

No. 65716-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

QUOC KIEN LU,

Appellant.

2011 JAN 26 PM 4:13  
CONFIDENTIAL  
K

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

The Honorable Ronald Kessler

BRIEF OF APPELLANT

THOMAS M. KUMMEROW  
Attorney for Appellant

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

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A. SUMMARY OF ARGUMENT

Quoc Lu was convicted of second degree burglary, second degree malicious mischief and unlawful possession of cocaine. His conviction was based on the show-up identification of Mr. Lu by a witness to the event. The trial court ruled the show-up was not impermissibly suggestive and otherwise reliable. Mr. Lu submits that questions raised by commentators about wrongful convictions based upon erroneous eyewitness identifications call into question this Court's rulings that show-up identifications are not impermissible *per se*. In addition, the identification here was not otherwise reliable. Finally, the State failed to prove that the damage to the victim's door exceeded \$750. Mr. Lu seeks reversal of his convictions and remand for a new trial or dismissal of the malicious mischief count.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Lu's right to due process by admitting the witness's identification of him because it was the result of an impermissibly suggestive show-up and was not otherwise reliable.

2. To the extent it is considered a finding of fact, the court erred in entering Conclusion of Law 4 regarding the show-up identification in the absence of substantial evidence.

3. To the extent it is considered a finding of fact, the court erred in entering Conclusion of Law 5 regarding the show-up identification in the absence of substantial evidence.

4. The jury's verdict on second degree malicious mischief violated due process because it was not supported by substantial evidence that the damage exceeded \$750.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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 violates due process. Was the show-up in this case impermissibly suggestive and the victim's subsequent identification of Mr. Mr. Lu unreliable, entitling Mr. Lu to reversal of the convictions for a violation of due process?

2. Due process requires the State to prove each essential element of the offense beyond a reasonable doubt. There must be proof that the damages exceeded \$750 to prove second degree malicious mischief. The State did not admit proof of the

replacement cost of the broken glass door and the restaurant owner's testimony failed to establish the damages exceeded \$750. Is Mr. Lu entitled to reversal of his conviction for malicious mischief with instructions to dismiss?

D. STATEMENT OF THE CASE

On the morning of December 20, 2009, at around 5:30 a.m., Cornelius Myles and Ronald Glew were arriving at their respective places of employment in a strip mall on Rainier Avenue in Seattle. RP 184-85, 241-42. Mr. Myles owned a laundromat and Mr. Glew worked at the Starbuck's. *Id.* Both saw a man wearing a black hooded sweatshirt approach the door to the Magic Dragon Chinese Restaurant in the same strip mall. RP 195-97,246-47. Mr. Glew watched as this man lowered his shoulder, broke the glass entrance door, and entered the restaurant. RP 249. Approximately 30 seconds later, Mr. Glew saw the man run out of the restaurant. RP 250. Mr. Myles did not see the man enter the restaurant but came out of his business to see the man running away and broken glass lying on the area outside the restaurant. RP 210. Mr. Glew called the police. RP 251.

Coincidentally, Seattle Police Officer David Lindner was pulling into the parking lot of the strip mall when he saw a man

wearing a black hooded sweatshirt jogging out of the lot. RP 372. The officer then heard Mr. Glew's report of burglary and immediately contacted Glew. RP 368. As a result, several Seattle Police officers set up containment of the area and a police dog was brought in to search. RP 374-75. Following an eight minute track, the dog discovered Quoc Lu wearing a black hooded sweatshirt and standing in a doorway. RP 156. Mr. Lu was detained by Seattle Police and held while Mr. Glew and Mr. Myles were brought for a single person show-up. RP 387. Both men identified Mr. Lu as the man they saw at the Magic Dragon Restaurant. RP 387.

Mr. Lu was subsequently charged with second degree burglary, second degree malicious mischief and possession of cocaine. CP 16-17.<sup>1</sup> Mr. Lu moved to suppress the results of the show-up identifications. CP 6-15. Following a hearing, the court found Mr. Myles' identification was admissible. CP 112; RP 100. On the other hand, the court suppressed the identification of Mr. Glew because prior to his show-up, the officer had told him Mr. Myles had already identified the person as the man responsible. CP 112-13, RP 100.

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<sup>1</sup> The cocaine was residue discovered in a pipe seized from Mr. Lu's pants pocket as a result of the police search of him after his arrest. RP 368, 420-21.

Following a jury trial, Mr. Lu was convicted as charged. CP 57-62.

E. ARGUMENT

1. MR. LU'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN MR. MYLES' IDENTIFICATION WAS ADMITTED WHERE IT WAS THE PRODUCT OF AN IMPERMISSIBLY SUGGESTIVE SHOW-UP

- a. An out-of-court court show-up identification

violates due process when it is so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. An accused person has a due process right to a 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). Showup 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 determination whether the  
identification procedure passes constitutional muster. First, the  
defendant must show that the identification procedure was  
suggestive. *State v. Vaughn*, 101 Wn.2d 604, 608-09, 682 P.2d

878 (1984). If the defendant does show that 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).

b. Mr. Lu established the single person show-up was impermissibly suggestive. 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).

While the courts of this state have repeatedly held that 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), commentators have criticized this belief in light of the modern evidence questioning the reliability of eyewitness evidence.

Unfortunately, the convenience of a show-up comes at a high price: the increased risk of a false identification. First, in a show-up, the risk of a false identification falls entirely on the sole suspect and is not spread out among six or eight individuals, as it would be in a lineup or photo array. Second, the way in which show-ups are necessarily conducted makes

them incredibly suggestive. As one expert has stated, show-ups are “the most grossly suggestive identification procedure now or ever used by the police.”

Show-ups are grossly suggestive in part because the sole suspect is already in custody and is being presented by a police officer. Eyewitnesses often believe that when an officer presents a suspect for identification, the officer has caught the true perpetrator. Few people would think that an officer would show a suspect without truly believing that the suspect was, in fact, the criminal. Even one state's attorney general has conceded that show-ups “convey the impression to witnesses that the police think they have caught the perpetrator and want confirmation.” Lineups and photo arrays, of course, are far less suggestive; if conducted properly, the witness will not know which person the officer believes to be the true perpetrator and, therefore, will not be influenced in the identification process.

Other factors also make show-ups highly suggestive. For example, when show-ups are conducted immediately after a crime and near the crime scene, as is usually the case, the eyewitness may make a positive identification simply because the suspect was in the area at the time and not because he is actually the perpetrator. Police can also consciously or subconsciously influence an eyewitness's identification by what they say and do and the manner in which they present the suspect during the show-up procedure.

Social science research supports the commonsense conclusion that show-ups are highly suggestive, making already bad evidence (eyewitness identifications) even worse. One study revealed that “when the identification was conducted twenty-four hours afterwards, fourteen percent of those who viewed a lineup made a mistaken identification,

whereas fifty-three percent of those who viewed a show-up made a mistaken identification.” Other research has also documented the suggestive nature of show-ups, as well as their link to false identifications and wrongful convictions.

Interestingly, however, the risk inherent in a show-up extends much further than simply the wrongful conviction of an innocent person. That is, in a show-up, when the witness makes a false identification, the innocent suspect will be arrested and prosecuted, and law enforcement will not continue to search for the true perpetrator. With a lineup or photo array, however, if the witness makes a false identification, he will identify a subject that the police have purposely inserted as filler. Consequently, the witness's misidentification will be known to the police, who can then continue with their investigation and their search for the true perpetrator.

Social science research proves that show-ups have a special place in the realm of eyewitness identification evidence. First, eyewitness identification evidence, even when produced by lineup and photo array procedures, is hopelessly unreliable and is largely responsible for the wrongful convictions in our country. Second, show-up procedures produce even less reliable eyewitness evidence, which makes already bad evidence even worse, and is even more likely to result in false identifications and wrongful convictions.

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 which the defendant was falsely identified, wrongfully convicted, sentenced to seventy years of incarceration, and then exonerated seven years later). See also Margery Malkin Koosed, *Reforming Eyewitness Identification Law And Practices To Protect The Innocent*, 42 Creighton L. Rev. 595, 615 (.2009) (“Indeed, improving eyewitness identification procedures may be more critical than improving other evidentiary procedures. When a forensic test is poorly administered, there is usually evidentiary material remaining that can be retested. Comparatively, when eyewitness identification procedures are suggestively and unreliably conducted, the procedure may so taint the eyewitness's memory that there is no ability to reliably retest the eyewitness's memory.”).

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 must reexamine its caselaw and conclude the show-up of Mr. Lu here was impermissibly suggestive.

c. The Biggers factors required suppression of Mr. Myles' identification of Mr. Lu. Once the court determines the 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 criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, 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. Myles' identification was not otherwise reliable. Mr. Myles' initial description to Seattle Police Officer Lindner was a Hispanic male wearing a black hood. CP 110. Mr. Myles saw this person apparently for a short period of time as he was entering his business. CP 110; RP 62. When he came back out of his business to see what this person was doing, the individual was gone. *Id.*

Mr. Myles description was not entirely accurate in that he identified the individual as Hispanic. Mr. Myles' viewing of the individual was very short and occurred as he was entering his business for the day to shut off the alarm. After the viewing, Mr. Myles spoke to the other eyewitness, Mr. Glew, and the two discussed their respective viewing and the details they observed. CP 110. Mr. Myles show-up identification was approximately 30 minutes after his initial viewing of the person. CP 111. The impermissibly suggestive show-up procedure did nothing to guard against a misidentification, and as a result, and contrary to the trial court's conclusion, it was not otherwise reliable.

Interestingly, although the court suppressed Mr. Glew's identification because it was tainted by the officer's comment, the court seemed to have been inclined to suppress it regardless. CP 112. The court noted in its ruling:

However, Glew did not have the same opportunity to view the suspect as Myles since Glew was much farther away and it was dark out, and Glew's identification was much less certain than Myles.

CP 112. Thus, even the trial court had suspicions about the impermissibly suggestive nature of the show-up identifications here.

The inescapable conclusion to draw from these facts was that Mr. Myles's initial observation of his assailant was less than accurate, and ultimately influenced by his discussion with the other eyewitness prior to the show-up. Thus, the entire show-up procedure was designed to direct Mr. Myles' choice to Mr. Lu since Mr. Lu was the only person presented at the show-up. Under the *Biggers* standard, Mr. Myles' identification of Mr. Lu was not otherwise reliable.

d. Mr. Myles' in court identification of Mr. Lu was tainted by the impermissibly suggestive identification. If a pretrial identification created a substantial likelihood of misidentification, an in-court eyewitness identification is likewise inadmissible and must be suppressed. *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.

As has been argued, Mr. Myles' pretrial identification of Mr. Lu created a substantial likelihood of misidentification based upon the impermissibly suggestive show-up. This show-up coupled with Mr. Myles' act of comparing notes prior to the show-up influenced his identification of Mr. Lu as the perpetrator, thus tainting the identification. As a consequence, the in-court identification was tainted by the pretrial identification and should have been suppressed.

e. The error in admitting the unreliable identification requires reversal of Mr. Lu's convictions. A constitutional error is presumed prejudicial. *State v. Maupin*, 128 Wn.2d. 918, 924, 913 P.3d 808 (1996). 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). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

Absent the identification by Mr. Myles of Mr. Lu as his assailant, there was very little independent evidence proving that Mr. Lu broke into the Magic Dragon. Mr. Myles did not see the individual enter the restaurant, did not hear any glass breaking, but merely saw the broken glass after the fact. Mr. Glew saw the person break the glass and enter, but his identification of Mr. Lu was ruled inadmissible pretrial. Thus, without this identification, there was no evidence that Mr. Lu was the person who burglarized the Magic Dragon. The error in admitting Mr. Myles' show-up identification was not a harmless error and Mr. Lu is entitled to reversal of his convictions.

2. THE STATE FAILED TO PROVIDE  
SUFFICIENT PROOF THAT THE DAMAGE  
TO THE DOOR EXCEEDED \$750

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Second degree malicious mischief required the State to prove that Mr. Lu knowingly and maliciously caused physical

damage to the property of another in an amount exceeding \$750.

RCW 9A.48.080. The dollar amount which made malicious mischief punishable as a class C felony was a separate element of the offense which the State was required to prove beyond a reasonable doubt. *State v. Timothy K.*, 107 Wn.App. 784, 789, 27 P.3d 1263 (2001).

b. The State failed to prove by credible evidence the damage to the glass door exceeded \$750. In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Richards*, 109 Wn.App. 648, 653, 36 P.3d 1119 (2001). Substantial evidence is that quantum of evidence sufficient to persuade a reasonable person that a finding is true. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

The restaurant owner did not submit a claim for the damage to the door, nor did the owner provide an invoice or bill for the cost of replacing the door. RP 327-28. The owner claimed to “remember” that the damage was between \$700 and \$800, and “[c]loser to \$800.” RP 327. This simply does not meet the

substantial evidence required to sustain a conviction for second degree malicious mischief.

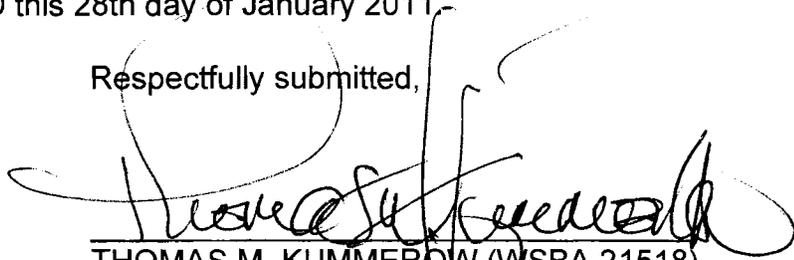
c. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Mr. Archie's conviction on Count II, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Further, remand for entry of a conviction on a lesser offense is not possible since the jury was never instructed on this lesser offense. See *In re the Personal Restraint of Heidari*, \_\_\_ Wn.App. \_\_\_, No. 63040-7, slip op. at 17 (Div. 1, January 24, 2011) ("we . . . hold that an appellate court may not remand for resentencing on a lesser included charge in a jury trial case unless the jury was instructed on that charge.").

E. CONCLUSION

For the reasons stated, Mr. Lu submits this Court must reverse his convictions and remand for a new trial, or strike the malicious mischief conviction.

DATED this 28th day of January 2011,

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
tom@washapp.org  
Washington Appellate Project – 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65716-0-I
v.	)	
	)	
QUOC KIEN LU,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710