

NO. 65716-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

QUOC KIEN LU,

Appellant.

2011 APR 27 PM 1:20

COURT OF APPEALS
FILED
[Signature]

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

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A. ISSUES

1. A show-up identification is admissible unless it is so impermissibly suggestive that it creates a substantial likelihood of irreparable misidentification. If such an identification procedure is unnecessarily suggestive, courts look at the totality of the circumstances to determine whether the identification is reliable. Here, a witness identified Lu at a show-up identification without hesitation and within 40 minutes of the crime, wearing the exact same clothing that he used to commit the crime. Given these circumstances, has Lu failed to demonstrate that the witness's identification was so unnecessarily suggestive that it created a substantial likelihood of misidentification?

2. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove second-degree malicious mischief, the State must show that the defendant caused over \$750 damage to another's property. The owner of the restaurant burglarized by Lu testified that it cost \$780 to repair the restaurant's broken glass door. Is this sufficient evidence to demonstrate that Lu caused over \$750 damage to the door?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Quoc Lu with Burglary in the Second Degree, Malicious Mischief in the Second Degree, and Violation of the Uniform Controlled Substances Act: Possession of Cocaine. CP 16-17. The jury convicted Lu as charged. CP 57-62; 1RP 481-82.¹ The trial court sentenced Lu to the high end of the standard sentencing range, imposing 57 months for the burglary, 22 months for the malicious mischief, and 24 months for the drug possession. CP 98-106; 2RP 11.²

2. SUBSTANTIVE FACTS

On Sunday, December 20, 2009, Connerilius Myles arrived for work at a laundromat around 5:40 a.m. 1RP 184-85. As Myles was parking his truck, a Hispanic male walked two feet in front of him wearing a black, hooded sweatshirt with white writing across the chest. 1RP 190-91, 195-97. Myles saw the man walk over and

¹ The Verbatim Report of Proceedings consists of two volumes, with the State adopting the following reference system: 1RP (5/4/10, 5/5/10, 5/10/10, 5/11/10, and 5/12/10) and 2RP (5/28/10).

² The State also alleged that Lu committed the crimes shortly after being released from custody. CP 16-17. Although the jury found that Lu committed the crimes with rapid recidivism, the State did not seek an exceptional sentence. CP 57-62; 2RP 1-2.

stand between the Radio Shack and the Magic Dragon, a fast-food Chinese restaurant a couple doors down from the laundromat. 1RP 184-86, 197.

Myles thought that the suspect looked "out of place" based on the time of the morning, the way he was standing, and the way he stared at Myles until Myles went inside the laundromat. 1RP 198. Myles turned off the alarm in the laundromat and walked back to the front door, where he saw the same man "jet" past and take off running down Andover Street, turning left at the corner of Rainier Avenue South. 1RP 197-98, 200-01. Myles noticed that there was broken glass outside the Magic Dragon that had not been there when he arrived minutes earlier. 1RP 199-201.

Around the same time Myles arrived for work, Ronald Glew also arrived to start his shift at the nearby Starbucks. 1RP 211, 242. Glew parked about 75-100 yards away from the Magic Dragon. 1RP 244. Glew saw the same man wearing a black, hooded jacket walk over to the Magic Dragon, look around, and drop his shoulder³ before going "straight through the door." 1RP 246-49. Glew estimated that the suspect spent 30 seconds to one

³ Although Glew believed that the man used his shoulder to shatter the glass door, police later found a small rock inside the restaurant. 1RP 249-50, 392-93.

minute inside the restaurant before running out the door and heading down Andover St. 1RP 249-51, 261.

Glew called 911 and Seattle Police Officer David Lindner coincidentally turned into the lot where Glew and Myles had parked. 1RP 251, 368-69. Lindner saw a Hispanic male jogging down Andover St., wearing all black with a hood covering his head. 1RP 368-71. Glew "flagged" down Lindner and told him what had happened, including the suspect's description and escape route. 1RP 369, 373-75. Although Lindner immediately left to look for the suspect, his efforts were unsuccessful. 1RP 373. Consequently, police set up patrol cars in the area to contain the suspect until a K-9 unit arrived. 1RP 283-85.

At 6:11 a.m., King County Sheriff's Deputy Randall Potter arrived with his dog, Panzer, to search for the suspect. 1RP 144. Panzer tracked the suspect's scent down Andover St., turning onto Rainier Ave. S., and heading up a stairwell to an old house. 1RP 378-79. Panzer located Lu leaning up against the house, wearing a black, hooded sweatshirt with white writing across the chest. 1RP 29, 49, 152, 343, 380-85. Lu's location was one-and-a-half to two blocks away from the restaurant. 1RP 384. Lindner recognized Lu as the person he had seen running down Andover St. when he

pulled into the parking lot. 1RP 384-85. Lindner detained Lu and waited for Myles and Glew to arrive for a show-up identification. 1RP 386-87.

Seattle Police Officer Juan Ornelas drove Myles and Glew separately to identify Lu. 1RP 341. Myles immediately identified Lu as the person whom he had seen outside the Magic Dragon. 1RP 225. Myles identified Lu without hesitation at 6:20 a.m., stating "that's him, that's him." 1RP 25, 185. While transporting Glew to Lu's location, Ofc. Ornelas told Glew that Myles had already identified Lu. 1RP 44. Subsequently, Glew positively identified Lu. 1RP 28. Lindner arrested Lu following the positive identifications and found a crack pipe in Lu's pocket in a search incident to arrest. 1RP 387-88. Residue inside the pipe later tested positive for cocaine. 1RP 420-21.

Prior to trial, Lu moved to suppress Myles's and Glew's identification of him as impermissibly suggestive. CP 6-15; 1RP 87-97. The court granted Lu's motion to suppress Glew's identification primarily based on Ofc. Ornelas's improper comment to Glew that Myles had already identified Lu. 1RP 100-01; CP 112. The court, however, admitted Myles's identification, finding that it

was "not impermissibly suggestive" and was reliable. 1RP 100-01; CP 112. Myles was unable to identify Lu at trial. 1RP 197.

At trial, the owner of the Magic Dragon restaurant, Yan Li, testified that he "remember[ed]" paying \$780 to fix the broken glass door. 1RP 316-17, 327.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED MYLES'S SHOW-UP IDENTIFICATION OF LU.

Lu argues that the trial court erred by admitting Myles's identification of him following the burglary. Despite decades-long precedent to the contrary, Lu urges the Court to hold that "single person show-ups are intrinsically impermissibly suggestive." Appellant's Br. at 10. Lu contends further that Myles's identification should have been suppressed because it was unreliable, and tainted Myles's later in-court identification of him.⁴ Finally, Lu argues that the court's error in admitting Myles's show-up identification was not harmless and requires reversal.

Lu's claims are meritless. Given the record, the court properly found that Myles's show-up identification was "not unnecessarily suggestive." 1RP 100; CP 112. Even if the show-up

⁴ Lu is mistaken. Myles did not identify him in court. 1RP 197.

identification was impermissibly suggestive, it was reliable and should have been admitted under Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Contrary to Lu's claim, Myles did not identify Lu in court and therefore any argument on this issue is irrelevant and should be stricken. Any error in admitting Myles's show-up identification was harmless.

Show-up identifications are not "per se impermissibly suggestive." State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).⁵ The defendant bears the burden of showing that the identification procedure was "unnecessarily suggestive." Id. If the defendant fails, the inquiry ends. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If the defendant prevails, the court considers, "based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification." Id.

⁵ Although show-up identifications are "somewhat suggestive," they allow witnesses to test their recollection of a suspect while their memories are still fresh, and provide for an expeditious release of innocent citizens. 12 Royce A. Ferguson, Washington Practice: Criminal Practice and Procedure § 3210 (3d ed. 2011). The trial court recognized this double-edged sword, stating, "The point of these one person show-ups, while sometimes frustrating to defense attorneys, is that in many cases the police discover they got the wrong guy and they can release him right there on the spot. So this actually works to defendants' advantage or at least to some defendants' advantages." 1RP 100.

Nearly forty years ago, the United States Supreme Court established the following factors to help guide courts in determining whether an unnecessarily suggestive identification procedure is reliable: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's description, (4) the witness's level of certainty at the time of identification, and (5) the length of time between the crime and the identification. Biggers, 409 U.S. 188 at 199-200.

Suggestive remarks or utterances by police officers, and witnesses who identify a suspect in each other's presence, are circumstances that might affect the admissibility of a show-up identification. 12 Royce A. Ferguson, Washington Practice: Criminal Practice and Procedure § 3211 (3d ed. 2011). The fact that a defendant is handcuffed and standing by a police car at the time of a show-up identification, however, is insufficient alone to demonstrate impermissible suggestiveness. Guzman-Cuellar, 47 Wn. App. at 336.

Given the record, the trial court properly found that Myles's show-up identification of Lu was "not impermissibly suggestive" and that all of the factors "tilt toward the State." CP 112; 1RP 100.

Although it is unclear from the trial court's oral and written findings whether the court found that Lu had met his threshold burden of demonstrating that Myles's show-up identification was "unnecessarily suggestive,"⁶ this Court should find that Lu has not met his burden.

At trial and on appeal, Lu fails to show how *Myles's* show-up identification was unnecessarily suggestive. Myles viewed Lu from the back seat of a patrol car within forty minutes of the burglary. 1RP 12-13, 23-25. The transporting officer, Ornelas, told Myles that they had a "possible suspect" and asked if Myles would go with him to "possibly identify the suspect." 1RP 23. There is nothing in the record to suggest, and Lu does not argue, that Ornelas did or said anything improper to influence Myles's identification of Lu. Indeed, the court characterized Myles's identification as a "classic" show-up. 1RP 100.

⁶ At the hearing, the court began its ruling by stating that "Miles' [sic] identification was not unnecessarily suggestive. All of the factors tilt toward the State." 1RP 100. The court did not apply any of the Biggers factors to Myles's show-up identification on the record. 1RP 100. In its written order, however, the court applied the factors before concluding that the "out-of court identification . . . is thus not impermissibly suggestive." CP 112. It is unclear whether the court ever found that Lu satisfied the threshold requirement of establishing that Myles's show-up identification was unnecessarily suggestive.

Rather than point to specific facts about his own case, Lu quotes a law review article at length discussing the general pitfalls of show-up identifications, and then urges this Court to reverse decades-long United States and Washington State Supreme Court jurisprudence and adopt the "modern view" that "single person show-ups are intrinsically impermissibly suggestive." Appellant's Br. at 7-10. Lu should not be allowed to prevail by relying solely on a law review article to advance his position, rather than pointing out the specific facts of *this case* that establish that Myles's show-up identification was impermissibly suggestive. The Court should hold Lu to his burden and find that he has failed to meet the threshold requirement, ending the inquiry. See Guzman-Cuellar, 47 Wn. App. at 335 (refusing to consider the second step's reliability factors where the defendant failed to satisfy the first step).

Nonetheless, if the Court finds that Lu has satisfied the threshold requirement, then the Court should find that Myles's show-up identification was reliable under Biggers. Examining the factors, the trial court found that:

the Hanson⁷ reliability factors outweigh any suggestiveness inherent in the show-up procedure. The evidence established that Myles did have an opportunity to view the suspect and that his attention was focused on the suspect. His prior description of the suspect was generally accurate. He was quite certain when making his identification. Finally, no more than 40 minute[s] had elapsed since he had seen the suspect at the store.

CP 112. Although Lu disputes the court's findings, substantial evidence supports them.

First, Myles had a unique opportunity to view Lu at the time of the burglary. Myles came within ten feet of Lu,⁸ observing Lu initially as he parked his truck and moments later as Lu stood next to him at the Radio Shack, located one door away from the Magic Dragon. 1RP 62; CP 108-11. Myles kept his eye on Lu until he entered the laundromat to turn off the alarm. 1RP 62; CP 110.

Myles accurately described Lu as a male wearing a black, hooded sweatshirt with white writing across the chest - the same clothing Lu was apprehended in 30 minutes later. 1RP 29, 62; CP 110-11. Myles's only error in describing Lu was describing him as

⁷ State v. Hanson, 46 Wn. App. 656, 664, 731 P.2d 1140, review denied, 108 Wn.2d 1003 (1987). The Hanson factors rely on, and are the same as, the Biggers factors.

⁸ Although Myles testified at trial that he came within two feet of Lu, the State will rely on the facts before the trial court at the time of the hearing. 1RP 191.

Hispanic when he is Asian.⁹ CP 110. Further, when Myles saw Lu at the show-up identification - 40 minutes after the burglary - Myles identified Lu without hesitation, repeatedly stating, "that's him." 1RP 30-31; CP 111. Based on the record, the trial court properly found that Myles's show-up identification was reliable and thereby admissible.

Lu challenges the court's reliability finding by selectively quoting the record. For example, Lu argues that "Myles' initial description to Seattle Police Officer Lindner was a Hispanic male wearing a dark hood." Appellant's Br. at 12. The court found, however, that Myles's initial description was more detailed, specifically that the suspect had on a black, hooded sweatshirt with white writing across the chest. CP 110. Similarly, Lu argues that Myles and Glew "discussed their respective viewing and the details they observed," when the court actually found that "Glew asked Myles if he had seen the suspect in front of the stores, and Miles said that he had."¹⁰ Appellant's Br. at 12; CP 110.

⁹ Significantly, Myles maintained this error at trial when he looked at Lu and described him as "Hispanic." 1RP 199.

¹⁰ As the basis for his argument, Lu cites the court's findings on CP 110. Lu might have meant to cite CP 109, where the court found, "The 911 operator called Glew back several minutes later. Glew (apparently conferring with another witness Connerilius Miles) said the suspect was Hispanic dressed in black with a hood over his head. Again conferring with Miles, Glew said . . ." This pretrial

Lu's argument that the trial court "had suspicions about the impermissibly suggestive nature of the show-up identifications" based on *Glew's* show-up identification is meritless. Appellant's Br. at 13. As Lu concedes, the trial court suppressed *Glew's* identification, largely based on Ofc. Ornelas's improper comment to *Glew* prior to the show-up identification, and on *Glew's* inferior ability to see Lu and lack of certainty when identifying him. CP 112. This Court should reject Lu's attempts to cast doubt on the reliability of *Myles's* show-up identification based on *Glew's* significantly different circumstances and selective quotations from the record.

This Court should also reject Lu's argument that *Myles's* "in-court identification was tainted by the pretrial identification." Appellant's Br. at 14. *Myles did not identify Lu in court.* When asked by the prosecutor whether he could "recognize [Lu] now in court," *Myles* responded, "No, not since December the 20th." 1RP 197. Lu's argument on this issue is meritless and should be stricken.

finding, however, was revealed to be erroneous at trial, when both *Glew* and *Myles* testified that they did not speak to each other on the day of the incident. 1RP 216, 256, 261.

Finally, any error in admitting Myles's show-up identification was harmless. Assuming that the constitutional harmless error standard applies,¹¹ there is no reasonable probability that Lu would have been acquitted had the error not occurred. See State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (holding an error is harmless beyond a reasonable doubt if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred"). Lu mistakenly claims that "no evidence" linked him to the burglary besides Myles's and Glew's identifications. Appellant's Br. at 15. Lu overlooks key additional evidence linking him to the crime.

For example, Glew testified that he, too, saw a man in a black, hooded jacket when he arrived for work at 5:45 a.m. 1RP 242, 246-49. Glew estimated that the man was 5'5" to 5'7" tall, consistent with Lu's height of 5'5" tall. 1RP 248-49, 268-69. Glew saw the suspect break into the Magic Dragon and run out the front door down Andover St., the same path that Myles saw Lu take, and

¹¹ It is unclear under the case law whether the improper admission of a show-up identification constitutes a due process violation, or merely an evidentiary error. See State v. George, 150 Wn. App. 110, 206 P.3d 697, review denied 166 Wn.2d 1037 (2009) (applying the harmless standard for improper admission of evidence); State v. Le, 103 Wn. App. 354, 367-68, 12 P.3d 653 (2000) (applying the constitutional harmless error standard because the identification occurred after an illegal arrest).

that Panzer later tracked. 1RP 206-10, 246-51, 261, 378. Glew saw no one else in the area at the time of the burglary. 1RP 253-54. Although the court suppressed his show-up identification, Glew provided significant incriminating testimony against Lu.

Officer Lindner also provided testimony substantially incriminating Lu. Lindner saw the same Hispanic male wearing a black, hooded sweatshirt jogging down Andover St. within seconds of the burglary. 1RP 251, 368-71. Lindner later identified the suspect as Lu less than an hour after the burglary. 1RP 384-85.

Panzer's "direct line track" to Lu also weighed heavily against Lu. 1RP 159. With a sense of smell 1,000 times better than humans, and near perfect conditions for tracking, Panzer led police to Lu within 8 minutes. 1RP 129, 147-48, 156, 159. Panzer's track followed Myles's and Glew's description of the burglar's path. 1RP 378-79. When Panzer reached Lu, Panzer began tugging on his leash and barked so loud that another nearby officer heard him. 1RP 158, 305. Lu was apprehended no more than two blocks away from the restaurant, within 40 minutes of the burglary, wearing the same clothing described by Myles, Glew, and Lindner. 1RP 156, 343, 384. Given the substantial evidence

against Lu, any error in admitting Myles's show-up identification was harmless.

2. SUFFICIENT EVIDENCE SUPPORTS LU'S MALICIOUS MISCHIEF CONVICTION.

Lu argues that the State failed to prove beyond a reasonable doubt that the damage to the glass door exceeded \$750. Viewing the evidence in the light most favorable to the State, Lu's argument fails. The State produced sufficient evidence that Lu caused over \$750 damage to the glass door.

A person is guilty of second-degree malicious mischief if he knowingly and maliciously causes physical damage to another's property in an amount exceeding \$750. RCW 9A.48.080(1)(a). At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. at 201. Circumstantial and direct

evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Lu challenges the sufficiency of the State's evidence solely on the dollar amount of the damage caused. Lu essentially attacks the credibility of the restaurant owner, Yan Li, as to his testimony about the cost to repair the broken door. After lengthy questioning about the incident, the following exchange ensued:

STATE: All right. One more series of questions, short questions. How much did you pay to repair the door?

LI: As far as I remember it's about \$780.

STATE: Okay. Do you remember if it was closer to 700 or closer to 800?

LI: Closer to 800.

STATE: And did your insurance pay anything?

LI: No, because I did not file a claim.

STATE: Why not?

LI: Because my deductible was \$1000.

STATE: Do you still have the repair bill from this time?
LI: No.
STATE: Why not?
LI: Oh, because I did not file a claim with the insurance company, so I thought I didn't need it.

1RP 327. Viewing the evidence in the light most favorable to the State, Li's testimony that the door cost "about \$780" to repair, and was "[c]loser to [\$]800" than \$700, was sufficient evidence for a rational trier of fact to find that the damage exceeded \$750. 1RP 327.

Lu's sufficiency challenge essentially boils down to an attack on Li's credibility. Lu faults Li for failing to submit an insurance claim and failing to provide an invoice for the repair cost. Without citing to any authority, Lu argues that Li's claim "to 'remember'" the damage costing closer to \$800, "simply does not meet the substantial evidence required to sustain a conviction." Appellant's Br. at 17-18. Lu fails to cite any authority to support his position.

Nonetheless, Li's testimony provided sufficient evidence that the glass door cost more than \$750 to repair. A victim's word is sufficient evidence to support a conviction. See RCW 9A.44.020(1) (a defendant's conviction for a sex offense does not require the

"testimony of the alleged victim be corroborated"); State v. Whitney, 44 Wn. App. 17, 21, 720 P.2d 853 (1986) (same regarding a kidnapping conviction).

Lu's post-conviction efforts to discredit Li's credibility are misplaced. On appeal, a reviewing court must defer to the trier of fact on issues of witness credibility, conflicting testimony, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. Given that Li was the only witness who testified about the repair cost, the jury must have found his testimony credible and persuasive. This Court should not second-guess the jury's credibility determination.

Moreover, photographs taken of the door immediately after the burglary reveal that the entire glass door was shattered. 1RP 202; Ex. 7, 21, 22. The jury reasonably concluded that it cost more than \$750 to repair the door in light of the significant damage caused. Admitting the truth of Li's testimony and drawing all reasonable inferences in favor of the State, there is substantial evidence from which a rational trier of fact could find that the damage to the glass door exceeded \$750. The Court should affirm Lu's malicious mischief conviction.

D. CONCLUSION

For the reasons stated above, the Court should affirm Lu's convictions and sentence.

DATED this 27th day of April, 2011.

Respectfully submitted,

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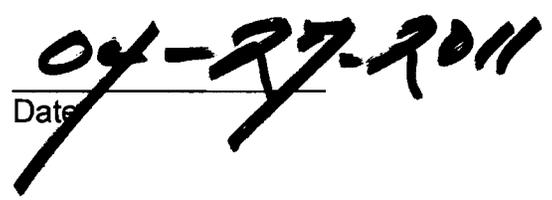
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. QUOC KIEN LU, Cause No. 65716-0-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.



Name
Done in Seattle, Washington


Date