Supreme Court No. 93834-2
(COA No. 73413-0-I, consolidated with 73592-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDISHAKUR IBRAHIM,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Abdishakur Ibrahim, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Ibrahim seeks review of the Court of Appeals decision dated September 26, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a show-up identification procedure conducted after the witness has been informed that his assailants have been arrested is unnecessarily suggestive where no safeguards are put into place to reduce the unreliability of the identification process.

2. Whether a cross-racial identification instruction is required where the witness identifies the assailant as a person from a distinct ethnic group.

D. STATEMENT OF THE CASE

On October 22, 2014, Mike Harris was robbed at gun point by three men. CP 1. Mr. Harris was looking to be paid give people rides from downtown Seattle when he was asked by an African man and his

two friends whether he would give them a ride to Tukwila. RP 496. Mr. Harris only spoke to the man in the front seat and focused upon his music while he was driving. RP 471, 535. When the men arrived in Tukwila, one of the men pointed a firearm at Mr. Harris and demanded his money. RP 477. Mr. Harris fought with the men who then took Mr. Harris' car. RP 477.

Dep. Jose Bartolo met with Mr. Harris and took a "generic description" of the three suspects from him soon after the crime occurred. RP 60. A call came over the officer's radio that three men had been apprehended in Mr. Harris' car while the officer was talking with Mr. Harris. RP 42. Mr. Harris was taken to where the men had been arrested. RP 502.

Mr. Harris was not warned the men who were apprehended were not necessarily the men who had robbed him. RP 55. Instead, Mr. Harris saw the car and the gun he believed had been used to rob him. RP 539-40. The suspects were surrounded by a number of officers. RP 494-50. Each suspect was then placed under the spotlight as each man was brought before Mr. Harris in handcuffs. RP 47. Mr. Harris identified each of them as the men who had robbed him. RP 46. Mr.

Ibrahim was identified as one of the men involved in the robbery. RP 351. He was charged with robbery in the first degree. CP 1.

The central issue at trial was the identification of Mr. Harris' assailants. Mr. Harris told the jury he had never met the men who robbed him before that night. RP 469. He admitted his opportunity to observe his assailants was limited. RP 536. His description of the men who robbed him was inconsistent with his prior description of his assailants, all of whom he described as young and one of whom he described as 15 to 16 years old, in contrast to Mr. Ibrahim's charged co-defendant, who was actually old enough to have gray hair. RP 407.

Defense counsel asked that the jury be instructed on factors the jury should weigh when evaluating eyewitness testimony. RP 565. The court declined to instruct the jury upon eyewitness testimony. RP 572. The court found the general instruction sufficient. RP 574.

The Court of Appeals affirmed Mr. Ibrahim's conviction. App. at 1. The Court of Appeals held the show-up identification procedure was not unnecessarily suggestive. App. at 1. The Court of Appeals also found the trial court did not commit manifest error when it declined to give an instruction on cross racial identification. App. at 7.

E. ARGUMENT

1. **REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER THE SHOW-UP IDENTIFICATION WAS UNNECESSARILY SUGGESTIVE WHERE THE IDENTIFYING WITNESS HEARD THROUGH THE POLICE HIS ASSAILANTS WERE ALREADY IN CUSTODY AND PROCEDURES WERE NOT PUT INTO PLACE TO REDUCE SUGGESTIBILITY.**

a. Unnecessarily suggestive identification procedures violate due process.

The limits which must be placed upon a show-up identification procedure is a significant question of law under the state and federal constitutions. RAP 13.4(b). As such, Mr. Ibrahim requests this Court grant review of whether the procedures employed to secure an identification of Mr. Ibrahim were constitutional.

Evidence of a show-up identification should be excluded if the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (discussing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977)). A witness's recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. *Brathwaite*, 432 U.S. at 112. Impermissibly suggestive out-of-court

identification procedures, including show-up procedures, violate due process where there is a substantial likelihood of irreparable misidentification. *See United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967); *see also* U.S. Const. amend. XIV; Const. art. I, § 3. When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977).

b. The procedures employed by the police to identify Mr. Ibrahim were unnecessarily suggestive.

Mr. Harris met with Dep. Bartolo soon he had been robbed. RP 42. Before the identification procedure, Mr. Harris was only able to give the deputy a "pretty generic description" of the men who had robbed him. RP 60. The officer ended up taking a description of the men from the police dispatch report instead. RP 60.

While Mr. Harris was speaking with Dep. Bartolo a call came in on the police radio saying Mr. Harris' car had been recovered. RP 42. The deputy told Mr. Harris they should go to the location to identify the suspects. RP 42. Hr. Harris was not told the suspects may or may not be present. RP 55.

The descriptions of the men arrested did not match the descriptions given by Mr. Harris. While Mr. Harris had described the men as young, one of the men was much older RP 90. The clothing the men were wearing was also inconsistent with Mr. Harris' description. RP 90, 80-81.

Nevertheless, Mr. Harris identified all of the men who were arrested as those involved in the robbery. The circumstances of identification ensured he would. While Mr. Harris admitted he had not had a good opportunity to view his assailants, he confirmed he was angry. RP 51. The procedures ensured he would make an identification. Each of the suspects was in handcuffs when they were identified. RP 45. They were surrounded by police vehicles with their lights flashing. RP 57. Mr. Harris remained in Dep. Bartolo's vehicle. Each of them were put under a spotlight, standing next to an officer, indicating they were already in custody. RP 47.

c. The unnecessarily suggestive nature of the identification procedures merits review under RAP 13.4(b).

Mr. Ibrahim asks this Court to grant review under RAP 13.4(b). The unnecessarily suggestive identification procedure employed by the police violated Mr. Ibrahim's due process rights and is a significant question of law under the state and federal constitutions. RAP 13.4(b).

The show-up identification should be excluded because the procedure was impermissibly suggestive and gives rise to a substantial likelihood of irreparable misidentification. *Linares*, 98 Wn. App. at 401.

This identification procedure became impermissibly suggestive when the officer informed Mr. Harris the men who had robbed him were in custody. When a witness is not protected from knowing the police believe they have arrested a suspect, the likelihood of improper identification greatly increases. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later*, 33 Law & Hum. Behav. 1, 6-7 (Feb. 2009) (rates of misidentification increase when law enforcement tell witness police have found a suspect); *see also State v. McDonald*, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

This is especially true where a witness states they did not have an opportunity to view the suspects before the identification procedure. *State v. Barker*, 103 Wn.App. 893, 905, 14 P.3d 863 (2000). Mr. Harris stated he did not have an opportunity to view the person he later identified as Mr. Ibrahim. RP 91. His focus was instead on the front passenger and his music. RP 54.

The procedure becomes more suspect where other identifying factors weigh against admissibility. *See, e.g., State v. Rogers*, 44 Wn.App. 510, 516, 722 P.2d 1349 (1986). Mr. Harris description of his assailants varied significantly. He described all of the suspects as young, yet one of the men arrested was significantly older. RP 91, 407. Likewise, they were wearing different clothing from what Mr. Harris had originally described. RP 90.

Mr. Harris also described his assailants as from a different ethnicity. RP 90-91. All three of the suspects were described by Mr. Harris as a different and unique racial classification from himself. RP 90. Mr. Harris described the suspects as African, while he considered himself African-American. RP 90, 496. This Court has recognized that one of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, 176 Wn.2d 611, 637, 294 P.2d 679 (2013) (Wiggins, J., dissenting).

The fact that Mr. Harris was certain of his identification should not be considered as a factor. Both courts and social science have found this to be an unreliable measure of reliability. *See e.g., Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001).

Because this procedure raises important constitutional questions, especially regarding the reliability of an identification procedure after the witness has been informed he need only confirm the police were correct in arresting his assailants, RAP 13.4 justifies review. The mere confirmatory nature of the show-up identification procedure employed by the police was unnecessarily suggestive. Mr. Ibrahim asks this Court to accept review.

2. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER A CROSS-RACIAL IDENTIFICATION INSTRUCTION IS REQUIRED WHERE A WITNESS IDENTIFIES A SUSPECT AS BEING FROM A DISTINCT ETHNIC GROUP.

The Court of Appeals found Mr. Ibrahim's challenge to the eyewitness instruction was waived because it was not raised in the trial court. App. 7. The request for the instruction was made by counsel for Ali Abdi Ali, one of Mr. Ibrahim's co-defendants. RP 565. And while the co-defendants did not enter into a joint defense agreement as may be typical in civil practice, it is also clear all of the co-defendants had the same defense. Mr. Ali's attorney led the defense, speaking first at all of the hearings and for some of the witnesses, he was the only attorney to ask questions. *See e.g.* RP 63, 92, 94, 274, 368, 386, 387, 416, 428, 437-38, and 452. The trial court had an opportunity to correct

the error raised when Mr. Ali's attorney requested a cross-racial jury instruction. *See, e.g., State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). While the record does not establish that Mr. Ibrahim's lawyer joined with Mr. Ali in requesting this instruction, it is also not clear that he did not.

a. A cross-racial jury instruction is necessary where an identification is made of someone from a distinct ethnic group.

RAP 13.4(b) justifies review of whether a cross-racial identification instruction is required when a witness identifies the suspect as being from a distinct ethnic group. This Court has had limited opportunities to review when a cross-racial identification instruction since it issued its plurality opinion in *State v. Allen*. Problems with eyewitness identification evidence have been widely recognized in the courts and scientific community. *Allen*, 176 Wn.2d at 616 (C. Johnson, J., lead opinion). Justice Madsen, in her concurrence, also recognized that with "social science increasingly casting doubt on the reliability of cross-racial identification, our courts must carefully guard against misidentification." 176.Wn.2d at 633 (Madsen, concurring).

Jury instructions are necessary because eyewitness evidence is so persuasive, even when the evidence is suspect. Eyewitness identification is erroneous approximately one third of the time. Taki V. Flevaris & Ellie Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 869 (2015) (citations omitted). Eyewitness misidentification is the most common cause of wrongful convictions. Jennifer Devenport, et al, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification, in Expert Testimony of the Psychology of Eyewitness Identification*, 51 (Brian L. Cutler ed., 2001).

This causes jurors to continue to accept eyewitness evidence, even when the evidence itself is flawed. Elizabeth F. Loftus, *Eyewitness Testimony* 9 (1979). Jurors tend to "overbelieve eyewitnesses, have insufficient understanding of the factors that affect memory, and are overly swayed by eyewitness confidence, which is not very diagnostic of accuracy and apt to be inflated by the time the eyewitness reaches the courtroom." Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. Applied Psychol. 524,

524 (2004); *see also* Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts,* 20 Applied Cognitive Psychol. 115, 125 (2006).

b. The jury should have been provided with an instruction on cross-racial identification.

A "defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); U.S. Const. amend. VI; Const. art. I, § 22. In *Allen*, a majority of justices suggested that a trial court's refusal to provide an instruction on cross-racial misidentification may be an abuse of discretion when "eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction." 176 Wn.2d at 634 (Chambers, concurring), *see also, id.* at 632-33 (Madsen, concurring) ("The dissent properly recognizes that cross-examination, expert testimony, and closing argument may not provide sufficient safeguards against cross-racial misidentification because the very nature of the problem is that witnesses believe their identification is accurate."); *id.* at 643 (Wiggins, dissenting) ("I would embrace a version of the rule adopted in other jurisdictions, holding that a court

must give the instruction where cross-racial eyewitness identification is a central issue in the case, where there is little corroborating evidence, and where the defendant asks for the instruction").

All three of the suspects were originally described by Mr. Harris as Africans, which Mr. Harris identified as a different and unique racial classification from himself, which was African American. RP 90. With little evidence corroborating Mr. Harris' identification, the defendants were entitled to an instruction on cross-racial identification.

On direct, the State elicited general testimony regarding the reliability of show-up procedures. RP 336. The trial court allowed this testimony over defense objections. RP 336. The officer stated that it was his opinion that show-up identifications were more accurate than other procedures. RP 337. The officer went on to compare photo montages to show up procedures, again telling the jury that the show ups were more accurate. RP 338.

Defense counsel proposed that the jury be instructed on eyewitness testimony, offering the Ninth Circuit Jury Instruction 4.11.[1]

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[1]4.11 EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

RP 564. This instruction properly advises the jury on factors to consider in determining whether an eyewitness identification is accurate.

Many of these factors apply here. Mr. Harris agreed he had not focused upon the man he later identified as Mr. Ibrahim, instead focusing upon his music. RP 471, 535-36. The suggestibility of the identification procedure had made Mr. Harris' identification more questionable. Mr. Harris had difficulty recalling facts, giving inconsistent answers between his testimony and when he had been interviewed by defense investigators. *Compare* RP 478, 481, with RP 508, 537. He also had difficulty remembering other facts, such as whether a spotlight was used during the show-up. *Compare* RP 515-166 with RP 356, RP 384, RP 398.

The procedures were also suggestive. The procedure took place in close proximity to Mr. Harris' stolen vehicle, with the firearm he

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(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

(2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

(3) any inconsistent identifications made by the eyewitness;

(4) the witness's familiarity with the subject identified;

(5) the strength of earlier and later identifications;

(6) lapses of time between the event and the identification[s]; and

(7) the totality of circumstances surrounding the eyewitness's identification.

believed had been used against him in sight. RP 539-540. Each of the suspects were in handcuffs and stood next to an officer during the show-up. RP 451. A spotlight was shown on them and numerous officers were on the scene. RP 381. Mr. Harris was informed the suspects had been arrested before he made the identification. RP 42.

The later identifications were not strong. Mr. Harris acknowledged that his assailants looked different from the men on trial. He told the jury the men who robbed him all looked the same age, while it was clear at trial Mr. Ali was older than his co-defendants. RP 498. In his original description of the assailants, he believed the man holding the firearm was 15 to 16 years old. RP 518. To Mr. Harris, the men all looked young. RP 519. At trial, he acknowledged they did not all look young and at least one had gray hair. RP 533.

c. RAP 13.4(b) authorizes review of whether the court should have allowed a cross-racial jury instruction.

Under the stress of a gunpoint robbery, Mr. Harris gave a description of three men, including one who he described as a teenager. When he was giving a statement to one of the deputies, he heard over the radio that the suspects in his robbery had been apprehended and that he should confirm that they were in fact his assailants. Mr. Harris was then taken to where the men were arrested, saw his car and a firearm

and made immediate identifications of each person. While he was pretty sure of his identifications at the beginning of his testimony, by its conclusion, he had no doubt that the men arrested, including Mr. Ibrahim, were the men who had robbed him.

Many of the factors that contribute to wrongful convictions are present in this identification procedure. Show-ups are inherently suggestive procedures. *State v. Ramires*, 109 Wn.App. 749, 761, 37 P.3d 343, *rev. denied*, 146 Wn.2d 1022 (2002). This procedure had many of the hallmarks that required an instruction. Mr. Harris' admitted opportunity to observe his assailants was limited. RP 536. It was unclear whether his identification was the result of his memory or Dep. Bartolo's description of the offenders which he took from the CAD report. RP 407. The identification was inconsistent with regard to Mr. Harris' description of the men, all of whom he described as young and one of whom he described as a teenager. RP 407. He had never met any of the men before that night. RP 469.

The question of whether a jury instruction should have been provided satisfied RAP 13.4(b). The totality of the circumstances surrounding this identification required an instruction. The jury should have been instructed upon the factors that should be used to determine

if the eyewitness identification was unreliable. This Court should grant review to determine whether a cross-racial jury instruction is required where a witness identifies a suspect as a person from a distinct ethnic group.

F. CONCLUSION

Based on the foregoing, petitioner Abdishakur Ibrahim respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 24th day of October 2016.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ABDIHAKIM A. MOHAMED, Defendant, ALI ABDI ALI and ABDISHAKUR I. IBRAHIM, and each of them, Appellants.	)	No. 73413-0-I (consolidated with 73592-6-I) DIVISION ONE UNPUBLISHED OPINION FILED: September 26, 2016

BECKER, J. — A show-up identification procedure was not unnecessarily suggestive when an officer told a car robbery victim that they were going to possibly identify suspects who were in his car when it was stopped. When one of the defendants was removed from the courtroom for disruptive behavior, the trial court adequately informed him that he would be allowed to return upon assurance that his conduct would improve.

We affirm.

FACTS

Michael Harris was in downtown Seattle offering people rides in his car for money on an October evening in 2014. He agreed to drive three men to Tukwila.

When the men got out of the car, one of them pulled a gun, held it to Harris's head and told him not to move. All three men got into Harris's car and drove off.

Harris called the police. Within about an hour, officers stopped Harris's car with three men inside. Harris was brought to the location, where he positively identified all three suspects as being involved in the car robbery. The State charged all three men with first degree robbery. A jury convicted them as charged. Two—appellants Abdishakur Ibrahim and Ali Ali—have appealed. Their appeals have been consolidated.

SHOW-UP IDENTIFICATION PROCEDURE

Both appellants moved to suppress the identification evidence on the basis that the show-up identification procedure was unduly suggestive. At the suppression hearing, the witness was Deputy Jose Bartolo, the responding officer who was with Harris when a broadcast came over his police radio that officers had stopped Harris's car. Bartolo testified that he told Harris that his car "was being stopped at a certain location. And that we'd be going to that location" to possibly identify three subjects who "were in the vehicle."

A number of police vehicles were present with their flashers on when Bartolo and Harris arrived. Bartolo parked with his car's lights directed towards Harris's car. He turned his spotlight on. Each of the three suspects, handcuffed, was brought separately to this lit area, within about two car lengths of Bartolo's car. Bartolo testified that Harris identified them as the three men who rode with him to Tukwila and robbed him.

The trial court entered findings of fact and conclusions of law and denied the motion to suppress. We review a trial court's findings of fact on a motion to suppress to determine whether they are supported by substantial evidence. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Here, no error is assigned to the findings of fact, so they are verities on appeal. Levy, 156 Wn.2d at 733. We review conclusions of law pertaining to suppression of evidence de novo. Levy, 156 Wn.2d at 733.

A defendant asserting that a police identification procedure denied him due process must show that the procedure was unnecessarily suggestive. Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). If the defendant makes this showing, the court reviews the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

A showup is not unnecessarily suggestive just because the suspects were handcuffed and standing near a police car. See State v. Fortun-Cebada, 158 Wn. App. 158, 170, 241 P.3d 800 (2010) ("By itself, the presence of a suspect in handcuffs is not enough to show the show-up procedure was unduly suggestive."); State v. Shea, 85 Wn. App. 56, 60, 930 P.2d 1232 (1997) (same); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 996 (1987) ("The thrust of Guzman's argument is that he was handcuffed and standing approximately 15 feet from the police car during the showup. These facts alone

are insufficient to demonstrate unnecessary suggestiveness"), review denied, 108 Wn.2d 1027 (1987).

Appellants argue that what made the showup unduly suggestive in this case was the fact that Harris learned from Bartolo and maybe also from the police broadcast that he was going to be taken to the scene where his car was stopped to possibly identify three individuals. They cite State v. McDonald, 40 Wn. App. 743, 744, 700 P.2d 327 (1985). In McDonald, the victim failed to identify the defendant, number 3, in a lineup. After the lineup, a detective told the victim that the subjects arrested following his robbery were numbers 3 and 5 in the lineup. McDonald, 40 Wn. App. at 744. At trial, the victim was allowed to make an in-court identification of the defendant. This court found the detective's statement to be impermissibly suggestive: "He *literally* told [the victim], '*This* is the man." McDonald, 40 Wn. App. at 746. The facts here are not comparable. Bartolo merely told Harris they were going to "possibly identify" three men who were in his car when it was stopped.

Appellants also argue that the use of Bartolo's spotlight and the "unusual" number of police made the showup unnecessarily suggestive. We disagree. As the trial court said in response to the spotlight argument, "I know that the spotlight was used, which would make sense considering it's 11:00 p.m. at night. And if a spotlight hadn't been used, if lighting hadn't been used, that would be the argument in front of me. That there was insufficient lighting." And appellants cite nothing in the record indicating that an "unusual" number of police were present.

The trial court did not err in its conclusion that defendants failed to meet their burden to demonstrate that the show-up procedure was unnecessarily suggestive. Therefore, we need not proceed to the second step of reviewing the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Guzman-Cuellar, 47 Wn. App. at 335.

EYEWITNESS IDENTIFICATION INSTRUCTION

At trial, Ali proposed an eyewitness identification jury instruction.[1] Ibrahim stated his position on two other defense-proposed instructions, but he did not mention the eyewitness instruction. The court declined to give the eyewitness instruction proposed by Ali, and Ibrahim took no exceptions. Ibrahim now argues

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[1] Ali proposed the Ninth Circuit jury instruction 4.11, which reads:

> You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.
>
> In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:
>
> (1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;
> (2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;
> (3) any inconsistent identifications made by the eyewitness;
> (4) the witness's familiarity with the subject identified;
> (5) the strength of earlier and later identifications;
> (6) lapses of time between the event and the identification[s]; and
> (7) the totality of the circumstances surrounding the eyewitness's identification.

NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 4.11 (2010) (alteration in original).

that the trial court erred in declining to give the jury a specific instruction about eyewitness testimony such as the one proposed by Ali.

The State argues that because Ibrahim did not take exception to the court's refusal to give the instruction, he invited the error he asserts on appeal. To be invited, an error must be the result of an affirmative, knowing, and voluntary act. State v. Lucero, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), rev'd on other grounds, 168 Wn.2d 785, 230 P.3d 165 (2010). Ibrahim did not demonstrate the kind of affirmative conduct that can be classified as inviting the error.

Nevertheless, we generally will not consider an issue that is raised for the first time on appeal. RAP 2.5. Below, Ibrahim did not raise any issue concerning an instruction on eyewitness testimony. Ibrahim makes a cursory claim in his reply brief that failing to give a special instruction on eyewitness testimony is a manifest error affecting a constitutional right. We reject this claim. The trial court gave pattern instructions on witness credibility[2] and the State's burden of proof.[3]

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[2] You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

These instructions, taken together, are generally sufficient to charge the jury with deciding whether the State has proven beyond a reasonable doubt that the witness correctly identified the defendant. State v. Allen, 176 Wn.2d 611, 686, 294 P.3d 679 (2013). In view of Allen, there was no manifest error. The issue is waived because it was not raised in the trial court.

RIGHT TO BE PRESENT

Ali interrupted the prosecutor's closing argument with an accusation that defense counsel was giving him drugs and offering him money in exchange for sex. At the court's instruction, a jail guard removed Ali from the courtroom. When the guard returned, he reported that Ali said he did not want to return to court, did not want to talk to his attorney, and wanted only to go back to his jail cell.

If a defendant is removed from the courtroom during his trial, he must be allowed to reclaim his right to be present if he assures the court that his conduct will improve. Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Chapple, 145 Wn.2d 310, 36 P.3d 1025 (2001). The trial court, aware of this rule, asked defense counsel to advise Ali that he would be permitted to return to the courtroom if he promised to behave appropriately. When the court returned from recess, Ali's attorney stated on the record that he

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[3] A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

had tried to make contact with Ali in the jail and that Ali refused to communicate with him. Closing argument then proceeded without Ali present. Ali argues that the trial court did not give him an appropriate opportunity to reclaim his right to be present.

There are no specific requirements governing the procedure a trial court uses to advise an ejected defendant of his right to reclaim the right to be present. Chapple, 145 Wn.2d at 325-26. In Chapple, the trial court sent defense counsel to ask whether the defendant wanted to return and, if so, to ask if he could conduct himself appropriately. Chapple, 145 Wn.2d at 324. Defense counsel reported back, on the record, that the defendant would not agree to behave differently if allowed to return. Chapple, 145 Wn.2d at 324. This was held to be adequate advisement. Chapple, 145 Wn.2d at 326.

Ali's case is like Chapple except that Ali refused to speak with defense counsel. Ali now argues that because the court knew he was unhappy with his attorney and had previously tried to have him discharged, the court should not have relied on the attorney to deliver the message and should have devised some other method, perhaps by appointing conflict counsel, sending the bailiff with a message, or drafting an order to give to Ali. These options were not proposed to the trial court at the time.

Ali had previously tried to delay the trial based on his alleged dissatisfaction with defense counsel. His outrageously disruptive behavior occurred during closing argument. Ali had two codefendants who both moved for

a mistrial based on his outburst. We conclude the steps taken by the court were, under the circumstances, adequate to protect Ali's right to be present at trial.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, A.C.J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73413-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 24, 2016