95304-0

Court of Appeals No. 75569-2-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TEKLEMARIAM DANIEL HAGOS,

Petitioner.

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

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Petitioner, Teklemariam Hagos asks this Court to accept review pursuant to RAP 13.4 of the Opinion of the Court of Appeals in *State v. Hagos*, 75569-2-I.

B. OPINION BELOW

Over Mr. Hagos's objection the trial court permitted the State to elicit overly-prejudicial and irrelevant evidence of statements he made on the night of his arrest. While these statements were not relevant to prove any element of the offense, the opinion of the Court of Appeals reasons the trial court properly admitted the evidence.

C. ISSUES PRESENTED

1. ER 404 categorically bars admission of evidence of other acts offered to show a person's propensity to act a certain way. Other acts evidence offered to prove simply that an individual is a bad person is inadmissible. Did the trial err in admitting evidence that did nothing more than prove Mr. Hagos was a bad person?

2. Suggestive identification procedures increase the likelihood of misidentification. Because eyewitnesses view only people the police believe to be suspects, show-up identifications are inherently suggestive. Here, the confirmatory identification took place after the

police told the eyewitness they had arrested a suspect and asked the witness to identify a person who stood handcuffed, surrounded by officers, and illuminated by a spotlight. The procedure led the witness to comment that it was "pretty obvious" who police wanted him to identify. Did the trial court's refusal to suppress the identification made as a result of that process, and later in court, deprive Mr. Hagos of due process?

D. STATEMENT OF THE CASE

After leaving a Seattle bar with other friends in the early morning hours, Cash Johnson and Greg Preissnitz stopped to get pizza on their walk home. RP 397-98. Given the hour, only a take-out window was open.

As they waited to order, the two noticed a man standing near the take-out window. The man appeared to be talking to himself and otherwise acting strangely. RP 399. When Mr. Johnson approached the window, he heard the man say what he believed to be "fucking faggot." RP 400. Mr. Johnson expressed his outrage to the man, but the man continued mumbling to himself. *Id.* Mr. Johnson later described the man as appearing intoxicated. RP 418.

Shortly, as the two stood eating pizza, the man knocked the pizza from their hands. RP 401. Mr. Johnson testified the man lunged at him several times holding a small knife in his hand. RP 401-03. Mr. Preissnitz who was standing behind Mr. Johnson did not see a knife. RP 452.

A bystander waived down a passing police officer, Tyler Verhaar, and pointed towards Mr. Hagos who was walking a short distance away from the restaurant. RP 479. Officer Verhaar followed Mr. Hagos a short distance, constantly observing him, until other officers arrested Mr. Hagos. RP 481-83. Several officers who came in contact with Mr. Hagos that morning testified he appeared either intoxicated or mentally ill. RP 174, 580.

The State originally charged Mr. Hagos with a single count of second degree assault. CP 1. After Mr. Hagos declined to plead guilty as charged, the State amended the information adding a second count of second degree assault with deadly weapon enhancements for both assault charges. CP 7-8

A jury convicted Mr. Hagos of a single count of second degree assault with a weapon enhancement and one count of fourth degree assault. CP 101-03.

E. ARGUMENT

1. The trial court erred and deprived Mr. Hagos a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

Evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(b). The rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

> ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.

State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

> To admit evidence of other acts the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014)).

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

> This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) (citing *Saltarelli*, 98 Wn.2d at 362).

In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Over defense objection, the trial court admitted evidence of several statements made by Mr. Hagos before the alleged assault and in the course of his arrest. RP 143. Specifically, the court permitted Mr. Johnson to testify that as he stood at the take-out window, he heard Mr. Hagos say "fucking faggots." RP 399. The court also permitted an arresting officer to testify that during a post-arrest pat down Mr. Hagos repeatedly called him and a female officer "faggots" and told them "get out of my butt." RP 531. Audio recordings of the arrest were played for the jury. The court also permitted an officer to testify that while he drove Mr. Hagos from the scene of his arrest, Mr. Hagos said "I want to fuck your wife." RP 548.

The sum of the trial court's oral ruling on the pretrial objection was:

> I am denying the Defense's motion to exclude those statements for the reasons argued by the State, both in the State's presentation yesterday, and also there was an email that was submitted by [the deputy prosecutor], and also [the deputy prosecutor] further supplemented his argument this morning.

RP 143.

The State's argument, accepted wholesale by the trial court, contended the evidence was relevant as evidence of identity, motive, intent and res gestae. RP 108. The State merely asserted the relevance outweighed any prejudice without any effort to explain how that was so.

The State did not charge Mr. Hagos with malicious harassment or any offense that made proof of motive necessary or relevant to any element of the offense.

While Mr. Johnson testified he is gay, RP 400, there is no indication Mr. Hagos knew that or in any way targeted Mr. Johnson because of that fact. Mr. Preissnitz's testimony indicated he is not gay. In fact, the record makes clear Mr. Hagos indiscriminately directed the slur at a number of people, one of whom happened to be gay, one who happened not to be gay, and several others for whom there is no evidence of whether they are gay or not. It appears nothing more than happenstance that Mr. Hagos uttered the slur and Mr. Johnson is in fact gay. Rather than indicate a motive or intent, that evidence simply invited the jury to conclude Mr. Hagos was a dislikable and homophobic person and was more likely assault a stranger.

The State also contended the evidence was relevant to prove identity arguing that because both Mr. Johnson heard his assailant say "fucking faggots" and the arresting officer heard Mr. Hagos say "faggot" that tended to prove Mr. Hagos was the assailant. This claim is tenuous at best, as the State offered the testimony of Officer Verhaar that he followed Mr. Hagos from the restaurant to the point of arrest.

The Court of Appeals, nonetheless, the trial court's wholly superficial analysis. Ignoring the fact that the State charge malicious harassment, the opinion embraces the notion that these statements were relevant to prove motive and intent. Opinion at 5.

But strained as it is, the logic cannot reach to the other statements made by Mr. Hagos. A claim that he would have sex with an officer's spouse does not logically prove identity except by permitting the jury to reason that if Mr. Hagos was the sort of person who makes such inappropriate statement he must also be the sort that would utter the slur heard by Mr. Johnson and thus the assailant. That is, the evidence was relevant solely based on the jury's conclusion that Mr. Hagos was a bad person.

With respect to these later statements, the opinion of the Court of Appeals simply does not address them.

Similarly, the indiscriminate use of certain slurs and a claim that he would have sex with another's spouse does not establish the context or *res gestae* of the crime free of the evidence's propensity value. Perhaps the opposite would have be true had the State intended to prove that such rantings demonstrated Mr. Hagos's intoxication or lack of mental capacity. That was most assuredly not the State's intent.

The trial court erred in admitting the evidence of other acts.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The prosecutor invited the jury to speculate that animus was the motive for Mr. Hagos's action. The prosecutor's closing argument began by urging the jury to find Mr. Hagos took actions on his hate. RP 638. As discussed above, Mr. Hagos's indiscriminate use of a slur does not establish any such thing. To be sure, his boast that he would have sex with an officer's wife establishes nothing beyond the fact that he was a bad person that evening and certainly not that any assault was motivated by hate.

Yet the prejudicial effect of those words is real. That prejudice outweighed any relevance to proof of identity as the evidence was

cumulative and wholly unnecessary on that point in light of Officer Verhaar's testimony and Mr. Priessnitz's identification of Mr. Hagos.

In fact, the State's efforts to put a gloss on the evidence as evidence of identity, and the trial court's wholesale adoption of the State's reasoning, is belied by the use to which the State put the evidence. The prosecutor, a seasoned litigator, understood the impact of those words choosing to emphasize them as the opening of his closing argument. The State sought admission of this evidence and employed it solely for its prejudicial effect on a Seattle jury. That prejudicial effect outweighed any actual relevance.

The Opinion does not address these concerns in any detail. The opinion that prosecutor's use of the evidence in closing. The opinion does not address the plain animus this evidence would create in the jury and the prosecutor's purposeful efforts to stoke that.

The Opinion of the Court dos not engage in the analysis this Court's opinions require. The opinion is contrary to those decisions and warrants review under RAP 13.4.

2. The court erred in refusing to suppress the unduly suggestive lineup procedure.

Officer Lidia Penante drove Mr. Preissnitz to the location of Mr. Hagos's arrest. RP 209. The officer told Mr. Preissnitz she would shine a light on the person arrested. *Id.*

As Mr. Preissnitz described, Mr. Hagos was handcuffed and surrounded by several officers. RP 465. Mr. Preissnitz noted it was pretty obvious who police wanted him to identify. *Id.*

Prior to trial, Mr. Hagos moved to suppress the unduly suggestive identification procedure employed in this case. RP 240. The court denied the motion. RP 257.

Show-up identifications are inherently suggestive because the eyewitness views only those particular people that the police have identified as suspects. *State v. Ramires*, 109 Wn. App. 749, 761, 37 P.3d 343, *review denied*, 146 Wn.2d 1022 (2002); *see State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006). Courts have recognized that "the practice of showing suspects singly to persons for the purpose of identification has been widely condemned." *State v. Rogers*, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986).

In fact, suggestive procedures increase the likelihood of misidentification. *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct.

1926, 18 L.Ed.2d 1149 (1967). A witness's recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. *Mason v. Brathwaite*, 432 U.S. 98, 112, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977). "[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and thus his susceptibility to suggestion is the greatest." *Wade*, 388 U.S. at 229. Impermissibly suggestive out-of-court identification procedures, including show-up procedures, violate due process where there is a substantial likelihood of irreparable misidentification. U.S. Const. amend. XIV; Const. art. I, § 3.

"Indeed, studies conducted by psychologists and legal researchers since *Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable." *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995). "Eyewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases." Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 TxWLR 123, 129 (Winter 2011); see Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 118 n.83 (2002)

("Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be 'notoriously unreliable--in some circumstances more often wrong than right.'").

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Brathwaite*, 432 U.S. at 144; see U.S. Const. amend. XIV; Const. art. I, § 3. A two-step inquiry is involved: first, a court must determine whether the identification procedure is suggestive. *State v. Kinard*, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). If the police used a suggestive procedure, the court decides whether the suggestiveness created a substantial likelihood of misidentification. *Id.* There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L.Ed.2d 401 (1972).

This Court should find that the show-up identification was unduly suggestive. 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 *Brathwaite*, 432 U.S. at 114). Because the show-up procedure was unduly suggestive, the court must determine the likelihood of misidentification. *Barker*, 103 Wn.App. at 905.

Officer Penante informed Mr. Preissnitz she wanted him to identify the person they had arrested and thereby 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); *see also State v. McDonald*, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

The witness's opportunity to view the suspect is evaluated based on the amount of time that a witness had to view the perpetrator and the circumstances under which the observation took place. *Barker*, 103

Wn. App. at 905. Mr. Preissnitz had never met nor seen Mr. Hagos before. RP 466. Mr. Preissnitz testified he was looking away during the attack. RP 468. Mr. Preissnitz also said he was standing behind Mr. Johnson who is taller than him and blocked his view. RP 469.

Any expressed certainty in his identification is a poor measure of reliability. For this reason, this factor has become disfavored by courts and scientists. *See e.g.*, *Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005) ("In the 32 years since the decision in [*Biggers*], the idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies." (internal quotation marks omitted)); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001). This Court should not be satisfied that Mr. Preissnitz's certainty that he had identified the right person weighs in favor of admissibility.

Had the trial court properly examined the suggestibility of the show-up procedure here, the identification would have been excluded. That error requires reversal.

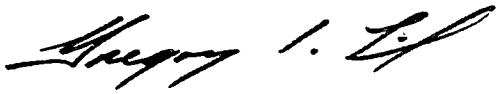
The continued use of impermissibly suggestive identification procedures is an issue of significant public interest and raises important

constitutional concerns. This Court should accept review under RAP 13.4.

F. CONCLUSION

For the reasons above this Court should accept review of the opinion in Mr. Hagos's case.

Respectfully submitted this 4th day of December, 2017.



Gregory C. Link – 25228
Attorney for Petitioner
Washington Appellate Project
greg@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TEKLEMARIAM DANIEL HAGOS, Appellant.	)	No. 75569-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 6, 2017

BECKER, J. — Appellant Teklemariam Hagos, convicted of second and fourth degree assault, challenges pretrial rulings denying his motions to exclude statements he made before and after the assaults and to suppress the result of a show-up procedure. Finding no error, we affirm.

Based on allegations that Hagos assaulted two men with a knife, the State charged him with two counts of second degree assault while armed with a deadly weapon. Prior to trial, Hagos moved to exclude statements he made around the time of the assault and to suppress a show-up identification.

At the suppression hearing, the State's evidence showed that on February 4, 2016, Derval Johnson and Gregory Priessnitz stopped to get pizza in the Capital Hill area of Seattle. As they waited to order, they noticed a man mumbling to himself near the takeout window. Johnson attempted to make conversation with the man. The man replied, "'fucking faggots.'"

A short time later, as Johnson and Priessnitz were eating their pizza slices, the man suddenly knocked the pizza out of their hands. Johnson turned to find the man slashing at him and Priessnitz with a knife.

Bystanders waived down a passing patrol car driven by Seattle Police Officer Tyler Verhaar. Officer Verhaar looked to his left and saw a man, later identified as Hagos, swinging something metallic at Johnson and Priessnitz. Officer Verhaar turned on his overhead lights, and the man immediately began walking away from the scene. Officer Verhaar approached Johnson and Priessnitz who reported the assault and pointed toward Hagos. Officer Verhaar followed Hagos a short distance, never losing sight of him, and later located a knife a few feet from where the incident occurred. Priessnitz identified the knife as the one Hagos had in his hand.

Other officers arrived and detained Hagos at a nearby gas station. Hagos was "highly agitated, very angry," "yelling, swearing," accusing the officers of "putting things up his ass" and repeatedly calling the officers "faggot." During his transport to the precinct, Hagos told the transporting officer, "I'm going to fuck your wife." Several witnesses said Hagos' behavior suggested he was intoxicated or had mental health issues.

Officer Lydia Penate spoke with Priessnitz and Johnson at the scene. Both said they could identify the assailant. Officer Penate then took Priessnitz to the area where officers were detaining Hagos, shined a spotlight on Hagos, and

asked Priessnitz if he could identify him. Priessnitz identified Hagos without hesitation, saying he had the same face, same hat, and same outfit.

The trial court denied Hagos' motions to exclude statements and to suppress the show-up identification. A jury later convicted him of one count of second degree assault with a deadly weapon and one count of fourth degree assault. Hagos appeals the court's pretrial rulings.

Motion to Exclude Statements Under ER 404(b)

Hagos first contends the trial court abused its discretion in admitting statements he made immediately before and after the assaults. Specifically, he contends the court should not have admitted testimony that he said "fucking faggots" just before the assaults, repeatedly called the arresting officers "faggots," told the arresting officers to "get out of my butt," and told the officer transporting him from the scene that "he wanted to fuck my wife." Hagos claims these statements were inadmissible under ER 404(b). We disagree.

ER 404(b) bars the admission of a defendant's other crimes, wrongs, or acts to show the defendant's character or that he acted in conformity with that character. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). Such evidence is admissible for limited purposes, however, such as motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. In addition, Washington courts recognize a "'res gestae' or 'same transaction' exception" to the restrictions of ER 404(b). State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The res gestae exception permits the admission

of evidence otherwise precluded by ER 404(b) "'if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.'" State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991), quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 115, at 398 (3d ed. 1989), aff'd, 120 Wn.2d 616, 845 P.2d 281 (1993). Evidence that falls within an exception to ER 404(b) is admissible only if it also meets the requirements of ER 403, which allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." We review the admission of evidence under these rules for abuse of discretion. Gunderson, 181 Wn.2d at 921-22.

Applying these principles here, we conclude the trial court's decision was well within its discretion. We agree with the State that the challenged statements came within several exceptions to ER 404(b), including motive. Motive is an "impulse, desire, or any other moving power which causes an individual to act." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence of motive is admissible even when it is a not an element of the charged crime. State v. Yarbrough, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009). Hagos' statements reflecting his hostility toward gay men in particular and his angry disposition in general demonstrated an animus or "moving power" relevant to the motive for the assaults. See State v. Finch, 137 Wn.2d 792, 822-24, 975 P.2d 967 (a defendant's hostile declarations toward victims or a racial group may be

probative of motive, intent, and state of mind), cert. denied, 528 U.S. 922 (1999); State v. Powell, 126 Wn.2d 244, 259-63, 893 P.2d 615 (1995) (recent events and statements involving the victim and the defendant were relevant to show ongoing hostilities between the two and were admissible as res gestae and to show motive).

The statements were also relevant to Hagos' intent—an element of both assault charges—and the assailant's identity. As the State points out, Hagos' defense centered on identity, intent, and voluntary intoxication. Hagos' statements were probative of each of these defenses.

Finally, the statements were also properly admitted as res gestae evidence. Assuming res gestae evidence is subject to the strictures of ER 404(b),[1] the statements in this case were "necessary for a complete description of the crime charged." The assaults were unprovoked and, absent the challenged statements, seemingly inexplicable. Hagos' state of mind and angry disposition around the time of the assaults were necessary to give the jury a complete description of the crime. See Powell, 126 Wn.2d at 263.

[1] Division Two of this court has held that res gestae evidence is "not 'prior misconduct' of the type generally inadmissible under ER 404(b)" and should be analyzed under ER 401, 402, and 403, not under ER 404(b). State v. Grier, 168 Wn. App. 635, 647, 278 P.3d 225 (2012), cert. denied, 135 S. Ct. 153 (2014); but see Lane, 125 Wn.2d at 831 (analyzing res gestae evidence under ER 404(b) but treating it as an exception).

ER 403

Hagos argues alternatively that even if the statements were admissible under ER 404(b), they were inadmissible under ER 403 because their probative value was substantially outweighed by the danger of unfair prejudice. While the statements were highly prejudicial, they were also highly probative. A trial judge has considerable discretion in balancing the probative value of evidence against its potential prejudicial impact. State v. Hughes, 106 Wn.2d 176, 201, 721 P.2d 902 (1986); see also Finch, 137 Wn.2d at 824 (deferring to trial court where balancing under ER 403 presented close question). We cannot say the court here abused its discretion.

Motion to Suppress Show-up Identification

Hagos next contends the show-up identification was so suggestive that it denied him due process. Again, we disagree.

A defendant claiming an identification procedure denied him due process must first 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 that showing, the court then 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). Relevant circumstances include the opportunity of the witness to view the suspect, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the

witness's level of certainty, and the time between the crime and the identification. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000); State v. Collins, 152 Wn. App. 429, 434, 216 P.3d 463 (2009), review denied, 168 Wn.2d 1020 (2010). When, as here, the trial court enters findings of fact and conclusions of law on the motion to suppress, we review the findings for substantial evidence and the conclusions de novo. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Because Hagos assigns no error to the trial court's findings of fact, they are verities on appeal. Levy, 156 Wn.2d at 733.

The trial court found that Officer Verhaar saw Hagos "swing a metallic object within inches of the victims" and did not lose sight of Hagos at any point before detaining him. A video taken by a camera in Officer Verhaar's patrol car showed Hagos stepping away from the fracas as one of the victim's pointed at him. The video also showed Officer Verhaar leaving his car and following Hagos. During the showup, Hagos stood next to uniformed officers with his hands handcuffed behind his back. Officer Penate shined a light on Hagos and asked Priessnitz if he could identify him. Priessnitz immediately stated, "'that's him.'" The court also found that

> the witnesses had an opportunity to view the defendant and their attention was directed to him because of his behavior. Mr. Priessnitz paid particular attention to the defendant because he was concerned about the defendant and felt that he should keep his "eye on him." Mr. Priessnitz also pointed the defendant out to Officer Verhaar as the defendant was walking away from the scene. Finally, Mr. Priessnitz was confident in his identification that was only minutes after the incident.

Conclusion of Law 3(a); See State v. Marcum, 24 Wn. App. 441, 445, 601 P.2d 975 (1979) (findings of fact mischaracterized as conclusions of law are treated as findings of fact). Based on these findings, the trial court concluded the showup was "not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." The court's unchallenged findings amply support that conclusion.

Hagos argues, however, that Priessnitz looked away during the attack, stood behind a person who blocked his view, and could have been influenced in his show-up identification by Officer Penante's statement that "she wanted him to identify the person they had arrested." Citing out-of-state authority, he also argues that Priessnitz's certainty regarding his identification does not make his identification more reliable. These arguments do not undermine the court's conclusion.

In addition to ignoring the court's unchallenged findings, Hagos' arguments ignore the evidence that Priessnitz's attention was drawn to Hagos before the assault, and that Priessnitz saw him knock the pizza from their hands and eat Johnson's pizza. Priessnitz thus observed Hagos for more than a moment and looked directly at his face. Consistent with that evidence, Priessnitz told Officer Penate prior to the showup that he could identify the assailant. He then proceeded to confidently identify Hagos based on his face, outfit, and hat. As noted above, the certainty of the identifying witness is a factor Washington

courts consider in determining whether an identification procedure created a substantial likelihood of misidentification.

Hagos' arguments also ignore Officer Verhaar's eyewitness testimony corroborating Preissnitz's identification of Hagos. And contrary to Hagos' assertions, Officer Penate did not testify that she wanted Priessnitz "to identify the person they had arrested"; rather she testified that she asked Priessnitz "if he could identify" a person they had "detained." Considering the totality of the circumstances, any suggestiveness in the showup did not create a substantial likelihood of irreparable misidentification.

In a statement of additional grounds for review, Hagos claims his trial counsel was ineffective for failing to let the jury know during argument "that the police officers did not read me my Miranda rights on the video shown in the courtroom by the officer." The record does not support this claim. The court ruled before trial that Hagos' statements to police were "spontaneously made by the defendant and were not in response to interrogation by the officers. Therefore, Miranda [v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)], does not apply." Conclusion of Law 2(a)(4).

Affirmed.

Becker, J.

Leach, J.

Cox, J.

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. 75569-2-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:

☒ respondent Ian Ith, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ian.ith@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 4, 2017

WASHINGTON APPELLATE PROJECT

December 04, 2017 - 4:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75569-2
Appellate Court Case Title:	State of Washington, Respondent v. Teklemariam Daniel Hagos, Appellant
Superior Court Case Number:	16-1-00616-3

The following documents have been uploaded:

- 755692_Petition_for_Review_20171204155858D1249603_9170.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20171204_155607.pdf

A copy of the uploaded files will be sent to:

- ian.ith@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Gregory Charles Link - Email: greg@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20171204155858D1249603