

66849-8

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NO. 66849-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HOWARD LEE ROSS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

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BRIEF OF RESPONDENT

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A. ISSUES

1. To prevail on a motion to suppress an identification, a defendant must show that the procedure was impermissibly suggestive. A show-up identification held shortly after a crime was committed, and in the course of a prompt search for the suspect, is generally admissible. Ross was identified by loss-prevention officer Aiu at a show-up less than 30 minutes after the crime, within blocks of the scene. Police gave Aiu a thorough admonishment telling him that the person being detained might not be the culprit, that he was not obliged to identify anyone, and that freeing an innocent person from suspicion was just as important as identifying a guilty person. Did the trial court properly find that the show-up was not impermissibly suggestive?

2. When there is reason to doubt a defendant's competency, i.e., his ability to understand the nature of the proceedings and assist his attorney at trial, the court must order an evaluation by qualified experts. Police believed that Ross was under the influence of a stimulant or a hallucinogen at the time of his arrest, which could explain his odd comments. At trial, months later, Ross's responses to the court indicated his understanding of the proceeding and his ability to assist his attorney. Where neither

Ross nor his attorney raised any concern about competency at trial, did the court's interactions with Ross fail to raise a reason to doubt his competency?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Howard Lee Ross was charged by information with Burglary in the Second Degree. The State alleged that Ross, on December 8, 2010, having previously been trespassed from all Nordstrom stores, stole merchandise valued at \$2,080 from the Nordstrom store at Bellevue Square. CP 1-4.

Ross opted for a bench trial. 1RP¹ 3-8; CP 11. Following a hearing under CrR 3.6, the trial court denied Ross's motion to suppress the identification made by Nordstrom's loss-prevention officer, Aaron Aiu. 2RP 39-47; CP 44-46. Ross then requested a stipulated facts trial, agreeing that the court could decide the case based on the pretrial testimony and the police reports. 2RP 48-58; CP 39-40. After reviewing the evidence and hearing the arguments

¹ The verbatim report of proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (March 7, 2011); 2RP (March 8, 2011); and 3RP (March 18, 2011).

of counsel, the court found Ross guilty beyond a reasonable doubt of Burglary in the Second Degree.² 2RP 69-75; CP 36-38. The court imposed a sentence within the standard range. 3RP 9; CP 47-54.

2. SUBSTANTIVE FACTS

Aaron Aiu was the Loss Prevention Assistant Manager at the Bellevue Square Nordstrom store. 2RP 3-4; Ex. 1 at 4.³ On December 8, 2010, a little after 7:00 p.m., Aiu saw an African-American man wearing a blue-and-white Seattle Mariners jacket approach a Gucci display. 2RP 5, 9; Ex. 1 at 4. The man had a white t-shirt under the Mariners jacket, and he wore dark blue denim jeans and dark-colored sneakers. 2RP 9; Ex. 1 at 4. Aiu described the man as about 6'2" tall and 170 pounds, with black hair and brown eyes. 2RP 10; Ex. 1 at 4. Aiu saw the man from a distance of about 10-12 feet. 2RP 5.

² In finding Ross guilty, the trial court explicitly declined to consider the identification evidence, concluding that this evidence was not necessary for a finding of guilt beyond a reasonable doubt. 2RP 72-75. The fact of the identification was nevertheless included in the court's written findings. CP 37.

³ For ease of reference, the State has numbered the substantive pages of Ex. 1 (not including the cover page) consecutively as pages 1-14.

In the space of about 15 seconds, the man grabbed two bags and a hat from the Gucci display and headed toward the store exit, bypassing several open cash registers and making no effort to pay for the merchandise. 2RP 6-8; Ex. 1 at 4. When Aiu tried to make contact, the man ran, ignoring Aiu's shouted commands to drop the bags. Ex. 1 at 4. Aiu saw the man get into the passenger side of a late-model, tan four-door sedan with license plate number 714TOU. Ex. 1 at 4. As the car drove away, Aiu notified other loss prevention agents to call the police. Ex. 1 at 4-5.

Within minutes, Bellevue Police Department ("BPD") Officer Nygren saw a car matching Aiu's description, including the same license plate number. Ex. 1 at 13. A man wearing a sports team jacket and dark pants got out of the passenger side, carrying a bag in his right hand. Id. As Nygren approached, he saw a Gucci symbol on the bag. Id. Nygren placed the man in handcuffs. Id.

BPD Officer Shawn Curtis responded to Officer Nygren's location. 1RP 16. He saw that Nygren had detained a person matching the description broadcast to police. 1RP 14, 16. There were two Gucci bags on the ground nearby, with Nordstrom tags and anti-theft devices still attached. 1RP 16, 23; Ex. 1 at 1.

Officer Curtis went to the Nordstrom store and picked up Aiu. 1RP 16-17; Ex. 1 at 1. Curtis told Aiu that the police had detained someone, and he read Aiu a "show-up admonishment." 1RP 17-18; 2RP 15-16; Ex. 1 at 1, 5. The admonishment cautioned Aiu about the identification procedure:

You're being asked to look at a suspect. The fact that this suspect is being shown to you should not influence your judgment. You should not conclude or guess that the suspect committed the crime just because you're being shown the suspect. You are not obligated to identify anyone. It is just as important to relieve an innocent person from suspicion as it is to identify guilty persons. Please do not discuss this case with other witnesses nor indicate in any way if you have identified a suspect.

1RP 18. Aiu identified the person being detained, immediately and without hesitation; Aiu also identified the Gucci merchandise.⁴ 1RP 19; Ex. 1 at 1, 5.

Curtis placed the detained man, who identified himself as Howard Lee Ross, under arrest. Ex. 1 at 1. While being transferred to Curtis's custody, Ross began acting strangely, accusing Curtis of "micro-chipping" him, and saying that he was "going on a spaceship." Id. Curtis believed that Ross's behavior

⁴ Aiu later identified Ross in open court. 2RP 16.

was consistent with someone who had taken a stimulant and/or a hallucinogen. Id.

Subsequent investigation showed that Ross had been arrested for shoplifting at the downtown Seattle Nordstrom store on July 30, 2010, and had been trespassed from all Nordstrom stores for a period of two years. Ex. 1 at 2, 5, 10-12. The total value of the items taken by Ross on December 8, 2010, was \$2,080. Ex. 1 at 2, 5.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE IDENTIFICATION EVIDENCE.

Ross contends that, because he was the only suspect presented to Aiu during the show-up procedure, the identification was impermissibly suggestive. Ross further argues that the procedure created a substantial likelihood of misidentification.

Ross is wrong on both counts. Show-up identifications are not per se impermissibly suggestive. This identification, conducted as it was within minutes of the crime, and with proper instruction to the witness, was not impermissibly suggestive. Nor, under all of the facts and circumstances of this case, did the trial court err in

finding that the show-up did not result in a substantial likelihood of irreparable misidentification. In any event, the trial court properly found that there was sufficient evidence, independent of the identification, on which to base a finding of guilt beyond a reasonable doubt.

An out-of-court identification procedure violates due process if it is so impermissibly suggestive that it gives rise to a substantial likelihood of irreparable misidentification. State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). The defendant bears the burden of showing that the identification procedure was impermissibly suggestive. Id.

A suggestive procedure such as a show-up is not necessarily *impermissibly* suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed.2d 401 (1972) ("the admission of evidence of a showup without more does not violate due process"). Rather, the defendant must show that the procedure was *unnecessarily* suggestive. Guzman-Cuellar, 47 Wn. App. at 335.

If the defendant makes this first showing, the court must next consider, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable

misidentification. Vickers, 148 Wn.2d at 118. In making this determination, courts typically consider the following factors: 1) the opportunity of the witness to view the suspect at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description; 4) the level of certainty demonstrated by the witness at the time of the confrontation; and 5) the amount of time that elapsed between the crime and the confrontation.⁵ State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000).

The admission of identification evidence is within the sound discretion of the trial court. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001), review denied, 140 Wn.2d 1022 (2002). The test is a deferential one, requiring the reviewing court to determine whether there are tenable grounds or reasons for the trial court's decision. Id. The trial court's factual findings will be upheld if they are supported by substantial evidence in the record. Id. at 434.

The show-up identification here was not impermissibly suggestive. Generally, a show-up that is held shortly after the crime was committed and in the course of a prompt search for the

⁵ These factors are derived from Neil v. Biggers, 409 U.S. 188, 199-201, 93 S. Ct. 375, 34 L. Ed.2d 401 (1972).

suspect is permissible. State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978). The fact that the suspect is handcuffed and is viewed in close proximity to a police car does not demonstrate unnecessary suggestiveness. Guzman-Cuellar, 47 Wn. App. at 336.

In arguing that the show-up procedure was unnecessarily suggestive, Ross ignores the extensive admonishment given to Aiu by Officer Curtis.⁶ Curtis cautioned Aiu that he should not conclude that Ross committed the crime simply because the police had detained Ross for the show-up. 1RP 18. Curtis assured Aiu that he was under no obligation to make an identification. Id. And Curtis reminded Aiu that it was just as important to relieve an innocent person from further suspicion as it was to identify a guilty person. Id. Under these circumstances, Ross has failed to show that the show-up procedure was impermissibly suggestive. The trial court properly found that it was not. CP 46; 2RP 44-45.

⁶ The trial court took note of the admonishment, observing that "[Officer Curtis] gave the loss prevention officer a really excellent set of warnings, in the sense that the warnings are really directed at strongly advising a witness that the person they are looking at may well be the wrong person and that it is critical not to implicate somebody that is innocent." 2RP 40.

Even if Ross could make this preliminary showing, there is no indication that the trial court erred in determining that the show-up procedure, as carried out here, did not create a substantial likelihood of irreparable misidentification. CP 45-46; 2RP 45-47. Aiu had a reasonably good opportunity to view Ross as he took merchandise from the Nordstrom store without paying for it. Aiu saw Ross head-on, from a distance of 10-12 feet, as Ross approached the Gucci display, and Aiu watched as Ross lingered at the display for about 15 seconds. Ex. 1 at 4; 2RP 5-8. Aiu, a loss-prevention specialist, focused on Ross as soon as Ross picked up the items without examining the price. 2RP 8-9. Aiu's description of Ross's clothing (blue Mariners jacket, denim jeans, white t-shirt) was accurate, and his description of Ross's height and weight (6'2", 170 lbs) was very close to Ross's actual dimensions (5'11", 175 lbs). Ex. 1 at 4, 7, 10; 1RP 21-22; 2RP 10. Aiu positively identified Ross immediately upon seeing him, without hesitation or doubt. 1RP 19; 2RP 15. Aiu made his identification within one-half hour of the incident. Ex. 1 at 1; 1RP 11, 19.

In addition to its oral ruling, the trial court entered written findings on the identification evidence. 2RP 39-47; CP 44-46. As detailed above, these findings are supported by substantial

evidence in the record. This Court should not disturb the findings in this appeal. See Kinard, 109 Wn. App. at 434 (appellate review of trial court's factual findings is limited to whether the findings are supported by substantial evidence).

Ross nevertheless faults the trial court for failing to consider the cross-racial nature of the identification. He cites cases and law review articles for the proposition that cross-racial identifications are inaccurate. Appellant's Opening Brief at 17-18. But Ross never presented this authority to the trial court, nor did he ask the trial court to consider the cross-racial nature of the identification in determining whether there was a substantial likelihood of irreparable misidentification. There is nothing to say that the court would not have done so had Ross raised the issue. Ross did not preserve this argument for appeal, and this Court should refuse to consider it. See State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (appellate court may refuse to entertain a claim of error not raised in the trial court); RAP 2.5(a).

In any event, in finding Ross guilty beyond a reasonable doubt, the trial court explicitly excluded the identification evidence, relying instead on the abundant circumstantial evidence. 2RP 73-75. The court relied on the "very short lapse of time, the same

area, the same general physical description, the exact same clothing and the same car. Not to mention the exact same merchandise." 2RP 73-74.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits a rational trier of fact to find the elements of the crime beyond a reasonable doubt. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial evidence and direct evidence are equally reliable. Thomas, 150 Wn.2d at 874.

The overwhelming circumstantial evidence of Ross's guilt supports the trial court's finding of proof beyond a reasonable doubt. Even if the identification evidence was admitted in error, Ross's conviction should nevertheless be affirmed.

2. THE TRIAL COURT HAD NO REASON TO DOUBT ROSS'S COMPETENCY.

Ross argues that the trial court had reason to doubt his competency, and thus should have ordered a competency evaluation. The record does not support this claim.

"No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). Whenever there is reason to doubt a defendant's competency, the court must order that the defendant be evaluated by qualified experts. RCW 10.77.060(1)(a). These competency provisions are mandatory. State v. Heddrick, 166 Wn.2d 898, 906, 215 P.3d 201 (2009).

Neither Ross nor his attorney raised a question about competency in the trial court. In arguing on appeal that the court had reason to doubt his competency, Ross relies heavily on Officer Curtis's observations at the time of arrest (Ross accused police of "micro-chipping" him, and said that he was "going on a spaceship").

Ex. 1 at 1. But Curtis noted in his report that Ross's behavior "was consistent with someone who had taken a stimulant, and/or hallucinogen." Id. Any effects of stimulants or hallucinogens would have worn off in the months that elapsed between the crime and Ross's trial, and Ross's custody status would have prevented him from acquiring such substances. See id.; 1RP 1-2. These observations provided no reason for the trial court to believe that Ross was not competent to stand trial.

This leaves Ross to rely on a few carefully selected comments that he made during the trial court's extensive colloquy with him concerning his waiver of trial and submission of the case on stipulated facts. 2RP 49-58. Ross cites to his comment that he relied on "ESP" for his belief that he would win regardless of whether he went to trial. Brief of Appellant at 24; 2RP 56-57. But Ross may have been using "ESP" in a less than literal sense, to refer to something like intuition. This brief, ambiguous remark did not provide the trial court with a reason to doubt Ross's competency.

Nor do Ross's references to what "they" told him provide a reason to doubt competency. These references could as easily have been to the advice or predictions of fellow detainees in the jail

as to voices in Ross's head. The trial court was not required to order a competency evaluation based on these vague allusions.

Moreover, there is evidence in the record to support a conclusion that Ross was competent, i.e., that he understood the nature of the proceedings and was able to assist his attorney. When the trial court asked Ross why he wanted to give up his right to a trial, he answered coherently and logically:

I mean, because, basically, from the [CrR 3.6] hearing that I just went through, they was contradicting stuff in that hearing and it still passed anyway. So, I mean, I believe now that the only thing I can do is try to go to the police report and try to maybe find something in there, or maybe reasonable doubt. Because them saying different stuff up there didn't bring no doubt in your mind that they should be able . . .

2RP 51-52. This response demonstrates that Ross understood the nature of the proceedings and, because he had tracked the small discrepancies in Aiu's description of him, that he could assist counsel in his defense.

Based on the totality of the trial court's interactions with Ross, the court had no reason to doubt his competency. This claim should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ross's conviction for Burglary in the Second Degree.

DATED this 11th day of January, 2012.

Respectfully submitted,

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