

NO. 37124-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

HAVEN MARY SCABBYROBE, Appellant.

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BRIEF OF RESPONDENT

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## **I. ASSIGNMENTS OF ERROR**

Ms. Scabbyrobe alleges that her defense attorney was ineffective for not filing a pretrial motion to suppress the showup identification procedure wherein the victim identified her as the woman who tried to drive his car away from his home.

## **II. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR**

Because Ms. Scabbyrobe asserts she received ineffective assistance of counsel flowing from her attorney's failure to move to suppress a pretrial identification procedure, the Court will assess her attorney's effectiveness by considering whether that motion, if filed, would have been granted. To this end, the Court will inquire whether the showup identification procedure was unnecessarily suggestive. Only if the showup was unnecessarily suggestive will the Court inquire, under the totality of the circumstances, whether the procedure used was so impermissibly suggestive that it created a substantial likelihood of irreparable misidentification.

## **III. STATEMENT OF THE CASE**

At approximately 7:00 a.m. on November 16, 2018, Jeffrey Huff left his 2013 Subaru Legacy unlocked and running in his driveway to warm it up before driving to work. (VRP 206-07). From a vantage point in his living room, he saw his car start moving backwards. (VRP 207). He exited his

front door, and saw someone in the vehicle. (VRP 208). At the edge of his driveway, the unauthorized driver of his vehicle turned the car to begin driving forward, struck an object, and stopped. (VRP 208-09).

When the vehicle stopped, Mr. Huff went to the passenger door, opened it, and got in. (VRP 209). He observed a female in the driver's seat of the car, and, using an expletive, told her to get out of his vehicle. (VRP 210-11). Sitting close to the female, Mr. Huff observed that she looked scared, and she told him that she could not get out of the vehicle on the driver's side. (VRP 211). Mr. Huff reached past her and tried to open the driver's side door, found that it was locked, and observed that the car had come to rest adjacent to mailboxes which also would have prevented the driver's side door from opening. (VRP 212).

Mr. Huff told the woman to exit the vehicle through the passenger door, so she crawled across him and got out of the vehicle. (VRP 213). Once outside the vehicle, she stood there as Mr. Huff exited. There were two bags in the vehicle, so Mr. Huff took them out of the car and put them on the ground. (VRP 213). The woman remained at the location a bit longer, digging through her pockets. (VRP 213). After a brief conversation in which Mr. Huff warned her not to pull out any weapon, the female picked up the bags and proceeded west down Cary Street and turned north on

Callahan Street. (VRP 213-14). Her pace was something between a walk and a run, which Mr. Huff characterized as “fast walking.” (VRP 214).

At 7:14 a.m., Mr. Huff called 911 immediately after losing sight of the female. (VRP 215, 285). The police responded within two minutes of his 911 call. (VRP 215). Sergeant Joseph Vanicek, a twenty-one (21) year veteran of the Union Gap Police Department, was on duty at the time when Mr. Huff called 911 and responded. (VRP 268). When Sergeant Vanicek arrived, he contacted Mr. Huff regarding the incident. (VRP 270). Sergeant Vanicek directed Officer Damon Dunsmore, a veteran officer with twenty-nine (29) years of experience, to check the area for the vehicle theft suspect and provided him information obtained from Mr. Huff to aid in locating the suspect. (VRP 277-78). The suspect was described as a Hispanic female with long dark hair wearing a black coat and carrying two backpacks. (VRP 229, 300). While Sergeant Vanicek was with Mr. Huff, Officer Dunsmore indicated via radio at 7:21 a.m., only seven (7) minutes after the 911 call, that he encountered a person who may be the suspect. (VRP 215, 279).

Officer Dunsmore had encountered Ms. Scabbyrobe when he found her running eastbound on Mead toward Rudkin Road where she turned north. (VRP 331). She was wearing dark clothing, including longer basketball-style shorts. (VRP 331). Officer Dunsmore, a veteran police officer, testified that her open-toed sandals, worn with socks, stood out to

him as not being typical footwear for jogging on a cold November morning. (VRP 331).

Mr. Huff accompanied Sergeant Vanicek to the location where Officer Dunsmore had the subject detained for a showup identification. (VRP 280). Sergeant Vanicek testified that he advised Mr. Huff, “just because the officer had somebody stopped doesn’t necessarily mean that they’re the person that tried to stop your vehicle.” (VRP 312). As Jeffrey Huff listened to Sergeant Vanicek, he added that the suspect would have a tattoo on her hand. (VRP 312). Mr. Huff also commented that her hair, now up, had been down when he saw her during the incident. (VRP 312).

Ms. Scabbyrobe was standing with Officer Dunsmore outside his patrol vehicle when Sergeant Vanicek and Jeffrey Huff observed her from an approximate distance of 30-40 feet. (VRP 307-08, 332-33). Mr. Huff noticed that the female was not wearing the same clothes as she had during the incident at his residence. The female was wearing sweatpants and a coat when encountered at his residence, whereas the female detained by Officer Dunsmore was wearing shorts and a t-shirt. (VRP 215). Different attire notwithstanding, Mr. Huff indicated he was one hundred percent (100%) certain that Ms. Scabbyrobe was the woman who was driving his car that morning. (VRP 282, 311).

After arresting and transporting Ms. Scabbyrobe to a holding cell at the police department, Officer Dunsmore returned to the neighborhood to search for the two backpacks Mr. Huff claimed Ms. Scabbyrobe had been carrying when she fled his residence. (VRP 333-34) The officer checked yards and garbage cans in the area along the likely routes that Ms. Scabbyrobe could have taken in flight from Mr. Huff's residence, but found the garbage cans recently emptied and believed that a garbage truck he saw departing the area when he arrived had just emptied the cans along the road. (VRP 334).

During the State's case-in-chief, Mr. Huff again identified Ms. Scabbyrobe as the woman who tried to steal his car. (VRP 216). Officer Dunsmore also testified at trial that Ms. Scabbyrobe was the woman he found running from the neighborhood of the vehicle theft. (VRP 329-30). Trial counsel for Ms. Scabbyrobe argued for dismissal at the close of the State's case (VRP 351-354). Ms. Scabbyrobe elected not to testify; and did not call any witnesses before the defense rested. (VRP 354-356). The jury found her guilty of Theft of a Motor Vehicle, as charged. (VRP 456-58). Ms. Scabbyrobe now appeals.

#### **IV. STANDARD OF REVIEW**

To prevail on a claim of ineffective assistance of counsel, the defendant must establish that:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26 (1987)). In order to show actual prejudice "by counsel's failure to move for suppression, [a defendant] must show the trial court likely would have granted the motion if made." *Id.* at 333-34.

An appellate court "must make every effort to eliminate the distorting effects of hindsight and strongly presume that counsel's conduct constituted sound trial strategy." *In re Rice*, 118 Wn.2d 867, 888-89 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1994)).

## **V. ARGUMENT**

The Court should deny Ms. Scabbyrobe's appeal because she cannot establish that her attorney was ineffective. Ms. Scabbyrobe has not shown that the show-up procedure was unnecessarily suggestive, therefore, she cannot make the requisite showing that a court would have granted a pretrial motion to suppress the victim's identification of her. Trial counsel for Ms.

Scabbyrobe vigorously attacked the victim's identification of Ms. Scabbyrobe at trial. Any inconsistency between Ms. Scabbyrobe's appearance and the description given by the victim should be considered in the context of the weight of the evidence, not function as a bar to its admissibility.

A due process challenge to pretrial identification procedure is a two-step inquiry:

A defendant asserting that a police identification procedure denied him due process must show that the procedure was unnecessarily suggestive. *Foster v. California*, 394 U.S. 440, 442, 22 L.Ed.2d 402, 89 S.Ct. 1127 (1969); *State v. Traweek*, 43 Wn.App. 99, 103 (1986); *State v. Booth*, 36 Wn.App. 66, 70 (1977). Once such a showing is made, the court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification.

*Manson v. Brathwaite*, 432 U.S. 98, 116, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977); *State v. Traweek*, *supra* at 103. Because the inquiry is a two-step process, this Court need not review the totality of the circumstances where a defendant fails to make the requisite preliminary showing that the showup procedure was unnecessarily suggestive. *Id.*

**A. The pretrial show-up procedure was not unnecessarily suggestive**

“Showups held shortly after a crime is committed and in the course of a prompt search for the suspect have been found to be permissible.” *State v. Booth*, 36 Wn.App. 66, 71 (citing *State v. Kraus*, 21 Wn.App. 388, 392 (1978); *State v. Medley*, 11 Wn.App. 491, 499 (1974)). “[T]he admission of evidence of a showup *without more* does not violate due process.” *Neil v. Biggers*, 409 U.S. 188, 198, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972) (emphasis added).

“[I]t is important to note that a prompt identification procedure frequently demonstrates good police procedure. A prompt identification procedure best guarantees freedom for innocent subjects.” *State v. Bockman*, 37 Wn.App. 474 (1984) (citing *Stovall v. Denno*, 833 U.S. 293, 302, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967)). [T]he United States Supreme Court has recognized that juries can intelligently measure the weight of questionable identification testimony.” *Id.* (citing *Brathwaite*, 432 U.S. at 116).

It is undisputed that the police conducted an in-person showup of Ms. Scabbyrobe, yet she argues it was unnecessarily suggestive by resorting to a tenuous analogy between the procedure in her case and a single-

photograph identification procedure found to **not** be impermissibly suggestive by the United States Supreme Court in *Manson v. Brathwaite*.

In *Brathwaite*, a detective observed a man from whom he bought drugs through a door open 12 to 18 inches at a distance of approximately 2 feet. 432 U.S. at 100. The duration of the encounter at the door was approximately 5-7 minutes, but the door was closed for some of that time. *Id.* After leaving the apartment complex where he bought the drugs from the person behind the door, the detective described the man to a colleague at the police station. *Id.* That colleague suspected that he knew who the detective was describing, and obtained a recent photo of the defendant from the records division. *Id.* Two days after the encounter at the doorway during the drug purchase, the detective looked at the single photograph provided by his colleague and identified the person shown as the person from whom he bought the drugs. *Id.*

In Ms. Scabbyrobe's case, Mr. Huff encountered her while she was trying to drive his vehicle away from his property. (VRP 204, 207). It was light outside. (VRP 223, 292). During the encounter, he was very close to her—in fact she crawled over him to exit the vehicle while he was in the passenger seat. (VRP 213). After they both exited the vehicle, she remained at the scene for a time and Mr. Huff talked to her before she collected her two bags and fled. (VRP 213). Mr. Huff was attentive enough

to Ms. Scabbyrobe during this conversation that he warned her against hostile action when he observed her rummaging through her pockets while standing nearby. (VRP 210-211).

As in *Brockman*, where the showup procedure was held not to be unnecessarily suggestive, Mr. Huff observed Ms. Scabbyrobe in close proximity during the incident in a well-lighted area, the trial record shows Mr. Huff was attentive during the showup procedure and observed Ms. Scabbyrobe from a reasonable viewing distance, and a very short time transpired between the time of the incident and identification. Moreover, Mr. Huff expressed one hundred percent (100%) confidence in his identification. *See Brockman*, 37 Wn.App. at 482.

Ms. Scabbyrobe, who was standing outside Officer Dunsmore's patrol vehicle, was not handcuffed, patted down, visibly restrained, or in the presence of multiple officers when the showup was conducted. (VRP 307-08, 332-33). It is worth noting that more prejudicial restraint settings have been found not to be suggestive. *State v. Guzman-Cuellar*, 47 Wn.App. 326, 336 (1987) (Showups are not necessarily suggestive even if the suspect is handcuffed and standing near a patrol car in the presence of numerous police officers) (citing *United States v. Hines*, 455 F.2d 1317 (D.C. Cir. 1971)).

Similarly, in *State v. Fortun-Cebada*, a single-suspect showup procedure was deemed not to be unduly suggestive, even though the defendant was in handcuffs in police custody, because the witness had ample time to observe the defendant, had a conversation with him, and identified him within minutes of the encounter. 158 Wn.App. 171, 241 P.3d 800 (2010). This Court should find that the showup procedure was not unnecessarily suggestive, which would result in denial of the appeal.

**B. Even if deemed suggestive, the pretrial showup procedure did not create a substantial likelihood of irreparable misidentification.**

“A suggestive procedure, such as a showup is not per se impermissibly suggestive.” *Booth*, 36 Wn.App. 66, 70-71 (1983) (citing *Neil v. Biggers*, 409 U.S. at 199, (“[A]dmission of evidence of a showup without more does not violate due process.”)).

When analyzing an identification procedure to ascertain whether there was a substantial likelihood of irreparable misidentification requires a court to consider the following factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (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.

*State v. Linares*, 98 Wn.App. 397, 401 (1999) (citing *State v. Shea*, 85 Wn.App. 56, 60 (1997)).

In *State v. Barker*, 103 Wn.App. 893, 905 (2000), the court found that a lineup procedure was suggestive, but did not create a substantial likelihood of misidentification because the witness, who was specifically warned that the photomontage may or may not contain the picture of the suspect, had a good look at the suspect and only six days had elapsed between the incident and photomontage. *Barker*, at 906.

In *Kraus*, a showup procedure more suggestive than the instant case was found not to be impermissibly suggestive. 21 Wn.App. at 390. In *Kraus*, within a few minutes of an alleged robbery, the defendant was located a couple blocks away from the incident. *Id.* at 389-90. He was wearing a light jacket, but the original description of the suspect had mentioned a dark jacket. *Id.* The victim observed the officer detain and pat-down the defendant before the showup procedure. *Id.* at 390. Regarding this showup procedure, which the court found not to be impermissibly suggestive, it wrote:

Here, Kraus was observed within a few minutes of the attempted robbery and approximately two blocks away. He entered a taxicab which stopped in the grocery store parking lot. Since Kraus was wearing a light jacket while the robbery suspect had been described as wearing a dark jacket, *the*

*officers were justified in taking Kraus back to the victim of the robbery for an attempted identification. **The police procedure of attempting a prompt identification in the course of a search for the robbery suspect was not impermissibly suggestive.***

*Kraus*, at 392 (both emphases added).

In terms of Mr. Huff's opportunity to view Ms. Scabbyrobe, he was very close to her during the incident and the area was well lit. Regarding Mr. Huff's degree of attention to Ms. Scabbyrobe, nothing in the record reveals that anything divided his attention during the incident. The record reflects that Mr. Huff was focused intently on her during the incident and paid her a high degree of attention as she sat next to him in the car, crawled over him to exit the vehicle via the passenger side door, and rummaged through her pockets during the portion of the encounter when both of them stood outside the vehicle.

Uncontroverted trial testimony indicated that Mr. Huff was one hundred percent (100%) certain of his belief that Ms. Scabbyrobe was the person who tried to steal his car; and he identified her during the trial itself. Uncontroverted testimony established that the showup procedure in this case occurred promptly after Mr. Huff reported the incident. He was transported by Sergeant Vanicek to identify Mr. Scabbyrobe in a showup procedure fewer than twenty(20) minutes after the alleged incident.

All these factors weigh in favor of this Court's finding that the showup procedure, if suggestive at all, was not so impermissibly suggestive as to create a substantial risk of irreparable misidentification.

**C. Because the pretrial showup procedure was not unduly suggestive, the in-court identification of Ms. Scabbyrobe was properly admitted.**

“Where an in-court identification is challenged and there is no issue of impermissibly suggestive procedures, the question of reliability goes only to the weight of the testimony and not its admissibility. That is, the subject can be adequately explored on cross examination.” *State v. Kinard*, 39 Wn.App. 871, 874 (1985) (citing *State v. Vaughn*, 101 Wn.2d 604 (1984); *State v. Gosby*, 85 Wn.2d 758 (1975)).

The alleged inaccuracies of Mr. Huff's description were challenged vigorously by trial counsel for Ms. Scabbyrobe. The appellate record does not provide this Court with sufficient information about Ms. Scabbyrobe's appearance to evaluate the impact, in terms of accuracy or believability, of Mr. Huff's characterization of Ms. Scabbyrobe as Hispanic rather than Native American. Even if it did, the Court should defer to the finder of fact. Like the alleged mischaracterization of her ethnicity, the differences in clothing, hairstyle, and belongings discussed at trial are not dispositive. Ms. Scabbyrobe could have easily removed her jacket and sweatpants to reveal the shorts and t-shirt she wore at the time of the showup; and her hair style

could have quickly and easily been altered. She could have discarded the two backpacks to lighten her load while fleeing. Mr. Huff's identifications of Ms. Scabbyrobe, both at the showup procedure and at trial, were properly admitted into testimony for the jury to weigh credibility according to its role as the trier of fact.

## **V. CONCLUSION**

Defense counsel did not provide Ms. Scabbyrobe ineffective assistance of counsel by foregoing a pretrial motion to suppress Mr. Huff's testimony identifying Ms. Scabbyrobe as the perpetrator. Ms. Scabbyrobe has not shown that the motion, if filed, would have been granted. The showup procedure used in Ms. Scabbyrobe's case was not unnecessarily suggestive. The jury was more than capable of considering the alleged deficiencies in Mr. Huff's identification of Ms. Scabbyrobe and to determine what, if any, weight to be given to Mr. Huff's testimony that Ms. Scabbyrobe tried to steal his car.

Respectfully submitted this 24<sup>th</sup> day of July, 2020.

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## DECLARATION OF SERVICE

I, Bret Roberts, state that on July 24, 2020, I caused to be emailed a copy of BRIEF OF RESPONDENT to Marek E. Falk at his email address, marek@washapp.org, 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.

DATED this 24<sup>th</sup> day of July, 2020, at Yakima, Washington.

s/ Bret A. Roberts  
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