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COURT OF APPEALS
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No. 34133-6-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JAYSON THOMAS SMITH,
Appellant.

APPELLANT'S REPLY BRIEF

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PM 12/11/06

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ARGUMENT

Point I: The State's Argument that a Suggestive Identification at Trial is Permissible if Not Accompanied by the In-Person Identification of the Defendant Ignores Established Authority Regarding Defendants' Due Process Rights

The State, in arguing that it may introduce a suggestive identification of the defendant at trial so long as it is not accompanied by a finger pointed at the defendant, asks this Court to allow the irreparable risk of misidentification to be admitted through the back door. It is well-established that impermissibly suggestive and unreliable identification procedures create an irreparable probability of misidentification and violate a defendant's due process rights. *See State v. Ramires*, 109 Wn. App. 749, 761, 37 P.3d 343 (2002) (citing *State v. Vickers*, 107 Wn. App. 960, 967, 29 P.3d 752 (2001); *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984); U.S. Const. amend. XIV; Wash. Const. art. I § 3.

Nevertheless, here, the State seeks to evade the constitutional issue on the ground that "there was no identification of the defendant, and therefore, there could be no 'misidentification.'" Brief of Respondent at 10. To the contrary, the witnesses clearly did identify Smith as the shooter when they identified the shooter as the person in a photograph and the photograph was conclusively established to be of Mr. Smith. Thus, the distinction the State draws in this case is false.

What the witnesses did not do is point to the person of Mr. Smith sitting in the court room and say, "he's the one." The absence of this step does not cleanse the identification procedure of constitutional error, however. While in most cases the suggestive identification procedure is conducted prior to trial, paving the way for the in-court identification of the defendant solely on the basis of the initial suggestive identification, the risk of misidentification follows from the suggestive identification itself, whenever it is made. Forty years ago the U.S. Supreme Court pointed out the problems inherent in the suggestive identifications themselves:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.

United States v. Wade, 388 U.S. 218, 228, 18 L. Ed. 2d 1149, 87 S. Ct. 1926

(1967). Thus, the State's contention that the failure to identify the person of Mr. Smith reduces the problem to a credibility issue does not withstand scrutiny.

There is no logical reason why a suggestive identification procedure would create a constitutional issue when used merely as a precursor to an in-court identification, but not when done in open court with a photo established to be of the defendant. Under the State's credibility theory, even out-of-court suggestive

identifications leading to in-court identifications should be permitted so long as the defendant is able to point out the problems with the identification procedure. It makes no sense to leave it to the jury to determine whether the procedure produced a misidentification if the identification is done with a photo in court, but withhold the identification altogether if it is done out of court, either with a photo or a physical line-up.

Indeed, the Supreme Court has indicated that suggestive identifications cannot be rectified by the safety mechanisms inherent in a trial. In holding that defendants are entitled to counsel at pre-trial line-ups, the Supreme Court dismissed the possibility that cross-examination could rectify problems arising from suggestive pre-trial identification procedures. Although one limit to the efficacy of cross-examination was the lack of witnesses at the pre-trial procedure (not a problem when the suggestive identification is made in court), the other was the nature of cross-examination itself. Under these circumstances, the Court held that the problem to be prevented in the first place was unfair identification procedures:

And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself.

United States v. Wade, 388 U.S. at 235. For the same reasons, reliance upon the jury's ability to make a credibility determination also fails to rectify the problems inherent in suggestive identifications.

Moreover, the State's view opens the door to the proliferation of previously unacceptable suggestive identification procedures. Whenever a witness cannot identify the person of the defendant as the perpetrator, the prosecution would be free to obtain an in-court photo identification by any suggestive procedure it chooses. For example, the prosecution could exhibit a photograph of the defendant dressed in gang colors, in prison garb, or even hand-cuffed to a police officer. While the defense could cross examine the witness about the identification, and the jury would be able to consider its suggestive nature, the irreparable risk of misidentification would already have tainted the trial.

Further, the violation of the defendant's rights would be compounded by the jury itself having viewed the picture used for the identification if the picture is patently prejudicial. After all, if a witness can be influenced by a suggestive procedure to such a degree that her out-of-court identification is unreliable, *see, e.g., Grant v. City of Long Beach*, 2003 Cal. Daily Op. Service 5670, 2003 D.A.R. 7135, 2003 U.S. App. LEXIS 13038 (9th Cir. 2003) (suggestive identification inadmissible when defendant's features bore little resemblance to others in the

array and his skin tone was significantly lighter), there is no reason to believe a jury is any less susceptible to such impressions. Plainly, if juries could be relied upon to evaluate the impact of suggestive identifications and their admission did not fundamentally compromise the fairness of a trial, courts would never have had to restrict their use to circumstances demonstrating other indicia of reliability.

For these reasons, the suggestive identification procedure used here presents a constitutional issue even though it was not followed by a finger pointed at Mr. Smith. Moreover, this constitutional issue should be reviewed *de novo*. See Appellant's Brief at 3. The State cites a case from Division Three which relied upon *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994), to apply the abuse of discretion standard on review of the admission of suggestive identifications. Brief of Respondent at 9, citing, *State v. Kinard*, 109 Wn. App. 428, 431-32, 36 P.3d 573 (2001). However, this Court should decline to follow *Kinard* as the decision in *Hill* has no bearing on a court's review of a legal question such as is presented here.

In *Hill*, the Court addressed the deference to be given *factual findings* of a trial court made at a suppression hearing. Concluding that the wrong standard of review had been erroneously imported into state law merely because of the existence of a federal constitutional issue, the court held that factual findings from

a suppression hearing were to be reviewed in exactly the same manner as any other factual findings. That is, they would not be reviewed at all in the absence of assigned error and, if supported by substantial evidence, they would be upheld. *Hill*, 123 Wn.2d 641, 644-47.

The *Kinard* court's decision relying on *Hill* to impose an abuse of discretion standard on review of suggestive identification cases is faulty in two respects. First, it interpreted *Hill*, which held that no special scrutiny need be imposed on factual findings merely because of the presence of a federal constitutional issue, to mean that no special review need be given the constitutional issues themselves. This view, of course, does not withstand scrutiny. Second, it erroneously reduced the issue in a suggestive identification case from "Was there an irreparable probability of misidentification in violation of a defendant's due process rights?" to "Did the Court properly admit the evidence?" When the question in this case presents a legal, constitutional issue, unlike the factual issue discussed in *Hill*, the *Kinard* court's analysis is unsound. For these reasons, this Court should decline to follow Division Three's holding on this matter. *See, e.g., State v. Vickers*, 107 Wn. App. 960, 968, 29 P.3d 752 (2001) (court "independent[ly]" reviewed photo montage).

For all of these reasons and the reasons set forth in Appellant's Brief, the constitutional issue in this case should be resolved by finding a violation of Mr. Smith's due process rights requiring reversal. See Appellant's Brief at 26-33.

Point II: Mr. Smith Preserved his Objection to Officer Stril's Hearsay Testimony and Such Testimony was Not Harmless

The State does not deny that the trial court erred in admitting Officer Stril's hearsay statement. However, it claims that the defense's objection to the statement was not preserved as the court never made a final ruling on the objection prior to the testimony and counsel did not object during the testimony. See Brief of Respondent at 20-24. This contention is meritless.

Although the court's ruling prior to the testimony was more implicit than explicit, it was a final ruling all the same. Before the witness took the stand, the State asked to take the witness out of order and proffered the hearsay statement the witness would be called upon to testify about. The State explained the exception under which it contended the hearsay was allowed. Defense counsel objected to the hearsay statement. RP 9 at 4-5. The court questioned defense counsel: "Well, do you have something that distinguishes this from the exception cited by [the State]?" RP9 at 5. Counsel answered in the negative. The court responded, "Okay" and asked the State if it was ready to proceed. *Id.* It did not state that it was reserving its ruling or that the defense was free to produce

For all of these reasons, Mr. Smith's objection to the hearsay statement was preserved. For the reasons set forth in Appellant's Brief, the error in this case was prejudicial and requires reversal. See Appellant's Brief at 24-25.

Mr. Smith relies on Appellant's Brief and his Statement of Additional Grounds for Review for the remainder of his arguments.

CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief and his Statement of Additional Grounds for Review, Jayson Thomas Smith respectfully requests this Court to reverse his convictions.

Dated this 1st day of December, 2006.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 1st day of December, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, P. Grace Kingman, Deputy Prosecuting Attorney, 930 Tacoma Avenue S, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Jayson T. Smith, DOC No. 663639, Washington Corrections Center, P.O. Box 900 (IMU-208), Shelton, WA 98584.



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