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ORIGINAL

NO. 63983-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEWAYNE MORRIS,

Appellant.

2019 JUN -1 PM 2:42



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. ARGUMENT	3
D. CONCLUSION	10

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Manson v. Brathwaite, 432 U.S. 98, 114, 53 L.Ed.2d 140, 97 S. Ct. 2243 (1977) 6

Washington State:

Robert v. Atl. Richfield Co., 88 Wn.2d 887, 568 P.2d 764 (1977) ... 3

State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) 4

State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002)..... 4

State v. Guloy, 104 Wn.2d 412, 432, 705 P.2d 1182 (1985)..... 4

State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001) 6

State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)..... 5

State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)..... 5

State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) 5

A. **ISSUES PRESENTED**

1. A trial court's decision to admit evidence is subject to harmless error analysis. The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. The Cooperating Witness identified Morris in a show-up the same evening that he engaged in two narcotics transactions with Morris. He later identified Morris in a photographic montage and finally in-court. Detective Smith, who observed both narcotics transactions, also positively identified Morris at the show-up and in court and Officer Kelly identified Morris as Dewayne Morris at the show-up and in court. Need this court reach any claimed error in the admission of the photomontage identification in light of the unchallenged identification evidence presented at trial?

2. An out-of-court identification of a defendant is admissible unless the procedure surrounding the identification is so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to

observe; the witness's degree of attention; the accuracy of the witness's prior description; the level of certainty of the witness at the time of the identification; and the length of time between the crime and the confrontation. The Cooperating Witness twice engaged in daytime conversations with Morris accompanied by hand-to-hand exchanges. The Cooperating Witness was experienced in conducting controlled buys and thus knew that he would later have to identify Morris. He provided a detailed and accurate description of Morris on the evening of the transactions and positively identified Morris as the seller both at the show-up that evening and in the photomontage two days later. Did the trial court properly exercise its discretion in finding that Morris did not meet his burden of showing the photomontage caused a substantial likelihood of misidentification?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Dewayne Morris with two counts of Delivery of Cocaine with one count occurring within 1000 feet of a school bus route. CP 5-6. Morris set his case for trial and moved

to suppress the show-up, photographic montage, and in-court identification evidence. After hearing testimony from Detective Bret Smith, considering pretrial exhibits 1-6, and hearing argument from counsel, the trial court found (1) the show-up montage was not suggestive, (2) the photographic montage was suggestive, (3) under the totality of the circumstances, the suggestiveness of the photomontage did not create a substantial likelihood of misidentification, and (4) the show-up and photographic montage identifications were admissible. CP 105 (Conclusions 3a-d). A jury found Morris guilty as charged. CP 42-5. Morris timely appealed. CP 106-07.

2. **SUBSTANTIVE FACTS**

Morris does not challenge the trial court's findings of fact.¹

The State, therefore, incorporates the trial court's findings of fact by reference.

C. **ARGUMENT**

1. THIS COURT NEED NOT REACH THE CLAIMED ERROR BECAUSE THE ALLEGED ERROR COULD NOT HAVE PREJUDICIALLY AFFECTED THE OUTCOME OF THIS CASE.

¹ Although Morris assigned error to Finding of Fact 1(z), he failed to support that assignment of error with any citation to authority or analysis. This Court thus need not consider this assignment of error and may presume that counsel has searched for authority to support this assignment of error and found none. Robert v. Atl. Richfield Co., 88 Wn.2d 887, 568 P.2d 764 (1977).

Morris contends that the trial court abused its discretion in admitting the photographic and in-court identifications but does not challenge the show-up identification.

A trial court's decision to admit evidence is subject to harmless error analysis. See State v. Guloy, 104 Wn.2d 412, 432, 705 P.2d 1182 (1985) ("the admission of inadmissible evidence is not among the constitutional errors which the court must always find to be prejudicial"). Nonconstitutional error in admitting evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. Id.

Here, immediately after the Cooperating Witness engaged in two narcotics transactions with Morris, he identified Morris at a show-up. 2RP 89-92, 162-64; 3RP 84-92. Thus, there was an independent basis for his in-court identification of Morris. Moreover, Detective Smith, who had also observed the Cooperating Witness twice interact with Morris, also positively

identified Morris at the show-up and later in court at trial. 2RP 92, 73-4. Additionally, the officer who assisted in contacting Morris for the show-up, identified him as Dewayne Morris at the show-up and later also identified him in court at trial. 3RP 88, 85. It is not likely, within reasonable probabilities, that admission of evidence concerning the Cooperating Witness's photographic montage identification of Morris materially affected the trial's outcome in light of the independent overwhelming evidence identifying Morris as the seller. Any error was harmless.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE PHOTOGRAPHIC MONTAGE AND IN-COURT IDENTIFICATION EVIDENCE.

Morris contends that the trial court abused its discretion in admitting the photomontage and in-court identification evidence.

"An out-of-court photographic identification violates due process if it is 'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'" State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) quoting State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) (citing State v. Vaughn, 101 Wn.2d 604, 682 P.2d 878 (1984)).

A two-step test is used to determine whether a photographic identification is so impermissibly suggestive that it creates a substantial likelihood of irreparable misidentification. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). To establish a violation, a defendant bears the burden of showing the identification procedure was impermissibly suggestive. Id. A suggestive identification procedure is "one that directs undue attention to a particular photo." Id. (citing Lineras, 98 Wn. App. at 403). If the defendant shows that the identification was suggestive, the court must then decide whether "the suggestiveness created a substantial likelihood of irreparable misidentification." Id. Deciding whether there is a substantial likelihood of irreparable misidentification requires the trial judge to consider the following factors: (1) the opportunity of the witness to view the criminal at the time; (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. Manson v. Brathwaite, 432 U.S. 98, 114, 53 L.Ed.2d 140, 97 S. Ct. 2243 (1977). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

a. Opportunity to View

Here, it was daytime when, at 4:00 p.m. on April 6, 2007, the Cooperating Witness approached Morris to attempt to purchase crack cocaine. CP 103 (Finding 1a, d). The Cooperating Witness had a face-to-face conversation with Morris to negotiate the price and quantity of crack cocaine he sought. Id. (Finding 1d, e, g). The two stood at arm's length as they made the exchange of crack cocaine for cash. CP 104 (Finding 1h). They continued their conversation as the Cooperating Witness asked Morris how he could contact him again and Morris told him that he could find him in the area and could call him "D." Id. (Finding 1i). Within 30 minutes, the Cooperating Witness again encountered Morris in the same area. Id. (Finding 1j, l). The Cooperating Witness conducted another hand-to-hand exchange with Morris of cash for crack cocaine. Id. (Finding 1m). These two face-to-face interactions within arm's reach, provided the Cooperating Witness with an exceptional opportunity to observe Morris.

b. Degree of Attention

The Cooperating Witness was not a casual or passing observer as may often be the case with eyewitness identification. The Cooperating Witness had worked with Detective Smith many

times on controlled buys. CP 103 (Finding 1b). He would be expected to pay special attention to detail, for he knew that he would have to subsequently describe and identify his vendor for later buys and arrest. See CP 103 (Finding 1f); CP 104 (Finding 1q, w). The Cooperating Witness's background and reason for contacting Morris show that his degree of attention during these interactions would naturally have been high.

c. Accuracy of the Description

The Cooperating Witness's description of Morris was provided to Detective Smith shortly after the transactions. See Pretrial Exhibits 3, 4. It included Morris's race, height, weight, coloring, facial hair, and the presence of a neck tattoo. CP 103 (Finding 1f); Pretrial Exhibit 3. It also included what Morris was wearing. Id. There is no claim that the Cooperating Witness's description was inaccurate, simply that it did not exactly match Detective Smith's description. Brief of Appellant at 9. Based upon the description, Officer Kelly was able to locate Morris for the show-up identification. CP 104 (Finding 1p); Exhibits 1, 3.

d. Witness's Level of Certainty

The Cooperating Witness had viewed photographic montages in the past and had both identified and failed to identify

the subject in the montage. CP 104 (Finding 1w). When Detective Smith presented the Cooperating Witness with the photomontage containing Morris's photo and asked him if the person who twice sold him crack cocaine two days prior was pictured in the montage, the Cooperating Witness stated he was certain in identifying Morris CP 105 (Finding 1z).

e. Time Between the Crime and Confrontation

The Cooperating Witness's description to Detective Smith was provided shortly after the crime. The same afternoon as the two transactions between the Cooperating Witness and Morris, the Cooperating Witness positively identified Morris at a show-up. CP 104 (Finding 1r). The photographic identification took place only "a couple days later." CP 104 (Finding 1t). This two day lapse in time, especially where it followed a show-up identification weighs in favor of finding the identification reliable.

These indicators all support the Cooperating Witness's ability to make an accurate identification and are not outweighed by the suggestive identification procedure. The trial court properly exercised its discretion in finding that the suggestiveness of the photomontage did not create a substantial likelihood of

misidentification and admitting the photographic montage and in-court identifications.

D. CONCLUSION

For these reasons, this Court should affirm Morris's conviction.

DATED this 1 day of ~~May~~ ^{June}, 2010.

RESPECTFULLY submitted,

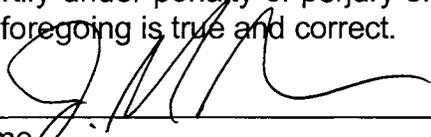
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Certificate of Service by Mail

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 & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DEWAYNE MORRIS, Cause No. 63983 - 8- 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
Done in Seattle, Washington

6.1.10

Date