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Court of Appeals
Division III
State of Washington

343502 consolidated with
34351-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

J. C., APPELLANT

APPEAL FROM THE JUVENILE COURT
OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in ruling on the admissibility of identification evidence before permitting the defense to present evidence.
2. The court erred in finding the victim did not identify the defendant and then relying on the victim's in-court testimony purportedly identifying the defendant.
3. The court erred in determining evidence of the show-up identification procedure was admissible
4. Erroneous consideration of identification evidence was not harmless.

B. ISSUES

1. The court combined the suppression hearing and facts trial into a single proceeding. Prior to the presentation of the defendant's case the court heard argument and ruled on a pretrial motion to suppress identification evidence. Did this procedure violate the defendant's right to present a defense?
2. For purposes of ruling on the reliability of a show-up identification proceeding the court ruled the victim did not

identify the defendant at trial. In support of the guilty verdict the court found the victim identified the defendant at trial. Do these conflicting findings cast doubt on the resulting verdict?

3. The court found the victim observed his alleged assailants in the dark while his attention was focused on a gun, and was unable to provide any description of any features other than the alleged assailants' hairstyles. Are the court's findings sufficient to support the conclusion the show-up identification of the defendant was reliable?
4. The court's findings provide an extended summary of the confusing, conflicting, and ambiguous trial testimony as to the underlying offense and include findings that the victim identified the defendant at an identification show-up and at trial. Was the court's ruling admitting into evidence the identification testimony harmless error?

C. FACTS

On February 7, 2016, a group of people approached Cody Zeller and asked him for a cigarette. (Supp CP 97)¹ His companion, Magdalena Rodriguez, became suspicious and called 911. (Supp CP 97)

According to Mr. Zeller the person asked, “Do you have a dollar” and when he went to pull out his wallet, before he knew it he looked down and had a gun pointed at his chest. (Supp CP 100) The male with the gun was 3-5 inches in front of him, standing next to another male. (Supp CP 101) They were demanding money. (Supp CP 101) After the first male ran off with Mr. Zeller’s money and the gun, Mr. Zeller and the second guy struggled over Mr. Zeller’s wallet and then the second guy ran away. (Supp CP 101)

After the 911 call Officer Gillette responded to the area looking for a mix of males and females in their twenties wearing all black. (Supp CP 106) Officer Gillette later testified that he received multiple and conflicting descriptions from dispatch. (Supp CP 106) As he was driving in the area, approximately four blocks away from the robbery, he saw three individuals, wearing black, walking away from his patrol vehicle in an alley. (Supp CP 106) Upon seeing his patrol car, one of the subjects

¹ The testimony of witnesses is conflicting and ambiguous. The statement of facts here is drawn from the trial court’s written findings which are supported by some evidence in the record.

immediately ran. (Supp CP 106) Officer Gillette took D.G. and J.L. into custody. (Supp CP 106) When the officer detained Mr. G. he told him that he was being detained for a “robbery” or an “armed robbery.” (Supp CP 107) J.C. was detained about twenty minutes later. (Supp CP 106)

Mr. Zeller gave a statement to law enforcement, took officers to the scene of the robbery, and was then transported by Officer Garza to a location where they had “caught” the suspects to see if he could identify them or not. (Supp CP 104) Mr. Zeller testified that he was shown three people; J.C. was the third person he was shown, and when the light was shone on him, he immediately looked away and Mr. Zeller knew he had been involved. (Supp CP 104)

As they were being transported to the detention center, conversation between J.C. and D.G. was recorded. (Supp CP 108) J.C. stated that they had \$23 dollars to go to McDonald’s with. (Supp CP 108) After D.G. told J.C. that they were going to be charged with armed robbery, J.C. responded, “no arm, we used a stick.” (Supp CP 108) J.C. described running from the police, jumping fences, watching police cars go by from the park bench, avoiding contact, calling law enforcement weak, calling officers pigs, and how he would have gotten away except he came back. (Supp CP 108) He then asked Officer Garza “how long are they gonna give us?” (Supp CP 108)

J.C. was searched and three one dollar bills were found in his possession. (Supp CP 107) A twenty dollar bill was found in D.G.'s shorts. (Supp CP 108) Mr. Zeller variously testified that "[h]e had a twenty-dollar bill with some one dollar bills, anywhere from \$23-\$26, somewhere between \$23-\$30 or 'about \$30.'" (Supp CP 103)

At trial, Mr. Zeller identified D.G. and J.C. as the two young men who had robbed him. (Supp CP 105) He was unable to identify which one took the money and had the gun initially and which one attempted to take his wallet. (Supp CP 105) There is no evidence a gun was recovered.

Defense counsel moved to suppress evidence derived from J.C.'s detention and the identification show-up. (Supp CP 3) J.C. and D.G. were tried together in juvenile court. The suppression hearing and trial of the facts were combined in a single proceeding. (RP 10-11, 310) Defense counsel concurred in this decision, stating, "I have complete faith in the Court to be able to distinguish between the issues, the suppression issues and the things that are supposed to be just for trial." (RP 9)

At the conclusion of the State's case the court ruled the fruits of the seizure and identification were admissible, but concluded there had been no in-court identification. The defense rested and following closing arguments the court found both defendants guilty of second-degree robbery. J.C. was given a standard range sentence of 15 to 36 weeks.

D. ARGUMENT

1. THE RECORD DOES NOT SUPPORT THE PRESUMPTION THAT THE JUDGE RELIED ONLY ON ADMISSIBLE EVIDENCE.

There is no requirement that a suppression hearing be separate from the trial in a juvenile adjudication. Where a case is tried to the bench, it is not error for the trial court to deny the accused's request for a separate CrR 3.5 hearing. *State v. Wolfer*, 39 Wn. App. 287, 292, 693 P.2d 154 (1984), *abrogated on other grounds by State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). Ordinarily "there is no need for a separate . . . hearing in the case of a bench trial," because "a judge is presumed to rely only upon admissible evidence in reaching a decision." *Wolfer*, 39 Wn. App. at 292.

The present case, however, suggests that this presumption is not always sound. Here, two difficulties arise from the use of a single hearing.

First, although the court initially recognized that the defense bears the burden of establishing that an out-of-court identification is unreliable, the court did not offer the defense an opportunity to present evidence. The court heard argument and ruled on the defense motions, including the admissibility of the identification evidence, before the defense rested. (RP 312-363, 365-66)

The United States and Washington Constitutions guarantee the right to present testimony in one's defense. *State v. Hudlow*, 99 Wn.2d 1, 14–15, 659 P.2d 514 (1983). When the defendant bears the burden of proof as to a suppression motion, the court effectively violates this right by ruling on the motion before offering the defendant an opportunity to present any evidence.

Second, at the conclusion of the State's case, the court declined to rule on the admissibility of Mr. Zeller's in-court identification of the defendants; the court expressly found there was no in-court identification. (RP 363-64; Supp CP 121) Yet in support of the verdict the court found:

When the prosecutor tried to clarify who Cody Zeller was referring to when he stated "those two gentlemen," Cody Zeller responded, "The two people who mugged me?" He then identified [D.G. and J.C.] as the two young men who had robbed him on February 7, 2016. He was unable to identify which one took the money and had the gun initially and which one attempted to take his wallet.

(CP 105)

As a result of the combined suppression hearing and trial procedure, the record fails to accurately disclose whether the defendant was aware of his right to present evidence or what evidence the court relied on in making factual determinations.

2. THE SHOW-UP IDENTIFICATION
PROCEDURE CREATED A SUBSTANTIAL
LIKELIHOOD OF MISIDENTIFICATION.

J.C. contends the trial court erred in refusing to suppress Mr. Zeller's identifications. He argues the suggestive show-up identification procedure violated his right to due process and rendered the subsequent in-court identification unreliable and inadmissible.

The trial court's decision on a motion to suppress is reviewed to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130–31, 942 P.2d 363 (1997). Conclusions of law are reviewed *de novo*. *State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

An out-of-court identification procedure violates due process if it 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). A defendant claiming a due process violation must first establish that the identification procedure was “impermissibly suggestive.” *Id.*; see also *State v. Guzman-Cuellar*, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).

Here, the court found:

FF1.25 “. . . Cody Zeller was either in or near a -police car throughout his contact with Officer Garza and had the ability to overhear the ‘on-air’ police communication regarding the search for possible suspects.”

FF1.26 “Officer Garza told Cody Zeller . . . that Officer Garza’s partners are chasing some people, they have set up a perimeter around the area, that Zeller is not in any danger, and that they have a few people they are interested in a few blocks away.”

FF1.27 “During the show-up/field identification, each of the respondents was handcuffed and individually pulled out of the police vehicles they were in. Additionally, Officer Garza used the spotlight on his vehicle to illuminate [J.L.] and respondents [D.G. and J.C.]”

(Supp CP 116)

The court concluded the show-up procedure was impermissibly suggestive. (Supp CP 120, CL 203)

If the defendant shows that the procedure was impermissibly suggestive, the court then assesses whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification. *Vickers*, 148 Wn.2d at 118. The key factor in determining admissibility is whether sufficient indicia of reliability supported the identification despite any suggestiveness. *State v. Rogers*, 44 Wn. App. 510, 515–16, 722 P.2d 1349 (1986).

The court considers all relevant circumstances, including “(1) the opportunity of the witness to view the [suspect] at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s

prior description of the [suspect], (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.” *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999); see also *Neil v. Biggers*, 409 U.S. 188, 198–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

The court found Mr. Zeller had an opportunity to observe his assailants because they were close to him, although there was little or no light in the area and his attention was focused on the gun. (Supp CP 117) Mr. Zeller merely described their hair and clothing as dark, and stated one had long hair and one had curly hair, which corresponded to the defendants’ hair styles, but he could not describe their features, and did not identify them in court. (CP 117, 121) With respect to Mr. Zeller’s level of certainty as to the identification the court found:

1.32.3 “. . . As soon as Zeller saw [J.C.], Zeller stated, ‘yeah, yeah, that’s him,’ and then he physically slumped over and broke down.

At 9:26PM, Zeller and Rodriguez were alone in the patrol car together. . . .Rodriguez told Zeller, ‘He knew it was him because he looked away.’ After further questioning regarding whether [J.C.]--was the person who had the gun in his possession last, Zeller tells Rodriguez, ‘I hope it’s him. He’s familiar. I hope it’s him.’ Zeller testified on the stand that the third person he was asked to identify was a male and that Zeller knew right away that the third male was involved because when the spotlight was shone on him, the male looked away and that was a sign to Zeller that he was one of the males who had robbed him.”

(Supp CP 118) The court determined that the show-up was conducted approximately 40 minutes after the 911 call came in. (Supp CP 117)

The court found, in effect, that because Mr. Zeller's attention was on the gun, and because it was dark, his description of his assailants was very limited, and after identifying J.C. as one of his assailants, Mr. Zeller promptly began expressing doubts and anxiety about this identification, and admitted that the identification was not based on J.C.'s appearance but on the fact that he had looked away when a spotlight was shown on him. Perhaps the only factor that supports the reliability of the identification is the brief time that elapsed between the offense and the identification show-up.

“Against these factors is to be weighed the corrupting effect of any suggestive aspects of the identification.” *State v. Hanson*, 46 Wn. App. 656, 664, 731 P.2d 1140 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977)).

Given the limitations on Mr. Zeller's ability to observe his assailants, such that he could not describe or recognize their faces or provide any description of their clothing other than that it was dark, his identification of J.C. does nothing more than confirm that the officers had quickly located an individual who fit Mr. Zeller's sparse description. Officer Garza, by his words and actions, had ensured that Mr. Zeller

would have that information before he even observed the suspects. The use of a spotlight apparently had significant effect on Mr. Zeller's identification. These suggestive aspects of the purported identification far outweigh the dubious inconclusive reliability factors mentioned by the court.

The court's findings do not support its conclusion denying the motion to exclude evidence of the show-up identification. Mr. Zeller's identification of J.C. indeed appears to be groundless.

3. ERRONEOUS ADMISSION OF THE UNRELIABLE IDENTIFICATION EVIDENCE WAS NOT HARMLESS.

Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Shupe*, 172 Wn. App. 341, 351–52, 289 P.3d 741 (2012).

Apart from Mr. Zeller's identification of J.C., the evidence of J.C.'s guilt consists of his presence within a few blocks of the crime scene about fifteen minutes after the crime was reported, evidence he ran when Officer Gillette ordered D.G. and J.L. to stop, and his post-arrest statements construed by the court as showing knowledge of the crime.

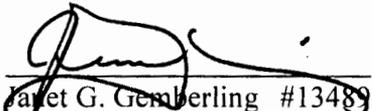
Had the identification evidence been excluded, there is a reasonable possibility the court would not have found J.C. guilty.

E. CONCLUSION

J.C.'s conviction rests on an unreliable show-up identification procedure and should be reversed.

Dated this 12th day of September, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 34351-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
J.C.,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on September 12, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on September 12, 2016, I mailed a copy of the Appellant's Brief in this matter to the Appellant:

J.C.
Yakima, WA

Signed at Spokane, Washington on September 12, 2016.


Janet G. Gemberling
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