

COURT OF APPEALS NO. 63959-5-1

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

STATE OF WASHINGTON

V.

BRIAN LANE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Michael Rickert, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's due process rights by admitting evidence of a show-up identification that was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

2. The trial court erred in denying the motion to suppress the show-up identification and evidence obtained as a result, as well as the in-court identifications of the witnesses.

Issues Pertaining to Assignments of Error

Two hours after a reported theft at the Cascade Mall Sears, two store employees were transported to a Mount Vernon convenience store to possibly identify two men they glimpsed fleeing from the store with armloads of clothes and jump into a red Isuzu Rodeo. The employees' only description of the men was that they were Hispanic, one with a Mohawk haircut and the other with longer, shaggy hair. The employees stated there were two Hispanic women in the Rodeo, one who moved to the front passenger seat, when the men jumped in the back.

The potential suspects – three women and two men, including appellant, all of Native American descent – were detained

when a Mount Vernon police officer noticed the group and the red Isuzu rodeo at the gas station/convenience store.

One of the store employees – in the presence of the other store employee – identified appellant as one of the men he glimpsed running from the store. The other – also in the presence of the other store employee – identified the other man. According to one of the employees, the transporting officer told them they were riding with the transporting officer to identify “the suspects.”

1. Whether the show-up identification of appellant was unduly suggestive, where the circumstances showed: the presence of 6 officers from two separate agencies; their positioning of appellant and the other suspects together in front of a police car with the red Isuzu Rodeo still present; the officers removed appellant’s hat to make him more closely resemble the employee’s description; the transporting officer told one of the employees the purpose of the show-up was to identify “the suspects;” and the witnesses identified the suspects in each other’s presence, rather than confidentially?

2. Whether the unduly suggestive circumstances created a substantial likelihood of misidentification where: the employees only glimpsed the thieves running from the store; there

was no indication the employees were particularly attentive at the time; the employees gave no indication they saw the thieves' faces; the employees described the thieves as Hispanic – while appellant and the other suspects are Native American; the employees gave no description of the thieves' height, weight or age; each employee identified only one suspect; and two hours had elapsed at the time of the identification?

B. STATEMENT OF THE CASE

Following a jury trial in Skagit County Superior Court, appellant Brian Lane was convicted of first degree theft. CP 111-120. The trial took place after an unsuccessful motion to suppress a witness' identification of Lane, evidence obtained as a result of that identification, as well as the witness' anticipated in-court identification. CP 6-33, 36-38. The propriety of the court's ruling on the motion to suppress is the subject of this appeal.

According to police reports,¹ on August 8, 2008, at approximately 12:45 p.m., Burlington police received a call reporting a theft at the Cascade Mall Sears. CP 12. Officers Goss

¹ The factual basis for the motion to suppress was predicated on the police reports, not live testimony. CP 12-33. The police reports allege the reported get-away vehicle was also involved in a hit-and-run. See e.g. CP 12. Because the circumstances of the hit-and-run are not pertinent to the show-up challenged here, those circumstances are omitted.

and Campo responded. CP 16-17. While en route, dispatch advised Sears employees described seeing two Hispanic men running out of the store with armloads of clothes. One man was described as short, with a Mohawk haircut, while the other was described as having longer, shaggy hair. CP 12, 17. Dispatch also advised the employees stated the men left in a 1995 Isuzu Rodeo with license plate number 930 WLT. CP 12, 17.

At Sears, Campo spoke with employee Jonathan Haberly who witnessed the theft. CP 17. According to Campo, Haberly said he saw two Hispanic men exit the east doors with armloads of clothes and jump into a red Isuzu Rodeo. He alleged one man took 10-15 Covington shirts and the other took 10-15 Canyon River Blues shorts. CP 17.

In a written statement taken at the time, Haberly described seeing two males with dark complexions. One had a short Mohawk, and each carried an armload of clothes, shorts and shirts, respectively. They ran out the door and jumped into the back of a red Isuzu Rodeo, with a license plate number of 930 WLT. To Haberly, it appeared there were two people in the front of the SUV. CP 33.

Store manager Belinda Richards, who also witnessed the theft, did not give a statement when police responded. However, assuming Richards made statements to responding officers consistent with her later written statement, she also described seeing two men with armloads of clothes running from the east entrance to a red Isuzu Rodeo. Richards also described seeing a woman in the Rodeo climb from the back to the front passenger seat to allow the men to enter the back. CP 31.

Although it is unclear from which witness the police heard this information, the police wrote in their reports that the Sears employees alleged seeing two Hispanic females in the vehicle. CP 12.

Campo reported that as he was leaving Sears, another witness reported the Rodeo travelled south on South Burlington Boulevard. CP 12, 17. Burlington police advised Mount Vernon police to be on the lookout for a red Rodeo. CP 16-17, 23.

Mount Vernon police officer Martinez reported seeing a red Rodeo thereafter, but lost sight of it until later that afternoon, at 2:19 p.m. CP 23, 25. While driving eastbound on College Way, he saw a red Rodeo parked at the AM/PM. Upon turning around and

approaching, he observed the license plate matched that reported by Burlington police. CP 23.

Martinez reported seeing a group of Indian men and women near the SUV. RP 23. The individuals were eventually identified as Reynold James, Brian Lane, Marie Washington, and Bridgett Finkbonner. CP 12. They were Native American, not Hispanic. CP 21.

Martinez approached the man in the driver's seat, who had a large dog on his lap. CP 23. Martinez identified the man as Reynold James and claimed James was agitated. CP 23. Martinez called for back-up and for Burlington police to respond to continue their theft investigation. CP 23. Martinez handcuffed James, who was older and reportedly not wearing a shirt, and placed him in the back of the patrol car to await the Burlington officers. CP 23, 27.

Mount Vernon police sergeant Deach arrived with Mount Vernon officers Maxwell and Zimmer.² CP 23. Deach and the officers told the remaining man, who was wearing a baseball cap, and the two women standing near the car, the police were there to investigate the Sears theft. CP 25, 27. According to Zimmer, he patted down the man and identified him as Brian Lane from the

² Maxwell reported his arrival time as 2:59 p.m. CP 30.

social security card Lane volunteered. CP 25. Deach placed Lane in handcuffs and put him in the back of a patrol car. CP 27.

According to Zimmer's report, the woman identified as Marie Washington was uncooperative, so he placed her in handcuffs as well. CP 27. The woman identified as Bridgett Finkbonner was reportedly compliant, however, and sat on the front bumper of one of the patrol cars. CP 27, 30. Deach located another woman reportedly associated with the group, identified as Courtney Solomon, from behind the convenience store. CP 26-28.

Meanwhile, Zimmer remembered that one of the suspects was described as having a Mohawk. Zimmer claimed that although Lane was wearing a hat, he could see Lane's head was partially shaved. Upon removing the hat, Zimmer reportedly observed a Mohawk haircut. CP 25.

Burlington police officer Vande Kamp and Burlington detective Rogge responded to the gas station at 2:37 p.m. CP 19, 21. Deach, Maxwell and Zimmer had already detained the other individuals, after Martinez took custody of James. CP 19, 21.

Burlington police sergeant Wischhusen advised officers at the scene that officer Kramer was en route with the Sears employees to possibly identify the suspects. CP 19. Police officers

lined up the two men and the three women in front of a police car so the Sears employees could identify them. CP 12, 19, 21, 28.

According to Richards' statement, at approximately 3:00 p.m., officer Kramer asked her and Haberly to accompany him "to identify the suspects." CP 31. At the AM/PM, the suspects were standing outside the Isuzu Rodeo. Haberly identified the suspect with the Mohawk, while Richards identified the man who was not wearing a shirt. Richards also identified Finkbonner as the woman who climbed from the back to the front passenger seat. CP 31.

According to Haberly's second written statement, around 3:00 p.m., officer Kramer asked him and Richards to drive by and see whether the police had detained the correct suspects. CP 32. At the AM/PM, the suspects were lined up for Haberly and Richards to identify. Haberly identified the man with the Mohawk haircut and darker complexion as definitely being one of the thieves. CP 32.

Solomon told police Washington had been driving at the time of the hit-and-run and that the men stole the clothes. CP 12, 21, 28. She agreed to give a written statement after police assured her she would be released. CP 29.

The police impounded the car, obtained a search warrant and recovered clothing with Sears tags still attached. CP 13, 19.

The loss prevention Sears employee reportedly scanned the items, with a reported total value of \$1,894.00. CP 13.

The defense argued the show-up procedure was unduly suggestive due to: the presence of 6 officers from two separate agencies; their positioning of the suspects together in front of a police car with the Rodeo still present; the officers' removal of Lane's baseball cap; Kramer's statement to the witnesses the purpose of the show-up was to "identify" the suspects; and because the witnesses identified the suspects in each other's presence, rather than confidentially. CP 9.

Moreover, the defense argued the circumstances weighed against the reliability of the witnesses' identification, in light of the their minimal opportunity to view the suspect as they were running out of Sears; the lack of evidence the witnesses could see the suspects' faces; the lack of evidence the witnesses were especially attentive; the witnesses' inaccurate descriptions of the suspects' ethnicity; and the witnesses' vague descriptions, which omitted any description of age, height, weight or clothing. CP 10. Moreover, the defense argued the witnesses' level of certainty was minimal, as each identified only one man, not both. Finally, the defense argued the time lapse between the theft and the identification

weighed against reliability, because the witnesses' memories would necessarily dim during the two-hour time period, and because the occupants of the Rodeo could have changed. As a result, it was likely the witnesses identified the vehicle, as opposed to its occupants. CP 10.

The court disagreed the show-up procedure was unduly suggestive. CP 36-38. Regardless, the court also found that any suggestiveness did not create a substantial likelihood of misidentification, because: the witnesses had time to view the suspects; there was no indication they did not pay attention; their prior descriptions of the suspects were accurate, regarding hair style and complexions; their level of certainty was high; and because the identification occurred within approximately two hours of the theft. CP 37.

C. ARGUMENT

THE TRIAL COURT VIOLATED LANE'S FIFTH AMENDMENT RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE ABOUT AN UNNECESSARILY SUGGESTIVE SHOWUP IDENTIFICATION.

Evidence of a show-up identification should be excluded when the identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

misidentification." State v. Rogers, 44 Wn. App. 510, 722 P.2d 1349 (1986) (quoting Simmons v. United States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1983)). Reliability is the linchpin in determining the admissibility of pretrial identifications, however, and reliable identifications can overcome the taint of a suggestive identification procedure. Manson v. Brathwaite, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977); State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988).

Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and it is the likelihood of misidentification that violates a defendant's right to due process. Neil v. Biggers, 409 U.S. 188, 198, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). Unnecessarily suggestive confrontations are further condemned because the increased chance of misidentification is gratuitous. Neil v. Biggers, 409 U.S. at 198.

This Court first determines whether the procedure was impermissibly suggestive, and if it was, this Court then determines whether, under the totality of the circumstances, that suggestiveness has rendered the identification unreliable. Taylor, 50 Wn. App. at 485; State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).

Contrary to the trial court's ruling here, the show-up identification of Lane was unnecessarily suggestive. The circumstances showed the presence of six officers from two separate police agencies. Lane was lined up with four other suspects in front of a police car with the suspect Rodeo still present. The police removed his hat to make him look more like the description given by Haberly. Officer Kramer told Richards she and Haberly were riding with him to identify "the suspects." And Richards and Haberly were permitted to make their identifications within earshot of each other, thereby increasing the likelihood of suggestion.

Generally, show-ups are not necessarily suggestive just because the suspect is handcuffed and standing near a patrol car or surrounded by police officers. See e.g. State v. Shea, 85 Wn.App. 56, 60, 930 P.2d 1232 (1997), overruled on other grounds, State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001). Under the circumstances here, however, Lane was not only handcuffed in front of a patrol car and surrounded by officers, he was also lined up with four other handcuffed suspects, near the suspected getaway car, and made to more closely resemble Haberly's description by the officers' removal of his hat. There was also the

transporting officers' suggestive statement and the suggestiveness of the witnesses' joint identifications. The constellation of circumstances resulted in an unduly suggestive identification procedure.

Contrary to the trial court's finding, the suggestiveness of the show-up identification created a substantial likelihood of irreparable misidentification. In the evaluation of reliability, this Court considers the factors set out in Neil v. Biggers. State v. Rogers, 44 Wn. App. at 515-16 (citing Manson v. Brathwaite, 432 U.S. at 114). These factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." Manson v. Brathwaite, 432 U.S. at 114; Neil v. Biggers, 409 U.S. at 199-200; Rogers, 44 Wn. App. at 515-16; McDonald, 40 Wn. App. at 746. Applied here, these factors weigh against reliability.

First, the employees did not have much of an opportunity to view the thieves at the time of the crime. Opportunity to observe is typically measured in minutes. See Rogers, 44 Wn. App. at 516 (approximately 20 minutes socializing with defendant); State v.

Burrell, 28 Wn. App. 606, 611, 625 P.2d 726 (1981) (two witnesses observed defendant for five minutes under street lights, and one witness had a second encounter); State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (1981) (police reserve officer involved in a six minute face-to-face confrontation with his assailant); cf. State v. McDonald, 40 Wn. App. 743, 747, 700 P.2d 327 (1985) (two to three minutes not sufficient when witness did not observe whether robber had a mustache or not). A fleeting glimpse of the criminal is not sufficient. State v. Thorkelson, 25 Wn. App. 615, 619, 611 P.2d 1278 (1980); cf. State v. Booth, 36 Wn. App. at 71 (forty-five seconds observation is sufficient in case where identification went to an automobile and corroborating evidence was found in the automobile). Neither Richards nor Haberly had more than a fleeting glimpse of the thieves running from the store.

Second, neither employee indicated he or she was especially attentive at the time of the crime. Significantly, fear or stress can affect perception, and Washington courts have recognized the relevance of these factors for accuracy of identification. See, e.g., State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984) (witness identifications reliable where they initially saw defendant in a non-stressful situation at the time of the crime);

State v. Taylor, 50 Wn. App. 481, 487, 749 P.2d 181 (1988) (expert testimony regarding effects of stress, including fear, on human perception and memory is relevant to reliability of eyewitness testimony).

Third, and perhaps most significant, the employees' descriptions of the thieves was vague and did not match the suspects who were eventually detained. See, e.g., State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992) (accurate description prior to confrontation included height, weight, color and type of hair, and unusual manner of dress); State v. McDonald, 40 Wn. App. 743, 747, 700 P.2d 327 (1985) (inaccurate description of criminal's clothing is a factor favoring reversal). While Richards and Haberly described Hispanic suspects, those detained by police were Native American. And in contrast to Haberly's description of the thieves, neither James nor Lane has a dark complexion. See e.g. Supp. CP ___ (sub. no. 27, State's Response to Motion to Suppress), attached pictures of James and Lane.

Finally, two hours had elapsed at the time of the identification. While this delay falls within the parameters of prior

cases,³ the show-up here still cannot be considered prompt and the store employees had little opportunity to view the thieves at the time of the crime. Under these circumstances, the delay militates against reliability. Rather, the delay provided time for the employees' memories to dim, and time for the occupants of the Rodeo to have changed, as evidenced by the third woman present at the time of the detention. As a consequence, the likelihood Richards and Haberly identified the suspects, as a result of the suggestive circumstances, i.e. the presence of the Rodeo, was increased by the time lapse.

In short, considering the totality of the circumstances, the suggestiveness of the show-up identification created a substantial likelihood of irreparable misidentification. The trial court erred in concluding otherwise and in denying the motion to suppress.

It is constitutional error to admit in-court identification evidence that is tainted by an illegal pre-trial identification process. Gilbert v. California, 388 U.S. 263, 272, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967). The state must show an independent origin of the

³ Compare State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978) (showup within a few minutes of attempted robbery); and State v. Booth, 36 Wn. App. 66, 71, 671 P.2d 1218 (1983) (showup within thirty to forty minutes of observation); with State v. Springfield, 28 Wn. App. 446, 448, 624 P.2d 208 (1981) (when

identification before testimony will be allowed. Gilbert v. California, 388 U.S. at 272; State v. Hilliard, 89 Wn.2d 430, 439, 573 P.2d 22 (1977); State v. Thorkelson, 25 Wn. App. 615, 619-20, 611 P.2d 1278 (1980) (courtroom identification suppressed when court cannot conclude that witnesses' recollections were not tainted by photo montage given a period of observation of only a few seconds).

In this case, Haberly testified to his show-up identification and identified Lane in court. RP 61-62. Richards, when looking at a picture of Lane taken at the show-up, testified she recognized the back of his head. RP 34; ex 2. As set forth above, both witnesses only had moments to glimpse the thieves running from the Sears store. In the police reports, they did not indicate they saw the thieves' faces. Accordingly, the show-up was their first opportunity to get a good look at Lane. Thus, the state cannot show an independent basis for either Haberly's or Richard's identification. Haberly should not have been allowed to identify Lane at trial, and Richards should not have been allowed to identify Lane in the picture.

police reserve officer had six minute face-to-face confrontation with assailant, seventeen hour delay is not error).

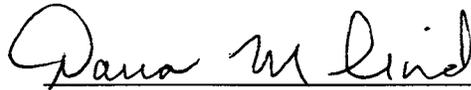
D. CONCLUSION

The trial court erred in denying the motion to suppress the show-up identification, the Sears clothing obtained as a result and the in-court identification by the witnesses. This Court should reverse.

Dated this 12th day of March, 2010.

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 63959-5-1
)	
BRIAN LANE,)	
)	
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 12TH DAY OF MARCH 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIN DYER
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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MARCH 2010.

x *Patrick Mayovsky*

2010 MAR 12 PM 4:10
CORTEZ
STATE