73413-0

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Court of Appeals
Division I
State of Washington

NO. 73413-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALI ALI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Tanya Thorp, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. ADMISSION OF THE SHOW-UP IDENTIFICATION VIOLATED ALI'S DUE PROCESS RIGHTS.

In his opening brief, appellant Ali Ali argued the trial court violated his Fifth and Fourteenth Amendment due process rights by admitting evidence of a show-up identification that was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. Brief of Appellant (BOA) at 15-20. In its response, the state claims: "The primary arguments of Ali and [co-appellant] Ibrahim, that showing them in handcuffs and near a police car rendered the showup unduly suggestive, have been rejected." Brief of Respondent (BOR) at 15 (citing State v. Fortun-Cebada, 158 Wn. App. 158, 170, 241 P.3d 800 (2010)). However, the state mischaracterizes the appellants' argument.

Not only were Ali and Ibrahim in handcuffs near a police car, there was an unusual number of policemen and the police made suggestive comments. An unusual number of policemen logically adds to a show-up's suggestiveness. See e.g. U.S. v. Hines, 455 F.2d 1317, 1318 (DC Ct. App. 1971) (rejecting unusual number of policemen as a factor showing suggestiveness where record was unclear as to how many police were present).

Here, not only were Ali, Ibrahim and Abdihakim Mohamed in handcuffs on the ground near a police car, they were near several police cars – that also had on their flashers. RP 47, 57. While it may be unremarkable – in isolation – that a spotlight was also used to illuminate the appellants (considering it was nighttime), it nonetheless added to the show of force and unusual police presence that would have suggested to Harris that police must have captured the perpetrators. These factors show suggestiveness.

But not only were the appellants handcuffed and in the presence of an unusual number of police officers, the police added to the suggestiveness by virtue of their comments to Harris. See e.g. State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985). In McDonald, an impermissibly suggestive statement was made by a police officer to the victim that one of the defendants, whom the victim failed to identify in a lineup, was a suspect. The victim later saw the defendant taken into the courtroom in handcuffs by police officers. The McDonald court held that, considering the totality of the circumstances, the later in-court identification was not reliable, and the substantial likelihood of misidentification required reversal. McDonald, 40 Wn. App. at 747-48.

The police made similar comments here. While Bartolo was talking to Harris, a police broadcast indicated deputy William Mitchem had located Harris' Geo Prizm. RP 43. Bartolo testified Harris likely heard the broadcast, including that there were three suspects in the car when it was stopped. RP 61. Bartolo told Harris his vehicle had been stopped and that Bartolo would take him to the stop location to possibly identify the three subjects in the Prizm. RP 44. Anyone in that circumstances would assume the three persons who were stopped in the car must be the same three who took it.

In short, the circumstances were more suggestive than in those cases where the suspect was merely handcuffed near a police car. This Court should consider all the circumstances, not just those acknowledged by the state.

Next, the state claims that even if the show-up procedure was unduly suggestive, Harris' identifications were still admissible based on the Braithwaite factors. BOR at 16; Manson v. Braithwaite, 432 U.S. 98. 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The state points to the court's "*undisputed* findings" inter alia that "Harris had over 20 minutes to view all three suspects inside the vehicle during the drive to Tukwila and for many minutes while

walking together to the victim's vehicle[.]" BOR at 17-18 (emphasis in state's brief).

First of all, the court's findings and conclusions were not filed until After Ali filed his opening appellate brief. BOR at 8, n.2. This is so, although the court ordered the prosecutor to prepare the findings following the motion to suppress. RP 104.

Regardless, opportunity to view the suspect is but one factor. The more important factor here is Harris' degree of attention, because that provides a more accurate gauge of what he actually observed. Harris told Bartolo that he did not interact with the three passengers during the ride. RP 54-55. Instead, he listened to music. RP 55. Thus, despite Harris' opportunity to view the suspects, he did not do so. This fact is not a "non sequitur" and is not contrary to the court's finding. See BOR at 18.

Another factor weighing against reliability was Harris' inaccurate prior description. He described the suspects as "maybe in their early 20s, late teens." Pretrial Ex 3. Significantly, Ali was 35. Pretrial Ex 1. While the court considered Harris' estimation of age to be a matter of his perception, the court appeared to be conflating the first consideration (whether the show-up was

suggestive) and the second consideration (whether the identification was nevertheless reliable):

> He acknowledged, he's about 57 years old. I'm not surprised that he would list anyone as being young. There's a difference between perception and suggestibility. His perception of age is not the same as being suggestible showup.

RP 101-02. Accordingly, the court failed to consider Harris' inaccurate description in the context of reliability. And significantly, the court never made any finding that Ali was particularly young looking. Accordingly, Harris' prior inaccurate description of Ali weighs against the reliability of Harris' identification of him.

Also inaccurate was Harris' description of Ali's clothing. The parties stipulated:

> The description provided by Mr. Harris of Defendant – Ali's clothing is different that [sic] than the clothing on Defendant-Ali at the time of arrest.

CP 80-81. That Ali "signed off on the court's undisputed finding of fact that "the witness was able to describe generally what type of clothing all three were wearing"[1] does not diminish from the fact Harris was incorrect – specifically – about the clothing Ali was wearing. This also weighs against the reliability of Harris' identification of him.

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[1] BOR at 18.

In short, the circumstances combined would likely compel anyone to misidentify a suspect in light of the unduly suggestive show-up. That is in fact what happened. This Court should find the admission of the impermissibly suggestive show-up violated Ali's due process rights and reverse his conviction.

2. THE COURT VIOLATED ALI'S SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL.

In his opening brief, Ali argued the court violated his right to be present because – after ejecting him from the courtroom – it never informed him he could reclaim his right to be present if he made assurances of proper future courtroom behavior. BOA at 20-24. It is the court's duty to make sure the defendant knows he can reclaim his right to be present:

> Trial courts must clearly inform a defendant who has been removed from the courtroom for disruptive behavior of his right to return to the courtroom and the way in which he may exercise that right. This requirement preserves the defendant's right to be present as well as the trial court's discretion in maintaining the safety and decorum of the courtroom.

State v. Thompson, 190 Wn. App. 838, 360 P.3d 988 (2015).

In certain circumstances, the court may delegate to defense counsel the task of informing the defendant of his right to return.

See e.g. State v. Chapple, 145 Wn.2d 310, 36 P.3d 1025 (2001). In Chapple, the trial court sent defense counsel to inquire whether the defendant wanted to return and if so, if he would conduct himself appropriately. Defense counsel reported back on the record that the defendant would not agree to conduct himself any differently. Chapple, 145 Wn.2d at 317, 324. Thus, under those circumstances, the Supreme Court found the trial court's requirement that defense counsel speak with the defendant and report back was adequate to give the defendant an opportunity to reclaim his right to return. Chapple, 145 Wn.2d at 326.

The circumstances here are completely different. The state does not dispute that Ali's attorney was unable to meet with Ali to deliver the message. BOR at 40. Under these circumstances, it was incumbent on the court to take further action to inform Ali of is right to return.

In its response, the state essentially argues that by virtue of his behavior, Ali waived or forfeited the right to be informed of his right to return:

> When Ali's attorney reported that Ali had refused to meet with him the trial court, in its discretion, decided to proceed with closing arguments. Ali claims that because his relationship with his attorney had broken down, it was an abuse of

> discretion for the trial court to have depended on his attorney to relay the advice that Ali could return to court if he promised to behave. But the trial court had reason to believe that Ali's baseless allegations against his attorney were another attempt to renew his motion to discharge Mr. Womack [defense counsel], which the court previously denied multiple times. RP 603-09. Was the court required to capitulate to Ali's manipulations by appointing new counsel in an effort to advise him of his right to return? Should Judge Thorp have signed a drag order to compel Ali's return to court by force so that she could personally advise him of his right to return to the proceedings?

BOR at 41.

There are several problems with this argument. First, while it may have been appropriate for the court initially to rely on counsel to inform Ali he could reclaim his right to return, it was not appropriate to proceed once the court learned counsel had not been able to relay the message. The next logical step would be for the court to briefly recess to obtain conflict counsel for the limited purpose of informing Ali of his right to return upon assurances of good behavior. Considering the number of attorneys at King County Superior Court at any given time and the limited purpose of the appointment, any delay caused by taking this additional step would have been minimal. It would not have been necessary for the court to appoint counsel to take over the case.

Moreover, the right to counsel and the right to be present are separate rights. Whether Ali's outburst could be construed as an effort to obtain new counsel, he still had the right to be present at his trial. The court failed to take adequate steps to protect this right by failing to insure he knew he could reclaim that right.

One of the cases cited by the Chapple court illustrates this point. Chavez v. Pulley, 623 F. Supp. 672 (E.D. Cal. 1985). On the day before trial, Chavez moved for substitute counsel but was denied. Chavez, 623 F. Supp. at 676. On the second day of trial, as defense counsel was explaining his need for a two-week continuance to permit Chavez to contact favorable witnesses, Chavez began interjecting. When the court told Chavez he needed to speak through counsel, Chavez began to describe a particular incident which he believed showed a conflict between him and his attorney. When Chavez would not stop interrupting the court, the court ordered him removed from the courtroom. Chavez, 623 F. Supp. at 677-78.

Once Chavez was removed, the court denied defense counsel's motion to continue. However, the court informed defense counsel that he would have five minutes to speak with Chavez to see "if he wants to behave." Chavez, at 678. Defense counsel

subsequently reported back: "I can represent to the Court, only in my conversation he said that he would not keep his mouth shut, that he said, 'You would have to gag me.'" Chavez, at 678.

In ruling on Chavez's subsequent habeas corpus petition, the court held the lower court committed constitutional error in failing to inform Chavez of his opportunity to reclaim his right to be present (and testify):

> The absence of a transcribed record of what was said between counsel and petitioner during the recess makes it difficult for this court to determine whether or not petitioner was offered the constitutionally required opportunity to reclaim his right to presence and the privilege to testify. The precise meaning of petitioner's remarks as reported to the court, and whether they may fairly be treated as a waiver of his right of presence and privilege to testify, are subject to considerable doubt. It should be recalled that petitioner was not satisfied with counsel's representation and that the two of them had had arguments which apparently included shouting and cursing, during pretrial meetings at the jail. Moreover, even if this court accepts as true counsel's representation on the record of the content of what petitioner said, the more critical area of inquiry is what counsel said to petitioner. Counsel was directed to convey the "message" stated by the court, but the record is, unhappily, devoid of what counsel actually said to petitioner.
>
> In the absence of such a record, this court must conclude that petitioner was not provided with the opportunity to reclaim his right to presence and privilege to testify, and that the trial court, although initially justified in removing petitioner, committed

> constitutional error when it decided to go forward with the trial in petitioner's absence.

Chavez, 623 at 682.

Significantly, the fact Chavez was dissatisfied with counsel and previously had tried to discharge him was not held against Chavez in the court's determination of whether Chavez was adequately informed of his right to return. Rather, it played into the court's decision that the trial court failed to take adequate steps to insure Chavez was properly informed. Thus, the state's argument here that the court should not have been required to "capitulate to Ali's [reported] manipulations" should be rejected.

Alternatively, the state argues any error was harmless because closing argument is not a critical stage of the proceeding. BOR at 41-43 (citing State v. Thorpe, 51 Wn. App. 582, 754 P.2d 1050 (1988)). Thorpe appears to be an anomaly. A quick review of federal cases indicates closing argument is a "critical stage" of the trial. See e.g. Herring v. New York, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); Hunter v. Moore, 304 F.3d 1066 (11th Cir. 2002); Burdine v. Johnson, 262 F.3d 336, 355 (5th Cir. 2001).

A violation of the due process right to be present is subject to harmless error analysis. As a result, "the burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt." State v. Irby, 170 Wash. 2d 874, 885-86, 246 P.3d 796, 802 (2011). Defense counsel had not yet heard the prosecutor's closing argument or given argument on behalf of Ali when Ali was removed from the courtroom. Had Ali been informed he could reclaim his right to be present, he could have assisted in this "critical stage of the proceeding." This Court should therefore reverse.

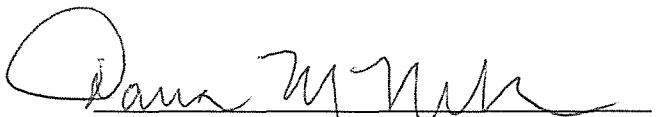
B. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Ali's conviction.

Dated this 6th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

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Respondent,	)	
	)	
vs.	)	COA NO. 73413-0-I
	)	
ALI ALI,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF APRIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALI ALI
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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF APRIL, 2016.

X Patrick Mayovsky