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King County Prosecutor  
Appellate Unit

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STATE OF WASHINGTON

NO. 69943-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

A.W.,

Appellant.

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

The Honorable J. Wesley Saint Clair, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED WHEN IT PERMITTED THE IN-COURT IDENTIFICATION.

The State argues J.N.'s in-court identification of A.W. was based on independent observations of A.W., rather than the improperly obtained pretrial identifications. Brief of Respondent (BOR) at 6. The State is wrong. Courts consider at least five factors in determining whether there is an independent basis to allow for an in-court identification. Manson v. Braithwaite, 432 U.S. 98, 114, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977). Under the proper analysis, as set forth in A.W.'s opening brief, consideration of these factors demonstrate J.N.'s in-court identification of A.W. as the thief was the product of the impermissively suggestive pretrial identification procedures and should not have been allowed. Brief of Appellant (BOA) at 8-13.

In support of its contrary claim, the State cherry-picks facts in an attempt to embellish the credibility of the in-court identification. But the facts taken in full context show inconsistencies in J.N.'s testimony, render the testimony not credible, and thus buttress A.W.'s argument that J.N. relied on impermissively suggestive identification procedures to identify A.W. in court. BOA at 8.

First, the State takes liberty in reciting the facts in stating that J.N. “provided [Principal Ruth Medsker] with White’s name.” BOR at 3. This overstates what the record shows. The principal testified J.N. gave her the name "Andrew" or "Andre", but did not give a last name. 1RP 122, 130. And although J.N. did state he gave the principal A.W.’s last name, he later had to recant this claim when it was discovered he told police he came up with A.W.’s last name by going through the photos in Principal Medsker’s office – a procedure held impermissibly suggestive by the trial judge. CP 5-19; 1RP 62; 105-06. Thus, contrary to what the State would have this Court believe, J.N. did not have A.W.’s last name until after meeting with Medsker.

Second, the State recites as fact that “[A.W.] looked back at J.N. twice while fleeing.” BOR at 2. What the State fails to acknowledge, however, is that J.N. contradicted himself on this point at trial. He claimed during court proceedings he saw the person’s face who ran down the alley, but when questioned further admitted he did not tell police or defense investigators he ever saw the person’s face. 1RP 89, 101-02. In fact, J.N. identified persons other than A.W. as possible suspects until Principal Medsker talked him out of it. 1RP 64. The State failed to explain or otherwise address this inconsistency. Further, the State fails to

explain or address another important inconsistency: why J.N. said the suspect had a lip ring when A.W. has never worn a lip ring. 1RP 62, 93.

Finally, the State recites as fact that “Principal Medsker indicated that White was suspended or expelled from West Seattle High School[.]” BOR at 4. Principal Medsker, however, gave no such testimony. Rather, it was J.N. who testified that the principal told him A.W. was suspended or expelled. 1RP 94. Indeed, Principal Medsker disputed J.N.’s version of events and testified A.W. had discipline problems but had not been expelled. 1RP 132.

When all the true facts are considered, only one logical conclusion emerges: J.N.’s in-court identification was the product of the impermissively suggestive out-of-court procedures employed by Principal Medsker and should not have been admitted.

The error in this case results in the precise kind of harm our Supreme Court cautioned against when a witness is allowed to rely on improper out-of-court procedures: “The harm which such procedures may cause is that once the witness makes a misidentification, he is thereafter apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of the subsequent courtroom identification.” State v. Hilliard, 89 Wn. 2d 430, 439, 573 P.2d 22 (1977).

C. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse A.W.'s conviction and remand for a new trial.

DATED this 15<sup>th</sup> day of January 2014

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69943-1-I
	)	
ANDRE WHITE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDRE WHITE  
2201 SW HOLDEN STREET  
APT F101  
SEATTLE, WA 98106

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF JANUARY, 2014.

X *Patrick Mayovsky*