

No. 42154-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CALVERT ANDERSON, JR.,

Appellant.

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

The Honorable, Judge
Cause No. 11-1-00101-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether Wagner's identification of Anderson was impermissibly suggestive because it was made from a single photograph shown to him by a police officer.

B. STATEMENT OF THE CASE.

Mackie Perryman was warming his car in front of his residence when Anderson approached him. Anderson requested a ride, mentioning that the police were on their way. [5/16-17/2011 RP 51] Perryman declined to give Anderson a ride, stating to Anderson, "Whatever is going on, I didn't want to have nothing to do with it." [5/16-17/2011 RP 52] Perryman observed Anderson cross the grassy common area. [5/16-17/2011RP 53]

While Nicholas Wagner was taking down Christmas lights he saw Anderson talking to Perryman. [5/16-17/2011 RP 37] Wagner then watched as Anderson almost ran across the grassy commons area within 20-25 feet of him in a manner that appeared "hesitant." [5/16-17/2011 RP 39, 43] It was strange enough to keep Wagner's attention. Wagner continued to observe Anderson walk toward Regnol Coiteux's car. [5/16-17/2011 RP 40] While Anderson stood next to the rear passenger door of Coiteux's car, Wagner heard the suspect state, "I'm going to steal this car." [5/16-17/2011 RP 40] The suspect walked behind the car to the rear passenger door on

the driver's side and repeated, "I'm going to steal this car." [5/16-17/2011 RP 40-41] Anderson then waited a few seconds, opened the driver's door and stated "I'm stealing this car." [5/16-17/2011 RP 41] Wagner then watched Anderson "speed off." [5/16-17/2011 RP 41]

Perryman, whose car was now warmed, left his apartment complex. [5/16-17/2011 RP 57] Perryman stopped at a four-way intersection and observed a car passing on his side [5/16-17/2011 RP 54] Perryman noticed that the driver looked like "the guy I was just speaking to." [5/16-17/2011 RP 54]

Officer Tinsley arrived on the scene within minutes after Coiteux's car was taken around 11:00 AM. [5/9/2011 RP 11] Officer Tinsley initially contacted Coiteux. [5/16-17/2011 RP 60] Coiteux directed Officer Tinsley to Wagner, who he noticed was taking down Christmas lights. [5/16-17/2011 RP 61]

Wagner provided Officer Tinsley with a description of the suspect--medium height, medium weight, mid-20s, medium complexion, and with a goatee. [5/16-17/2011 RP 45, 47, 48] Wagner then directed Officer Tinsley to Perryman. [5/16-17/2011 RP 62]

Perryman was able to provide Officer Tinsley with the possible residence of the suspect, 736 Edelweiss. [5/16-17/2011 RP 62-63] At that residence Officer Tinsley obtained Anderson's name. [5/16-17/2011 RP 64] Officer Tinsley then searched the jail records for Anderson and found a photo. [5/16-17/2011 RP 64-65]

Officer Tinsley then approached Wagner again. While within arm's length he opened his MTC (the laptop computer containing the photo) and before Officer Tinsley was able to make any declaration or statement Wagner declared "That's him! That's the fellow that said, 'I'm going to steal the car.'" [5/9/2011 RP 14 and 5/16-17/2011 RP 66]

The photo depicted Anderson in a "gray T-shirt with a darker over T-shirt over it." [5/9/2011 RP 15] The photo was admitted into evidence as State's Exhibit 1 during the preliminary hearing and State's Exhibit 2 during trial. [5/9/2011 RP14 and 5/16-17/2011 RP 66] Beside the photo other information was written, specifically Anderson's:

- Name
- Date of birth
- Descriptors:
 - Missing tip of right F-I-N
 - Tattoo upper left arm, feather
 - Tattoo on the back, a sea monster
- Telephone number

- Address (736 Edelweiss, same as Perryman's testimony.)
- Place of birth
- The word inmate in italics.

[5/9/2011 RP16]

Officer Tinsley approached Perryman (at a later date since he had left for work already) and presented him with the same screen image that was shown to Wagner. Perryman identified Anderson as the person he spoken to. [5/16-17/2011 RP 55, 67]

C. ARGUMENT.

1. Standard of Review

Anderson cites to Humphrey Industries, Ltd. V. Clay Street Associates, LLC, 170 Wn.2d 495, 502, 242 P.3d 846 (2010), for this standard of review: "Whether or not an identification procedure is unduly suggestive is a mixed question of law and fact, subject to review de novo." Opening brief at 4. Actually, Humphrey Industries states that "[w]hether a party substantially complied with a *statute* is a mixed question of law and fact, which we review de novo," citing to State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (emphasis added).

He is correct that the standard of review for purported constitutional violations is de novo. Bellevue School Dist. v. E.S.M., 171 Wn. 2d 695, 702. 257 P.3d 570 (2011).

2. Impermissible Suggestiveness

Criminal defendants have a constitutional right to due process of law. U.S. Const. Amend. XIV; Wash. Const. Art. 1, Sec.

3. Regarding eye-witness identifications,

[the defendant] bears the burden of proving that the [identification] was impermissibly suggestive. See State v. Gould, 58 Wn. App. 175, 185, 791 P.2d 569 (1990) (citing State v. Guzman–Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987)). If he proves impermissible suggestiveness, he must then establish that, the “suggestiveness created a substantial likelihood of irreparable misidentification.” State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). Important factors are (1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the degree of certainty demonstrated at the line up, and (5) the time between the crime and the line up. Maupin, 63 Wn. App. at 897, 822 P.2d 355.

State v. Ratliff, 121 Wash. App. 642, 649, 90 P.3d 79 (2004).

Anderson quotes from State v. Maupin, 63 Wn. App. 887,896, 822 P.2d 335 (1992) (citing, inter alia, Manson v. Brathwatite, 432 U.S. 98, 97, S.Ct. 2243,2254,53 L.Ed.2d 140 (1977)), to argue that “presentation of a single photo is, as a matter

of law, impermissibly suggestive.” Opening brief at 5. The language used in Maupin was a misinterpretation of Manson which stated that generally speaking, identifications arising from single-photograph may be viewed “with suspicion.” Manson, 432 U.S. at 116, citing to Simmons v. United States, 390 U.S. 377, 383, 88 S.Ct. 967, L. Ed. 2d 1247 (1968). Simmons stated that while the danger of a witness’ incorrect identification will be increased with the use of a single photo the danger “may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. “ Id.

The original holding was that a single photo identification was subject to general suspicion that could be easily dispelled with a cross examination. A misquote has mutated the standard to impermissible as a matter of law. The use of a single photo is not, as a matter of law, impermissibly suggestive without more.

Upon Officer Tinsley’s presentation of Anderson’s image to Wagner, he was immediately able to identify the photo as the man he saw cross the grassy area, declare aloud that he was stealing the car, and enter without permission the victim’s car and speed away. Officer Tinsley did not utter a single word or make any gesture indicating guilt. Nor did he subject the witness to repeated

viewings of the same image. This presentation of a single photo to a witness for identification was not impermissibly suggestive.

4. Biggers Factors

If this Court finds that the presentment of a single photo is impermissibly suggestive then a further inquiry is required. It must be determined whether or not the suggestiveness of the use of a single photo created a substantial likelihood of irreparable misidentification. Anderson asserts that the factors in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), which control this determination, weigh against the state. The state disagrees for the following reasons.

i. Biggers Factor #1: The opportunity of the witness to view the criminal at the time of the crime.

The first factor to consider is the opportunity of the witness to view the criminal at the time of the crime. An opportunity to view a perpetrator commit a crime requires the witness to have the physical ability to observe and to be in the right place at the right time with one's attention focused on the particular event. There is no question as to his physical ability to identify all the participants. Wagner was in the right place at the right time. His home is no more than 30 feet from the site of the crime. He was outside his

home, taking down Christmas lights just prior to and during the commission of the crime. Wagner's view of Anderson was completely unobstructed; no trees, buildings or other obstructions interfered with his line of sight.

Wagner's attention and focus increased and became fixed on the events that unfolded before him. Wagner was uniquely situated to observe the details of the entire scene unfold. There is no question as to his physical ability to identify all the participants and there can be no question of his opportunity. Wagner's narration of the entire events with particular details, as corroborated by Perryman and Coiteux proves he took full advantage of the opportunity to view the perpetrator commit the crime.

ii. Biggers Factor #2: The witness' degree of attention.

The second factor to consider is the witness' degree of attention. When there is threat of violence one becomes hyperaware of his surroundings. It is reasonable to infer that this level of alertness or degree of attention becomes ever more increased when, as a parent, one believes his or her child is in danger. Wagner's attention increased from casual observer to being intently focused and fearful for his daughter's safety. He observed Anderson having a conversation with Perryman. Then

Anderson's peculiar and "hesitant" crossing of the grassy area caught his attention, raising his alertness. With heightened alertness he then observed Anderson's suspicious movements around the back side of victim's car as he declared three times, "I'm going to steal this car." Wagner sent his daughter into the house. He then watched as Anderson entered the victim's car and sped away.

iii. Biggers Factor #3: The accuracy of the witness' prior description of the criminal.

The third factor to consider is the accuracy of the witness' prior description of the criminal. Defense argues that there is no proof that Wagner's vague description matched the suspect's appearance, nor was his description sufficiently specific to allow the police to positively identify Anderson. Wagner's initial description of the suspect to Officer Tinsley was not vague. He was able to give particular descriptions of a man of medium height and medium weight in his early twenties with medium complexion and a goatee wearing a blue or dark color hoodie. This description is not vague but exactly matches Anderson's appearance on the date of the crime.

Further, Perryman was able to provide a possible address of the suspect. The resident of that address had a criminal history. The criminal report had a photo attached which showed a man of medium height and medium weight in his mid-twenties with medium complexion and a goatee. The matching address and initial description was sufficient for Officer Tinsley to identify Anderson as a suspect.

iv. Biggers Factor #4: The level of certainty demonstrated by the witness at the confrontation.

The fourth factor to consider is the level of certainty demonstrated by the witness at the confrontation. Wagner's absolute certainty of the identification of Anderson as the perpetrator of the crime is conceded to by the defense.

v. Biggers Factor #5: The length of time.

The final factor to consider is the length of time. The period of time – within hours – between the theft and identification of the suspect is very brief, as conceded to by the defense.

2. Harmless Error

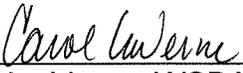
“A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.”

State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Even if the use of a single photo was impermissibly suggestive and that created a substantial likelihood of irreparable misidentification, the error in admitting Wagner's identification was harmless because the same screen image that was shown to Wagner and objected to was also shown to Perryman; his identification was admitted without objection.

D. CONCLUSION.

It was not error for the court to admit Wagner's identification of Anderson from the single photograph. The State respectfully requests that the conviction be affirmed.

Respectfully submitted this 13th day of December, 2011.



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Transmittal Letter

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