

66849-8

66849-8

NO. 66849-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

HOWARD LEE ROSS

Appellant.

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CLERK OF COURT
JULIA M. HARRIS

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

The Honorable Catherine Shaffer

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted an unduly suggestive and unreliable show-up identification, in violation of Mr. Ross's due process rights.

2. The court erred when it entered CrR 3.6 Hearing Conclusion of Law 2, that the security guard had a good opportunity to view the suspect at the time of the crime and a good opportunity to see the suspect's face, because it is not supported by substantial evidence. CP 45.

3. The court committed error when it entered CrR 3.6 Hearing Conclusion of Law 3, stating that the witness's degree of attention and accuracy of description were very good, because it is not supported by substantial evidence. CP 45.

4. The court erred in entering CrR 3.6 Hearing Conclusion of Law 4, that the show-up procedure was not unduly suggestive. CP 46.

5. The court erred in entering CrR 3.6 Hearing Conclusion of Law 5, that the show-up procedure did not create a substantial risk of misidentification. CP 46.

6. The trial court erred in entering Conclusion of Law II.A, finding that the Mr. Ross unlawfully entered or remained unlawfully

in the Bellevue Nordstrom Store, because there is insufficient evidence to place Mr. Ross at the scene. CP 37.

7. The trial court erred in entering Conclusion of Law II.B, stating that the defendant's [Mr. Ross's] "entering or remaining was with the intent to commit a crime against a person or property therein," because there is insufficient evidence to place Mr. Ross at the scene. CP 37.

8. The lower court violated RCW 10.77.060 when it continued with trial after observing indications of incompetence.

9. The lower court violated the Fourteenth Amendment to the United States Constitution and Article 1, § 3 of the Washington Constitution when it allowed a potentially incompetent defendant to stand trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An identification procedure is illegal if it is so impermissibly suggestive it creates a substantial risk of misidentification. A suggestive procedure is one that unduly directs the witness's attention to one individual over another. In this case, the witness was told that officers "may have stopped the person matching the description," and was then shown only one suspect, who had been detained next to a police car with flashing lights and

a bag of store merchandise. Was the identification procedure impermissibly suggestive?

2. In order to determine whether a suggestive identification procedure created a likelihood of misidentification, Washington courts consider five factors: 1) the opportunity of the witness to view the suspect at the time of the offense, 2) the witness's degree of attention, 3) the accuracy of the witness's description, 4) the level of certainty at confrontation, and 5) the time between the offense and the confrontation. Did a suggestive identification procedure create a serious likelihood of misidentification when the witness only viewed the suspect for less than two minutes, much of that time from the back, later described the suspect as 3 inches above Mr. Ross's height, said that the suspect had "short black hair" when Mr. Ross had been wearing a hat, and admitted to paying only passing attention for part of the extremely short time he viewed the suspect?

3. Cross-racial identification has been found by courts and experts to be unreliable. In this case, the witness is Asian/Pacific Islander, while Mr. Ross is African-American. Did the cross-racial nature of the identification contribute to the procedure's substantial likelihood of misidentification?

4. A defendant must not be convicted unless there is sufficient evidence to prove beyond a reasonable doubt that the defendant committed each element of the offense. In this case, the judge said that she was discounting the positive identification from the show-up procedure when considering whether there was sufficient evidence to convict Mr. Ross. Absent the show-up identification, there is no evidence to place Mr. Ross at the scene of the crime. Must Mr. Ross's conviction be reversed?

5. An incompetent person may not stand trial. After witnessing evidence of incompetency, trial judges in Washington must stop proceedings and order an evaluation of the defendant. When he was arrested, Mr. Ross said he was going on a spaceship and worried about being micro-chipped. In court, he stated that he had ESP. Must Mr. Ross's conviction be reversed because the trial judge did not order a competency hearing?

C. STATEMENT OF THE CASE

1. Facts and Show-up Identification

Shortly after 7:00 pm on December 8, 2010, Nordstrom security guard Aaron Aiu was standing in the women's fragrance section when he saw a man approach the Gucci display in the

men's department. 2RP 5–6.¹ He had not seen the man enter the store. 2RP 5. While on the job, Aiu saw several hundred people come through Nordstrom every day. 2RP 8. Aiu paid less attention to individuals who hadn't given him any "indicators" of potential theft. 2RP 8–9. Prior to picking up any expensive merchandise, the man Aiu saw gave him no "indicators." 2RP 9.

The man stood at the Gucci table for around 15 seconds. 2RP 8. Aiu was standing 10–12 feet away. 2RP 5. The man then took two bags and a hat, and turned and started heading toward the exit. 2RP 6–7. His back was to Aiu. 2RP 7. The entire observation took two minutes or less. 2RP 8.

Aiu followed the man out of the exit, and the man started running. CP 3. He got into a vehicle. CP 3. Aiu then radioed another security guard to call the police, providing a description of the man he had seen. He said that the man was African-American, was wearing a Mariners jacket and jeans, that he was 6' 2", and that he had short, black hair. 2RP 10. The surveillance video of the incident shows a hat covering the man's hair. 2RP 22–23. Aiu later

¹ The verbatim report of proceedings consists of three volumes, which are referred to herein as follows:

03/7/2011	-	1RP
03/8/2011	-	2RP
03/18/2011	-	3RP

said that he couldn't remember if there was a hat or a do-rag, or if the hat came down over the man's ears or rested above them. 2RP 22. At the time of the incident, Aiu also described the vehicle he had seen and gave its license plate. 1RP 15.

Bellevue Police Officer Chris Nygren was patrolling traffic near the Nordstrom, and saw a car pass that matched the description that was dispatched at 7:11 pm. 1RP 12. Nygren saw the vehicle stop and a passenger exit. 1RP 15. At 7:15, after noticing that the passenger was carrying Gucci bags, Nygren detained the passenger, Howard Ross. 1 RP 15–16; CP 3. Nygren handcuffed Ross. 1RP 16. Two other officers, Aclair and Curtis, arrived on the scene. 1RP 16.

Officer Curtis left to go to Nordstrom to pick up Aiu for a show-up identification. 1RP 16. Aiu was informed that the police "may have stopped the person matching the description." 2RP 11. Curtis drove Aiu to the sidewalk where Mr. Ross was detained, and as the car passed where Mr. Ross was standing, Mr. Aiu identified him as the suspect. 2RP 14. He identified Mr. Ross from inside the police car, from ten feet away. 2RP 14. At the time, Mr. Ross was in handcuffs and police cruiser lights were flashing. 1RP 29. Mr. Ross was 5-10 feet away from the cruiser and flashing lights. 2RP 13.

The Gucci bags were next to him on the ground. 1RP 36. Curtis arrested Ross at 7:36 pm. CP 3. As he was being handcuffed, Mr. Ross made incoherent statements. CP 3. He stated that Curtis was micro-chipping him, and that Ross would be going on a spaceship. CP 3.

Mr. Ross is 5'11," not 6'2". 2RP 63–64. Mr. Ross is African-American. Ex. 1 at p. 13 (Curtis's arrest report).² Mr. Aiu is Asian/Pacific Islander. Ex 1 at p. 1 (Case report).

2. Courtroom Proceedings

In court, Mr. Ross waived his right to a jury trial. 1RP 7. Still, he refused to sign the waiver form, stating, "I just don't feel like I should sign any of this stuff." 1RP 7. The court proceeded with a CrR 3.6 suppression hearing on the issue of the show-up identification. 1RP 9 – 2RP 39.

Following the hearing, Mr. Ross submitted to a stipulated facts trial. 2RP 51. When the court inquired into the reason that Mr. Ross would be willing to give up all of his trial rights, Mr. Ross replied in part that there had been discrepancies between the witness's description and Mr. Ross's physical characteristics. 2RP 52–53. The court replied that "people can give pretty good

² Exhibit 1 was supplementally designated and a copy of the relevant pages is attached as Appendix A.

descriptions of other people without getting height right . . . it's not like you are a tiny little Asian person, for example." 2RP 53–54.

The court proceeded to ask whether anyone had threatened Mr. Ross if he didn't give up his trial rights. 1RP 54–55. He replied, "No, I won't be in trouble if I keep talking about the things I can do. They don't tell me about this trial specifically, no." The colloquy continued:

Court: Okay. Did anybody promise you some sort of benefit or good thing if you give up your trial rights?

Ross: Well, not specifically the trial rights, I would say. But, I was told—well, I can't even say that. Oh, man.

Court: You may have had plea offers, but I'm asking something different, which is, did somebody say you're going to get a good—

Ross: What if I didn't see them say it, but, I know they say it, because I know how I talk to people.

Court: Okay. To your knowledge, has [the prosecutor] or anybody from the state promised you anything to get you to give up your right to see the witnesses testify or call your own witnesses?

Ross: From his mouth talking to me face to face?

Court: Yes.

Ross: No, I can't say that.

Court: But you suspect that the State—

Ross: I suspect it, yes.

Court: Is that why you're doing this, because you suspect the State wants you to give up your right to trial?

Ross: I suspect because I have been told in the way that, you know, basically that I was going to win regardless, and all that. So, you know. So, I mean, I feel like I'm going to win But [the prosecutor] didn't say that out of his mouth to me in my face.

[The Court asked the defense attorney if he knew of any promises implicitly or explicitly made to Mr. Ross, and the attorney demurred.]

Ross: What's implicitly?

Court: Something that isn't said but it's implied.

Ross: Oh no, it wasn't like that, it was more like ESP.

2RP 54–57. The court continued the colloquy and then proceeded to review the stipulated facts, finding Mr. Ross guilty. 2RP 69.

During her oral findings of fact and conclusions of law, the judge explained that she was setting aside the show-up identification, and finding Mr. Ross guilty based on the other evidence in the case.

2RP 72, 75.

Mr. Ross appeals. CP 43.

D. ARGUMENT

1. THE COURT ERRED BY FAILING TO SUPPRESS THE IMPERMISSIBLY SUGGESTIVE AND UNRELIABLE SHOW-UP IDENTIFICATION

a. An out-of-court identification procedure violates due process when it is so suggestive it creates a substantial likelihood of misidentification. When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it cannot be admitted. State v. Hilliard, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); Manson v. Brathwaite, 432 U.S. 98, 144, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). This is a two-step inquiry: first, a court must determine whether the identification procedure is suggestive. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). A suggestive identification procedure is one that unduly calls attention to one individual over others. Id. If that test is satisfied, the court moves to the question of whether the suggestiveness created a substantial likelihood of misidentification. Id. There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and

confrontation. State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000); Neil v. Biggers, 409 U.S. 188, 199–200, 193 S.Ct. 357, 34 L.Ed.2d 401 (1972).

Against this standard, the show-up procedure conducted in Mr. Ross's case was so suggestive as to create a substantial likelihood of misidentification.

b. The one-man show-up identification, in which Mr. Ross was standing next to a police vehicle and Nordstrom merchandise, was impermissibly suggestive. In the context of a photo identification, the display of a single individual to a witness is impermissibly suggestive as a matter of law. State v. Maupin, 63 Wn. App. 887, 896, 822 P.2d 355 (1992) (citing Brathwaite, 432 U.S. at 116). This Court noted that "the practice of showing suspects singly to persons for the purpose of identification has been widely condemned." State v. Rogers, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986).

In this case, Officer Aiu was taken only to see Mr. Ross; Ross was not one of multiple options in a scenario that would have required Aiu to use his actual recollection to pick Ross as the suspect. The suggestiveness of the procedure was compounded by several other factors. First, prior to being picked up for the show-up,

Aiu was told that the police “may have stopped the person matching the description.” 2RP 11. A verbal affirmation from the police that the subject could be the crime suspect weighs in favor of suggestiveness. See State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985). Second, Aiu identified Ross when Ross was standing within five to ten feet of a police cruiser with its lights flashing. 1RP 29; 2RP 13. Proximity to a police vehicle is also suggestive. See State v. Booth, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983). Finally, Ross was situated next to Gucci handbags, when Aiu had reported Gucci items stolen. 1RP 36. Under Washington law, the procedure used to identify Mr. Ross was impermissibly suggestive.

c. The suggestive show-up procedure created a substantial likelihood of misidentification by a witness who saw a moving suspect from at least ten feet away, for less than two minutes. Since the show-up procedure used with Mr. Ross was unduly suggestive, the court must evaluate the five Biggers factors to determine the likelihood of misidentification. Barker, 103 Wn. App. at 905.

In this case, three of the five factors indicate that the suggestiveness of the procedure created a considerable risk of

misidentification. The first factor is the opportunity that the witness had to view the suspect at the time of the crime. Barker, 103 Wn. App. at 905. Courts consider the amount of time that a witness had to view the offender and the circumstances under which the observation took place. For example, in State v. Rogers, the court explained that the witness had a good opportunity to view the witness when they were both in the same room for 20 minutes, and the suspect was “never out of [the witness’s] sight.” 44 Wn. App. 510, 516, 722 P.2d 1349 (1986). In State v. Traweek, the witness saw the suspect “face-to-face” when he came over to her and ordered her to lie on the floor. 43 Wn. App. 99, 104, 715 P.2d 1148 (1986) (abrogated on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)). The court counted that factor against the likelihood of suggestiveness. Id. In contrast, the court in McDonald stated that the witness’s opportunity to view the suspect was “limited” when the criminal incident took five to six minutes, and two to three of those minutes the suspect was not directly in the witness’s view. 40 Wn.App. at 747. The court weighed the other factors and explained that the identification was unreliable. Id.

In this case, Aiu saw the suspect in Nordstrom for two minutes or less. 2RP 8. While the suspect initially walked toward

Aiu, facing him, he then turned to the Gucci table, where he stood for 15 seconds. 2RP 8. Aiu was 10-12 feet away. 2RP 5. Aiu never got *closer* to the suspect than that for a full view of his face. Rather, Aiu followed the suspect from behind as the suspect turned and moved quickly out of Nordstrom. 2RP 7. Once outside, the suspect began running. CP 3. There was no close observation, and certainly no face-to-face encounter. These circumstances provided less opportunity for Aiu than for the witness in McDonald to see the respective suspects. The court erred when it found that there was a good opportunity for Aiu to view the offender.

The second factor that courts consider is the degree of attention the witness paid to the offender at the time of the crime. Barker, 103 Wn. App. at 905. In Traweek, the witness stated that she “watched the two men closely from the moment they entered the store.” 43 Wn. App. at 104. In State v. Fortun-Cebada, the witness spoke with the offender, walked down the street with him, and hugged him before parting. 158 Wn. App. 158, 171, 241 P.3d 800 (2010). The court stated that these circumstances did not create a substantial likelihood of misidentification. Id. In contrast to both of those cases, Aiu was not paying close attention to the suspect until the point that he reached the Gucci table. 2RP 8–9.

Aiu did not see the man enter the store. 2RP 5. On typical days, Aiu sees several hundred people in Nordstrom. 2RP 8. Aiu was not paying close attention to the man even for the entirety of the brief time that he viewed him. 2RP 8–9. This limited attention contributes to the likelihood of misidentification.

The third factor is the accuracy of the witness’s description. Barker, 103 Wn. App. at 905. It is clear under Washington law that descriptions need not be perfect in order to be accurate, thus satisfying the third prong. See, for example, Rogers, 44 Wn. App. at 516 (“Baker’s description of Rogers was essentially accurate.”); State v. Cook, 31 Wn. App. 165, 172–73, 639 P.3d 863 (1982) (all witnesses gave “fairly accurate” descriptions”).

But some minor differences between a witness’s description and the identified suspect’s appearance have lead courts to weigh this factor against admissibility. For example, in McDonald, the witness had stated that the suspect wore a blue short-sleeved shirt and jeans. 40 Wn. App. at 747. When the identified suspect was arrested, he was wearing khaki pants and a long-sleeved shirt. Id. In this case, there were two major discrepancies in Aiu’s initial identification. First, he stated that the perpetrator was 6’2” tall. 2RP 10. Mr. Ross’s drivers license shows that he is actually 5’11”. 2RP

63–64. Second, Aiu noted that the man had short, black hair. 2RP 10. But surveillance video of the incident shows a hat covering the man’s hair. 2RP 22–23. When questioned about the presence of a hat, Aiu said that he could not remember if it had been a hat or a do-rag, or if the hat came down over the suspect’s ears or not. 2RP 22. Given the short time that Aiu had to view the perpetrator and his divided attention, he third factor also weighs against admission of the identification.

The fourth factor is the witness’s level of certainty. Mr. Aiu did not hesitate in identifying Mr. Ross. 1RP 19. But many courts have noted that there is no correlation between an eyewitness’s level of certainty and the accuracy of the identification. See, for example, Brodes v. State, 614 S.E.2d 766, 770–71 (Ga. 2005) (“In the 32 years since the decision in Neil v. Biggers, the idea that a witness’s certainty in his or her identification of a person as a perpetrator reflected the witness’s accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies.”) (internal quotation marks omitted); Jones v. State, 749 N.E.2d 575, 586 (Ind.App. 2001); see also Krist v. Eli Lilly Co., 897 F.2d 293, 296 (7th Cir. 1990).

Thus, three of the five Biggers factors indicate that the

suggestive show-up procedure created a substantial likelihood of misidentification. The fourth factor should not weigh heavily in favor of admission. As a whole, the test shows that the trial court should have found that there was a substantial likelihood of misidentification in Mr. Ross's case.

d. The cross-racial nature of the show-up created a substantial risk of misidentification. Eyewitness misidentification is a question of due process. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Courts are required to look to the totality of the circumstances to determine whether the identification procedure violated due process. To give structure to the totality-of-the-circumstances test, Washington courts have relied on the five Biggers factors for over thirty years. See, e.g., State v. Hanson, 46 Wn. App. 656, 664, 731 P.2d 1140 (1987); State v. Christanson, 17 Wn. App. 264, 268, 562 P.2d 671 (1977).

In the interim, a substantial body of literature, both legal and scientific, has emerged questioning the reliability of eyewitness identifications. It is now widely noted that eyewitness misidentifications are the leading cause of wrongful convictions. State v. Riofta, 166 Wn.2d 358, 371, 209 P.3d 467 (2009). In particular, cross-racial identifications have come under scrutiny for

their repeatedly inaccurate results. See State v. Cheatam, 150 Wn.2d 626, 646, 81 P.3d 830 (2003), citing Thomas Dillickrath, Expert Testimony on Eyewitness Identification: Admissibility and Alternatives, 55 U. Miami L. Rev. 1059, 1063–65 (2001); United States v. Jernigan, 492 F.3d 1050, 1054 (9th Cir. 2007), citing Harvey Gee, Eyewitness Testimony and Cross-Racial Identification, 35 New Eng. L. Rev. 835 (2001).

Washington courts have also begun to grapple with the implications of these new findings on criminal procedure. Most recently, in State v. Allen, this Court held that the failure to allow a jury instruction on cross-racial identification was not a violation of due process. 161 Wn. App. 727, 745, 255 P.2d 784 (2011), review granted, ___ Wn.2d ___ (Case No. 86119-6, Sept. 26, 2011). The court wrote at length about the problems of cross-racial identification, but expressed caution about adopting a rule that might allow instructions that commented on the weight of the evidence. Id. at 745.

In this context, there is no such concern. The five-factor Biggers analysis is used solely by courts, and not by juries. Cf id. at 741–45. In light of the inherent unreliability of cross-racial identifications, this Court should consider the racial composition of

an identification procedure as an additional factor in determining whether or not an identification procedure creates a substantial likelihood of misidentification. Doing so would bring the law more closely in line with the current, and evolving, science: cross-racial identifications are simply less reliable than identifications within one race. Reliability is the touchstone of the evaluation of the likelihood of misidentification. State v. Vaughn, 101 Wn.2d 604, 607–08, 682 P.2d 878 (1984). Thus, including cross-racial analysis in the matrix would be an appropriate, and timely, modification.

The case at bar involved a cross-racial identification: Mr. Ross is African-American, while Mr. Aiu is Asian/Pacific Islander. Ex. 1 at p. 1. This fact alone likely contributed to the unreliability of the show-up identification. See generally Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984).

This additional factor further supports the conclusion that Mr. Aiu's identification of Mr. Ross was tainted by a substantial risk of misidentification. The trial court should have excluded the evidence.

e. Without the out-of-court identification, there was not sufficient evidence to convict Mr. Ross of burglary in the second degree. The conviction must be reversed. In her oral findings, the

trial judge explained that she was not considering the show-up identification in the evidence used to convict Mr. Ross of second-degree burglary. 2RP 72, 75. But in the written findings, the judge concluded that Aiu had positively identified Mr. Ross. CP 37. In either case—either because the judge voluntarily excluded the suggestive identification or because it should have been suppressed due to its procedural flaws, a consideration of the evidence *without* the show-up is not sufficient to convict Mr. Ross.

The due process guarantees of Article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution require that every element of a charged crime be proved beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Without the show-up identification, there is simply no evidence to place Mr. Ross at the scene of the particular crime of which he is accused. That Mr. Ross had a similar appearance to the suspect and carried similar items to those missing from the store is merely circumstantial evidence. A conviction that is not supported by substantial evidence must be reversed.

2. MR. ROSS'S CONVICTION MUST BE REVERSED
BECAUSE THE TRIAL COURT VIOLATED WASHINGTON
STATUTES AND THE CONSTITUTION BY NOT
CONDUCTING A COMPETENCY HEARING

a. As soon as a court has reason to doubt a defendant's competency, trial may not proceed. Both statutory and constitutional law prohibit the trial of an incompetent individual. State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); RCW 10.77.050. The federal standard for competency is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational [and] factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

In Washington, protections for defendants are even greater. In re the Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Competency to stand trial is based on (1) whether the accused is capable of properly understanding the nature of the proceedings against him and (2) whether he is capable of rationally assisting his legal counsel in the defense of his cause. RCW 10.77.010(15). The law states, "[N]o incompetent

person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050.

A court must make a competency determination if it has reason to doubt the defendant’s competence to stand trial. Godinez v. Moran, 509 U.S. 389, 391, 402 n.13, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); Drope, 420 U.S. at 178-80. “The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the ‘defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.” Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). Where there is a substantial question of doubt regarding whether a defendant is competent to stand trial, Washington courts have held that due process requires the court to stop or enjoin proceedings and conduct a competency hearing. Fleming, 142 Wn.2d at 863; State v. Hicks, 41 Wn. App. 303, 308, 704 P.2d 1206 (1985).

The procedures for handling a defendant with questionable competency are outlined in RCW 10.77. They are mandatory. See Wicklund, 96 Wn.2d at 805. After a party or the court raises doubts as to the defendant’s competency, the court must order an

evaluation of the defendant by proper experts. RCW 10.77.060.

Upon completion of the evaluation, the court must then determine the individual's competency to stand trial, plead guilty, or proceed pro se. Fleming, 142 Wn.2d at 863.

b. The trial court, which had several reasons to question Mr. Ross's competency before the end of the stipulated facts trial, erred by not stopping the proceedings and ordering an evaluation. There are no definitive signs that require a competency hearing, and much discretion rests with the trial judge. City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985); State v. O'Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979). Still, where there are clear indications that a defendant is not behaving rationally, he is not competent to stand trial and the law requires that he undergo an evaluation. See RCW 10.77.060. For example, in State v. Marshall, the defendant suffered from paranoia and auditory hallucinations. 144 Wn.2d 266, 271, 29 P.3d 192 (2001). The court held that it was error not to either allow him to withdraw a guilty plea or conduct a competency hearing. Id. at 281–82. One indication from counsel that a defendant may not be competent is enough for a court to need to order a competency hearing. State v. Madsen, 168 Wn.2d 496, 509–10, 229 Wn.2d 714 (2010).

In this case, Mr. Ross stated that he was “going on a spaceship” and that a police officer was “micro-chipping” him when he was arrested. CP 3. The report with these statements was submitted to the court as part of the stipulated facts trial. 2RP 60. In court, Mr. Ross demonstrated further indications of delusion and paranoia: he stated that he had gotten the message over “ESP” that he was going to win his case. 2RP 57. He repeatedly referred to what “they” told him, but said that they did not tell him “face to face.” 2RP 54–57.

c. The court’s failure to inquire into Mr. Ross’s competence requires reversal of his conviction. Mr. Ross was denied due process when the court did not order a competency evaluation after witnessing reasons to doubt his competency. His conviction must be reversed. See Fleming, 142 Wn.2d at 863–64; State v. Anene, 149 Wn. App. 944, 956, 205 P.3d 992 (2009).

E. CONCLUSION

For the reasons set forth above, Mr. Ross respectfully requests that this Court reverse his conviction for burglary in the second degree.

DATED this 3rd day of OCTOBER, 2011.

Respectfully submitted:


LINDSAY CALKINS (Rule 9 No. 9117856)


LILA J. SILVERSTEIN (WSBA No. 38394)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

BELLEVUE POLICE DEPARTMENT
CASE REPORT

CASE NO.

2010-00063693

PERSONS INFORMATION

PERSON 1	SUBJECT CODE Registered owner		NAME (LAST, FIRST, MIDDLE) Woody, Nichelle Floretta									
	ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 3635 Courtland PL S Lower Seattle, WA 98144								PRIMARY PHONE		OTHER PHONE	
	DOB 12/18/1966	AGE 43	RACE Black	SEX F	HEIGHT 5' 03	WEIGHT 180	HAIR COLOR Black		EYE COLOR Brown			
	DL # /DL STATE WOODYNF341RQ / WA		COMPLEXION	BUILD	DISTINCTIVE FEATURE		OCCUPATION					
	SCHOOL/EMPLOYER NAME								SCHOOL/EMPLOYER PHONE			
SCHOOL/EMPLOYER ADDRESS (STREET ADDRESS, CITY, STATE, ZIP)								STATEMENT TAKEN None				
PERSON 2	SUBJECT CODE Victim		NAME (LAST, FIRST, MIDDLE) Nordstrom,									
	ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 100 Bellevue Square Bellevue, WA 98004								PRIMARY PHONE (425)455-5800		OTHER PHONE	
	DOB	AGE	RACE	SEX	HEIGHT	WEIGHT	HAIR COLOR		EYE COLOR			
	DL # /DL STATE		COMPLEXION	BUILD	DISTINCTIVE FEATURE		OCCUPATION					
	SCHOOL/EMPLOYER NAME								SCHOOL/EMPLOYER PHONE			
SCHOOL/EMPLOYER ADDRESS (STREET ADDRESS, CITY, STATE, ZIP)								STATEMENT TAKEN				
PERSON 3	SUBJECT CODE Witness		NAME (LAST, FIRST, MIDDLE) Aiu, Aaron K									
	ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 100 Bellevue Square Bellevue, WA 98004								PRIMARY PHONE (425)455-5800		OTHER PHONE	
	DOB 12/15/1976	AGE 33	RACE Asian-Pacific Islander	SEX M	HEIGHT 5' 8	WEIGHT 200	HAIR COLOR Black		EYE COLOR Brown			
	DL # /DL STATE AIU**AK245RN / WA		COMPLEXION	BUILD	DISTINCTIVE FEATURE		OCCUPATION Security guard					
	SCHOOL/EMPLOYER NAME Nordstrom								SCHOOL/EMPLOYER PHONE (425)455-5800			
SCHOOL/EMPLOYER ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 100 Bellevue Square Bellevue, WA 98004								STATEMENT TAKEN Written				
PERSON 4	SUBJECT CODE Witness		NAME (LAST, FIRST, MIDDLE) Stanton, Alan Craig									
	ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 100 Bellevue Square Bellevue, WA 98004								PRIMARY PHONE (206)755-9002		OTHER PHONE (425)455-5800	
	DOB 10/09/1950	AGE 60	RACE White	SEX M	HEIGHT 5' 9	WEIGHT 165	HAIR COLOR Gray or partially gray		EYE COLOR Hazel			
	DL # /DL STATE		COMPLEXION	BUILD	DISTINCTIVE FEATURE		OCCUPATION Sales					
	SCHOOL/EMPLOYER NAME Nordstrom								SCHOOL/EMPLOYER PHONE (425)455-5800			
SCHOOL/EMPLOYER ADDRESS (STREET ADDRESS, CITY, STATE, ZIP) 100 Bellevue Square Bellevue, WA 98004								STATEMENT TAKEN Written				

HEREBY CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT:

REPORTING OFFICER NAME AND ID#

DATE

REVIEWING SUPERVISOR

DATE



BELLEVUE POLICE DEPARTMENT

450 110th Avenue NE, Bellevue WA 98004

CASE REPORT

CASE NO. 2010-00063693

EVENT	DATE REPORTED	TIME	INCIDENT TYPE	
	12/08/2010	19:11	Theft	
	OCCURRED BETWEEN	TIME	LOCATION OF OCCURRENCE	REPORTING DISTRICT
	12/8/2010	19:05	100 BELLEVUE SQUARE Bellevue, WA 98004	1-1
	AND	TIME	REPORTING OFFICER (NAME AND ID #)	STATUS / DATE
	12/8/2010	19:09	Curtis / P449	Closed 12/8/2010

OFFENSE	STATUTE/ORDINANCE #	COMMIT/ATTEMPT	DESCRIPTION OF STATUTE/ORDINANCE
	9A.56.030(1)[2303]	Commit	THEFT 1ST DEGREE OTHER THAN FIREARM OR MV [SHOPLIFTING]
	9A.52.030[2205]	Commit	BURGLARY 2ND DEGREE [BURGLARY-NO FORCED ENTRY-NONRESIDENCE]

SUSPECT	SUBJECT CODE	NAME (LAST, FIRST, MIDDLE)		
	Suspect	Ross, Howard Lee		
	ADDRESS (STREET ADDRESS, CITY, STATE, ZIP)			PRIMARY PHONE
	24922 111 AVE SE 2 Kent, WA 98030			
	DOB	AGE	RACE	SEX
	06/02/1977	33	Black	M
	HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR
5' 11	175	Black	Brown	
INJURY/TREATMENT				
DL # / DL STATE	COMPLEXION	BUILD	DISTINCTIVE FEATURE	
ROSS*HL232LB / WA				
SCHOOL/EMPLOYER NAME		SCHOOL/EMPLOYER PHONE		
SCHOOL/EMPLOYER ADDRESS (STREET ADDRESS, CITY, STATE, ZIP)				

CASE SUMMARY	ASSOCIATED CASE	2010-
	Summary: Suspect arrested for Theft 2/Burglary after shoplifting over \$2000 worth of Gucci items. Suspect was trespassed from Nordstrom previously.	
	Disposition: Case closed by arrest.	

HEREBY CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT:			
REPORTING OFFICER	DATE	REVIEWING SUPERVISOR	DATE
Curtis / P449	12/08/2010	Flores / L62	12/08/2010