

NO. 34872-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RAMIREZ,

Appellant.

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

APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR..... 1

C. SUPPLEMENTAL ARGUMENT 1

Hritsco’s identification should have been excluded under the Fourteenth Amendment because the State twice exposed Hritsco to photographs of Ramirez as a possible suspect and also asked Hritsco to make an identification at trial where Ramirez was the defendant.....1

D. CONCLUSION..... 6

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	5
<i>Manson v. Brathwaite</i> , 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)	4, 5
<i>Neil v. Biggers</i> , 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).....	4
<i>Perry v. New Hampshire</i> , 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)	1, 4, 5

Decisions of Other Courts

<i>State v. Dickson</i> , 322 Conn. 410, 141 A.3d 810 (2016)	4
<i>State v. Henderson</i> , 208 N.J. 208, 27 A.3d 872 (2011)	2, 4
<i>Young v. Conway</i> , 698 F.3d 69 (2d Cir. 2012)	3

Constitutional Provisions

U.S. Const. amend. XIV	1
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Other Authorities

Kenneth A. Deffenbacher et al., Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 <i>Law & Hum. Behav.</i> 287, 299 (2006)	2
Ryan D. Godfrey & Steven E. Clark, Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value, 34 <i>Law & Hum. Behav.</i> 241 (2010)	3

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Carlton Hritsco's identification violates Christopher Ramirez's federal constitutional right to due process. U.S. Const. amend. XIV.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Whether Hritsco's identification of Ramirez should have been excluded where the police presented two photographic lineups to Hritsco within 24 hours, both of which included photographs of Ramirez, and Hritsco did not identify Ramirez, but Hritsco did identify Ramirez—the defendant—in court, at trial during the prosecution's direct questioning almost two years later?

C. SUPPLEMENTAL ARGUMENT

Hritsco's identification should have been excluded under the Fourteenth Amendment because the State twice exposed Hritsco to photographs of Ramirez as a possible suspect and also asked Hritsco to make an identification at trial where Ramirez was the defendant.

The Fourteenth Amendment right to due process limits the admission of identifications infected by improper police influence. U.S. Const. amend. XIV; *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). If “the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime,” the trial court must exclude the identification unless circumstantial “indicia of reliability are

strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances.” *Id.*

Two distinct, but related problems violated federal due process guarantees here. First, the police increased the likelihood of misidentification by successively exposing Hritsco to Ramirez. Second, the State asked Hritsco if he could identify Ramirez for at least the third time when Ramirez was literally seated as the defendant at his criminal trial. Because the circumstantial indicia of reliability do not outweigh the suggestiveness of the procedures, the identification should have been suppressed.

“Viewing a suspect more than once during an investigation can affect the reliability of the later identification.” *State v. Henderson*, 208 N.J. 208, 255-56, 27 A.3d 872 (2011).

“[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.” *Id.* Multiple exposures to photographs of the same individual greatly increases the chance the witness will identify that individual in the later procedures. “A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot.” *Henderson*, 208 N.J. at 255-56 (quoting Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 *Law & Hum. Behav.* 287, 299 (2006)).

Carlton Hritsco spent 15 to 20 minutes on November 1, 2014, conversing in the dark with a person he described as an “Indian or Hispanic looking” man five feet eight inches tall and weighing 180 pounds. RP 476, 516-18, 522. Within a couple of hours the police showed Hritsco photographs of five different individuals identified in a database as “Demon,” including Ramirez. RP 476-78, 486, 518. Hritsco did not identify any of the individuals, including Ramirez, as the person he had spoken with earlier that night. Within 24 hours, the police presented Hritsco with a second photographic lineup that again included Ramirez. RP 949, 1053-56. Hritsco again did not identify Ramirez or any other individual. RP 519. In court, at trial, the State again asked Hritsco if he could identify the person he spoke with on November 1, 2014. RP 513-15. Hritsco then identified Ramirez. RP 515.

Hritsco’s identification of Ramirez from the media and at trial was tainted by the repeated exposure to Ramirez immediately following Hritsco’s conversation with an “Indian or Hispanic looking” man. Research shows that out-of-court identifications can irreparably taint the reliability of an in-court identification, even where (1) the out-of-court identifications resulted in no identification or a misidentification of a filler and (2) the out-of-court identifications are admissible under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). *See Young v. Conway*, 698 F.3d 69, 82-84 (2d Cir. 2012) (citing and describing research). In fact, “false identification rates increase, and accuracy on the whole decreases, when there are multiple identification procedures.” Ryan D. Godfrey & Steven E. Clark, Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value, 34 Law & Hum. Behav. 241, 241, 256 (2010) (attributing this effect to “misplaced familiarity due to the memory

of the suspect,” as opposed to the memory of the perpetrator, or due to “heightened expectations and suggestiveness”). Moreover, there could hardly be a more “suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime.” *State v. Dickson*, 322 Conn. 410, 423-24, 141 A.3d 810 (2016).

In short, State action created a “substantial likelihood of misidentification.” *Perry*, 565 U.S. at 239 (quoting *Biggers*, 409 U.S. at 201; citing also *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Excluding the identification would serve the deterrence rationale by alerting police to the prospect that successive photographic lineups are unnecessarily suggestive. *Perry*, 565 U.S. at 241-42.

The passage of time between Hritsco’s November 1 conversation and his identification of Ramirez confirms the unreliability of the identification. *Brathwaite*, 432 U.S. at 114 (time between event and identification is one of the factors analyzed to determine whether reliability outweighs police suggestiveness). “Scientists generally agree that memory never improves.” *Henderson*, 208 N.J. at 267. Hritsco could not identify Ramirez on the night in question or the next day, when police presented Hritsco with photographic lineups that each included a photograph of Ramirez. Yet, twenty-three months later, at trial, the State again asked Hritsco if he could identify the individual with whom he spoke. That time, Ramirez was sitting in the defendant’s seat. And, that time, Hritsco identified Ramirez.

Moreover, the identification was unreliable because Ramirez does not match the physical description Hritsco provided on November 1, 2014. *See Brathwaite*, 432 U.S. at 114 (accuracy of prior description is one of the factors analyzed to determine whether reliability outweighs police suggestiveness). Ramirez is six feet tall and weighed about 220 pounds. RP 463-64, 469, 1069; Ex. 115. Hritsco described a man four inches shorter and 40 pounds lighter. RP 476, 516-18, 522. Hritsco told police that the man he spoke with had acne or scars on his face; Ramirez does not. *Compare* RP 476, 516-18, 522 *with* Ex. 115. Hritsco also described long, slicked back hair that does not match Ramirez. *Id.* Thus, circumstantial indicia of reliability do not outweigh the corruptive influence of the State's identification procedures. *See Perry*, 565 U.S. at 232. The identification should have been excluded.

The admission of Hritsco's identification violated due process, requiring reversal because the State cannot demonstrate the identification evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State's evidence connecting Ramirez to the murders was remarkably thin. No one saw Ramirez at his uncles' apartment complex on November 1. The murder weapon was not located. There were at least four other people known to Spokane police as "Demon." Moreover, the State's only evidence supporting motive or premeditation was a four-month-old text message containing, at best, a cryptic message and which was followed by months of innocuous messages. Because its other evidence was weak, the State conceded that Hritsco was a "critical witness" and the court's exclusion of his placement of Ramirez near the scene of the crimes on November 1 would be a "significant blow to the State's case." RP 62-63. Because admitting the

tainted identification was not harmless beyond a reasonable doubt, the convictions should be reversed.

D. CONCLUSION

In addition to the reasons set forth in Ramirez's opening brief, the Court should reverse and remand for a new trial because the admission of Hritsco's identification of Ramirez violated Ramirez's right to due process under the United States constitution.

DATED this 19th day of October, 2017.

Respectfully submitted,

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