

Supreme Court No. 96645-1

Court of Appeals No. 76572-8-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

RAUL CORTES-MENDEZ,

Petitioner.

---

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

---

PETITION FOR REVIEW

---

Kate Benward  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER.....1

B. ISSUES PRESENTED FOR REVIEW ..... 1

C. STATEMENT OF THE CASE.....2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED.....5

**1. Where social science research establishes that the third *Manson v. Brathwaite* reliability factor—the accuracy of the witness’s prior description of the suspect— is critical to assessing the reliability of a suggestive identification, should this Court accept review of the Court of Appeals’ decision that ignored this third factor, in violation of due process and contrary to the substantial public interest in reducing wrongful convictions?.....5**

a. The United States Supreme Court articulated the factors a court must consider before admitting an out-of-court identification obtained through a suggestive identification procedure like the one used by Officer Lemberg.....5

b. Social science research establishes that memory is reshaped over time; thus the ability provide a description of the suspect prior to the suggestive identification is critical. .... 7

c. The Court of Appeals ignored the third *Manson v. Brathwaite* factor that undermined the reliability of Officer Lemberg’s out-of-court identification. .... 9

d. The Court of Appeals’ analysis of the remaining *Brathwaite* factors does not mitigate the risk of irreparable misidentification. 10

**2. This Court should grant review to determine whether counsel is ineffective for failing to seek exclusion of an unquestionably suggestive identification procedure..... 12**

F. CONCLUSION ..... 15

**TABLE OF AUTHORITIES**

**Washington State Supreme Court Cases**

*In re Caldellis*, 187 Wn.2d 127, 385 P.3d 135 (2016) ..... 13

*In re Khan*, 184 Wn.2d 679, 363 P.3d 577 (2015) ..... 12

*In re Yates*, 177 Wn.2d 1, 296 P.3d 872 (2013) ..... 13

*State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004) ..... 13

*State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009)..... 13

*State v. Vickers*, 148 Wn.2d 91, 59 P.3d 58 (2002)..... 5

**Washington Court of Appeals Decisions**

*State v. Barker*, 103 Wn. App. 893, 14 P.3d 863 (2000)..... 6

*State v. Birch*, 151 Wn. App. 504, 213 P.3d 63 (2009) ..... 5

*State v. Feely*, 192 Wn. App. 751, 368 P.3d 514 (2016), *review denied*, 185 Wn.2d 1042, 377 P.3d 762 (2016) ..... 13

*State v. Kinard*, 109 Wn. App. 428, 36 P.3d 573 (2001)..... 6

*State v. Linares*, 98 Wn. App. 397, 989 P.2d 591 (1999)..... 6

*State v. McDonald*, 40 Wn. App. 743, 700 P.2d 327 (1985)..... 6

*State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006)..... 14

*State v. Rainey*, 107 Wn. App. 129, 28 P.3d 10 (2001)..... 14

*State v. Ramirez*, 109 Wn. App. 749, 37 P.3d 343 (2002)..... 11

**Washington Constitutional Provisions**

Const. art. I, § 22 ..... 2, 12  
Const. art I, § 3..... 1

**Federal Constitutional Provisions**

U.S. Const. amend. VI.....12  
U.S. Const. amend. XIV.....1

**Rules**

RAP 13.3..... 1  
RAP 13.4(b)(3) ..... 1, 16  
RAP 13.4(b)(4).....1, 16  
RAP 2.5(a)(3) ..... 14

**United States Supreme Court Decisions**

*Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977)..... 1, 6, 9  
*Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).. 6  
*Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 6  
*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)..... 12, 13  
*United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed 1149 (1967) .....7

## Other Authorities

- Douglas Balko, *Justice Delayed Is Justice Denied: Wrongful Convictions, Eyewitness-Expert Testimony, and Recent Developments*, 46 Suffolk U.L. Rev. 1087 (2013).....9
- Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139 (2008).....8
- Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time in-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. Crim. L. & Criminology 947 (2015).....7

A. IDENTITY OF PETITIONER

Raul Cortes-Mendez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 76572-8-I, issued on November 13, 2018, pursuant to RAP 13.3 and RAP 13.4(b)(3), and (4). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. Where social science research establishes that the third *Manson v. Brathwaite*<sup>1</sup> reliability factor—the accuracy of the witness’s prior description of the suspect— is critical to assessing the reliability of a suggestive identification, should this Court accept review of the Court of Appeals’ decision that ignored this third factor, in violation of due process and contrary to the substantial public interest in reducing wrongful convictions? RAP 13.4(b)(3), (4); U.S. Const. amend. XIV; Const. art I, § 3.

2. Should this Court grant review under RAP 13.4(b)(3) and (4) to determine whether defense counsel was ineffective for not moving to suppress Officer Lemberg’s pre-trial identification of Mr. Cortes-Mendez and subsequent in-court identification, based on this highly

---

<sup>1</sup> *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977).

suggestive, improper pre-trial identification procedure? U.S. Const. amend. VI, XIV; Const. art. I, § 22.

### C. STATEMENT OF THE CASE

While on routine patrol, Office Lemberg pulled into a restaurant parking lot. RP 70. As he pulled into the parking lot, his headlights flashed into the driver's compartment of a vehicle. RP 71. He saw a man in the driver's seat and a female seated in the passenger side of the vehicle. RP 71. He also noted a man standing at the passenger side door. RP 70. He backed into the parking spot next to the parked car. RP 71. While parked beside the vehicle, he ran the vehicle's license plate number and learned that the vehicle had recently been sold, but the title had not been transferred. RP 73-74.

After about thirty seconds, the vehicle left the parking lot. RP 76, 113. When the vehicle pulled away, the officer did not get a good view of the driver. RP 114. Officer Lemberg followed the vehicle out of the parking lot while still gathering information about the transfer of title. RP 75-76.

Officer Lemberg followed behind the vehicle without incident for 10-12 blocks while he got more information about the vehicle's title status. RP 76, 78. Based on this information, he then attempted to make

a traffic stop. RP 79. The vehicle did not stop. RP 80-83. The officer pursued the vehicle with his lights on for eight to nine seconds then terminated pursuit. RP 123, 83.

Officer Lemberg wrote his police report that night, and failed to include any physical description of the driver of the vehicle in that report. RP 99, 101, 102. Nor did he provide any physical description of the driver he claimed to have briefly seen when communicating with dispatch. RP 109. Officer Lemberg did not turn his in-car camera onto the driver, so there was no camera footage of the driver of the vehicle. RP 110-111. And though the restaurant had a surveillance camera in the parking lot, Officer Lemberg did not request or obtain the surveillance video. RP 128, 130. The closest Officer Lemberg got to the driver of the vehicle was five to seven feet away. RP 72.

Officer Lemberg claimed that he got a good look at the occupants of the vehicle, and that he made eye contact with the person seated in the driver's side of the vehicle. RP 72. But it was dark outside, and there were no lights on the inside of the vehicle. RP 106. He was not able to provide any description of the passenger in the vehicle other than that she was female. RP 108. He recalled no specific features about the male who stood outside the vehicle. RP 108.



Shortly after he ceased pursuit of the vehicle, Officer Lemberg pulled up the booking photo of a person with the same name as the person who purchased the vehicle. RP 132. He decided that the driver of the vehicle that he had seen fleetingly in the parking lot was the person in the photo, Mr. Cortes-Mendez. RP 85, 86.

At trial, over defense objection, the State introduced Mr. Cortes-Mendez's Department of Licensing (DOL) identification with his picture on it. Ex. 2; RP 85-86.<sup>2</sup> Officer Lemberg testified that the person in the DOL photograph was the driver of the vehicle he saw that night. RP 87-88. He also identified Mr. Cortes-Mendez in the courtroom as the driver of the vehicle he briefly pursued. RP 87-88.

Based on Officer Lemberg's identification, the jury convicted Mr. Cortes-Mendez of attempting to elude a pursuing police vehicle. CP 1; 82.

On appeal Mr. Cortes-Mendez challenged the admissibility of Office Lemberg's highly suggestive, unreliable identification, and alleged his trial counsel was ineffective for not moving to suppress this identification pre-trial. The Court of Appeals affirmed, ruling that the suggestive identification procedure used by Officer Lemberg was

---

<sup>2</sup> The trial court did not allow Officer Lemberg to testify about the booking photo because of the potential prejudice to the jury. RP 58.

sufficiently reliable based on selective application of the *Manson v. Brathwaite* factors. Slip opinion at 6.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**1. Where social science research establishes that the third *Manson v. Brathwaite* reliability factor—the accuracy of the witness’s prior description of the suspect— is critical to assessing the reliability of a suggestive identification, should this Court accept review of the Court of Appeals’ decision that ignored this third factor, in violation of due process and contrary to the substantial public interest in reducing wrongful convictions?**

a. The United States Supreme Court articulated the factors a court must consider before admitting an out-of-court identification obtained through a suggestive identification procedure like the one used by Officer Lemberg.

An identification procedure violates the Fourteenth Amendment right to due process when it is “so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.” *State v. Birch*, 151 Wn. App. 504, 514, 213 P.3d 63 (2009) (citing *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002)).

To evaluate whether the Due Process Clause bars admission of identification evidence, courts use a two pronged test. First, the defendant must show that “the identification procedure was suggestive.” *State v. Kinard*, 109 Wn. App. 428, 433, 36 P.3d 573 (2001) (citing *State v. Barker*, 103 Wn. App. 893, 905, 14 P.3d 863

(2000)). “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

Here it is not disputed that Officer Lemberg’s single-photograph identification of an individual he saw earlier is an impermissibly suggestive identification procedure. Slip op. at 6 (*citing Brathwaite*, 432 U.S. at 114). The question is whether there are nevertheless sufficient indicia of reliability to outweigh the corrupting effect of the suggestive identification procedure. *Id.* (*citing Biggers*, 409 U.S. at 199-200); *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). Identification evidence must be suppressed if there is a “very substantial likelihood of irreparable misidentification.” *State v. McDonald*, 40 Wn. App. 743, 747–48, 700 P.2d 327 (1985) (*citing Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).

To determine the reliability of identification testimony, a court considers (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy

of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Brathwaite*, 432 U.S. at 114-116 (citing *Biggers*, 409 U.S. at 199-200).

Since *Brathwaite*, social science research has shown the critical importance of the third factor, the ability to describe the suspect prior to the suggestive identification procedure, because of how a person's memory of an event changes with time and new information.

b. Social science research establishes that memory is reshaped over time; thus the ability provide a description of the suspect prior to the suggestive identification is critical.

Courts have long recognized that the “vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed 1149 (1967).

Social science research has revealed the complexity of memory, and that it is “inherently unstable and subject to change.” Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time in-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. Crim. L. & Criminology 947, 957 (2015). Research has shown that memory is “reconstructive,”

meaning that, like “like physical evidence, memory trace evidence can be contaminated, lost, destroyed, or otherwise made to produce results that can lead to an incorrect reconstruction of the event in question. *Id.* at 959 (citing *State v. Lawson*, 291 P.3d 673, 688 (Or. 2012); Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 148 (2008)). It is now known that “receiving new information after an event can change how a person later remembers that event.” Derek Simonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 Md. L. Rev. 1044, 1051 (2011). Thus, the witness’s ability to describe the suspect before the suggestive identification procedure is critical to a reliability determination, because of the process by which a suggestive image supplants the initial memory.

By contrast, *Brathwaite’s* fourth factor, witness confidence in the identification, has been questioned by social scientists, whose research shows that witness confidence has no bearing on the reliability of an eyewitness identification. Douglas Balko, *Justice Delayed Is Justice Denied: Wrongful Convictions, Eyewitness-Expert Testimony*,

*and Recent Developments*, 46 Suffolk U.L. Rev. 1087, 1096 (2013); *see also United States v. Jones*, 689 F.3d 12, 18 (1st Cir. 2012) (“the witness’ lack of confidence is certainly a reliable warning sign, while the presence of confidence is probably closer to a neutral factor.”).

c. The Court of Appeals ignored the third *Manson v. Brathwaite* factor that undermined the reliability of Officer Lemberg’s out-of-court identification.

The Court of Appeals excluded from its analysis the critical third *Brathwaite* factor where Officer Lemberg provided no description of the suspect prior to the suggestive identification procedure. Slip op. at 7 (Court of Appeals reviews the “all but one” of the *Brathwaite* factors). And the Court erroneously privileged a factor which social science research shows is not an indicator of reliability.

Unlike the officer in *Brathwaite*, Officer Lemberg recorded no physical features of the driver, passenger, or man outside the vehicle prior to viewing the single photo. RP 106-108. Officer Lemberg’s highly suggestive identification procedure entirely lacked the *Brathwaite* reliability factor (3), accuracy of the description prior to the suggestive procedure. *Brathwaite*, 432 U.S. at 115.

The Court of Appeals acknowledged that “Lemberg did not take notes or describe the suspect to dispatch before receiving information

connecting Cortes-Mendez to the car.” Slip op. at 7. Rather than assessing how this lack of prior corroborating description undermined Officer Lemberg’s identification, the Court of Appeals ruled that the absence of this safeguard meant “we cannot compare the ‘accuracy of the description’ made by Lemberg after the initial encounter to the booking photograph. We must exclude this factor from our analysis.” Slip op. at 8. The Court of Appeals thus excluded from consideration, rather than weighed as a negative factor, this critical factor of the witness’s ability to describe the suspect prior to the suggestive identification.

d. The Court of Appeals’ analysis of the remaining *Brathwaite* factors does not mitigate the risk of irreparable misidentification.

The Court of Appeals’ partial analysis of the *Brathwaite* factors fails to protect against the risk of mistaken identification.

The Court of Appeals privileged the fourth *Brathwaite* factor, which social science has shown to be an invalid measure of reliability, mistakenly crediting Officer Lemberg’s “high level of certainty” that the person he viewed through the highly suggestive identification procedure was Mr. Cortes-Mendez. Slip op. at 9.

The Court of Appeals found that Officer Lemberg's fleeting view provided a sufficient opportunity to view, contrasting it with the limited opportunity to view the suspect in *State v. Ramirez*, 109 Wn. App. 749, 754-57, 762-63, 37 P.3d 343 (2002). Slip op. at 8. However, in *Ramirez*, there was corroborating evidence of guilt that mitigated the risk of mistaken eye witness identification, including the defendant's confession and the officer's description of the suspect prior to the suggestive identification. *Ramirez*, 109 Wn. App. at 755. In Mr. Cortes-Mendez's case, the State's ability to prove the offense depended entirely on Officer Lemberg's identification of Mr. Cortes-Mendez as the driver of the vehicle.

The Court of Appeals' failure to weigh this critical third factor—Officer Lemberg's failure to provide a description of the driver before viewing Mr. Cortes-Mendez's photo through a highly suggestive identification procedure—deprived Mr. Cortes-Mendez of due process because of the risk of irreparable misidentification from the unreliable identification procedure.



**2. This Court should grant review to determine whether counsel is ineffective for failing to seek exclusion of an unquestionably suggestive identification procedure.**

The Court of Appeals failed to determine whether Mr. Cortes-Mendez's counsel was ineffective for failing to object to the admission of the unreliable, suggestive identification procedure because the Court erroneously determined that even though suggestive, Officer Lemberg's identification was sufficiently reliable. Slip op. at 10.

Because Officer Lemberg's identification of Mr. Cortes-Mendez came as a result of an impermissibly suggestive identification procedure that lacked sufficient guarantors of reliability, the out-of-court identification and subsequent in-court identification should have been suppressed, and defense counsel was ineffective for not moving to exclude these identifications on due process grounds.

The accused has the constitutional right to effective assistance of counsel. *In re Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)); U.S. Const. amend. VI; Const. art. I, § 22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to

meet the case of the prosecution to which they are entitled.” *Strickland*, 466 U.S. at 685 (internal citations omitted).

Ineffective assistance of counsel is established when (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) “the deficient performance prejudiced the defense.” *In re Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013) (citing *Strickland*, 466 U.S. at 687–88.). The presumption that counsel acted reasonably is rebutted by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *In re Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016) (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Prejudice is established when “there is a reasonable probability that, but for the deficient performance, the outcome would have been different.” *State v. Feely*, 192 Wn. App. 751, 769, 368 P.3d 514 (2016), *review denied*, 185 Wn.2d 1042, 377 P.3d 762 (2016). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

When the trial record is developed sufficient to determine whether a defense motion to suppress would have been granted or denied, the appellate court can review whether failure to raise a suppression issue was ineffective assistance of counsel. *State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998); RAP 2.5(a)(3). “Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006) (citing *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001)).

The defense theory at trial was that Officer Lemberg lacked sufficient opportunity to view the driver of the vehicle it later pursued.<sup>3</sup> See RP 49-50, 162; 164. Defense counsel accordingly cross-examined Officer Lemberg about his limited ability to see the driver of the vehicle, and his inability to describe any person either in the vehicle or outside of it. RP 105-114. Thus here, where the State had the burden of establishing the identity of the driver pursued by Officer Lemberg, the record is fully developed as to the lack of reliability of Officer Lemberg’s identification of Mr. Cortes-Mendez.

---

<sup>3</sup> The defense also argued that the driver of the vehicle did not drive in a reckless manner. RP 165.

Yet, defense counsel failed to move to suppress Officer Lemberg's identification procedure as unduly suggestive; arguing only for exclusion of Mr. Cortes-Mendez's DOL photo on relevance grounds, and for lack of personal knowledge. CP 13-15, 34-36; RP 58-59, 86. There is no conceivable tactical reason for not objecting to the highly suggestive identification procedure on due process grounds, especially where the defense fully developed its lack of reliability on cross-examination, and argued to the jury that the officer's identification was not reliable:

[H]e gets information about who owned that car. He gets a name, and the name of the owner of that car happens to be Mr. Cortes-Mendez. And he looks at a photo and says yup, that is the guy. And that's what the State wants you to (indiscernible). Folks, there is so much reasonable doubt with that...

RP 164. The defense's limited objection on relevance grounds to the highly suggestive identification procedure certainly prejudiced Mr. Cortes-Mendez, because the unreliable identification was the sole evidence relied on by the State to prove that Mr. Cortes-Mendez was the driver of the vehicle. RP 156.

#### F. CONCLUSION

The Court of Appeals erred in excluding from consideration of a critical *Brathwaite* factor that social science research has shown to be a

critical safeguard against the unreliability of identifications derived from a suggestive identification procedure. This omission violates due process and implicates the substantial public interest in reducing wrongful convictions, meriting review by this Court. RAP 13.4(b)(3) and (4).

Respectfully submitted this the 13th day of December 2018.

s/ Kate Benward  
Washington State Bar Number 43651  
Washington Appellate Project  
1511 Third Ave, Ste 610  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2711  
E-mail: [katebenward@washapp.org](mailto:katebenward@washapp.org)

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2018 NOV 13 AM 8:48

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

RAUL CORTES-MENDEZ,

Appellant.

No. 76572-8-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: November 13, 2018

LEACH, J. — Raul Cortes-Mendez appeals his conviction for attempting to elude a pursuing police vehicle. He claims that his trial counsel provided ineffective representation by failing to object to an officer’s out-of-court and later in-court identifications. Because he does not show that the trial court would likely have granted a request to suppress this evidence, his claim fails. We affirm.

**BACKGROUND**

Officer Nathan Lemberg has worked for the Seattle Police Department (SPD) for more than eight years. On the evening of February 16, 2016, he was “proactively policing” the Aurora corridor in a marked police vehicle. He pulled into the Jack in the Box parking lot on the northeast corner of North 85th and Aurora. As he drove into the lot from the east, toward a set of parking places along the facing wall of the Jack in the Box, he noticed a man standing next to a

Ford Taurus, looking at the person in the passenger's seat. This man walked away after spotting Lemberg's car. One concern for police along the Aurora corridor is illegal drug activity. Lemberg thought he might have interrupted a drug transaction. But without more information, he did not believe that he had sufficient cause to detain anyone.

Although the interior of the Taurus was dark, Lemberg could see a man in the driver's seat and a woman in the passenger's seat. He drove toward the Taurus, nearly perpendicularly, with the intent of seeing its license plate number. He initially could not see into the Taurus clearly but as he approached within five to seven feet, his headlights lighted its interior. Lemberg made eye contact with the driver and got "a very good look at the occupants." He testified during trial a year later that he noticed the driver's eyes were brown.

After observing the occupants, Lemberg turned his car so he could back into the space next to the Taurus. Lemberg did not describe the suspect to dispatch, take notes of his observations, or turn his video camera to face the occupants of the car. Instead, he immediately conducted a computer search based on the license number he observed. The search revealed that the Taurus had been sold but title had not been transferred. Failure to transfer title within 45 days of sale is a crime.<sup>1</sup> Lemberg also noticed that the Taurus did not have a temporary trip permit that would excuse the failure to register. While the police

---

<sup>1</sup> RCW 46.12.650(7).

vehicle and the Taurus were still parked next to each other, the driver of the Taurus was illuminated by the ambient light in the parking lot.

About 30 seconds after Lemberg parked, while the results were still coming in on the license search, the driver of the Taurus pulled out of his parking space. Lemberg did not get a closer look at the driver as the Taurus was pulling out. He followed the Taurus for about ten blocks. When the license plate search returned the information about the failure to transfer title, he decided to stop the Taurus. He was directly behind it and turned on his overhead lights. The Taurus slowed to let the car in front of it turn right. Immediately afterward, it changed lanes, accelerated, and drove through a red light at the intersection of Third Avenue NW and NW 85th Street. The Taurus then continued quickly west on NW 85th Street.

Lemberg turned on his siren and followed the Taurus through the red light but decided to end his pursuit out of concern for the danger to the public at large.<sup>2</sup> He pulled over and learned from the dispatcher that Cortes-Mendez had purchased the vehicle. Within 15 minutes of ending pursuit, Lemberg searched Cortes-Mendez's name and retrieved a booking photograph that matched his memory of the driver. He wrote a report that evening but did not include a detailed description of his observations before the records search as he had identified Cortes-Mendez based upon the booking photograph.

---

<sup>2</sup> This is SPD policy. Officers terminate pursuit when threats to public safety of a chase outweigh the magnitude of the offense for which the pursuit is enacted.



At trial, the defense asked the court to exclude any reference to the booking photograph. The State agreed not to offer the booking photograph and offered instead a state-issued identification card. Cortes-Mendez objected, initially on the basis of hearsay and later on the basis of relevancy because the officer did not view the identification card to determine the identity of the driver. The court allowed the State to ask the officer how he located the photograph without identifying its source. The court also admitted the identification card as a business record but pointed out that counsel could question Lemberg about his use, if any, of the card to identify Cortes-Mendez.

During trial, Lemberg identified Cortes-Mendez as the driver. He testified that on the night in question, he viewed a photograph of the purchaser of the vehicle and it matched the man he saw driving the Taurus and the defendant. He did not describe the photograph he viewed as a booking photograph. He also identified the person in the identification card photograph as the driver but stated that he did not use the card for his initial out-of-court identification. The jury found Cortes-Mendez guilty of attempting to elude a pursuing police vehicle. He appeals.

#### ANALYSIS

We review claims of ineffective assistance of counsel de novo.<sup>3</sup> To succeed on a claim of ineffective assistance of counsel, the appellant must

---

<sup>3</sup> State v. Feely, 192 Wn. App. 751, 768, 368 P.3d 514, review denied, 185 Wn.2d 1042 (2016).

establish that the trial attorneys performed below an objective standard of reasonableness and that this failure resulted in prejudice.<sup>4</sup> This court starts with a strong presumption that trial counsel provided effective representation.<sup>5</sup> The appellant may rebut this presumption only with a clear showing of incompetence.<sup>6</sup>

Cortes-Mendez does not meet his burden. He does not show that the in-court and out-of-court identification evidence gave rise to a substantial likelihood of irreparable misidentification. So he cannot show that the trial court likely would have granted a request to suppress this identification evidence. As a result, his ineffective assistance claim also fails.

#### Identification Evidence

Cortes-Mendez claims that Lemberg's out-of-court identification procedure violated his right to due process and the trial court should have suppressed any evidence arising from it. But he does not show that Lemberg's identification of him gave rise to a substantial likelihood of irreparable misidentification.

An out-of-court identification that is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification" violates due process.<sup>7</sup> To establish a due process violation, a defendant first must establish

---

<sup>4</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>5</sup> State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d. 1251 (1995).

<sup>6</sup> State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

<sup>7</sup> State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (quoting State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)).

that the identification procedure was impermissively suggestive.<sup>8</sup> Single photograph identification procedures can raise due process concerns.<sup>9</sup> If a defendant shows an identification was impermissively suggestive, then he also must show this procedure created a “substantial likelihood of irreparable misidentification.”<sup>10</sup> Because Cortes-Mendez fails to show that Lemberg’s identifications met this second prong, we need not evaluate the first prong of the analysis.

Courts measure the likelihood of irreparable misidentification by looking at the totality of the circumstances to see if the identification demonstrated “sufficient aspects of reliability.”<sup>11</sup> Reliability “is the linchpin in determining the admissibility of identification testimony.”<sup>12</sup>

In Manson v. Brathwaite,<sup>13</sup> the United States Supreme Court considered the admissibility of an out-of-court single-photograph identification by a law enforcement officer of an individual he encountered earlier. The State conceded that the officer's single photograph identification of Brathwaite was impermissibly suggestive. The Court did not find this concession dispositive of the due process issue. Instead, the Court evaluated the totality of the circumstances to determine

---

<sup>8</sup> State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001).

<sup>9</sup> Linares, 98 Wn. App. at 403; Simmons v. United States, 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

<sup>10</sup> Vickers, 148 Wn.2d at 118.

<sup>11</sup> Manson v. Brathwaite, 432 U.S. 98, 106, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

<sup>12</sup> Brathwaite, 432 U.S. at 114.

<sup>13</sup> 432 U.S. 98, 101, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

whether the identification was reliable.<sup>14</sup> Because the Court found that the identification was reliable, it did not give rise to a substantial likelihood of irreparable misidentification.<sup>15</sup> The due process claim failed.

The Brathwaite Court evaluated these factors to determine reliability: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”<sup>16</sup> Against these factors, a court must weigh the corrupting effect of the suggestive identification itself.<sup>17</sup> Aspects indicative of the corruption of a suggestive identification include “urgency [and] coercive pressure to make an identification arising from the presence of another.”<sup>18</sup> In contrast, “circumstances allowing [for] care and reflection” and the chance to examine the photograph at one’s “leisure” reduce the suggestive impact of the procedure.<sup>19</sup>

Our review of the totality of the circumstances, using all but one of the factors examined by the Brathwaite Court, shows that Lemberg’s identification was reliable and not substantially likely to result in irreparable misidentification. Lemberg did not take notes or describe the suspect to dispatch before receiving information connecting Cortes-Mendez to the car. So we cannot compare the

---

<sup>14</sup> Brathwaite, 432 U.S. at 114-16 (using the factors identified in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), to determine reliability).

<sup>15</sup> Brathwaite, 432 U.S. at 116.

<sup>16</sup> Brathwaite, 432 U.S. at 114.

<sup>17</sup> Brathwaite, 432 U.S. at 114.

<sup>18</sup> Brathwaite, 432 U.S. at 116.

<sup>19</sup> Brathwaite, 432 U.S. at 116.

“accuracy of the description” made by Lemberg after the initial encounter to the booking photograph.<sup>20</sup> We must exclude this factor from our analysis. The remaining factors weigh in favor of the identification’s reliability.

Lemberg had a moderate opportunity to view the driver in the parking lot. He encountered the Taurus at night with transient light. At one point, he saw the suspect illuminated by his headlights from about five to seven feet away. He made eye contact with the driver and spent another 20 to 30 seconds parked next to the car, in view of the driver, before the Taurus pulled away. While less favorable than in Brathwaite, where the encounter was in late daylight,<sup>21</sup> the conditions here were more favorable than in State v. Ramirez.<sup>22</sup> There, the court found reliable the officer’s identification of the defendant based on viewing a suspect at night through a window from a position near the rear tire on the driver’s side of the car.<sup>23</sup>

Lemberg’s degree of attention when making the identification weighs heavily in favor of reliability. A trained officer on duty brings a particularly high degree of attention to making observations of potential suspects.<sup>24</sup> Lemberg was on duty when he encountered the suspect. He was a trained police officer with more than eight years of experience.<sup>25</sup> He was also suspicious of the activity in

---

<sup>20</sup> Brathwaite, 432 U.S. at 115 (listing factor three as “the accuracy of the description” made by the witness after the encounter).

<sup>21</sup> Brathwaite, 432 U.S. at 114.

<sup>22</sup> 109 Wn. App. 749, 754-57, 762-63, 37 P.3d 343 (2002).

<sup>23</sup> Ramirez, 109 Wn. App. at 754.

<sup>24</sup> Brathwaite, 432 U.S. at 115.

<sup>25</sup> See Brathwaite, 432 U.S. at 115 (indicating that police officers’ training raises their attentiveness as witnesses).

and around the Taurus. An officer's heightened suspicion supports increased attention to detail.<sup>26</sup> Officer Lemberg displayed a high level of certainty, stating that he obtained a "very good look" at the suspect and that he recognized Cortes-Mendez as the driver when he viewed the booking photograph. He also displayed confidence during his in-court identification.

The very short time between when Lemberg encountered the suspect and when he identified Cortes-Mendez from the booking photograph supports reliability. Courts have considered elapsed times of one and two days to be reliable.<sup>27</sup> Here, only about 30 minutes to an hour elapsed. Lemberg was in the parking lot adjacent to the Taurus for 20 to 30 seconds. He then pursued the Taurus for about 13 blocks. Fifteen minutes after ending pursuit, he found the photograph.

The identification was also not affected by any corrupting influences that would make it unreliable. Because Lemberg ended the chase, he was in no rush to complete the identification. He was not feeling coerced by other officers since he was alone when he identified Cortes-Mendez in the booking photograph. Lemberg behaved the way a trained officer should in this situation. Rather than attempting to bolster a predetermined conclusion, he searched for the correct answer by conducting a systematic investigation of a suspicious circumstance.

---

<sup>26</sup> See Ramires, 109 Wn. App. at 762 (discussing the impact of suspicion on heightened attention to detail).

<sup>27</sup> See, e.g., Brathwaite, 432 U.S. at 115-16; Ramires, 109 Wn. App. at 762.

Because Lemberg's identification of Cortes-Mendez based on the booking photograph and his memory of the encounter is reliable, it did not risk a substantial likelihood of irreparable misidentification and therefore did not violate due process. So Cortes-Mendez fails to establish that the trial court would have been likely to grant a motion to suppress evidence flowing from this initial out-of-court identification.

#### Assistance of Counsel

A criminal defendant has a constitutional right to effective assistance of counsel.<sup>28</sup> The burden is on the convicted defendant to "show that (1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'the deficient performance prejudiced the defense.'"<sup>29</sup> An appellant must prove both prongs to establish ineffective assistance.<sup>30</sup>

Cortes-Mendez asserts he suffered ineffective assistance of counsel at trial because his attorneys did not move to suppress Lemberg's out-of-court and in-court identification. However, since he fails to show that the trial court would likely have granted a motion to suppress, Cortes-Mendez also fails to establish that his attorneys' performance prejudiced him.

If an appellant fails to establish either prong of an ineffective assistance of counsel claim, that claim fails. So Cortes-Mendez's claim fails.

---

<sup>28</sup> In re Pers. Restraint of Khan, 184 Wn.2d 679, 688, 363 P.3d 577 (2015).

<sup>29</sup> In re Pers. Restraint of Yates, 177 Wn.2d 1, 35, 296 P.3d 872 (2013) (quoting Strickland, 466 U.S. at 687-88); Khan, 184 Wn.2d at 688; McFarland, 127 Wn.2d at 334-35.

<sup>30</sup> Feely, 192 Wn. App. at 769.

CONCLUSION

We find that Cortes-Mendez failed to demonstrate ineffective assistance of counsel. He failed to show that a court would likely have granted a motion to suppress the out-of-court and in-court identification evidence because he did not establish that the identification procedure violated his due process right. We affirm.

WE CONCUR:

Andrus, J.

Leach, J.

Urdahl, 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. 76572-8-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:

respondent James Whisman, DPA  
[PAOAppellateUnitMail@kingcounty.gov]  
[Jim.Whisman@kingcounty.gov]  
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 13, 2018

# WASHINGTON APPELLATE PROJECT

December 13, 2018 - 4:49 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 76572-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Raul Cortes-Mendez  
**Superior Court Case Number:** 16-1-02420-0

### The following documents have been uploaded:

- 765728\_Petition\_for\_Review\_20181213164850D1476698\_9890.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was washapp.121318-19.pdf*

### A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20181213164850D1476698**