

No. 45721-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT DOUGLAS STARGEL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-00847-7
The Honorable Stanley Rumbaugh, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Scott Stargel's right to due process by admitting the complaining witness' identification of him because it was the result of an impermissibly suggestive photo montage and was not otherwise reliable.
2. The trial court erred when it denied Scott Stargel's motion to suppress the victim's out-of-court photo identification.
3. The trial court erred when it allowed the victim to make an in-court identification.
4. The trial court erred when it found that the photo montage created by investigators was not impermissibly suggestive.
5. The trial court erred when it found that the victim's identification contained sufficient indicia of reliability.
6. The State failed to prove beyond a reasonable doubt every element of the charge of second degree theft.
7. The State failed to prove beyond a reasonable doubt that items taken from the victim's truck were valued at greater than \$750, which is required to convict a defendant of second degree theft.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is a photo montage impermissibly suggestive when the

defendant's head occupies a noticeably larger portion of the photograph than the heads of any of the other five pictured individuals, the background of the defendant's photograph is brighter than the background in the other photographs, and where the defendant is the only individual with a visible and eye-catching tattoo? (Assignments of Error 1, 2 & 4)

2. Does a victim's identification contain sufficient indicia of reliability where the victim viewed the suspect for only a few seconds, where the victim failed to notice that the suspect was wearing a hat, and where the photo montage identification took place nine months after the incident? (Assignments of Error 1, 3 & 5)
3. Where the victim testified only as to the value of the stolen items at the time he purchased them, and no evidence was presented indicating their condition when they were stolen or indicating whether and how much devaluation may have occurred since the time of purchase, did the State fail to prove beyond a reasonable doubt that the items taken from the victim's truck were valued at greater than \$750? (Assignment of Error 6 & 7)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Scott Douglas Stargel by Information with one count of second degree theft (RCW 9A.56.020, .040) and one count of second degree vehicle prowling (RCW 9A.52.100). (CP 1-2) Before trial, Stargel moved to suppress the victim's identification of Stargel from a photo montage, and to exclude any in-court identification as impermissibly tainted. (CP 8-14) The trial court denied the motion. (CP 84-86; 1RP 37-39)¹

The trial court also denied Stargel's mid-trial motion to dismiss the theft charge. (2RP 101-05) The jury convicted Stargel as charged. (3RP 43) The trial court denied Stargel's post-trial motion to arrest judgment on the theft conviction. (5RP 3-8) The trial court then imposed a standard range sentence, but suspended a portion of the jail time in favor of electronic home monitoring and community service hours. (5RP 9-13; CP 74-83, 91-95) This appeal timely follows. (CP 90)

B. SUBSTANTIVE FACTS

In April of 2011, Dalton Hembroff was a college student

¹ The transcripts will be referred to by their volume number (#RP).

preparing for his end-of-semester finals. (2RP 23-24) On the afternoon of April 15, he drove his white Ford truck to a Puyallup Subway sandwich shop to purchase lunch. (2RP 24-25) He pulled into the parking lot, which Subway shared with several other businesses. (2RP 25, 26) He parked and stepped out of his truck. (2RP 26)

As he was getting out of his truck, he noticed a man standing in front of a blue car parked next to Hembroff's truck. (2RP 27, 30) He and the man made eye contact, which Hembroff thought was odd. (2RP 27) But Hembroff continued into the Subway where, for the next few minutes, he was facing away from his truck as he ordered and purchased a sandwich. (2RP 27-28, 29)

When Hembroff returned to his truck, he immediately noticed that his backpack and a mail-order package were missing from the back seat. (2RP 29) He saw the blue car pulling out of the parking lot in a way that seemed "pretty brisk[.]" (2RP 29) Hembroff could also see that the man he made eye contact with earlier was driving the blue car. (2RP 30) He suspected that the man and his female passenger might have been responsible for taking the backpack and package, so he decided to follow them. (2RP 30, 31)

According to Hembroff, the blue car drove erratically, going

fast then slow and making a u-turn on a residential street. (2RP 31-32, 54-55) As he followed the blue car, Hembroff called 911 to report the theft and gave the 911 operator the blue car's license plate information. (2RP 31-32) The operator told Hembroff to stop following the blue car, so Hembroff returned to the Subway parking lot to meet a responding police officer. (2RP 32, 33, 74)

Hembroff gave a description of the man he saw, who he believed took his belongings from the truck. (2RP 33, 75) Hembroff learned that an adjacent gas station had surveillance video that might have captured the incident. (2RP 34) He retrieved a DVD of the surveillance footage and gave it to the police. (2RP 35; Exh. P6) The footage shows a man apparently taking something out of the trunk of the blue car, walking to the passenger door of Hembroff's truck, opening the door, leaning into the truck, removing items from the truck, getting into the driver's seat of the blue car, then pulling out of the parking lot. (Exh. P6; 2RP 38-40) The man's face is not visible in the footage. (Exh. P6)

Hembroff testified that the backpack taken from his truck contained two school text books and his laptop computer. (2RP 25) The textbooks were purchased for \$80 to \$100 each, and the laptop was purchased within the last year for \$900. (2RP 26) The mail-

order package contained a new, unworn jacket purchased for \$100.
(2RP 25)

On January 9, 2012, nearly nine months later, a Puyallup Police Detective created a photographic “six pack” montage for Hembroff to view. (2RP 42, 86-87, 88-89) Scott Stargel’s photograph was included in the montage. (Exh. P3) Hembroff identified Stargel as the man he believes he made eye contact with and who he believes can be seen in the surveillance footage entering his truck and taking his belongings. (2RP 45, 92) Hembroff also identified Stargel in court. (2RP 27, 45)

The State introduced Stargel’s driver’s license, which contains descriptive information similar to the description given by Hembroff to the responding officer shortly after the incident. (2RP 76; Exh. P1)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED WHEN IT DENIED STARGEL’S MOTION TO SUPPRESS HEMBROFF’S OUT-OF-COURT AND IN-COURT IDENTIFICATIONS.

A trial court’s decision to admit evidence of an out-of-court identification is reviewed under the abuse of discretion standard. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). An out-of-court identification procedure meets the requirements of due process, and is admissible at trial, if it is not 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); State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999); Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

The court must conduct a two-step inquiry to determine whether an out-of-court identification is impermissibly suggestive. Kinard, 109 Wn. App. at 433. First, the defendant must show that the identification procedure was suggestive. Kinard, 109 Wn. App. at 433. A procedure is suggestive if it directs undue attention to a particular person or where the photograph of the suspect is “in some way emphasized.” Eacret, 94 Wn. App. at 283; State v. Jones, 175 Wn. App. 87, 108, 303 P.3d 1084 (2013) (quoting Simmons, 390 U.S. at 383). That is because a witness may err in identifying criminals from photographs when “one picture is emphasized.” State v. Hilliard, 89 Wn.2d 430, 439, 573 P.2d 22 (1977).

In this case, the photograph of Stargel (number 5 of 6) is emphasized in several ways. First, his head occupies a significantly larger portion of the photograph square and less of his torso and clothing is shown, when compared to the other five individuals in the montage. It looks is as if Stargel’s photograph had been enlarged.

Additionally, the background in his photograph is significantly brighter, and he is the only person with a visible tattoo.² (See Exh. P3, also attached in the Appendix.) All of these factors highlight and draw attention to Stargel's photograph. His photograph clearly stands out from the other five photographs in the montage. The photo montage was therefore impermissibly suggestive.

If the defendant demonstrates the identification procedure is impermissibly suggestive, the court must proceed to the second part of the inquiry and determine whether, under the totality of the circumstances, the identification contained sufficient indicia of reliability despite the suggestiveness. Kinard, 109 Wn. App. at 433; Vickers, 148 Wn.2d at 118. In considering whether an identification contains sufficient indicia of reliability, a court must consider the following factors:

“(1) the opportunity of the witness to view the criminal at the time; (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 confrontation; and (5) the time between the crime and the confrontation.”

Kinard, 109 Wn. App. at 434 (quoting State v. Barker, 103 Wn. App.

² See e.g. State v. Burrell, 28 Wn. App. 606, 610, 625 P.2d 726 (1981) (“Burrell's photo is a closer view than the others, which might have tended to call attention to his photo.”)

893, 905, 14 P.3d 863 (2000)).

For example, in State v. Booth, the court held that a witness' out-of-court identification was sufficiently reliable to be admitted into evidence, where the witness was driving slowly when she saw the defendant and she observed the defendant for 45 seconds, she paid particular attention to the defendant's car because it had Missouri license plates and she was from Missouri, and the identification was unequivocal and took place only 30 to 40 minutes after she first observed the defendant. 36 Wn. App. 66, 71, 671 P.2d 1218 (2011).

In this case, the trial court considered the five reliability factors and concluded:

(1) witness/victim Dustin [*sic*] Hembroff observed the defendant on two occasions and noted that the defendant appeared to [*sic*] suspicious to him; (2) Mr. Hembroff paid particular attention to the defendant because something felt amiss to Mr. Hembroff when he saw the defendant; (3) in all relevant points, Mr. Hembroff's pre-identification description of the defendant was consistent with the physical description of the defendant, and Mr. Hembroff chose the defendant from the photomontage; (4) Mr. Hembroff has a high level of certainty that he had chosen the correct person from the photomontage; and (5) 9 months has passed between the time Mr. [H]embroff described the defendant and the time he picked the defendant out of the photomontage.

(CP 85) Based on these findings, the trial court determined that the photomontage evidence was not so impermissibly suggestive as to

give rise to a substantial likelihood of irreparable misidentification. (CP 86) The trial court was wrong.

The evidence shows that Hembroff saw the unfamiliar suspect for only “a moment” as they passed each other in the parking lot. (RP2 27 28, 48) Hembroff testified he made eye contact with the suspect, which indicates that Hembroff did not spend those brief seconds studying the suspect’s facial features. (RP2 27) Then, according to Hembroff, he “continued on my way and just thought nothing of it.” (RP2 27)

Hembroff described the suspect as having short brown hair, but the surveillance video clearly shows that the suspect was wearing a hat that covered his hair. (RP2 50, 61-62, 77; Exh. P6) Hembroff was unable before the identification to describe the suspect’s race. (RP2 64) And nine months passed between the incident and the photographic confrontation. (RP2 42, 86-87) These factors show that Hembroff’s identification of Stargel from the photo montage did not contain sufficient indicia of reliability.

Hembroff’s photographic identification was the only evidence tying Stargel to the charged crimes. No evidence was presented connecting Stargel to the blue car, to the location on the day in question, or to the stolen items. And, although Hembroff identified

Stargel in court, Hembroff admitted that he likely would be unable to identify Stargel as the suspect outside of court at the time of trial. (RP2 27, 62, 69) The convictions rested solely on Hembroff's identification nine months after the incident, based on a fleeting look at the suspect as Hembroff exited his truck and walked into a Subway restaurant to purchase lunch.

The photo montage was impermissibly suggestive and Hembroff's identification from that procedure should not have been admitted at trial. Any subsequent identification by Hembroff was also tainted and should have been suppressed because "[t]he 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." Hilliard, 89 Wn.2d at 439.³ Therefore, the trial court abused its discretion when it admitted evidence of the photographic identification and when it allowed Hembroff to identify Stargel in court during trial. Stargel's convictions must be reversed.

³ See Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) and State v. Williams, 27 Wn. App. 430, 443, 618 P.2d 11 (1980) (an in-court eyewitness identification of a defendant is suppressible if the pretrial identification procedures were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification).

B. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE ITEMS TAKEN FROM HEMBROFF'S TRUCK WERE VALUED AT GREATER THAN \$750.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

To convict Stargel of theft in the second degree, the State must prove beyond a reasonable doubt that the items taken from Hembroff’s truck were valued at greater than \$750. RCW 9A.56.020(1)(a) and 9A.56.040(1)(a).⁴ “Value” for the purposes of theft means the market value of the property at the time and in the approximate area of the theft. RCW 9A.56.010(21). Market value is

⁴ “A person is guilty of theft in the second degree if he or she commits theft of . . . [p]roperty or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value[.]” RCW 9A.56.040(1)(a).

the price that a well-informed buyer would pay to a well-informed seller. State v. Longshore, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (quoting State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)).

Evidence of retail price alone may be sufficient to establish value. Longshore, 141 Wn.2d at 430. And evidence of the price paid for an item is entitled to great weight. State v. Hermann, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). But such evidence must not be too remote in time. State v. Melrose, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). Also, value need not be proved by direct evidence. Hermann, 138 Wn. App. at 602. Rather, the jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affect its value. Melrose, 2 Wn. App. at 831. Evidence other than market value, such as replacement cost, is inadmissible unless it is first shown that the property has no market value. State v. Clark, 13 Wn. App. 782, 788, 537 P.2d 820 (1975) (quoting 52A C.J.S. LARCENY § 118 (1968)).

For example, in State v. Ehrhardt, the defendant was charged with second degree theft, among other crimes, after several construction tools were taken from a shed on the victim's property. 167 Wn. App. 934, 937-38, 276 P.3d 332 (2012). The victim, Brian Glaze, testified about his four years of experience working in

construction and the cost of the tools that had been moved from the shed. 167 Wn. App. at 938. Glaze testified that: he bought the air compressor for \$100 five or six years before trial, but that he had never used it and it was brand new; he purchased the pressure washer for \$199 within the last year; the rotary hammers cost about \$450 and that they were about three years old; the nail guns cost “in the \$230 range” each and were also about three years old; and “bits and parts and pieces” in a stereo wiring box were worth about \$100. 167 Wn. App. at 938.

On appeal, this Court reversed Ehrhardt’s second degree theft conviction, finding that the State provided insufficient evidence of the condition of the items at the time that would enable the jury to determine their market value:

Glaze testified that the air compressor and pressure washer were essentially new, enabling the jury to find that their original cost was their current market value. And Glaze testified that the items in the stereo wiring box were worth \$100 at that time because there were only “bits and parts and pieces” left. This was testimony about the contemporaneous value of the items, and was sufficient for the jury to find their market value.

However, Glaze did not testify about the condition of the rotary hammers and nail guns. Glaze’s testimony suggested that all of these tools had been used for professional construction for approximately three years. And Glaze testified only as to what the tools “cost,” not what they were then worth in their used

condition.

[T]he State presented no direct evidence and insufficient circumstantial evidence of the condition or depreciation of the tools from which the jury could infer their market value. Nor did the State present evidence that the tools had no market value, which would have permitted the State to rely on evidence of their replacement cost.

167 Wn. App. at 945-46.

Similarly here, the State presented no evidence indicating whether the text books or laptop computer were purchased new or used, or what the condition or depreciation of these items might be. There was no evidence from which the jury could infer their current value. The State therefore failed to prove that the items taken from Hembroff's truck exceeded the \$750 threshold.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Here, the State failed to present evidence from which the jury could find all of the elements of second degree theft, and Stargel's theft conviction must be reversed and dismissed.

V. CONCLUSION

The photo montage was impermissibly suggestive because it improperly drew attention to Stargel's photograph. The factors surrounding Hembroff's observation of the suspect show that his identification of Stargel was not reliable. The trial court therefore abused its discretion when it allowed the State to present testimony that Hembroff picked Stargel from the photo montage, and when it allowed Hembroff to identify Stargel at trial. Both of Stargel's convictions should be reversed on this ground. Furthermore, the State failed to present sufficient evidence from which the jury could infer that the value of the items taken from Hembroff's truck exceeded \$750. For this reason as well, Stargel's second degree theft conviction should be reversed and dismissed.

DATED: May 23, 2014



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CERTIFICATE OF MAILING

I certify that on 05/23/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Scott D. Stargel, 9702 74th Ave E, Puyallup, WA 98373.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

PHOTOGRAPHIC LINE-UP (EXHIBIT P3)



1



2



1



3



2

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