

COURT OF APPEALS

JAN 27 11:19

STATE OF WASHINGTON  
BY *[Signature]*

NO. 40940-2-II (Consol.)

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

TERRELL D. NATHAN, Appellant.

---

APPELLANT'S BRIEF

---

Rebecca Wold Bouchey  
WSBA #26081  
Attorney for Appellant

P.O. Box 1401  
Mercer Island, WA 98040  
(206) 275-0551

*USPS 1/26/11*

## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR .....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III.	STATEMENT OF THE CASE .....	2
IV.	ARGUMENT .....	9
	<b>ISSUE 1: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS WHERE THE ONLY EVIDENCE DIRECTLY LINKING MR. NATHAN TO THE CRIME SCENE IS THE DOG TRACK AND THERE IS NO CORROBORATING EVIDENCE OF MR. NATHAN AS THE PERPETRATOR .....</b>	<b>9</b>
	<b>ISSUE 2: THE TRIAL COURT VIOLATED MR. NATHAN'S FIFTH AMENDMENT RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE OF AN UNNECESSARILY SUGGESTIVE SHOWUP IDENTIFICATION. 14</b>	
V.	CONCLUSION.....	21

# TABLE OF AUTHORITIES

## TABLE OF CASES

### United States Supreme Court Cases

<i>Foster v. California</i> , 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 1247 (1969).....	19
<i>Manson v. Brathwaite</i> , 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).....	19
<i>Neil v. Biggers</i> , 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972) .....	15, 18
<i>Simmons v. United States</i> , 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1983).....	14, 15, 19

### Washington Cases

<i>State v. Aver</i> , 109 Wn.2d 303, 310, 745 P.2d 479 (1987).....	13
<i>State v. Ellis</i> , 48 Wn.App. 333, 738 P.2d 1085 (1987).....	11, 12
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980) .....	14
<i>State v. Hopson</i> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).....	15
<i>State v. Johnson</i> , 132 Wn. App. 454, 132 P.3d 767 (2006).....	18
<i>State v. Loucks</i> , 98 Wn.2d 563, 656 P.2d 480 (1983).....	9, 11, 12
<i>State v. McDonald</i> , 40 Wn. App. 743, 700 P.2d 327 (1985) .....	19
<i>State v. Nettles</i> , 81 Wn.2d 205, 210, 500 P.2d 752 (1972) .....	19
<i>State v. Rogers</i> , 44 Wn. App. 510, 722 P.2d 1349 (1986).....	14, 15

### Federal Cases

<i>Velez v. Schmer</i> , 724 F.2d 249, 252 (1 <sup>st</sup> Cir. 1984) .....	20
--	----

## CONSTITUTIONAL PROVISIONS

5 <sup>th</sup> Amendment, due process .....	15
--	----

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by convicting Mr. Nathan based on uncorroborated dog tracking evidence.
2. The trial court erred by denying the motion to for mistrial when witness testimony revealed that the show up identification, which was unconstitutionally tainted by the excessively suggestive circumstances.
3. The trial court erred by convicting Mr. Nathan based on evidence that is insufficient to convince a fair-minded jury of his guilt.
4. The trial court erred by denying the motions for mistrial.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. There is insufficient evidence to support the convictions where the only evidence directly linking Mr. Nathan to the crime scene is the dog track and there is no corroborating evidence of Mr. Nathan as the perpetrator.
2. The trial court violated Mr. Nathan's fifth amendment right to due process by admitting evidence of an unnecessarily suggestive showup identification.

### III. STATEMENT OF THE CASE

#### *Substantive Facts:*

On March 27, 2009, at 10:30 p.m., Shauna Ward called 911 to report that “eight to ten” men had pushed into her apartment and attempted to rob them.<sup>1</sup> RP 6/14/10 7, 52. At the time, Ms. Ward was at home with her boyfriend, Timothy Smith, and Mr. Smith’s brother, Benjamin Wheeler. RP 6/14/10 5. The men wore bandana’s over their faces and masks. RP 6/14/10 9. So, neither Mr. Wheeler nor Ms. Ward could give a description other than that they were young and black. RP 6/14/10 12.

The men came in to the apartment by pushing past an exiting guest, identified only as “Eric” but never found. RP 6/14/10 6-7. One of the men was wearing a “teal” shirt and one carried a hammer. RP 6/14/10 7. They entered the apartment and tried to take Ms. Ward’s laptop from her. RP 6/14/10 8. Ms. Ward said that the man with the hammer stood over her and demanded the laptop. RP 6/16/10 14-15. The prosecutor asked her if the man hit her with the hammer, and Ms. Ward said no, but that he “said that he was going to.” RP 6/16/10 15.

---

<sup>1</sup> There was dispute about how many individuals there were. On the stand, Ms. Ward recalled that there were “definitely” more than three men, she was not sure how many, but believed there were six. RP 6/14/10 25, RP 6/16/10 14, 25. Mr. Wheeler testified that there were four men. RP 6/14/10 7.

Ms. Ward testified that the man with the hammer was wearing a white and black flannel shirt and black gloves, with a bandana over his face and a “beanie hat.” RP 6/16/10 18. She did not see his face and could only say that he was black. RP 6/16/10 19.

Mr. Wheeler fought with the man trying to take the laptop. RP 6/14/10 8. That was when Ms. Ward went to the kitchen to call 911.

After a few minutes, the men ran back out the front door. RP 6/14/10 9. They left behind one shoe and a hammer. RP 6/14/10 11.

Mr. Wheeler testified that he saw “them” walking across the parking lot. RP 6/14/10 10. One of them was the “kid with the teal shirt.” RP 6/14/10 10. Mr. Wheeler did not say how many men he saw. RP 6/14/10 10.

After the 911 call, the dispatch report went out of eight to ten black male suspects. RP 6/14/10 52. Sergeant Robert Stark was a block away when he saw three young African American men—they seemed to duck out of sight. RP 6/14/10 39-40. The direction they were walking led to the nearby YMCA, which was only a block or two away. RP 6/14/10 59-60; RP 6/21/10 41. Sergeant Stark drove over to them and asked them to come over—they did. RP 6/14/10 40. The men willingly told Sergeant Stark their names: Terrell Nathan, Marcus White, and Henry Ward. RP

6/14/10 45, 47, RP 6/21/10 39-40. Mr. Nathan and Mr. White lived in the same apartment complex as the victims. RP 6/21/10 31, 39-40.

The police then made the three young men wait in the police cars for ten minutes until they could conduct a “showup” for Mr. Wheeler and Ms. Ward. RP 6/14/10 40, 44. Officer Wendy Haddow-Brunk testified that the boys were told they were not free to leave until after the showup. RP 6/15/10 16.

At the time of their detention, Mr. White was wearing a black T-shirt, red shorts, and basketball shoes. RP 6/21/10 56. Mr. Nathan was wearing a black jacket, black workout pants, and black shoes. RP 6/21/10 31-32. Mr. Law was wearing a blue shirt. RP 6/21/10 12.

The police took Mr. Wheeler and Ms. Ward to identify the boys they had detained. RP 6/14/10 19. When they got there, the witnesses saw three African American young men surrounded by police officers and police cars, “lit up” by headlights. RP 6/14/10 20; RP 6/21/10 23, 13. The canine officer was standing next to the suspects with her dog. RP 6/15/10 40; RP 6/21/10 23-24. None of them were missing a shoe. RP 6/15/10 57.

Ms. Ward testified that she identified one of the suspects as the man with the hammer because he had black gloves on.<sup>2</sup> RP 6/16/10 22. She said that it was the fact that he had black gloves on that was her reason for making the identification. RP 6/16/10 39. She also said he was the same race and perhaps the same height, though she did not recall how tall the man she initially saw was. RP 6/16/10 38-39. She did not recognize anything in his facial features. RP 6/16/10 22. He has not wearing the clothes she remembered—in fact, she did not remember what clothes the robber had worn. RP 6/16/10 23, 40. She did not recognize anyone in the courtroom. RP 6/16/10 24.

Ms. Ward acknowledged that her identification was influenced by the circumstances of the showup. She testified that she knew that was the same man because: “[T]he canine had followed his scent from my apartment to find them.” RP 6/16/10 38. She said that prior to being called to the showup, she had watched the canine begin to track and then had seen the dog with the suspects, leading her to conclude the dog had tracked them. RP 6/16/10 41-42. She was sure of that fact. RP 6/16/10 47. In addition, she believed the three suspects looked “sweaty and scared.” RP 6/16/10 39. Finally, she was told by the police that “they had

---

<sup>2</sup> The record does not show which of the three was wearing the black gloves the witness identified.

found clothing that [the suspects] had discarded.” RP 6/16/10 42. She said this final fact was told to her just after her identification at the scene. RP 6/16/10 42.

Mr. Wheeler testified that he could only identify “the one with the green shirt,” but by his shirt only because he did not recognize their faces and their clothes were different than the robbers. RP 6/14/10 12, 26. Then, Mr. Wheeler testified that Mr. White “might or might not” be the boy who was wearing the green shirt.<sup>3</sup> RP 6/14/10 12, 25.

Officer Benjamin Logan, who had transported Mr. Wheeler and Ms. Ward to the showup, testified he told them they had suspects “in custody” that he was taking them to identify. RP 6/21/10 27-28. He testified that then both simultaneously identified all three suspects as the robbers, with no hesitation and without detail: “That’s them.” RP 6/21/10 7-8. He never told them the suspects might not be the perpetrators. RP 6/21/10 48.

Officer Wendy Haddow-Brunk, the canine handler, testified that she had conducted a canine search for suspects after she had attended the showup identification. RP 6/15/10 16, 20. At first, she testified that she

---

<sup>3</sup> The police officers testified that it was Henry Law wearing a blue shirt. RP 6/21/10 12.

began the dog track at the sport courts<sup>4</sup> of the apartment complex because the suspects had been seen leaving that way. RP 6/15/10 20. Later, she said that they began on the threshold of the apartment. RP 6/15/10 52.

The track proceeded across the sport courts, through the gate leading to the other end of the complex, to a stairwell near the sport courts. RP 6/15/10 53. At the bottom of the stairwell, the dog alerted to a pile of clothes. RP 6/15/10 25. She re-directed the dog to continue to track, leaving the clothing behind. RP 6/15/10 54-55, 56. He lost the scent at a tall fence, appeared to re-acquire the trail, and ended up at the street where the three suspects had been detained. RP 6/15/10 56.

The State called a forensic DNA technician, who testified that two items of clothing had DNA from Mr. Nathan; specifically, an ECCO brand sweatshirt and a jacket. RP 6/16/10 96, 100. A pair of pants had DNA matching Mr. White. RP 6/16/10 93. There was also a pair of jeans with DNA matching Mr. Law. RP 6/16/10 101. Neither these four items nor any of the other items of clothing in the pile were identified by the witnesses as the clothing worn by the robbers.

Upon their arrest, it was learned that Mr. Nathan and Mr. White both lived in the same apartment complex where the witnesses resided.

---

<sup>4</sup> Ms. Ward said this was the basketball courts—that she saw the dog tracking there. RP 6/16/10 41. Officer Haddow-Brunk called them tennis courts. RP 6/15/10 20.

RP 6/21/10 31, 39-40. The route they took through the basketball courts and to the street where they were detained, was a reasonable route to the local YMCA. RP 6/21/10 41.

*Procedural History*

Mr. Nathan was charged, along with Mr. White, with attempted first degree robbery and first degree burglary. CP 1-2.

After Ms. Ward's testimony, the defense moved for a mistrial, arguing that the showup had been arranged in a way that was unfair and that the resulting testimony was "extremely prejudicial" to the defense and no corrective instruction could remove the prejudice. RP 6/16/10 50-53. The court denied the motion, finding that the identification was not prejudicial because it was too tentative. RP 6/16/10 56.

After the State rested, the defense moved for dismissal on grounds of insufficient evidence. RP 6/21/10 67, 70-71. The Court denied the motion, ruling the evidence was sufficient to go to the jury. RP 6/21/10 75. This motion was renewed after the defense rested, adding to the sufficiency grounds that, in addition, the suggestive nature of the showup had created a substantial likelihood of misidentification at trial. RP 6/21/10 83.

Mr. White and Mr. Nathan were found guilty of attempted first degree robbery and first degree burglary. RP 6/24/10 1. However, the

jury returned an answer of no to the special verdict finding that the defendants were armed at the time of the commission of the crimes. RP 6/24/10 1.

Mr. Nathan had no prior convictions and an offender score of two only due to the current offenses. CP 38-39. The court imposed a sentence in the standard range. RP 6/24/10 23, CP 41. This appeal timely follows.

#### IV. ARGUMENT

**ISSUE 1: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS WHERE THE ONLY EVIDENCE DIRECTLY LINKING MR. NATHAN TO THE CRIME SCENE IS THE DOG TRACK AND THERE IS NO CORROBORATING EVIDENCE OF MR. NATHAN AS THE PERPETRATOR.**

*A. Dog tracking evidence alone is insufficient to support a conviction without corroborating evidence of identity.*

In *State v. Loucks*, 98 Wn.2d 563, 656 P.2d 480 (1983), the court held that dog tracking evidence alone could not support a conviction.

The dangers inherent in the use of dog tracking evidence can be alleviated only by the presence of corroborating evidence identifying the accused as the perpetrator of the crime. Police dogs cannot be conclusively relied on to follow the trail of one individual if other human trails cross this one, or even come near it. Craig, *The Dog as a Detective*, 18 Sci. Monthly 38, 39 (1924), cited in 1 J. Wigmore, *Evidence*, § 177, at 637. While a dog's trainer may be available for cross examination, he obviously will be unable to answer many questions bearing on the reliability of the dog's conclusions. Comment, 9 Wash. & Lee L.Rev. at 253-54.

98 Wn.2d at 567.

The State argued to the jury that the defendant's were among those who robbed the apartment, shed their outer clothes to disguise themselves, and then were arrested. RP 6/21/10 91. The State argued for conviction based on the dog tracking, the witness identification at the showup, and the DNA linking Mr. Nathan and Mr. White to the clothes. RP 6/21/10 106; RP 6/22/10 45, 47, 48-50.

The dog track is the only thing in this case that connects the clothing to the crime scene. No-one testified that the clothing found was worn by the suspects that night or even that it looked similar to it. Mr. Nathan and Mr. White lived in the same apartment complex as the victims, so their presence there is not suspicious. RP 6/21/10 31, 39-40. The so-called identifications provided by Ms. Ward and Mr. Wheeler were based in one case on a green shirt and in the other on black gloves. See RP 6/16/10 22, 39, RP 6/14/10 12, 26. Neither witness was certain and neither could identify Mr. Nathan or Mr. White.<sup>5</sup> RP 6/16/10 24. And, the circumstances of their "identifications" was based on a showup that was impermissibly suggestive (see below). The only other evidence is DNA linking Mr. Nathan and Mr. White to the clothes. RP 6/16/10 93,

---

<sup>5</sup> Mr. Wheeler testified that Mr. White "might or might not" be the man who was wearing the green shirt, RP 6/14/10 12, 25, but the officers testified that Henry Law was the only one wearing a green shirt, RP 6/21/10 12. The record does not show who was wearing black gloves.

96, 100. However, without any link of the clothes to a crime, this evidence is irrelevant. The only evidence linking the clothes to the scene of the crime is the dog track.

So, the only “corroboration” of identity that could be considered is the “identification” at the showup of Henry Law based on a green shirt that might be the same. See RP 6/16/10 22, 39, RP 6/14/10 12, 26. The other “identification” was of a man wearing black gloves—and we don’t know which of the three that was. Even the judge commented that this “identification” was so weak as to be without evidentiary value. RP 6/16/10 56.

The State Supreme Court has not yet defined the quantum of evidence that is sufficient “corroborating evidence” in this context. The language of *Loucks* suggests that the evidence should be sufficient standing alone to convict the defendant; i.e.: “The dangers inherent in the use of dog tracking evidence can be alleviated only by the presence of corroborating evidence identifying the accused as the perpetrator of the crime.” *Loucks*, at 567. However, in *State v. Ellis*, 48 Wn.App. 333, 738 P.2d 1085 (1987), Division I held sufficient corroboration that the suspects were found hiding in clothing matching the description of the suspects seen at the crime scene. *Ellis* held that corroborating evidence would be evidence that would confirm or strengthen the dog tracking evidence. 48

Wn.App. at 335. Whichever standard is applied to this case, there is insufficient corroborating evidence to permit the conviction of Mr. Nathan.

This case resembles *Loucks*, where the State argued that the dog tracking evidence was corroborated by circumstantial evidence suggesting an accomplice was present at the scene of the crime and the defendant's unexplained presence in the vicinity. 98 Wn.2d at 568. The Court found this to be insufficient to corroborate the dog tracking evidence and reversed the conviction. 98 Wn.2d at 569.

By contrast, in *Ellis*, the police themselves saw men at the scene of the crime and were able to describe in detail what they were wearing. Later, a dog tracked one man, wearing the same clothes, to where he was hiding under a car. The other man was tracked to a swamp, hiding, and he pulled a knife when located. *State v. Ellis*, 48 Wn. App. 333, 333-34.

In this case, Mr. Nathan and his friends were found walking toward the YMCA wearing basketball clothes. RP 6/14/10 59-60, RP 6/21/10 31-32, 41, 56. They were not hiding under a car and they did not try to run away from the police. They did not match the description given by the witnesses, because there were only three of them, not eight, and they were not wearing similar clothing. No one could testify that they looked like the assailants. This is not sufficient corroborating evidence—

it would certainly not be sufficient for conviction and does not confirm or strengthen the dog tracking evidence. Likewise, the DNA evidence only proves Mr. Nathan and Mr. White left clothing lying around near the basketball court in their apartment complex—that is not proof of burglary and robbery. If they had been playing basketball at the court and decided to leave and walk to the YMCA, they may have left the clothes to be retrieved later.

Under *Loucks*, this dog tracking evidence is insufficient in and of itself to support conviction and must be supported by corroborating evidence of identity. The dog tracking is the only evidence connecting the crime scene to the clothing and therefore the only evidence connecting the defendants to the crime scene. That is why the prosecutor repeatedly referred to the dog tracking as key to his case. RP 6/21/10 102-103, 106; RP 6/22/10 48-50. Because there is insufficient corroboration of the dog tracking evidence, the conviction must be reversed under *Loucks*.

*B. Even with the dog tracking evidence, the evidence submitted by the State is insufficient to support the convictions.*

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a

*Rogers*, 44 Wn. App. 510, 722 P.2d 1349 (1986) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1983)). Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and it is the likelihood of misidentification, which violates a defendant's right to due process. *Neil v. Biggers*, 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972). While prompt crime scene showups are not per se impermissible, they are generally suspect. *State v. Kraus*, 21 Wn. App. 388, 392, 584 P.2d 946 (1978); *Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir. 1969). Evidence of identification should not be admitted at trial if the circumstances of the pre-trial confrontation were so infected by suggestiveness as to give rise to a substantial likelihood of misidentification. *Neil*, 409 U.S. at 198. In this case, because the defense discovered the facts about the tracking dog being present at the showup during the trial, the motion took the form of a motion for mistrial based on the impermissible showup. The court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The police testified that they conducted the showup in the following way: with the three suspects being the only black men present, spotlighted by headlights, surrounded by uniformed police officers and police vehicles and a police dog. RP 6/15/10 40; RP 6/21/10 23-24, 13.

Whatever they were told, both Ms. Ward and Mr. Wheeler testified that they understood that they were being taken “to identify” the three suspects that were detained, not to rule them out. RP 6/14/10 19; RP 6/16/10 22. Ms. Ward said that she knew these were the perpetrators because she saw the tracking dog there and she had seen him leave the apartment complex, so she assumed the dog tracked the men there. RP 6/15/10 20. She said that when she commented to Officer Logan that the men were not wearing the same clothes, he told her they had changed and that the dog found the clothes. RP 6/16/10 42. This last fact is particularly interesting, because the canine officer testified that the dog tracking occurred after the showup and no-one admitted to telling the witnesses about the result of the tracking. RP 6/15/10 16, 20.

Ms. Ward testified that she recognized one of the suspects because he had black gloves on and was and African-American. RP 6/16/10 22, 38-39. She said she did not recognize his facial features and was not sure how tall he was. RP 6/16/10 38-39. Mr. Wheeler testified that he did not recognize any faces, but could identify “the one with the green shirt,” because his shirt was similar to the perpetrator. RP 6/14/10 12, 26. Officer Logan, who transported the witnesses to the showup, testified that Ms. Ward and Mr. Wheeler both simultaneously identified all three

suspects with no hesitation. RP 6/21/10 7-8. He did not inquire of them if they were only identifying one suspect and on what basis. RP 6/21/10

The only descriptions given by Mr. Wheeler and Ms. Ward to the police were of the person who let the robbers in, “Eric.” RP 6/21/10 18-19, 20. Of the others, Mr. Wheeler only said they were “young, black males.” RP 6/21/10 19. And Ms. Ward never gave any description of the others other than her 911 call, where she said only that there were eight to ten black men with bandanas over their faces. RP 6/14/10 7, 52; RP 6/21/10 20.

The court below denied Mr. Nathan’s motion for mistrial following the testimony of the eye-witnesses, which was based on the fact that the showup procedure used was impermissibly suggestive. RP 6/16/10 56.

In denying the motion for mistrial, while not specifically finding that the showup was impermissibly suggestive, the trial court reasoned that the identification was weak and therefore not a harmful error:

Assuming that she is right, we still have—what did she say that she identified? You know, she said these guys were dressed strangely and they had gloves on. . . . I just think that whatever is out there is out there. I don’t think that . . . it raises to a level that it would justify a mistrial. I think that the jury has the whole picture of the thing and that *this identification is not a strong one, certainly*. It may well be a conclusion based on the fact that this person had gloves on and so did this other person. There is not much more to it than that.

Italics added. RP 6/16/10 56.

A similar identification to those in this case was suppressed in *State v. Johnson*, 132 Wn. App. 454, 132 P.3d 767 (2006). In that case, a man was robbed by three young men. The victim did not get a good look at the robbers' faces, but he was able to describe their clothing to the police. Police took the victim for a showup identification, and he identified the suspects as the men who robbed him only from their clothing. The trial court suppressed this identification, although the victim was permitted to identify the defendant's jacket in court. *Johnson*, at 456-57.

Like *Johnson*, the witnesses here were identifying a person based solely on items of clothing, in an impermissibly suggestive context. Due process requires that such evidence be suppressed if the suggestiveness of the identification procedure creates a substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. at 198. The witnesses were told they were going to "identify" the suspects and when they arrived, defendants were lit up, surrounded by police and police cars, the only black men present. This scenario, alone is impermissibly suggestive.

Then, the identification additionally compromised by the presence of the tracking dog, which suggested to one witness that the dog had tracked them there. Ms. Ward's understanding that the police had tracked

the defendants to that location before she identified them renders the identification procedure unnecessarily suggestive. See, e.g., *Simmons v. United States*, 390 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (chance of misidentification heightened if police indicate they have other evidence suspect committed crime); *State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985) (Identification procedure held impermissibly suggestive where witness tentatively identified defendant when, after lineup, officer told him defendant had been arrested for a crime); *State v. Nettles*, 81 Wn.2d 205, 210, 500 P.2d 752 (1972) (police should not by words or actions, indicate a “favored” suspect); *Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 1247 (1969) (by repeated use of unfair identification procedures, police in effect told witness “this is the man.”). In this case, the police created a scenario that was unnecessarily suggestive and violated Mr. Nathan’s due process rights.

When the defendant establishes that an impermissibly suggestive identification procedure was used, the court must determine whether, under the totality of circumstances, the resulting identification was unreliable. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The “corrupting effect of the suggestive identification” is to be weighed against factors indicating reliability including, (1) the opportunity of the victim to observe the subject at the

time of the crime, (2) the witnesses' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. at 114.

Application of these factors to the facts of this case compels the conclusion that the identifications here were unreliable. Both Mr. Wheeler and Ms. Ward testified that they never saw the faces of the attackers, and neither of them gave any description beyond young black male. This is insufficient. *See Velez v. Schmer*, 724 F.2d 249, 252 (1<sup>st</sup> Cir. 1984) (Identification suspect where witness described white T-shirt and shaggy hair but unable to describe assailant's age, build, height, weight, skin color, other clothing, or other specifics of appearance).

It is clear that the impermissibly suggestive showup corrupted these identifications and without any indicia of reliability, Mr. Nathan's convictions were compromised by the due process violation. *See McDonald*, 40 Wn. App. at 747-48 (reversing and remanding where identification procedure impermissibly suggestive and identification not otherwise reliable). The prosecutor repeatedly emphasized to the jury the officer's version of events—that both Ms. Ward and Mr. Wheeler positively identified all three men as the robbers, despite the fact that they both testified that they never saw anyone's face and could not be certain.

RP 6/22/10 45; RP 6/21/10 92, 101, 102, 106. Thus, the compromised showup compromised the identification at the scene, which was used by the State to argue that Mr. Nathan and Mr. White were guilty. This was a violation of due process and should have been obvious to the court at the time of the motion for mistrial. It was the natural result of the trial court's denial of the motion. Therefore, The trial court abused its discretion in denying the motion for mistrial.

## V. CONCLUSION

Mr. Nathan was convicted in this case based on the uncorroborated evidence that a dog tracked his scent from the scene of the crime to a pile of clothes left by the basketball court and the prosecutor's implications to the jury that these clothes were worn by the assailants, without any testimony to that effect. A person cannot be convicted in this case based on the uncorroborated evidence of a dog tracking. Therefore, the convictions must be reversed.

Furthermore, Mr. Nathan's fifth amendment right to due process was compromised by the witnesses' testimony about identifications that occurred in an impermissibly suggestive showup—a showup where only the three suspects stood surrounded by police officers and the police dog. Ms. Ward clearly understood that the dog being there identified the defendants as the robbers, even though neither she nor Mr. Wheeler ever

saw a face. This testimony violated due process and therefore also requires reversal of the convictions.

DATED: January 25, 2011

*Rebecca W. Bouchey*

Rebecca Wold Bouchey #26081  
Attorney for Appellant

11 JAN 27 AM 11:19  
STATE OF WASHINGTON  
BY *RW*  
DEFINITION  
COURT OF APPEALS  
JANUARY 27, 2011

CERTIFICATE OF SERVICE

I certify that on January 25, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

*Counsel for the Respondent:*  
Kathleen Proctor  
Office of Prosecuting Attorney  
930 Tacoma Ave. S., Rm. 946  
Tacoma, Washington 98402-2171

*Appellant:*  
Terrell D. Nathan  
DOC# 341974  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

*Rebecca W. Bouchey*

Rebecca Wold Bouchey  
WSB# 26081  
Attorney for Appellant