

68631-3

68631-3

NO. 68631-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEVAUGHN DORSEY,

Appellant.

DOCKETED
STATE COURT
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LJ

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	6
1. THE SHOW-UP IDENTIFICATION WAS NOT IMPERMISSIBLY SUGGESTIVE AND IT DID NOT CREATE A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.....	6
a. Relevant Law	7
b. The Show-Up Identification Was Not Impermissibly Suggestive	9
c. Even If The Show-Up Identification Was Suggestive, It Did Not Create A Substantial Likelihood Of Irreparable Misidentification	11
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brendlin v. California, 551 U.S. 249,
127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) 9

Manson v. Brathwaite, 432 U.S. 98,
97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) 8, 11, 12

Neil v. Biggers, 409 U.S. 188,
93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) 8, 12

Washington State:

State v. Burrell, 28 Wn. App. 606,
625 P.2d 726 (1981) 12

State v. Eacret, 94 Wn. App. 282,
971 P.2d 109 (1999) 7

State v. Fortun-Cebada, 158 Wn. App. 158,
241 P.3d 800 (2010) 7, 8

State v. Freeman, 153 Wn.2d 765,
108 P.3d 753 (2005) 15

State v. Guzman-Cuellar, 47 Wn. App. 326,
734 P.2d 966 (1987) 7, 9, 10

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994) 9

State v. Linares, 98 Wn. App. 397,
989 P.2d 591 (1999) 7

State v. Maupin, 63 Wn. App. 887,
822 P.2d 355 (1992) 8

State v. Mendez, 137 Wn.2d 208,
970 P.2d 722 (1999)..... 8, 9

State v. Rogers, 44 Wn. App. 510,
722 P.2d 1349 (1986)..... 15

State v. Springfield, 28 Wn. App. 446,
624 P.2d 208 (1981)..... 15

A. ISSUE PRESENTED

1. A show-up identification is admissible as long as it is not impermissibly suggestive. A suggestive identification is still admissible if it is found to be reliable and it does not create a substantial likelihood of irreparable misidentification. Here, Devaughn Dorsey was detained approximately three blocks away from an interrupted burglary in progress at a school, approximately 12 minutes after a witness called to report the burglary and described the suspects, and then was positively identified by the witness. Was this show-up identification impermissibly suggestive or so lacking in reliability that it created a substantial likelihood of irreparable misidentification?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Juvenile respondent, Devaughn Dorsey, was charged by information in King County Juvenile Court with one count of burglary in the second degree. CP 1. Dorsey moved to suppress evidence of a "show-up" identification (in-person identification) by a witness as impermissibly suggestive. CP 3-12. The court denied the defense motion and found Dorsey guilty of burglary in the

second degree. CP 26-29; CP 30-33. Dorsey now challenges the court's admission of evidence of the witness's show-up identification and in-court identification.

2. SUBSTANTIVE FACTS

On Sunday, October 23, 2011, at approximately 11:48 a.m., a silent alarm was activated at Meany Middle School, alerting the Seattle Public School's alarm desk, who in turn, alerted Fiafia Faletogo, an alarm desk response specialist. 2RP¹ 4-5; CP 30. The school building, located at 301 21st Avenue East, Seattle, Washington, had been secured the day before, nobody had permission to be in the building, and no activities were scheduled for October 23rd. 1RP 17-18; 2RP 151. Faletogo arrived at the school at approximately 12:03 p.m. to 12:05 p.m., 15 to 17 minutes after he received the call. 2RP 5. Faletogo entered the school building and discovered broken glass on the floor outside the school's interior office, and observed that the office's reception window had been broken. 2RP 8-9; CP 30. Faletogo then noticed a slender, black male in his late teens, wearing a white, long-sleeved, cotton-wear

¹ For continuity purposes, this brief follows the appellant brief's method of referring to the verbatim report of proceedings as follows: 1RP – 3/12/2012; 2RP – 3/13/2012; 3RP – 3/12/2012.

shirt, looking through cabinets in the office. 2RP 9-10. Faletogo used his radio to call the alarm desk monitor who in turn patched in a 911 operator. 2RP 13; CP 31. As Faletogo made the call, he kept his voice quiet, exited the building, and stood outside near the security door and a window. 2RP 11-14. While on the call, Faletogo watched as the youth he had seen in the office and another youth casually walked past the window he was looking in. 2RP 14.

Faletogo estimated his distance from the two youths was approximately two to four feet. 2RP 22. Faletogo could see both youths' faces for approximately three to five seconds and made eye contact with them. 2RP 46. He focused his attention on the second youth's face because he had already seen the first youth, and he wanted to be able to identify both. 2RP 50. At 12:17 p.m., Faletogo described the youths to the 911 operator as "two black males, one wearing white, one wearing black, late teens." 2RP 55; exhibit 48.

Faletogo said that the second youth was wearing a black or dark blue zip-up windbreaker with a hood, and he described it as being a "sportswear" top. 2RP 16-17, 28-29, 50. Faletogo testified that he gave very brief descriptions to the 911 operator because he wanted the police to be dispatched quickly, and that he would have been able to give a fuller description if he had the time to do so. 2RP 55. Once

the two youths made eye contact with Faletogo, they ran away.

2RP 22.

Seattle Police responded to the area. Officer Schoenberg observed two males walking within blocks of Meany Middle School; the two males matched the description of the suspects from the reported burglary. 2RP 117-18. A witness, Lane Gerritsen, saw the two youths walking away from the area of the school, repeatedly looking back at a police car. 1RP 43. He gave an in-court identification of one of the men as Dorsey, and stated that he was wearing a black jacket. 1RP 42, 45. Moments later, these two males were apprehended in the neighborhood by officers. 2RP 120-21, 127-28. One was identified as Dorsey; the other was identified as Derrick Jones.

Faletogo was transported to the locations of both suspects, who were separately detained approximately three blocks from the burglarized school. 2RP 23-26. Faletogo first positively identified Jones as the male wearing white who he had seen looking through cabinets in the school office and later walking in the hallway. 2RP 24. Next, Faletogo positively identified Dorsey as the male wearing a black or dark blue windbreaker who was walking with Jones in the hallway. 2RP 26-28. At the show-up identification, Faletogo was

between 10 to 20 feet away from Dorsey, and recognized Dorsey's face, height, complexion, and jacket right away. 2RP 28, 45.

After Officer Faust detained Dorsey and searched him incident to arrest, he found a screwdriver and a pack of "Hi-Chew" gum or candy. 2RP 66, 129. Multiple packages of Hi-Chew were located inside the school near the scene of the burglary and were sold by the school's student association for fundraising. 1RP 36-37. Dorsey testified that he had bought the Hi-Chew earlier in the day and that he had used exact change; he did not carry a wallet or have any cash or coins on his person at the time of arrest. 3RP 29, 36-37. Dorsey also testified that the jacket he was wearing at the time of arrest was not his. 3RP 17. He stated that he had taken his shirt off while playing basketball earlier, and that Jones gave him the jacket to put on when they were running from the police. 3RP 16-18. Dorsey stated that the screwdriver was in the jacket pocket from the night before when Jones was fixing a bicycle. 3RP 19. When Jones was searched incident to arrest, he also had a pack of Hi-Chew on his person. 3RP 5-6. Jones' fingerprints were lifted from an empty bag of chips found in a garbage can at the school. 2RP 142-13, 168-69.

C. ARGUMENT

1. THE SHOW-UP IDENTIFICATION WAS NOT IMPERMISSIBLY SUGGESTIVE AND IT DID NOT CREATE A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

Dorsey maintains that the trial court erred by permitting evidence of Faletogo's show-up identification moments after the incident occurred, as well as his identification later in court. Specifically, he claims that the show-up identification was impermissibly suggestive, and this created a substantial likelihood of irreparable misidentification by the witness. His claim should be rejected. Faletogo observed Dorsey from a short distance of four feet, he made eye contact with Dorsey, he studied Dorsey's face so that he could later identify him, and he was focusing on Dorsey because he had already observed the other man with Dorsey. The show-up identification was done approximately 12 minutes after Faletogo observed Dorsey, it was done from a distance of 10 to 20 feet, the police officers did not coach or guide Faletogo to identify Dorsey, and Faletogo was certain that Dorsey was the same person he saw in the school. Accordingly, evidence of Faletogo's show-up identification was properly admitted, and his in-court identification was proper. The trial court did not err in its admission

of this evidence or in finding Dorsey guilty of burglary in the second degree.

a. Relevant Law.

Out-of-court identification procedures do not violate due process unless they are so impermissibly suggestive that they create a substantial likelihood of irreparable misidentification. State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999). See also State v. Linares, 98 Wn. App. 397, 989 P.2d 591 (1999). For a defendant to claim a due process violation, he must establish that the identification procedure used by law enforcement was unduly or unnecessarily suggestive. State v. Fortun-Cebada, 158 Wn. App. 158, 170, 241 P.3d 800 (2010); State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). Courts have found that a show-up identification near the scene of the crime is not per se impermissibly suggestive and that the presence of a suspect in handcuffs next to police vehicle is not enough, in itself, to make a showing that the procedure was unduly suggestive. Guzman-Cuellar, 47 Wn. App. at 335-36.

If the defendant is able to satisfy the threshold burden of suggestiveness, then the court determines whether the

identification procedure was so suggestive that it creates a substantial likelihood of irreparable misidentification. The court uses a totality of circumstances analysis in its determination. Fortun-Cebada, 158 Wn. App. at 170, citing State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). Primarily, the court must determine if the identification was reliable, even with any suggestiveness. In doing so, the court must consider factors set out by the U.S. Supreme Court in Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and later applied in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The factors to consider are: (1) the opportunity of the witness to view the suspect at the time the crime is committed; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty the witness demonstrates at the confrontation with the suspect; and (5) the amount of time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. at 114; Neil v. Biggers, 409 U.S. at 199-200.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999),

overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. *Mendez*, 137 Wn.2d at 214.

b. The Show-Up Identification Was Not Impermissibly Suggestive.

A show-up procedure is not per se suggestive even when a suspect is in handcuffs and standing near police officers or police vehicles. *Guzman-Cuellar*, 47 Wn. App. at 336. In *Guzman-Cuellar*, a witness saw a man shoot a victim in the doorway of a tavern. The witness did not know the identity of the shooter and only saw him briefly. 107 Wn. App. at 328. Shortly after the shooting occurred, police officers apprehended the defendant and transported him to the tavern for a show-up identification by the witness. The witness identified the defendant as the shooter. *Id.* at 329. In upholding the show-up, this Court held that although the defendant was handcuffed and standing fifteen feet from a police car, these facts alone did not demonstrate unnecessary suggestiveness. *Id.* at 336. This Court did not conduct the totality

of circumstances analysis because the defendant failed to meet the preliminary threshold that the show-up identification was unnecessarily suggestive. Id. at 335.

In this case, the show-up identification of Dorsey was not unnecessarily suggestive for several reasons. First, the show-up identification was conducted mere minutes after Faletogo saw the suspect in the school, and only about three blocks away from the location of the crime. 2RP 24, 74; CP 28. Second, although Dorsey was in handcuffs and standing outside a police car, this positioning is similar to the defendant in Guzman-Cuellar, which was found to not be impermissibly suggestive. 2RP 44; Guzman-Cuellar, 47 Wn. App. at 336. Third, the police officers made no threats, promises, or overly suggestive remarks to Faletogo concerning the suspect's involvement in the crime before the show-up identification, and they did not discuss the burglary during the transport. 2RP 23, 25-26, 31-32, 97, 101; CP 28. Fourth, Faletogo was fully able to tell the officers if he had any doubts when identifying Dorsey as the second man he saw in the school; instead, he said he was absolutely sure it was the same man. CP 28. Fifth, Faletogo was able to identify Dorsey right away and he based his identification on Dorsey's face as well as his

complexion and height. 2RP 28, 189-90. Additionally, Faletogo was able to identify the jacket Dorsey was wearing at the show-up identification was the same jacket he saw him wearing in the school. 2RP 27-28, 189-90; CP 27. The court found Faletogo's testimony to be credible and found that the jacket Dorsey was wearing when he was arrested was the same jacket Faletogo had seen him wearing in the school, noting that the distinction between black and dark blue was not significant. 2RP 189-91; CP 27. For all of these reasons, the trial court rejected the defense argument that the show-up identification was impermissibly suggestive. 2RP 191-92; CP 28-29.

Because the show-up identification of Dorsey was not impermissibly suggestive, the trial court did not err in admitting the show-up identification and subsequent in-court identification. The juvenile trial court's finding of guilt should be affirmed.

- c. Even If The Show-Up Identification Was Suggestive, It Did Not Create A Substantial Likelihood Of Irreparable Misidentification.

Although the trial court did not find the show-up identification to be impermissibly suggestive, it still conducted the five factor analysis set forth in Manson v. Brathwaite. 2RP 190-92; CP 28. As

outlined above, if the defendant meets the initial burden of showing the show-up procedure was unnecessarily suggestive, the Court must look for other indicia of reliability supporting the identification. State v. Burrell, 28 Wn. App. 606, 610, 625 P.2d 726 (1981); Manson v. Brathwaite, 432 U.S. at 114; Neil v. Biggers, 409 U.S. at 199-200. Due process is violated only if, under the totality of the circumstances, the show-up identification is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Burrell, 28 Wn. App. at 610. In applying the five factors, the trial court found that Faletogo's identification of Dorsey was reliable. CP 28.

First, the court considered Faletogo's opportunity to view the suspect at the time of the crime. Faletogo had a clear opportunity to view Dorsey at the scene of the burglary and was standing at a good angle. 2RP 19, 189; CP 27. Specifically, Faletogo was standing right outside a clear, glass window, about four feet away from Dorsey as he walked by. 2RP 22; CP 27. Faletogo saw Dorsey's upper body and face and he made eye contact with him for three to five seconds. 2RP 46; CP 27. The court found that Faletogo had sufficient opportunity to view Dorsey through the window of the school. 2RP 190; CP 28.

Second, the court considered Faletogo's degree of attention when viewing Dorsey at the scene of the crime. Faletogo had every reason to carefully attend to Dorsey's appearance when he observed him in the school. Faletogo was acting as the security officer when he responded to the alarm at the school, and was therefore tasked with determining the reason for the alarm and documenting any events that occurred during his response. 2RP 4. He testified that he focused on Dorsey's face because he had already seen Jones' face enough to identify him if needed, but this was his first time seeing Dorsey. 2RP 50; CP 27. Faletogo explicitly stated that he was examining Dorsey's face so that he would be able to identify him, and that his purpose was so that he did not falsely accuse someone. 2RP 30. While observing Dorsey through the window, Faletogo was relaying a description what he was seeing to the 911 operator. 2RP 55. The court found that Faletogo was able to focus his full attention on the suspects he was seeing through the window and that he wasn't distracted by being on the radio, since his purpose for being on the radio was to communicate exactly what he was seeing. 2RP 190; CP 28. Additionally, the court found that Faletogo was able to specifically

focus his attention on Dorsey because he had already viewed the other suspect earlier. 2RP 190; CP 28.

Third, the court considered Faletogo's prior description of Dorsey. Faletogo accurately described Dorsey in the report to the 911 dispatcher. Specifically, Faletogo reported seeing two black males, late teens, one wearing white and one wearing black. 2RP 55; CP 27, exhibit 48. Dorsey is a black male in his late teens, and was wearing a black jacket at the time he was apprehended by police officers. 2RP 26; exhibit 4. The court found that Faletogo's prior description of Dorsey was accurate and that any discrepancy in the color of Dorsey's jacket was minor. 2RP 190-91; CP 28.

Fourth, the court considered the level of certainty Faletogo demonstrated at the confrontation with the suspect he was identifying. Faletogo immediately identified Dorsey as the second youth he had seen walking in the school hallway. 2RP 28, 189-90. In particular, Faletogo recognized Dorsey's face, height, complexion and jacket. 2RP 28, 189-90. Faletogo was in a police vehicle approximately 10 to 20 feet from Dorsey and he testified that he has 20/20 vision. 2RP 45, 51. Additionally, the show-up

identification occurred at 12:29 p.m., in broad daylight. 2RP 13, 74; CP 288. Faletogo did not express any uncertainty or hesitation in identifying Dorsey. 2RP 28. The trial court found it understandable and believable that Faletogo would be able to identify Dorsey's face without hesitation after seeing it for three to five seconds mere minutes beforehand. 2RP 191. Additionally, the court noted that Faletogo was absolutely sure in his identification of Dorsey. 2RP 191; CP 28.

Fifth, the court considered the amount of time between the crime and the show-up identification. The time interval between Faletogo's observation of Dorsey inside the school and the show-up identification of Dorsey was relatively short - only 12 minutes. 2RP 74-76, 191; CP 27-28. This time frame is well within the permissible range for show-up identifications. See State v. Rogers, 44 Wn. App. 510, 516, 722 P.2d 1349 (1986) (six hours that elapsed between incident and show-up was well within permissible range); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (1981), overruled on other grounds by State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) (17 hours permissible). The trial

court took into consideration that the time elapsed was less than a quarter of an hour, adequately satisfying the fifth factor. 2RP 191; CP 28.

Based on its totality of the circumstances analysis, the trial court found that the show-up identification utilized was reliable and did not create a substantial likelihood of irreparable misidentification. For these reasons, the trial court did not err in admitting the show-up identification and subsequent in-court identification. The juvenile trial court's finding of guilt should be affirmed.

D. CONCLUSION

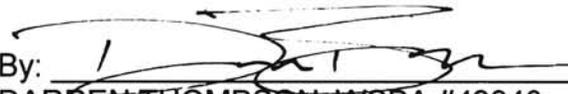
The show-up identification conducted in this case was not impermissibly suggestive, it was reliable, and it did not create a substantial likelihood of irreparable misidentification. The trial court properly admitted evidence of the show-up identification and subsequent in-court identification. Accordingly, for the foregoing

reasons, the State asks this Court to affirm Dorsey's adjudication of guilt for burglary in the second degree.

DATED this 14th day of November, 2012.

Respectfully submitted,

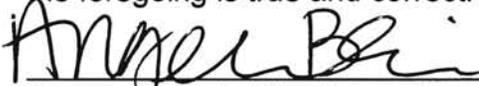
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DEVAUGHN DORSEY, Cause No. 68631-3-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 Angela Blocki
Done in Seattle, Washington

11/14/12
Date 11/14/12