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Court of Appeals
Division III
State of Washington

No. 34350-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Deshawn Gray,

Appellant.

Yakima County Superior Court Cause No. 16-8-00071-2

The Honorable Judge Ruth Reukauf

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated D.G.'s Fourteenth Amendment right to due process by admitting an impermissibly suggestive eyewitness identification.
2. The trial court erred by admitting into evidence Zeller's out-of-court identification of D.G., Ms. Lee, and J.C.
3. The trial court erred by adopting Findings of Fact No. 1.49 (CP 64)
4. . The trial court erred by adopting Findings of Fact No. 1.49.1 (CP 64)
5. The trial court erred by adopting Findings of Fact No. 1.49.2 (CP 64)
6. The trial court erred by adopting Finding of Fact No. 1.11 (CP 75).
7. The trial court erred by adopting Finding of Fact No. 1.31 (CP 79).
8. The trial court erred by adopting Finding of Fact No. 1.34 (CP 81).
9. The trial court erred by adopting Conclusion of Law No. 2.1 (CP 68).
10. The trial court erred by adopting Conclusion of Law No. 2.3 (CP 68).
11. The trial court erred by adopting Conclusion of Law No. 2.4 (CP 68).
12. The trial court erred by adopting Conclusion of Law No. 2.5 (CP 68).
13. The trial court erred by adopting Conclusion of Law No. 2.4 (CP 83).
14. The trial court erred by adopting Conclusion of Law No. 2.5 (CP 83).
15. The trial court erred by adopting Conclusion of Law No. 2.7 (CP 83).

ISSUE 1: Due process prohibits the use of eyewitness identification testimony tainted by impermissibly suggestive police procedures. Did the erroneous admission of tainted identification testimony violate D.G.'s Fourteenth Amendment right to due process?

16. Pursuant to RAP 10.1(g), DG. adopts and incorporates the assignments of error set forth in the opening brief filed by co-appellate J.C.

ISSUE 2: Pursuant to RAP 10.1(g), D.G. adopts and incorporates the statement of issues set forth in the opening brief filed by co-appellate J.C..

17. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because D.G. is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cody Zeller is 22 years old and lives in Yakima. RP 62-63. He has been diagnosed with acute stress, which causes him to lose consciousness at times. RP 42. His girlfriend Magdalena Rodriguez said that during times when the couple has argued, he has hyperventilated and passed out. RP 51-52. Zeller asserts that he doesn't pass out as much as he just collapses. RP 122.

Zeller and Rodriguez watched a football game and argued about how she would get home. RP 24-25, 51, 64. She was angry and refused to walk with him, and walked faster to get away from Zeller. RP 25, 51. Zeller walked after her, falling further and further behind. RP 26-27, 65-66.

At some point, they saw a group of people. RP 65-66. Rodriguez would later say the group was all white people in dark clothing. RP 38, 40, 59. She heard someone in the group asked Zeller for a cigarette. RP 28, 69. She also said she saw a red beanie. RP 38.

Rodriguez kept walking, and did as she did most every week – she called the police. RP 52-53. But when they answered, she hung up, because she had nothing to report. RP 39.

According to what Zeller later told police, what happened next was that two of the members of the group asked him for money, which he

declined to give. RP 69. Zeller said he then changed his mind and got out his wallet. RP 69-70. He told police that he felt a gun at his back but at trial admitted that he had not. RP 71-74. He said the gun was in front of him, being moved around and held by two different males. RP 73. The pair demanded money, received it, and ran away. RP 73.

Zeller told police they had put the gun to his head, which they hadn't; Zeller explained that he made the claim about the gun because he felt it wouldn't matter.¹ RP 115-116, 143. Zeller told police that night that \$30² was taken, while he told the jury that it was between \$23 and \$26. RP 77-79, 266. He said that he can't really describe the attackers except for their hair. RP 85-86. He said one of the males had curly hair and the other had long hair. RP 85-86.

After handing over his wallet, Zeller ran a block and a half and found Rodriguez. By this time she was on the phone with 911 since they had rung her back after her hang-up. RP 31-33, 39, 130. Zeller passed out.³ RP 34-35. Rodriguez told the operator that Zeller had anxiety and worked to calm him down. RP 31-32. When Zeller came to, he got up and ran after his attackers, but of course they were gone. RP 34-35.

¹ Zeller actually went so far as to act out his claim about the gun for officers. RP 238-239, 267.

² Zeller admitted he "rounded up." RP 124.

³ Zeller denied that he lost consciousness. RP 104.

Police searched the area, using what descriptive information they had obtained from Zeller. This included that the males were Hispanic, wearing dark clothing, and had dark hair. RP 237. While they looked, they radioed information out, which Zeller heard, including that they were chasing a suspect. RP 127-128, 193, 284-285. That suspect would soon be caught and identified as J.C. RP 195-203.

Police seized fifteen year old black male D.G. in an alley about 4 and a half blocks from the incident. RP 179; CP 1. He was cooperative, wearing dark clothing, and without a red beanie. RP 156-158, 172-173.

Three people were eventually shown to Zeller and Rodriguez. They were in cuffs, brought out of police cars one at a time. RP 176, 220-221. Police shone a light on each person for Zeller. CP 78. The first one was D.G. Neither identified him as Zeller's attacker. The second was Lee, a female, who Zeller said was present. RP 249-250. The third was J.C., who Zeller said was the person. RP 250. When police shined the light into his face, he turned away. RP 49-50.

Rodriguez told Zeller that he turned away because he knows what he did was wrong. RP 49. At the later trial, Rodriguez would explain that when a person is guilty, they look away. RP 49-50. Zeller would agree with this and confirm it was part of his identification. RP 117.

Both juveniles were charged with robbery in the second degree and harassment. CP 1. The matter was tried in juvenile court.

Rodriguez did not identify anyone in the group, either to police or at trial. RP 45-46. She acknowledged that she did not see anyone's face. While she admitted that she told authorities that night that the people who approached Zeller were white, she claimed at trial that she could not tell their race. RP 40, 53.

In a recording played for the court, Zeller can be heard after he made the identification of J.C. He said, after the officer walked away, that he hopes it was him. RP 273.

At trial, both juveniles' attorneys moved to prevent an in-court identification as well as any testimony about the show-up done by police. RP 5-11, 333-336. The trial judge heard the evidence, found the identification procedure impermissibly suggestive, but admitted the identification testimony. RP 262, 364; CP 73-84.

Both juveniles were found guilty of robbery in the second degree, but acquitted of the harassment charge. CP 47-50, 56-69; RP 409-437. Each timely appealed. CP 51-55.

ARGUMENT

I. D.G.’S ROBBERY CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT WAS BASED IN PART ON AN IMPERMISSIBLY SUGGESTIVE EYEWITNESS IDENTIFICATION PROCEDURE.

The trial turned on Zeller’s identification of the people who robbed him. The trial judge found that police used an impermissibly suggestive procedure. Zeller’s identification of all three young people should have been suppressed.

A. The Court of Appeals should review this constitutional violation *de novo*.

Constitutional violations are reviewed *de novo*. *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016). Appellate courts review a trial court’s findings on a suppression motion under the substantial evidence standard; conclusions of law are reviewed *de novo*. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

B. The trial court found the identification procedure impermissibly suggestive.

Before he was asked to identify anyone, Zeller learned from Officer Garza that officers were “chasing” some people. CP 78. Zeller also overheard radio traffic as the officers pursued suspects. CP 78. Garza then drove Zeller to where police “had ‘caught’ the suspects” so he could

identify them. CP 64. Before this occurred, he had been unable to give a detailed description, in part because he was focused on the gun he said was held close to his chest. CP 59. The descriptions he did give were inconsistent.

Police showed Zeller three young people in handcuffs. CP 78. Each was taken from the back of a patrol car, and police shone a spotlight on each person's face. CP 78. Of D.G., Zeller was only able to say:

Looks like him. Not sure. Yeah, not sure for sure. Don't know. I remember the curly hair.
CP 79-80.⁴

He later testified that he didn't recognize D.G., was "iffy" about the identification, and that "he identified the suspects because he had heard that they were 'running away' from law enforcement."⁵ CP 79-80, 81.

The trial judge found that "the police did use an impermissibly suggestive procedure in obtaining the out of court identification." CP 82. Given this finding, the court should have suppressed the evidence.

Admission of identification testimony violates due process if police use procedures "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Vickers*,

⁴ He also expressed doubt after identifying J.C., saying "I hope it's him. He's familiar. I hope it's him." CP 80.

⁵ He also testified that he identified J.C. because he looked away when police shone a light in his face. CP 80.

148 Wn.2d 91, 118, 59 P.3d 58 (2002). Because the trial judge found the procedure here impermissibly suggestive, this case turns on whether the improper procedure created a “substantial likelihood of irreparable misidentification.” *Id.*

Courts weigh the corrupting effect of a suggestive identification against factors indicating reliability. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). These factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description, (4) the witness’s certainty at the time of the identification, and (5) the length of time between the crime and the identification. *Id.* In this case, only one factor—the length of time⁶—weighs in favor of reliability. The other four favor exclusion of the evidence.

First, Zeller had only limited opportunity to view the perpetrators. Although they stood close to him, the crime took place “on a dark corner, there were no porch lights or street lights on to illuminate the area.” CP 64, 79. Instead, “[t]he only light source came from passing cars.” CP 79.

Second, Zeller’s attention was not on his assailants. Instead, his “primary focus was the gun.” CP 79. Despite this, he could not remember

⁶ Approximately 40 minutes. CP 79, 81.

the gun's color. CP 65. His distracted attention is reflected in the conflicting statements he gave about what happened during the incident. CP 61-64, 74.

For example, Zeller initially said that he felt the gun prod him in the back. CP 62. Another time he said the gun never touched him, and had never been pointed at his back. CP 61, 62. He told police that the gun was aimed directly at his forehead, but later said this was not true. CP 62, 74. In his testimony, he told the court that the gun was pointed at his stomach, but was lifted to point upward when cars passed. CP 62-63. He said he voluntarily took his wallet out when asked for a dollar, and planned to give money because he was generous. CP 60-61, 63. However, on cross-examination, he said that his assailants aimed the gun at him before he took his wallet out. CP 64.

Third, Zeller did not provide an accurate description, except in the most superficial way, and the descriptions he did provide were inconsistent. At one point he said he'd been attacked by two females and one male. CP 58, 59, 74, 77. He also described them as two males and three females. CP 66. On occasion, he said the perpetrators were two males who were part of a larger group of bystanders, all of whom were

wearing dark or black clothing.⁷ CP 58, 60, 62, 66, 74. He said that the robbers may have been in their mid-twenties; D.G. is only 16 and does not look old for his age. CP 59, 67, 74, 76; RP 167.

Zeller could not describe any physical features of his assailants, other than to say one had long dark hair and one had dark curly hair. CP 79. He described their clothing as dark or black, but did give almost no details as to what they were wearing.⁸ CP 74.

Fourth, he was not at all certain about his identification of D.G. CP 64, 79-80. When he saw D.G., the most he could say was “Looks like him,” which he qualified with “not sure,” “not sure for sure,” and “don’t know.” CP 79-80. He testified that he didn’t recognize D.G., and was “iffy” about the identification. CP 79-80. He also told the court that “he identified the suspects because he had heard that they were ‘running away’ from law enforcement.” CP 81.⁹ Nor was Zeller confident about his identification of J.C.: he identified J.C. because he looked away when police shone a light in his face. CP 80. Shortly after identifying him, he told Rodriguez “I hope it’s him.” CP 80.

⁷ Rodriguez also described a group of people. CP 57, 58, 59.

⁸ At one point he described a “black hooded sweater,” but did not say who was wearing the sweater. CP 66.

⁹ In fact, D.G. did not run when approached by the police. CP 67, 75.

Even Zeller's apparent confidence in his identification of Lee does not favor admission. CP 80. He acknowledged that she was not involved in the robbery, but stood off to the side with the rest of the group. CP 62, 64, 80.

The procedures used here were so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. *Vickers*, 148 Wn.2d at 118. The trial judge should have suppressed the identification evidence.¹⁰

II. D.G. ADOPTS AND INCORPORATES THE ARGUMENTS OF HIS CO-APPELLANT J.C..

Pursuant to RAP 10.1(g), D.G. adopts and incorporates the argument set forth in the opening brief filed by co-appellate J.C.

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state, nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in

¹⁰ This includes the identification of Lee and J.C.. Because police found D.G. in their company, Zeller's identification of them provides some evidence implicating D.G.

advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.” *Sinclair*, 192 Wn.App. at 388.

D.G. is a juvenile. He has been convicted of a felony. CP 47. The trial court determined that he is indigent for purposes of this appeal. Order of Indigency (entered 4/18/16), Supp. CP. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person, who meets the GR 34 standard for indigency, to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, D.G.'s conviction must be reversed and the identification testimony suppressed. The case must be remanded for dismissal.

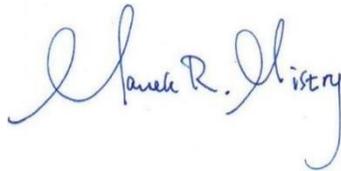
If the state substantially prevails, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on December 7, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 7, 2016.



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