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NO. 63769-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
FEB 22 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE BRYANT,

Appellant.

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

The Honorable Michael J. Fox, Judge

OPENING BRIEF OF APPELLANT

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DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to due process and a fair trial when it permitted evidence of an impermissibly suggestive lineup and an in-court identification.

2. The trial court erred when it made the following findings of fact and conclusions of law in denying the defense motion to suppress identification evidence:

- a. based on the victim's detailed description of the robber, he had a good opportunity to view the robber and do so accurately [2RP 57];
- b. Officer Conners "did a very good job" and used "a good and necessary police enforcement technique that should be encouraged rather than discouraged" [2RP 61];
- c. nothing about the lineup procedure is suspect [RP 60];
- d. the lineup procedure was not impermissibly suggestive and the results are admissible at trial [2RP 62].

Issues Pertaining to Assignments of Error

1. Appellant was charged with robbery. Within 30 minutes of the robbery, the victim was shown a series of photographs using a method that was impermissibly suggestive. The victim's identification of appellant as the assailant was suppressed. Police then conducted a lineup and asked the victim if he recognized anyone. Appellant was the only individual common to

both the earlier suggestive montage and the lineup. The victim identified appellant as the assailant in the lineup and again at trial. Did the trial court err when it allowed evidence of these identifications?

2. Several of the trial court's key findings, and its ultimate conclusion that the lineup procedure was not impermissibly suggestive, are not supported by the evidence. Are the findings and conclusion erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged appellant Dwayne Bryant with robbery in the first degree and assault in the second degree. CP 24-25. A jury acquitted Bryant of assault but found him guilty of robbery. CP 83. The court imposed a standard-range 90-month sentence, and Bryant timely filed his notice of appeal. CP 91, 93, 99.

2. Substantive Facts

a. The robbery

On the evening of November 7, 2008, around 6:30 p.m.,

Zachary Foster walked to his Seattle apartment from work. 3RP¹ 23.

As Foster crossed the street, two men approached him. 3RP 28-30.

One of the men grabbed Foster's left arm and said, "give me your shit" while the second man stood close by. 3RP 30.

Foster was shocked. He and the man who grabbed him continued to walk to the street corner. 3RP 30-31. Foster was stammering and trying to figure out what was happening. The man repeatedly said "give me your shit." 3RP 31. When Foster asked what he wanted in particular, the man said "all of it" while reaching into his pocket and revealing the handle and about half of the barrel of a gun. 3RP 31-32.

Foster placed a backpack he was carrying on the ground and removed a jacket and other outer clothing he had been wearing. Foster's wallet was in his jacket. The man grabbed the items and started to walk away. Foster turned toward the door of his apartment building, but was then struck in the jaw with a fist or other object. 3RP 33-36. Foster was stunned and fell to the ground on all fours. 3RP 37.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 13, 2009; 2RP – April 14, 2009; 3RP – April 15, 2009; 4RP – April 16, 2009; 5RP – April 20, 2009; 6RP – July 2, 2009.

Once on his feet again, Foster mistakenly believed he had thrown his wallet in a nearby bush and began looking for it. 3RP 41. When he did not find it, he entered his apartment and asked his girlfriend to call 911. 3RP 41. Police and other emergency responders arrived within 5 minutes. 3RP 44. Foster suffered a fractured jaw. 4RP 49. Sometime after November 7, an acquaintance of Foster's found a portion of the contents of his wallet in the street several blocks from the robbery. 3RP 97-101.

b. Montage, lineup, and in-court identification

Seattle Police Officer Michael Conners was one of several who responded to the 911 call. RP 103-106. Foster told Conners the man that stole his property was African American, about 6-foot-1, medium build, with a scruffy beard – as if he had not shaved in a few days, mid to late twenties, wearing a tight black do-rag over very short hair, an oversized green hooded jacket, and dark blue jeans. 3RP 39-40, 110.

The description reminded Officer Conners of Dwayne Bryant, whom he had seen in the neighborhood earlier that day. Unlike the assailant, however, Bryant had been wearing a black puffy jacket with fur around the collar. 3RP 110-111. Conners' patrol beat

covers a 10-block radius around Harborview Hospital. 3RP 103. In his car, Connors keeps a binder with photos of individuals he has encountered in the neighborhood whom he has deemed “troublemakers.” RP 124. He has a black and white photo of Bryant. 3RP 122; 4RP 37.

Within 30 minutes of the crime, Connors showed Foster Bryant’s photo. 3RP 49. Connors also showed Bryant a black and white photo of a second man from the binder. Both of these pictures merely show the individual from the shoulders up. 4RP 37, 45; pretrial exhibits 2-3 (from 2/19/09). The man in the second black and white photo is heavier than Bryant and has longer, braided hair. Pretrial exhibit 3 (from 2/19/09). Connors has the ability to display video recordings in his patrol car. He also showed Foster color video clips of four other individuals. 4RP 37-39; pretrial exhibits 4-7 (from 2/19/09); trial exhibits 21-24. All four of these individuals were younger than the man Foster described and also differed from his description of the assailant in other ways, including hair style, weight, clothing, and the absence of facial hair. 4RP 39-45.

Referring to the assailant, Foster indicated the picture of Bryant “looked just like him.” 4RP 46. Prior to trial, Judge James Rogers found this identification impermissibly suggestive:

2. The Court concludes that the black and white booking photographs [sic] of Dwayne Bryant was unduly suggestive as one of two booking photographs shown in conjunction with the in-car live video images of four individuals in plain clothes and shown from the knees up in front of a patrol car.
3. The Court finds that the second photograph does not look like the defendant, which necessarily directed attention to the defendant's black and white booking photograph.

CP 22.²

In light of the court's ruling, the State decided to place Bryant in a lineup to see if Foster would select him as the assailant. Foster once again selected Bryant and the defense moved to suppress both this identification and any identification at trial, arguing both were tainted by the initial improper identification. CP 28-30.

The judge assigned for trial, Judge Michael Fox, held a hearing on the motion. Judge Rogers had concluded that the improperly suggestive identification at the scene did not prevent the State from asking Foster whether he could identify Bryant at trial.

² The only witness at this hearing was Officer Conners. See Supp. CP ___ (sub no. 32, Clerk's Minutes). The hearing has not been transcribed. While a transcript of this hearing is not necessary to decide the issues on appeal, to ensure a complete appellate record, undersigned counsel is obtaining a transcript, which should be complete before the State's brief is due.

CP 22. Judge Fox, however, held that he was not bound by that finding and would make an independent determination on the admissibility of subsequent identifications. 1RP 58-59.

At a hearing on the issue, the State submitted 26 photos from the lineup. Trial exhibit 14. The defense called Dr. Geoffrey Loftus, a professor of psychology at the University of Washington, who has studied human perception and memory for the past 45 years. 1RP 62-63. Loftus explained how memories can be supplemented with external “postevent information” that is incorporated into the memory, modifies it, and falsely increases one’s confidence that the memory is accurate. 1RP 70-71, 93-101.

Dr. Loftus reviewed materials from Bryant’s case, including police reports and the photos he had been shown shortly after the robbery. He also visited the scene. 1RP 74. He noted it was dark when the robbery occurred and although streetlights provide some illumination, they are of “limited help in terms of your ability to memorize something as complicated as a face.” 1RP 75-76, 112-13. Moreover, because there were two perpetrators, Foster’s attention would have been drawn away from any one individual’s face. 1RP 77. Foster also would have been focused on the weapon once it was displayed. 1RP 78. Foster described himself as “highly

stressed,” and stress diminishes one’s mental capacities. 1RP 78-79, 117-120. Adding to Foster’s difficulties in making an accurate identification is the fact the perpetrators were black and Foster is white; “people aren’t as good at identifying members of other races than members of their own race.” 1RP 79.

Loftus described the montage prepared by Officer Conners as “biased in important respects,” as Judge Rogers had recognized. 1RP 80. At the subsequent lineup, Bryant was the only individual common to both identification opportunities and therefore the only individual Foster had seen before. 1RP 80-81. Therefore, even if Bryant did not commit the robbery, Foster may have chosen him based solely on the fact he recognized him from the earlier photo. 1RP 81.

Loftus also was critical of the lineup in other respects. Lineups should be double blind, meaning those administering them do not know which individual is the suspect. This avoids any conscious or unconscious cues to the witness suggesting the “correct” pick. 1RP 82-84. Moreover, lineups should be conducted sequentially, meaning the witness views one person at a time as opposed to a group view. 1RP 84. Simultaneous views nearly double the likelihood of a false identification. 1RP 85.

In summary, Dr. Loftus found three problems with the lineup in this case: (1) most importantly, Bryant was the only person common to the first montage and the lineup; (2) the lineup was not conducted using double blind procedures; and (3) it was done simultaneously rather than sequentially. 1RP 86.

Considering problems with Foster's initial ability to form a memory of the robber (poor lighting, high stress, divided attention, cross-racial identification) and the introduction of improper postevent information (the suggestive photo of Bryant), Dr. Loftus concluded it is possible, despite Foster's confidence, that the suggestive photo led to a misidentification of Bryant as the robber at the subsequent lineup. 1RP 86-92. Moreover, Foster's selection of Bryant at the lineup had now provided an additional source of postevent information – and an additional opportunity for memory reconstruction – thereby increasing the possibility Foster would confidently identify Bryant as the robber at trial. 1RP 87-88, 90-92.

Although Dr. Loftus had not interviewed Foster, he testified that interviewing a witness is not the best way to determine memory because of the distorting effects of postevent information. 1RP 103, 123. Not only can this information impact the witness's identification of the assailant, it can distort the witness's perception of other

aspects of the situation, including his recollection of his level of attention and his memory of the lighting. 1RP 123-124.

In addition to Loftus, Seattle Police Detective Thomas Healy also testified at the hearing on the defense motion to suppress. Healy was in charge of the lineup on February 25, 2009. 2RP 3. Healy testified that the lineup took place at the Seattle Police headquarters. He selected the five subjects who stood with Bryant and attempted to find individuals with similar physical characteristics. 2RP 4-5, 12.

Prior to the lineup, Foster was provided instructions, which Healy reviewed with him. 2RP 6, 8-11; trial exhibit 18. Unlike standard instructions for photomontages, these instructions do not include an advisement that the person may or may not be in the lineup. 2RP 38-40.

Healy allows each defendant to select his number in the lineup, and he knew Bryant had selected number 3. 2RP 13-14, 34-35. Foster was already seated in a room adjacent to the lineup room as the six men entered. 2RP 5. Healy did not speak to Foster during the lineup. 2RP 14-15. At Foster's request, each man was told to say "give me your shit." 2RP 11-12. Once the lineup was over, Foster indicated that individual 3 was the person who had

robbed him. 2RP 13, 15-16, 37; trial exhibit 6.

According to Detective Healy, Foster was confident in his pick. 2RP 17, 36. Healy conceded, however, the lineup was not done sequentially. 2RP 22. He also conceded that Bryant was the only man in both Officer Conner's photomontage and the subsequent lineup. 2RP 13, 36.

The defense argued that the initial suggestive montage tainted all subsequent identifications. 2RP 41-50. Moreover, in addition to the impact of the initial montage on the subsequent lineup, the lineup was flawed in its own right because it was not conducted sequentially. Nor was it double blind; Detective Healy knew that Bryant was the suspect and occupied position 3. 2RP 46-48.

In an oral ruling, Judge Fox denied the defense motion to suppress the lineup results and preclude an in-court identification.³ 2RP 63.

At trial, jurors heard testimony from both Foster and Officer Conners that when shown the photograph of Bryant shortly after the robbery, Foster indicated that Bryant looked like the robber. 3RP 49; 4RP 46. Judge Fox expressly instructed jurors not to consider this

evidence to establish that Bryant was involved in the robbery. Rather, it was to be considered only to establish that Foster was shown Bryant's photo approximately 30 minutes after the incident. 3RP 49-50.

Foster testified that he identified Bryant at the subsequent lineup, knew immediately the man who robbed him was in position number 3, and had no doubt it was Bryant based on his appearance and voice. 3RP 53-59. He denied that he was thinking of the earlier photo when selecting Bryant. 3RP 80.

Detective Healy also testified that Foster identified Bryant at the lineup. 3RP 140-152. In addition, Healy testified that he interviewed Bryant and Bryant indicated he had been in the neighborhood on the day the robbery occurred. 3RP 133. Healy impounded Bryant's car. The only item of interest inside the car was a black stun gun in the glove box. 3RP 134-138, 160-162. DNA testing on the gun revealed no evidence it had been in contact with Foster. 4RP 10-11, 23-25. Moreover, Foster testified the stun gun was not what the assailant had showed him. 4RP 35.

c. The defense case

The defense called Dr. Loftus at trial. 4RP 58. Similar to his

³ Judge Fox did not enter written findings and conclusions.

pretrial testimony, Loftus discussed the nature of memory and attention, the tendency to incorporate postevent information, the disconnect between a witness's confidence and accuracy, difficulties with cross-racial identification, and the risk of false convictions based on eyewitness testimony. 4RP 59-95, 103-106. Loftus also discussed the need for double blind and sequential identification procedures. 4RP 99-103.

As to the circumstances of this case, Loftus noted it was two hours after sunset when Foster was robbed, so it was completely dark and the streetlights were of questionable use. Although Foster claimed "it was getting dark," Loftus testified this is consistent with the tendency of witnesses to recall the circumstances more favorably than they actually were. 4RP 107, 112-13. Also affecting Foster's ability to perceive his attacker was the fact he was "highly stressed" and his attention may have been divided among the two assailants and the gun. 4RP 113-15.

According to Loftus, the four video clips and two photos Officer Connors showed Foster shortly after the robbery did not comport with any of the standards for montages. 4RP 116. It was unusual to use some color and some black and white images. 4RP 116. Moreover, because the men in the four color images were too

young to be the assailant, Foster was essentially presented with a two-person montage. 4RP 117. Foster's selection of Bryant's photo raises the specter that his memory of the assailant has been reconstructed to conform to that photo. 4RP 118-19.

Loftus was critical of the subsequent live lineup because it was not conducted sequentially or with double blind procedures. 4RP 118-20. And Foster's selection of Bryant "could act as a form of postevent information that would allow the witness to further reconstruct his memory of the person who robbed and assaulted him." 4RP 120. That Bryant was the sole common individual in the first montage and the lineup means that even if Bryant was not the robber, he was the only individual who would look familiar to Foster at the lineup. 4RP 121.

Loftus testified that the out of court identifications could also impact Foster's live testimony:

both of these identification procedures could provide the basis for Foster to have constructed a memory, reconstructed a memory of the actual crime such that the role of the perpetrator was filled in in a very strong way by Mr. Bryant based on his appearance in the live lineup and based on the photograph that Mr. Foster had seen earlier. So by the time he gets to court, he has a strong memory of Mr. Bryant as the person he saw commit the crime, but not necessarily a memory that was formed at the time of the original event.

4RP 121-22.

Bryant testified in his own defense. 4RP 127. He lives in West Seattle but grew up in the area where the robbery occurred, still has family and friends there, and visits often. 4RP 128-31. He was in the neighborhood on the afternoon of November 7 and likely hanging out with friends that day. 4RP 131. But he had never seen Foster before and denied robbing or assaulting him. 4RP 132.

During closing argument, the prosecutor recognized that the case turned on Foster's identification and argued jurors should trust Foster's memory. 5RP 19, 22-31. Defense counsel argued that Foster recognized Bryant, but not from the robbery. He recognized him from the improper initial montage, which tainted everything thereafter. 5RP 42-54.

Bryant was convicted of robbery and now appeals to this Court.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT PERMITTED
EVIDENCE OF THE LINEUP AND THE IN-COURT
IDENTIFICATION.

Impermissibly suggestive out-of-court identification procedures violate due process where there is a substantial likelihood of irreparable misidentification. Simmons v. United States,

390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000). Moreover, these out-of-court identifications taint any subsequent in-court identification. State v. McDonald, 40 Wn. App. 743, 745-748, 700 P.2d 327 (1985).

The defendant bears the burden to demonstrate that a procedure is suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002). Once that burden is satisfied, the court must decide whether there is a substantial likelihood of irreparable misidentification based on several factual considerations. Id. at 433. Factors to be considered include (1) the opportunity of the witness to observe 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 time of the identification; and (5) the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

The trial court's findings of fact must be supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d

58 (2002). The court's ultimate decision on the admissibility of identification evidence is reviewed for abuse of discretion. Kinard, 109 Wn. App. at 431-32.

The analysis in Bryant's case begins with the initial images Officer Connors used within 30 minutes of the robbery. A procedure is suggestive if it "directs undue attention to a particular photo." State v. Eacret, 94 Wn. App. 282, 283, 971 P.2d 109 (1999); see also Linares, 98 Wn. App. at 285 (determining whether anything "unduly attracts attention" to the defendant's photo). Judge Rogers properly found Officer Connors' methods impermissibly suggestive because they drew undue attention to Bryant's photo. He suppressed the results of this montage. CP 22.

This was correct. All four individuals in the color video clips appear younger than Bryant and also differ in other ways, including hair style, weight, clothing, and the absence of facial hair. Compare pretrial exhibit 2 (from 2/19/09) with pretrial exhibits 4-7 (from 2/19/09). And the photo of Bryant looks nothing like the man depicted in the second black and white photo. Particularly distinguishing is this man's long hair. See pretrial exhibit 3 (from 2/19/09).

While Judge Rogers found that Officer Connors had not

tainted any subsequent identifications of Bryant as the assailant, Judge Fox rejected that premature determination and examined the issue anew. CP 22; 1RP 58-59. Ultimately, he adopted some of Judge Rogers' factual findings, disagreed with others, and added some of his own. 2RP 53-63.

More specifically, Judge Fox found that Officer Conners responded to the 911 call and obtained the following description of the robber from Foster: "a Black male, 6'0", 165-175 pounds, medium build, medium complexion, in his mid to late 20s, scruffy beard (like he had not shaved in a few days), green hoody jacket, jeans, a tight do rag over very short hair." 2RP 55; CP 21. After hearing the description, Conners suspected Bryant. He had seen Bryant earlier that day, in the area, wearing a green hoody sweatshirt under a puffy jacket. 2RP 55; CP 21.

Judge Fox found that Conners put together a montage within 30 minutes. 2RP 56; CP 21. Conners showed Foster four subjects on his in-car video and two different subjects using booking photos. Foster immediately selected Bryant's photo. 2RP 56; CP 21. Bryant's photo was unduly suggestive; the second booking photo does not look like Bryant, which necessarily directed Foster to Bryant's photo. 2RP 56-57; CP 22. Judge Fox adopted Judge

Rogers' finding that based on Foster's detailed description of the robber, he had a good opportunity to view the robber and do so accurately. 2RP 57; CP 22.

Regarding the subsequent lineup, Judge Fox found that it was conducted "in accord with what are generally accepted lineup practices," although falling short of what Dr. Loftus would recommend. 2RP 59-60. Police used "[p]roper, if not ideal, techniques." 2RP 62. All of the participants were African-American, and have "somewhat similar physical appearances," although not as similar as what could be achieved through a computer-assisted photographic montage. 2RP 59-60. All the men were within four inches of height, 50 lbs, and 10 years of age. 2RP 60. There were some differences in facial hair and complexion. 2RP 62. Even accepting that cross-racial identifications are more difficult, Judge Fox found that the lineup was not impermissibly suggestive. 2RP 62.

Judge Fox dismissed the impact of the initial photograph identification. Rather than fault Officer Connors for his methods, Judge Fox commended him, indicating that he used "a good and necessary police enforcement technique that should be encouraged rather than discouraged." 2RP 61.

Judge Fox erred in concluding that the lineup was not

impermissibly suggestive. Critically, Judge Fox failed to acknowledge the negative impact of the earlier suggestive montage used by Officer Conners. Instead, as just noted, he praised Conners. Moreover, he lamented that if such a photo could taint everything that followed, it “would basically lead to the dismissal of many, many different cases in this country if that were the law.” 2RP 61.

But the United States Supreme Court has recognized the potential impact of a prior image used in a suggestive manner. “Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.” Simmons, 390 U.S. at 383-84. Dr. Loftus discussed the impact of such postevent information at length in the hearing on the defense motion to suppress. 1RP 70-71, 93-101.

Moreover, this risk is increased because Bryant was the only individual common to both the photo montage and the lineup. The danger of witness misidentification is increased where police show a witness “the pictures of several persons among which the photograph of a single such individual recurs or is in some way

emphasized." Simmons, 390 U.S. at 383; see also Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969) (procedure unfair in part because defendant only person in both lineups). Dr. Loftus also discussed this scientific phenomenon during the pretrial hearing. 1RP 80-81.

While Judge Fox found that the lineup in Bryant's case satisfied generally accepted practices, he recognized there was room for improvement based on Dr. Loftus' suggested methods. Indeed, Loftus testified that the failure to conduct a sequential lineup nearly doubled the likelihood of a false identification. 1RP 84-85. By itself, this undermines Judge Fox's finding there is nothing suspect about the lineup procedure. Moreover, Judge Fox found there were more differences among the lineup participants compared to what was possible in a computer assisted photomontage, and he recognized that cross-racial identifications like the one in this case are more difficult.

But it was the earlier tainted identification that had the greatest impact on the lineup. Without giving proper consideration to two critical factors – the impact of the improper prior photomontage and that Bryant was the only common participant in the montage and lineup – Judge Fox found the lineup not suggestive. This was error.

It is precisely because of these factors the result of the lineup was inadmissible. Like the first photo identification, and largely because of it, the lineup also was impermissibly suggestive. Judge Fox's contrary conclusion is erroneous.

Because the lineup was suggestive, the next question is whether there is a substantial likelihood of irreparable misidentification under the relevant factors. Kinard, 109 Wn. App. at 433. Application of these factors demonstrates a substantial likelihood.

1. Opportunity to View

Foster did not testify at either of the pretrial hearings concerning the identification evidence. Based on the detail in his description of the robber, Judge Rogers found that he had a good opportunity to view the assailant and Judge Fox adopted this finding. 2RP 57.

But it is apparent the robbery took place unexpectedly and very quickly. There was little in the way of conversation and Foster complied in short order. Although Foster had some opportunity to look at the intruder, that opportunity was less than the length of the entire encounter since he was also looking at the second assailant, looking at the gun, and focusing on removing his clothing and

backpack. In McDonald, the incident took far longer – five to seven minutes. But there, as here, the victim was able to observe the suspect’s face for only a portion of that time. This Court described that opportunity as “limited.” McDonald, 40 Wn. App. at 747. Foster’s opportunity was also limited. Judge Fox’s contrary finding is not supported by the evidence.

2. Degree of Attention

As just discussed, Foster’s attention was divided. At times he was looking at the robber, at times he was looking at the accomplice, at times he was looking at the gun, and at times he was looking at his property. Moreover, Foster was under great stress during the encounter. Dr. Loftus explained the negative impact of divided attention and stress on memory. Foster’s attention was affected by both.

3. Accuracy of Prior Description

It appears Judge Fox found Foster’s description of the robber accurate. 2RP 57; CP 22 (reciting Judge Roger’s finding on this point). But it is difficult to compare Foster’s description with Bryant because the State never introduced any evidence establishing Bryant’s height, weight, or age, which can easily be proved through Department of Licensing records.

The only clearly shared attributes are that both men are black, both have a scruffy beard, both have short hair, and both have a green hoody, although Bryant was wearing a puffy jacket over his green hoody and the robber was not. 2RP 55; CP 21. To the extent Judge Fox found Foster's description accurate, the evidence is insufficient to support this finding.

4. Certainty at Identification and Length of Time between Crime and Identification

Significant time passed between the robbery and the lineup identification. The robbery occurred on November 7, 2008. The lineup did not take place until February 25 of the following year.

Judge Fox did not make a finding on Foster's level of certainty at the lineup. Detective Healy testified that Foster was confident in his pick. 2RP 17, 36. Given Dr. Loftus' testimony that certainty and accuracy do not necessarily correlate, however, Foster's level of certainty is of questionable value. As Loftus explained, Foster's selection of Bryant at the lineup provided an additional source of memory reconstruction, increasing the possibility Foster would confidently identify Foster. 1RP 87-88, 90-92.

5. Weighed Against the Corrupting Effect of the Suggestive Identification

As previously discussed, Judge Fox largely discounted any

corrupting effect from the initial improper identification of Bryant. But that procedure increased significantly the chance Foster would identify Bryant as the robber the day of the crime. It also increased significantly the chance Foster would do the same during the lineup because Bryant was certainly familiar to Foster on that date (he had seen his photo) and Bryant was the only man common to both identification opportunities.

Considering all of the circumstances in this case, there is “a very substantial likelihood of irreparable misidentification.” Simmons, 390 U.S. at 384. The first suggestive montage, where Foster identified Bryant as the suspect, tainted everything that followed. The subsequent lineup only made things worse. Given the circumstances, it was hardly surprising that Foster would select Bryant’s photo in the lineup and identify Bryant as the robber at trial.

D. CONCLUSION

All out of court and in court identifications should have been suppressed. They were the State's primary evidence linking Bryant to the crime. Bryant's robbery conviction must be reversed.

DATED this 22nd day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63769-0-1
)	
DWAYNE BRYANT,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DWAYNE BRYANT
DOC NO. 864154
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF FEBRUARY, 2010.

x *Patrick Mayovsky*