

No. 65818-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY EUGENE HEROD,

Appellant.

FILED  
APR 11 2011  
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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Anthony Herod was detained by Seattle Police and made the subject of a show-up identification that was tainted by the police showing the victims police video of the pursuit and flight of the their suspected assailant prior to the show-up. Mr. Herod was subsequently convicted of two counts of first degree robbery based solely upon the victims' identification. Mr. Herod submits that the show-up was impermissibly suggestive and the victims' identifications were not otherwise reliable.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Herod's constitutionally protected right to appeal under art. I, § 21 of the Washington Constitution due to the incomplete findings and conclusions regarding the impermissibly suggestive and otherwise unreliable show-up identification.

2. Mr. Herod's right to due process under the Fourteenth Amendment as well as art I, § 3 of the Washington Constitution was violated by the admission of the impermissibly suggestive and unreliable show-up identification.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Following a CrR 3.6 hearing the Court is required to enter written findings of fact and conclusions of law resolving the disputed issues raised in the hearing. The primary disputed issue in Mr. Herod's hearing was the timing of the victims' viewing of the police video, whether it was before or after the show-up where they identified Mr. Herod as their assailant. The trial court's findings explicitly refused to resolve the issue. Is Mr. Herod entitled to remand for the entry of complete findings that comply with the mandate of CrR 3.6?

2. The Fourteenth Amendment to the United States Constitution as well as art. I, § 3 of the Washington 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. Here, the evidence established the police held an impermissibly suggestive staged show-up where they played a video showing the chase and ensuing flight of the driver to the witnesses prior to the show-up. The witnesses also overheard police radio transmissions prior to the show-up stating that the suspect had been apprehended. Was the show-up impermissibly suggestive and the witnesses' subsequent identification of Mr.

Herod unreliable, entitling Mr. Herod to reversal of the convictions for a violation of due process?

D. STATEMENT OF THE CASE

On April 24, 2009, Mathew Tundo and Navin Pai were returning to Mr. Pai's car after a night at the Ballard Jazz Festival. 7/20/2010RP 63-66, 7/21/2010RP 1826. As they approached the car, Mr. Pai saw a man standing nearby talking on his phone. 7/21/2010RP 28. When Mr. Pai opened the door to enter his car, this man stopped him and brandished a handgun. 7/21/2010RP 32-35. He demanded Mr. Pai's wallet and cellular phone, and also demanded Mr. Tundo's wallet and cellular phone. 7/20/2010RP 69-70, 7/21/2010RP 34-38. After those items were surrendered, the man asked for the keys to Mr. Pai's car, then drove off in the car. 7/21/2010RP 38-54. Mr. Pai borrowed a cellular phone from a nearby person and called the police. 7/21/2010RP 57.

Seattle Police officer Todd Kibbee contacted Mr. Pai and Mr. Tundo, obtained their information, and broadcast the assailant's description as well as the descriptive information about the car. 7/21/2010RP 113-14. Mr. Pai's car was seen by Seattle police officers driving northbound on 24<sup>th</sup> Avenue NW at NW 80<sup>th</sup> Street in Ballard. 7/20/2010RP 22-23. The car sped away from officers,

stopped on a dead-end street, and the driver fled. 7/20/2010RP 27-29. A search of the area ultimately revealed appellant, Anthony Herod inside a van parked in a drive-way. 7/20/2010RP 45. Mr. Herod was searched and no weapon was discovered. 7/20/2010RP 48.

Approximately 45 minutes after the robbery, Mr. Pai and Mr. Tundo were taken by the Seattle Police to the location where Mr. Herod was being held for a show-up. 7/21/2010RP 115. Prior the show-up, Mr. Pai and Mr. Tundo were shown by the police the in-car camera footage showing the short pursuit and the driver subsequently fleeing. 7/20/2010RP 87. The police also told the two that the suspect had been arrested. *Id.*

Mr. Herod was handcuffed and stood beside a police car while the police car in which the two witnesses were seated shined a spotlight on Mr. Herod. 7/21/2010. Both men identified Mr. Herod. 7/21/2010RP 118.

Mr. Herod was charged with two counts of first degree robbery. CP 1-2. Prior to trial, Mr. Herod moved to suppress the identifications as the result of an impermissibly suggestive identification process and the identifications were not otherwise reliable. CP 61-67. Without holding an evidentiary hearing, the trial

court ruled the identifications were admissible. CP 116-18; 7/19/2010RP 25-26. During Mr. Herod's jury trial, Mr. Pai and Mr. Tundo were allowed to identify Mr. Herod in court as the assailant. 7/20/2010RP 77, 7/21/2010RP 45. Mr. Herod was subsequently convicted as charged. CP 75, 77.

#### E. ARGUMENT

1. THE TRIAL COURT'S FINDINGS OF FACT ARE DEFICIENT IN FAILING TO RESOLVE DISPUTED FACTS ON THE ULTIMATE ISSUE OF WHETHER THE VIDEO WAS PLAYED BY THE POLICE BEFORE OR AFTER THE WITNESSES' IDENTIFICATIONS

The primary issue at Mr. Herod's pretrial motion to suppress the identification was the show-up and whether the victims were shown a video by police of him prior to their identifications, thus rendering the circumstances impermissibly suggestive. The court's findings regarding this issue state in relevant part:

The Court does not make findings as to when the video may have been shown [to] Mr. Pai and Tundo [sic], but does make conclusions with regard to admissibility of the evidence generally.

CP 117.

CrR 3.6 states in relevant part:

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion *the court shall enter written findings of fact and conclusions of law.*

(Emphasis added).

“[W]here findings are required, they must be sufficiently specific to permit meaningful review.” *In re LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). While the degree of particularity required in findings of fact depends on the circumstances of the particular case, the findings should at least be sufficient to indicate the factual bases for the court’s ultimate conclusions. *State v. Russell*, 68 Wn.2d 748, 415 P.2d 503 (1966); *Groff v. Department of Labor & Indus.*, 65 Wn.2d 35, 40, 395 P.2d 633 (1964). The purpose of the requirement of findings and conclusions is to insure the trial judge “has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.” *State v. Agee*, 89 Wn.2d 416, 421, 573 P.2d 355 (1977), quoting *Roberts v. Ross*, 344 F.2d 747, 751 (3d Cir.1965).

“The findings that were entered by the trial court basically constitute a narrative account of what occurred at the scene of the investigatory stop and the subsequent investigation and arrest, but nowhere point to what ‘specific and articulable facts’ reasonably

support a suspicion that criminal activity was afoot. The problem in this case is that the absence of such particularized findings does not permit us to determine whether the stop was based on legally permissible and adequate reasons or whether it was based on a perceived racial incongruity between the suspects and the locale in which they were stopped[.]” *State v. Barber*, 118 Wn.2d 335, 345, 823 P.2d 1068 (1992).

Here, the court skirted the precise issue to be dealt with at the suppression hearing. As argued, *infra*, the playing of the video for the witnesses coupled with overhearing police radio transmissions that the police had caught “the suspect,” created an impermissibly suggestive show-up. The court’s findings fail to resolve this conundrum.

In addition, the ultimate finding for the trial court was whether, in light of this impermissibly suggestive show-up, the identifications were otherwise reliable. The court’s findings regarding this issue are vague and conclusory, failing to apply the legal factors to the facts of this case in a manner that would allow this Court to review the trial court’s decision-making process.

While it is true this Court can look to the trial court’s oral findings to supplement or augment the written findings when they

are insufficient, the court's oral findings are similarly deficient. See *State v. Hescocock*, 98 Wn.App. 600, 606, 989 P.2d 1251(1999) ("a reviewing court may look to the trial court's oral ruling to interpret written findings and conclusions").

The remedy for incomplete written findings is to remand to the trial court for entry of complete findings. *Barber*, 118 Wn.2d at 345. This Court should remand the matter to the trial court to provide written findings "sufficiently specific to permit meaningful review" without taking new evidence. *Id.*

2. MR. HEROD'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN MR. PAI'S AND MR. TUNDO'S IDENTIFICATIONS WERE ADMITTED WHERE THEY WERE 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). It is the likelihood of misidentification which violates a defendant's right to due process. *Foster v. California*, 391 U.S. 902, 88 S.Ct. 1654, 20 L.Ed.2d 416 (1968).

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 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. Herod 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). A show-up is inherently suggestive because it suggests that the police think that they have

caught the perpetrator of the offense. The court here made no finding regarding whether the show-up was suggestive.

“A staged show-up is presumptively more suggestive than a line-up, . . . and particularly more suggestive, . . .” *Velez v. Schmer*, 724 F.2d 249, 251 (1<sup>st</sup> Cir., 1984).

[T]here is substantial support for the notion that misidentifications made pursuant to showups are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays. Despite the unreliability of showup identifications, juries generally rely heavily upon these identifications at trial—like they do all eyewitness identifications—even when the defense presents strong evidence that casts substantial doubt upon the accuracy of the identification. Due to jury insensitivity to this potential for error, juries may be frequently convicting innocent people on the basis of showup misidentifications.

. . .

Showup misidentifications are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays because many safeguards that exist with other methods of identification, such as lineups and photographic arrays, do not exist for showups. The most important safeguard that exists with lineups and photographic arrays, but that does not exist for showups, is the presentation of more than one person from whom to choose.

Amy Luria, *Showup Identifications: A Comprehensive Overview Of The Problems And A Discussion Of Necessary Changes*, 86 Neb. L. Rev. 515, 516, 520 (2008).

*Velez* is one of the only published cases dealing with a staged show-up. In *Velez*, the police brought two victims of an armed robbery to the police station where the show-up occurred. *Id.* at 250. Mr. Velez was shown to the victims at the police officers told them, "This is him, isn't it?" *Id.* The First Circuit found the show-up to be impermissibly suggestive.

Here, given that the video was shown to the men before the show-up, a similar circumstance to *Velez* occurred. Prior to Mr. Pai and Mr. Tundo being asked to identify whether Mr. Herod was involved, they were shown a video of the pursuit and the flight of the driver. The two men also overheard police radio transmissions stating that the police had recovered Mr. Pai's car and arrested the suspect. This was akin to the staged show-up in *Velez*. The information provided to the two men prior to them being shown Mr. Herod standing alone detained by the police was almost identical to the police in *Velez* telling the witnesses that this was their assailant. This show-up was impermissibly suggestive.

c. The *Biggers* factors required suppression of Mr. Pai's and Mr. Tundo's identification of Mr. Herod. Once it is determined that the show-up was impermissibly suggestive, it then must be determined 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 *Brathwaite*, 432 U.S. at 114.

Washington utilizes the *Biggers* test to determine the admissibility of an identification. *Vickers*, 148 Wn.2d at 118.<sup>1</sup>

Here, Mr. Herod submits Mr. Pai and Mr. Tundo's identifications were not otherwise reliable and should have been suppressed. The initial description provided by the two men of their assailant was of a Hispanic man with pale skin, in his 30's wearing dark clothing. CP 4. This identification was vague with no great detail. In addition, Mr. Herod is not Hispanic. CP 65. The witnesses did not have a great deal of time to view their assailant at the scene, the robbery occurring very quickly. The offense occurred at night in an area not very well lit. The witnesses' attention was no doubt directed at the assailant's gun and not his face. Although the identifications occurred relatively quickly after the event and the witnesses' were quite certain of their relative identifications, these factors alone are not determinative.

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<sup>1</sup> [T]he five reliability factors articulated by the Supreme Court in *Manson* "are not valid predictors of the reliability of eyewitness testimony" because they are based upon incorrect assumptions. One commentator has explained that "[p]sychological studies demonstrate that each of the factors identified by the Court, and subsequently applied by the inferior federal courts and state courts, is either unsupported as a scientific matter or dangerously incomplete."

Lurie, *supra*, 86 Neb. L. Rev. at 537-38, quoting Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 276 (1991).

Again, the decision in *Velez* provides a template for deciding this matter. In *Velez*, five boys were walking along a road when they were confronted by two men, one of whom had a rifle. *Velez*, 724 F.2d at 250. The man with the rifle asked the boys what was going on, then fired a shot in the air. *Id.* When one of the boys began to walk away, the man shot and killed this boy, then shot and wounded another one of the boys. *Id.* Both men fled in a waiting car. *Id.* The boys described the car in detail, and several hours later, Mr. Velez was arrested after being seen driving the car. *Id.* The boys were shown Mr. Velez in a show-up while the police stated, "This is him, isn't it?" *Id.* at 251. The trial court found the show-up results admissible at trial. *Id.* The First Circuit reversed, initially finding the show-up impermissibly suggestive, then unreliable after assessing it under the *Biggers* test. *Id.* at 251-52.

After applying the *Biggers* factors, the *Velez* Court found the boys had an ample opportunity to view the assailant, but that the length of time, the degree of the boys' attention and their initial description all added up to an unreliable identification. The boys' initial description was that the assailant had shaggy hair and was wearing a T-shirt. *Id.* at 251. Regarding the boys attention to detail, the Court rejected the district court's finding that their

description of details about the car rendered the identification of the person more reliable, noting that “[w]hen one is identifying magnesium wheels, one is not looking at someone’s face.” *Id.* Finally, the Court discounted the certainty of the boys’ identification, noting that in addition to telling the boys, “that’s him,” the police also held the boys at the police station for nine hours, thus lending one to believe the boys “were undoubtedly tired and wanting to go home[.]” *Id.* at 252. The Court concluded: “In sum, the initial reliability tests, considered collectively, demonstrate a ‘substantial likelihood of irreparable misidentification.’” *Velez*, 724 F.2d at 252.

The inescapable conclusion after comparing the facts of *Velez* to the facts in Mr. Herod’s matter is that the show-up was impermissibly suggestive and not otherwise reliable. After applying the *Biggers* factors, Mr. Pai’s and Mr., Tundo’s identification of Mr. Herod was not otherwise reliable. The trial court’s conclusion to the contrary must be reversed.

d. The in court identification of Mr. Herod was tainted by the impermissibly suggestive and unreliable identifications. 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. Pai's and Mr. Tundo's pretrial identifications of Mr. Herod created a substantial likelihood of misidentification based upon the impermissibly suggestive show-up that was not otherwise reliable. This show-up coupled with the police showing the two men the police video prior to the show-up clearly influenced their identification of Mr. Herod 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. Herod's convictions. 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). The State must point to sufficient untainted evidence in the record to inevitably lead to a finding of guilt. *Id.*

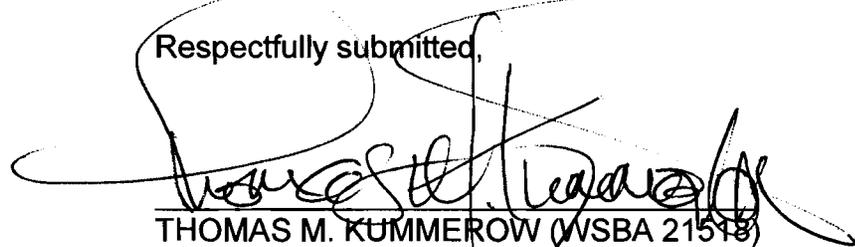
Absent the identification of Mr. Herod as the assailant, there was no independent evidence proving that Mr. Herod robbed Mr. Pai and Mr. Tundo of their wallets and Mr. Pai of his car. Thus, without the identifications of Mr. Pai and Mr. Tundo, there was no evidence that Mr. Herod robbed the two men. The error in admitting the show-up identification was not a harmless error and Mr. Herod is entitled to reversal of his convictions.

E. CONCLUSION

For the reasons stated, Mr. Herod requests this Court reverse his convictions and remand for a new trial.

DATED this 24th day of February 2011.

Respectfully submitted,

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

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65818-2-I
v.	)	
	)	
ANTHONY HEROD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2011.

X \_\_\_\_\_ 

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