Supreme Court No. 92875-4

(Court of Appeals No. 72454-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

TRAVIS LEAR,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Constitution

Statutes

Rules

Other Authorities

Other Courts

A. IDENTITY OF PETITIONER

Travis Lear, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Lear appealed from his King County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

1. To meet due process requirements, an identification procedure must not be impermissibly suggestive, or it may give rise to a substantial likelihood of irreparable misidentification. Where detectives made suggestive comments to the alleged victim's father before showing a single photograph, did the suggestiveness of the encounter taint later identification procedures, denying Mr. Lear due process, and should review thus be granted pursuant to RAP 13.4(b)(1) and (2)?

2. A criminal statute is unconstitutionally vague in violation of the due process clauses of the Fourteenth Amendment and Article I, section 3, when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. Where a prosecutor has discretion to file a predatory offense special allegation, but the statute does not provide any standards or guidelines to inform the exercise of that discretion, is the

special allegation statute unconstitutionally vague, and should review be granted pursuant to RAP 13.4(b)(1), (2), and (3)?

3. A criminal statute violates the equal protection clauses of the Fourteenth Amendment and Article I, section 12 when it authorizes unfettered prosecutorial charging discretion with no means to protect against disparate treatment. Where a prosecutor has discretion to file a predatory offense special allegation, but the statute does not provide any limits to the exercise of that discretion, does the special allegation statute violate equal protection, and should review be granted pursuant to RAP 13.4(b)(1), (2), and (3)?

D. STATEMENT OF THE CASE

1. Factual Background.

On January 30, 2013, P.K., an 11-year-old girl, was at the Enumclaw Public Library, when she was molested by a stranger in the bathroom. 7/31/14 RP 136; 8/4/14 RP 83-84. Her father, Jeremy, was sitting nearby, but was unaware of P.K.'s plight. 8/4/14 RP 83- 85. Other facts are incorporated by reference. See Brief of Appellant at 5-10.

2. Identification procedures.

At the police station, Detective Mark Leitl interviewed P.K. and her father Jeremy in the same conference room. 8/4/14 RP 128, 138; 8/5/14 RP 13-14. Although it is considered the best practice to interview witnesses

separately, to prevent witnesses from influencing each others' accounts, Detective Leitl acknowledged that he *disregarded the best practices* in this case. 8/5/14 RP 13-14, 45.

Detective Leitl told both P.K. and Jeremy that the police had a suspect, and that the suspect had been in the lobby of the police station that very day. 8/5/14 RP 53. At one point, Detective Leitl interrupted the interview with P.K. to show Jeremy a single photograph of Travis Lear, standing in the lobby of the police station.[1] Id. at 28; 8/4/14 RP 129-31; Ex. 16. The photo had been downloaded from police surveillance cameras. 8/5/14 RP 22-28; Ex. 16. Jeremy identified Mr. Lear as the man he had spoken to outside of the library, and said he was 100 percent sure. 8/4/14 RP 129-32.[2]

Jeremy's identification of the single photo should have been no surprise, since the detective's comments to Jeremy were extremely suggestive: "We had a gentleman in our lobby earlier today. We don't know what he was wearing, but he was a registered offender." 7/29/14 RP

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[1] At trial, Mr. Lear's Community Corrections Officer Lillian Wilbur testified that her office shares a lobby with the police department, and that Mr. Lear had visited her the morning of the incident, expressing an interest in visiting the library. 8/4/14 RP 154-55. No reference was made to Mr. Lear's criminal history, his status on probation, or Ms. Wilbur's job title. Id. Ms. Wilbur identified Mr. Lear in court and said she has known him for four years. Id.

[2] Detective Leitl's conversation with Jeremy in the next room is audible from the room where P.K. sits. 8/4/14 RP 44; 8/5/14 RP 54-55; Ex. 3 (pre-trial).

36; 8/5/14 RP 53 (emphasis added). After Jeremy identified the single photo shown to him, Detective Leitl did not advise him to refrain from discussing the photo with his daughter, P.K. 8/5/14 RP 53-55.

Jeremy then returned to the room where P.K. was waiting, and told her that the police had a photograph of the man, and "I've identified him – we know who it is. And they know who he is. And so they're gonna go and get him and he's gonna get locked up." CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial). Detective Leitl returned to the interview room and likewise told both P.K. and Jeremy that the police knew the person they had identified in the photo, and that the police would get him. CP 88 (citing Ex. 1); Ex. 3 (pre-trial).

The next day, P.K. and Jeremy went back to the police station to look at a photo montage. 8/4/14 RP 27, 132; 8/5/14 RP 78. The montage included a different photograph of Mr. Lear, along with several other photographs, and was conducted sequentially. 8/5/14 RP 78-82. Both P.K. and her father selected the photograph of Mr. Lear. 8/4/14 RP 27-29, 132-34; 8/5/14 RP 78.

The State charged Mr. Lear with one count of first degree child molestation, which was amended at trial to include a special allegation that it was a predatory offense, because Mr. Lear was a stranger to P.K. RCW 9.94A.030(38); CP 158-59; 7/29/14 RP 42-44.

3. Trial and Sentencing.

Prior to trial, the defense moved to suppress the single photo identification by Jeremy, the montage identifications by P.K. and Jeremy, as well as any in-court identification of Mr. Lear, arguing any in-court identification would be tainted by the suggestive identification procedures. CP 84-93; CP 142-57.

A pre-trial hearing was held on July 28, 2014. Following the hearing, the trial court concluded the identification procedures were conducted under circumstances that were "impermissibly suggestive." CP 243. The court found, however, that under the totality of the circumstances, the identifications were reliable, and not so suggestive as to taint any in-court identification of Mr. Lear. CP 243-44.

Following a jury trial, Mr. Lear was found guilty as charged. 8/6/14 RP 77; CP 195-96.

At sentencing, the standard range, usually 90-130 months, was increased to 300 months to life, due to the predatory offense special allegation. RCW 9.94A.030(38); 9/12/14 RP 2. The court sentenced Mr. Lear to 300 months to life. Id. at 8-10; CP 227-38.

Mr. Lear appealed, raising the identical issues raised herein. On January 19, 2016, the Court of Appeals affirmed his conviction.

He seeks review in this Court. RAP 13.4(b)(1), (2), (3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, WITH OTHER DECISIONS OF THE COURT OF APPEALS, AND BECAUSE A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION IS INVOLVED. RAP 13.4(b)(1), (2), (3).

1. Because the in-court identification was tainted by the single-photo identification procedure, it was reversible error when the trial court failed to suppress. The Court of Appeals decision should therefore be reviewed by this Court.

a. Lack of reliability in eyewitness identification and the problem of wrongful conviction.

Evidence indicates that "[m]istaken eyewitness identification is a leading cause of wrongful conviction." State v. Allen, 161 Wn. App. 727, 734, 255 P.3d 784 (2011), aff'd, 176 Wn.2d 611, 294 P.3d 679 (2013). Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of convictions overturned through DNA testing. Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 78 (2008) ("The overwhelming number of convictions of the innocent involved eyewitness identification—158 of 200 cases (79%).").[3]

[3] See also Innocence Project, Eyewitness Identification Reform, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php

Research shows that memory is not like a video recording but is a "constructive, dynamic, and selective process." State v. Henderson, 208 N.J. 208, 245, 27 A.3d 872 (2011). There are three stages of memory: acquisition, retention, and retrieval. Id. (citing Elizabeth F. Loftus, Eyewitness Testimony 21 (2d. ed. 1996)). Memory can be distorted, contaminated, and even falsely imagined at each stage of the process. Id. at 246. "Like physical trace evidence, memory traces can be tampered with, destroyed, lost, distorted, or contaminated by the procedures that are used to collect it." Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 Wis. L. Rev. 615, 622-23.

Various factors, including some present here, significantly increase the chance that an eyewitness's memory will be false or distorted. Garrett, Judging Innocence, supra, at 79; Allen, e.g., 176 Wn.2d at 661. For example, a witness's high level of stress reduces the accuracy of the witness's subsequent identification. Kenneth A. Deffenbacher, et al., A Meta-Analytic review of the Effects of High Stress on Eyewitness Memory, 28 L. & Hum. Behav. 687 (2004).

(72% of more than 300 wrongful convictions in the U.S. involved mistaken eyewitness identification) (last accessed 2/18/16).

The way in which police administer a suspect lineup or photo montage can also affect witness accuracy, including whether there was a significant delay between the event and the lineup, and whether police failed to use a double-blind procedure, as here. Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later, 33 Law & Hum. Behav. 1, 14 (Feb. 2009); Timothy O'Toole, Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Val. U. L. Rev. 109, 119 (2006).

Rates of misidentification also increase when police tell a witness before viewing a lineup that *they have found a suspect*, as police did here. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 6-7 (emphasis added).

b. The current framework is flawed because it does not sufficiently deter suggestive police practices nor adequately account for the variables that actually affect witness accuracy.

Washington law on the admissibility of eyewitness identifications is based on the federal standard. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). This evolved from three United States Supreme Court cases:

Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 191 L. Ed. 2d 1247 (1968), Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Under this standard, an identification procedure violates due process only if it is so impermissibly suggestive that it leads to a substantial likelihood of irreparable misidentification. Linares, 98 Wn. App. at 401. A defendant bears the burden to establish a due process violation by showing, first, that the procedure was "impermissibly" suggestive. Id.; State v. Vaughn, 101 Wn.2d 604, 610-11, 682 P.2d 878 (1984). If, and only if, it was, the court then determines whether, considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification. Linares, 98 Wn. App. at 401. To answer that question, courts consider the following "Biggers" factors: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's level of certainty at the time of the confrontation; and (5) the delay between the crime and the confrontation. Id.; Manson, 432 U.S. at 114; Biggers, 409 U.S. at 199-200.

Under this approach, courts examine the five Biggers factors *only if* the defendant meets his threshold burden of showing the identification procedure itself was impermissibly suggestive. Vickers, 148 Wn.2d at 118. If the court finds the procedure was not impermissibly suggestive, the inquiry ends; in such a case, the unreliability of the identification goes to its weight, not its admissibility. Linares, 98 Wn. App. at 402.

Scientists, commentators, and courts in other jurisdictions have concluded that this approach does not sufficiently deter suggestive police practices nor guard against the risk of wrongful convictions obtained through mistaken identifications. As the New Jersey Supreme Court stated in its decision departing from the Manson framework, the approach "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." Henderson, 208 N.J. at 285.

A police officer's confirmatory suggestive remark following an identification (*e.g.*, "Good, you identified the suspect") – as occurred in Mr. Lear's case -- leads witnesses to inflate their reports of how much attention they paid and how much confidence they have. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 11

(and studies cited); Garrett, Eyewitnesses and Exclusion, supra, at 470; see also State v. McDonald, 40 Wn. App. 743, 744-45, 700 P.2d 327 1985 (reversing conviction where police told witness, "this is the man," following identification). "[T]his suggestive confirmatory effect is stronger for mistaken eyewitnesses than it is for accurate eyewitnesses, thereby making inaccurate eyewitnesses look more like accurate eyewitnesses and undermining the certainty-accuracy relation." Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 12.

Other suggestive features that lead witnesses to report they had a better view of the culprit and are more confident in their pick include subtle, unconscious cues and expectations by the administrator, whether police tell the witness the suspect has been apprehended or is present in the lineup, and even the suggestion that the eyewitness will later be cross-examined about the identification. Garrett, Eyewitnesses and Exclusion, supra, at 470. Thus, in these ways, "the Manson factors are circular and highlight the very features of eyewitness memory that may be most profoundly affected by suggestion." Id. at 470-71.

Finally, the Biggers factors are generally not helpful in spotting accurate identifications because they are not highly correlated with eyewitness accuracy. For instance, studies show that jurors rely strongly

on the confidence of the eyewitness but confidence is not correlated with accuracy. Garrett, Eyewitnesses and Exclusion, supra, at 469. Indeed, this scientifically-documented lack of correlation between a witness's certainty and the accuracy of his or her identification led the Georgia Supreme Court to ban jury instructions that informed the jury they could consider this factor when deciding whether an identification was reliable. Brodes v. State, 279 Ga. 435, 442, 614 S.E.2d 766 (2005).

Likewise, the correlation between the consistency and completeness of the witness's description and identification accuracy is also poor. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 12-13. "Eyewitnesses tend to select the person who looks most like their memory of the culprit and will readily select an innocent person if that person fits the eyewitness's pre-lineup description better than do the lineup fillers." Id. (internal citations omitted).

The witness's opportunity to view the suspect, on the other hand, is positively correlated with identification accuracy. Henderson, 208 N.J. at 264 (citing Colin G. Tredoux, et al., Eyewitness Identification, in 1 Encyclopedia of Applied Psychology 875, 877 (Charles Spielberger ed., 2004)). No minimum time is required to make an accurate identification, but a brief or fleeting contact is less likely to produce an accurate

identification than a more prolonged exposure. Id. At the same time, other studies show eyewitnesses' estimates of time and opportunity are often greatly overestimated and can be influenced by confirmatory suggestive comments made by the administrator, as here. Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 10 (and studies cited).

In sum, Washington's test for determining the admissibility of an eyewitness identification encourages. rather than deters, suggestive procedures and fails to guard sufficiently against unreliable identifications. It does not require courts to determine whether police could have used a less suggestive procedure; it allows courts to consider "reliability" factors only if they first find the procedure used was "impermissibly suggestive;" and the reliability factors it provides do not correlate well with eyewitness accuracy.

c. Even under current case law, the impermissibly suggestive identification procedures used in this case resulted in a tainted in-court identification of Mr. Lear.

The trial court found the police conduct during the single-photo identification procedure in this case was impermissibly suggestive. CP 242. (FF – A). The court specifically found the father's identification of a single photo to be problematic, and also found fault with "the

combination of Det. Sgt. Leitl's comments (specifically that they had a suspect in their lobby earlier that day who was a registered offender)." CP 242 (FF – B). Despite this egregious lapse in police procedure, however, the court ruled the procedure did not result in a substantial likelihood of misidentification under the totality of the circumstances, largely due to Jeremy's self-reported certainty during the single photo identification, the later montage, and the in-court identification. CP 242.

The flaw in the trial court's findings is the initial police misconduct – the impermissibly suggestive show-up consisting of the single-photo identification in the hallway – contaminated the subsequent identification procedures. See, e.g., McDonald, 40 Wn. App. at 744-45. Detective Leitl's comments to Jeremy in the hallway, both before and after he identified the photograph, served to bolster the father's confidence level in his own purported identification of the suspect. 7/29/14 RP 36; 8/5/14 RP 53 (detective told father they had suspect in custody who was a registered offender, and who had been in lobby the same morning as the assault). Following Jeremy's identification of the single photo, he returned to the interview room and informed his daughter that the suspect (Mr. Lear) was known to the police, and would be arrested. CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial).

Detective Lietl similarly told P.K. and Jeremy that the police knew this man and would "get" him. CP 88 (citing Ex. 1); Ex. 3 (pre-trial).

The techniques used during the joint interview with both P.K. and Jeremy present were not only a violation of police procedure, but tainted and corrupted the interviews and identification procedures that followed. For police to make statements during – or even following – an identification procedure that validate a witness's focus on a particular individual, is a violation of due process. McDonald, 40 Wn. App. at 744-45; see also Wells & Quinlivan, Suggestive Eyewitness Identification Procedures, supra, at 11-12 (discussing phenomenon of suggestive confirmatory effect, whereby assurances that witness selected "correct" suspect results in repeated selection of same suspect, and high self-reported confidence). Detective Leitl shared with Jeremy and P.K., among other things, Mr. Lear's presence in the police station lobby the morning of the incident, as well as his criminal history as a registered sex offender. CP 87 (citing Ex. 1); 8/4/14 RP 142; Ex. 3 (pre-trial). Any subsequent identification of Mr. Lear was impermissibly contaminated after this, and should have been excluded.

d. Because the Court of Appeals decision affirming Mr. Lear's conviction is in conflict with decisions of this Court and other decisions

of the Court of Appeals, review should be granted.

The trial court's findings that under the totality of the circumstances, the single photo identification was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification were not based upon substantial evidence. Therefore, the Court of Appeals decision should be reviewed by this Court. RAP 13.4(b)(1), (2).

2. Because RCW 9.94A.836 is unconstitutionally vague, this Court should grant review pursuant to RAP 13.4(b)(3).

a. A criminal statute is unconstitutionally vague when it fails to provide ascertainable standards to protect against arbitrary enforcement.

"The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Accordingly, under the due process clauses of the Fourteenth Amendment and Article I, section 3, a criminal statute is unconstitutionally vague when it fails to sufficiently define the offense so citizens understand what conduct is prohibited, or when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. In re Detention

of Danforth, 173 Wn.2d 59, 74, 264 P.3d 783 (2011); City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

b. The special allegation statute violates due process by failing to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory exercise of prosecutorial discretion.

The special allegation statute provides no ascertainable standards or guidelines to inform prosecutorial discretion in filing the allegation. RCW 9.94A.836 provides:

In State v. Rice, the petitioner challenged the predatory offense special allegation statute on the grounds that the Legislature's use of the term "shall" imposed a mandatory duty on the prosecutor to charge the special allegation and thereby infringed on a prosecutor's inherent charging discretion, in violation of the separation of powers doctrine. 174 Wn.2d 884, 892-908, 279 P.3d 849 (2012). The Rice Court ruled the statute withstood the challenge on the grounds the term "shall," as used in the statute, was discretionary rather than mandatory because: 1) the statute did not provide any consequences for non-compliance with the statute, 2) prosecuting attorneys have broad, statutory charging discretion, and 3) mandatory charging statues are unconstitutional. Id. at 895-907.

By ruling that "shall" means "may" in this context, the Court eliminated the legislative directive and opened the door to arbitrary, ad hoc, or discriminatory filing of the special allegation. The statute does not set forth any guidelines or limitations to inform the exercise of prosecutorial discretion. Instead, the prosecutor has unfettered charging discretion.[4] In the absence of any limitations or guidelines to inform when a prosecutor *may* file a special allegation, the special allegation statute is unconstitutionally vague.

c. The special allegation statute violates equal protection by inviting grossly disparate sentences for similarly situated defendants.

The equal protection clauses of the Fourteenth Amendment and Article I, section 12 require that the government treat similarly situated people in a similar manner. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); In re Personal Restraint of Mota, 114 Wn.2d 465, 473, 788 P.2d 538 (1990), (citing Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978)). A statute that implicates physical liberty interests is reviewed pursuant to the "rational basis" test, that is, whether the statute is rationally related to achieve a legitimate

[4] In State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993), the Court previously considered a vagueness challenge to the juvenile sexual motivation special allegation statute, RCW 13.40.135, which is structured substantially similarly to the predatory offense special allegation statute.

state objective. State v. Coria, 120 Wn.2d 156, 170-71, 839 P.2d 890 (1992). If there is a disparity in the treatment of individuals accused of the same crime, equal protection requires, at minimum, a rational basis for such disparity. See, e.g., Rinaldi v. Yeager, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (law establishing reimbursement for indigent appeals irrationally discriminated between persons who were confined for offenses and those that were not).

Absent any guidelines or limitations to inform the exercise of prosecutorial discretion, there is no legitimate reason or rational basis to selectively file the special allegation, especially where, as here, the allegation results in a greatly increased minimum sentence. By comparison, the death penalty statute survived an equal protection challenge insofar as it requires prosecutors to "perform individualized weighing of the mitigating factors," and therefore does not confer prosecutors with unfettered discretion. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995); accord State v. McEnroe, 179 Wn.2d 32, 42, 309 P.3d 428 (2013).

Moreover, a court may not dismiss a special allegation "unless it finds that the order [of dismissal] is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make

proving the special allegation doubtful." RCW 9.94A.836(3). By eliminating judicial review and discretion, and by failing to link the exercise of prosecutorial discretion to legislative purpose, the special allegation further confers prosecutors with unfettered discretion to selectively file the special allegation in violation of the constitutional right to equal protection.

d. Because the special allegation statute is unconstitutional, review should be granted.

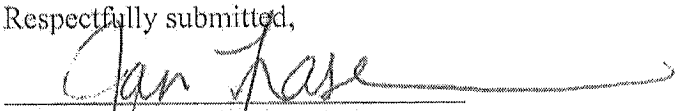
Accordingly, the Court of Appeals decision affirming the conviction and sentence is in conflict with decisions of this Court, other decisions of the Court of Appeals, and raising constitutional issues. Review should be granted. RAP 13.4(b)(1), (2), (3).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed. RAP 13.4(b)(1), (2), (3).

DATED this 18th day of February, 2016.

Respectfully submitted,



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. TRAVIS LEAR, Appellant.	)	No. 72454-1-I UNPUBLISHED OPINION FILED: January 19, 2016

VERELLEN, A.C.J. — Travis Lear contends that impermissibly suggestive out-of-court identification procedures violated his right to due process. But substantial evidence supports the trial court's determination that the identifications were reliable and admissible despite any suggestive procedures. Lear's contentions that the predatory offense statute, RCW 9.94A.836, violates equal protection and is unconstitutionally vague are also without merit. We therefore affirm Lear's conviction for child molestation in the first degree.

FACTS

On the morning of January 30, 2013, 11-year-old P.K. and her father, Jeremy K., went to the Enumclaw Public Library. After about an hour, P.K. asked if she could go to the car to eat an apple. Jeremy K. gave P.K. the car keys and remained in the library.

P.K. returned to the car and sat in the back seat while she ate an apple and read a library book. Suddenly, a man she had never seen before opened the door and ordered her out of the car. The man told P.K. to go to the library bathroom or he would kill her. P.K. believed the man would kill her if she did not comply.

P.K. followed the man back into the library, where he told her to check if anyone was in the women's bathroom. When P.K. said no one was in the bathroom, the man took her inside, followed her into in one of the stalls, and locked the door. He then ordered P.K. to remove her pants. When P.K. refused, the man put his hand down her pants, rubbed her vagina, and kissed her.

After about three to four minutes, the man threatened to kill P.K. if she told anyone. He then told her to return to the library and act as if nothing had happened.

In the meantime, Jeremy K. left the library and returned to the car. When he found the car empty and the keys on the steering wheel, he assumed that P.K. had gone to the bathroom. Jeremy K. then drove the car to the front of the library to wait for her.

A short time later, the back door "burst open"[1] and P.K. got in the car. She was upset and crying and said that "a man just took me to the bathroom and tried to have sex with me."[2] When Jeremy K. asked who the man was, P.K. pointed to a man who was walking away from the library and identified him as the assailant.

Jeremy K. ran after the man, later identified as Travis Lear, and confronted him. When Jeremy K. repeated P.K.'s accusation, Lear denied molesting P.K. and explained, "No, that wasn't me. It's another guy. I heard some screaming and was helping but the other guy is inside."[3] Lear identified himself as "Martin Little."[4]

Jeremy K. quickly returned to the car, where P.K. confirmed that Lear was the assailant. Jeremy K. confronted Lear again and told him to stay until the police arrived.

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[1] Report of Proceedings (Aug. 4, 2014) at 98.

[2] Id.

[3] Id. at 105.

[4] Clerk's Papers at (CP) at 240 (Finding of Fact 1-P).

Lear told Jeremy K. to leave him alone and ran off.

At this point, Jeremy K. called 911. He described the suspect as a white male in his early 20s with pale skin and a scruffy beard and wearing a red coat, jeans, and a backpack. Officer Dustin Lobell responded to the 911 call. P.K. described her assailant as a white male in his 20s with an "orangish-reddish" beard, a "thick" build, and hair about two inches long.[5] The man was wearing a red jacket and blue and gray backpack.

Detective Mark Leitl accompanied P.K. and Jeremy K. to the nearby police station. Leitl then conducted a video recorded interview of P.K. and Jeremy K. in the same conference room. Leitl acknowledged that the best practice is to interview witnesses separately, but decided to interview P.K. in her father's presence because she was so upset.

At the beginning of the interview, Leitl told P.K. and Jeremy K. that the police had a suspect, "a gentleman in our lobby earlier today. We don't know what he was wearing, but he was a registered offender."[6] P.K.'s description matched that of Travis Lear, whom Leitl had seen at the police station shortly before the assault. While at the station, Lear had told a community corrections officer that he was planning to visit the library.

At one point during the interview, Leitl asked Jeremy K. to step out of the conference room. Leitl showed him a still photograph taken from the police surveillance video of Lear's visit earlier in the morning. Jeremy K. immediately said, "[T]hat's him"

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[5] Id. (Finding of Fact 1-O).

[6] Id. (Finding of Fact 1-S).

and that he was "100% sure" it was the man he confronted outside the library.[7] P.K. remained in the conference room. When he returned, Jeremy K. told P.K. that the police knew who the assailant was and would be arresting him. P.K. did not see the photograph.

On the following day, January 31, 2013, P.K. and Jeremy K. returned to the police station and separately viewed a photomontage with six photographs. The photomontage did not use Lear's surveillance photograph. Both P.K. and Jeremy K. picked Lear's photograph. P.K. said she was 85 percent sure; Jeremy K. stated that he was 100 percent sure.

The State charged Lear with one count of child molestation in the first degree. Prior to trial, he moved to suppress, arguing that the suggestive identification procedures tainted Jeremy K.'s single photo identification, both Jeremy K.'s and P.K.'s photomontage identifications, and any in-court identifications.

Following a CrR 3.6 hearing, the trial court denied the motion to suppress. The court found that the single photograph identification procedure was impermissibly suggestive and that the photomontage procedure was not suggestive. But the court concluded that under the totality of the circumstances, even if both procedures were impermissibly suggestive, the identifications were reliable and the procedures not so suggestive as to taint in-court identifications.

The jury found Lear guilty as charged. Based on a predatory offense finding, the court imposed an indeterminate sentence of 300 months to life.

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[7] CP at 241 (Finding of Fact 1-W).

ANALYSIS

Lear contends the trial court erred in refusing to suppress all of P.K.'s and Jeremy K.'s identifications. He argues that the suggestive single photograph identification procedure, coupled with the improper and suggestive joint interview of Jeremy K. and P.K., and the comments that the police and Jeremy K. made to P.K. about arresting a suspect violated his due process rights and rendered all subsequent identifications unreliable and inadmissible.

We generally review the trial court's decision on a motion to suppress to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law.[8] We review conclusions of law de novo.[9]

An out-of-court identification procedure violates due process if it is so impermissibly suggestive as to give rise to "a substantial likelihood of irreparable misidentification."[10] A defendant claiming a due process violation must first establish that the identification procedure was "impermissibly suggestive."[11] If the defendant satisfies this threshold burden, the court then assesses whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.[12]

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[8] See State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997).

[9] State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

[10] State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

[11] Id.; see also State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).

[12] Vickers, 148 Wn.2d at 118.

The key factor in determining admissibility is whether sufficient indicia of reliability supported the identification despite any suggestiveness.[13] In making this determination, the court considers all relevant circumstances, including "(1) the opportunity of the witness to view the [suspect] at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the [suspect], (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation."[14]

The trial court here found that the single photograph identification procedure was impermissibly suggestive. The court also assumed, for purposes of its decision, that the photomontage was suggestive. The evidence amply supports the court's determination that the identifications were reliable and admissible despite any suggestive procedures.

First, as the trial court found, both P.K. and Jeremy K. had a significant opportunity to view the suspect's face. Jeremy K. approached the man twice, stood within a few feet of him, and had a brief conversation on each occasion. P.K. was able to view the suspect over an extended period time: when he opened the car door and ordered her out, accompanied her to the library, and locked himself in a stall with her. The suspect then forced P.K. to kiss him before he released her. P.K. also spoke multiple times with the man during the assault.

Second, both witnesses had ample opportunity to focus their attention on the man's face. Jeremy K. repeatedly attempted to confront the man that P.K. had identified as her assailant. P.K. was in close proximity to the suspect during a tense

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[13] State v. Rogers, 44 Wn. App. 510, 515-16, 722 P.2d 1349 (1986).

[14] State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999); see also Neil v. Biggers, 409 U.S. 188, 198-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

and fearful encounter and paid close attention to his ongoing instructions.

Third, Jeremy K. provided an accurate description of the suspect to the 911 operator and to the responding officers. P.K. also gave the responding officers a detailed and accurate description of the suspect's physical appearance and clothing. Her descriptions remained consistent throughout the course of her interview.

Fourth, both Jeremy K. and P.K. were highly certain of the accuracy of their identifications. Jeremy K. expressed 100 percent certainty for his identification of both the surveillance photograph and the photomontage. P.K. stated that she was 85 percent certain of her identification during the photomontage.

Finally, only about one hour elapsed between the assault and Jeremy K.'s identification of the surveillance photograph. The photomontage occurred only one day later.

Under the circumstances, substantial evidence supports the trial court's findings on the reliability factors. The findings, in turn, support the conclusion that the identifications were reliable and admissible despite any suggestiveness. The trial court did not err in admitting Jeremy K.'s and P.K.'s identifications.

Lear contends that Washington law on the admissibility of eyewitness evidence is flawed and "fails to guard sufficiently against unreliable identifications."[15] He suggests that the trial court erred in relying on several of the factors that supported the reliability determination. But Lear raises these arguments for the first time on appeal.

[15] Appellant's Br. at 21.

Because he fails to allege or demonstrate a manifest constitutional error, we decline to consider them.[16]

Lear next contends the predatory offense statute, RCW 9.94A.836, is unconstitutionally vague. He argues that the statute fails to provide ascertainable standards to protect against arbitrary enforcement.

An appellate court reviews the constitutionality of a statute de novo.[17] We presume that the statute is constitutional, and the party challenging that presumption bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional.[18]

"In any vagueness challenge, the first step is to determine if the statute in question is to be examined as applied to the particular case or to be reviewed on its face."[19] A vagueness challenge to a statute that does not involve First Amendment rights must be evaluated "in light of the particular facts of each case."[20]

Lear does not allege that RCW 9.94.836 involves First Amendment rights. Nor does he contend that the statute is vague as applied to the facts of his case. Because Lear's challenge is purely facial, he fails to establish RCW 9.94A.836 is unconstitutionally vague.

Lear also contends that RCW 9.94A.836 violates equal protection, arguing that because RCW 9.94A.836 lacks any guidelines or limitations to inform the exercise of

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[16] RAP 2.5(a)(3); see State v. Kirkland, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007);.

[17] State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

[18] In re Welfare of A.W., 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

[19] City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795 P.2d 693 (1990).

[20] Id. at 182.

prosecutorial charging discretion, there is no rational basis for the resulting "grossly disparate sentences for similarly situated defendants."[21]

RCW 9.94A.836 provides:

> (1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.
>
> (2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.
>
> (3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

The term "predatory" means:

> (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; (iii) a pastor, elder, volunteer, or other person in authority in any church or

[21] Appellant's Br. at 33.

> religious organization, and the victim was a member or participant of the organization under his or her authority; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the same meaning as defined in RCW 28A.225.010; and (B) "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.[22]

The term "stranger" means "the victim did not know the offender twenty-four hours before the offense."[23]

In State v. Halstien, our Supreme Court considered nearly identical provisions in RCW 13.40.135, the juvenile sexual motivation statute:

> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses as defined in RCW 9.94A.030(29)(a) or (c) when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably consistent defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact-finder.
>
> (2) In a juvenile case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the juvenile committed the offense with a sexual motivation. The court shall make a finding of fact of whether or not the sexual motivation was present at the time of the commission of the offense. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030(29)(a) or (c).
>
> (3) The prosecuting attorney shall not withdraw the special allegation of "sexual motivation" without approval of the court through an order of dismissal. The court shall not dismiss the special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.[24]

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[22] RCW 9.94A.030(39).

[23] RCW 9 .94A.030(51).

[24] 122 Wn.2d 109, 115, 857 P.2d 270 (1993) (quoting former RCW 13.40.135(1)-(3) (1990)).

In rejecting a vagueness challenge to the statute, the court concluded that these provisions sufficiently guided and limited prosecutorial discretion to prevent arbitrary enforcement:

> The statute also meets the second part of the vagueness test: it contains ascertainable standards of guilt which prevent arbitrary enforcement. As noted above, the State must present evidence of some conduct during the course of the offense as proof of the defendant's sexual purpose. The State carries this burden of proof and must establish the sexual motivation allegation beyond a reasonable doubt. RCW 13.40.135(2). In addition, the prosecutor's charging discretion is guided and limited by the statute. The prosecutor may not file the allegation unless "sufficient admissible evidence exists" which would justify a finding of sexual motivation by a "reasonable and objective fact-finder," and the prosecutor must weigh that evidence against the most plausible defense. RCW 13.40.135(1). The trial court must also enter a finding of fact whether or not the sexual motivation was present. RCW 13.40.135(2). These standards protect against arbitrary, ad hoc, or discriminatory enforcement.[25]

Lear does not present any meaningful analysis to distinguish Halstien or to support his claim that RCW 9.94A.836 contains no guidelines to inform or limit prosecutorial charging discretion. He has therefore failed to satisfy his burden of demonstrating an equal protection violation.

Affirmed.

WE CONCUR:

Trickey, J

Schindler, J

[25] Id. at 121.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72454-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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