possibly been in Olympia at 6:00 pm. The State argued that (1) Pender was improperly "calling a witness merely to impeach that witness's testimony," and that the proposed "evidence [was] immaterial and irrelevant." Report of Proceedings (7/1/2008) at 87.

Defense counsel argued that Pender was not trying to introduce impeachment testimony

[12] In its response, the State asserts that the record shows that when Butler and Lorenz saw the running man they were not in the same place Viehweg was when he saw the man who ran past his car and, therefore, Butler and Lorenz did not see the same person Viehweg saw. Because the parties have not submitted any trial exhibits that would shed light on where Butler and Lorenz were in relation to where the shooting occurred, we cannot determine whether the State's characterization of the record is correct.

[13] The opening statements are not part of the record on appeal. *See* RAP 9.2(b).

but, rather, to demonstrate that eyewitness identification was not necessarily accurate. But the trial court agreed with the State that Pender was attempting to "set up a dichotomy in [his] own case," and ruled that, under *Hancock*, Pender could not present both Barker's and Franklin's testimony. Pender then elected to call Barker as a witness instead of Franklin.

b. Eyewitnesses

Barker, the site supervisor at the Tacoma Boys and Girls Club, testified that Pender frequently came to the club's daycare facility to drop off or to pick up Babbs's daughter. The daycare log from May 14, 2007, showed that Pender had picked up a child from the daycare at 5:45 pm. Barker verified that the signature on the log was Pender's.

Butler testified that at the time of the shooting, she was in Olympia to receive a "diversity award," she had heard the gunshots, and had seen the man running away from the Thurston County courthouse when she went outside because she was feeling ill. Although she testified that she had told an officer that she thought the running man was Caucasian, she acknowledged that (1) she had told the officer she could have seen something light on the man's hood rather than a light complexion; and (2) she had seen the man for only a "split second."

Lorenz testified that she was driving by the Thurston County courthouse when she heard at least four gunshots.[14] After closing her car window, she looked toward the courthouse and then turned to see a slender young man wearing a white t-shirt and jeans run across the street behind her stopped car. She testified that (1) she believed the man was five feet ten or eleven inches tall; (2) he was white, Hispanic, "or something"; and (3) he had "kind of wavy hair,

[14] Lorenz did not testify about what time it was when she heard the gunfire.

longish, wavy hair."

c. Dr. Geoffrey Loftus

Dr. Geoffrey Loftus testified as a human perception, memory, and witness identification expert. He described how human memory works, how our memories are constructed from fragments of sensory information, and how memories can change over time as a result of inferences we make and additional "post-event" information we obtain. He cautioned that if a witness receives incorrect post-event information, that witness can incorporate this incorrect information into his or her memories.

In addition, Loftus testified about photomontage identification procedures in general and criticized the procedure Haller used with Nolan. Loftus described several flaws in Haller's procedure that may have placed undue emphasis on Pender's photograph and influenced Nolan's memory and her ability to provide a correct identification. Loftus also testified that studies have shown a particularly high rate of false identification related to the type of photomontage procedures used in this case.

3. Closing Argument and Verdict

Defense counsel's closing argument focused on the reliability of the witnesses' observations, possible problems with Nolan's photomontage identification, and conflicting witness identifications. Counsel also emphasized that the jury had heard no evidence about the traffic conditions between Tacoma and Olympia just before the shooting.

The jury found Pender guilty of attempted first degree murder, while armed with a firearm. Pender appeals.

ANALYSIS

I. Franklin's Testimony not Admissible

Pender argues that the trial court erred when it ruled that Franklin's testimony was inadmissible under *Hancock*. He asserts that this ruling prevented presenting his defense because it precluded the jury from hearing factual evidence that the shooting had occurred at 6:00 pm rather than 7:00 pm. The State concedes that the trial court erred when it excluded Franklin's testimony based on *Hancock*, but it argues that we can affirm the trial court's decision on another ground because Franklin's testimony was inadmissible under ER 401 and ER 403. We agree.

We agree that the trial court erred when it found Franklin's testimony inadmissible under *Hancock*. But we hold that the trial court could have alternatively excluded this evidence as irrelevant to whether the other eyewitness identifications were faulty. We further hold that even if Pender had argued below that this testimony was admissible to show the shooting occurred at 6:00 pm rather than 7:00 pm, Franklin's testimony was not relevant to that issue. Because the trial court could have excluded this evidence on other grounds, there is no reversible error.

A. Standard of Review

We review the trial court's evidentiary rulings for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). An abuse of discretion occurs when the trial court acts in a way that is manifestly unreasonable or exercises its discretion on untenable grounds or for untenable reasons. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)).

A defendant in a criminal case has a constitutional right to present relevant, admissible

evidence in his defense. ER 104; *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (citing *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990)), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Because an error in excluding otherwise relevant, admissible evidence is an error of constitutional magnitude, we evaluate whether any such error is harmless under the constitutional harmless error test.[15] *See Austin*, 59 Wn. App. at 194. Additionally, we may affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)).

B. *Hancock* Inapplicable

In *Hancock*, our Supreme Court held that a party cannot call a witness for the primary purpose of later impeaching that witness's testimony with otherwise inadmissible hearsay statements. *State v. Hancock*, 109 Wn.2d 760, 762-64, 748 P.2d 611 (1988). Here, the evidence contradicting Franklin's potential testimony—that he had seen Pender in Olympia at 6:00 pm on the night of the shooting—was Barker's testimony that Pender had been in Tacoma at 5:45 pm that evening. If the jury believed Barker's testimony, Pender's presence in Olympia at 6:00 pm was impossible. Thus, Barker's testimony is the relevant impeaching testimony; but because this testimony was neither hearsay nor inadmissible, *Hancock* could not support the trial court's exclusion of Franklin's testimony. That the trial court erred in relying on *Hancock*, however,

[15] A constitutional evidentiary error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error; the State bears the burden of establishing harmless error in this context. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

does not end our inquiry.

C. Other Grounds to Affirm

The State argues that alternatively the trial court could have properly excluded Franklin's testimony as irrelevant under ER 401[16] and as confusing and/or misleading under ER 403.[17] We agree that the excluded evidence was not relevant given the argument Pender presented to the trial court.

At the second trial, Pender argued that he wanted to introduce Franklin's and Barker's testimonies to establish that Franklin's identification of Pender was faulty and thereby demonstrate to the jury that eyewitness identifications are not always accurate. But one witness's faulty identification is simply not relevant to whether another witness's identification was accurate.[18]

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[16] ER 401 provides: "'Relevant evidence' means 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."

[17] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[18] We note that Pender does not argue on appeal and did not argue below that Franklin's testimony was relevant to whether Franklin and the other witnesses had mistaken him for another individual that they had all seen at the time of the shooting. Instead, Pender's argument, both here and below, is that Franklin's testimony would establish, in general, that witness identifications are not always accurate.

Furthermore, to the extent Franklin's testimony could have served as an example of faulty identification, this evidence was, at best, cumulative, in light of Loftus's testimony on Pender's behalf. Loftus focused on problems and risks of eyewitness identifications in general and the photomontage in particular. Thus, even without Franklin's testimony, the jury heard evidence that eyewitness misidentifications are not unusual; it also heard about several factors that could have affected Nolan's identification, causing her to misidentify Pender as the man she saw on the

Because the trial court could have excluded Franklin's testimony as irrelevant to the legal theory Pender presented, the trial court's error in relying on *Hancock* does not require reversal. Accordingly, we affirm on these alternative grounds.

D. New Argument

Pender argues for the first time on appeal that the trial court should have allowed Franklin's testimony because it established "that the shooting might actually have occurred at 6 PM" and, in conjunction with Barker's testimony, established that Pender could not have been the shooter. But Pender did not present this argument to the trial court when he argued for the admission of Franklin's testimony at the second trial. Instead, he stated only that he wanted to present Franklin's testimony to demonstrate that eyewitness identification can be faulty; thus, the trial court never had the opportunity to evaluate the proposed evidence on this basis. Accordingly, Pender's offer of proof below was inadequate to preserve this new argument. *See* ER 103(a)(2); *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991) ("It is the duty of a party offering evidence 'to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling.'" (quoting *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978)).[19]

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night of the shooting.

[19] Even if Pender had presented this argument to the trial court, we could still affirm the trial court's decision on another ground. At the first trial, Franklin did not testify that the shooting occurred at 6:00 pm. Although Franklin testified that he *saw* someone he believed to be Pender in the area around 6:00 pm on the night of the shooting, Franklin did not testify that the shooting *occurred* at that time. At most, Franklin's earlier testimony revealed that the shooting had occurred some unspecified time after Franklin's work release class had started. Accordingly,

II. Statement of Additional Grounds for Review

In his SAG, Pender argues that his conviction cannot stand because the charging document sets out his name and the plaintiff's designation in capital letters and no such entities exist. Pender's SAG argument is frivolous. *See Russell v. United States*, 969 F. Supp. 24, 25 (W.D. Mich. 1997). Therefore, we do not further consider it.

We affirm.

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

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Hunt, J.

I concur:

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Penoyar, A.C.J.

Franklin's prior testimony did not establish that he had any evidence that was relevant to when the shooting itself occurred, and the trial court could have refused to allow the testimony on this basis.

Moreover, every other witness who heard or saw the shooting testified that the shooting occurred around 7:00 pm. Given these facts, no reasonable jury would have believed that the shooting occurred at 6:00 pm, and any error in excluding this evidence was harmless beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425-26.

Quinn-Brintnall, J. (dissenting) — I agree with the majority's holding that the trial court erred when it found Brandon Franklin's testimony inadmissible under *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988). In my opinion, a trial court's evidentiary ruling that rests on an erroneous application of law *necessarily* establishes an error under the more lenient abuse of discretion standard applicable to evidentiary matters. *See State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); *see also State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994) (we review evidentiary rulings for an abuse of discretion), *cert. denied*, 514 U.S. 1129 (1995). I cannot agree that, had the trial court properly applied the correct legal principles to the evidence that Jerome C. Pender presented, it would have exercised its discretion to exclude such evidence. Accordingly, I would reverse and remand for a new trial.

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QUINN-BRINTNALL, J.