

66163-9

66163-9

NO. 66163-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIKADIR KHALIF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES

1. A show-up identification is admissible unless it is so impermissibly suggestive that it creates a substantial likelihood of irreparable misidentification. If such an identification procedure is unnecessarily suggestive, courts look at the totality of the circumstances to determine whether the identification is reliable. Here, a witness identified Khalif at a show-up identification with "100 percent" certainty and within 20 minutes of the crime, wearing the same distinct basketball jersey that he used to commit the crime. Given these circumstances, has Khalif failed to demonstrate that the witness's identification was so unnecessarily suggestive that it created a substantial likelihood of misidentification?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Abdikadir Khalif with Residential Burglary. CP 1. The court convicted Khalif as charged. CP 15-17; RP 159-66.¹ The court imposed an alternative, "Option B" sentence, suspending 52-65 weeks commitment at the Juvenile

¹ The Verbatim Report of Proceedings consists of one volume, designated as RP.

Rehabilitation Administration, with the condition that Khalif complete 60 hours of community service and mental health treatment. CP 4-10.

2. SUBSTANTIVE FACTS

On May 17, 2010 around 9:50 p.m., Amanda Schmidt, her husband, Lance Stevens, and their infant daughter arrived home to "unusual sounds" in their house. RP 63-64, 101-02; CP 12. Schmidt realized that the sounds were coming from above her front porch when she walked outside and saw a young, African-American male jump from her rooftop and land in her flower bed. RP 102-05; Ex. 20; CP 12. Schmidt's porch light illuminated the man, who was wearing blue jeans and a white t-shirt underneath a "teal-turquoise" Denver Nuggets jersey, bearing the name and number of basketball player Carmelo Anthony. RP 68, 102-04, 122-23; Ex. 20; CP 12.

Schmidt primarily observed the man from the back for 10-15 seconds as he "hopped" his way down the tiered flower beds in her front yard and fled. RP 102-04, 108; CP 12. Schmidt noted the large, white number on the back of his jersey, which looked like a "12 or something." RP 104; Ex 20. According to Schmidt, the man

was "medium to light build," "relatively tall," and had "short dark, curly hair." RP 104; Ex. 20. Stevens, who was standing behind Schmidt, described the man as being young, in his "early 20s," and wearing a Denver Nuggets basketball jersey belonging to the player Carmelo Anthony. RP 66-68; Ex. 20. Schmidt confirmed this description and provided additional details to the 911 operator about the suspect's description. Ex. 20.

Multiple police officers responded to the area to help contain and locate the suspect. RP 27-28, 43, 80-81, 91; CP 13. Within minutes of the call, Seattle Police Officer Roberto Sabay saw Khalif walking down the street with another young African-American male. RP 28-29; CP 13; see Ex. 1-A (in-car video showing Khalif coming into view at 10:01 p.m.). Khalif was wearing blue jeans and a white t-shirt underneath a blue Denver Nuggets basketball jersey, bearing Anthony's last name and number, while his companion was wearing a red, hooded sweatshirt. Ex. 1-A, 9-11, 17, 19. Khalif's companion had short, curly hair. Ex. 17, 19.

Sabay ordered the young men to stop. RP 28-29; CP 13. Both were sweating "profusely," despite the fact that it was nighttime and not hot outside. RP 29, 83. Khalif and his

companion were apprehended six to eight blocks uphill from Schmidt's house. RP 110, 127; CP 13.

During a weapons frisk, police located an "Excellence in Teaching" medallion that belonged to Schmidt in the pocket of Khalif's companion. RP 94, 116-17; CP 13. Schmidt kept the medallion in her upstairs office next to her bedroom, where she initially heard the noise coming from. RP 117. Police detained Khalif and his companion separately in handcuffs while they waited for Schmidt to arrive for the show-up identification. RP 29, 47; CP 13.

Schmidt "immediately" identified Khalif at the show-up. RP 114; CP 13. Police held Khalif by his arms at a distance of 20-25 feet away from Schmidt and illuminated him with a patrol car spotlight and lights from a nearby car wash. RP 113-14. Schmidt asked police to turn Khalif around so that she could see him from behind and then stated, "yes, that is the person I just saw." RP 115.

Prior to the show-up identification, police told Schmidt that they had detained a suspect who matched her description. RP 109. Schmidt was "pretty certain" that the police had also told her prior to the show-up that they had found her medallion on

Khalif's companion, but she could not be sure. RP 129-31; CP 13. When Schmidt arrived at the show-up, an officer asked her something along the lines of, "[D]o you recognize this person, have you seen him today?" RP 114. Schmidt was "100 percent" certain that Khalif was the person who jumped off her roof 20 minutes prior based on his clothing, haircut, build, and body. RP 115, 118, 130; CP 13. Schmidt had "no" doubts about her identification at the car wash. RP 115.

At trial four months later, Schmidt also identified Khalif without hesitation, based on his build and the shape of his head. RP 118. When defense counsel asked Schmidt whether Khalif might have switched shirts with his companion, Schmidt replied that she believed Khalif was the same person based on his build and haircut. RP 126-27.

Prior to trial, Khalif moved to suppress Schmidt's identification of him as impermissibly suggestive.² RP 23-24. The court denied Khalif's motion to suppress the show-up identification,

² Neither the State nor defense counsel's briefing is in the record, however, it is clear from the record that the court received and considered briefing from both parties. RP 22-24.

finding Schmidt "very credible" and her identification reliable.

RP 138-39.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED SCHMIDT'S SHOW-UP IDENTIFICATION OF KHALIF.

Khalif argues that the trial court erred by admitting Schmidt's identification of him at the car wash. He contends that the show-up identification was impermissibly suggestive because the police told Schmidt prior to the identification that they had a suspect who matched her description, and was with someone carrying her medallion. Khalif further contends that the procedure was unnecessarily suggestive because the police did not ask Schmidt's husband to participate in the show-up identification, and never asked Schmidt to identify Khalif's companion, who had hair that more closely matched the suspect's description.

On appeal, Khalif claims for the first time that the trial court should have applied the missing witness doctrine and presumed that the show-up identification was unnecessarily suggestive based on the State's failure to call any officers who spoke to Schmidt prior to the identification. Khalif argues that the show-up identification

created a substantial likelihood of irreparable misidentification based on Schmidt's limited opportunity to view him from behind.

Khalif's claims are meritless. Given the record, the court properly found that even if Schmidt's show-up identification was unnecessarily suggestive,³ it did not create a substantial likelihood of irreparable misidentification. RP 137-39; CP 14. Police located Khalif and his companion, profusely sweating, six to eight blocks away from the victim's house within 10 minutes of the burglary. RP 28-29, 83, 110, 127; CP 13. Khalif's distinct basketball jersey perfectly matched the suspect description, and Schmidt identified him with 100 percent certainty, within 20 minutes of the crime. RP 104, 115, 118, 130; Ex. 9-11, 20; CP 13. Khalif cannot show that the show-up identification was unreliable.

³ Although the court's written findings of fact and conclusions of law clearly conclude that the identification procedure was "unnecessarily suggestive," the court's oral findings are less clear. Compare CP 14 (finding the identification procedure "unnecessarily suggestive"), with RP 137 (finding the procedure "suggestive"). This discrepancy, however, results in little consequence given that the court's written order controls over any apparent conflict with its oral ruling. State v. Skuza, 156 Wn. App. 886, 898, 235 P.3d 842 (2010).

Show-up identifications are not "per se impermissibly suggestive."⁴ State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). Generally, a show-up identification is admissible if it is held shortly after the crime is committed and in the course of a prompt search for the suspect. State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978). The defendant bears the burden of showing that the identification procedure was "unnecessarily suggestive." Guzman-Cuellar, 47 Wn. App. at 335. If the defendant fails to carry this burden, the inquiry ends. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If the defendant prevails on this point, the court considers, "based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification." Id.

A show-up identification might be impermissibly suggestive based on suggestive remarks or utterances by police officers, or by witnesses who identify a suspect in another witness's presence.

12 Royce A. Ferguson, Washington Practice: Criminal Practice and

⁴ Despite the "somewhat suggestive" nature of show-up identifications, they allow witnesses to test their recollection of a suspect while their memories are still fresh, and provide for an expeditious release of innocent citizens. 12 Royce A. Ferguson, Washington Practice: Criminal Practice and Procedure § 3210 (3d ed. 2011).

Procedure § 3211 (3d ed. 2011). A show-up identification is not impermissibly suggestive based solely on a defendant being handcuffed in the presence of police officers. Guzman-Cuellar, 47 Wn. App. at 336.

Once a defendant demonstrates that a show-up identification is unnecessarily suggestive, the court must determine whether the identification is so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification based on the following factors: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's description, (4) the witness's level of certainty at the time of identification, and (5) the length of time between the crime and the identification. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000).

Here, the trial court properly found that even if Schmidt's show-up identification of Khalif was unnecessarily suggestive, there was not a substantial likelihood of irreparable misidentification. The court carefully balanced each of the Biggers factors before finding Schmidt's identification reliable. RP 134-39; CP 12-14.

Applying the first factor, the court found that Schmidt offered "mixed" testimony about her opportunity to view the suspect at the time of the burglary. RP 135. Although Schmidt could only see the suspect's back and side profile, she had an "excellent" opportunity to see the suspect's clothing, and a "good" opportunity to see the suspect "in macro." RP 135; CP 14. Schmidt's degree of attention, the second factor, was "very high." CP 14.

Considering the third factor, the accuracy of Schmidt's description, the court found that Schmidt was "extremely accurate" in her description of Khalif's clothing, race, and build. RP 135; CP 14. The court dismissed the small discrepancies in Schmidt's description of the jersey's color and writing, noting that Schmidt saw the jersey at night, and was ultimately accurate about Khalif wearing a blue jersey with Anthony's name and team number.⁵ RP 136-37; CP 14. Although Schmidt's description of the suspect's hair appeared to more closely match Khalif's companion, the court

⁵ Schmidt described the jersey as being teal with white writing, although it was actually royal blue, with yellow writing. RP 136; Ex. 9-11. Further, Schmidt initially told the 911 operator that the suspect was wearing a jersey with the number "12 or something" on the back. Ex. 20. Schmidt testified at trial, however, that she was certain the number was "in the teens" because "it was '1' and another digit." RP 104. Anthony's team number is actually "15." Ex. 10. The court ultimately considered this inconsistency to "hardly be a compromising fact" given that the number "2" can be inverted into the number "5." RP 137.

noted that Schmidt specifically cited Khalif's hair as one of the reasons she identified him at the scene. RP 136.

The court concluded that the fourth factor, Schmidt's degree of certainty at the time of the identification, was "100 percent" and could not have been higher, and that the fifth factor, the length of time between the crime and identification, was "very short." RP 135-37; CP 14.

The court noted that the fact that Schmidt might have been told prior to the show-up that the other suspect had her medallion essentially cut both ways.⁶ RP 137. The court reasoned that on one hand, the information could lead Schmidt to identify Khalif because "they were together," but on the other hand it could lead her to not identify him because the medallion was not on the person "she was being asked to consider." RP 137.

⁶ Khalif assigns error to the court's finding of fact that Schmidt "could not recall whether she was asked about the coin before or after the show-up identification." CP 13 (Finding of Fact 15). Schmidt's testimony on this issue, however, was equivocal. When the court questioned Schmidt about the timing of events, Schmidt stated that she believed that the officers told her about the medallion before the show-up identification, but she could not be sure. See RP 131 ("I believe so, but I can't say that I'm 100 percent sure."). Thus, substantial evidence supports the court's finding on this issue and it is binding on appeal. See State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997) (holding challenged factual findings that are supported by substantial evidence in the record are binding on appeal).

Finally, the court concluded that Schmidt was "very credible,"

stating:

Asked to identify the suspect in court, if she believes this was not the suspect, I believe her credibility would allow her to say that, no, I don't believe that this is the person. Now, I recognize that the respondent's argument is that the die [sic] has been cast. I understand that. And her belief may be genuine, however, that does not make it accurate, I understand that, the argument.

But also with in-court identifications, when we look at what the descriptions were, whether they're accurate such as the hair and the rest, *there is something to the difference between description and recognition and when a credible in-court witness has to consider the defendant in court, it was credible when she indicated that she recognized this particular person.*

RP 138-39. Thus, the court concluded that Schmidt's show-up and in-court identifications were reliable, despite the minor discrepancies that Khalif challenged in the trial court and raises now on appeal.

In challenging the trial court's admission of the show-up identification, Khalif does not even attempt to apply all five of the Biggers reliability factors. Rather, Khalif focuses primarily on the alleged unnecessary suggestiveness of the procedure used by the police. Khalif faults the police for telling Schmidt that they had a suspect who matched her description and was with someone

carrying her medallion, for asking Schmidt only to participate in the show-up identification, and for failing to ask Schmidt to identify Khalif's companion. Without citing any authority for the proposition, Khalif further contends that the court should have presumed under the missing witness doctrine, *sua sponte*, that the State's failure to call an officer to testify about the exact words exchanged with Schmidt prior to the show-up identification leads to the conclusion that the procedure was unnecessarily suggestive.⁷

These arguments, however, bear on the first step of the inquiry, the unnecessary suggestiveness of the police-implemented identification procedure. None of these arguments address the second step of the inquiry, whether "considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification." Linares, 98 Wn. App. at 401. In other words, even assuming that the show-up identification procedure was impermissibly suggestive for all of the reasons that

⁷ This case is distinguishable from other cases where defendants have disputed receiving Miranda warnings, and courts have held that the State's failure to call other officers who were present during the interrogation and could have corroborated the testifying officer's testimony, results in the inference that the warnings were not given. E.g. State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016 (1998). Unlike those cases, which involved a "swearing contest" between the defendant and the officer about what had occurred, there is no dispute here that police told Schmidt that they had detained someone who matched her description. RP 109.

Khalif contends, Khalif still must show that Schmidt's identification was unreliable under the five Biggers factors. Khalif falls far short of carrying this burden.

Khalif does not dispute the court's findings that Schmidt's degree of attention was "very high" when she saw the suspect land in her flower bed, or that she identified him with "100 percent" certainty within a "very short" time of the burglary. RP 135-37; CP 14. Thus, Khalif does not dispute that at least three of the five Biggers factors suggest that Schmidt's identification was reliable.

Rather, Khalif disputes the reliability of Schmidt's identification by focusing on the limited opportunity Schmidt had to view him and mistakenly claiming that Schmidt did not describe him as wearing a Denver Nuggets jersey. Although Schmidt did not see him from the front, Khalif does not dispute the court's findings that she had an "excellent" opportunity to see his clothing from the back, and a "good" opportunity to see him "in macro." RP 135; CP 14. Schmidt provided an "extremely accurate" description of Khalif's clothing, race, and build. RP 135; CP 14.

Khalif wrongly contends that Schmidt did not identify the Denver Nuggets as the team associated with the jersey that he was wearing. Khalif specifically assigns error to the court's factual

findings that Schmidt saw and described the suspect as "wearing a blue Denver Nuggets basketball Jersey." CP 12-13 (Findings of Fact 3 and 4).

Although Schmidt's husband was the first person to describe the suspect to the 911 operator as wearing a blue Denver Nuggets basketball jersey, Schmidt confirmed this description moments later and provided additional details about the jersey, including that it was "royal blue" in color with the number "12 or something" written in white on the back. Ex. 20. Substantial evidence supports the trial court's findings that Schmidt described the suspect as wearing a Denver Nuggets jersey, and this Court should consider them binding on appeal. See State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997) (holding that when challenged factual findings are supported by substantial evidence in the record they are binding on appeal).

Nearly all five of the Biggers factors suggest that Schmidt reliably identified Khalif as the suspect who unlawfully entered her home. Schmidt had an unobstructed view of Khalif from behind, she paid close attention to him, and perfectly described his race, gender, build, and unique basketball jersey. RP 135-37; CP 12-14. Schmidt identified Khalif with "100 percent" certainty within 20

minutes of the crime. RP 115, 118, 135-37; CP 14. Despite minor inconsistencies in her description of Khalif, the trial court found Schmidt "very credible." RP 138. The court properly admitted Schmidt's identification of Khalif as reliable under a totality of the circumstances.

D. **CONCLUSION**

For the reasons stated above, the Court should affirm Khalif's residential burglary conviction.

DATED this 27th day of July, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. ABDIKADIR KHALIF, Cause No. 66163-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date