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MAR 24 2013

King County Prosecutor
Appellate Unit

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court violated appellant's right to due process under U.S. Const. Amend. § 14 when it denied his motion to suppress an in-court identification. CP 38-42.¹

2. The trial court erred in entering Conclusion of Law "c" in its CrR 3.6 findings and conclusions, which found as a matter of fact that there was a source, independent of the impermissible identification procedures employed by the State, for the complaining witness's claim that it was the appellant who stole his necklace. CP 41-42.

Issue Pertaining to Assignment of Error

The juvenile appellant was charged with theft. Prior to fact-finding, the trial court suppressed evidence of the complaining witness's out-of-court identification of appellant as the thief, concluding it was the product of impermissibly suggestive and unreliable identification procedures. The trial court denied, however, appellant's motion to exclude the complaining witness from making an in-court identification of him as the thief. At the fact-finding, the only evidence linking appellant to the crime was the complaining witness's in-court identification, which the court relied on to find appellant guilty. Did the court err in denying the motion to exclude the in-court identification when the State failed to

¹ Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Identification filed January 10, 2013.

produce clear and convincing evidence it was the product of a source of knowledge independent from the impermissibly suggestive and unreliable identifications procedures previously employed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The prosecutor charged juvenile appellant A.W. (d.o.b. 02/27/1995) with one count of first degree theft. CP 1, 43. The State alleged on April 27, 2012, A.W. stole a necklace from J.N. (d.o.b. 10/18/1997). CP 1; 1RP 39-40.² Seventeen-year-old A.W. had no prior criminal history and lived with his mother and father in a stable home environment. CP 23, 33-36. A.W. pled not guilty and the case was set for trial. 1RP 3.

The defense moved to suppress evidence of all out-of-court identifications, arguing the procedures used by a school principal to show photos of A.W. to J.N., and the Seattle Police Department's use of the same photos in a montage shown to J.N., were impermissibly suggestive and denied A.W. due process of law. CP 5-19. The motion was granted. CP 38-42; 1RP 179-81. The court, however, denied a defense motion to suppress any potential in-court identification. CP 41-42. The trial judge allowed the in-court identification based on J.N.'s testimony that he met

² This brief refers to the verbatim report of proceedings as follows: 1RP - November 27, 2013; and 2RP - December 11, 2012 and January 10, 2013.

A.W. at the McDonalds. 1RP 184. The judge found A.W. guilty as charged. CP 30-32. The judge imposed a standard range disposition and restitution. 2RP 52; CP 43. A.W. appeals. CP 50.

2. Substantive Facts

During the CrR 3.6 hearing, J.N. testified he went to McDonalds after school on April 27, 2012. 1RP 42. He spent 45 minutes at the restaurant with, "Joe and a few of [Joe's] friends." 1RP 41. The group left the McDonalds together departing by way of the alley behind the restaurant. 1RP 52. Someone approached J.N from behind, grabbed his chain necklace from the back of his neck, and ran down the alley in the opposite direction. 1RP 52, 88. J.N. chased the person but lost sight of him. 1RP 59.

For the first time - at the CrR 3.6 hearing - J.N. testified he saw the person's face that ran down the alley, claiming the person turned around twice while running away. 1RP 53-54. But when questioned further, J.N. admitted he did not tell police or defense investigators he ever saw the person's face. 1RP 89, 101-02. When asked by Seattle Police for names and telephone numbers of his friends who witnessed the incident, J.N. could not identify anyone in the group. 1RP 45, 88, 151. Later, the prosecutor asked J.N.:

Q: And how many people were present?

A. Six, if you count me.

Q. And how many of those six people including you did you know?

A. One was Joe and I knew another person but not very well.

Q. And who was that?

A. I couldn't recall his name on the spot now, but I've met him a few times.

1RP 44.

The prosecutor then asked if he knew Joe's last name. 1RP 43. J.N. responded, "No, not since I haven't [sic] had contact with him for a while." Id. But, J.N. described the alley behind the McDonalds with - as the court characterized - "unusual" precision citing number of trees, the exact height of the trees and exact number of cars parked in the alley at the time. 1RP 118-19, 208. J.N. claimed he met A.W. for the first time during those 45 minutes at the McDonalds. 1RP 45. The prosecutor asked did he remember his conversation with A.W., but J.N. replied, "not very much." Id. Then the prosecutor asked J.N. to make an in-court identification of A.W., which he did. 1RP 47-48. No one from the group of six, save J.N., testified at the proceedings.

After his necklace was taken, J.N. walked to West Seattle High School, where he was not a student, but his friend Joe was, so he thought the alleged thief might be too. 1RP 60. J.N. spoke to the head principal, Ruth Medsker, and told her what happened. 1RP 62.

Medsker showed J.N. photos of students from an on-line database on her computer, from a database not accessible to the general public. 1RP 62-63, 122, 131. The principal said J.N. gave her the name Andrew or Andre, but did not give a last name. 1RP 122, 130. In contrast, J.N. said he gave the principal A.W.'s last name but later admitted he told police he came up with A.W.'s last name by going through the photos in Principal Medsker's office. 1RP 62; 105-06. J.N. further testified he gave the principal a description of the person and that he wore a lip ring. 1RP 62, 93. A.W. did not have a lip ring. 1RP 178, 209. Principal Medsker showed J.N. approximately thirty different pictures with names associated with them. 1RP 63-64. J.N. said "she made me look through [the photos] to see if I could spot the right person. I spotted a couple that I said like [sic] might be him." 1RP 64. J.N. selected a few photographs of possible suspects before he was shown A.W.'s photo. He said that Principal Medsker shared the possible suspects' personal information when showing the photographs including: 1) they never had any problems with school; 2) they received good grades; and 3) they engaged in extracurricular activities. 1RP 67-68. But later when he was shown A.W.'s photograph Principal Medsker said A.W. was either suspended or expelled and that "it was a good bet that he was the one who committed the crime." 1RP 94.

Principal Medsker disputed J.N.'s version of events, noting A.W. had discipline problems, but had not been expelled. 1RP 132. Medsker also disputed J.N.'s claim that he saw A.W.'s photograph on the principal's computer, recalling instead that it was from a yearbook, which she showed J.N. only after they were done looking at pictures on her computer. 1RP 63, 123, 130.

J.N. testified he called the police before looking at the photos from Principal Medsker. 1RP 95, 102. The defense asked J.N.:

Q. Now, after the events in Medsker's office -- relating to the phone call, after the events in Medsker's office, that's when you called 911?

A. No, when I talked to the administrator at the front desk, I told her my necklace has been stolen. She said--and I asked if I could talk to the principal. She said she will get the principal, you can call 911 if you'd like on that phone. I went to the phone, called 911. When I was done with the phone call about 10 seconds after that when Ms. Medsker came out of her office, I walked into her office and told her what happened.

1RP 102. Medsker again contradicted J.N., recalling he called police only after he looked at the photos, "I watched him dial the phone." 1RP 123, 136.

J.N. told police A.W. was the person who took the necklace, so Seattle Police Detective Brian Ballew requested A.W.'s photo from the school security department at Seattle Public Schools. 1RP 140, 142.

Ballew said this was a typical arrangement between Seattle Police Department and the Seattle Public Schools. CP 39-40; 1RP 142. He created a photo montage and arranged to show it to J.N. 1RP 145-46. J.N. immediately identified A.W. from the montage and told the detective it was a different photo than the one Principal Medsker showed him. CP 40; 1RP 147. Like Medsker, Ballew disputed J.N.'s version of events and testified instead he learned after-the-fact that the photo of A.W. in the montage was the same photo Medsker had showed J.N. 1RP 150. Had the detective known this beforehand, he would not have used the same photo in the montage. CP 40; 1RP 150. No explanation was offered by the detective for the failure to conduct a line up. 1RP 151.

At the conclusion of the CrR 3.6 hearing, the court granted the motion to suppress all out-of-court identification of A.W. by J.N. CP 42. The court denied, however, the motion to suppress J.N.'s ability to make an in-court identification. CP 41-42; 1RP 181, 185. The court made CrR 3.6 findings of fact, and the following conclusions of law:

c. THE IN-COURT IDENTIFICATION WAS PERMITTED SUBJECT TO INDEPENDENT SOURCE TESTIMONY

The court found the out-of-court identification procedures inadmissible but found enough evidence existed to permit J.N. to make an in-court identification, subject to reasonable doubt considerations and challenges. The court adopted J.N.'s hearing testimony for purposes of the trial on

the basis that all testimony related to J.N.'s independent source of identification would be subject to reasonable doubt review. In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

CP 41-42. In short, the court adopted the prior testimony of J.N. from the CrR 3.6 hearing up to the point J.N. lost sight of the person running down the alley. CP 42; 1RP 189-90.

At the close of trial, the judge acknowledged the only evidence regarding identification "has solely come from [J.N.]" 1RP 208.

C. ARGUMENT

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

The trial court properly excluded J.N.'s pre-trial photo identifications of A.W. as unconstitutionally suggestive. Once the defense establishes the inadmissibility of pretrial identifications based on improper suggested procedures, any in-court identification must be excluded unless the State is able to present "clear and convincing evidence that the in-court identifications [is] based upon observations of the suspect other than the [unconstitutional] identification." U.S. v. Wade, 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L. Ed. 2d 1149 (1967). In other words, the State must show "the in-court identification had an independent origin and was properly

admitted.” State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977) (citing Wade).

In Hilliard, the Washington Supreme Court explained the concern as follows: “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 subsequent courtroom identification.” Id. at 439. Suggestive identification procedures potentially violate due process because they increase the likelihood of misidentification. State v. Johnson, 132 Wn. App. 454, 458, 132 P.3d 767(2006), review denied 159 Wn.2d 1002, 153 P.3d 195 (2007) (citing Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); U.S. Const. Amend. § 14.

Among the factors courts should consider in determining whether there is an independent basis to allow an in-court identification are: (1) the opportunity of the victim to observe the subject at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty at the confrontation; and (5) the length of time between the crime and the confrontation. Manson v. Braithwaite, 432 U.S. 98, 114, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977). “Against these factors is to be weighed the corrupting effect of the

suggestive identification itself.” Id.; (see also Briggs, 409 U.S. at 199-200).

Applying these factors here, the State cannot show by clear and convincing evidence that J.N.’s in-court identification of A.W. is independent and untainted by the unconstitutional suggestive photo identifications:

1. The Opportunity of the Victim to Observe the Subject at the Time of the Crime.

J.N. originally told the police that he did not see the person's face at the scene. 1RP 89, 101-02. Thus, he would have had no opportunity to view the criminal at the time of the crime. J.N. changed his story and said for the first time at trial that he did see the person's face at the scene. 1RP 53-54.

2. The Degree of Attention.

The trial judge allowed the in-court identification based on J.N.'s testimony that he met A.W. at the McDonalds. 1RP 184. J.N. said he had not met A.W. before that time. 1RP 45. A.W., however, could not recall the names of his friends at McDonalds that day. 1RP 43-45, 88, 151. Moreover, J.N. testified he was with several other individuals when his necklace was taken but he could not identify even one as a witness for the prosecution when requested to do so by police. 1RP 43-45, 88, 151. In

fact, when the prosecutor asked J.N. to identify his friend Joe, J.N. said he didn't know Joe's last name because he had not had contact with him "for a while." 1RP 44. J.N. said he "knew another person [who was at the McDonalds] but not very well." Id. And he could not remember that person's name at all despite having "met him a few times." 1RP 44. His degree of attention is not reliable and certainly not credible.

3. The Accuracy of the Description.

J.N.'s original description of the criminal differed from A.W. J.N. testified that whoever took his necklace wore a lip ring. 1RP 62, 93, 209. A.W. has never worn a lip ring. 1RP 178. Thus, J.N.'s prior description of the criminal did not accurately describe A.W., although it may have been an accurate description of the actual criminal. Also, the trial court found J.N. less credible when he gave a description of the crime scene. 1RP 118-19, 208.

4. The Witness' Level of Certainty.

J.N. contradicted himself several times before and during the proceedings. These contradictions and credibility concerns undermine any claim of certainty to the in-court identification. For example, he testified he knew A.W.'s last name before he left McDonalds, but was forced to admit he only learned A.W.'s last name after Principal Medsker showed him a photo. 1RP 62, 90-91, 105-06, 122, 130. Additionally, as noted

earlier, J.N. testified he was with several other individuals when his necklace was taken but he was not certain enough to identify any one of them as witnesses for the prosecution when requested to do so by police. 1RP 43-45, 88, 151. No other witness testified at trial despite J.N.'s certainty that others witnessed the crime.

Further, the court found problems with J.N.'s level of certainty. J.N. described the alley behind the McDonalds with - as the court characterized - "unusual" precision citing number of trees, the exact height of the trees and exact number of cars parked in the alley at the time. 1RP 118-119, 208. The judge went on to say:

Now, there are certain times when [J.N.'s] testimony becomes less credible as when he provided a descriptor of the location with three trees and 150-foot fir tree and then three cars parked on that street and then on the street that he followed him around to that [sic] the chase ensued to, there being nine cars and approximately nine to 13 trees, that precision really is unusual, I would say, in many ways.

1RP 208.

5. The Time Between the Crime and the Confrontation.

The in-court confrontation occurred seven months after the alleged incident. Thus, the in-court identification reflected months of corrupting influence of the improper suggestive identification.

There were no other indicia that the in-court identification was independent of the improper photo identification procedures employed by

the school and police. For example, J.N. did not know A.W. prior to the alleged crime. 1RP 45. J.N. at most met A.W. for the first time at the McDonald's prior to the theft, and did not remember any conversation between the two. 1RP 45-46.

In summary, J.N. made no statements prior to the improper photo identifications that either identified A.W. or provided a description of the thief that resembled A.W. in any respect. Moreover, J.N.'s testimony was inconsistent and lacked credibility, as the court found. 1RP 208. In these circumstances, the State has not established by clear and convincing evidence that the in-court identification was the product of an independent source of knowledge untainted by the impermissibly suggestive procedures used to obtain the photo identifications.

The facts here are in stark contrast to cases where a court has found an independent basis for an in-court identification. In State v. Johnson, 132 Wn. App. 454, 132 P.3d 767(2006), review denied 159 Wn.2d 1002, 153 P.3d 195 (2007), a jury convicted defendant of second degree robbery. Id. at 455. The trial court suppressed the witness pretrial identification of Johnson, ruling it was based on an impermissibly suggestive show-up. Id. The trial court allowed, however, the in-court identification of a jacket worn by the robber because it found credible the witness's testimony that he remembered the jacket from the robbery, not

the show-up. Id. at 459. Significantly, the witness described the jacket in detail to police when they arrived at the robbery scene, thus establishing as a source of knowledge about the jacket independent of the impermissibly suggestive show-up. Id. 460.

Similarly, in Hilliard, the Court found the in-court identification independent because “the witness recognized the defendant prior to the assault and spent several minutes talking with him. The victim had ridden with the defendant for 30 to 45 minutes a few months earlier and was with him on another occasion for about 5 minutes.” 89 Wn.2d at 440. Cf., State v. Griggs, 33 Wn. App. 496, 502, 656 P.2d 529, (1982) (identification independent where victim had met defendant approximately 10 days to 2 weeks prior to the crime, she knew him by name, and she spent 4 to 6 hours in the apartment with the defendant the night of the crime as confirmed by other witnesses, as well as defendant).

Here, J.N.'s multiple inconsistencies show his in-court identification was not independent at all; rather it was wholly dependent on the impermissibly suggestive out-of-court identification procedures. Our courts suppress suggestive procedures because they increase the likelihood of misidentification. Johnson, 132 Wn. App. at 458. Here, the State failed to prove by clear and convincing evidence that J.N.'s in-court identification of A.W. was independent from the improper photographic

identifications, and therefore the trial court erred denying the defense motion to exclude the in-court identification. This violated A.W.'s due process rights and this Court should therefore reverse his conviction.

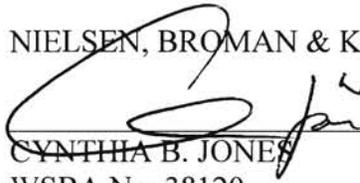
D. CONCLUSION

For the foregoing reasons, the in-court identification should have been suppressed. It was the State's primary evidence linking A.W. to the theft. His conviction must be reversed.

DATED this 24th day of July, 2013.

Respectfully Submitted,

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Respondent,

vs.

ANDRE WHITE,

Appellant.

COA NO. 69943-1-I

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 24TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDRE WHITE
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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JULY, 2013.

x Patrick Mayovsky

2013 JUL 24 PM 4:23
COURT OF APPEALS
STATE OF WASHINGTON