SUPREME COURT NO. 98267-8

NO. 78346-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOU,

Petitioner.

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

The Honorable Janice Ellis, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Michael Lou requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Lou, No. 78346-7-I, filed February 10, 2020. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Where eyewitnesses saw Lou in shackles outside the courtroom before making in-court identifications, did the trial court violate Lou's due process rights when it denied his motion to exclude the identifications as unduly suggestive?

C. STATEMENT OF THE CASE

1. Substantive Facts

a. After being caught using a stolen identity, Ronald McKinney pointed the finger at Lou in exchange for leniency.

Ronald McKinney was caught red-handed using a faked driver's license and another person's information to fill out a credit application and purchase a high-end chain saw. 3RP[1] 292-300, 362-63. He then claimed Lou gave him the information and identification, drove him to the store in his van, and planned to wait for him but presumably fled when the police

[1] There are 12 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 1, 2017; 2RP – Feb. 12, 13, 14, 15, 16, 2018; 3RP – Feb. 20, 21, 22, 23, 26, Apr. 23, 2018.

arrived. 3RP 357, 361-62. McKinney pled guilty to three felony charges, a fourth was dismissed, and the prosecutor agreed to recommend that he serve only 33 months in prison. 3RP 372, 392. This leniency was granted on the condition that he testify against Lou. 3RP 424.

McKinney testified he began working with Lou in 2016. 3RP 342. He claimed Lou would create an identification card using McKinney's face and would give McKinney information such as the person's name, social security number, address, and phone number. 3RP 343. McKinney was to assume the identity and buy items such as generators and chain saws. 3RP 343, 349.

He claimed Lou kept a computer and printer for making identification cards in his van. 3RP 347. According to McKinney, the plan was for Lou to sell the items and split the proceeds evenly with McKinney. 3RP 350, 368-69.

McKinney told police Lou also made identification cards for himself, usually using a photograph of a person who generally resembled Lou. 3RP 367-68. McKinney identified exhibit 8 as the photograph Lou would use. 3RP 429. He described the face as "Samoan culture." 3RP 429.

McKinney testified he personally witnessed Lou engaging in a transaction only once. 3RP 368. He thought it might have been at

Washington Tractor in Aberdeen.[2] 3RP 369. McKinney had no personal knowledge of any other transaction charged in this case except the incident at Washington Tractor in Mount Vernon,[3] which McKinney claimed was a "solo trip," Lou by himself. 3RP 369-70.

b. The eyewitness testimony consisted of largely tentative or tainted identifications by store employees.

Meanwhile, police were investigating a series of fraudulent purchases of power equipment such as generators and chain saws. 2RP 179. After hearing from McKinney, police showed a photomontage containing Lou's photograph to various store employees. 2RP 182-84.

Ralph Craig and Charlotte Rinehart, from Peninsula Feed in Port Orchard, were shown a montage and picked photograph number 1. 2RP 548-49, 551, 556; 3RP 536-37. Lou was photograph number 3. 3RP 536-37. They did not identify anyone at trial.

David Suppler, from Washington Tractor in Mount Vernon, and Ehrin Wallace, from Washington Tractor in Ellensburg, described the transaction and provided documents, but did not give a description and did not identify anyone. 2RP 343-64, 475-86. They could only say that the name

[2] The charges relating to Washington Tractor in Aberdeen were counts 9 and 10, which were dismissed without being submitted to the jury. CP 414; 2RP 296-331; 3RP 554.
[3] The incident at Washington Tractor in Mount Vernon related to counts 11 and 12. CP 414-15; 2RP 343-64.

and photograph on the driver's license presented matched the person who was in front of them at the time. 2RP 354-56, 480, 486.

Jeff Wall, at Lynwood Motoplex, made what he called an "educated guess." 2RP 226. He picked Lou's photograph because the others did not appear to be the correct age. 2RP 228. He did not identify anyone in court.[4] 2RP 232.

Todd Janner, from Siskun Power Equipment in Everett, was shown a photo montage about three months after the transaction. 3RP 150, 157. At first, he could not identify anyone. 3RP 153. Then the officer asked if he was "leaning" toward any of the photographs. 3RP 154. At that point, Janner picked photo number 3, Lou. 3RP 155-56.

Jordan Giske met a customer purporting to be Michael Avis on July 16, 2016. 2RP 386-90, 403-18. He spent 20-25 minutes with the man. 2RP 421. He described the man as approximately five feet, eight inches tall, Caucasian or "oriental" with a stocky build. 2RP 420. Approximately two months later, when shown the photo montage, he identified Lou with 85 percent certainty. 2RP 427-29.

Nearly a year and a half later, Giske testified at trial. Before his testimony, he viewed Lou entering the courtroom, in handcuffs and flanked by two jail security officers. 2RP 437, 440. He then declared himself 100

[4] After defense objection, the court declined to permit Hall's in-court identification testimony. 2RP 232.

percent certain Lou was the person he met that day. 2RP 421. Giske is white. 2RP 435. He acknowledged that there was only one person present who possibly matched his description of the suspect. 2RP 433.

This is confirmed by photographs taken at trial and attached to counsel's motion to strike the in-court identifications. CP 260-64; 2RP 440-41. Lou was the only non-white man (and one of only two males) sitting at counsel's table. There were two female prosecutors, a female judge, one female defense attorney, and one tall white male defense attorney as well as uniformed security officers. Only one person present even remotely resembled Giske's description of a five foot eight inch tall, stocky man of "oriental" descent.

Josh Bair spent approximately 30 to 60 minutes with the man calling himself as Michael Avis on July 21, 2016. 2RP 490-91, 497-98. In his statement to police, Bair said the man was Native American. 2RP 492. The day of trial, Bair also viewed Lou in handcuffs, flanked by security. 2RP 503. He then testified that by "Native American," he meant anyone with darker skin than his own, specifically of Asian descent. 2RP 492. He identified Lou "absolutely." 2RP 493. Like Giske, he agreed that, of all the people at the counsel table, one looked obviously different. 2RP 499.

At the end of Bair's testimony, defense counsel argued there was a due process concern in allowing witnesses to view Lou in handcuffs in the hallway being escorted into the courtroom by guards before identifying him in court. 2RP 503-04. The court noted the point was well-taken and suggested the prosecutor muster witnesses elsewhere in the future. 2RP 505-06.

Dan Hollister, at Pilchuk Equipment Rentals, described a dark complected Hawaiian, man approximately six feet tall and 220 pounds. 3RP 5. At trial, he identified Lou. 3RP 13. However, when police showed him the photomontage, he identified someone else. 3RP 536-37.

Finally, Alexander Laigo, at Goodsell Power Equipment, identified Lou when police showed him the photo montage. 3RP 58-59. At the time, he was 100 percent certain because it was only 24 hours after the transaction. 3RP 58-59. By the time of trial, he no longer had sufficient recollection to identify anyone. 3RP 41-66.

The defense also presented expert testimony on the vagaries of eyewitness identification by Dr. Stephen Ross, a professor of psychology at the University of Washington, Tacoma. 3RP 557.

c. The State also presented documents pertaining to the transactions such as invoices and credit applications.

In six of the nine incidents, the state presented a copy of the driver's license used in the transaction. 2RP 217, 356, 542; 3RP 14-15, 45-46, 146-47. In each of the nine, the state presented invoices, credit applications, or other paperwork signed by the customer at the time. 2RP 261-63, 348-55, 415-18, 482-85, 494-98, 563-67; 3RP 18-23, 46-54, 141-48.

For each transaction, the person named in the documents testified he did not engage in the transaction, the photograph on the identification was not of him, and certain other details were incorrect. 2RP 270-77, 508-20, 578-83; 3RP 35-40, 80-85, 199-203. All of the individuals denied knowing Lou or giving him permission to use their personal information. 2RP 277-78, 507, 511, 516, 583; 3RP 40, 85, 203.

A summary of the transactions is as follows:

Date	Store	Employee(s)	Named Purchaser
Nov. 5, 2015	Lynwood Motoplex	Jeff Wall	Richard Carlson
May 27, 2016	Siskun Power Equipment	Todd Janner	Joel Bandy
July 12, 2016	Washington Tractor – Mount Vernon	David Supler	Michael Avis
July 16, 2016	Washington Tractor – Olympia	Jordan Giske	Michael Avis
July 20, 2016	Washington Tractor – Ellensburg	Ehrin Wallace	Michael Avis

July 21, 2016	J&I Power Equipment	Josh Bair	Michael Avis
Aug. 1, 2016	Peninsula Feed	Ralph Craig Douglas Deford Charlotte Rinehart	Douglas Garrison
Sept. 11, 2016	Pilchuk Rentals	Dan Hollister	Kevin James
Sept. 21, 2016	Goodsell Power Equipment	Alejandro Laigo	Kevin Gacke

d. Three months after arresting McKinney, police searched Lou's van.

Approximately three months after McKinney was arrested, police searched Lou's van. No computer or printer was found. 3RP 456-57. Police did find a shipping label for Wayne Jewell, a person whose identification McKinney had used. 3RP 357, 439. They also found laminating pouches with "Washington" in reflective type as well as a sheet of paper printed with the Washington state seal, ink, invisible ink, fluorescent powder, and paperwork relating to a purchase from Honda/Kubota in Issaquah by Dana Marler. 3RP 439-40, 484-89. Marler denied engaging in any transaction with that retailer and testified the face on the identification was not his. 3RP 461. They also found sales documents from Goodsell Power Equipment in the name of Kevin Gacke. 3RP 500-01.

2. Procedural Facts

At the close of the State's case, the court dismissed counts 1 (leading organized crime), 9 (second-degree identity theft), and 10 (forgery). 3RP

553-54. The jury acquitted Lou on count 8 (trafficking in stolen property). CP 130. Lou was found guilty of four counts of first-degree identity theft, nine counts of forgery, one count of first-degree theft, and two counts of second-degree theft. CP 118-36. The court imposed exceptional sentences for a total sentence of 96 months. CP 48-49.[5]

On appeal, Lou argued that permitting the eyewitnesses to view him in shackles immediately before their in-court identification testimony was impermissibly suggestive in violation of due process. The Court of Appeals held that, assuming the procedure was impermissibly suggestive and arranged by state action, the totality of the circumstances provided sufficient indicia of reliability to avoid a due process violation. Lou now seeks this Court's discretionary review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

The in-court identifications violated due process because the witnesses saw Lou in handcuffs outside the courtroom before identifying him.

Allowing witnesses to view the accused in handcuffs before identifying him in court is an impermissibly suggestive procedure, particularly when the accused is visibly different from the other persons at counsel table. Under these circumstances, the in-court identifications are

[5] The judgment and sentence was twice amended to correct scrivener's errors. The changes do not affect the issues raised in this brief. CP 508-14.

not reliable when weighed against the polluting influence of the suggestive viewing. Lou's right to due process was violated, and his convictions should be reversed because they are based on the unreliable in-court identifications.

Impermissibly suggestive out-of-court identification procedures violate due process when there is a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985); U.S. Const. amend. XIV; Const. art. I, § 3. Once the procedure is shown to be impermissibly suggestive, the court must then determine whether, under the totality of the circumstances, the identification testimony is reliable in spite of the impermissibly suggestive procedure. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

1. The in-court identifications were impermissibly suggestive.

Allowing Giske and Bair to see Lou in handcuffs before their testimony was impermissibly suggestive. See United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995). In Emanuele, the court suppressed a bank teller's in-court identification after she had earlier observed United

States Marshals leading Emanuele from court in shackles. Emanuele, 51 F.3d at 1127, 1130. That teller and another teller conferred and said, "it has to be him." Id. The teller had been unable to identify the robber in an earlier photomontage. Id. at 1126.

The court determined that, "[T]o walk a defendant — in shackles and with a U.S. Marshal at each side — before the key identification witnesses is impermissibly suggestive." Id. at 1130. The court concluded the teller's lengthy and clear view of the robber at the time of the robbery only highlighted her earlier inability to identify him in the photomontage. Id. The court held the teller's failure to identify the defendant earlier combined with the impermissibly suggestive "viewing of the defendant in conditions reeking of criminality, bolstered by the comments of another witness," rendered the in-court identification unreliable.[6] Id.

The same is true here. Moreover, even if seeing Lou in handcuffs in the hallway was not, standing alone, impermissibly suggestive, the combination of the hallway viewing and the fact that Lou was the only non-white man (and one of only two males) sitting at counsel's table rendered the cross-racial in-court identifications impermissibly suggestive.

[6] The in-court identification of the other teller involved in the separate robbery was not deemed unreliable because that teller had initially identified the defendant from a photomontage. Emanuele, 51 F.3d at 1131.

In-court identifications are inherently suggestive because the defendant is "conspicuously seated in relative isolation" at counsel's table. United States v. Williams, 436 F.2d 1166, 1168 (9th Cir. 1970); United States v. Rundell, 858 F.2d 425, 427 (8th Cir. 1988). "[I]it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." United States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997) (citing United States v. Archibald, 734 F.2d 938, 941, 943 (2d Cir. 1984); United States v. Hill, 967 F.2d 226, 232 (6th Cir.1992)). That concern is heightened when the defendant and the witness are of different races. Id. (citing Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L.Rev. 934 (1984)). That is the case here with both Giske and Bair. 2RP 435, 492.

Some courts have criticized the practice of in-court identification when the defendant looks clearly different from others sitting at counsel table. For example, in United States v. Correa–Osorio, 784 F.3d 11, 19–22 (1st Cir. 2015), the court noted "[a]n in-court identification may be unduly suggestive . . . if the defendant looked different from others in the courtroom or at counsel table . . . (say, by being the only black person present)." Similarly, in United States v. Morgan, 248 F. Supp. 3d 208, 213 (D.D.C. 2017), the court declared, "This Court agrees with the Second, Third, and Fifth Circuits that it is suggestive to ask a witness to identify

the perpetrator of the charged crime when it is obvious to that witness which person is on trial for committing that crime. Here, there will be no doubt that the African–American man seated at counsel table is being prosecuted."

Other courts have held in-court identification, standing alone, is not per se impermissibly suggestive. See State v. Smith, 36 Wn. App. 133, 138-40, 672 P.2d 759 (1983) (in-court identification not unduly suggestive where a black defendant was seated alone at defense counsel table with no other black persons nearby); United States v. Bush, 749 F.2d 1227, 1232 (7th Cir. 1984) (having defendant sit at counsel table does not establish a due process concern for in-court identification).

But here, the in-court identification does not stand alone. It stands together with the preceding hallway viewing in handcuffs. The combined result is impermissible suggestiveness because the two events were close in time, with the hallway viewing leading into the in-court identification. Witnesses of a different race identified Lou, the only non-white man sitting at counsel table, after they had just seen him escorted into the courtroom in handcuffs. These circumstances combined to render the in-court identification procedure impermissibly suggestive.

In deciding whether an identification is impermissibly suggestive, courts have also considered "the strength and propriety of the initial

identification." Reese v. Fulcomer, 946 F.2d 247, 262 (3d Cir. 1991). "If the initial identification is either nonexistent or weak . . . subsequent viewings may be impermissibly suggestive." Id. The accused has a right to "avoid having suggestive methods transform a selection that was only tentative into one that is positively certain." Raheem v. Kelly, 257 F.3d 122, 135 (2d Cir. 2001) (citing, *inter alia*, Simmons, 390 U.S. at 383).

In this case, Giske's identification via the photomontage was significantly weaker than at trial moving from 85 percent to 100 percent certainty. 2RP 421, 427. This indicates that the increase in Giske's certainty was generated by his viewing of Lou in handcuffs generated, the very scenario that troubled the court in Raheem, 257 F.3d at 135. Bair had made no prior identification. 2RP 489-502. The much weaker and nonexistent prior identifications indicate that the hallway viewing and the in-court viewing combined to create an impermissibly suggestive identification procedure.

2. The in-court identifications are irreparably tainted under the totality of circumstances.

To determine whether identification testimony is reliable despite an impermissibly suggestive procedure, courts consider the following factors: (1) the witness' opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness'

prior description of the criminal, (4) the level of certainty when viewing a defendant or his image, and (5) the length of time between the crime and the identification procedure. Biggers, 409 U.S. at 199-200. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Brathwaite, 432 U.S. at 114.

Giske and Bair viewed the person they knew as Avis for 20-60 minutes the day of the transaction. 2RP 421, 491. In terms of their degree of attention, this was a routine transaction for Giske and Bair. 2RP 385-86, 413, 490-91, 499-500. The accuracy of the prior description weighs against reliability, particularly for Bair, who, at the time, described the person as "Native American." 2RP 492, 498-99. He made no pre-trial identification. Giske, meanwhile, had his level of certainty shoot up from 85 percent to 100 percent after viewing Lou in handcuffs. 2RP 421, 427. This undermines the reliability of his identification. The passage of time also weighs against reliability. Giske's montage identification was two months after the incident. 2RP 428-29. His in-court identification was nearly a year and a half after that. Similarly, Bair's in-court identification was nearly 18 months after the incident. Finally, these were both cross-racial identifications. 2RP 435, 492. Research demonstrates the inherent unreliability of eyewitness identification generally and of cross-racial

eyewitness identification specifically. State v. Allen, 176 Wn.2d 611, 621 & n.4, 294 P.3d 679 (2013).

In these circumstances, there is "a very substantial likelihood of irreparable misidentification." Simmons, 390 U.S. at 384. The impermissibly suggestive "viewing of the defendant in conditions reeking of criminality," rendered Bair and Giske's in-court identifications unreliable. Emanuele, 51 F.3d at 1131.

3. Reversal is necessary regardless of the standard of review.

Constitutional due process is violated when an impermissibly suggestive identification procedure results in a substantial likelihood of irreparable misidentification. Simmons, 390 U.S. at 384; McDonald, 40 Wn. App. at 746; U.S. Const. amend. XIV; Const. art. I, § 3. A claim of a denial of constitutional rights is reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009); Brown v. State, 155 Wn.2d 254, 261, 119 P.3d 341 (2005).

However, even under an abuse of discretion standard, Lou's convictions should be reversed. Judicial discretion "'means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.'" T.S. v. Boy Scouts of

Am., 157 Wn.2d 416, 423, 138 P.3d 1053, 1057 (2006) (quoting State ex rel. Clark v. Hogan, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)). A discretionary decision is reversible on appeal when the court's decision is manifestly unreasonable or rests on untenable grounds. Id. Untenable grounds include failing to apply the correct legal standard. Id.; Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A court also abuses its discretion by denying constitutional rights. Iniguez, 167 Wn.2d at 280 (citing State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

Here, the trial court violated Lou's right to due process by allowing impermissibly suggestive in-court identification testimony. The trial court also failed to apply the correct legal standard, namely, the factors listed in Biggers. In ruling on Lou's motion to strike, the court did not mention any of the factors. Instead, it simply discussed the logistical difficulties posed by the courthouse layout. 2RP 505-06. The court did not weigh the corrupting influence of the shackles viewing against other potential indicia of reliability. It simply threw up its hands as if nothing could be done. That is not a reasoned exercise of discretion to which appellate court should defer.

Constitutional error is presumed prejudicial and requires reversal unless the State meets the heavy burden of proving it harmless beyond a reasonable doubt. State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482

(2013) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). If there is any possibility the error was the "'slight impetus'" that affected the verdict, the conviction must be reversed. State v. Coristine, 177 Wn.2d 370, 383, 300 P.3d 400 (2013) (quoting Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). That high burden cannot be met here.

The untainted evidence is far from overwhelming. In total there were nine incidents. In three of the incidents, there was no eyewitness identification of Lou as the person involved (David Supler, Ehrin Wallace, and Douglas Deford did not identify anyone; Ralph Craig identified someone else). 2RP 343-64, 475-86, 556, 571, 575-76. In two others, a witness identified Lou in a photomontage (Jeff Wall and Alejandro Laigo). For the sixth, the witness at first could not pick anyone, but then said he was leaning toward Lou's photo. 3RP 153-56. A seventh witness, Dan Hollister, identified a different person in the photomontage, but at trial claimed to be able to identify Lou. 3RP 13, 536-37. Hollister's was the only in-court identification that was not tainted by seeing Lou marched into court in handcuffs.

Against this backdrop of tentative and nonexistent identifications, the Bair and Giske identifications were not harmless beyond a reasonable

doubt. On the contrary, their testimony was likely to be the impetus for conviction.

4. This Court should grant review.

This case raises a critical constitutional issue that is likely to recur in other cases in the future, particularly in Snohomish County and any other county with a similar courthouse layout. The State claimed in its briefing to the Court of Appeals that having the witnesses view Lou in shackles just before their testimony was necessary due to the layout of the courthouse with only one hallway. Brief of Respondent at 20. Review is therefore warranted under RAP 13.4(b)(3) and (4).

"Mistaken eyewitness identification is a leading cause of wrongful conviction." State v. Sanchez, 171 Wn. App. 518, 572, 288 P.3d 351 (2012). "[The] vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The recognized problems with eyewitness identifications should not be exacerbated by allowing witnesses to view the accused in shackles before the witness takes the stand to then identify the only person in the room who even vaguely resembles the witness' prior description. Allowing witnesses to view the defendant in handcuffs before in-court

identification testimony compromises the integrity of the trial as a truth-seeking process. Lou's convictions should be reversed.

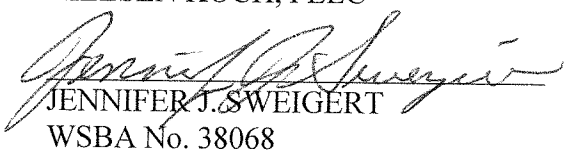
E. CONCLUSION

The Court of Appeals opinion presents significant questions of constitutional law and public interest. Lou requests this Court grant review under RAP 13.4 (b) (3), and (4), and reverse.

DATED this 11th day of March, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL THOMAS LOU, Appellant.	No. 78346-7-I DIVISION ONE UNPUBLISHED OPINION FILED: February 10, 2020

CHUN, J. — Michael Lou appeals his convictions for first degree identity theft, forgery, first degree theft, second degree identity theft, and second degree theft. He claims that two in-court identifications were impermissibly suggestive and therefore violated his right to due process. He also contends that his trial counsel performed ineffectively by failing to renew a motion to sever, move for a mistrial, or request a limiting instruction after the court dismissed three counts at the close of the State's case. We determine that, because the identifications contained sufficient indicia of reliability, Lou's due process claim fails. Additionally, we reject Lou's ineffective assistance of counsel claim because he fails to show that his counsel's performance was deficient or that it prejudiced him. Accordingly, we affirm except to remand to strike the criminal filing and deoxyribonucleic acid (DNA) fees from the Judgment and Sentence.

I. BACKGROUND

On August 5, 2016, Lynden police arrested Ronald McKinney for using a fake driver's license to complete a credit application. Following his arrest, McKinney told police the following: Lou made fake identifications (IDs) for him and he used the IDs to purchase items on credit. The IDs contained McKinney's photograph but another person's name and identifying information. McKinney and Lou sold the items online for two-thirds of their price. The two split the profit.

On June 1, 2017, the State filed an amended information charging Lou with 22 counts: leading organized crime (count 1), first degree identity theft (counts 2, 5, 11, 16, 21), forgery (counts 3, 7, 10, 12-15, 17, 19, 22), first degree theft (count 4), trafficking in stolen property (count 8), second degree identity theft (counts 9, 18), and second degree theft (counts 6, 20). Lou's attorney moved to sever the trial, which motion the court denied. The court found that Lou had "failed to demonstrate that [he] would be unduly prejudiced by having Counts 1-22 presented to a jury in a single trial." Lou again submitted a motion to sever, which the court denied.

Witness Jordan Giske testified at Lou's trial as follows: On July 16, 2016, while at work at a Washington Tractor store, Giske spent 20-25 minutes helping a customer purchase equipment. Because the customer applied for financing, Giske collected personal information. The customer identified himself as Michael Avis and provided a driver's license with that name. The customer was "approximately 5'8" or so, 180 to 185 pounds, fit or stocky build and [C]aucasian or Oriental." Giske stated that he was "100 percent sure" that Lou was the

customer he helped that day. Giske agreed with the defense that Lou was the only person in the courtroom who matched his description of the customer.

Giske additionally stated that he had seen Lou walking outside the courtroom. After Giske left the witness stand, the defense stated, because Lou was in custody, he must have been in handcuffs and escorted by officers when Giske saw him outside of the courtroom. The court agreed.

Josh Bair also testified for the State. Bair's testimony provided the following: While working at J & I Power Equipment on July 21, 2016, Bair spent between 30 minutes and an hour helping a customer with financing for some equipment. Bair recollects the interaction "exactly." As part of protocol, Bair copied the customer's driver's license. The customer signed the financing form as Michael Avis. When Bair later provided a statement for the police, he wrote that the customer was "a medium build Native American male." By Native American, Bair "meant [the customer] was darker complexion than [himself], some sort of Asian type descent." While in the courtroom, Bair identified Lou as the customer he had helped. Bair acknowledged that Lou looked different than the other people at the defense table. After a recess, Lou's defense counsel stated for the record that she saw Bair in the hallway before officers brought Lou into the courtroom and therefore believed that Bair had seen Lou in handcuffs prior to making his in-court identification.

After the witnesses testified, Lou moved to strike the in-court identifications. Lou argued that the identifications violated due process because the combination of (1) the witnesses seeing him in restraints and escorted, and

(2) him being the only person at the defense table matching the witnesses' descriptions, rendered the identification procedures unnecessarily suggestive. The court denied Lou's motion.

At the close of the State's case, the court dismissed count 1 (leading organized crime) due to insufficient evidence and counts 9 and 10 (second-degree identity theft and forgery) for lack of venue.

On February 26, 2018, the jury acquitted Lou of count 8 (trafficking in stolen property) but found him guilty on the remaining charges. Lou appeals.

II. ANALYSIS

A. In-Court Identifications

Lou argues that the two in-court identifications violated his federal right to due process because the witnesses saw him in handcuffs and escorted by officers outside of the courtroom prior to the identifications and because he was the only person matching the descriptions of the suspect at the defense table. Advancing several arguments, the State claims no due process violation occurred. We conclude that Lou's claim fails because the identifications bore sufficient indicia of reliability.

This issue involves the admission of evidence, which we review for abuse of discretion.[1] State v. Birch, 151 Wn. App. 504, 514, 213 P.3d 63 (2009).

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[1] Though Lou did not address the standard of review in his briefing, at oral argument he contended that we should review this issue de novo. Wash. Court of Appeals oral argument, State v. Lou, No. 783467 (Jan. 16, 2020), at 1 min., 51 sec. though 2 min., 27 sec. (on file with court). But this would contradict the case law directly addressing this issue. See Birch, 151 Wn. App. at 514 (reviewing a due process challenge to an in-court identification for an abuse of discretion).

"A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons." Birch, 151 Wn. App. at 514.

An out-of-court procedure violates due process if it is impermissibly suggestive such that it is substantially likely that irreparable misidentification will occur. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Courts use a two-part analysis to determine whether an identification violated due process. See Birch, 151 Wn. App. at 514. Under this analysis, the party challenging the identification first bears the burden of showing that the procedure was impermissibly suggestive. Vickers, 148 Wn.2d at 118. If the party makes this initial showing, the court then considers whether, based on the totality of the circumstances, the procedure "created a substantial likelihood of irreparable misidentification." Vickers, 148 Wn.2d at 118. In deciding this factor, courts consider whether, despite the suggestiveness, the identification contained sufficient indicia of reliability. State v. Ramires, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). To this end, courts analyze:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Birch, 151 Wn. App. at 514.

Assuming, without deciding, that the identifications were impermissibly suggestive,[2] Lou's due process claim fails because the identifications contained sufficient indicia of reliability.

Here, Giske helped the man he identified as Lou with purchasing equipment for 20-25 minutes. As such, he had close contact with the customer for an extended period of time. Prior to his in-court identification, he described the person as "approximately 5'8" or so, 180 to 185 pounds, fit or stocky build and [C]aucasian or Oriental." And Lou's Judgment and Sentence describes him as 5'10" tall, 180 pounds in weight, and having black hair and brown eyes. Giske further testified that he was "100 percent sure" that Lou was the customer he helped that day.

Bair also spent an extended period of time at close contact with the man he identified as Lou in court. In total, he spent between 30 minutes and an hour helping with financing. Bair described the customer as "a medium build Native American male," though he later testified that "Native American" was how he described people with darker skin than his own. Bair testified that he could "recollect exactly" his interaction with the customer.

Though certain facts suggested that the witnesses could be mistaken in their identifications of Lou, the shortcomings of their identifications went to the weight of the evidence rather than its reliability. Birch, 151 Wn. App. at 515.

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[2] For purposes of this opinion, we also assume, without deciding, that there was improper arrangement by law enforcement. See Perry v. New Hampshire, 565 U.S. 228, 242, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) (holding that the Due Process Clause is implicated only when the identification is procured under unnecessarily suggestive circumstances arranged by law enforcement).

Because both in-court identifications of Lou contained sufficient indicia of reliability, we conclude the trial court did not abuse its discretion by admitting them.

B. Ineffective Assistance of Counsel

Lou asserts that his trial counsel performed ineffectively by failing to renew the motion to sever or move for a new trial after the court dismissed counts 1, 9, and 10, and by not requesting an instruction to limit the jury's consideration of the evidence relating to the dismissed counts. The State asserts that Lou cannot establish the elements of an ineffective assistance claim. We agree with the State.

For only counts 1, 9, and 10 the State presented evidence of three fraudulent transactions:

> • A man and a woman entered a Washington Tractor store in Snohomish on July 1, 2016. The woman filled out a credit application to purchase two generators. The man appeared to be of "island descent," had brown hair, and was "[p]robably six-foot to six-foot two." The employee helped the woman load the generators into a baby blue hatchback-style vehicle.
>
> • After impounding Lou's vehicle, detectives found paperwork issued by Issaquah Honda/Kubota containing the name Dana Marler.
>
> • On June 8, 2016, an employee at a Washington Tractor store in Aberdeen helped a customer who "was about 5'10", 5'11" or so, white, you know, white complexion, dark brown hair, bit of facial hair" with a transaction to purchase equipment. The transaction turned out to be fraudulent. The employee could not identify anyone in a photo montage as the customer he had helped. At trial, the employee described the customer as of "possibly Asian descent or maybe white Asian, some kind of mix."[3]

[3] The State does not argue that this evidence related to any count other than 1, 9, and 10.

At the end of the State's case, the court dismissed counts 1, 9, and 10. Lou's attorney did not renew the motion to sever, move for a mistrial, or request a limiting instruction.

An ineffective assistance of counsel claim involves mixed questions of law and fact that we review de novo. State v. Linville, 191 Wn.2d 513, 518, 423 P.3d 842 (2018).

Washington imposes a two-pronged test for determining whether a defendant received constitutionally sufficient representation. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Under this test, the defendant bears the burden of showing both deficient performance and resulting prejudice. Estes, 188 Wn.2d at 457-58. An attorney's performance is deficient "if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Estes, 188 Wn.2d at 458 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To show prejudice, the defendant must demonstrate a reasonable probability that, had their counsel performed sufficiently, the outcome of the proceedings would have been different. Estes, 188 Wn.2d at 458. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458 (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984). Applying these standards, we conclude that Lou's ineffective assistance of counsel claim fails.

Lou first argues that his counsel should have renewed the motion to sever after the court dismissed counts 1, 9, and 10. But regarding the question of deficient performance, counsel need not pursue strategies that reasonably appear unlikely to succeed. State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011). Here, the court had twice before denied Lou's motion to sever. When the court first denied the motion, it found that Lou had failed to demonstrate that a single jury trial would result in undue prejudice. Given the court's previous denials of his motions to sever and its finding that a single trial would not cause undue prejudice, Lou's attorney could have reasonably believed that the court would have denied yet another motion to sever. As such, Lou's attorney did not perform deficiently by failing to renew the motion to sever.

Lou next claims he received ineffective assistance of counsel because his attorney did not move for a mistrial after the court dismissed counts 1, 9, and 10. But this claim also fails because Lou cannot show his attorney's failure to move for a mistrial constituted deficient performance. To obtain a mistrial, Lou would have had to show that nothing the court could have said or done would have remedied the harm to him. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Given this high bar, Lou's attorney again could have reasonably believed that the court would have denied a motion for a mistrial. See Brown, 159 Wn. App. at 371. Thus, Lou fails to satisfy the deficient performance prong as it relates to his counsel's failure to move for a mistrial.

Finally, Lou claims that his counsel was ineffective because she did not request a limiting instruction after the jury heard evidence related to three

uncharged fraudulent transactions. But Lou cannot show that this constituted deficient performance. Before the court instructed the jury, Lou's counsel was presumably aware that the court would provide a limiting instruction to evaluate each count separately. And indeed, the court did so: the instruction provided that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." The court additionally instructed the jury to not consider charges 1, 9, and 10 for any reason. Jurors are presumed to follow the court's instructions. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). To be sure, an additional limiting instruction would have potentially emphasized the evidence related to the three uncharged transaction. Thus, we can presume that the decision not to request one was legitimate trial strategy. State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (finding that lawyer's failure to request limiting instruction was tactical). "Deficient performance is not shown by matters that go to trial strategy or tactics." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Additionally, as to prejudice, because the court gave these two instructions, Lou cannot show that the lack of a third limiting instruction prejudiced him.

In light of the foregoing, Lou's claims of ineffective assistance of counsel fail.

C. Legal Financial Obligations

Lou seeks to have the $200 filing fee and $100 DNA fee stricken from his judgment pursuant to State v. Ramirez, 191 Wn.2d 732, 739, 426 P.3d 714

(2018). Ramirez, decided after the trial court imposed the fees in this case, holds that trial courts may not impose discretionary costs on an indigent criminal defendant. 191 Wn.2d at 746. Here, the trial court recognized Lou's indigence when it allowed him to pursue his appeal at public expense. The $200 criminal filing fee is discretionary. Ramirez, 191 Wn.2d at 748. Additionally, the $100 DNA sampling fee is discretionary if the State has already collected an offender's DNA because of a prior conviction. RCW 43.43.7541. Lou's Judgment and Sentence recognized that he had prior convictions and that the State had already collected a DNA sample from him. The State properly concedes this issue.

Affirmed except to remand to strike criminal filing and DNA fees from the Judgment and Sentence.

Chun, C.J.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

March 11, 2020 - 4:46 PM

Filing Petition for Review

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