

NO. 70115-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMIKO DEJONE FANT,

Appellant.

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KING COUNTY

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES

A trial court's admission of evidence is reviewed for an abuse of discretion. Here, the trial court admitted a show-up identification of the defendant where the witness's description of the defendant was consistent with his appearance, the witness saw the defendant in daylight, made eye contact with the defendant, was paying close attention, was aware that he might be witnessing a crime, the show-up occurred less than an hour after the witness observed the defendant, and the witness was 100% certain of the identification. Did the trial court abuse its discretion by admitting the identification evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Demiko Fant, was charged with one count of residential burglary. CP 1-4. Fant moved to suppress evidence that the victim's neighbor, Jonathan Kim, identified the defendant as one of the burglars. CP 7-13. Following an evidentiary hearing, the trial court denied Fant's motion and allowed the admission of the identification evidence. CP 53-59. A jury convicted Fant as

charged. CP 92. The trial court imposed a first time offender waiver and Fant appealed. CP 96, 97-105.

2. SUBSTANTIVE FACTS

The trial court's written findings of fact and conclusions of law in support of its decision to admit the identification evidence accurately set forth the evidence presented at the hearing. CP 53-59; 1RP 35-130¹.

On September 22, 2011, at around 12:30 p.m., Jonathan Kim was in his backyard in Federal Way when he heard what sounded like glass being broken at his next door neighbor's home. CP 53; 1RP 36-37, 70, 90-91. The weather that day was clear. Id. Kim looked into his neighbor's yard and saw that a rear window was broken. CP 53-54; 1RP 38, 70-71. Kim went out to the front and took note of an unfamiliar vehicle parked across the street from his neighbor's house. CP 54; 1RP 38, 40-41, 48-49, 71-72. Kim walked to a point near the street where he could observe part of his neighbor's front yard. CP 54; 1RP 38-42.

¹ The verbatim report of proceedings consists of six volumes, referred to in this brief as follows: 1RP (February 26, 2013); 2RP (February 27, 2013); 3RP (February 28, 2013); 4RP (March 4, 2013); 5RP (March 5, 2013); and 6RP (March 22, 2013).

Kim started to smoke a cigarette and waited to see what would happen. CP 54; 1RP 41. He was paying close attention, because he believed that his neighbor's home had been broken into. CP 54, 59; 1RP 36-54, 70-72, 76-77. Within a few moments, Kim observed a young man who appeared to be coming from the direction of his neighbor's front door. CP 54; 1RP 41-43, 73-76. Kim was unable to observe much of this person's appearance. Id. Kim watched the young man walk across the street and into the vehicle he noticed earlier. Id.

A moment or two later, Kim observed three other males cross the neighbor's yard from the direction of his neighbor's front door area. CP 54; 1RP 43, 77-79. One of the males paused, turned his head, and made eye contact with Kim for one or two seconds. CP 54-55; 1RP 44-48, 79-84. This allowed Kim to see the male's entire face. Id. Kim described the male as a light-skinned African American or Hispanic male, perhaps early 20's, with "frizzy" hair, wearing a white T-shirt. Id. This man crossed the street with the other men and got into the rear passenger side of the car Kim noticed earlier. Id.

The car started to drive down the street. CP 55; 1RP 48-49, 84-85. Kim entered his own car and began to follow the other car

while calling 911. Id. Kim was able to get the first five digits of the license plate, but was unsure of the last digit. CP 55; 1RP 85-86, 121-22. Eventually, the other car stopped and one or more people got out. CP 55; 1RP 50-53, 87. Then, Kim turned his car around and went home. CP 55; 1RP 54, 87.

Kim described what he had observed to the police. CP 55; 1RP 55, 88. Kim overheard at some point that the police had identified the registered owner of the car Kim observed, and that the registered owner's address was within a mile of Kim's home. CP 55; 1RP 55-56, 59, 88-90. Kim also recalled hearing that the owner of the vehicle had notified the police that his car had been stolen shortly after Kim called 911. CP 55-56; 1RP 60-61.

An officer took Kim to see if he could identify a potential suspect. CP 56; 1RP 56-58, 88, 90. Kim was told that the potential suspect was associated with the car that Kim had followed. Id. While on the way to the show-up identification, the police engaged in joking with Kim about the stupidity of reporting a vehicle involved in a burglary as stolen after the burglary had been reported and the vehicle had been described to the police. CP 56; 1RP 60-61, 66, 68, 101-05.

Within an hour of the report of the burglary, the officer drove Kim slowly by the area that Fant was standing in the cul de sac, at a distance of 40 feet or so. CP 56-57; 1RP 46-47, 61-64, 88-95. Kim observed Fant for approximately 10 seconds. Id. Kim identified Fant as the person who made eye contact with him and testified that he was 100% certain of his identification. Id. Kim stated that Fant matched his recollection of the person who made eye contact with him, and that his clothing, skin tone, hair, and age were the same. Id.

At the time of the identification Fant was not in custody, was not handcuffed, and was not in a police car. CP 57; 1RP 91-95, 127-30.

The trial court concluded that the show-up identification was unnecessarily suggestive because Kim was either told, or overheard

(1) that the potential suspect was associated with the vehicle that Kim had followed and had described to the police; (2) that the vehicle's owner had reported it being stolen shortly after Kim had followed the vehicle and called 911 to report the suspected burglary; and (3) because the police engaged in joking with Kim about the stupidity of reporting a vehicle involved in a burglary as stolen, after the burglary has been reported and the vehicle has been described to police.

CP 58. The trial court then noted that it was to consider whether the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification, or whether the identification was reliable despite the suggestive procedure, and noted the five factors to be considered. CP 58-59.

The trial court then evaluated the five factors that were to be considered, stating:

Here, Kim had a clear view of the suspect in broad daylight, as the suspect was walking across Kim's neighbor's yard, and especially when the suspect turned and made eye contact with Kim for 1-2 seconds. Kim was paying close attention, as he understood that he might be witnessing a crime, and he planned to report it to the police. Kim's description of the suspect to the police, while not terribly detailed, was consistent with Fant's appearance at the show-up identification (including the clothing he was wearing, his skin tone, his hair, and his age), which occurred no more than an hour after Kim first saw the suspect. Any inaccuracies in his description and recollection go to weight rather than admissibility, and can be adequately addressed in cross examination. And, Kim expressed 100% certainty in his identification of Fant as the person who had made eye contact with him while leaving his neighbor's yard.

CP 59. The trial court denied the defense motion to suppress after concluding that there was no substantial likelihood of irreparable misidentification. CP 59.

C. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE IDENTIFICATION EVIDENCE.

Fant appears to argue that the trial court abused its discretion in denying his motion to suppress the evidence of the show-up identification and the in-court identification. Fant's claim should be rejected because the trial court engaged in the appropriate analysis and there were tenable grounds for the trial court's admission of the identification evidence.

A trial court's admission of evidence, such as an identification of the defendant, is reviewed for abuse of discretion. State v. Salinas, 169 Wn. App. 210, 224, 279 P.3d 917 (2012); State v. Birch, 151 Wn. App. 504, 514, 213 P.3d 63 (2009); State v. Kinard, 109 Wn. App. 428, 431-35, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002).

Fant does not challenge the trial court's findings of fact; Fant accepts them as having "accurately set forth the evidence presented at the hearing." Brief of Appellant at 3. As such, the trial court's findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

“To meet due process requirements, an out-of-court identification must not be ‘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 make this determination, a two-part test is employed. Id. First, the defendant must show the identification procedure was impermissibly suggestive. Id. Show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987) (citing Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986)). If the defendant fails to make this showing, the inquiry ends. Vickers, 148 Wn.2d at 118.

“If the defendant proves the procedure was impermissibly suggestive, under the second step of the analysis, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification.” Birch, 151 Wn. App. at 514 (citation omitted). To make this determination, courts consider: (1) the opportunity of the witness to view 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 confrontation; and (5) the time between the crime and the confrontation. Birch, 151 Wn. App. at 514; State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999).

For example, in Kinard, the Court of Appeals determined that the trial court did not abuse its discretion by admitting a suggestive photo montage. Kinard, 109 Wn. App. 428. In Kinard, the trial court made the following finding:

The Court applied the five factors as set forth in Neil v. Biggers, 409 U.S. 188[, 93 S.Ct. 375, 34 L.Ed.2d 401] (1972), to the evidence before it. Ms. Davis had the opportunity to view the defendant at the scene of the crime. Her attention was focused on the defendant. Her description of the suspect fit that of the defendant and is accurate. She exhibited a high level of certainty in her identification of the defendant independent of the photomontage. She had the opportunity to make an identification of the defendant within a day or two following the alleged incident.

Id. at 434. The Kinard court noted that the trial court "applied the required test," noted that Kinard did not challenge the trial court's factual findings, and found that the trial court did not abuse its discretion in admitting the evidence of the photo identification. Kinard, 109 Wn. App. at 434-35.

The instant case is analogous to Kinard. Here, the trial court found that the show-up identification used in this case was “unnecessarily suggestive,” and then, appropriately, applied the required test. CP 57-59. The trial court concluded that there was not a substantial likelihood of misidentification. Id. In reaching this conclusion, the trial court relied exclusively on the unchallenged findings of fact and reasonable inferences therefrom. CP 53-59.

The trial court made factual findings, that were supported by the evidence, for all five factors to be considered: (1) Kim had a clear view of the suspect in broad daylight (12:30 p.m.), as the suspect was walking across Kim’s neighbor’s yard, and especially when the suspect turned and made eye contact with Kim for one to two seconds; (2) Kim was paying close attention, as he understood that he might be witnessing a crime, and planned to report it to the police; (3) Kim’s description of the suspect to the police was consistent with Fant’s appearance at the show-up identification based on the clothing he was wearing, his skin tone, his hair, and his age; (4) Kim was 100% certain of his identification; and (5) the show-up occurred no later than an hour after Kim first saw the suspect. As such, the trial court had tenable grounds for its ruling

and did not abuse its discretion by admitting the identification evidence.

In attacking the first factor, Fant attempts to argue that Kim's opportunity to view the suspect was insufficient and cites State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278 (1980), for the proposition that "a fleeting glimpse is not sufficient." Brief of Appellant at 12. Fant's reliance on Thorkelson is misplaced. Contrary to Fant's assertion, Thorkelson does not define what a "fleeting glimpse" is, and does not address the general sufficiency of a "fleeting glimpse." Thorkelson only briefly mentions a concern for a "fleeting glimpse" accompanied by only tentative identifications.² Thorkelson, 25 Wn. App. at 619. This concern is only noted as a justification for the larger holding in Thorkelson; that the identification evidence in that case should have been

² In contrast to the tentative identifications in Thorkelson, Kim was 100% certain of his identification of Fant. Most importantly, the idea that observing a person for a few seconds is per se insufficient for identification is simply incorrect. Birch, 151 Wn. App. at 515. The Birch court noted that:

Moreover, we are satisfied no due process violation occurred. Ms. Morales was approximately three feet away from Mr. Birch during the incident. She looked at his face for "a good few seconds." She gave a description similar to Mr. Birch's age and appearance and testified she was sure Mr. Birch was the perpetrator. Although Mr. Birch suggested other facts bearing on his identification, the fact question was properly left to the jury without a substantial likelihood for misidentification.

Id. (citations omitted).

suppressed because it was generally inappropriate to use photographic identification procedures on in-custody defendants. Id. at 618-19.

Moreover, Division I of the Washington Court of Appeals has expressly modified its holding in Thorkelson and noted that it was overly broad.³ See, e.g., State v. Poulos, 31 Wn. App. 241, 244, 640 P.2d 735, 737 (1982); State v. Burrell, 28 Wn. App. 606, 609-10, 625 P.2d 726, 728 (1981); see also State v. Royer, 58 Wn. App. 778, 782, 794 P.2d 1325, 1327 (1990) (where Division II expressly declined to follow Thorkelson). As such, the standard expressed in Thorkelson, that rejects nearly all photographic identification procedures of in-custody defendants, no longer controls and is moreover irrelevant to the instant case.

In attacking the second and third factors, Fant disputes Kim's degree of attention and the accuracy of his prior description. Brief of Appellant at 12-13. However, the trial court considered these facts and specifically addressed them, finding that "Any

³ "Identification evidence should be suppressed only where consistent with the purpose of such restrictions, namely, preventing misidentification of suspects by witnesses. Thorkelson creates a rule of exclusion somewhat broader in scope than is consistent with this purpose. But the procedure by which identification evidence is obtained is not so determinative of its reliability that a per se rule of exclusion for photographic identifications is appropriate. Insofar as Thorkelson may suggest a per se rule of exclusion, we modify its holding." State v. Burrell, 28 Wn. App. 606, 609-10, 625 P.2d 726, 728 (1981).

inaccuracies in his description and recollection go to weight rather than admissibility, and can be adequately addressed in cross examination." CP 59. The court's conclusion is in accord with case law that other facts bearing on identification are properly left to the jury. Birch, 151 Wn. App. at 515. After engaging in the correct analysis, the trial court made findings that are supported by the record and reasonably concluded that suppression of the identification was not required. In so doing, the trial court properly exercised its discretion.

D. CONCLUSION

Fant's conviction for residential burglary should be affirmed.

DATED this 11th day of December, 2013.

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 Koch, the attorney for the Appellant, at Nielsen, Broman and Koch, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in State Of Washington v Demiko Dejone Fant , Cause No. 70115-1-I, in the Court Of Appeals, Division 1, 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.

Mary Heinzen
Mary Heinzen, Paralegal

Dec 11, 2013
Date:

Done in Kent, Washington

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