

64177-8

64177-8

NO. 64177-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN ERAS-DUQUE,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUL - 1 AM 10:23

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Should this court determine that the trial court violated this defendant's due process rights? (No.)
2. Should this court determine that to deny a motion to suppress a show-up identification was error? (No.)

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The King County Prosecutor charged Juan Eras-Duque with three counts of first degree robbery for an incident which occurred on May 3, 2008. Record of Court Proceedings 1-4, 49-50. He was convicted by a jury based on evidence presented. He raises two issues on appeal. Appellant Brief 2.¹

2. SUBSTANTIVE FACTS

El Abuelo is a store in Issaquah which caters to Hispanic clientele. Report of Proceedings, Volume 4 at 10.² Two men robbed the store on May 3, 2008. RP3 at 10. One had a gun. RP3 at 11. There were two people in the store when the robbery started, Maria Armenta and her husband, who had been visiting her while she worked. RP7 at 84-87. The men forced them to lie on the floor of the store as the robbery occurred. RP7 87-94. A customer came in while they were being robbed and was also forced to the ground. RP4 at 9-11. His name was Juan Aguilar-

¹ Appellant Brief, hereinafter referred to as "AB."

Hernandez. Id. The men fled the store. RP4 at 11-14. Sergeant Nash was in the area, and saw two men walking down the street within three blocks of where it occurred. RP3 at 86-87, 91. This was within two to three minutes of the crime according to his testimony. RP4 at 49. Estimated distance of the men from the crime scene was roughly a quarter mile. Id.

Dispatch described two Hispanic men, one wearing red boots. RP3 at 86-91. Defendant Eras-Duque was wearing red boots when stopped by Nash. Id. Nash testified that Eras-Duque's red boots stood out to him as he'd never seen boots like that (and that color) before. RP3 at 87-88.

The men were ordered to the ground at gun point. RP3 at 88. Other officers responded to the area. Id. They handcuffed and frisked the two men. RP2 at 33-34; RP3 at 89. Eras-Duque denied any involvement in the robbery. RP3 at 52; RP4 at 56; RP5 at 69. His statements were suppressed by the trial court as Judge Shaffer found he did not waive his *Miranda* rights knowingly, intelligently and voluntarily because police read him his rights in English instead of Spanish. Id.

A show up identification was done with two of the three victims. RP3 at 61. This show up was done roughly twenty minutes after Sgt. Nash stopped the two men. Officer Christian Munoz and Officer Brett Lange took the two men from the scene (El Abuelo) and transported them the several blocks to identify if the detained men were the same men who

² Report of Proceedings, hereinafter referred to as "RP".

had committed the robbery. RP4 at 48-49. Maria Armenta, the third victim, did not go to the show-up identification as she was badly shaken from the crime. RP4 at 49. Officer Lange drove, officer Munoz was the front passenger, and the victims rode in the back of the police car. RP4 at 49-50.

Victims Hernandez and Vasquez were driven by the show-up twice, with the officers driving by slowly. RP4 at 50-51. The suspects may have been in different positions on each of the two times officers drove by, according to the four officers who testified. Two of the officers were involved in taking the victims to perform the identification, two were involved in maintaining custody of the suspects during this time. RP 4 at 51; RP2 at 18, 40-42; RP 3 58-60.

The victims both indicated that they believed the suspects were lying down when the show-up identification was done. RP4 at 53-54; RP3 at 61; RP5 at 25, 31-32. They both identified the two men as being the same two men as had committed the robbery. Id.

Victim Hernandez testified that one of the men who committed the robbery wore tennis shoes and the other wore boots. RP4 at 12. He said the man with tennis shoes had “tinted” or highlighted hair. Id. He was in the store for about ten minutes while the robbery occurred. RP4 at 14.

As he was driven by, Hernandez indicated that he recognized the men based in part on their footwear and the highlights one of them had.

RP4 at 19-29. Hernandez could not identify the boots Eras-Duque was wearing at the time of the suppression hearing. RP4 at 20-21. He could not identify the defendant at the suppression hearing or trial. RP4 at 29; RP7 at 33-34.

Victim Vasquez also identified both men as lying on the sidewalk. RP5 at 25, 31-32. He said he recognized the man by their clothing, the red boots, and hair of the man who had the gun during the robbery. RP5 at 27. He was 90 percent sure of his identification. RP5 at 29. At trial, he could not identify the defendant. RP5 at 27.

The court found that the defendant who plead guilty (Castillo) and the defendant on trial (Eras-Duque) were lying on the ground during the show-up. RP5 at 79. Judge Shaffer found that the identification procedure was suggestive but not *impermissibly* so. RP5 at 79. She went on to rule that even if it was suggestive, the identifications were reasonably reliable because the witnesses identified both suspects with a “high degree” of certainty a “short time” after the robbery and after having gotten a good look at each man. RP5 at 81-82.

The court declined to suppress the identification. RP5 at 83.

ARGUMENT

1. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS BY ADMITTING A SHOW-UP IDENTIFICATION RULED AS BEING "APPROPRIATE" IN PRE TRIAL MOTIONS.

The Court Appeals has noted that "We are firmly committed to the rule that when findings of fact are supported by evidence, none that are truly findings of fact will be disturbed on appeal." Firefighters Local 1296 v. Kennewick, 86 Wash.2d 156, 161, 542 P.2d 1252 (1975); State v. Williams, 96 Wn2d 215, 220-21 (1981); Valentine v. Dept. of Licensing, 77 Wn.App. 838, 846 (1995). It is one of many functions of an Appellate Court to determine questions of law. Id. Judge Catherine Shaffer made rulings in this case about the identification procedure. Those rulings are captured in her findings of fact and conclusions of law pursuant to Criminal Rules 3.5 and 3.6.

A defendant asserting that a police identification procedure denied him due process must show that procedure was unnecessarily suggestive. *U.S.C.A. Const.Amend. 14. (emphasis added)*. A procedure such as a show-up is not per se impermissibly suggestive. *U.S.C.A. Const.Amend. 14., Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972); State v. Rogers, 44 Wash.App. 510, 515, 722 P.2d 1349 (1986). A

defendant asserting that a police identification procedure denied him due process must show the procedure was unnecessarily suggestive. Foster v. California, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969); State v. Traweek, 43 Wash.App. 99, 103, 715 P.2d 1148 (1986); State v. Booth, 36 Wash.App. 66, 70, 671 P.2d 1218 (1983).

Once such a showing is made, the court will consider the totality of the circumstances to determine whether the suggestiveness created a substantial likelihood of irreparable misidentification. Manson v. Braithwaite, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977); State v. Traweek, *supra*, 43 Wash.App. at 103, 715 P.2d 1148. In this case, the honorable Judge Catherine Shaffer did just that. She took conflicting testimony and reconciled it, determining that even though there may have been some level of suggestiveness to the show-up procedure, the procedure was not so impermissibly suggestive as to have created an irreparable harm of misidentification. Court's 3.6 Rulings.

Issues similar to the one raised by the Appellant in this case are not issues of first impression for this Court. In fact, issues involved with show-up identifications are dealt with in the context raised by the Appellant, and were found to be admissible.

The Guzman-Cuellar court determined that a show-up conducted at scene of a shooting less than one hour after the crime was not "unnecessarily suggestive," for purpose of that defendant's due process

claim, "even though the defendant was handcuffed during show-up and was standing approximately 15 feet from a police car." State v. Guzman-Cuellar, 47 Wash.App 326, 734 P.2d 966 (1987) *citing* U.S.C.A.

Const.Amend. 14.

As was the case in Guzman-Cuellar, this Court need not review the totality of the circumstances because Mr. Eras-Duque has failed to make the preliminary showing that the show-up was *unnecessarily* suggestive. Any show-up may have a tinge of suggestiveness, however, the requirement is that it be "unnecessarily" suggestive. This is not met.

As in Guzman-Cuellar, the thrust of Mr. Eras-Duque's argument is that he was handcuffed and in close proximity to a police car during the show-up. As that Court ruled: "These facts alone are insufficient to demonstrate unnecessary suggestiveness." *See generally* Guzman-Cuellar, United States v. Hines, 455 F.2d 1317 (D.C.Cir.1971) (court ruled that a show-up was not unduly suggestive even though the robbery suspect was handcuffed and a number of policemen were present). In this case there is the added fact that Mr. Eras-Duque was present with his would-be co-defendant, but, that fact is not enough to reach the threshold required to have this show-up qualify as "unduly suggestive." The same holds true with regard to whether the men were standing or lying down.³ Both civilian witnesses indicated they were clearly able to see the suspects and

identify them. Both civilian witnesses indicated that had they not been sure, they would have said so. Accordingly, the trial court did not err in admitting evidence of the show-up.

There is a trilogy of cases addresses concerns to the proper identification of a person.⁴ Similarly, the Neil v. Biggers guidelines intended to ensure that a show-up identification of a person do not have untenable issues.⁵ Because of the nature of one-on-one show-ups, guidelines were adopted to ensure reliability of them and to guarantee defendants due process rights. Factors that should be considered in evaluating the likelihood of misidentification have been spelled out by appellate courts. To challenge a show-up identification, a defendant has the burden to show “(1) that the procedure was unnecessarily suggestive; and, if so, (2) whether considering the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification.” State v. Shea, 85 Wash.App. 56, 59, 930 P.2d 1232 (1997), *abrogated on other grounds by* State v. Vickers, 107 Wash.App. 960, 967 n. 10, 29 P.3d 752 (2001).

³ Additional testimony on this issue became available at trial which went beyond the scope of what was discussed in the original 3.6 hearing.

⁴ See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

⁵ Other than to an identification of a person/suspect, these guidelines have only been applied to identifications of photographs of suspects. See Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); State v. Hewett, 86 Wash.2d 487, 545 P.2d 1201 (1976).

For the second step, the Court should consider several factors of reliability: (1) the witness's opportunity to observe the criminal during the crime, (2) the degree of attention the witness paid during the crime, (3) the accuracy of any prior description by the witness, (4) the degree of certainty exhibited by the witness in the identification, and (5) the length of time between the crime and the identification. State v. Christianson, 17 Wash.App. 264, 268, 562 P.2d 671 (1977); accord Neil v. Biggers, supra. See also Shea, 85 Wash.App. at 59, 930 P.2d 1232.

The two victims who performed the identification in this case indicated a high level of certainty at the time of the identification. There was a very short period of time between the crime and the show-up identification (under 25 minutes). They both had the chance to view the defendants during the crime, although admittedly the victims were focused on the weapon and were ordered to keep their faces down as they were forced to lay on the ground while the robbery was being committed. In terms of their accuracy of description of the men, the men were able to give details in terms of the clothing and physical description of each man. And, while they could not give 100 percent accurate descriptions with regard to all clothing and physical attributes of each man, this is far from atypical given the nature of eyewitness identification. There is no issue with regard to cross-racial identification. The possibility of

misidentification, it has been argued, increases when a witness or victim is of another ethnicity.

Additionally, the third victim, Maria Armenta, confirmed that the boots recovered from Eras-Duque were the boots she was sure she saw the man without the gun wearing during the robbery. She explained what they looked like before she was shown them in trial. She gave a detailed description of these unique red boots, down to the detailing on the toe of the boot. She had an extended period of time to observe them. The boots were very unique, and she is familiar with uniquely styled boots, as they sell boots similar to the ones he was wearing at the store El Abuelo. While she did not attend the line-up, this fact is important in terms of confirming the value of the identifications and any potential "irreparable harm" as alleged by the appellant.

Based on the totality of the evidence, the Court did not violate the defendant's due process rights.

2. THE TRIAL COURT DID NOT MAKE A REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE SHOW-UP IDENTIFICATION.

The admission or refusal of evidence is "within the trial court's sound discretion," which the Court of Appeals "will not reverse on appeal absent a showing of abuse of discretion." State v. Stubsoen, 48 Wn.App.

139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987); State v. Mendez, 29 Wash.App. 610, 611, 630 P.2d 476 (1981). That showing can not be made here.

The standard of review is abuse of discretion for trial court rulings. "A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence." *See State v. Taylor*, 60 Wash.2d 32, 40, 371 P.2d 617 (1962). Here, Judge Catherine Shaffer had to compare the potential prejudice of the introduction of a potentially somewhat suggestive identification procedure against the benefit of allowing a jury to consider this evidence and determining its evidentiary weight and value.

State v. Harris, 97 Wash.App 865, 989 P.2d 553, Wash.App Div. 3 (1999) provides guidance with regard to this standard. "The deferential abuse of discretion standard gives a trial judge wide latitude on a variety of trial questions, including the admission or exclusion of evidence, the wording of instructions, the order and sequence of witnesses, and many other trial related matters." Harris citing State v. Marks, 90 Wash.App. at 984, 955 P.2d 406, Wash.App. Div. 3, (1998).

The Court went on to say that is "because the trial judge is in the middle of, and part of, the ongoing drama that is a jury trial. An appellate court, on the other hand, reads a record." Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ.

L.REV.. 277, 280 (1995/96). The Appeals Court noted that its role "then is appropriately limited to review of questions which can best be characterized as questions of law." *See State v. Lough* , 125 Wash.2d 847, 861, 889 P.2d 487 (1995). "Therefore, so long as the trial court's grounds for its decision are reasonable or tenable, they should not be subject to appellate meddling. Only in those instances where the trial court's discretionary decision clearly falls beyond the pale should we reverse." *See Id.* at 861, 889 P.2d 487..

The trial court used its discretion in this case, and its discretionary decisions were reasonable given the information available to the court when it made its ruling. Judge Shaffer's discretionary decision does not fall beyond the pale.

In reviewing a denial of a motion to suppress this Court must determine whether the challenged findings of fact are supported by substantial evidence in the record and whether those findings support the Court's conclusions of law. *State v Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (*citing State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). In this case, the findings are supported by the record and the evidence presented. And, while the court noted

The Court would normally consider unchallenged findings as verities on appeal. *Hill*, 123 Wn.2d at 644. In this case, defense counsel Kevin McCabe challenged all findings of fact and conclusions of law.

The Court found, however, that while the identification procedure was slightly suggestive, it was not impermissibly so. Court's Rulings on 3.6 at page 7.

When reviewing the trial court's conclusions of law, this Court should employ a *de novo* standard. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123 Wn.2d at 644). "However, credibility and weight determinations are left to the trier of fact and are not subject to review." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Because of conflicting testimony from officers and civilians on this issue, it is important to keep this in mind.

Ordinarily evidentiary rulings are reviewed for a manifest abuse of discretion. State v. Smith, 115 Wash.2d 434, 444, 798 P.2d 1146 (1990). The ruling at issue here denied a motion to suppress brought under Criminal Rule 3.6, the procedure for admitting identification, and the court entered findings of fact and conclusions of law. This Court's review should determine, *de novo*, whether the trial court derived the proper conclusion from the undisputed findings of fact about what occurred with the identification. See State v. Armenta, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997).

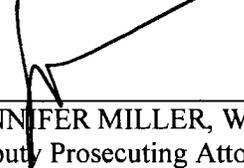
CONCLUSION

For the aforementioned reasons this Court should deny counsel's assignments of error with regard to the trial of their client, and affirm the jury's finding of guilt on three counts of Robbery First Degree.

DATED this 30 day of JUNE 2010

RESPECTFULLY submitted,

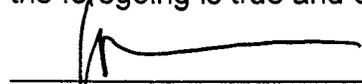
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen, Broman and Koch PLLC at 1908 E Madison Street in Seattle, Wa., containing a copy of the **response brief**, in STATE V. JUAN ERAS-DUQUE, Cause No. 64177-8-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 Jennifer Miller
Done in Seattle, Washington

June 30 '10
Date JUNE ~~24~~, 2010
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