

NO. 66819-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN CASEY,

Appellant.

REC'D
JUN 30 2011
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUN 30 PM 3:55

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

The Honorable John P. Erlick, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural History</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	8
1. <u>FAILURE TO PRECLUDE ISEMAN FROM IDENTIFYING CASEY AS THE BURGLAR AT TRIAL DENIED CASEY A FAIR TRIAL</u>	8
2. <u>REMAND IS NECESSARY BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6(b)</u>	14
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Austin</u> 65 Wn. App. 759, 831 P.2d 747 (1992).....	15
<u>State v. Cruz</u> 88 Wn. App. 905, 946 P.2d 1229 (1997).....	15
<u>State v. Guloy</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	13
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	15
<u>State v. McDonald</u> 40 Wn. App. 743, 700 P.2d 327 (1985).....	9, 10, 11, 12, 13
<u>State v. Pulido</u> 68 Wn. App. 59, 841 P.2d 1251 (1992) <u>review denied</u> , 121 Wn.2d 1018 (1993).....	14
<u>State v. Rogers</u> 44 Wn. App. 510, 722 P.2d 1349 (1986).....	8, 9
<u>State v. Smith</u> 68 Wn. App. 201, 842 P.2d 494 (1992).....	15
<u>State v. Tagas</u> 121 Wn. App. 872, 90 P.3d 1088 (2004).....	14
<u>State v. Vailencour</u> 81 Wn. App. 372, 914 P.2d 767 (1997).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>FEDERAL CASES</u>	
<u>Foster v. California</u> 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969).....	9
<u>Manson v. Brathwaite</u> 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977).....	4, 9
<u>Neil v. Biggers</u> 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).....	9, 10, 11
<u>Simmons v. United States</u> 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1983).....	9
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.6.....	1, 5, 6, 7, 14, 15
CrR 6.1.....	14, 15
RCW 9A.28.020.....	1
RCW 9A.36.041.....	1
RCW 9A.52.025.....	1
RCW 9A.76.170.....	2,
U.S. Const. amend. V.....	9
U.S. Const. amend. XIV, § 1.....	9
Wash. Const. art. I, § 3.....	9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to preclude an in-court identification of appellant as the burglar by the complaining witness when that witness was unable to identify appellant as the burglar during a show-up conducted by police on the day of the burglary.

2. The trial court violated CrR 3.6(b) by failing to enter written findings of fact and conclusions of law.

Issues Pertaining to Assignments of Error

1. The complaining witness to a residential burglary was unable to identify appellant as the alleged burglar at a show up conducted shortly after the alleged offense. Did the trial court err in denying a motion to preclude the complaining witness from identifying appellant as the burglar at trial when the reliability of that identification was unfairly tainted by the witness's viewing of appellant on the day of the alleged offense?

2. Does the trial court's failure to comply with CrR 3.6(b) require remand for entry of the required written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant Shawn Casey with residential burglary, attempted residential burglary, bail jumping and fourth degree assault. CP 19-20; RCW 9A.28.020; RCW 9A.36.041; RCW 9A.52.025; RCW

9A.76.170(1), (3)(c). The State alleged that on May 30, 2010, Casey first briefly entered the home of Mari Iseman through an open living room window, but leapt back out when Iseman appeared, then took a substantial step in burglarizing the nearby home of Cynthia Davis by going into her backyard, and then assaulted Davis's neighbor, Robert Reynolds, in Reynolds' backyard. CP 4-7. The State also alleged Casey failed to appear for a court hearing on July 21, 2010. CP 20.

A jury trial was held February 14-18, 2011, before the Honorable John P. Erlick. 1RP-5RP¹. The jury convicted Casey of residential burglary, bail jumping and fourth degree assault, but acquitted him of attempted residential burglary. CP 40-41, 43-46; 5RP 6-10. Casey was sentenced under the Drug Offender Sentencing Alternative (DOSA) for the residential burglary, received a standard range 29-month sentence for bail jumping, and a suspended 12-month sentence for fourth degree assault. CP 89-100; 6RP 10-12. Casey appeals. CP 104-116.

2. Substantive Facts

According to the "Certification for Determination of Probable Cause", Iseman was in the back bedroom of her Auburn home on May 30, 2010, when she heard a "loud thud" come from her living room. When she

¹ There are six volumes of verbatim report of proceedings referenced as follows: 1RP - 2/14/11; 2RP - 2/15/11; 3RP - 2/16/11; 4RP - 2/17/11; 5RP - 2/18/11; and 6RP - 3/9/11

went to investigate she saw a "dark figure standing on her couch next to an open window. The figure jumped or fell out of the window. " CP 4-5. When she looked out the window she saw a man "in the process of standing up directly in front of the window." CP 5. When she asked what he wanted, he told her he needed money, and then walked away and joined two other people about a block from her home and left the area. Iseman was unable to give police a good description of the man she thought had entered her house, but did say she thought he "had a dark complexion (such as Hispanic) wearing a dark shirt and dark pants." CP 6. When Iseman was taken in a patrol car to view Casey and his companions after Casey's arrest, however, she was unable "to positively identify" him or either of his companions as the man she had seen outside her window. CP 6.

Pretrial, defense counsel moved to preclude Iseman from identifying Casey at trial as the man she saw outside her window. CP 12-18. The motion notes Iseman told police the man she saw was "a Hispanic male in his twenties wearing a black jacket and jeans[.]" CP 13. When Iseman was brought to a "show up" of Casey and his two companions, "Iseman did not identify any of the three individuals as being inside her home, and she remained convinced that the individual she saw at her home was a Hispanic male or had a dark complexion." CP 14. The motion notes Casey is

(sentencing).

Caucasian.² *Id.*

The defense argued Iseman should be precluded testifying Casey was the burglar because it would be the result of impermissibly suggestive circumstances; her viewing of him at a show-up on the day of the burglary. Counsel argued that under the factors set forth in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977),³ the defense motion should be granted. CP 14-18.

The prosecution did not file an answer to the motion. In its trial memorandum, however, it notes:

Ms. Iseman was transported to the scene and [was] unable to identify defendant. She is unclear whether she was shown only the two people her burglar met up with or all three, which would include the defendant. Ms. Iseman indicates she would be able to recognize the person who was inside her home again if she saw him.

Supp CP __ (sub no. 45, State's Trial Memorandum, 2/14/11) at 3.

At a hearing the first day of trial, the prosecutor acknowledged

² Casey's companions were described at trial as an Asian male, Brian Hans, and a woman named Nicole Mallory. 3RP 82, 120-21, 128-29, 165.

³ *Manson v. Brathwaite* provides:

These 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. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

432 U.S. at 114.

Iseman had signed a statement saying there were three people at the show-up on May 30th. 1RP 66. The prosecutor noted, however, that in an interview the week before trial Iseman said she thought she could identify the burglar if she saw him again. 1RP 66-67.

Defense counsel again noted Iseman's original description of the burglar as having "a dark complexion and being Hispanic" after viewing him from one to three feet away through an open window, and that she subsequently saw him meet up with "two other men". 1RP 68. Counsel also noted Iseman's written statement said she was shown three people at the show-up, but at a subsequent interview could only recall seeing two. 1RP 68-69.

The trial court suggested holding a CrR 3.6 hearing at which Iseman would testify and if

she says no, I can't identify him, then we're talking academics here. If she says yes, I can identify him and then explains how and why, then I make a judgment on that and have a record. I don't have a record now, other than one piece of the record, which is she could not identify him at the show-up, field show-up. And that she told the State apparently that she might be able to identify him. But I need to know why. Why is it somebody can identify an individual eight months later when she couldn't at the time[?]

1RP 70-71.

Defense counsel objected, arguing that allowing Iseman the

opportunity to identify Casey as the burglar, either in a pretrial hearing or at trial, would constitute an impermissibly suggestive identification procedure because Casey is obviously the defendant in the proceeding and therefore most likely to be identified by Iseman as the burglar. 1RP 70-72, 74-75.

Counsel also noted:

What the State is attempting to do, they, if the State had, for example, a week [after the show-up] done a second line-up or second photo montage and she had picked [Casey] out of that line-up, we would still be here today arguing that that second montage or that second line-up was essentially corrupted by the prior show-up that had occurred before. What the State is attempting to do today, . . . what they would like to have done is another field show-up. But they want to have it done right here in Court in front of the jury.

1RP 71-72.

In deciding to hold a CrR 3.6 hearing, the trial court stated:

I think the concern is that the show-ups, there, there's two concerns about suggestibility. One is, is the first that a show-up taints later identifications. So if you, if you have a single person who's part of a show-up and the person says, yeah, I think that's the individual and then later sees that same individual, that corroborates the original show-up. So if the original show-up is tainted, it taints the later identification. That's not at issue here because Ms. Iseman didn't initially identify the defendant and therefore there's no prior taint of her potential current identification. The second type of suggestibility is just by being in the courtroom, a defendant is at risk of being identified as the . . . perpetrator. . . .

1RP 77-78.

On the second day of trial, the prosecutor noted an objection to the

court's decision to hold a CrR 3.6 hearing. 2RP 2. The prosecutor argued there was no "scenario" in which Iseman should be precluded from identifying Casey at trial as the burglar. 2RP 2, 6-7. The prosecutor claimed there is no basis in fact to claim Iseman's identification of Casey as the burglar was tainted by prior events, but that holding the CrR 3.6 hearing could potentially unfairly lead to a basis for the defense to make such an assertion. 2RP 6, 8.

Defense counsel agreed that holding a CrR 3.6 hearing could lead to additional reasons to suppress identification testimony by Iseman. Counsel requested the court to suppress the testimony based on the existing record. 2RP 9.

The court decided not to hold the CrR 3.6 hearing. Instead the court denied the defense motion on the basis that there was nothing to suggest law enforcement had done anything between the time of the show-up and trial to improperly suggest to Iseman that Casey was the burglar, such as showing her a picture of him or conducting another show-up. 2RP 9-11. To date, written findings of fact and conclusions of law have not been filed in conjunction with this ruling.

At trial, Iseman claimed she recognized Casey as the man she saw standing outside her window on May 30, 2011. 3RP 25. Regarding her inability to identify Casey at the show-up, Iseman could not recall whether

she was shown two or three people, but said she thought she recognized the clothing as that worn by the burglar's companions, but did not recognize any of them as the burglar. 3RP 41-42. Iseman admitted telling police on the day of the incident that the burglar was "darker complected." 3RP 54. She also admitted that Casey has a "lighter" complexion. 3RP 55. Finally, Iseman admitted telling police she did not get a good look at the face of the burglar. 3RP 56.

C. ARGUMENT

1. FAILURE TO PRECLUDE ISEMAN FROM IDENTIFYING CASEY AS THE BURGLAR AT TRIAL DENIED CASEY A FAIR TRIAL.

Seeing Casey at the show-up so tainted the reliability of Iseman's in-court identification of him as burglar that it should have been precluded as too likely to result in irreparable misidentification. The trial court's failure to comprehend this taint and preclude the in-court identification deprived Casey of his right to a fair trial. This Court should therefore reverse his residential burglary conviction.

Evidence of identification should be excluded when the identification procedure is "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, 88 S. Ct. 967, 19 L. Ed. 2d 1247

(1983)). Suggestive confrontations increase the likelihood of misidentification, which may violate a defendant's right to due process. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969); U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3.

Reliability is the key to determining the admissibility of identifications, however, and reliable identifications can overcome the taint of a suggestive identification procedure. Manson v. Brathwaite, 432 U.S. at 114; State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). In determining whether a particular identification is admissible this Court determines whether the procedure leading to the identification was impermissibly suggestive, and if so, whether the totality of the circumstances indicates the 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). This is accomplished by consideration of the factors set out in Neil v. Biggers to evaluate reliability in the face of a suggestive identification. Rogers, 44 Wn. App. at 515-16. These factors include: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the accuracy of the witness's description of the suspect; (3) the witness's degree of attention; (4) the level of certainty demonstrated by the witness during the identification, and (5) the time

between the crime and the identification procedure. Neil, 409 U.S. at 199-200; Rogers, 44 Wn. App. at 515-16; McDonald, 40 Wn. App. at 746.

Instructive here is McDonald. In McDonald police had the victim, Pettersen, view a line up that included two men police suspected committed the crime, McDonald and Dean. Pettersen picked McDonald and one other, but not Dean. When told one of his picks was incorrect and directed to consider Dean, Pettersen said it was a "toss up" between the one he picked and Dean. 40 Wn. App. at 744. The trial court granted the defense motion to exclude the "toss up" comment, but refused to suppress Pettersen's in-court identification Dean as one of the robbers. 40 Wn. App. at 745.

Applying the factors in Neil v. Biggers, this Court agreed it was reversible error not to have suppressed Pettersen's in-court identification of Dean in light of his inability to independently pick him out of the original line-up;

First, Pettersen's opportunity to view the criminal at the time of the crime was limited. Pettersen testified that the whole incident took "five or six minutes ... Maybe not that long." He also acknowledged that for possibly 2 or 3 minutes of that time, the criminal was "somewhat behind me, so not always in my line of sight", while the two men marched Pettersen across the street to the entrance of the alley. Pettersen also testified that the criminal "may have had a mustache" at the time of the robbery. He admitted that he used the word "may" because he was uncertain. Thus, Pettersen directly observed the suspect for, at most, 2

or 3 minutes and did not observe him closely enough to determine whether or not he wore a mustache.

Second, Pettersen's initial description of the criminal's clothing was inaccurate. Pettersen first described Dean as wearing jeans and a blue, short-sleeved polo shirt. As established at trial, Dean was arrested wearing khaki pants and a long-sleeved, button-down shirt.

Finally, the factors of the level of certainty demonstrated by Pettersen at the confrontation and the length of time between the crime and the confrontation are inapplicable because Pettersen picked the wrong person at the lineup. There can be no stronger demonstration of his inability to make an accurate identification. The lineup was conducted only 22 hours after the robbery. Although Dean was in the lineup, Pettersen selected McDonald, Dean's codefendant, and another person. His selection of codefendant McDonald from the same lineup suggests there is no reason for his failure to identify Dean other than an inability to do so.

40 Wn. App. at 747.

Applying the Neil v. Biggers factors here results in the same conclusion as in McDonald. First, Iseman admitted she did not get a good look at the face of the burglar as he stood outside her living room window. 3RP 56. If she did not get a good look at the burglar at the time of the offense, it is axiomatic that the reliability any subsequent identification will be suspect.

Second, Iseman's description of the burglar was vague; dark complexion, possibly Hispanic, wearing dark clothes. CP 14. Although this may be an accurate description of the burglar, it cannot reasonably be characterized as an accurate description of Casey, who is Caucasian. CP

14. Thus, this factor weighs against the reliability of her subsequent in-court identification.

Third, that Iseman looked out the window and engaged the burglar in conversation indicates her attention was focused on the burglar when he was outside her window. 3RP 18-22, 26-28. But in light of her vague description and admission that she did not get a good look at the burglar's face, this factor is neutral at best.

Fourth, Iseman's level of certainty at the initial show-up was non-existent. She failed to identify anyone as the burglar, much less Casey. CP 6, 14. That she expressed confidence in her in-court identification must be view in context. 3RP 45. As defense counsel noted pretrial, any confidence by Iseman in her in-court identification is tainted by the fact that she had the opportunity to view him at the show-up on May 30, 2010, and therefore may have remembered him from that event, and then allowed that memory to morph into a false memory of the burglary. 1RP 71-72. Thus, Iseman's subjective confidence in her in-court identification does not warrant the necessary objective confidence that the in-court identification was reliable. Like the McDonald court noted, "[t]here can be no stronger demonstration of [Iseman's] inability to make an accurate identification" of Casey than her inability to pick him out at the show-up conducted shortly after the burglary. 40 Wn. App. at 747.

Finally, approximately eight months passed between Iseman's inability to identify Casey at a show-up, and her in-court claim that he was the burglar. There is no reason to assume her ability to reliably identify the burglar improved over time. To the contrary, Iseman agreed her memory of the incident was better on May 30, 2010, than it was at trial in February 2011. 3RP 56.

As in McDonald, the totality of the circumstances here show that the suggestiveness of the in-court identification created a substantial likelihood of irreparable misidentification. The trial court erred in concluding otherwise and in denying Casey's motion to suppress the identification. The remedy is reversal and remand for a new trial. McDonald, 40 Wn. App. at 748.

Like other due process violations, the violation here may be subject to a constitutional harmless error analysis. To conclude an error is harmless under this standard, the State must prove beyond a reasonable doubt that any rational jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985). The State cannot meet this burden here.

Absent Iseman's in-court identification of Casey as the burglar, there was no evidence directly linking Casey to the offense. Although Casey made statements to police admitting he talked to a woman through a

window, he never said it was Iseman he spoke to. IRP 23. Moreover, absent Iseman's in-court identification of Casey, there was a reasonable basis to conclude Casey's Asian companion, Brian Han, was the burglar rather than Casey, particularly in light of Iseman's initial description that the burglar had a dark complexion. Under these circumstances, the State cannot meet its heavy burden, and reversal is required.

2. REMAND IS NECESSARY BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6(b).

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1997) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

The purpose of CrR 3.6(b) is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993). When the trial court fails to enter findings and conclusions as required by CrR 3.6, “there will be a strong presumption that dismissal is the appropriate remedy.” State v.

Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court's failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions). This Court should remand for entry of complete and thorough findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (if trial court fails to enter a finding as to an element of the crime charged, the appropriate remedy is to vacate and remand for appropriate findings).

D. CONCLUSION

For the reasons stated, this Court should reverse Casey's residential burglary conviction and remand for a new, fair trial. In the alternative, this Court should remand for compliance with CrR 3.6(b).

DATED this 30th day of June 2011.

NIELSEN, BROMAN & KOCH, PLLC


CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66819-6-1
)	
SHAWN CASEY,)	
)	
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 30TH DAY OF JUNE, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHAWN CASEY
DOC NO. 890838
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE, 2011.

x *Patrick Mayovsky*