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King County Prosecutor
Appellate Unit

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NO. 64177-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN ERAS-DUQUE,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's due process rights by admitting evidence of a show-up identification that was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

2. The trial court erred in denying the motion to suppress the show-up identification.¹

Issues Pertaining to Assignments of Error

Two men robbed a store at gunpoint and forced those present to lie facedown on the ground. After police stopped two men a few blocks from the store, another officer drove two of the witnesses past the men and asked the witnesses if they could identify them as the robbers.

1. Was the show-up identification of appellant impermissibly suggestive where the evidence showed the appellant and the other suspect, Santos Castillo,² were: surrounded by four officers and their patrol cars; forced to lie facedown with handcuffs visible; and identified by two witnesses who sat together in a patrol car, rather than identifying the witnesses independently?

¹ Written findings of fact and conclusions have not been entered but undersigned counsel's understanding is they are in the process of being prepared.

² Castillo pleaded guilty to the robbery and testified Eras was not involved.

2. Did the unduly suggestive circumstances create a substantial likelihood of misidentification where the witnesses had limited opportunity to observe the robbers, were under considerable stress, and conflated or were mistaken about various details of their descriptions of the robbers?

B. STATEMENT OF THE CASE³

1. Procedural facts

The King County prosecutor charged appellant Juan Eras-Duque (“Eras”) with three counts of first degree robbery occurring May 3, 2008. CP 1-4, 49-50. A jury convicted Eras as charged and he was sentenced within the standard range. CP 76-83.

2. Introduction, pretrial hearing, and court ruling to admit

Two men robbed El Abuelo, an Issaquah store selling Mexican goods. The robbers made off with money from the cash register and a customer, rings belonging to the cashier and her husband, and the cashier’s cell phone. After the robbers left, those still present contacted the police.

³ This brief refers to the verbatim reports as follows: 1RP – 2/19/09; 2RP – 6/22/09 (morning); 3RP – 6/22/09 (afternoon); 4RP – 6/23/09; 5RP – 6/24/09 and 6/25/09; 6RP – 6/29/09; 7RP – 6/30/09; 8RP – 7/1/09; and 9RP – 7/6/09 and 8/21/09.

Before trial, Eras moved to suppress two witnesses' show-up identification of Eras and Castillo, an acquaintance of Eras who pleaded guilty to the robbery before Eras's trial but disclaimed Eras's involvement. CP 36-38. The court held a hearing on Eras's motion. 2RP 12-42; 3RP 49-102; 4RP 8-79, 118-21; 5RP 12-62.

Sergeant Kevin Nash was dispatched to El Abuelo and arrived in the area within a few minutes. He saw two men matching the description of the robbers about three blocks north of the store. 3RP 86-87, 91. Dispatch had described two Hispanic men, one wearing a yellow shirt and blue jeans, and the other wearing a brownish shirt and red boots. 3RP 84-85, 95. Eras was wearing red cowboy boots and a brown and white shirt when stopped. 3RP 55, 66. Nash testified Eras's red boots stood out most because he had never seen a man in red boots. 3RP 87-88.

Nash ordered the men to the ground at gunpoint. 3RP 88. Three other officers soon arrived and assisted in handcuffing and frisking Eras and Castillo. 2RP 15, 17, 33-34; 3RP 89. Upon questioning, Castillo admitted he committed the robbery and the devil made him do it. 4RP 55. Eras denied any involvement. 4RP 56.⁴

⁴ The court suppressed Eras's statements to police, finding he did not waive his Miranda rights because the police read the rights in English. 3RP 52; 5RP 69.

About 20 minutes after the initial stop, Officer Christian Munoz drove Juan Hernandez, the customer, and Silvestre Vazquez, the cashier's husband,⁵ past the scene of the stop. Both men identified Eras and Castillo as the robbers. 3RP 61; 4RP 53-54.

Hernandez testified at the suppression hearing that two men, one with a gun, committed the robbery. One wore tennis shoes and the other wore boots. 4RP 12. The man with tennis shoes had tinted or highlighted hair. 4RP 12, 40.

After Hernandez entered the store, the men immediately ordered him to the ground. 4RP 11. The robbery lasted about 10 minutes; however, Hernandez was ordered not to look at the men. 4RP 14.

After the robbery, Officer Munoz told Hernandez the police had stopped two suspects. 4RP 18. Munoz drove Hernandez by two men lying side-by-side on the sidewalk. 4RP 19-20, 32. Hernandez recognized the men based on their footwear and one of the men's hair highlights. 4RP 19-20, 29.

Eras had highlighted hair and wore boots at the time of his arrest. 4RP 27-28; 5RP 63-64; 9RP 68-69. However, at the hearing Hernandez could not identify the boots Eras was wearing when arrested or recall their

⁵ The cashier, Maria Armenta, was too upset to participate in the show-up identification. 4RP 49.

color. 4RP 20-21, 33-34. Hernandez also could not identify Eras at the suppression hearing or trial. 4RP 29; 7RP 33, 43.

Vazquez testified he got a good look at the robbers because their faces were not covered during the robbery. He acknowledged, however, that he was immediately ordered to lie facedown on the floor when the robbers entered the store. 5RP 17.

After the robbery, the police drove Vazquez past two men lying on the sidewalk. 5RP 25, 31-32. Vazquez said he recognized the men by their clothing; in particular, he recognized the red boots and “white” hair of the man who wielded the gun. 5RP 27. Vazquez was 90 percent certain the men in the show-up were the robbers. 5RP 28-29. But at the hearing and again at trial, Vazquez did not identify Eras. 5RP 27; 7RP 112.

Unlike the identifying witnesses, the four officers involved variously asserted either that the suspects were standing and facing the road during the show-up procedure or did not recall how the suspects were displayed. 2RP 18, 41-42; 3RP 58-60, 93; 4RP 50-52, 61.

The court found Eras and Castillo were lying facedown on the ground during the show-up. 5RP 79 (court’s oral ruling). The court concluded that while the identification procedure was suggestive, it was not *impermissibly* suggestive. 5RP 79. And even if the procedure was

impermissibly suggestive, the court concluded, the identifications were sufficiently reliable because the witnesses identified both suspects with a high degree of certainty only a short time after the robbery and after getting a good look at each man. 5RP 81-82. The court therefore denied Eras's motion to suppress the identification. 5RP 83.

3. Trial testimony

Store cashier Maria Armenta testified the robbers entered around 8:30 while she and her husband sat at a table watching television.⁶ 5RP 120. The men entered the store and immediately went to the soda case. 5RP 121. Suddenly one of the men, who had a gun, ordered Armenta and Vazquez to lie facedown on the floor. 6RP 136-37, 140.

The gunman wore blue jeans and tennis shoes. 6RP 137. Armenta did not get a good look at the other man and recalled only his red boots with white trim. 6RP 136, 148, 153, 157.

The gunman ordered Armenta to take money out of the cash register and then returned her to the floor near Vazquez, who was guarded by the man with the boots. 6RP 142. The gunman also made Armenta remove her rings and struck her with the gun after she said there was no more money. 6RP 144-45, 151. The booted man took Armenta's cell

⁶ The door was not visible from the table, but it made a noise when opened. 5RP 117; 7RP 107. Armenta and Vazquez were still at the table when the gunman ordered them to the ground. 7RP 85-86.

phone. 6RP 143, 151. Armenta was uncertain which man took the customer's money. 6RP 151.

Unlike the police officers, Armenta testified men in the Mexican community commonly wore boots of the color and style of those she saw; moreover, El Abuelo sold or could order such boots. 6RP 154, 159-60; cf. 6RP 19 (Sergeant Nash's testimony he had never seen similar boots in years of law enforcement); 8RP 31 (similar testimony by Detective Darrin Benko).

Like Hernandez and Vazquez, Armenta was unable to identify Eras at trial. 6RP 157. Hernandez's girlfriend, who briefly saw one of the men outside the store, was likewise unable to identify Eras. 6RP 132.

The police officers provided testimony generally consistent with their pretrial hearing testimony as to the identification procedure. In addition, Sergeant Nash testified his colleagues found a large amount of money and a cell phone in a bush about 10 feet from where he stopped the men. 6RP 32-33, 45, 88. Castillo had gold rings later identified as belonging to Vazquez and Armenta in his front pocket. 6RP 63. A gun was found under a nearby trashcan near some grass the day after the robbery. 6RP 42; 9RP 15.

Nash also testified the bottoms of Eras's pants were wet when he was stopped. 6RP 42. Police officers testified the grass in the area the

gun was found could have been wet around the time of the robbery. 6RP 42, 81; 8RP 29-30; 9RP 20.

Santos Castillo pleaded guilty to robbing El Abuelo. He moved to Washington a few weeks before the robbery and was staying with Eras's extended family. 8RP 47, 85. He met Eras the day of the robbery. 8RP 49, 86.

The family planned to go to a dance that night at which fancy dress was de rigueur. 8RP 53. Because Castillo needed to buy appropriate attire, he met up with a friend, Miguel, who drove Castillo and Eras to a store Eras knew of so Castillo could buy clothing. 8RP 55, 87-88. Like Eras, Miguel had highlighted hair and wore red or wine-colored boots. 8RP 95.

After Eras got out of the car, Castillo remained a few moments while Miguel gave him a gun. 8RP 58, 91-92. Castillo and Miguel entered the store shortly after Eras. 8RP 61-62, 69. At Miguel's direction, Castillo threatened the people with a gun and stole a wallet, rings, and money from the cash register. 8RP 70, 74. Castillo lost track of Eras after the robbery began. 8RP 70.

While Castillo was removing the woman's rings, something spooked Miguel and he ran out the front door. Castillo never saw him again. 8RP 76. Castillo quickly left the store but he was unfamiliar with

the area and did not know where to hide. 8RP 94. Castillo saw Eras from a distance and tried to catch up with him, but Eras kept walking. 8RP 94. Fearing detection, Castillo tossed the gun and other items. 8RP 93.

C. ARGUMENT

THE TRIAL COURT VIOLATED ERAS'S DUE PROCESS RIGHTS BY ADMITTING AN UNNECESSARILY SUGGESTIVE SHOWUP IDENTIFICATION.

Evidence of a show-up identification should be excluded when the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Rogers, 44 Wn. App. 510, 722 P.2d 1349 (1986) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1983)). Suggestive confrontations increase the likelihood of misidentification, which may violate a defendant's right to due process. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969); U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. Reliability is the linchpin in determining the admissibility of pretrial identifications, however, and reliable identifications can overcome the taint of a suggestive identification procedure. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988).

In determining whether an identification is admissible, this Court determines whether the procedure was impermissibly suggestive, and if so, whether the totality of the circumstances indicates the suggestiveness has rendered the identification unreliable. Taylor, 50 Wn. App. at 485; State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

Show-ups are widely condemned and may be found unnecessarily suggestive where police aggravate the suggestiveness of the procedure. Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987). Generally speaking, show-up identifications are not necessarily suggestive merely because the suspect is handcuffed and standing near a patrol car or surrounded by police officers. See, e.g., State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997), overruled on other grounds, State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001). But Eras and Castillo were not only handcuffed and surrounded by at least four officers and their cars; as the court found, they were also lying facedown for the identification procedure. 5RP 79. Thus, despite the officers' repeated assertions to the contrary, the evidence showed the police did not take care to mitigate the suggestiveness of the identification procedure. Johnson, 817 F.2d at 729.

In addition, at the time of the show-up, Eras was lying next to Castillo, who admitted he was the gunman, a fact that may have suggested "guilt by association" and led witnesses to believe Eras too was involved.

Finally, the witnesses' joint identifications while seated side-by-side in a patrol car exacerbated the suggestiveness of the procedure. See Montiero v. Picard, 443 F.2d 311 (1st Cir. 1971) (joint identification held impermissibly suggestive but conviction affirmed because admission of tainted identifications harmless beyond a reasonable doubt); United States v. Wilson, 435 F.2d 403 (D.C. Cir. 1970) (strongly disapproving of practice of joint witness identifications); United States ex rel. Choice v. Brierley, 363 F. Supp. 178, 188-89 (D.C.Pa. 1973) (joint photographic identification, one-on-one station house confrontation, limited opportunity of witnesses to observe robber, and other circumstances led court to find identification procedures denied accused due process); see also United States v. Wade, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (reliability of joint identifications has been repeatedly discredited as "fraught with dangers of suggestion" (citation omitted)). The aggregation of these circumstances resulted in an unduly suggestive procedure in Eras's case.

Contrary to the trial court's finding, the suggestiveness of the identification procedure created a substantial likelihood of irreparable misidentification. This Court considers the factors set out in Neil v. Biggers to evaluate reliability in the face of a suggestive identification. Rogers, 44 Wn. App. at 515-16. These factors include the opportunity to

view the offender at the time of the crime, the witness's degree of attention, the accuracy of his description of the suspect, the level of certainty demonstrated during the identification, and the time between the crime and the identification procedure. Neil, 409 U.S. at 199-200; Rogers, 44 Wn. App. at 515-16; McDonald, 40 Wn. App. at 746. These factors weigh against a finding of reliability.

First, the witnesses had a limited opportunity to view the robbers. Opportunity to observe is often measured in minutes. See Rogers, 44 Wn. App. at 516 (approximately 20 minutes socializing with defendant); State v. Burrell, 28 Wn. App. 606, 611, 625 P.2d 726 (1981) (two witnesses observed defendant for five minutes under street lights, and one witness had a second encounter); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (1981) (police reserve officer involved in a six minute face-to-face confrontation with his assailant); cf. McDonald, 40 Wn. App. at 747 (five to six minutes not sufficient when witness's view obstructed for half of the duration of the crime). A fleeting glimpse of the criminal is not sufficient. State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278 (1980); cf. State v. Booth, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983) (45-second observation period is sufficient in case where identification went to an automobile and corroborating evidence was found in the automobile).

Although here the robbery itself lasted longer, the two male witnesses were, unlike Armenta, facedown on the ground and unable to observe the robbers at leisure throughout the robbery. McDonald, 40 Wn. App. at 747. The witnesses' limited ability to observe is borne out by the fact that, among other inconsistencies, (1) Vazquez described the man with the boots as the gunman and (2) Hernandez said the man with highlighted hair wore tennis shoes, not boots. 4RP 39-40; 5RP 27; see McDonald, 40 Wn. App. at 474 (although witness saw individual for two to three minutes, fact that witness could not recall if robber had a moustache weighed against a finding the identification was nonetheless reliable).

Second, both Hernandez and Vazquez were held at gunpoint during the crime. And Vazquez suffered the additional stressor of viewing his wife held at gunpoint and assaulted. Fear or stress can affect perception, and Washington courts have recognized the relevance of these factors for accuracy of identification. See, e.g., State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984) (witness identifications reliable where they initially saw defendant in a non-stressful situation at the time of the crime); Taylor, 50 Wn. App. at 487 (expert testimony regarding effects of stress, including fear, on human perception and memory is relevant to reliability of eyewitness testimony).

As for the third factor, the witnesses' descriptions of the robbers were not consistent or were not accurate. See, e.g., McDonald, 40 Wn. App. at 747 (inaccurate description of criminal's clothing is a factor favoring reversal). Vazquez described the man with boots as the gunman. Hernandez testified at the suppression hearing that the man wearing tennis shoes (who he asserted had highlighted hair) took his wallet. 4RP 22, 40. But in a statement Hernandez made night of the robbery, he said the gunman wore boots and a yellow shirt and was the person who took his wallet. 4RP 37-38. The witnesses' inconsistent and at times vague descriptions weigh against the finding the identifications were reliable despite the suggestiveness of the procedure. McDonald, 40 Wn. App. at 747.

As for the remaining factors, the identification occurred shortly after the robbery and the witnesses asserted their certainty as to the identification. But considering the totality of the circumstances, the suggestiveness of the show-up identification created a substantial likelihood of irreparable misidentification. The trial court erred in concluding otherwise and in denying Eras's motion to suppress the identification. The remedy is reversal and remand for a new trial. Id. at 748.

Like other due process violations, the violation in Eras's case may be subject to a constitutional harmless error analysis, which requires that a reviewing court be convinced beyond a reasonable doubt that any rational jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985). The State cannot meet this burden here. The witnesses were unable to identify Eras at trial. Unlike the police officers, Armenta — a Mexican woman working in a store selling Mexican clothing and footwear — testified boots such as Eras's were not unique but commonly worn by men in the Mexican community. Castillo testified Eras was not involved in the robbery and suggested he only caught up with Eras moments before seizure by the police. Thus, only the show-up identification suggested Eras participated in the robbery. Under these circumstances, the State cannot meet its heavy burden, and reversal is required.

D. CONCLUSION

The trial court erred in denying Eras's motion to suppress the show-up identification and the error was not harmless beyond a reasonable doubt. This Court should therefore reverse Eras's convictions and remand for a new trial.

DATED this 30TH day of April, 2010.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64177-8-I
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JUAN ERAS-DUQUE,)	
)	
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 30TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUAN ERAS-DUQUE
 DOC NO. 333673
 MONROE CORRECTIONAL COMPLEX
 P.O. BOX 777
 MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*

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