

69943-1

69943-1

2011 OCT 19 11:21:54

NO. 69943-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE WHITE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE J. WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

RAUL R. MARTINEZ
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
THE TRIAL COURT DID NOT ERR IN PERMITTING THE IN-COURT IDENTIFICATION OF WHITE BECAUSE IT WAS BASED ON OBSERVATIONS INDEPENDENT OF THE IMPERMISSIBLE IDENTIFICATION	6
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Manson v. Braithwaite, 432 U.S. 98,
97 S. Ct. 2243 (1997) 6

Neil v. Biggers, 409 U.S. 188,
97 S. Ct. 375 (1972) 6, 7

Perry v. New Hampshire, ___ U.S. ___,
132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) 5

United States v. Wade, 388 U.S. 218,
87 S. Ct. 1926 (1967) 6

Washington State:

State v. Booth, 36 Wn. App. 66,
671 P.2d 1218 (1983) 10, 11

State v. Burrell, 28 Wn. App. 606,
225 P.2d 726 (1981) 7

State v. Johnson, 132 Wn. App. 454,
132 P.3d 767 (2006) 7

State v. Kinard, 109 Wn. App. 428,
36 P.3d 573 (2001) 7

State v. Sanchez, 171 Wn. App. 518,
288 P.3d 351 (2012) 5

Rules and Regulations

Washington State:

CrR 3.6..... 1, 4, 8, 9

A. ISSUE PRESENTED

The victim identified the defendant based on his independent recollection of spending 45 minutes in his presence, having conversations with him, and chasing after him after the defendant stole his necklace. Did the trial court err in denying the motion to suppress the victim's in-court identification of the defendant as the person who robbed him?

B. STATEMENT OF THE CASE

Andre White was charged with one count of theft in the first degree following an April 27, 2012 incident in which White was alleged to have stolen a necklace from J.N. (d.o.b. 10/18/1997). CP 1-2.

Immediately prior to trial, the defense moved to suppress any identification of White based on the assertion that J.N.'s pretrial identification process was impermissibly suggestive. CP 5-19.

During the CrR 3.6 hearing, J.N. testified that on April 27, 2012, he went to McDonald's with some friends after school. 1RP 40. At the McDonald's, J.N. met with his friend Joe and four of Joe's friends. 1RP 41. White was one of the four friends.

1RP 45. He introduced himself to J.N. as "Andre" and the group sat down together for approximately 45 to 50 minutes. 1RP 45. White sat across the table from J.N. and was less than three feet away. 1RP 46. The two talked a few times, but J.N. was unable to recall the contents of their conversation. 1RP 46. J.N. described White as about five feet, six inches tall with a shaved head, blue jeans, and a coat. 1RP 47.

Approximately 45 minutes after J.N. met White, Joe said that he had to go to the Alaska Junction. 1RP 48. J.N.'s gym was near that area, so he left with Joe. 1RP 48. Everyone else at the table left as well, and walked with the two friends. 1RP 52.

As the group neared the alley that leads to the gym's entrance, White approached J.N. from behind. 1RP 52. White then grabbed J.N.'s chain necklace from the back of his neck, broke it off, and ran away with the necklace down the alley. 1RP 52. J.N. knew that White stole the necklace because the rest of the group remained. 1RP 52. White was the only person who ran away. 1RP 52. Moreover, J.N. recognized White's clothing, physical structure, and shaved head. 1RP 52.

J.N. gave chase and clearly saw White running away. 1RP 53. In fact, White looked back at J.N. twice while fleeing.

1RP 54. J.N. did not catch White, and returned to the group who informed J.N. of White's last name. 1RP 59-60.

After learning White's last name, J.N. immediately went to West Seattle High School to see if anyone at the school knew more information about White. 1RP 60, 65. J.N. was put into contact with Principal Ruth Medsker. 1RP 60.

J.N. told Principal Medsker about the theft and provided her with White's name. 1RP 62. Principal Medsker indicated that the name sounded familiar and showed pictures of individuals who matched the description provided by J.N. 1RP 62. As the two looked through the photos, Principal Medsker commented on the background of the students that were in the photos which she was pulling up. 1RP 67. For example, she commented on which students had never had problems in school, which received good grades, and which did extracurricular activities. 1RP 68. J.N. and Principal Medsker went through approximately 30 pictures before J.N. spotted a photo of White. 1RP 62.

When Principal Medsker clicked on White's photo, his full name was shown on the screen. 1RP 64. Although J.N. became confused as to whether his assailant's first name was

“Andrew” or “Andre,” J.N. pointed out White as the person who stole the necklace. 1RP 64, 68. J.N. did have White’s last name correct, however. 1RP 64. After J.N. identified White as the individual that stole his necklace, Principal Medsker indicated that White was suspended or expelled from West Seattle High School and that he attended an alternative school. 1RP 68. Law enforcement was called to the school. 1RP 78.

When the Seattle Police Department officers responded to the school, they were apprised of the situation and then interviewed J.N. 1RP 78-79. Two weeks later, Seattle Police Department Detective Brian Ballew contacted J.N. at school and showed him a photo montage that contained photos of White and five other people. 1RP 79, 146. J.N. picked White’s photo out of the group of six that was shown to him. 1RP 148. The photo of White used in the montage was the same photo that J.N. had picked earlier when Principal Medsker showed it to him. 1RP 150.

At the CrR 3.6 hearing, J.N. identified White in court as the individual that stole the necklace. 1RP 47. J.N. indicated that he recognized White based on his facial structure, shaved

head, height, and “physical structure.” 1RP 47. Moreover, J.N. indicated that he was 99% confident that White was the individual with whom he spoke at McDonald’s. 1RP 48. Significantly, J.N. testified that his in-court identification of White was based on memory. 1RP 48.

At the conclusion of the hearing, the court suppressed the out-of-court identification procedures employed by Principal Medsker and Detective Ballew because the procedures were unduly suggestive. CP 41.¹ The court denied, however, the defense’s motion to suppress J.N.’s in-court identification of White. CP 42. Lastly, though the court questioned the credibility of J.N. and Principal Medsker with respect to the identification procedures, it found J.N.’s testimony generally credible. CP 31, 42.

¹ Pursuant to Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012), the suppression was probably in error. The Due Process Clause does not require judicial inquiry into the reliability of identification evidence that was not procured by law enforcement as argued by the State below. Id. at 732. However, because the State did not cross-appeal this issue it will not be addressed further. See also State v. Sanchez, 171 Wn. App. 518, 288 P.3d 351 (2012).

C. **ARGUMENT**

THE TRIAL COURT DID NOT ERR IN PERMITTING THE IN-COURT IDENTIFICATION OF WHITE BECAUSE IT WAS BASED ON OBSERVATIONS INDEPENDENT OF THE IMPERMISSIBLE IDENTIFICATION.

In this case, the record establishes that J.N.'s in-court identification of White was based on his independent observations of White, rather than the suppressed pretrial identifications. Though a pretrial identification of a defendant may be inadmissible, an in-court identification of the defendant by the same witness is permitted when the prosecution proves by clear and convincing evidence that the basis for the identification has an origin independent of the pretrial procedure. United States v. Wade, 388 U.S. 218, 240, 87 S. Ct. 1926 (1967). The reliability of the in-court identification is the linchpin of the due process identification procedure. Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243 (1997).

To determine the reliability of an in-court identification, courts examine the totality of the circumstances. Neil v. Biggers, 409 U.S. 188, 199, 97 S. Ct. 375 (1972). An improper identification only violates due process rights if it is so impermissibly suggestive that it creates ". . . a very substantial likelihood of irreparable

misidentification.” State v. Burrell, 28 Wn. App. 606, 610, 225 P.2d 726 (1981) (emphasis added).

When considering the totality of the circumstances, courts examine: (1) the witness’s opportunity to view the criminal at the time of crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation. Biggers, 409 U.S. at 199-200. The trial court’s decision is reviewed for abuse of discretion. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001); see also State v. Johnson, 132 Wn. App. 454, 459, 132 P.3d 767 (2006).

In the present case, application of the “totality of the circumstances” test elements clearly establishes that the in-court identification was reliably derived from a source independent of the suppressed out of court identifications.

Under the first element, J.N. had an opportunity to view White at the time of crime. Specifically, J.N. testified that he met White and four other individuals at McDonald’s after school. 1RP 41. White introduced himself to J.N., and the group sat down together for 45 to 50 minutes. 1RP 45. White sat directly across

the table from J.N. and the two spoke several times. 1RP 46. Further, when J.N.'s necklace was stolen, he clearly saw White running away, particularly when White looked back at J.N. twice. 1RP 52. J.N. recognized White's clothing, physical structure, and shaved head. 1RP 52, 54. Additionally, immediately after the crime J.N.'s friends provided him with White's last name. 1RP 59. These facts establish that J.N. had a prolonged opportunity to observe White before and during the crime.

Under the second element, the degree of attention J.N. gave White was unavoidably substantial, given that the two sat approximately three feet away from each other for nearly 50 minutes. 1RP 45, 46. During that time, the two spoke and were members of a small group of six people. 1RP 44, 45. The degree of attention J.N. gave to White was significantly higher than the attention to which he would have given a random bystander.

Under the third element, J.N.'s initial description of White was accurate. J.N. initially described White as five feet, six inches tall, with a shaved head, blue jeans, and a coat. 1RP 47. Later, J.N. then identified White at the CrR 3.6 hearing by his facial structure, shaved head, height, and physical structure. 1RP 47. Additionally, J.N. thought that White's full name was "Andrew

White.” 1RP 64. He was only slightly mistaken about White’s first name, and the description of White was accurate.

Under the fourth element, J.N. demonstrated an extremely high level of certainty during the identification procedure with Principal Medsker. Specifically, J.N. looked through approximately 30 pictures with Principal Medsker before finding one that was clearly White. 1RP 62. Also, at the CrR 3.6 hearing, J.N. indicated that he was 99% confident that White was the person who stole the necklace, and that this identification was based on his memory of the incident. 1RP 48. All of this evidence establishes that J.N. had a high level of certainty when he identified White.

Under the fifth and final element, J.N.’s in-court identification confrontation took place on November 27, 2012, which was merely seven months after the April 27, 2012 underlying incident.

Given the totality of the circumstances, the evidence clearly and convincingly establishes that there was not a substantial likelihood of irreparable misidentification of White at trial. As the trial court noted, “[...] *[T]his is unlike the stranger [cases] where all you see is a fleeting glance of someone as they run away. This is after a 45 minute interaction.*” 1RP 185 (emphasis added). The pragmatism of this comment becomes even more apparent when

the facts of this case are compared to State v. Booth, 36 Wn. App. 66, 671 P.2d 1218 (1983).

In Booth, two men in Halloween masks robbed a bank. Id. at 67. Shortly after the robbery, a witness noticed a man with a brown paper bag in his hands who was running down the street. Id. He removed his shirt and quickly entered a maroon vehicle with Missouri license plates that was driven by a female driver. Id. The man had money in his hands. Id. The witness relayed this information to police, who subsequently stopped a vehicle matching the description provided. Id. The witness was taken to a patrol vehicle in which the defendant was held and identified him as the man she had previously seen. Id.

Though this show-up in Booth was found to be impermissibly suggestive, the court held the identification of the defendant sufficiently reliable because: (1) the witness had the opportunity to clearly observe the defendant for 45 seconds; (2) the witness was paying great attention to the witness because he had money in his hands and was running; (3) the witness's identification was unequivocal; and, (4) the time between the crime and the confrontation was only 30 to 40 minutes. Id. at 71. Unlike the witness in Booth, who only saw the defendant for approximately

45 seconds, J.N. sat across a table from White for 45 minutes and had several conversations with him. White introduced himself to J.N. and J.N. learned his name.

The evidence of an independent basis for identification clearly exceeds the evidence provided in Booth and, as such, is more than enough to establish by clear and convincing evidence that the identification was sufficiently reliable to be presented to the jury. Thus, the trial court did not abuse its discretion when it denied White's motion to suppress the in-court identification.

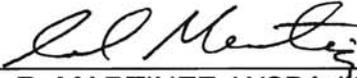
D. CONCLUSION

The conviction should be affirmed.

DATED this 13th day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
RAUL R. MARTINEZ, WSBA #31848
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Cynthia B. Jones and Christopher H. Gibson, the attorneys 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. ANDRE WHITE, Cause No. 69943-1-I, 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.

Betty A. Huddleston
Name

11/14/13
Date

Done in Seattle, Washington