

68631-3

68631-3

NO. 68631-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

D.D.,

Appellant.

REC'D
SEP 20 2012
King County Prosecutor
Appellate Unit

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

The Honorable Barbara Mack, Judge

BRIEF OF APPELLANT

SEP 20 10:00 AM '12
DIVISION ONE

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| <u>Issues Pertaining to Assignments of Error</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| 1. <u>Procedural Facts</u> | 2 |
| 2. <u>Substantive Facts</u> | 3 |
| C. <u>ARGUMENT</u> | 8 |
| THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE OF THE SHOW-UP AND THE IN-COURT IDENTIFICATION..... | 8 |
| 1. <u>Opportunity to View</u> | 11 |
| 2. <u>Degree of Attention</u> | 12 |
| 3. <u>Accuracy of Prior Description</u> | 13 |
| 4. <u>Certainty at Identification and Length of Time between Crime and Identification</u> | 14 |
| 5. <u>Weighed Against the Corrupting Effect of the Suggestive Identification</u> | 14 |
| D. <u>CONCLUSION</u> | 15 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|-----------|
| <u>State v. Booth</u> 36 Wn. App. 66, 671 P.2d 1218 (1983)..... | 12 |
| <u>State v. Burrell</u> 28 Wn. App. 606, 625 P.2d 726 (1981)..... | 11 |
| <u>State v. Guzman-Cuellar</u> 47 Wn. App. 326, 734 P.2d 966 (1987)..... | 10 |
| <u>State v. Hilliard</u> 89 Wn.2d 430, 573 P.2d 22 (1977)..... | 15 |
| <u>State v. Kinard</u> 109 Wn. App. 428, 36 P.3d 573 (2001) <u>review denied</u> , 146 Wn.2d 1022 (2002)..... | 9, 10, 11 |
| <u>State v. Linares</u> 98 Wn. App. 397, 989 P.2d 591 (1999) <u>review denied</u> , 140 Wn.2d 1027 (2000)..... | 9 |
| <u>State v. Maupin</u> 63 Wn. App. 887, 822 P.2d 355 <u>review denied</u> , 119 Wn.2d 1003 (1992). | 13 |
| <u>State v. McDonald</u> 40 Wn. App. 743, 700 P.2d 327 (1985)..... | 11 |
| <u>State v. Rogers</u> 44 Wn. App. 510, 722 P.2d 1349 (1986)..... | 9, 10, 11 |
| <u>State v. Springfield</u> 28 Wn. App. 446, 624 P.2d 208 <u>review denied</u> , 95 Wn.2d 1020 (1981) | 12 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---|--------|
| <u>State v. Thorkelson</u> 25 Wn. App. 615, 611 P.2d 1278 <u>review denied</u> , 94 Wn.2d 1001 (1980) | 12, 15 |
| <u>State v. Vickers</u> 148 Wn.2d 91, 116, 59 P.3d 58 (2002) | 9 |
| <u>FEDERAL CASES</u> | |
| <u>Manson v. Braithwaite</u> 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)..... | 9 |
| <u>Simmons v. United States</u> 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) | 9, 14 |
| <u>United States v. Hines</u> 455 F.2d 1317 (D.C. Cir. 1971) | 10 |
| <u>United States v. Wade</u> 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)..... | 15 |
| <u>RULES, STATUTES AND OTHER AUTHORITIES</u> | |
| CrR 3.6 | 1, 2 |
| JuCR 7.11..... | 2 |

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to due process and a fair trial when it permitted evidence of an impermissibly suggestive and unreliable show-up identification and a subsequent identification at trial.

2. The trial court erred when it entered finding of fact 9, which indicates, "Faletogo had sufficient opportunity to view [D.D.]'s jacket and face through the window."¹

3. The trial court erred when it entered conclusions of law I.b., I.c., and II in denying the defense motion to suppress identification evidence.

Issues Pertaining to Assignments of Error

1. Appellant was charged with burglarizing a school. Twelve minutes after the burglars fled the school, and several blocks away, a school district employee was driven to where police had detained two suspects. Both suspects were in handcuffs, near a police car, and standing with at least one uniformed police officer. The employee positively identified appellant as one of the individuals in the school and identified him again at trial. Did the trial court err

¹ The trial court's written CrR 3.6 findings and conclusions are attached to this brief as an appendix.

when it allowed evidence of these identifications?

2. Neither the evidence nor the law supports several of the trial court's key findings and conclusions. Are they erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged appellant D.D. with one count of Burglary in the Second Degree. CP 1. The State alleged that on Sunday, October 23, 2011, D.D. and D.J. broke into Meany Middle School, located at 301 21st Avenue E. in Seattle. CP 2.

The defense moved to suppress evidence that a Seattle School District employee – Fiafia Faletogo – had positively identified D.D. as one of the individuals in the school that day, arguing the procedures used by Seattle Police were impermissibly suggestive and denied D.D. due process of law. CP 3-12. The motion was denied. Supp. CP ____ (sub no. 72, CrR 3.6 Findings of Fact and Conclusions of Law).

The Honorable Barbara Mack found D.D. guilty as charged. CP 18; Supp. CP ____ (sub no. 73, Findings of Fact and Conclusions of Law Pursuant to JuCR 7.11(d)). Judge Mack imposed local sanctions (30 days' detention) and ordered D.D. to pay \$418.90 in

restitution to the school district. CP 19-24. D.D. timely filed his Notice of Appeal. CP 25.

2. Substantive Facts

The presentation of evidence on the defense motion to suppress was incorporated into trial. 1RP² 4.

Fiafia Faletogo is the “alarm desk response specialist” for the Seattle Public School District. It is his job to respond to any alarm in any district building. 2RP 4. At 11:48 a.m. on the morning of Sunday, October 23, 2011, Faletogo received a call from a monitoring service that an alarm had been tripped at the Meany Middle School Building. 2RP 5. The building had been secured, and the silent alarm set, the day before; no one had permission to be in the building on Sunday. 1RP 16-19.

Faletogo arrived at the building about 15 minutes after receiving the call, entered through a security door, and headed toward the main office. 2RP 5-8. He found shattered glass on the floor next to the office doorway and discovered that a service window (with an opening at the bottom through which to pass objects) had been broken. 2RP 8-9; exhibit 9. Through the broken window,

² This brief refers to the verbatim report of proceedings as follows: 1RP – 3/12/2012; 2RP – 3/13/2012; 3RP – 3/16/2012.

Faletogo saw a person – a slender black male wearing a white shirt. This person was rifling through cabinets and drawers inside the office area. 2RP 9-10.

While quietly exiting the building, Faletogo contacted the monitoring service by radio, reported a burglary in progress, and described what he had seen. 2RP 10-12. As he stood outside the building looking in through windows in a door, he saw two individuals casually walk past that door. 2RP 13-14; exhibit 18. The first person was the same individual he had just seen in the office. He and the second person were walking side-by-side with the second person farther away from Faletogo, a distance he estimated at four feet. 2RP 15-16, 22.

According to Faletogo, both individuals were 6' to 6'2" tall and appeared to be in their late teens. 2RP 21, 41. Whereas the first individual was wearing a white shirt, the second was wearing what appeared to be a windbreaker "that athletes wear" with a zipper. 2RP 16. Depending on when and to whom he was speaking, Faletogo sometimes described the jacket as "dark blue," sometimes as "black," and sometimes as simply "dark." 2RP 16, 46 (testifies it was dark blue); 2RP 54-55 (tells monitor it is black); 2RP 58-59 (statement to police indicates "dark top").

As the two individuals walked by the door, they noticed Faletogo looking back at them. According to Faletogo, he made eye contact with the two for three to five seconds before they ran north up the hallway and out of sight. 2RP 17-23, 46. There are several exits to the school building and Faletogo did not know which exit the two used to leave. 2RP 35-38; exhibit 13.

Lane Gerritsen was getting into his car at the corner of 21st Ave. and E. Mercer Street – within a few blocks north of the school – when he looked south down 21st and saw a police car with its emergency lights on. 1RP 39-41; exhibit 3. He also noticed two individuals walking toward him on 21st and looking back over their shoulders at the police activity. 1RP 41-43. He identified one of the individuals as D.D. 1RP 42. Neither individual ran. They were walking at a “standard pace.” 1RP 44, 49-51. After D.D. and the second individual walked past Gerritsen, a police car entered the area and an officer ran between two homes. 1RP 44. Gerritsen could not see what happened thereafter, but heard one of the individuals tell police, “I didn’t do anything.” 1RP 47-48.

After a brief foot chase, officers detained D.D. and D.J. in the area between 20th and 21st Ave. E. 2RP 63-65, 117-121; exhibits 19, 61. Officers frisked D.D., finding two cell phones, “Hi-Chew” candy,

and a screwdriver. 2RP 66; 3RP 5-6. Police also found a package of Hi-Chew when frisking D.J. 2RP 92, 153. The candy was similar to that sold by students for fundraising and kept in a glass display cart at the school. That cart had been tampered with in the burglary. 1RP 24-27, 31-32; exhibits 7-8. D.D. repeatedly asked why he was being arrested, telling police he had been jogging in the area and professing his innocence. When asked about the candy, D.D. said he had purchased it. 2RP 77, 126.

While D.D. and D.J. were still at the arrest scene, police decided to do a show-up identification. Officer Ben Archer picked up Faleto go at the school, telling him that officers had stopped two people and needed him to determine whether they were the same two that had been in the school. 2RP 96. He also may have informed Faleto go that the two had run away from police. 2RP 97. First, Faleto go was asked to look at D.J. He was handcuffed and standing by a patrol car with one or more police officers. 2RP 44, 97. Faleto go identified him as the first individual (in a white shirt) whom he had seen in the school. 2RP 24-25; exhibit 34.

Faleto go was then driven a block away to view D.D., who also was handcuffed, by a patrol car, and standing with at least one officer. 2RP 25, 44, 102, 114. At 12:29 p.m. – 12 minutes after

police had been dispatched to the area – Faletogo identified D.D. as the second individual in the school (wearing the dark, black, or blue jacket). 2RP 25-26, 74, 76; exhibit 4. Just as he had done on October 23, 2011, at trial Faletogo identified D.D. as the second individual he saw in the school. 2RP 15, 20. He testified that he recognized D.D.'s face and D.D.'s height appeared consistent with the second person. 2RP 21.

Police lifted fingerprints from items inside the school. D.J.'s prints were found on an empty bag of chips that had been discarded in a trashcan inside the school. 2RP 142-143, 168-169. In contrast, D.D.'s prints were not found on any item inside the school. 2RP 169.

D.D. took the stand in his own defense. He testified that on the morning of October 23, 2011, he got a ride to the Miller Community Center (located adjacent to Meany Middle School) to meet D.J. and play basketball. 3RP 13-15; exhibit 13. D.D., D.J., and a third young man, whom D.D. did not know, played ball until D.J. and the other individual left, indicating they would be right back. 3RP 15-16. Like D.D., the third individual was African-American. He also was approximately D.D.'s age and height. 3RP 32-33.

D.D. was sweaty and took off his shirt while waiting for the other two to return. 3RP 16. After waiting 15 to 20 minutes, only

D.J. returned and he was in a frantic state. He was running and shouted for D.D. to “run, bro, run.” 3RP 17, 25. Based on D.J.’s appearance, D.D. did as he was told and the two ended up running several blocks before stopping to catch their breath. 3RP 17, 34. D.J. noticed that D.D. was not wearing a shirt and gave him his black jacket, which D.D. put on. 3RP 17-18, 29, 32; exhibit 4. D.D. saw a pursuing police officer and, due to his fear of police (his father and friends have been arrested many times) started running again, but stopped when an officer drew his gun. 3RP 18-19.

D.D. admitted lying to the police when he claimed he had been jogging in the area. He had been scared and this was the first thing that came to mind. 3RP 19. The screwdriver found in the black jacket belonged to D.J. 3RP 35. The Hi-Chew candy was his; he had purchased it earlier that day. 3RP 34, 36-37. D.D. denied ever entering the school that day. 3RP 19.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE OF THE SHOW-UP AND THE IN-COURT IDENTIFICATION.

Impermissibly suggestive out-of-court identification procedures – including show-up procedures – violate due process where there is a substantial likelihood of irreparable misidentification.

Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986).

The defendant bears the burden to demonstrate that a procedure is suggestive. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002). Once that burden is satisfied, the court must decide whether there is a substantial likelihood of irreparable misidentification based on several factual considerations. Id. at 433. Factors to be considered include (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the confrontation. Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

The trial court's findings of fact must be supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The court's ultimate decision on the admissibility of

identification evidence is reviewed for abuse of discretion. Kinard, 109 Wn. App. at 431-32.

Although show-up procedures have been widely condemned, they are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); Rogers, 44 Wn. App. at 515. That a defendant is handcuffed and standing somewhere near police is insufficient, by itself, to demonstrate a show-up is impermissibly suggestive. Guzman-Cuellar, 47 Wn. App. at 336 (citing United States v. Hines, 455 F.2d 1317 (D.C. Cir. 1971)).

Here, D.D. was handcuffed, standing near the rear of a police car, and in the presence of at least one officer. 2RP 44, 102, 114. But there is more. Officer Archer conceded he may have told Faletogo, just prior to the show-ups, that the two suspects he was about to view had run from police. 2RP 97. Moreover, just before looking at D.D., Faletogo correctly identified D.J. as the first person he saw in the school. 2RP 24-25. Naturally, this would have reinforced the suggestion to Faletogo that the next person he was about to view (D.D.) was the second person he saw in the school.

Judge Mack's conclusion that the show-up was not impermissibly suggestive is erroneous. And because the show-up

was improperly suggestive, the next question is whether there is a substantial likelihood of irreparable misidentification under the relevant factors. Kinard, 109 Wn. App. at 433; Rogers, 44 Wn. App. at 515. Application of these factors demonstrates a substantial likelihood.

1. Opportunity to View

Faletogo did not see anyone with D.J. while D.J. was inside the office area. He only saw a second person when he was back outside the building and looking in through a window. 2RP 13-14, 41; exhibit 18. He was able to make eye contact with the two, but only for three to five seconds. 2RP 22. And while Faletogo testified that he focused more on the second individual during these few seconds (because he had already seen D.J.), his description at the time was very general – two slender black males, late teens, one wearing white and the other black, 6' to 6' 2" tall. 2RP 50, 55, 58; exhibits 48-49.

Opportunity to observe is typically measured in minutes. See Rogers, 44 Wn. App. at 516 (approximately 20 minutes in same room); State v. McDonald, 40 Wn. App. 743, 747, 700 P.2d 327 (1985) (describing even two or three minutes as "limited"); State v. Burrell, 28 Wn. App. 606, 607-608, 611, 625 P.2d 726 (1981) (two

witnesses observed defendant five minutes before attack and during attack under street lights, and one witness had an additional encounter with him); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (police reserve officer involved in a six minute face-to-face confrontation with his assailant), review denied, 95 Wn.2d 1020 (1981); cf. State v. Booth, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983) (forty-five seconds observation is sufficient in case where identification went to an automobile and corroborating evidence was found in the automobile).

A fleeting glimpse is not sufficient. State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980). And the three to five seconds in this case – shared between the two suspects – is far more akin to a “fleeting glimpse” than the minutes-long observations usually found in the case law. Judge Mack’s finding of fact 9 (that Faletogo had sufficient time to view D.D.’s jacket and face) is incorrect and not supported by the evidence.

2. Degree of Attention

After seeing D.J. in the office area, Faletogo surreptitiously exited the school to avoid detection. 2RP 10-12. He obviously did not expect to be seen or to see anyone at his new location and had

to make his observations quickly. Moreover, at the time, his attention was divided because he was on the radio with the monitor reporting what he had already seen inside the building. 2RP 10-13.

3. Accuracy of Prior Description

D.D. was indeed wearing black and is an African-American teen. But given this very general description, its accuracy is far less probative than where the defendant matches a specific and detailed description. Compare State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (prior to challenged procedure, witness accurately describes defendant, “including height, weight, color and type of hair and manner of dress”), review denied, 119 Wn.2d 1003 (1992).

Moreover, while Faletogo indicated *both* individuals were 6' to 6' 2" tall, this description does not match D.J. and D.D. D.D., the taller of the two, is only 6' tall and D.J. is apparently several inches shorter. 3RP 31-32. And the jacket D.D. was wearing does not appear to be, as Faletogo described, a “windbreaker . . . that athletes wear.” Compare 2RP 16 with exhibit 4.

4. Certainty at Identification and Length of Time between Crime and Identification

At least twelve minutes had passed from the time Faletogo saw both individuals in the school to the time he identified D.D. as the second individual. 2RP 25-26, 74, 76 (time between 911 dispatch and show-up). Faletogo claimed he knew immediately that D.D. was the second individual based on his lighter skin tone, face, and height. 2RP 28. But he also conceded he did not pay much attention to what the second individual was wearing. 2RP 30.

5. Weighed Against the Corrupting Effect of the Suggestive Identification

As discussed above, Judge Mack largely discounted any corrupting effect from the show-up, concluding it was suggestive but not impermissibly so. In fact, the procedures used – handcuffing D.D., having him stand by the patrol car, having one or more officers stand by him, possibly telling Faletogo that both suspects had run from police, and having Faletogo first look at D.J. (who, by everyone’s account, undoubtedly was inside the school) – increased significantly the chance Faletogo would identify D.D. as the other burglar. Considering all of the circumstances in this case, there is “a very substantial likelihood of irreparable misidentification.” Simmons, 390 U.S. at 384.

Moreover, because the State cannot demonstrate an independent source for the in-court identification, Faletogo should not have been permitted to identify D.D. in court, either. See United States v. Wade, 388 U.S. 218, 240-242, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); State v. Hilliard, 89 Wn.2d 430, 439-440, 573 P.2d 22 (1977); Thorkelson, 25 Wn. App. at 619-620.

Harmless error?

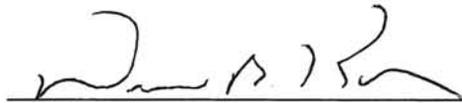
D. CONCLUSION

The out of court and in court identifications should have been suppressed. They were the State's primary evidence linking D.D. to the burglary. His conviction must be reversed.

DATED this 20th day of September, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON
MAY 31 2012
SUPERIOR COURT
BY JOVELITA V. ... CLERK
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

STATE OF WASHINGTON,

Plaintiff,

No 11-8-02565-1

vs

DEVAUGHN DORSEY,
B D 12/30/94

Respondent

CrR 3.6 FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

THE ABOVE-ENTITLED CASE having come on for fact-finding on March 12 2012, before Judge Barbara Mack in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Mary Cobb, the respondent appearing in person and having been represented by his attorney, Annela Wagonfeld, the Court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On October 23, 2011 at approximately 11:48a m , a silent alarm sounded at Meany Middle School in Seattle, Washington Security Response Specialist Fia Faletogo responded within 15-20 minutes Faletogo is tasked with responding to alarms throughout the entire school district His responsibilities include reporting criminal activity to his monitor and/or to the Seattle Police Department, and relaying identification descriptors of suspects
- 2 Faletogo entered the school building, and observed shattered glass on the floor outside the school's interior office The glass had come from the office's reception window
- 3 Faletogo approached the window, and saw co-Respondent Derrick Jones inside the office Jones was a black male, in his late teens, wearing a white long-sleeve top Jones had his

COURT'S FINDINGS AND CONCLUSIONS
ON RESPONDENT'S MOTION TO SUPPRESS ID - 1

ORIGINAL

Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
1211 Alder
Seattle, Washington 98122
(206) 296 9025 FAX (206) 296 8869

72

1 back to Faleto go, but eventually turned such that Faleto go was able to see part of Jones'
2 face

3 4 Faleto go exited the school and radioed his monitor to report the burglary His monitor
5 patched in the 911 operator

6 5 While Faleto go was on the phone with his monitor and the 911 dispatcher, two males inside
7 the school walked casually past the window next to where Faleto go was standing The two
8 males were walking side-by-side, and were visible from the waist up

9 6 The window through which Faleto go observed the two males was approximately four feet
10 tall and three feet wide The two male suspects were within a few feet of Faleto go

11 7 Faleto go made eye contact with both males for three to five seconds Faleto go recognized
12 the individual closest to him to be Jones, the individual from inside the office

13 8 Faleto go spent the majority of the three to five seconds looking at the second male because
14 he had not yet seen that male The second male was the Respondent, Devaughn Dorsey
15 Dorsey was wearing a black zip-up windbreaker

16 9 Faleto go had sufficient opportunity to view Dorsey's jacket and face through the window

17 10 Jones and Dorsey both made eye contact with Faleto go, and then began running

18 11 At 12 17 p m , Faleto go gave the following description of the two males to the 911 operator
19 "2 black males One wearing white, the other wearing black Late teens "

20 12 Multiple units from the Seattle Police Department arrived on scene Within minutes, Jones
21 and Dorsey were detained blocks from Meany Middle School

22 13 At the time Jones was apprehended, Jones was wearing the same white thermal long-sleeve
23 shirt he was wearing when seen inside the school by Faleto go

24 14 At the time Dorsey was apprehended, Dorsey was wearing the same black zip-up Columbia
windbreaker he was wearing when seen inside the school by Faleto go

15 At trial, Faleto go testified the windbreaker was dark blue Also at trial, Faleto go identified a
photo of the black windbreaker worn by Dorsey (at the point of being apprehended) as the
same windbreaker Dorsey was wearing inside the school This Court finds the distinction
between dark blue and black is not significant This Court finds that the windbreaker
identified in the photo by Faleto go was the same windbreaker worn by Respondent inside
Meany Middle School

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

16 Shortly before 12 29 p m , Faleto go was informed by Officer Benjamin Archer that the
Scattle Police Department had detained two people, and that officers needed Faleto go to
drive to the location where the two individuals were detained and determine if the two
individuals detained were the two people he saw inside Mcany Middle School At no time
did Officer Archer suggest to Faleto go that he had to positively identify the detained
suspects

17 Faleto go agreed to accompany Officer Archer

18 Faleto go was driven by Officer Archer to where Jones was detained Faleto go immediately
identified Jones as the first male he had seen inside the school

19 At approximately 12 29 p m, Faleto go was driven by Officer Archer to where Dorsey was
detained Dorsey was detained a few blocks from where Jones was detained

20 Officer Archer parked his patrol car within half a block of where Dorsey was detained
Faleto go remained seated in the back of Officer Archer's patrol car Dorsey was standing
next to a patrol car Dorsey was in handcuffs

21 Faleto go was absolutely sure Dorsey was the second male he has seen inside the school

22 This Court finds Faleto go's testimony to be credible

Having made these Findings of Fact, the Court also now enters the following

CONCLUSIONS OF LAW

I

- a The show-up was suggestive based on the fact Dorsey was in handcuffs during the show-up and the fact Dorsey was standing next to a patrol car during the show-up
- b The totality of circumstances evidences the show-up was not impermissibly suggestive
- c Even if the show-up was impermissibly suggestive, Faleto go's identification of Dorsey at the show-up was reliable based on the fact that (1) Faleto go had sufficient opportunity to view Dorsey at the time of the crime, (2) Faleto go was focusing his full attention on the two males in the hallway, (3) Faleto go accurately described Dorsey's race, age and clothing to the 911 dispatcher, (4) Faleto go was absolutely sure at that show-up that Dorsey was the second male inside the school, and (5) only twelve minutes passed between the 911 call and the show-up with Dorsey

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

II

The show-up identification conducted with Dorsey did not violate Dorsey's constitutional due process rights. The defense motion to suppress the show-up identification is denied.

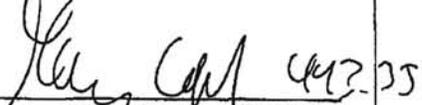
III

Judgment should be entered in accordance with Conclusion of Law II. In addition to these written findings and conclusions, the court hereby incorporates its oral findings and conclusions as reflected in the record.

SIGNED this 31 day of May, 2012


Honorable Barbara A. Mack

Presented by


Mary Cobb, WSBA #44335
Deputy Prosecuting Attorney


Anela Wagonfeld, WSBA #33197
Attorney for Respondent

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

| | | |
|---------------------|---|-------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 68631-3-I |
| |) | |
| D.D., |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] D.D.
3739 S. BURNS STREET
SEATTLE, WA 98118

2012 SEP 20 PM 4:00
COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER 2012.

x Patrick Mayovsky