

NO. 63769-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE BRYANT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

BRIEF OF RESPONDENT

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COURT OF APPEALS OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	11
1. THE TRIAL COURT CORRECTLY FOUND THAT THE LINEUP IDENTIFICATION PROCEDURE WAS NOT UNNECESSARILY SUGGESTIVE. ....	11
a. The Trial Court Correctly Concluded That The Lineup Was Not Impermissibly Suggestive .....	12
b. Bryant Fails To Meet His Burden Of Proving The Lineup Was Suggestive .....	15
c. Even If The Lineup Was Suggestive, The totality Of The Evidence Reveals That The Identification Contained Sufficient Indicia Of Reliability Despite The Suggestiveness.....	17
2. EVEN IF ADMISSION OF THE LINEUP IDENTIFICATION WAS IMPROPER, THE VICTIM'S IN-COURT IDENTIFICATION WAS PROPERLY ALLOWED BECAUSE IT HAD AN INDEPENDENT SOURCE.....	19

3. THE TRIAL COURT'S FINDINGS OF FACT  
AND CONCLUSIONS OF LAW ARE  
SUPPORTED BY SUBSTANTIAL EVIDENCE ..... 22

D. CONCLUSION ..... 26

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Neil v. Biggers, 409 U.S. 188,  
93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)..... 14

Simmons v. United States, 390 U.S. 377,  
88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)..... 12

United States v. Davenport, 753 F.2d 1460  
(9th Cir. 1985) ..... 14, 15

United States v. Portillo, 633 F.2d 1313  
(9th Cir. 1980), cert. denied,  
450 U.S. 1043 (1981) ..... 14

Washington State:

State v. Acrey, 148 Wn.2d 738,  
64 P.3d 594 (2003)..... 23

State v. Barker, 103 Wn. App. 893,  
14 P.3d 863 (2000), rev. denied,  
143 Wn.2d 1021 (2001)..... 12, 14

State v. Boast, 87 Wn.2d 447,  
553 P.2d 1322 (1976)..... 21

State v. Bockman, 37 Wn. App. 474,  
682 P.2d 925 (1984)..... 25

State v. Booth, 36 Wn. App. 66,  
671 P.2d 1218 (1983)..... 17

State v. Burrell, 28 Wn. App. 606,  
625 P.2d 726 (1981)..... 15

<u>State v. Cook</u> , 31 Wn. App. 165, 639 P.2d 863 (1982).....	16, 20
<u>State v. Eacret</u> , 94 Wn. App. 282, 971 P.2d 109 (1999).....	12, 13
<u>State v. Gould</u> , 58 Wn. App. 175, 791 P.2d 569 (1990).....	20
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).....	21
<u>State v. Harris</u> , 97 Wn. App. 865, 989 P.2d 553 (1999), <u>rev. denied</u> , 140 Wn.2d 1017 (2000).....	12
<u>State v. Hewett</u> , 86 Wn.2d 487, 545 P.2d 1201 (1976).....	20
<u>State v. Hillman</u> , 66 Wn. App. 770, 832 P.2d 1369 (1992).....	23
<u>State v. Kinard</u> , 109 Wn. App. 428, 36 P.3d 573 (2001).....	11-14
<u>State v. Linares</u> , 98 Wn. App. 397, 989 P.2d 591 (1999).....	13, 14
<u>State v. McGary</u> , 37 Wn. App. 856, 683 P.2d 1125 (1984).....	23
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	22, 23
<u>State v. Ramires</u> , 109 Wn. App. 749, 37 P.3d 343, <u>rev. denied</u> , 146 Wn.2d 1022 (2002).....	13
<u>State v. Rogers</u> , 44 Wn. App. 510, 722 P.2d 1349 (1986).....	12

State v. Smith, 36 Wn. App. 133,  
672 P.2d 759 (1983)..... 20, 21

State v. Traweck, 43 Wn. App. 99,  
715 P.2d 1148 (1986)..... 14, 15

### Rules and Regulations

#### Washington State:

CrR 3.6..... 1, 9, 22, 23

**A. ISSUES PRESENTED**

1. Did the trial court err in finding that Bryant had not proven that the lineup identification procedure was impermissibly suggestive even though the victim already saw Bryant in a photograph for less than one minute three months before the lineup when the lineup was conducted according to standard lineup procedure, there was no suggestive verbal or nonverbal communication to the victim and the lineup participants all had a similar appearance?

2. Did the trial court properly exercise discretion by allowing the victim's in-court identification when Bryant did not object to the in-court identification and the in-court identification was based on the victim's memory of the robbery rather than the photograph he observed for one minute three months prior to the lineup?

3. Did the trial court properly make findings of fact when substantial evidence supports the court's specific CrR 3.6 findings?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The defendant, Dwayne Bryant, was charged in King County Superior Court with one count of Robbery in the First Degree and one count of Assault in the Second Degree. CP 24-25. On February 19, 2009, the court granted Bryant's motion suppressing the photo montage identification as impermissibly suggestive. CP 20-23. On April 14, 2009, the court denied Bryant's motion to suppress the subsequent lineup identification. 2RP 62. On April 21, 2009, a jury returned a verdict of guilty on the charge of Robbery in the First Degree and not guilty on the charge of Assault in the Second Degree. CP 76. Bryant was sentenced to a standard range sentence on July 2, 2009. CP 92.

**2. SUBSTANTIVE FACTS.**

On the evening of November 7, 2008, 23 year old Zachery Foster was walking home from work when he encountered the defendant, Dwayne Bryant, near the corner of 11<sup>th</sup> Avenue and Spruce Street in Seattle. 3RP 24; 3RP28. Although it was night time, this attack occurred under a street light. 3RP 27. Foster had

been working all day and had not consumed any alcohol or drugs. 3RP 24-25. Bryant pulled what appeared to be a handgun part way out of his pocket and yelled, "Gimme all your shit!" 3RP 30. Bryant walked Foster to the street corner. 3RP 30. As Bryant continued to demand Foster's belongings, Foster asked what Bryant wanted. 3RP 31. Bryant demanded everything. 3RP 31. Bryant then pulled out what appeared to be the handle of a firearm from his pocket. 3RP 31-32. Foster's attention was focused on Bryant's face throughout the incident, except for the moment when he saw the gun handle. 3RP 32-33.

Fearing he would be hurt, Foster took off his North Face jacket, North Face fleece, and backpack. 3RP 32; 3RP 35-36. Bryant grabbed Foster's belongings and turned to leave. 3RP 33; 3RP 37. As Foster turned to move away, he was struck in the face. 3RP 33. As a result of the attack, he suffered a broken jaw. 3RP 33; 3RP 52; 4RP 49. Bryant and the unidentified accomplice (who acted as a lookout) fled. 3RP 38.

Foster was unable to provide much information about the second suspect. 3RP 40-41. That suspect did not do or say anything during the attack. 3RP 30; 3RP 38.

Foster then walked a few steps to his apartment where his girlfriend called 911. 3RP 43.

Seattle Police Officer Connors responded and contacted Foster within minutes. 3RP 44-45. Despite his injury, Foster remained calm and conveyed a description of the attacker to Officer Connors. 3RP 107. Specifically, Foster stated that the suspect who robbed and struck him was a black male, about 6'1", medium build, a "scruffy" beard ("like he hadn't shaved in a couple days"), short black hair with a tight black do-rag, about 20 years old, and wearing an oversized green hoody and dark blue jeans. 3RP 110.

Officer Connors immediately realized that Bryant was a possible suspect. 3RP 110. Earlier that day, Officer Connors had observed Bryant in that same area wearing a dark green hoody under a black jacket and dark jeans. 3RP 111. In addition, Bryant matched the physical description. 3RP 111. Foster picked Bryant out of a montage created by Officer Connors at the scene. 3RP 112. Rather than a standard montage containing six photographs created from DOL or jail photos, Officer Connors presented several images comprised of black and white photos, color photos and video that he had available to him at the time he interviewed Foster. CP 20-23.

Officer Connors testified that Foster was very adamant that was the person who had just robbed him. 3RP 112.

A few days later, Detective Healy took a telephonic statement from Foster. Foster described his attacker consistently with the original description provided to Officer Connors. 3RP 171-72.

Bryant was arrested on an unrelated matter a couple days later. 3RP 131.

In a pretrial hearing on February 19, 2009, the Honorable Judge James Rogers suppressed the photo montage at the scene as unduly suggestive. CP 20-23. Judge Rogers found that an in-court identification would be admissible at trial since the victim had an independent source for the identification. CP 20-23. A live lineup was conducted with the court's permission on February 25, 2009. 2RP 3. Zachary Foster immediately recognized Bryant as his attacker. 2RP 17.

Just before trial, Bryant moved to suppress the lineup identification claiming it was impermissibly suggestive. The Honorable Judge Michael Fox heard testimony from Detective Healy and Dr. Loftus, considered the Findings of Fact and Conclusions of Law entered by Judge Rogers (Bryant did not object), and considered the photos taken during the lineup, a standard Seattle Police

Department form used to instruct Foster before the lineup, and a standard Seattle Police Department form used to document Foster's identification of Bryant. 1RP 61; 2RP 3; Pretrial Exhibits 2-7; and see FFCL.

During the hearing, Detective Healy testified that the lineup procedure itself was conducted in accordance with the generally accepted lineup procedure routinely used by the Seattle Police Department. 2RP 7. Before the lineup began, Detective Healy met with Foster and advised him of the lineup procedures using the standard Lineup Instruction Sheet. 2RP 8. Detective Healy reviewed the form line by line with Foster and gave him a printout of the form. 2RP 8-10. Detective Healy testified that the victim "seemed pretty clear" on the process. 2RP 11.

The six individuals participating in the lineup were held in a separate room. 2RP 26. They were all of the same general appearance. All were African-American black males, with similar facial hair, age, and weight. See Pretrial Exhibit #3; 2RP 23. All individuals appeared to have similar body structure and were purposefully dressed in bulky white Tyvek suits that reveal little body detail. See Pretrial Exhibit #3; 2RP 23.

The lineup subjects were briefed on the lineup procedure while the defendant's attorney was present. 2RP 7. Just before the lineup began, the defendant was given the opportunity to pick which number he wanted to be in the lineup. 2RP 7. The defendant chose to be number three. 2RP 13.

Photos of the six participants and the setting of the lineup procedure were admitted during the pretrial hearing. Pretrial Exhibits 2-7.

Detective Healy did not know what number the defendant had chosen when he met with Foster to advise him of the lineup process. 2RP 13. There was no conversation between Detective Healy and Foster between that initial meeting and the lineup procedure itself. 2RP 13. In fact, there was no conversation during the lineup procedure at all. 2RP 15.

Foster was sitting in a darkened seating area. 2RP 22. Also present in this area were detectives, Foster's father, the victim's advocate, Bryant's attorney, and her investigator. 2RP 25-26. When the lineup began, all six individuals entered the lighted stage area through door to the side of the stage. 2RP 26. This stage area is well lit. 2RP 22. The defendant appeared as number three. 2RP 13. First, each individual was asked to step forward, turn to

the side, and then step back into place. Second, each individual was asked to say the phrase, "Give me your shit." 2RP 12. This is a phrase the attacker made several times during the robbery.

Immediately after the lineup procedure, Detective Healy interviewed Foster in a private conference room. 2RP 16. Nobody else was present during this interview. 2RP 16. Detective Healy asked Foster, "Did you recognize any of the subjects in the lineup; and if so, from where?" 2RP 37. Foster stated that he recognized number three as the person who robbed and attacked him on November 7, 2008. 2RP 16, 37. This identification was documented on a standard Seattle Police Department Form. 2RP 16.

Detective Healy testified that Foster appeared both confident in his identification of his attacker and was visibly shaken. 2RP 17. Detective Healy based this opinion on his experience of conducting hundreds of victim, witness, and suspect interviews. 2RP 17. Foster appeared to be somewhat upset and stated that seeing his assailant again brought back a lot of bad memories. 2RP 17. Foster attributed his selection on Bryant's voice and physical attributes: his size, face, facial features, and complexion. 2RP 17.

It should be noted that the defendant's attorney did not make any objections to the lineup procedure at the time of lineup. 2RP 7. There is no evidence that anything out of the ordinary occurred during this lineup procedure.

Dr. Geoffrey Loftus testified on behalf of the defendant during the pretrial hearing. On direct, the bulk of his testimony was about the effect of environmental factors and post-event information on perception and memory. 1RP 65-101. However, on cross-examination, Dr. Loftus admitted he had not interviewed Foster and did not conduct any tests on Foster's perceptiveness or memory abilities. 1RP 103; 110. Dr. Loftus also admitted that the victim could have selected Bryant in the lineup because Bryant was his attacker. 1RP 111. Dr. Loftus was not present for the lineup. 2RP 25-26.

After considering all of the evidence, the Findings of Fact and Conclusions of Law entered after the previous montage suppression hearing, briefing, and argument of counsel, the trial court found that the lineup was not suggestive and denied Bryant's CrR 3.6 motion to suppress the lineup. 2RP 62. The court orally documented his findings of fact and conclusions of law at that time on the record. 2RP 53-62. The formal Findings of Fact and

Conclusions of law were recently drafted and mirror the transcript of the trial court's oral findings. Supp. CP \_\_ (Sub. No. \_\_)(Findings of Fact and Conclusions of Law for the April 2009 CrR 3.6 hearing).

At trial, Foster described his attacker as roughly 6' - 6'1", medium build, 170-180 lbs, African American, unshaven (at least a couple days), plus a goatee style beard, Doc Marten shoes, dark jeans, white t-shirt, green hoody sweatshirt, baggy style clothing, mid-late 20s, and had a somewhat deeper voice. 3RP 40.

Despite the earlier suppression of the montage, Bryant elected to go into the issue of the effect of post-event information on Foster's memory during trial. The court gave a limiting instruction to the jury and gave the State a very narrow script on how to address the previously excluded montage with Foster during his testimony. 3RP 46-50. The State followed the court's instructions. 3RP 46-50. However, the defense attorney opened the door to the admissibility of the montage during her cross examination. 3RP 76-77. Upon re-direct, the State asked Foster more detailed questions about the montage. 3RP 79-80. Foster stated that he only looked at the photo of Bryant for less than a minute. 3RP 79. When asked what he thought when he saw the photo of Bryant, Foster said, "That that was the guy that robbed

me." 3RP 79. When asked if he thought about the photo during the lineup, Foster said, "No." 3RP 80.

Foster also testified to identifying Bryant in the lineup. 3RP 55. When asked how he knew Bryant was his attacker, he again said he recognized Bryant's face as well as his voice. 3RP 56. When asked if he had any doubt whether Bryant was the person who attacked him, Foster said "No." 3RP 57. When asked how he felt when he saw his attacker during the lineup, Foster said "scared" because it was the first time he had seen his attacker in person since the attack. 3RP 59-60. When asked if he saw his attacker in the courtroom, Foster identified the defendant. 3RP 28. Defense did not object to the in-court identification. 3RP 28.

**C. ARGUMENT**

**1. THE TRIAL COURT CORRECTLY FOUND THAT THE LINEUP IDENTIFICATION PROCEDURE WAS NOT UNNECESSARILY SUGGESTIVE.**

A court's decision to admit evidence of an out-of-court identification is within the sound discretion of the trial court and subject to an abuse of discretion standard on appeal. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). The standard is a deferential one and this Court must affirm the trial court's

decision when there are tenable grounds or reasons underlying it. Id., (citing State v. Harris, 97 Wn. App. 865, 870, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000)).

a. The Trial Court Correctly Concluded That The Lineup Was Not Impermissibly Suggestive.

Evidence of an out-of-court identification is admissible if it is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999) (citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). See also State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000), rev. denied, 143 Wn.2d 1021 (2001); Kinard, 109 Wn. App. at 432-33. The standard of review for police identification procedures is *de novo*. State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986). In considering credibility, however, deference is given to the trial judge, who had the opportunity to evaluate the demeanor of witnesses. Id.

A two-step inquiry is required when determining whether an out of court identification is impermissibly suggestive. 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 photo.” Eacret, 94 Wn. App. at 283. Generally, courts have found montages to be impermissibly suggestive only when the defendant is the sole possible choice given the witness’s earlier description. State v. Ramires, 109 Wn. App. 749, 761, 37 P.3d 343, rev. denied, 146 Wn.2d 1022 (2002).

If the defendant fails to meet his initial burden of showing that the montage was impermissibly suggestive, the inquiry ends. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). If, and only if, the court finds that the montage is impermissibly suggestive does the court undertake the second step of the analysis—determining whether, under the totality of the circumstances, the identification contained sufficient indicia of reliability despite the suggestiveness. Ramires, 109 Wn. App. at 761; Linares, 98 Wn. App. at 401.

In considering the second prong of the test, courts contemplate the following factors: (1) the opportunity of the witness to view of the suspect prior to the identification, (2) the witness’s degree of attention at the time of the incident, (3) the accuracy of the witness’s prior description of the suspect, (4) the level of

certainty demonstrated when making an identification, and (5) the time between the incident and the identification procedure. Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Kinard, 109 Wn. App. at 434; Barker, 103 Wn. App. at 905; Linares, 98 Wn. App. at 401.

Case law offers substantial guidance on the issue of the admissibility of the lineup identification. In United States v. Davenport, 753 F.2d 1460 (9th Cir. 1985), the defendant argued that a witness's lineup identification was tainted because the police had shown the same witness a photo montage containing the defendant's photograph before the witness selected the defendant in the lineup. The Ninth Circuit stated: "We do not regard wither the lineup or the in-court identification as unnecessarily suggestive. The fact that {the defendant} was the only individual common to the photo spread and the lineup cannot, without further indicia of suggestiveness, render the lineup conducive to irreparable misidentification." Id. at 1463 (footnote omitted)(citing United States v. Portillo, 633 F.2d 1313, 1324 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981)).

In Traweck, State v. Traweck, 43 Wn. App. 99, 104-05, 715 P.2d 1148 (1986), the court held that a lineup identification was

reliable even though the victim of the assault described his assailant as a blond man and the defendant was the only blond participant in the lineup. The court concluded that the victim's identification was reliable based on the fact that she got a good look at her assailant, her description was accurate, and she identified the defendant in the lineup less than 48 hours after the incident. Traweek, 43 Wn. App. at 103-04.

Similarly, the court found sufficient indicia of witness reliability in Burrell where the witnesses had an adequate opportunity to view the defendant, their descriptions were accurate, and each identified the defendant within four days of the incident. State v. Burrell, 28 Wn. App. 606, 611, 625 P.2d 726 (1981).

b. Bryant Fails To Meet His Burden Of Proving The Lineup Was Suggestive.

Bryant did not meet this initial burden of showing that the lineup was suggestive. Bryant argues that the lineup was impermissibly suggestive because Bryant was the only person who was in both the lineup and the previously suppressed montage. However, that fact alone does not direct undue attention to a particular individual. Davenport, 753 F.2d 1463. If that were the

rule, no subsequent identification procedures would ever be admissible. An in-court identification of a defendant which follows a suggestive out-of-court identification procedure is proper as long as the in-court identification has an independent source. State v. Cook, 31 Wn. App. 165, 172, 639 P.2d 863 (1982.).

Here, the lineup procedure did not direct undue attention to a particular person. The photos of the lineup procedure clearly show that all six individuals that participated in the lineup have same general appearance and none of them stood out among the others. The lineup was conducted according to the generally accepted lineup procedures. Bryant's attorney did not make any objections to the lineup procedure at the time of lineup. Nor is there is any indication that anything out of the ordinary occurred during this lineup procedure. Foster was advised of the lineup procedure. Detective Healy did not coach or influence him in any way.

Foster immediately picked number three after the viewing the lineup and was confident that Bryant was his attacker. Lending credence to his selection is that fact that Foster was shaken upon seeing the man who robbed him three months earlier.

In the montage, a witness is limited to making an identification based on motionless visual factors alone. In the

lineup, the witness not only observes the suspects physical appearance, but also their movements and their voice. The evidence presented at the pretrial hearing reveals that the lineup was not suggestive. Because the lineup was not suggestive, the inquiry ends.

- c. Even If The Lineup Was Suggestive, The totality Of The Evidence Reveals That The Identification Contained Sufficient Indicia Of Reliability Despite The Suggestiveness.

Even if the lineup procedure was suggestive, Bryant has not shown that the lineup procedure created a very substantial likelihood of irreparable misidentification.

In State v. Booth, the Court of Appeals found that a showup was impermissibly suggestive because the police did not get a prior description of the suspect from the witness to verify her identification, and Booth was in the back of a police car with his back to the witness. 36 Wn. App. 66, 71, 671 P.2d 1218 (1983). The court held that the identification was still sufficiently reliable, however, because the witness had the opportunity to clearly observe the defendant for 45 seconds; she was paying great

attention to the defendant because he had money in his hands and was running; her identification was unequivocal; and the time between the crime and the identification was only 30 to 40 minutes.

Id.

Here, there is sufficient indicia of reliability to allow admission of the lineup identification. First, the victim had a significant opportunity to view Bryant prior to viewing the lineup. This was not a crime where an attacker ran past a victim, grabbing his or her bag as they sped by. In the case at hand, the victim stood face-to-face and had a verbal exchange with the attacker.

Second, Foster's attention was focused on the attacker during the crime. In fact, Foster was unable to provide any detail about the second suspect present during the attack because his attention was focused on the primary attacker. They engaged in conversation and Foster's attention was on the person speaking to and demanding things from him. Foster was able to provide a detailed description of the attacker, Mr. Bryant.

Third, Foster's descriptions of the suspect given to Officer Connors and Detective Healy are consistent and match Bryant's

appearance. In fact, the description was so detailed that Officer Connors deduced that Bryant was a possible suspect because he saw Bryant earlier that day in the same area wearing the same clothes and matching that same description.

Fourth, Foster has consistently demonstrated a high level of certainty when viewing the montage and the lineup.

Finally, only three months passed between the robbery and the lineup.

Based on the totality of the circumstances, Bryant has not shown that the lineup identification created a very substantial likelihood of irreparable misidentification. The trial court properly refused to suppress the lineup identification.

**2. EVEN IF ADMISSION OF THE LINEUP IDENTIFICATION WAS IMPROPER, THE VICTIM'S IN-COURT IDENTIFICATION WAS PROPERLY ALLOWED BECAUSE IT HAD AN INDEPENDENT SOURCE.**

An in-court identification of a defendant which follows a suggestive out-of-court identification procedure is proper as long as the in-court identification has an independent source. Cook, 31 Wn. App. at 172. In determining whether a witness' in-court identification had an independent source, relevant factors include:

- the witness' prior opportunity to observe the suspect;
- the existence of any discrepancy between any pre-confrontation description and the defendant's actual description;
- any prior identification of another person;
- any prior identification of the defendant by photograph;
- failure to identify the defendant on a prior occasion;
- the lapse of time between the alleged act and the identification; and
- whether the witness previously knew the defendant.

State v. Smith, 36 Wn. App. 133, 138, 672 P.2d 759 (1983). In

State v. Gould, the Washington Supreme Court held that the in-court identification was proper because it was based on the witness' observations at the time of the robbery; nothing in the record indicated that the identification was influenced by a show-up or by suggestive comments made by the police. 58 Wn. App. 175, 185, 791 P.2d 569 (1990); see also State v. Hewett, 86 Wn.2d 487, 496, 545 P.2d 1201 (1976); (identification by victim at hearing was based on victim's independent pre-arrest observation of defendants and was not tainted by police station identification).

In the case at hand, Bryant did not object to the in-court identification at trial and therefore did not preserve the issue for

appeal. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); State v. Boast, 87 Wn.2d 447, 451-52, 553 P.2d 1322 (1976). However, even if the court finds that the issue has been properly preserved for appeal, analysis of the Smith factors clearly reveals that the in-court identification was properly admitted.

First, as stated above, Foster had a significant opportunity to observe Bryant during the commission of the crime. Second, there is no discrepancy between the descriptions to Officer Connors and the defendant's actual description. Third, the victim has consistently identified Bryant as his attacker and has never identified anyone else. Fourth, even though the identification was suppressed, Foster had previously identified Bryant by a photograph. Fifth, through the montage and lineup, the victim has never failed to identify Bryant as his attacker.

Sixth, the initial montage identification occurred approximately 30 minutes after Officer Connors arrived on scene (within minutes of the robbery itself). The lineup occurred approximately three months later. This is significant. It is

reasonable to believe that an average person would not remember a person that they saw in a photograph for a few seconds three months after they observed the photograph. However, it is reasonable that Foster recognized Bryant in the lineup because he was in fact the person who attacked him on the evening of November 7, 2008.

Finally, the victim had not known Bryant before the attack. Analysis of these factors weigh in favor of permitting an in-court identification even if the court finds that the lineup should have been suppressed.

**3. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The trial court did not err when denying Bryant's CrR 3.6 motion to suppress evidence of the lineup since the ruling is supported by substantial evidence.

Substantial evidence must support the trial court's factual findings. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is defined as 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'

Mendez, 137 Wn.2d at 214. Unchallenged factual findings are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

Please note that the written Finding of Fact and Conclusions of Law regarding the defendant's CrR 3.6 motion to suppress the lineup were entered while this appeal was pending. This document, signed by the State and the defendant's trial attorney, was created based on the transcript of the detailed oral findings of fact and conclusion of law the trial court made at the conclusion of the hearing. Notice was given to Bryant's appellate attorney during the process.

During the CrR 3.6 hearing to suppress identification evidence, the trial court considered the testimony, Findings of Fact and Conclusions of Law (FFCL) entered after the previous montage

1/10 2/18 4/10

suppression hearing, briefing, and argument of counsel before finding that the lineup was not suggestive. 2RP 62, Supp. CP \_\_\_ (Sub. No. \_\_\_)(Findings of Fact and Conclusions of Law for the April 2009 CrR 3.6 hearing). Note that Bryant did not object to the trial court considering the Findings of Fact and Conclusions of Law from the previous montage suppression hearing.

First, Bryant challenges the trial court's finding that based on the victim's detailed description of the robber, Foster had a good opportunity to view the robber and did so accurately. Under the facts incorporated by reference from the previous montage suppression hearing, Officer Connors testified on February 19, 2009, that Foster described his attacker as a black male, 6', 165-175 lbs, medium build, medium complexion, mid-late 20s, scruffy beard (like he had not shaven in a few days), green hoody, jeans, and a tight doo rag over very short hair. Supp. \_\_\_ RP 8 (Motion hearing transcript from 2/19/09). Based on this description, Officer Connors recognized the suspect being described as Bryant, who he knew from prior contacts in the area and had seen in that area earlier that day. Supp. \_\_\_ RP 8 (Motion hearing transcript from 2/19/09).

Second, Bryant challenges the trial court's finding that Officer Connors "did a very good job" and used a "good and necessary police enforcement technique that should be encouraged rather than discouraged." On February 19, 2009, Officer Connors testified that after hearing Foster's detailed description of the suspect, he gathered a series of images available to him at that time and showed them to Foster. Supp. \_\_\_ RP 9 (Motion hearing transcript from 2/19/09). A prompt identification procedure frequently demonstrates good police procedure because it best guarantees freedom for innocent suspects. State v. Bockman, 37 Wn. App. 474, 482, 682 P.2d 925 (1984).

Third, Bryant challenged the trial court's finding that nothing about the lineup procedure is suspect. Detective Healy testified that the lineup procedure was conducted according to standard Seattle Police Department protocol. 2RP 7.

Fourth, Bryant challenges the trial court's "finding" that the lineup procedure was not impermissibly suggestive and the results are admissible at trial. Technically, this is a conclusion of law rather than a finding of fact. The validity of the court's ruling is analyzed in detail above.

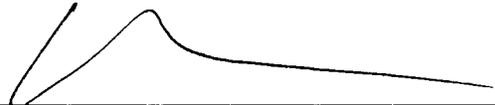
**D. CONCLUSION**

For the foregoing reasons, this Court should affirm Bryant's conviction of one count of Robbery in the First Degree.

DATED this 22 day of April, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DWAYNE BRYANT, Cause No. 63769-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Wenita Schwantes

Name

Done in Seattle, Washington

4/22/10

Date

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