

NO. 70115-1-I

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

REC'D
OCT 15 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DEMIKO FANT,

Appellant.

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

The Honorable Andrea Darvas, Judge

SEP 15 11:41 AM
W

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to due process and a fair trial when it permitted evidence of an impermissibly suggestive and unreliable show-up identification.

2. The trial court erred when it permitted a witness to identify appellant at trial.

3. Although the trial court properly found the show-up unnecessarily suggestive, it erred when it concluded there was not a substantial likelihood of irreparable misidentification.

4. The trial court erred when it entered conclusions of law 5 and 6 in support of its decision denying the defense motion to suppress.¹

Issues Pertaining to Assignments of Error

1. Appellant was charged with residential burglary. Police conducted a show-up in which they had a witness look at appellant to determine whether he was one of several individuals seen leaving the burglarized home. The trial court properly recognized the procedures police used at the time were impermissibly suggestive. Did the trial court err, however, when it allowed evidence of this

¹ The court's written findings and conclusions are attached to this brief as appendix.

identification at appellant's trial based on its conclusion there was not a substantial likelihood of irreparable misidentification?

2. Did the trial court also err when it permitted the witness to identify appellant at trial as one of the individuals involved?

3. Neither the evidence nor the law supports the court's conclusion that there was not a substantial likelihood of irreparable misidentification. Is this conclusion erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged appellant Demiko Fant with one count of Residential Burglary. CP 1. The State alleged that on September 22, 2011, Fant was among a group of young men who broke into a Federal Way home and stole video game equipment and accessories. CP 2-3.

The defense moved to suppress evidence that the victim's neighbor – Jonathan Kim – had positively identified Fant as one of the burglars, arguing the procedures police used were impermissibly suggestive and denied Fant due process of law. CP 7-13. Following an evidentiary hearing, the motion was denied. CP 53-59.

A jury convicted Fant as charged. CP 92. The trial judge imposed 2 days' jail, 224 hours' community service, and 6 months'

community custody under a first time offender waiver. CP 100. Fant timely filed his Notice of Appeal. CP 96.

2. Substantive Facts

The trial court's written findings and conclusions in support of its decision denying the motion to suppress accurately set forth the evidence presented at the hearing. CP 53-59.

At about 12:30 p.m. on September 22, 2011, Jonathan Kim was in the backyard of his Federal Way home when he heard the sound of breaking glass coming from his neighbor's home. CP 53; 1RP² 36-37, 70, 90. Kim peered into the neighbor's yard and saw that a rear window was broken. CP 53-54; 1RP 38, 70-71.

Kim walked through his home, out his front door, and into his front yard, where he noticed an unfamiliar dark Lincoln Town Car or Mercury Marquis parked across the street from his neighbor's house. CP 54; 1RP 38, 40-41, 48-49, 71-72, 122. An individual was sitting in the driver's seat and the engine appeared to be off. CP 54; 1RP 41, 73.

A hedge blocked Kim's view of his neighbor's front door, but as he stood in his own yard smoking a cigarette, he observed a

² This brief refers to the verbatim report of proceedings as follows: 1RP – 2/26/13; 2RP – 2/27/13; 3RP – 2/28/13; 4RP –

young man in blue jeans and a black hoodie walking to the suspicious car from the direction of his neighbor's front door. The young man then entered the passenger side of the car. CP 54; 1RP 41-43, 73-76.

A moment or two later, Kim saw three additional males appear from the direction of the neighbor's front door and walk across the neighbor's front yard. CP 54; 1RP 43, 77-78. One of these individuals appeared Hispanic or Filipino, was smaller than the other two, and was carrying a large backpack. CP 54; 1RP 44, 80, 82-83. A second individual turned his head in Kim's direction and the two made eye contact for one to two seconds, which allowed Kim to briefly see his face. CP 54-55; 1RP 44-45, 80-81. This individual was light-skinned African American or Hispanic, perhaps in his early 20's, with frizzy hair, wearing a white T-shirt. CP 55; 1RP 44-46, 79-80. All three individuals entered the parked car, which began to drive away. CP 55; 1RP 48, 78-79, 84-85.

Kim entered his own car, followed the other car for several blocks, and called 911 to report what he suspected had been a burglary. Although the car he was following sped up, Kim was able to relay the license plate number to a dispatcher. Kim was confident

3/4/13; 5RP – 3/5/13; 6RP – 3/22/13.

he had 5 of 6 digits correct; he was unsure whether the last digit was a letter or the number 2. CP 55; 1RP 49-50, 85-86, 121-122. When the car containing the young men eventually stopped, and it appeared one or more of its occupants were exiting, Kim turned around and drove back home, where he met with Federal Way Police officers. CP 55; 1RP 50-54, 87.

Kim told officers what he had witnessed. He also went with officers to the location where he had last seen the suspicious car, but the car was no longer there. CP 55; 1RP 55. Kim overheard officers discussing that they had identified the registered owner of the vehicle and the owner lived within a mile of Kim's home. CP 55; 1RP 55-56. Kim also learned the registered owner had reported the car stolen shortly after Kim had followed the car and called 911. CP 56; 1RP 60-61, 124-128.

At some point within an hour of Kim's 911 call, Kim agreed to accompany police to see if he could identify a suspect as one of the young men from his neighbor's yard. CP 56; 1RP 56-58, 67, 88, 90. Officer John Kamiya drove Kim to the location, a cul-de-sac in front of Demiko Fant's home, which was less than a mile away from Kim's home. CP 56; 1RP 59, 88-89, 108. Kamiya told Kim that the suspect would be standing outside and that Kim should see if he

recognized him. CP 56; 1RP 60, 89, 109. Importantly, Kim already knew the suspect was associated with the car he had followed. Moreover, Kim had even joked with an officer regarding the fact the vehicle had been reported stolen shortly after Kim called police about its involvement in the suspected burglary. CP 56; 1RP 60-61, 66, 68, 101-105.

From a distance of about 40 feet, Kim looked at the suspect (Fant), who was standing near a police officer, and identified him as the person with whom he had briefly made eye contact. He indicated he was 100% certain. CP 56; 1RP 46-47, 62, 92-93, 101. Although Kim concluded Fant's hair, skin tone, and white shirt matched the individual he had seen earlier, either the person he saw at the burglary was wearing glasses and Fant was not, or vice versa. CP 57; 1RP 44-45, 63, 94-95. Kim also could not recall whether the suspect with whom he briefly made eye contact had any facial hair. Fant, however, had a thin moustache and goatee. CP 57; 1RP 45, 97, 99-100; exhibits 10-11.

The trial court concluded the show-up identification was impermissibly suggestive because:

Kim was either told, or overheard, (1) that the potential suspect was associated with the vehicle that Kim had followed and had described to the police; (2) that the

vehicle's owner had reported it being stolen shortly after Kim had followed the vehicle and called 911 to report the suspected burglary; and (3) because the police engaged in joking with Kim about the stupidity of reporting a vehicle involved in a burglary as stolen, after the burglary had been reported and the vehicle has been described to police.

CP 58. However, after applying the factors set forth in Neil v. Biggers, 409 U.S. 188, 198-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), the court concluded suppression of the identification was unnecessary because the procedures were not so suggestive as to create a substantial likelihood of irreparable misidentification. CP 58-59.

At trial, Iran Kaveh testified that she owns the house that was burglarized on September 22, 2011. 4RP 91-92. Her home was locked when she left that morning to take her son to school and go to work, and no one had permission to be inside. 4RP 91-95. The intruders had broken a rear bathroom window and tampered with other windows and doors. 4RP 92-93. Personal belongings inside the home had been disturbed and some of her son's video game equipment was missing. 4RP 93-94.

Kim repeated his testimony concerning what he had heard and seen on the afternoon of the burglary. 2RP 38-53; 3RP 5-36. He also identified Fant as the same individual he identified

September 22, 2011, and one of the individuals he had seen in Kaveh's yard. 3RP 11. Officers testified that Fant was the registered owner of the car Kim had followed and that Fant and his fiancée claimed it had been stolen shortly after the burglary. 3RP 40-45; 4RP 29-36, 65-66. Officers also testified to the circumstances of the show-up and Kim's identification of Fant. 4RP 37-40, 67-72.

Fant did not testify at trial, but a defense investigator did. 4RP 109. Based on testimony of prosecution witnesses, the investigator took measurements of the cul-de-sac in which the show-up took place and determined, depending on which witness was correct, Kim may have been as close as 40 feet or as far away as 180 feet from Fant when he made his positive identification. 4RP 109-115.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE OF THE SHOW-UP AND THE IN-COURT IDENTIFICATION.

Impermissibly suggestive out-of-court identification procedures – including show-up procedures – violate due process where there is a 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. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027, 10 P.3d 406 (2000); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986).

The defendant bears the burden to demonstrate a procedure is suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002). Once that burden is satisfied, the court must decide whether there is a substantial likelihood of irreparable misidentification based on several factual considerations. Id. at 433. The key inquiry is whether the evidence remains reliable despite any suggestiveness. Rogers, 44 Wn. App. at 515-516.

This Court reviews the trial court's determination on a motion to suppress for substantial evidence and to see if the findings support the conclusions of law. State v. Schlieker, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). The trial court's findings of fact must be supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Conclusions of law are reviewed de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Although show-up procedures have been widely condemned, they are not per se impermissibly suggestive. State v. Guzman-

Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); Rogers, 44 Wn. App. at 515. Here, however, the trial court properly concluded the procedures employed by Federal Way police were impermissibly suggestive because, at the time of the initial identification, Kim already knew Fant was associated with the suspect vehicle, knew the vehicle's owner had reported it stolen shortly after the reported burglary, and had even joked with officers about the stupidity of such a report. CP 57-58. These factors combined to make a positive identification far more likely.

Because the show-up was improperly suggestive, the next question is whether there is a substantial likelihood of irreparable misidentification. Kinard, 109 Wn. App. at 433; Rogers, 44 Wn. App. at 515. Factors to be considered include (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the confrontation. Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

Contrary to the trial court's conclusion, application of these factors demonstrates a substantial likelihood of irreparable misidentification.

1. Opportunity to View

Kim was able to see the face of the individual he later identified as Fant when the individual briefly – one to two seconds – made eye contact with him. CP 54-55. But Kim's opportunity to view this person produced only a general description: light skinned African-American of Hispanic male, perhaps early 20's, frizzy hair, wearing a white T-shirt. CP 55.

Opportunity to observe is typically measured in minutes. See Rogers, 44 Wn. App. at 516 (approximately 20 minutes in same room); State v. McDonald, 40 Wn. App. 743, 747, 700 P.2d 327 (1985) (describing even two or three minutes as "limited"); State v. Burrell, 28 Wn. App. 606, 607-608, 611, 625 P.2d 726 (1981) (two witnesses observed defendant five minutes before attack and during attack under street lights, and one witness had an additional encounter with him); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (police reserve officer involved in a six minute face-to-face confrontation with his assailant), review denied, 95 Wn.2d 1020 (1981); cf. State v. Booth, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983)

(forty-five second observation is sufficient in case where identification went to an automobile and corroborating evidence was found in the automobile).

A fleeting glimpse is not sufficient. State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980). Kim's opportunity to view the suspect he later identified as Fant is more akin to a "fleeting glimpse" than the minutes-long observations usually found in the case law.

2. Degree of Attention

The trial court concluded that Kim was playing close attention because he suspected a burglary. CP 59. While it cannot be disputed that Kim was on high alert, his attention was divided among the multiple individuals heading for the suspicious car.

3. Accuracy of Prior Description

While Fant's appearance was similar to the individual Kim saw in his neighbor's yard, the trial court properly recognized that Kim's description of the suspected burglar "was not terribly detailed." CP 59. Given his very general description, its accuracy is far less probative than where the defendant matches a specific and detailed description. Compare State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (prior to challenged procedure, witness

accurately describes defendant, “including height, weight, color and type of hair and manner of dress”), review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992). Moreover, Kim conceded that either the suspect or Fant was wearing glasses, but not both. CP 57. And whereas Kim did not recall the suspect having any facial hair, Fant has a thin mustache and goatee. CP 57.

4. Certainty at Identification and Length of Time between Crime and Identification

Kim indicated he was 100% certain in his identification, which occurred no more than one hour after Kim saw the suspect. CP 59.

5. Weighed Against the Corrupting Effect of the Suggestive Identification

The procedures used – in particular, Kim’s prior knowledge Fant was associated with the suspect vehicle, his knowledge the vehicle’s owner had just reported it stolen, and his joking with officers about the stupidity of such a report – increased significantly the chance Kim would identify Fant as one of the burglars. Considering all of the circumstances, including the relatively short length of time Kim observed the suspect, that he could offer no more than a general description of the suspect (and one that did not include facial hair), and his divided attention, there is “a very substantial likelihood of irreparable misidentification.” Simmons, 390 U.S. at 384.

Moreover, because the State cannot demonstrate an independent source for the in-court identification, Kim should not have been permitted to identify Fant in court, either. See United States v. Wade, 388 U.S. 218, 240-242, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); State v. Hilliard, 89 Wn.2d 430, 439-440, 573 P.2d 22 (1977); Thorkelson, 25 Wn. App. at 619-620.

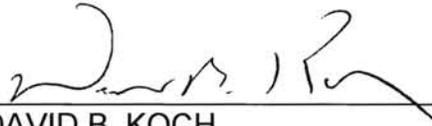
D. CONCLUSION

The out of court and in court identifications should have been suppressed. They were the State's primary evidence linking Fant to the burglary. His conviction must be reversed.

DATED this 15th day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON

FEB 27 2013

SUPERIOR COURT CLERK
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 11-1-10410-5 KNT

vs.

DEMIKO FANT,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER ON DEFENDANT'S
MOTION TO SUPPRESS
EYEWITNESS IDENTIFICATION

THIS MATTER came before the court on February 26, 2013 for trial. The court conducted a hearing pursuant to CrR 3.6 on the defendant's motion to suppress an eye witness "show-up" identification of the defendant. Having considered the testimony of witnesses Jonathan Kim, John Kamiya, and Jonathan Jimenez, and the briefing and argument of counsel, the court hereby enters the following

FINDINGS OF FACT

1. On September 22, 2011 around 12:30 p.m., Jonathan Kim was in his backyard in Federal Way when he heard what sounded to him like glass being broken at his next door neighbor's home. The weather that day was clear. Kim moved to a point in his back

*Findings of Fact, Conclusions of Law
And Order on Defendant's Motion to Suppress*

ORIGINAL

Judge Andrea Darvas
Maleng Regional Justice Center #4H
401 - Fourth Ave. N.
Kent, WA 98032
(206) 906 0970

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1 yard from which he could see the neighbor's home, and saw that a window in the back of
 2 the home had been broken. Kim then went through his own home and out his front door.
 3 He immediately noticed a dark colored car, which he believed to be a Lincoln Town Car or
 4 a Mercury Marquis, parked across the street from his neighbor's house. Kim took note of
 5 this car because he was familiar with vehicles belonging to his neighbors, and this partic-
 6 ular vehicle was unfamiliar to him. Kim noticed that there was a person sitting in the
 7 driver's seat, and that the vehicle's engine did not appear to be running.
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9 2. Kim walked to a point near the street, and near where his own car was parked,
 10 from which point he could observe part of his neighbor's front yard. He was unable to see
 11 the neighbor's front door, because his view was blocked by a tall hedge at or near the
 12 property line. Kim started to smoke a cigarette and waited to see what would happen. He
 13 was paying close attention, because he believed that his neighbor's home had been broken
 14 into. Within a few moments, he observed a young man in blue jeans and a black hoodie
 15 with the hood raised, who appeared to be coming from the direction of his neighbor's front
 16 door. Kim was unable to observe much about this person's appearance, other than that he
 17 appeared to be around 5'8" and about 170 lbs. This person walked through the front yard
 18 and proceeded to cross the street and enter the passenger side door of the unfamiliar
 19 vehicle that Kim had noticed earlier.
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22 3. A moment or two later, Kim observed three other males crossing the neigh-
 23 bor's yard, who also appeared to Kim to be coming from his neighbor's front door area.
 24 One of these three males appeared to be Hispanic or Filipino, was smaller and thinner than
 25 the other men, and was carrying a large backpack. He was wearing a light colored shirt
 26 and a black baseball cap. Kim also observed another male who paused and turned his head
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and made eye contact with Kim for one to two seconds, allowing Kim to see his entire face. Kim described this person as a light-skinned African American or Hispanic male, young, perhaps early 20's, with "frizzy" "poofy" hair, wearing a white T-shirt. This man crossed the street with the other three men in his group and he got into the car Kim had noticed earlier, into the rear passenger side. The other men also got into the car, and the car then started to drive down the street.

4. Kim entered his own car, made a U-turn, and followed behind the other car for approximately six blocks. At the same time, Kim called 911 to report that he believed he had witnessed a burglary of his neighbor's home. Although the car he was following speeded up as Kim followed it, he was able to pull within 10 feet of the car and read off part of the license plate number to the dispatcher. He was able to read off the first 5 digits of the license plate, but he was unsure of the last digit, which he said could have been a letter, but which looked like a "2". Shortly after Kim began following the car, it made a turn onto a side street. When Kim also made the turn, he observed that the car had stopped in the middle of the street, doors were opening, and one or more people were getting out of the car. At that point, Kim turned his own car around and drove back to his own home, where he met with Federal Way police officers.

5. Back at his home, Kim described what he had observed to the police. He spoke with several officers at various times. He went with the police and showed them where the car Kim had followed had stopped in the street, but the car was no longer there, and Kim returned with police to his own home. Kim recalls overhearing at some point that the police had identified the registered owner of the vehicle that Kim had observed, and that the registered owner's address was within a mile of Kim's home. Kim also recalls

1 hearing that the owner of the vehicle had notified the police that his car had been stolen
2 shortly after Kim had called 911 and had reported the suspected burglary and the license
3 number of the car he was following. It is unclear whether any of the officers explicitly
4 related these things to Kim, or whether Kim overheard police officers discussing this
5 information among one another, but he did learn of it.

6
7 6. At some point within an hour of reporting the suspected burglary to the
8 police, an officer asked Kim whether he would agree to accompany the officer to see if
9 Kim could identify a potential suspect as one of the people Kim had observed leaving the
10 vicinity of his neighbor's home. Kim agreed to do this, and Officer Kamiya transported
11 Kim in the back of a patrol car to a cul de sac in front of defendant Demiko Fant's home,
12 which was less than a mile away from Kim's home. Kamiya told Kim that the potential
13 suspect would be standing outside, and that Kim should look at him and see if he recog-
14 nized him. Kamiya did not tell Kim the name of the suspect, and did not give Kim any
15 description of the person, but Kim did know that the potential suspect was associated with
16 the car that Kim had followed. Kim also recalled joking with an officer regarding the
17 suspect vehicle having been reported stolen shortly after Kim had called the police about
18 the suspected burglary.
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21 7. The patrol car drove slowly by, at a distance of 40 feet or so, while Fant was
22 standing in the cul de sac near Officer Jimenez. Kim identified Fant as the person who
23 had made eye contact with Kim before getting into the car Kim had observed. Kim was
24 able to observe Fant for approximately 10 seconds during this "show-up" identification
25 procedure, and he stated he was 100% certain of his identification.
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8. Kim stated that Fant matched his recollection of the person who had made eye contact with him, and that his clothing and hair were the same. However, Kim noted that on one occasion when he saw the suspect, the suspect was wearing eye glasses, and on the other occasion, he was not. Kim was unable to recall whether he saw the eye glasses when the suspect made eye contact with him from the neighbor's yard, or when Kim saw the person at the "show-up" identification. Kim also did not recall whether the suspect had any facial hair, and stated that he did not recall any facial hair.

9. At the time of the "show-up" identification, Fant was not in custody. He was not handcuffed, and he was not in a police car. However, Fant was arrested immediately after Officer Jimenez was notified that Kim had made a positive identification of Fant, and Fant's booking photos taken that same day show that Fant had a thin mustache and goatee surrounding his mouth and chin.

Having made the foregoing Findings of Fact, the court hereby enters its

CONCLUSIONS OF LAW

1. A "show-up" identification inherently involves some degree of suggestibility. However, this type of witness identification is commonly utilized by police and has been sanctioned by courts for many years. Even having a suspect in handcuffs or in a police car during a "show-up" identification has been held not to be unduly suggestive. See, e.g., *State v. Fortun-Cebada*, 158 Wn. App. 158, 241 P.3d 800 (2010); *U.S. v. Bagley*, 772 F.2d 482, 492-93 (9th Cir. 1985).

2. Here, the suspect was not in handcuffs or in visible police detention at the time of the show-up identification. However, this show-up identification was made unnecessarily suggestive because Kim was either told, or overheard, (1) that the potential

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suspect was associated with the vehicle that Kim had followed and had described to the police; (2) that the vehicle's owner had reported it being stolen shortly after Kim had followed the vehicle and called 911 to report the suspected burglary; and (3) because the police engaged in joking with Kim about the stupidity of reporting a vehicle involved in a burglary as stolen, after the burglary has been reported and the vehicle has been described to police.

3. However, even when the police engage in unnecessarily suggestive identification procedures, the eyewitness's identification of a suspect should be suppressed only when the procedure is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). The purpose of the due process check for reliability in the event a defendant establishes improper police conduct is "to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct." *Perry v. New Hampshire*, __ U.S. __, 132 S.Ct. 716, 726 (2012) (emphasis in original).

4. A defendant has the burden of showing that an identification procedure was impermissibly suggestive. If the defendant meets this burden, then the court must consider whether the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification, or whether the identification was reliable despite the suggestive procedure. *Neil v. Biggers*, 409 U.S. 188, 198-200, 93 S.Ct. 375, 34 L.Ed. 401 (1972). The factors to be considered are: "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 bet-

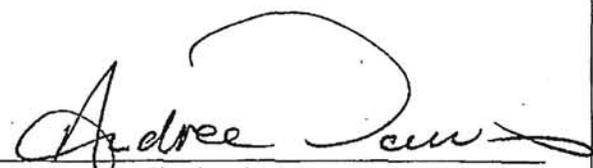
ween the crime and the confrontation.” *State v. Fortun-Cebada, supra*, 158 Wn. App. at 170, citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

5. Here, Kim had a clear view of the suspect in broad daylight, as the suspect was walking across Kim's neighbor's yard, and especially when the suspect turned and made eye contact with Kim for 1-2 seconds. Kim was paying close attention, as he understood that he might be witnessing a crime, and he planned to report it to the police. Kim's description of the suspect to the police, while not terribly detailed, was consistent with Fant's appearance at the show-up identification (including the clothing he was wearing, his skin tone, his hair, and his age), which occurred no more than an hour after Kim first saw the suspect. Any inaccuracies in his description and recollection go to weight rather than to admissibility, and can be adequately addressed in cross examination. And, Kim expressed 100% certainty in his identification of Fant as the person who had made eye contact with him while leaving his neighbor's yard.

6. After careful analysis of the facts and law, this court is unable to conclude that Kim's having been informed that the suspect he was being asked to identify was associated with the car Kim had observed, and that the owner of the car had reported it stolen shortly after Kim reported the suspected burglary, created a substantial likelihood of irreparable misidentification. For these reasons, the motion to suppress the eyewitness identification is denied.

It is so ordered.

Dated: February 27, 2013


Judge Andrea Darvas

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70011-5-I
)	
DEMIKO FANT,)	
)	
Appellant.)	

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 15TH DAY OF OCTOBER 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 AND/OR VIA EMAIL.

[X] DEMIKO FANT
9544 187TH STREET SE
PUYALLUP, WA 98375

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF OCTOBER 2013.

X *Patrick Mayovsky*