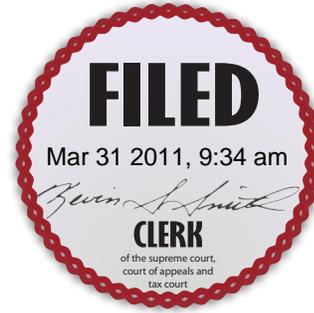


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TIMOTHY W. ROBERTSON, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 27A02-1008-CR-929

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APPEAL FROM THE GRANT SUPERIOR COURT  
The Honorable Jeffrey D. Todd, Judge  
Cause No. 27D01-0803-FB-22

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**March 31, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Timothy W. Robertson appeals his convictions for Armed Robbery, a class B felony,<sup>1</sup> and Battery, a class B misdemeanor,<sup>2</sup> and the trial court's finding that he is a Habitual Offender.<sup>3</sup> Specifically, Robertson argues that the trial court erred in allowing a police officer and a probation officer to give their opinions that Robertson was the robber in a surveillance video. Concluding that this evidence was admissible, we affirm the judgment of the trial court.

### FACTS

At approximately 7:05 p.m. on February 28, 2008, Robertson entered Michael's Dairy Barn in Marion, brandished a screwdriver, and took money from the clerk. Fredericka Small approached the Dairy Barn as Robertson was leaving. When the clerk told Small that the store had been robbed by the man who had just left, Small followed the man around the store and saw him get into a minivan. Small wrote down a partial license plate number from the minivan, took it back to the store, and gave it to Marion Police Department Lieutenant Justin Faw, who was investigating the robbery.

When Lieutenant Faw learned the store had surveillance cameras, he asked Detective Mark Stefanatos to come to the store and review the surveillance video. Lieutenant Faw believed Detective Stefanatos knew more criminals than any other detective in the department and might be able to identify the robber in the surveillance

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<sup>1</sup> Ind. Code § 35-42-5-1(1).

<sup>2</sup> I.C. § 35-42-2-1(a).

<sup>3</sup> Ind. Code § 35-50-2-8(a).

video. Upon reviewing the video, Detective Stefanatos immediately recognized the man in the video as Robertson because Detective Stefanatos was personally acquainted with him.

Lieutenant Faw created a photo array and showed it to the Dairy Barn clerk. The clerk identified two of the photographs as possibly being the person who robbed her. One of those photographs was of Robertson. In the meantime, the minivan that Small had seen in the Dairy Barn parking lot was found abandoned in an apartment complex. The minivan was registered to Dawn Jones, Robertson's long-time girlfriend. Jones told police officers that Robertson left in the minivan to purchase Tylenol for her that morning and never returned.

On March 3, 2008, the State charged Robertson with armed robbery, a class B felony, battery, a class B misdemeanor, and with being a habitual offender. Robertson's jury trial commenced on June 28, 2010. Over Robertson's objection, the trial court allowed Detective Stefanatos to testify that, in his opinion, Robertson was the robber in the surveillance video. The trial court also allowed Grant County Probation Officer Thomas Lawson to testify that, in his opinion, Robertson was the robber in the surveillance video. Lawson had met with Robertson on four occasions over a period of two to three months.

A jury convicted Robertson as charged. Robertson admitted that he was a habitual offender. The trial court sentenced him to a total of fifty years. Robertson now appeals.

#### DISCUSSION AND DECISION

## I. Standard of Review

Robertson argues that the trial court erred in admitting evidence. Specifically, Robertson contends that the lay opinion testimony of Detective Stefanatos and Probation Officer Lawson identifying him as the robber in the surveillance videotape was improperly admitted.

The admission of evidence is within the sound discretion of the trial court. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002). The trial court's decision is given great deference and will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. Id. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. Id.

## II. Evidence Rule 701

Indiana Evidence Rule 701, which governs opinion testimony by lay witnesses, provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

This Court previously discussed the admissibility of lay opinion testimony by a person who is not an eyewitness to the crime in Gibson v. State, 709 N.E.2d 11 (Ind. Ct. App. 1999). There, this Court applied the Seventh Circuit's interpretation of Federal Evidence Rule 701, and held that where identification of the robber was at issue, and the

robbery victim was able to identify Gibson as looking like the robber, even though he was unable to do so with absolute certainty, the trial court was correct in determining that the lay opinion testimony of the investigator would be helpful to the jury. Gibson, 709 N.E.2d at 15.

In U.S. v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991), the Seventh Circuit specifically noted that under Federal Evidence Rule 701, a lay witness may testify regarding his or her opinion of the identity of the person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to identify the defendant correctly from the photograph than the jury. For example, because the police officers in Stormer were familiar with the defendant and his appearance, they were in a better position to identify the person on the surveillance video tape than the jury. Id.

Similarly, in U.S. v. Jackson, 688 F.2d 1121, 1125 (7th Cir. 1982), the Seventh Circuit upheld a district court's decision to allow a lay witness to give her opinion about the identity of a robber depicted in bank surveillance photographs. The witness had seen the defendant, whom she identified as the person in the photographs, only once at an office Christmas party. The Seventh Circuit stated that the lay witness's testimony helped the jury because she could compare the identity of the person in the photographs with everyone she had met, whereas the jury was limited to comparing the person in the photographs with the defendant. Id.

Here, as in Gibson, the identification of the robber was at issue, and the clerk was unable to identify the robber with absolute certainty. In addition, Detective Stefanatos

and Lawson were both personally acquainted with Robertson, and were more likely to identify him correctly from the video than the jury. Accordingly, the trial court properly determined that the opinion testimony of these witnesses would be helpful to the jury, and Robertson's argument fails.

### III. Evidence Rule 403

Nevertheless, Robertson argues that even if the evidence was admissible pursuant to Rule 701, it should have been excluded as prejudicial pursuant to the balancing test under Evidence Rule 403 because the danger of unfair prejudice substantially outweighed its probative value. Specifically, Robertson contends that testimony from a police officer and a probation officer who have both had prior contact with Robertson might lead the jury to infer that Robertson "had problems with the law in the past." Appellant's Br. p. 20.

Evidence which may otherwise be admissible may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Evid. R. 403. The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission and its ruling will be reversed only for an abuse of discretion. Larry v. State, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999).

Here, where the identity of the robber was at issue, the identification of Robertson as the robber in the video was highly probative. Further, although a detective and a

probation officer identified Robertson in the video, the State correctly points out that no connection was ever drawn between their work and their basis for knowing Robertson. Under these circumstances, the probative value of the evidence substantially outweighs the potential for prejudice, and we find no error. As a result, we conclude that the trial court did not err in admitting this evidence.<sup>4</sup>

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.

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<sup>4</sup> Robertson also argues that if the armed robbery conviction is reversed, the habitual offender determination must be reversed as well. He is correct that if an appeal of the underlying felony is successful, the habitual offender determination must also be reversed. See Rogers v. State, 422 N.E.2d 1211, 1215 (Ind. 1981). This is because without the former, the latter cannot stand. Id. Here, however, the appeal of the underlying felony was not successful. We therefore do not reverse the habitual offender determination.