FILED
May 28, 2014
Court of Appeals
Division I
State of Washington

Supreme Court No. 90437-5

(Court of Appeals No. 69912-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent

v.

CRUZ BLACKSHEAR,
Petitioner.

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# PETITION FOR REVIEW

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FILED
JUL - 1 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

Cruz Blackshear, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Blackshear appealed from his Snohomish County Superior Court conviction for robbery in the second degree. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The Fourteenth Amendment to the United States Constitution guarantees a criminal defendant a fair trial. Admission of an identification that is the result of an impermissibly suggestive show-up procedure violates due process. Where the show-up identification was unduly suggestive and the subsequent identification of Mr. Blackshear unreliable, was the Court of Appeals decision in conflict with other decisions of the Court of Appeals, with decisions of this Court, and does it raise a significant question of due process under the United States constitution, requiring review? RAP 13.4(b)(1), (2), (3)?

2. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case and moving to suppress inadmissible evidence. Where

Mr. Blackshear's attorney failed to move for suppression of the impermissibly suggestive show-up, was the Court of Appeals decision in conflict with other decisions of the Court of Appeals and with decisions of this Court, requiring review? RAP 13.4(b)(1), (2), (3)?

3. Mr. Blackshear also requests this Court review each and every issue raised in his Statement of Additional Grounds. RAP 13.4(b)(1), (2), (3).

D. STATEMENT OF THE CASE

On October 15, 2012, Cruz Blackshear was spending time with his friend, Heather Ray, near the Wait's Motel in Everett. 12/26/12 RP 50-52. A few blocks away, near Providence Hospital, John Couldry was walking on Colby Street, after visiting his wife, who was recovering from surgery. 12/27/12 RP 3-6. Before he reached his car, Mr. Couldry was accosted by a young man who demanded his money. Id. Mr. Couldry, who was, himself, recovering from a surgical procedure, stated at trial that his assailant was a young man in blue jeans and a brown or tan t-shirt. Id. He also stated that he was colorblind, and that after he gave the man his cell phone, he closed his eyes, bracing to be punched. Id. at 7-10. The suspect hit Mr. Couldry in the side of the head and ran off; Mr. Couldry went back to the hospital to report the incident to security guards, who called the police. Id. at 8-11.

About an hour later, Everett Police Officer Christopher Reid stopped and detained Mr. Blackshear, who was still near the Wait's Motel. 12/27/12

RP 117-20. Telling Mr. Blackshear that he fit the description of an individual involved in a robbery nearby, Mr. Blackshear and Ms. Ray were both detained. Id.[1] Mr. Couldry was brought to the area in a police car and told that officers had detained a suspect and they wanted to see if Mr. Couldry could identify him. Id. at 13. Mr. Couldry was also told that a canine unit had been brought in to track the suspect. Id. When Mr. Couldry was brought directly to the area in which Mr. Blackshear was being detained by uniformed police officers, Mr. Couldry identified Mr. Blackshear as the person who had taken his cell phone. Id.[2]

Mr. Blackshear was charged with robbery in the second degree. CP 72-73. At trial, defense counsel indicated in an oral motion in limine that he was making a "defense request to suppress the identification by Mr. Couldry as essentially an impermissible one-person show-up." 12/26/12 RP 23-35. However, defense counsel conceded that he neglected to brief the suppression issue in his trial brief or to provide authority to the court. Id. at 23-29. The trial court denied the motion with leave to renew, but defense

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[1] Mr. Blackshear did not actually fit the description that Mr. Couldry had given, which was: blue jeans, light brown or tan t-shirt. 12/27/12 RP 3-6. Mr. Blackshear was wearing dark pants, a white t-shirt, and a black jacket. Id. at 17, 129-31. Mr. Couldry also estimated the suspect's weight at around 115 pounds, and Mr. Blackshear weighed 160 at the time of his arrest. Id. at 131.

[2] A woman standing at a nearby bus stop, Sonia Rundle, testified that she saw a person resembling Mr. Blackshear approach an older man, but she only saw him ask the man for a cigarette. 12/27/12 RP 29-33. When she saw the younger man with the cell phone, she thought he was borrowing it; she never saw an altercation. Id. at 32-33.

counsel never provided authority, and failed to object to the admission of the in-court identification during trial. 12/27/12 RP 3-6, 11-14.

Mr. Blackshear was convicted of robbery in the second degree. CP 50; RP 128-31.

Mr. Blackshear appealed, arguing that the identification procedure had been impermissibly suggestive, and that his counsel had been constitutionally ineffective for failing to move to suppress the identification. CP 2-13. Mr. Blackshear also raised a number of grounds in his Statement of Additional Grounds.

On April 28, 2014, the Court of Appeals affirmed Mr. Blackshear's conviction. Appendix.[3]

Mr. Blackshear seeks review in this Court. RAP 13.4(b)(2).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH OTHER DECISIONS OF THE SUPREME COURT, WITH OTHER DECISIONS OF THE COURTS OF APPEALS, AND RAISES A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES. RAP 13.4(b)(1), (2), (3).

1. The show-up identification violated due process because it was so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. An accused person has a due process right to a

[3] On May 19, 2014, the Court of Appeals filed a new Opinion to correct a typographical error. Only the corrected Opinion is attached.

fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. Chambers v. Mississippi, 410 U.S. 284, 310, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). "[R]eliability [is] the lynchpin in determining admissibility of identification testimony" under a standard of fairness that is required under the Due Process Clause of the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

The United States Supreme Court has noted the due process concerns surrounding eyewitness identifications. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Courts have long condemned the police practice of using single-defendant show-up identifications because the very act of showing only one suspect infers that the police have already narrowed their attention to that particular person. Stovall, 388 U.S. at 302; State v. Hanson, 46 Wn. App. 656, 666, 731 P.2d 1140 (1987). Show-up identifications are not necessarily constitutionally impermissible if held shortly after the crime is committed and in the course of a prompt search for the suspect. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208 (1981). However, evidence of a show-up identification violates due process, if 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, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

A two-step test is used to determine whether the identification procedure passes constitutional muster. First, the defendant must show the identification procedure was suggestive. State v. Vaughn, 101 Wn.2d 604, 608-09, 682 P.2d 878 (1984). If the defendant shows the identification procedure was suggestive, the court must decide whether the suggestiveness created a substantial likelihood of irreparable misidentification. State v. Maupin, 128 Wn.2d. 918, 924, 913 P.3d 808 (1996).

To establish a due process violation, a defendant must show the identification procedure was unduly suggestive. Vickers, 148 Wn.2d at 118; State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). Although a show-up involving a suspect displayed in handcuffs near a police car was not impermissibly suggestive as a matter of law, State v. Guzman-Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966, review denied, 108 Wn.2d 1027 (1987), it certainly raises concerns regarding the reliability of eyewitness evidence. Michael D. Cicchini and Joseph G. Easton, 100 J. Crim. L. & Criminology 381, 389-91(Spring 2010) (footnotes omitted), quoting Jessica Lee, Note, No Exigency, No Consent: Protecting Innocent Suspects from the

Consequences of Non-Exigent Show-Ups, 36 Columbia Human Rights. L. Rev. 755, 769, 770 (2005) (discussing Gregory v. State, No. 93-SC-878-MR (Ky. Nov. 23, 1993).

In light of the modern view that single person show-ups are intrinsically impermissibly suggestive and have resulted in scores of wrongful convictions, this Court should reexamine its case law, concluding the show-up of Mr. Blackshear here was impermissibly suggestive, and should grant review. RAP 13.4(b)(1), (2), (3).

2. The *Biggers* factors required suppression of the complaining witness's identification of Mr. Blackshear; therefore, the Court of Appeals decision requires review. Once a trial court determines a show-up was impermissibly suggestive, the court must then determine whether, under the totality of the circumstances, the identification was nevertheless reliable. Vickers, 148 Wn.2d at 118.

In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court reaffirmed that a conviction based upon eyewitness identification will be set aside if the "identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." Id. at 197 (citation omitted). But the Court found that an identification can nonetheless be admissible if it is otherwise reliable. Id. The Court identified a test to ascertain whether, under the "totality of the

circumstances," an identification is reliable despite the suggestive procedures. Id. at 199-200.

The factors to be considered include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the suspect, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Biggers, 409 U.S. at 193. See also Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Washington utilizes the Biggers test to determine the admissibility of an identification. Vickers, 148 Wn.2d at 118.

Here, Mr. Couldry's identification was not particularly reliable nor accurate. Mr. Couldry's initial description to Everett police officers was a white man, approximately five-feet, seven-inches tall, and 115 pounds, wearing a light brown or tan shirt and Levi's; Mr. Couldry qualified this bare-bones description with the notable caveat that he is colorblind. 12/26/12 RP 58-59; 12/27/12 RP 11-13, 17-21, 96-99, 138-40, 153-55. Mr. Couldry stated that he only saw his assailant for a short period of time -- he did not see the suspect approach him while he walked to his car; the suspect demanded his money; he gave the young man his cell phone; he immediately closed his eyes and braced to receive a slap to the head. 12/27/12 RP 7, 17-21.

Mr. Couldry's ability to view the suspect was very short and occurred during a traumatic incident; he stated that he was quite focused on protecting his abdomen, due to his health condition, which distracted his attention from the suspect. Id. at 7. Mr. Couldry testified that when the show-up was conducted, "it was hard for me to make a positive identification." 12/27/12 RP 24. Under the Biggers factors, Mr. Couldry's description of the suspect was not sufficiently reliable to overcome the suggestive identification procedure employed by the police.

The entire show-up procedure was designed to direct him to choose Mr. Blackshear, since Mr. Blackshear was the only person presented at the show-up, standing on the street with police officers. Mr. Couldry had been informed by officers that he was being taken to view the person who had been apprehended, in order to make an identification. 12/27/12 RP 13. Lastly, Mr. Blackshear did not even match the description given by Mr. Couldry, outweighing the description by 60 pounds, and even without the black jacket, wearing entirely different clothing (white shirt and black pants, rather than brown shirt and blue jeans). Under the Biggers standard, Mr. Couldry's identification of Mr. Blackshear was not otherwise reliable, and was tainted by the impermissibly suggestive procedure. State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 110 (1980), aff'd, 96 Wn.2d 215, 634 P.2d 868 (1981), quoting Simmons, 390 U.S. at 384.

Mr.Couldry's pretrial identification of Mr. Blackshear created a substantial likelihood of misidentification at trial, based upon the impermissibly suggestive show-up. Id. As a consequence, the in-court identification was tainted by the pretrial identification and should have been suppressed.

3. The Court of Appeals decision affirming the trial court's decision requires review. A constitutional error is presumed prejudicial. Maupin, 128 Wn.2d. at 924. The State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Without the show-up identification, there was insufficient evidence that Mr. Blackshear was the person who robbed Mr. Couldry. The error in admitting the show-up identification, as well as each of the references to the show-up, was not harmless.

For these reasons, the Court of Appeals decision is in conflict with decisions of the Court of Appeals, with decisions of this Court, and moreover, raises a significant question of due process under the Constitution of the United States, requiring the review of this Court. RAP 13.4(b)(1), (2), (3).

4. Mr. Blackshear did not receive the effective assistance of counsel guaranteed by the federal and state constitutions.

a. Mr. Blackshear had the constitutional right to the effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did

counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

In reviewing the first prong of the Strickland test, appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to move for suppression of the impermissibly suggestive show-up. Mr. Blackshear was charged with a robbery that occurred on October 15, 2012; the show-up took place within an hour of the robbery on the same date. CP 70-71. The identification procedure was described in the affidavit of probable cause, dated November 2, 2012. Id. The complaining witness, Mr. Couldry, gave an incomplete and inaccurate description of his assailant, which did not match Mr. Blackshear. 12/26/12 RP 58-59; 12/27/12 RP 11-14, 17-21, 96-99, 117-20, 153-55. Nevertheless, despite receiving notice of the show-up,

defense counsel failed to file a CrR 3.6 motion to suppress the identification procedure.

There can be no legitimate tactical explanation for counsel's failure to bring a plausible motion to suppress an identification procedure that was impermissibly suggestive. See Reichenbach, 153 Wn.2d at 130-31 (no conceivable tactical reason to fail to move to suppress critical evidence in search warrant case); State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006) (no tactical reason to fail to move to suppress evidence obtained as result of pretextual stop).

Failure to bring a legitimate motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. Reichenbach, 153 Wn.2d at 130-31; Meckelson, 133 Wn. App. at 436. Here, the complaining witness, Mr. Couldry, testified that when he was driven to the location where Mr. Blackshear had been detained, "it was hard for me to make a positive identification." 12/27/12 RP 24. As discussed above, under the Biggers factors, Mr. Couldry's description of the suspect was not sufficiently reliable to overcome the suggestive identification procedure employed by the police. 409 U.S. at 193. Under these circumstances, the trial judge likely would have suppressed the show-up identification in this case, had defense counsel brought a proper suppression motion.

Further, it is clear from the record that defense counsel's attention was drawn to the suppression issue, and that his decision not to brief the issue or to litigate suppression was not tactical. See, e.g., State v. McFarland, 127 Wn.2d 322, 336-37, 899 P.2d 1251(1995) (because of the presumption of effective representation, defense must show in the record the absence of tactical reasons supporting the challenged conduct by counsel). Here, defense counsel made an oral motion to suppress the show-up on the day of trial. 12/26/12 RP 23-25, 27-29. When the court inquired why defense counsel had not briefed the issue, he apologized and stated only that he had not had the opportunity to interview the complaining witness until after he had already drafted his trial brief. 12/26/12 RP 23-25, 27-29. Then defense counsel stated that he "apologize[d] for not having been able to brief" the issue, and promised to provide case law supporting his position to the court, since "I don't have authority for the Court [today]." Id. at 28 (emphasis added). The defense requested "leave to address this" before the show-up was introduced; however, authority was never provided, and a motion to suppress was never filed on behalf of Mr. Blackshear. Id. During trial, when the complaining witness testified about the show-up procedure, defense counsel failed to object. 12/27/12 RP 11-14, 25.[4]

[4] Defense counsel also failed to object to several witnesses' hearsay accounts of Mr. Couldry's identification of Mr. Blackshear. 12/16/12 RP 53-55; 12/27/12 RP 123-24, 141-43

Accordingly, Mr. Blackshear's attorney's failure to challenge the show-up constitutes constitutionally deficient performance. Strickland, 466 U.S. at 687-88; Reichenbach, 153 Wn.2d at 130-31; Thomas, 109 Wn.2d at 226.

5. Because the Court of Appeals decision regarding ineffective assistance of counsel is in conflict with decisions of this Court, review is required. Mr. Blackshear did not receive a fair trial because his attorney did not move to suppress the impermissibly suggestive show-up, despite the fact that he was aware of its occurrence and aware of its import. Thomas, 109 Wn.2d at 229, 232; Reichenbach, 153 Wn.2d at 130-31.

Accordingly, the Court of Appeals decision upholding the conviction was in conflict with decisions of this Court, and review should be granted. RAP 13.4(b)(1).

MR. BLACKSHEAR PRESERVES FURTHER REVIEW OF ALL OTHER ISSUES PREVIOUSLY RAISED IN BRIEFING AND IN HIS STATEMENT OF ADDITIONAL GROUNDS.

Mr. Blackshear's petition for review focuses on the issues discussed above. Mr. Blackshear does not, however, abandon the other arguments or assignments of error raised in his briefing, either by counsel or in his Statement of Additional Grounds. Each of these arguments is expressly reserved for further review.

F. CONCLUSION

For the above reasons, the Court of Appeals decision requires review, as it is in conflict with other decisions of the Court of Appeals or with decisions of this Court. RAP 13.4(b)(1), (2), (3).

DATED this 28th day of May, 2014.

Respectfully submitted,

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# APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, v. CRUZ BLACKSHEAR, Appellant. | ) | No. 69912-1-I<br>DIVISION ONE<br>UNPUBLISHED OPINION<br>FILED: May 19, 2014 |

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STATE OF WASHINGTON
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SPEARMAN, C.J. — Cruz Blackshear appeals his conviction on one count of robbery in the second degree, arguing that the trial court committed reversible error in denying his motion to suppress evidence of the victim's showup identification and subsequent in-court identification. Blackshear contends that defense counsel's failure to adequately raise the suppression issue amounted to ineffective assistance of counsel. In a statement of additional grounds for review, Blackshear further asserts that (1) the dog tracking evidence was contaminated, (2) witness testimony was not credible, (3) police officers ignored his request for an attorney during questioning, and (4) the prosecutor improperly argued that Blackshear is left handed. We conclude that Blackshear is unable to demonstrate that he suffered prejudice as a result of the alleged errors, and that his additional grounds for review lack merit. We therefore affirm.

## FACTS

On the afternoon of October 15, 2012, John Couldry visited his wife at Providence Hospital in Everett. As Couldry left the hospital and walked towards his car, he was confronted by a man who demanded his money. Couldry, who was 59 years old and recovering from surgery, denied having any money and kept his hands in his sweatshirt pockets to protect his abdomen. The man asked Couldry if he had a knife. When Couldry said he did not, the man struck Couldry on the side of the head. Couldry, who felt that he was not in any condition to fight back, offered the man his cell phone. The man took the phone, and Couldry saw him walk across the street towards a park. Couldry immediately returned to the hospital and asked security to call the police.

Sonya Rundle was sitting at the bus stop next to the park at the time of the incident. Rundle saw a young man leave the park and approach an older man. Rundle said the young man was wearing jeans but no shirt. She said the older man took out his cell phone, and the young man took it and ran back to the park where a woman was waiting. Rundle saw the man put on a black jacket, and the pair took off down an alley. Rundle later positively identified Blackshear at trial as the young man who took the cell phone.

When police arrived, Couldry and Rundle provided a description of the man who took the phone and his female companion. Couldry told police he is colorblind, but that he thought the robber was wearing a light brown or tan t-shirt and Levi's jeans. A description was broadcast, and police then began to search the area. A K-9 unit from the Lynnwood Police Department was also called.

Officer Christopher Reid saw a couple that resembled the description of the suspects. The man was later identified as Blackshear, and the woman as his friend Heather Ray. Officer Reid asked Blackshear and Ray if they had seen anyone matching the description of the suspects. They denied seeing anyone. Officer Reid notified other officers that he had located the suspects. He then recontacted Blackshear and Ray, informed them that they matched the description of the suspects, and asked them to remain so police could bring a witness to their location. When Couldry arrived, he positively identified Blackshear as the man who took his cell phone. Couldry later identified Blackshear in court as well.

Meanwhile, the police dog tracked a scent from the park in the direction Rundle and Couldry said the man had fled. The dog tracked directly to the patrol car where Blackshear was seated.

Blackshear was arrested, and Ray gave a written statement. Ray said she saw Blackshear leave the park and go across the street to talk to "some old guy." Verbatim Report of Proceedings VRP (12/16/12) at 46. Ray saw Blackshear take something from the man and walk away. When Blackshear returned, he told Ray that he had stolen the man's phone and said they needed to walk away. Ray and Blackshear walked away together, but split up after a short time. Five minutes later, Ray received a call on her cell phone from an unidentified number. The caller was Blackshear. He directed Ray to walk toward him. They walked together towards a motel located about a block from the hospital, where they

were stopped by police. The route Ray described was the same route the police dog tracked from the park to Blackshear.

Blackshear was charged with one count of second degree robbery, alleged to have been committed while he was on community custody. A jury found Blackshear guilty. The trial court imposed a standard range sentence. He now appeals.

## DISCUSSION

### Ineffective Assistance of Counsel

Blackshear argues that the trial court violated his right to due process by admitting Couldry's identification of him as the robber because it was the product of an impermissibly suggestive single person showup identification procedure. He also contends that Couldry's in-court identification was tainted by the impermissibly suggestive out-of-court identification.[1] Accordingly, Blackshear contends that defense counsel was ineffective for failing to file a CrR 3.6 motion to suppress the identification evidence.

At trial, defense counsel indicated in an oral motion in limine that he was making a "request to suppress the identification by Mr. Couldry as essentially an impermissible one-person show-up." VRP (12/26/12) at 24. Defense counsel conceded that he had not addressed this issue in his trial brief, but explained that he had not been able to interview Couldry until after the trial brief was due. The trial court denied the motion, but expressly stated that defense counsel could

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[1]. State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 110 (1980) (where pretrial identification creates a substantial likelihood of misidentification, in-court eyewitness identification may also be suppressible).

renew the argument upon offering authority to the court and the State. Defense counsel, however, did not renew the motion or object to admission of the in-court identification during trial.

To demonstrate ineffective assistance of counsel, appellant must show that: "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. MacFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume that counsel's representation was effective. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). This presumption can be overcome by a showing that "his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Davis, 152 Wn.2d at 673. "A failure to establish either element of the test defeats the ineffective assistance of counsel claim." In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

On this record, we cannot determine whether defense counsel's decision not to follow up his oral motion in limine with a written CrR 3.6 motion to suppress was unreasonable. Defense counsel stated that he decided to raise the suppression issue after interviewing Couldry and looking at the photographs. However, he had not yet thoroughly researched the issue at the time he orally raised it. It is possible that upon researching the issue, defense counsel

reasonably believed that the motion to suppress Couldry's identification would not be successful, particularly where the remaining evidence implicated Blackshear in the crime. It is also possible that counsel simply neglected to follow up on the issue.

Regardless of whether defense counsel's representation was deficient, we conclude that the representation did not prejudice Blackshear. To establish a due process violation in an identification procedure, a defendant bears the burden of showing the procedure was impermissibly suggestive. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). If the court determines the showup was impermissibly suggestive, it then considers "whether the procedure created a substantial likelihood of irreparable misidentification" under the totality of the circumstances. State v. Vickers, 148 Wn.2d 91,118, 59 P.3d 58 (2002). In determining the reliability of an identification, courts consider the following factors: (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. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Linares, 98 Wn. App. at 401.

It is well-established that showup identifications are not per se impermissively suggestive. Neil v. Biggers, 409 U.S. at 198; State v. Rogers, 44 Wn. App. 510, 515-516, 722 P.2d 1349 (1986). "Showups held shortly after a crime is committed and in the course of a prompt search for the suspect have

been found to be permissible." State v. Booth, 36 Wn.App. 66, 71, 671 P.2d 1218 (1983) (citing State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978)). Showups are not necessarily suggestive even if the suspect is handcuffed and standing near a patrol car or surrounded by police officers. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997), abrogated on other grounds by Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001); United States v. Hines, 455 F.2d 1317, 1329 (D.C. Cir. 1971).

Blackshear acknowledges that showups are not necessarily suggestive, but asserts that this rule has resulted in scores of wrongful convictions. He asks this court to reexamine its case law and conclude that Couldry's showup identification was impermissibly suggestive. We decline Blackshear's invitation to abandon a well-established principle, particularly under the facts of this case. At the time of the showup identification, Blackshear was standing near police officers and a police car, but had not been handcuffed. Couldry testified that he did not necessarily expect that the person who police had detained was the person who robbed him. The police dog tracked the scent from the park to Blackshear after Couldry had already identified him. Blackshear has not met his burden of showing that the showup was unnecessarily suggestive. If the defendant fails to make this showing, the inquiry ends. Vickers, 148 Wn.2d 91.

We conclude that Blackshear has failed to show that defense counsel's failure to file a CrR 3.6 motion to suppress the showup identification or object to

Couldry's in-court identification, resulted in prejudice. Accordingly, Blackshear's ineffective assistance of counsel claim fails.[2]

Statement of Additional Grounds for Review

First, Blackshear argues that the dog tracking evidence was unreliable because it was contaminated. Blackshear notes that the search occurred approximately 45 minutes after the robbery, in a public area that was not cordoned off, and that a track may be impacted if the area has been traveled by more than one person. Defense counsel did not move to exclude the dog tracking evidence. Even if he had, the evidence would have been admissible. "As a condition precedent to admission of tracking dog evidence it must be shown that: (1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow." State v. Welker, 37 Wn. App. 628, 636, 683 P.2d 1110 (1984) (citing State v. Loucks, 98 Wn.2d 563, 566, 656 P.2d 480

[2] The State also argues that Blackshear failed to preserve the suppression issue by failing to timely raise it below. Generally, an appellant cannot raise an issue for the first time on appeal unless there is a manifest error affecting a constitutional right. RAP 2.5(a); McFarland, 127 Wn.2d at 333. The defendant has the burden of showing prejudice by identifying the constitutional error and explaining how the error affected his rights. Id. It is the showing of actual prejudice that makes the error "manifest" and allows for appellate review. Id. (citing State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). Even if we assume without deciding that Blackshear waived the suppression issue, the result again turns on a showing of prejudice. As discussed above, Blackshear is unable to make this required showing.

(1983)). The record contains ample proof that all of these requirements were met.

Second, Blackshear challenges Ray's credibility as a witness for the State. Blackshear notes that Officer Reid told Ray that the victim had identified Blackshear as the robber, and that Blackshear was not carrying two phones at the time of arrest.[3] According to Blackshear, Officer Reid tore up Ray's original statement because it did not corroborate his story, and coerced Ray to write a new statement that matched his version of events by threatening to put her in jail.

In contrast, Officer Reid testified that he told Ray her "noncooperation could implicate her as a suspect in the crime as an after-the-fact accomplice," but he denied manipulating Ray into saying what he wanted to hear. VRP (12/27/12) at 132-35. Officer Reid had "a general recollection" that Ray may have begun a statement that was thrown away, but could not specifically remember what if anything had been written down. VRP (12/27/12) at 134. And Ray testified that "[i]t's not the fact about not wanting to go to jail, it's what I saw and I told them." VRP (12/26/12) at 72.

"An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)

[3] Blackshear also asserts that Officer Reid "admitted to using impermissible suggestiveness." Appellant's Statement of Additional Grounds for Review at 2. This is incorrect. Officer Reid testified that Couldry identified Blackshear at a showup identification, but he never admitted that the process was impermissibly suggestive.

(quoting State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967)). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We cannot review the jury's determination of Ray's credibility as a witness.

Third, Blackshear contends that the police improperly ignored his request to speak with an attorney and continued to question him without giving full Miranda[4] warnings. Because Blackshear objected to the admission of statements he made at the time of arrest, the trial court held a CrR 3.5 hearing. "[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Miranda claims are issues of law requiring de novo review." State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007) (citing State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)).

"Miranda warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing Miranda, 384 U.S. at 444)). If a suspect requests counsel at any time during a custodial interview, questioning must cease until a lawyer has been made available or the suspect reinitiates conversation. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.E.2d 378 (1980). The suspect's request for counsel must be unambiguous. Davis v. U.S., 512 U.S.

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

452, 459, 114 S.Ct. 2350, 129 L. Ed.2d 362 (1994) (holding that defendant's remark "Maybe I should talk to a lawyer" was not a request for counsel).

Here, the trial court issued the following written conclusions pursuant to CrR 3.5, based solely on undisputed facts:

> The Court finds that the defendant's early comment to Officer Reid "Well if I am under arrest then you should talk to my lawyer" is an ambiguous statement and not an invocation of the right to counsel. It is not a request for an attorney. The defendant was then later fully and properly advised of his Miranda rights by Officer Reid, and understood those rights and agreed to waive them. He then answered Officer Reid's questions for a time until he invoked his right to silence. His statements to Officer Reid prior to invoking his right to silence are admissible at trial as the result of a proper advice and waiver of Miranda rights.
>
> The defendant's pre-Miranda statements to Officer Marrs were volunteered by the defendant and were not the product of any custodial interrogation by Officer Marrs. Accordingly, they will be admissible at trial as volunteered statements by the defendant.

CP at 76.

There is sufficient evidence in the record to support the findings of fact, and the trial court's conclusions regarding the admissibility of Blackshear's statements are legally correct.[5]

Fourth, Blackshear challenges an argument made by the prosecutor during closing argument. The prosecutor stated that Blackshear is left-handed and noted that Couldry was struck on the right side of the head, consistent with a

[5] In his opening brief, Blackshear argued that remand is required because the trial court erred in failing to enter written findings of fact and conclusions of law following the CrR 3.5 hearing. The State has since supplemented the record to include the CrR 3.5 certificate. The State requested that Blackshear be given an opportunity to file supplemental briefing limited to the trial court's findings and conclusions in that certificate. Blackshear, however, did not submit a reply brief or otherwise request an opportunity to file supplemental briefing. We note that the conclusions of law in the certificate track the trial court's oral ruling.

strike delivered by a left-handed person. Blackshear asserts that he is ambidextrous rather than left-handed, and argues that the prosecutor improperly introduced evidence unrelated to the charged crime after promising not to.

Blackshear is mistaken. A defendant claiming prosecutorial misconduct must show both improper comments and resulting prejudice. State v. Evans, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). In response to Blackshear's pretrial motion to exclude prior misconduct under ER 404(b) and ER 403, the prosecutor said "I have no intention of questioning or bringing up topics unrelated to the actual robbery incident in this case." VRP (12/26/2012) at 13. Regardless of whether Blackshear is ambidextrous or left-handed, the prosecutor's argument was relevant to the charged crime and did not implicate prior misconduct. The argument was not improper or prejudicial.

Affirmed.

Spearman, C.J.

WE CONCUR:

## 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. 69912-1-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:

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Snohomish County Prosecutor's Office
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 28, 2014

# WASHINGTON APPELLATE PROJECT

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