73413-0

FILED
Apr 11, 2016
Court of Appeals
Division I
State of Washington

NO. 73413-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

ABDISHAKUR IBRAHIM,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

This Court should reverse Abdishakur Ibrahim's conviction and order a new trial. The show-up identification procedure conducted by the police was unduly suggestive and the court erred in allowing an in court identification. Further, the court failed to properly instruct the jury on the factors to consider when evaluating the reliability of eyewitness testimony.

1. The unduly suggestive identification procedure requires reversal.

Evidence of a show-up identification should be excluded if the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn.App. 397, 401, 989 P.2d 591 (1999) (discussing *Mason v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977)). The State argument that the identification procedure conducted by the police was proper by focusing primarily upon Mr. Ibrahim being in handcuffs and next to police cars when he was arrested ignores evidence which other courts have relied upon to find an identification procedure to be unduly suggestive. Reply at 15. This identification should be suppressed because of the substantial likelihood that it caused Mr. Ibrahim to be misidentified.

Before Mr. Harris made his identification, he met with Dep. Bartolo. RP 42. Although Mr. Harris had given Dep. Bartolo a "generic" description of his assailants, the deputy created a detailed description in Mr. Harris' report based upon other reports he received, then only confirming the description with Mr. Harris. RP 60.[1]

While the deputy was taking Mr. Harris' statement, the two men heard a radio call notifying them that Mr. Harris' car had been found and suspects had been arrested. RP 42. Mr. Harris was not advised that the real suspects may not have been present at the scene. RP 55.

At the scene, the police ensured he would make a positive identification by creating circumstances to ensure Mr. Harris would identify the suspects as the men who stole his car. Each of the suspects were in handcuffs. RP 45. They were surrounded by a number of police vehicles, with their lights flashing. RP 57. Mr. Harris remained in the deputy's car, identifying each suspect from approximately three car lengths away. RP 46. Each suspect was brought into a spotlight, standing next to a police officer, clearly indicating they were in custody. RP 47.

[1] Mr. Harris' description of the men who robbed him was not consistent with the men who were arrested, one of whom was much older than any of the men Mr. Harris described. RP 90.

When the deputy informed Mr. Harris the police had three persons in custody for robbing him, he increased the likelihood of an improper identification. 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, 6-7 (Feb. 2009) (rates of misidentification increase when law enforcement tell witness police have found a suspect). The police suggested to Mr. Harris that the people arrested had robbed him. *See State v. McDonald*, 40 Wn.App. 743, 746, 700 P.2d 327 (1985). There were a high number of police officers present when Mr. Ibrahim was identified. *See, e.g. U.S. v. Hines*, 455 F.2d 1317, 1318 (DC Ct. App. 1971).

Mr. Harris's description and the appearance of the suspects also weighs against admissibility. *See e.g. State v. Rogers*, 44 Wn.App. 510, 516, 722 P.2d 1349 (1986). In *McDonald*, an important factor in suppressing the identification was the difference in the description of the suspect's clothing. 40 Wn.App. at 747. Here, the identification of one of the suspects varied greatly from the description Mr. Harris had given to the 911 operator. RP 95. All three of the suspects were described as young, which was also not the case. RP 91.

While Mr. Harris appeared certain, this is a poor measure of reliability and has become disfavored by courts and scientists. *See e.g. Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001). This Court should not factor Mr. Harris' certainty into the reliability of the identification procedure. In fact, Mr. Harris became more certain as the trial progressed making it apparent Mr. Harris' memory had been tainted by the unduly suggestive identification process. When the State first asked Mr. Harris where each of the persons who robbed him were sitting, he was only sure that the person he identified as Mr. Mohamed was sitting in the front seat and was only "pretty sure" about where the other two were sitting. RP 473. As the prosecutor continued to repeat this question, Mr. Harris instead became "very sure" of where each person was seated. RP 474. By the close of his direct testimony, Mr. Harris had "no doubt" in his identification. RP 498-99.

While discounted by the State, cross racial identification is a factor in this identification procedure. One of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, 176 Wn.2d 611, 637, 294 P.2d 679 (2013) (Wiggins, J., dissenting) (citing James M. Doyle, *Discounting the Error*

Costs: Cross–Racial False Alarms in the Culture of Contemporary Criminal Justice, 7 Psychol. Pub. Pol'y & L. 253 (2001)). Mr. Harris described all of the suspects as a different and unique racial classification from himself, referring to the suspects as African, while referring to himself as African American. RP 90.

While the State also argues that Mr. Harris' identification should still have been admitted even if the identification procedures were unduly suggestive, this court should reject this argument. Reply at 16. While the State argues Mr. Harris had sufficient opportunity to view the suspects before the robbery, this is not consistent with the testimony. Mr. Harris admitted he had some conversation with the passenger in the front seat, but did not speak with the men in the back seat, focusing instead upon his music. RP 471, RP 535. He made mistakes with regard to the age of the suspects, describing them all as young, when one of the men arrested was significantly older, with grey hair. RP 407. Mr. Harris also made mistakes with clothing. CP 80-81.

The admission of an impermissibly suggestive identification, is presumed prejudicial. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). The State failed to meets its burden of proving beyond a reasonable doubt that the fact finder would have reached the same

result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). This Court should reverse Mr. Ibrahim's conviction.

2. Mr. Ibrahim was entitled to an instruction on cross-racial identification.

The State asks this Court to reject the claim the trial court erred in failing to provide an eyewitness instruction. Reply at 26. Although the State describes the cross-racial identification issue as a "half-hearted suggestion," this Court should not so easily dismiss the error which can occur from a misidentification. *Id*.

Problems with eyewitness identification evidence have been widely recognized in the courts and scientific community. *Allen*, 176 Wn.2d at 616 (C. Johnson, J., lead opinion). They are the most common cause of wrongful convictions. Jennifer Devenport, et al, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification, in Expert Testimony of the Psychology of Eyewitness Identification*, 51 (Brian L. Cutler ed., 2001). Eyewitness identification is erroneous approximately one third of the time. Taki V. Flevaris & Ellie Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 869 (2015).

The cultural differences between African immigrants and African-Americans can be significant. *See* Jacob Conteh, *How African-Americans and African Immigrants Differ*, The Globalist (Nov. 16, 2013)[2] This Court should not accept the argument that the shade of a person's skin is the only factor to consider in making an assessment of whether a person may have difficulty with cross racial identification. Instead, the court should focus upon the witness's self-identification and the way the witness made his identification, along with cultural identity. The court should also focus upon the witnesses perceptions of race. Here, Mr. Harris identified himself as culturally distinct from the suspects. RP 90.

The State argues Mr. Ibrahim invited this error by failing to request the instruction proposed by Mr. Ali's attorney. Reply at 21. Mr. Ibrahim does not concede that the error was invited, but if this Court finds otherwise, it should reach the issue because it is an error affecting a constitutional right. *State v. Henderson*, 114 Wn.2d 867, 876, 792 P.2d 514 (1990). To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *State v. Lucero*, 152 Wn.App.

[2] Available at http://www.theglobalist.com/african-americans-african-immigrants-differ/.

287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wn.2d 785, 230 P.3d 165 (2010). The defendant must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The State bears the burden of proof on invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

While it is true the parties did not enter into a joint defense agreement as may be typical in civil practice, it is also clear that all of the attorneys had the same defense. Mr. Womack, Mr. Ali's attorney, led the defense, speaking first at all of the hearings and for some witnesses, being the only attorney to ask questions. See e.g. RP 63, 92, 94, 274, 368, 386, 387, 416, 428, 437-38, 452. While the record does not establish that Mr. Tavel joined with Mr. Womack in requesting this instruction, it is also not clear that he did not.

With "social science increasingly casting doubt on the reliability of cross-racial identification, our courts must carefully guard against misidentification." *Allen*, 176.Wn.2d at 633 (Madsen, concurring). Mr. Harris identified his assailants as ethnically distinct from himself,

describing them as from Africa and with "immigrant accents". RP 479-80. The court's denial of the request for an identification instruction constitutes reversible error.

B. CONCLUSION

Abdishakur Ibrahim was the subject of an unduly suggestive identification procedure. The court should have suppressed the identification as unduly suggestive.

The trial court was asked to instruct the jury on how to evaluate eyewitness testimony but declined to do so, despite this being a central issue to Mr. Ibrahim's defense. This failure to instruct the jury upon eyewitness testimony denied Mr. Ibrahim the opportunity to fairly argue his defense. He is entitled to a new trial.

DATED this 8th day of April 2016.

Respectfully submitted,

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DIVISION ONE

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	)	
Respondent,	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF APRIL, 2016.

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