SUPREME COURT NO. 93834-2
COURT OF APPEALS NO. 73413-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ALI ALI,

Petitioner.

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

The Honorable Tanya Thorp, Judge

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# PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES



FEDERAL CASES

## TABLE OF AUTHORITIES

Page

FEDERAL CASES



RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Ali Ali asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Ali, COA No. 73413-0-I, filed September 26, 2016, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court violated petitioner's 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?

2. Whether the court violated petitioner's Sixth Amendment right to be present at all critical stages of the proceeding?

D. STATEMENT OF THE CASE

1. Pretrial Motion to Suppress the "Show-Up" Identification

Following a jury trial in King County Superior Court, petitioner was convicted of first degree robbery. CP 87. The state's theory was that Ali and co-defendants Abdihakim Mohamed and Abdishakur Ibrahim allegedly pulled a gun on Mike Harris and took his Geo Prizm. CP 1. According to the state's charging document, Harris agreed to give the men

a ride from Seattle to Tukwila. When they arrived, however, one of the men reportedly pulled a gun on Harris and the three took off in Harris' car. CP 5.

Approximately 55 minutes later, police spotted and stopped Harris' car and took its three occupants – Ali, Mohamed and Ibrahim – into custody. CP 6. Harris was brought to the scene for a "show-up" identification and agreed the men in custody were the men who took his car. CP 6. After Harris agreed to a search of his car, police recovered a handgun from underneath the driver's seat. CP 6.

Ali moved to suppress the show-up identification as impermissibly suggestive. CP 67-72. For the motion, the parties stipulated:

> 1. 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.
>
> 2. Officer Bartolo was the only officer who communicated with Mr. Harris regarding the one-on-one identification.
>
> 3. The entirety of the 911 CD should be considered for purposes of the 3.6 hearing.

CP 80-81.

In addition, the court took the testimony of deputy Jose Bartolo. RP 39. Bartolo was the officer who responded to Harris' 911 call. Bartola

arrived at 10:56 p.m. to the AM/PM near South 154th Street and International Boulevard, where Harris was located. RP 40, 42.

Harris told Bartolo he had agreed to give three men a ride to Tukwila, but instead, the men directed Harris to the parking garage across the street, threatened him with a gun and took his car. RP 43.

Harris told Bartolo he really did not interact with the men during the ride and instead, listened to music. RP 55.

While Bartolo was talking to Harris, a police broadcast indicated another deputy, William Mitchem, had located Harris' Geo Prizm. RP 43. Bartolo acknowledged Harris likely heard the broadcast, including that there were three individuals in the car when it was stopped. RP 61. Bartolo instructed 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.

When they arrived at the stop location at 11:54 p.m.,[1] Bartolo could see the Geo Prizm and three men handcuffed and in custody on the sidewalk. RP 45-46, 54, 56. Bartolo stopped his patrol car approximately 30-40 feet from the Geo Prizm. RP 46. There were a number of other police cars there that had been involved in the stop and had their flashers activated. RP 57.

Bartolo parked with his lights directed southbound towards Harris' vehicle and turned his spotlight on. RP 47-48. The suspects were led toward Bartolo's car one at a time by one of the other deputies and stopped one to two car lengths away for Harris to identify. RP 47. RP 48. Harris positively identified each of the handcuffed men led by the officer as being involved in the robbery. RP 49-50.

Defense counsel argued the show-up identification was impermissibly suggestive because Harris knew his car had been stopped and that the persons he was about to identify were in the car when police stopped it. CP 70; RP 89. Furthermore, when Harris was taken to his car, Ali and the other two suspects were in custody on the sidewalk near the car. CP 70. And when the identification was made, Ali was handcuffed and accompanied by a deputy with a spotlight shining in his face. CP 70; RP 89. The combination of these factors strongly suggested Ali was one of the men who stole Harris' car. CP 70; RP 90.

As defense counsel further argued, the suggestiveness created a strong likelihood of misidentification, as evidenced by the discrepancy between Harris' descriptions of the suspects and the physical appearance of the men taken into custody. CP 70. Harris described the men as black and in their early twenties. CP 70; RP 91. However, Ali was 35 years old.

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[1] Bartolo testified the stop occurred near South 195th Street and International Boulevard.

CP 70; RP 91. Moreover, he was wearing different clothes than described by Harris. CP 80-81, 89. There was also a strong likelihood of misidentification, because Harris did not interact with the men during the car ride. RP 96. Accordingly, he did not have a good opportunity to view the suspects prior to the identification. CP 71; RP 96. Finally, approximately an hour had passed between the time of the incident and the show-up identification. RP 89. There was therefore plenty of time for a change in the car's occupants by the time of the stop. RP 97.

The court disagreed the circumstances showed a strong likelihood of misidentification, which in turn, caused the court to question whether suggestiveness had been established. RP 100-102. In short, the court found the defense had not met its burden and denied the motion to suppress. RP 102.

On appeal, Ali argued the trial court violated his right to due process by admitting evidence about an unnecessarily suggestive show-up identification. Brief of Appellant (BOA) at 15-20; Reply Brief of Appellant (RB) at 1-6. Not only were Ali and his co-defendants in handcuffs near a police car, there were an unusual number of policemen and the police made suggestive comments. RB at 1-6 (citing U.S. v. Hines, 455 F.2d 1317, 1318 (DC Ct. App. 1971) (rejecting unusual

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RP 55.

number of policemen as a factor showing suggestiveness where record was unclear as to how many police were present); State v. McDonald, 40 Wn. App. 743, 700 P.2d 327 (1985) (in-court identification unreliable where police officer informed victim that one of the defendants, whom the victim failed to identify in a lineup, was a suspect)).

The court of appeals disagreed the circumstances were similar to those in McDonald or that the record showed an unusual number of police officers present. Appendix at 4. Finding no suggestiveness, the court did not address whether the totality of the circumstances created a substantial likelihood of irreparable misidentification. Appendix at 5.

2. Trial in Ali's Absence

Ali's distrust of his attorney James Womack manifested early and culminated in Ali's outburst and removal from the courtroom just before closing arguments.

Ali's distrust stemmed in part from "continuances back to back," to which Ali objected but defense counsel did not. RP 18; BOA at 10. Ali was also frustrated that Womack did not file motions Ali requested. RP 18. When trial convened on March 11, Ali moved to discharge Womack, citing the above reasons. RP 17-18. After hearing from Ali and Womack, the court ruled there had not been a total breakdown in communication to warrant Womack's discharge. RP 20-21.

Ali persisted, however, accusing Womack of working for the prosecution and lying to him. RP 25. The court admonished Ali to choose his words carefully and noted Womack had filed a number of motions on his behalf. RP 25-26.

After the parties rested, but before closing argument, Womack put Ali's increasing distrust on the record. RP 604. Ali was unhappy with Womack's anticipated closing argument. RP 604. The discussion culminated in Ali alleging that Womack had offered him money for sex. RP 605-06.

The court ruled there was no credible basis to discharge counsel and warned:

> And I am instructing you right now, sir, if you make an outburst in front of the jury when they return to this courtroom for closing argument, I will stop this matter and you will be escorted out. Do you understand that, sir?

RP 609.

Approximately two pages into the prosecutor's closing argument (as transcribed), Ali interrupted and the following occurred:

> DEFENDANT ALI: I just want to tell the jury my lawyer, he –
>
> THE COURT: Members of the jury –
>
> DEFENDANT ALI: He (inaudible) give me – (inaudible/voices overlapping) supplying drugs, sex, I refused. He wants – give me some money and I refused –

> THE COURT: Please exit the courtroom immediately.
>
> DEFENDANT ALI: This is against me and he locked me up with something I haven't done. Once the evidence is against me.
>
> UNIDENTIFIED SPEAKER: Stay seated.
>
> UNIDENTIFIED SPEAKER: I wish you wouldn't get up.
>
> UNIDENTIFIED SPEAKER: He's too upset now. I'm just letting you guys know –
>
> (In Court/Jury Out).

RP 613-14. The court thereafter recessed to allow counsel to consider how they should proceed. RP 614.

When court reconvened, the court questioned Sergeant Lu under oath about what had since happened with Ali. RP 617. According to Lu, Ali was refusing to return to court, did not want to talk to his attorney and wanted to return to his cell. RP 617. When asked about an alternate location for Ali to watch the proceedings, Lu asserted the jail did not have enough staff to sit with Ali at another location. RP 618. Moreover, Lu did not believe Ali would "come willfully to that courtroom." RP 618.

Womack moved for a mistrial on grounds there was a complete breakdown in communication, and Ali would be better served if he had "counsel that he could possibly work with." RP 621.

The court denied the motion, characterizing Ali's outburst as "discrete," and noting only closing argument remained. RP 624. The court saw no reason Womack could not still fully advocate on Ali's behalf. RP 624.

The court also ruled that Ali had waived his right to be present but that he needed to be advised that he could return if he made assurances of appropriate behavior. RP 622-23. The court asked Womack to so advise Ali before he returned to his general cell. RP 623.

When court reconvened, Womack informed the court he had not been able to communicate with Ali:

> THE COURT: And is there anything you would like to put on the record about advising Defendant Ali?
>
> MR. WOMACK: Yes, Your Honor. I did at the court's permission, immediately after we broke last I did go downstairs and attempted to make contact with Defendant Ali. He turned it to the zero, I sat there, I was later informed that a couple things that Defendant Ali (inaudible).
>
> THE COURT: Thank you, Counsel. Thank you for making those efforts.

RP 628-29.

On appeal, Ali argued the court violated his Sixth Amendment right to be present at all critical stages of the trial, because it failed to ensure he was informed of his right to return upon an assurance of good

behavior. BOA at 20-23; RB at 6-12. Ali acknowledged that ordinarily, 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) (advisement of right to return adequate where defense counsel was able to communicate with Chapple). But once the court learned defense counsel had been unable to communicate with Ali to deliver the message, Ali argued it was incumbent on the court to take further action to inform Ali of his right to return. RB at 7.

The appellate court disagreed:

> Ali's case is like Chapple except that Ali refused to speak with defense counsel. Ali now argues that because the court knew he was unhappy with his attorney and had previously tried to have him discharged, the court should not have relied on the attorney to deliver the message and should have devised some other method, perhaps by appointing conflict counsel, sending the bailiff with a message, or drafting an order to give to Ali. These options were not proposed at the time.
>
> Ali had previously tried to delay the trial based on his alleged dissatisfaction with defense counsel. His outrageously disruptive behavior occurred during closing argument. Ali had two codefendants who both moved for a mistrial based on his outburst. We conclude the steps taken by the court were, under the circumstances, adequate to protect Ali's right to be present at trial.

Appendix at 9.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. WHETHER ALI'S RIGHT TO DUE PROCESS WAS VIOLATED BY ADMISSION OF THE UNECESSARILY SUGGESTIVE SHOW-UP IDENTIFICATION IS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

Due process protections apply to pretrial identification proceedings. U.S. Const., amends. 5 and 14; Const., art. 1, § 3; Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled on other grounds by, Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Evidence of a show-up identification should be excluded when the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1983)).

A defendant asserting that a police identification procedure denied him due process must show that the procedure was unnecessarily suggestive. Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). If the defendant makes this showing, the court reviews the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Contrary to the court of appeals decision, the procedure used here was unnecessarily suggestive. Generally, a showup is not unnecessarily suggestive just because the suspects were handcuffed and standing near a police car. See State v. Fortun-Cebada, 158 Wn. App. 158, 170, 241 P.3d 800 (2010) ("By itself, the presence of a suspect in handcuffs is not enough to show the show-up procedure was unduly suggestive"). But here, however, not only were Ali, Mohamed 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 at 1318.

And contrary to the court of appeals characterization, the record shows there were several police cars – that also had on their flashers – in addition to Bartolo's car. That means Ali, Ibrahim and Mohamed were essentially surrounded by four police cars at the time of the identification. The fact a spotlight was also used to illuminate them similarly adds 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.

The court of appeals was also incorrect in finding the facts of McDonald sufficiently distinguishable to admit Harris' identification. 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.

As in McDonald, the police added to the suggestiveness by virtue of their comments to Harris. While Bartolo was talking to Harris, a police broadcast indicated deputy 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 circumstance would assume the three persons who were stopped in the car must be the same three that took it.

In short, the circumstances were more suggestive than in those cases where the suspect was merely handcuffed near a police car. The appellate court erred in concluding otherwise. For the reasons stated in Ali's opening and reply briefs, the suggestiveness created a substantial likelihood of irreparable misidentification. BOA at 19 (noting: the

discrepancy between Harris' physical description of the suspects as appearing in their early 20s and Ali's age of 35; Ali's clothing was different than described by Harris; Harris' limited interaction with the suspects; and length of time between the robbery and the identification would have allowed for a change in the car's occupants by the time of the stop). This Court therefore should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

2. WHETHER THE COURT VIOLATED ALI'S SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL IS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. U.S. Const. amends. V, VI, XIV; Wash. Const. art. 1, §§ 3, 22. Although an accused can lose this right if he or she engages in repetitive and disruptive behavior, see Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), State v. DeWeese, 117 Wn.2d 369, 381, 816 P.2d 1 (1991), trial courts are bound to follow certain guidelines before ejecting a defendant from the courtroom. State v. Chapple, 145 Wn.2d 310, 320-26, 36 P.3d 1025 (2001).

This Court has identified these guidelines as follows:

> First, the defendant should be warned that his conduct could lead to removal. Second, the defendant's conduct must be severe enough to justify removal. Third, this court has expressed a preference for the least severe alternative that will prevent the defendant from disrupting the trial. Finally, the defendant must be allowed to reclaim his right to be present upon assurances that the defendant's conduct will improve.

Chapple, 145 Wn.2d at 320.

At issue here is whether Ali was given an opportunity to reclaim his right to be present following his removal. As indicated, Ali

acknowledged this Court's decision in Chapple, where it held delegating to defense counsel the task of informing a removed defendant of his right to return upon assurances of good behavior was sufficient to safeguard the right to be present. See RB at 7 (discussing Chapple, 145 Wn.2d at 326).

However, the circumstances here are completely different. The state did not dispute (and the court of appeals recognized) that Ali's counsel was unable to meet with him to deliver the message. This Court should accept review to clarify what additional steps the court should be required to take under these circumstances. RAP 13.4(b)(3).

For instance, there are many other steps the court could have taken to execute its duty to inform Ali of his right to return. It could have appointed conflict counsel, sent the bailiff with a message or fashioned an order to give to Ali. See Appendix at 8. The appellate court dismissed these options, noting: "These options were not proposed to the trial court at the time." Appendix at 8.

Regardless, it is the trial court's responsibility to "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." State v. Thompson, 190 Wn. App. 838, 360 P.3d 988 (2015). Thus, that these options were not brought up does not

diminish the court's duty to ensure the defendant knows of his right to return.

Moreover, case law from other jurisdictions suggests the court's actions here were insufficient to ensure Ali's right to be present. See e.g. Chavez v. Pulley, 623 F. Supp. 672 (E.D. Cal 1985) (sending counsel to see if the removed defendant "wants to behave" was constitutionally inadequate, especially since Chavez was dissatisfied with counsel's representation and there was no record of what counsel actually said).

As the Court of Appeals wrote in its decision in this case, "There are no specific requirements governing the procedure a trial court uses to advise an ejected defendant of his right to reclaim the right to be present." Appendix at 8 (citing Chapple, 145 Wn.2d at 325-26). As such, this Court should accept review to provide necessary guidance. RAP 13.4(b)(3).

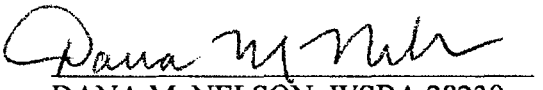
F. CONCLUSION

Because this case involves significant questions of law under the state and federal constitutions, this Court should accept review.

Dated this 25th day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ABDIHAKIM A. MOHAMED,<br><br>Defendant,<br><br>ALI ABDI ALI and ABDISHAKUR I. IBRAHIM, and each of them,<br><br>Appellants. | ) | No. 73413-0-I<br>(consolidated with 73592-6-I)<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: September 26, 2016 |



BECKER, J. — A show-up identification procedure was not unnecessarily suggestive when an officer told a car robbery victim that they were going to possibly identify suspects who were in his car when it was stopped. When one of the defendants was removed from the courtroom for disruptive behavior, the trial court adequately informed him that he would be allowed to return upon assurance that his conduct would improve.

We affirm.

FACTS

Michael Harris was in downtown Seattle offering people rides in his car for money on an October evening in 2014. He agreed to drive three men to Tukwila.

When the men got out of the car, one of them pulled a gun, held it to Harris's head and told him not to move. All three men got into Harris's car and drove off.

Harris called the police. Within about an hour, officers stopped Harris's car with three men inside. Harris was brought to the location, where he positively identified all three suspects as being involved in the car robbery. The State charged all three men with first degree robbery. A jury convicted them as charged. Two—appellants Abdishakur Ibrahim and Ali Ali—have appealed. Their appeals have been consolidated.

SHOW-UP IDENTIFICATION PROCEDURE

Both appellants moved to suppress the identification evidence on the basis that the show-up identification procedure was unduly suggestive. At the suppression hearing, the witness was Deputy Jose Bartolo, the responding officer who was with Harris when a broadcast came over his police radio that officers had stopped Harris's car. Bartolo testified that he told Harris that his car "was being stopped at a certain location. And that we'd be going to that location" to possibly identify three subjects who "were in the vehicle."

A number of police vehicles were present with their flashers on when Bartolo and Harris arrived. Bartolo parked with his car's lights directed towards Harris's car. He turned his spotlight on. Each of the three suspects, handcuffed, was brought separately to this lit area, within about two car lengths of Bartolo's car. Bartolo testified that Harris identified them as the three men who rode with him to Tukwila and robbed him.

The trial court entered findings of fact and conclusions of law and denied the motion to suppress. We review a trial court's findings of fact on a motion to suppress to determine whether they are supported by substantial evidence. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Here, no error is assigned to the findings of fact, so they are verities on appeal. Levy, 156 Wn.2d at 733. We review conclusions of law pertaining to suppression of evidence de novo. Levy, 156 Wn.2d at 733.

A defendant asserting that a police identification procedure denied him due process must show that the procedure was unnecessarily suggestive. Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). If the defendant makes this showing, the court reviews the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

A showup is not unnecessarily suggestive just because the suspects were handcuffed and standing near a police car. See State v. Fortun-Cebada, 158 Wn. App. 158, 170, 241 P.3d 800 (2010) ("By itself, the presence of a suspect in handcuffs is not enough to show the show-up procedure was unduly suggestive."); State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997) (same); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 996 (1987) ("The thrust of Guzman's argument is that he was handcuffed and standing approximately 15 feet from the police car during the showup. These facts alone

are insufficient to demonstrate unnecessary suggestiveness"), review denied, 108 Wn.2d 1027 (1987).

Appellants argue that what made the showup unduly suggestive in this case was the fact that Harris learned from Bartolo and maybe also from the police broadcast that he was going to be taken to the scene where his car was stopped to possibly identify three individuals. They cite State v. McDonald, 40 Wn. App. 743, 744, 700 P.2d 327 (1985). In McDonald, the victim failed to identify the defendant, number 3, in a lineup. After the lineup, a detective told the victim that the subjects arrested following his robbery were numbers 3 and 5 in the lineup. McDonald, 40 Wn. App. at 744. At trial, the victim was allowed to make an in-court identification of the defendant. This court found the detective's statement to be impermissibly suggestive: "He *literally* told [the victim], '*This* is the man." McDonald, 40 Wn. App. at 746. The facts here are not comparable. Bartolo merely told Harris they were going to "possibly identify" three men who were in his car when it was stopped.

Appellants also argue that the use of Bartolo's spotlight and the "unusual" number of police made the showup unnecessarily suggestive. We disagree. As the trial court said in response to the spotlight argument, "I know that the spotlight was used, which would make sense considering it's 11:00 p.m. at night. And if a spotlight hadn't been used, if lighting hadn't been used, that would be the argument in front of me. That there was insufficient lighting." And appellants cite nothing in the record indicating that an "unusual" number of police were present.

The trial court did not err in its conclusion that defendants failed to meet their burden to demonstrate that the show-up procedure was unnecessarily suggestive. Therefore, we need not proceed to the second step of reviewing the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Guzman-Cuellar, 47 Wn. App. at 335.

EYEWITNESS IDENTIFICATION INSTRUCTION

At trial, Ali proposed an eyewitness identification jury instruction.[1] Ibrahim stated his position on two other defense-proposed instructions, but he did not mention the eyewitness instruction. The court declined to give the eyewitness instruction proposed by Ali, and Ibrahim took no exceptions. Ibrahim now argues

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[1] Ali proposed the Ninth Circuit jury instruction 4.11, which reads:

> You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.
>
> In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:
>
> (1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;
> (2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;
> (3) any inconsistent identifications made by the eyewitness;
> (4) the witness's familiarity with the subject identified;
> (5) the strength of earlier and later identifications;
> (6) lapses of time between the event and the identification[s]; and
> (7) the totality of the circumstances surrounding the eyewitness's identification.

NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 4.11 (2010) (alteration in original).

that the trial court erred in declining to give the jury a specific instruction about eyewitness testimony such as the one proposed by Ali.

The State argues that because Ibrahim did not take exception to the court's refusal to give the instruction, he invited the error he asserts on appeal. To be invited, an error must be the result of an affirmative, knowing, and voluntary act. State v. Lucero, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), rev'd on other grounds, 168 Wn.2d 785, 230 P.3d 165 (2010). Ibrahim did not demonstrate the kind of affirmative conduct that can be classified as inviting the error.

Nevertheless, we generally will not consider an issue that is raised for the first time on appeal. RAP 2.5. Below, Ibrahim did not raise any issue concerning an instruction on eyewitness testimony. Ibrahim makes a cursory claim in his reply brief that failing to give a special instruction on eyewitness testimony is a manifest error affecting a constitutional right. We reject this claim. The trial court gave pattern instructions on witness credibility[2] and the State's burden of proof.[3]

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[2] You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

These instructions, taken together, are generally sufficient to charge the jury with deciding whether the State has proven beyond a reasonable doubt that the witness correctly identified the defendant. State v. Allen, 176 Wn.2d 611, 686, 294 P.3d 679 (2013). In view of Allen, there was no manifest error. The issue is waived because it was not raised in the trial court.

RIGHT TO BE PRESENT

Ali interrupted the prosecutor's closing argument with an accusation that defense counsel was giving him drugs and offering him money in exchange for sex. At the court's instruction, a jail guard removed Ali from the courtroom. When the guard returned, he reported that Ali said he did not want to return to court, did not want to talk to his attorney, and wanted only to go back to his jail cell.

If a defendant is removed from the courtroom during his trial, he must be allowed to reclaim his right to be present if he assures the court that his conduct will improve. Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Chapple, 145 Wn.2d 310, 36 P.3d 1025 (2001). The trial court, aware of this rule, asked defense counsel to advise Ali that he would be permitted to return to the courtroom if he promised to behave appropriately. When the court returned from recess, Ali's attorney stated on the record that he

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[3] A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

had tried to make contact with Ali in the jail and that Ali refused to communicate with him. Closing argument then proceeded without Ali present. Ali argues that the trial court did not give him an appropriate opportunity to reclaim his right to be present.

There are no specific requirements governing the procedure a trial court uses to advise an ejected defendant of his right to reclaim the right to be present. Chapple, 145 Wn.2d at 325-26. In Chapple, the trial court sent defense counsel to ask whether the defendant wanted to return and, if so, to ask if he could conduct himself appropriately. Chapple, 145 Wn.2d at 324. Defense counsel reported back, on the record, that the defendant would not agree to behave differently if allowed to return. Chapple, 145 Wn.2d at 324. This was held to be adequate advisement. Chapple, 145 Wn.2d at 326.

Ali's case is like Chapple except that Ali refused to speak with defense counsel. Ali now argues that because the court knew he was unhappy with his attorney and had previously tried to have him discharged, the court should not have relied on the attorney to deliver the message and should have devised some other method, perhaps by appointing conflict counsel, sending the bailiff with a message, or drafting an order to give to Ali. These options were not proposed to the trial court at the time.

Ali had previously tried to delay the trial based on his alleged dissatisfaction with defense counsel. His outrageously disruptive behavior occurred during closing argument. Ali had two codefendants who both moved for

a mistrial based on his outburst. We conclude the steps taken by the court were, under the circumstances, adequate to protect Ali's right to be present at trial.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, ACJ

Cox, J.

## NIELSEN, BROMAN & KOCH, PLLC

## October 26, 2016 - 2:43 PM

**Transmittal Letter**

Document Uploaded: 734130-Petition for Review.pdf

Case Name: Ali Ali
Court of Appeals Case Number: 73413-0

Party Respresented:

**Is this a Personal Restraint Petition?** ○ Yes ◉ No

Trial Court County: King - Superior Court # ____

## The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

**Comments:**

copy sent to: Ali Ali 382281 Coyote Ridge Corrections Center P.O. Box 769 Connell, WA 99326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

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