73413-0

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Court of Appeals
Division I
State of Washington

NO. 73413-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDISHAKUR IBRAHIM,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Studies conducted by psychologists and legal researchers since *Mason v. Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable. Eyewitness misidentification is a factor in 75% of DNA exoneration cases. Nevertheless, jurors tend to over rely upon eyewitness testimony, even where the identification procedures employed by the police are suggestive.

Abdishakur Ibrahim was the subject of an unduly suggestive identification procedure. The eyewitness heard before the procedure took place that his assailants had been apprehended. He was never warned the suspects might not be his assailants and he viewed each of them sequentially under the glare of a spotlight, while they were in handcuffs and surrounded by police officers. The court should have suppressed the identification as unduly suggestive.

The trial court was asked to instruct the jury on how to evaluate eyewitness testimony but declined to do so, despite this being a central issue to Mr. Ibrahim's defense. This failure to instruct the jury upon eyewitness testimony denied Mr. Ibrahim the opportunity to fairly argue his defense. He is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. Mr. Ibrahim's due process rights were violated when the court admitted identification evidence which was impermissively suggestive and created a likelihood of misidentification.

2. Mr. Ibrahim's opportunity to fairly argue his defense was denied when the court failed to provide required instructions to the jury on eyewitness testimony.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Suggestive identification procedures increase the likelihood of misidentification. Because eyewitnesses view only people the police believe to be suspects, show-up identifications are inherently suggestive. Here, the confirmatory identification took place after the police told the eyewitness the three people found in his stolen vehicle were the suspects in his robbery. The police then took the eyewitness to where his car had been recovered and showed the eyewitness each of the suspects, who were handcuffed and clearly in police custody. Was suppression of this unduly suggestive identification procedure required?

2. Jurors tend to over believe eyewitnesses, have an insufficient understanding of the factors that affect memory, and are overly swayed

by eyewitness confidence. A defendant is entitled to jury instructions which enable him to argue his defense. Was Mr. Ibrahim denied the opportunity to fairly argue his defense where the trial court failed to instruct the jury upon eyewitness testimony where identification was the central issue in his defense?

D. STATEMENT OF THE CASE

On October 22, 2014, Mike Harris was robbed at gun point by three men. CP 1. Mr. Harris testified he was looking to give people car rides from downtown Seattle near 3rd Avenue and Yesler Street when he was asked by an African man and his two friends whether he would give them a ride to Tukwila. RP 496.[1] He agreed upon the condition they would pay him. RP 496. Mr. Harris had some conversation with the passenger in the front seat, but did not speak with the men in the back seat. RP He focused upon his music. RP 471, RP 535. When he got to Tukwila, the front seat passenger asked him to park behind a Moneytree Store. RP 474. Everyone got out of the car and one of the men pointed a firearm at Mr. Harris and demanded his money. RP 477.

[1] The transcript consists of seven volumes of trial transcripts and one relating to sentencing. Counsel will refer to the trial transcripts using the notation "RP". The sentencing transcript will be referred to by its date and page.

The men then got into a fight before the three assailants took Mr. Harris' car. RP 477.

Mr. Harris called the police. Dep. Jose Bartolo met with Mr. Harris and took a "generic description" of the three suspects from him. RP 60. While the officer was taking Mr. Harris' statement, a call came over the radio that three men had been apprehended in Mr. Harris' car. RP 42. Approximately 50 minutes had passed since the robbery occurred. RP 54. Mr. Harris was taken to where his car had been seized. RP 502. He saw his car and the gun he believed was used to rob him. RP 539-540. He saw a number of police cars and officers. RP 494-50. He was never admonished that the men he was being shown could not be suspects in his robbery. RP 55. A spotlight was then shown on each of three men who were brought before him handcuffed and surrounded by the police. RP 47. Each man was placed into a spotlight beam shining from Dep. Bartolo's car. RP 47. Mr. Harris identified each of them as the men who had robbed him. RP 46. Mr. Ibrahim was identified by Mr. Harris as one of the men involved in the robbery. RP 351. He was charged with robbery in the first degree. CP 1.

Prior to trial, the court held a hearing to determine whether the police had employed an unduly suggestive show-up procedure. Dep.

Bartolo was the only witness who testified at this hearing. RP 39. The court found that the identification procedure was not unduly suggestive and denied defense motions to suppress. RP 104.

The central issue at trial was the identification of Mr. Harris' assailants. Mr. Harris told the jury he had never met the men who robbed him before that night. RP 469. He admitted his opportunity to observe his assailants was limited. RP 536. His description of the men who robbed him was inconsistent with his prior description of his assailants, all of whom he described as young and one of whom he described as 15 to 16 years old, in contrast to Mr. Ibrahim's charged co-defendant, who was actually old enough to have gray hair. RP 407.

Defense counsel asked that the jury be instructed on factors the jury should weigh when evaluating eyewitness testimony. RP 565. The court declined to instruct the jury upon eyewitness testimony. RP 572. The court found the general instruction sufficient. RP 574.

The jury found Mr. Ibrahim guilty. CP 12. He was sentenced to 35 months. CP 35.

E. ARGUMENT

1. The failure of the court to suppress the unduly suggestive identification procedure requires reversal.

a. Show-up procedures are inherently unduly suggestive.

Show-up identifications are inherently suggestive because the eyewitness views only those particular people that the police have identified as suspects. *State v. Ramires*, 109 Wn.App. 749, 761, 37 P.3d 343, *rev. denied*, 146 Wn.2d 1022 (2002); *see State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006). This Court has recognized that "the practice of showing suspects singly to persons for the purpose of identification has been widely condemned." *State v. Rogers*, 44 Wn.App. 510, 516, 722 P.2d 1349 (1986).

In fact, suggestive procedures increase the likelihood of misidentification. *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967). A witness's recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of the police. *Mason v. Brathwaite*, 432 U.S. 98, 112, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977). "[T]he dangers for the suspect are particularly grave when the witness's opportunity for observation was insubstantial and thus his

susceptibility to suggestion is the greatest." *Wade*, 388 U.S. at 229. Impermissibly suggestive out-of-court identification procedures, including show-up procedures, violate due process where there is a substantial likelihood of irreparable misidentification. U.S. Const. amend. XIV; Const. art. I, § 3.

"Indeed, studies conducted by psychologists and legal researchers since *Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable." *Comm. v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995). "Eyewitness misidentification is the leading cause of wrongful convictions, a factor in 75 percent of post-conviction DNA exoneration cases." Jason Cantone, *Do You Hear What I Hear?: Empirical Research on Earwitness Testimony*, 17 TxWLR 123, 129 (Winter 2011); *see* Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L.J. 1009, 118 n.83 (2002) ("Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be 'notoriously unreliable--in some circumstances more often wrong than right."').

When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977);

Brathwaite, 432 U.S. at 144; *see* U.S. Const. amend. XIV; Const. art. I, § 3. A two-step inquiry is involved: first, a court must determine whether the identification procedure is suggestive. *State v. Kinard*, 109 Wn.App. 428, 432, 36 P.3d 573 (2001). If the police used a suggestive procedure, the court decides whether the suggestiveness created a substantial likelihood of misidentification. *Id*. There are five factors traditionally considered in this second inquiry: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's level of attention, (3) the accuracy of the witness's description of the offender, (4) the level of certainty at confrontation, and (5) the time between the offense and confrontation. *State v. Barker*, 103 Wn.App. 893, 905, 14 P.3d 863 (2000); *Neil v. Biggers*, 409 U.S. 188, 199-200, 193 S. Ct. 357, 34 L.Ed.2d 401 (1972).

b. Mr. Ibrahim was subjected to an unduly suggestive show-up procedure.

Mr. Ibrahim was subjected to an unduly suggestive show-up procedure. After the robbery occurred, Dep. Bartolo met Mr. Harris. RP 42. Mr. Harris told the deputy he did not interact with the suspects during the drive to Tukwila. RP 54. Approximately an hour had passed from when Mr. Harris was robbed and when the call came in that suspects had been arrested. RP 54. Dep. Bartolo testified that Mr.

Harris only gave a "pretty generic description" of the people who had robbed him. RP 60. The deputy instead wrote the description he had gotten from the CAD report[2] and confirmed with Mr. Harris that this description matched who he believed to be the suspects. RP 60.

The CAD report came from Mr. Harris' 911 call. In this call, Mr. Harris described his assailants as young men, which did not match the description of the men arrested, who were much older. RP 90. In addition, the clothing Mr. Harris described his assailants as having worn was inconsistent with what the suspects in the show-up were wearing.[3] RP 90. While the deputy believed "[i]t sounded as if he [Mr. Harris] knew who they were or what they looked like," the officer never actually had Mr. Harris describe the men except in generic terms, instead relying upon the CAD report. RP 60.

While the deputy was taking Mr. Harris' statement, a radio call came out notifying the police that Mr. Harris' car had been found. RP 42. The deputy told Mr. Harris they would go to the location where the vehicle had been stopped to identify the suspects. RP 42. He did not

[2] Computer-aided dispatch (CAD), also called computer-assisted dispatch, is a method of dispatching taxicabs, couriers, field service technicians, mass transit vehicles or emergency services assisted by computer. Wikipedia, the Free Encyclopedia, Computer-aided dispatch, https://en.wikipedia.org/wiki/Computer-aided_dispatch.

[3] The parties agreed that Mr. Ali was wearing different clothes than had been described by Mr. Harris in the 911 call. RP 90.

advise Mr. Harris that the real suspects may or may not be present. RP 55.

At the scene, Mr. Harris was put into a situation where he was going to identify the suspects as the people who robbed him, no matter who he saw. Mr. Harris was taken to where the suspects were. RP 45. He was aware the police believed they had apprehended the people who had robbed him. An hour had passed between the robbery and the identification procedure. RP 89. Mr. Harris never had a good opportunity to view his assailants, but he was angry and ready to make an identification. RP 51.

The procedures the police employed ensured he would make a positive identification. Each of the suspects were in handcuffs when Mr. Harris identified them. RP 45. They were surrounded by a number of police vehicles, with their lights flashing. RP 57. Mr. Harris remained in the deputy's police car and identified each suspect from approximately three car lengths away from where they were each held. RP 46. Each of the suspects were brought into a spotlight, standing next to a police officer, clearly indicating they were in custody. RP 47.

c. *The admission of the unduly suggestive identification procedure and subsequent in court identification requires this Court to order a new trial.*

This Court should find that the show-up identification was unduly suggestive. Evidence of a show-up identification should be excluded if the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *State v. Linare*s, 98 Wn.App. 397, 401, 989 P.2d 591 (1999) (*discussing Brathwaite*, 432 U.S. at 114). Because the show-up procedure was unduly suggestive, the court must determine the likelihood of misidentification. *Barker*, 103 Wn.App. at 905.

When the deputy informed Mr. Harris the police had three persons in custody for robbing him, he increased the likelihood of an improper identification. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and The Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later*, 33 Law & Hum. Behav. 1, 6-7 (Feb. 2009) (rates of misidentification increase when law enforcement tell witness police have found a suspect); *see also State v. McDonald*, 40 Wn.App. 743, 746, 700 P.2d 327 (1985).

The witness's opportunity to view the suspect is evaluated based on the amount of time that a witness had to view the perpetrator and the circumstances under which the observation took place. *Barker*, 103

Wn.App. at 905. While the evidence showed that Mr. Harris was in a car with the three suspects from Seattle to Tukwila, his focus was never upon the suspect identified as Mr. Ibrahim. RP 91. Instead, he focused upon the front passenger and listened to his music. RP 54. The circumstances under which the identification took place ensured Mr. Harris would make a positive identification, regardless of who was in police custody.

Further, Mr. Harris's description and the identified suspect's appearance weigh against admissibility. *See, e.g.*, *Rogers*, 44 Wn. App. at 516. In *McDonald*, an important factor in suppressing the identification was the difference in the description of the suspect's clothing. 40 Wn.App. at 747. Here, the identification of one of the suspects varied greatly from the description Mr. Harris had given to the 911 operator. RP 95. All three of the suspects were described as young, which was also not the case. RP 91.

While Mr. Harris appeared certain of his identification, certainty is a poor measure of reliability. For this reason, this factor has become disfavored by courts and scientists. *See e.g.*, *Brodes v. State*, 614 S.E.2d 766, 770–71 (Ga. 2005) ("In the 32 years since the decision in *Neil v. Biggers*, the idea that a witness's certainty in his or her identification of

a person as a perpetrator reflected the witness's accuracy has been flatly contradicted by well-respected and essentially unchallenged empirical studies." (internal quotation marks omitted)); *Jones v. State*, 749 N.E.2d 575, 586 (Ind. App. 2001). This Court should not be satisfied that Mr. Harris certainty that he had identified the right people weighs in favor of admissibility.

This court should also be concerned with the potential cross racial identification. RP 91. One of the leading causes of misidentification results from the witness and suspect being of different races. *State v. Allen*, 176 Wn.2d 611, 637, 294 P.2d 679 (2013) (Wiggins, J., dissenting) (citing James M. Doyle, *Discounting the Error Costs: Cross–Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 Psychol. Pub. Pol'y & L. 253 (2001)). "The cross-race effect, also known as the own-race bias or other-race-effect, refers to the consistent finding that adults are able to recognize individuals of their own race better than faces of another, less familiar race." John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, 2 Handbook of Eyewitness Psychology: Memory for People, 257, 257-58 (Rod C. L. Lindsay et al. eds., 2006). The cross-racial nature of the identification procedure increases the risk of misidentification. All

three of the suspects were originally described by Mr. Harris as Africans, which Mr. Harris identified as a different and unique racial classification from himself, which was African American. RP 90.

Had the trial court properly examined the suggestibility of the show-up procedure here, the identification would have been excluded. That error requires reversal.

The admission of an impermissibly suggestive identification, is presumed prejudicial. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.3d 808 (1996). The State bears the burden of proving beyond a reasonable doubt that the fact finder would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

While there was substantial evidence Mr. Ibrahim was in a stolen vehicle when he was arrested, this is insufficient to prove he was involved in the robbery of that vehicle. The evidence that ties him to the robbery is being arrested in Mr. Harris' vehicle and Mr. Harris' identification. The totality of the circumstances demonstrate that the identification procedure undermined Mr. Harris's ability to make an in-court identification. Mr. Ibrahim is entitled to a new trial where the identification is suppressed.

2. The court committed error requiring a new trial when it failed to instruct the jury upon eyewitness testimony.

a. Problems with the reliability of eye witness testimony are widely recognized in jurisprudence but not in the general population.

Problems with eyewitness identification evidence have been widely recognized in the courts and scientific community. *State v. Allen*, 176 Wn.2d at 616 (C. Johnson, J., lead opinion); Taki V. Flevaris & Ellie Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 866 (2015). Eyewitness misidentification is the most common cause of wrongful convictions. Jennifer Devenport, et al, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in *Expert Testimony of the Psychology of Eyewitness Identification*, 51 (Brian L. Cutler ed., 2001) ("For several decades now, scholars and social scientists have studied miscarriages of justice occurring in the American legal system and have drawn the same conclusion: Mistaken eye witness identifications is the lead cause of wrongful convictions."). Eyewitness identification is erroneous approximately one third of the time. Flevaris, 38 Seattle U. L. Rev. at 869 (*citing* Brief for Am. Psychological Ass'n as Amici Curiae Supporting Petitioner at 14-17, *Perry v. New Hampshire*, 132 S.

Ct. 716, 181 L.Ed.2d 694 (2012) (explaining that "researchers have conducted a variety of studies of actual witness identifications ... [that] have consistently found that the rate of inaccurate identifications is roughly 33 percent")); *see also, e.g., Bruce W. Behrman & Sherrie L. Davey, Eyewitness Identification in Actual Criminal Cases: An Archival Analysis,* 25 Law & Hum. Behav. 475, 482 (2001) (study of actual lineups finding that eyewitnesses identified suspects 50% of the time and mistakenly identified lineup "foils"--unrelated individuals inserted into the lineups--24% of the time)).

Despite the mounting evidence that eyewitness testimony is unreliable, jurors continue to accept it even when the evidence is itself is flawed. Elizabeth F. Loftus, *Eyewitness Testimony* 9 (1979) ("Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence."). Jurors tend to "overbelieve eyewitnesses, have insufficient understanding of the factors that affect memory, and are overly swayed by eyewitness confidence, which is not very diagnostic of accuracy and apt to be inflated by the time the eyewitness reaches the courtroom." Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J.

Applied Psychol. 524, 524 (2004); *see also* Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 125 (2006) (jurors agree with experts on eyewitness testimony only 13% of the time). A recent national study found that most people believe visual memory works just like an accurate video camera recording and is similarly accurate. Daniel J. Simons & Christopher F. Chabris, *What People Believe About How Memory Works: A Representative Survey of the U.S. Population*, 6 PLoS ONE 3 (2011). Jurors share this mindset. Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. Applied Psychol. 1241, 1245 (1992) (survey demonstrating lack of juror knowledge on findings of eyewitness science).

b. Jury instructions are necessary to educate the jury on the dangers of misidentification.

A "defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); U.S. Const. amend. VI; Const. art. I, § 22. Cautionary jury instructions are sometimes required when dubious categories of evidence are admitted at trial against a criminal defendant. *See, e.g., State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) (requiring cautionary instruction if accomplice testimony is to be admitted without sufficient corroboration), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989); *State v. Renfro*, 96 Wn.2d 902, 906, 639 P.2d 737 (1982) (requiring cautionary instruction if stipulated polygraph evidence is to be admitted). In *Allen*, a majority of justices suggested that a trial court's refusal to provide an instruction on cross-racial misidentification may be an abuse of discretion when "eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction." 176 Wn.2d at 634 (Chambers, concurring), *see also, id*. at 632-33 (Madsen, concurring) ("The dissent properly recognizes that cross-examination, expert testimony, and closing argument may not provide sufficient

safeguards against cross-racial misidentification because the very nature of the problem is that witnesses believe their identification is accurate."); *id.* at 643 (Wiggins, dissenting) ("I would embrace a version of the rule adopted in other jurisdictions, holding that a court must give the instruction where cross-racial eyewitness identification is a central issue in the case, where there is little corroborating evidence, and where the defendant asks for the instruction").

c. Mr. Ibrahim's right to a fair trial was denied when the court failed instruct the jury on eye witness identification.

An instruction should have been given here because eyewitness identification was the central issue, there was little evidence corroborating Mr. Harris's identification, and Mr. Ibrahim specifically requested the instruction. On direct, the State elicited general testimony regarding the reliability of show-up procedures. RP 336. The trial court allowed this testimony over defense objections. RP 336. The officer stated that it was his opinion that show-up identifications were more accurate than other procedures. RP 337. The officer went on to compare photo montages to show up procedures, again telling the jury that the show ups were more accurate. RP 338.

Defense counsel proposed that the jury be instructed on eyewitness testimony, offering the Ninth Circuit Jury Instruction 4.11.[4] RP 564. This instruction properly advises the jury on factors to consider in determining whether an eyewitness identification is accurate. Many of these factors apply here.

The ability of Mr. Harris to identify each of the suspects required the court to instruct the jury on eyewitness identification. Research and exonerations implicating mistaken identification tend to involve identification of strangers. Flevaris, 38 Seattle U. L. Rev. at 869-70 (*citing, as example*, *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009); *State v. Guloy*, 104 Wn.2d 412, 429-430, 705 P.2d 1182 (1985); *State v. Welchel*, 115 Wn.2d 708, 711-713, 801 P.2d 948 (1990); *State v. Pam*, 30 Wn.App. 471, 476, 635 P.2d 766 (1981)).

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[4] 4.11 EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

(2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

(3) any inconsistent identifications made by the eyewitness;

(4) the witness's familiarity with the subject identified;

(5) the strength of earlier and later identifications;

(6) lapses of time between the event and the identification[s]; and

(7) the totality of circumstances surrounding the eyewitness's identification.

While Mr. Harris believed he got a good look at all three men he gave a ride to, his testimony suggests otherwise. There was no conversation between Mr. Harris and the three men, except with the man who asked for the ride. RP 471. Mr. Harris walked ahead of them while going to his car and then did not engage in conversation with them while in the car, instead listening to his music. RP 471, RP 535. He did not have a conversation with either of the men in the back seat, including the one he later identified as Mr. Ibrahim. RP 510. He only briefly looked at the men in the back seat and agreed he did not have much opportunity to look at them. RP 536. Even as he was giving his description to Dep. Bartolo, who had arrived to take his statement, he could only give a "general" description of his assailants. RP 407. The deputy completed the remainder of Mr. Harris' description of the assailants by using the CAD report. RP 407.

Once a trial has begun, the suggestibility of the identification procedure will amplify. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 460 (2012) (*citing United States v. Robertson*, 19 F.3d 1318, 1323 (10th Cir. 1994) (citations omitted) (*quoting United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986))). Even during the trial, it is apparent Mr. Harris' memory had

been tainted by the undue suggestibility of the process and that Mr. Harris was a suggestible witness. When the State first asked Mr. Harris where each of the persons who robbed him were sitting, he was only sure that the person he identified as Mr. Mohamed was sitting in the front seat and was only "pretty sure" about where the other two were sitting. RP 473. As the prosecutor continued to repeat this question, Mr. Harris instead became "very sure" of where each person was seated. RP 474. By the close of his direct testimony, Mr. Harris had "no doubt" in his identification. RP 498-99.

Mr. Harris believed he had no memory issues with regard to the facts of the case. RP 549. But Mr. Harris' ability to recall was suspect. At trial, Mr. Harris told the jurors he had gotten into a fight with his three assailants, which resulted in them sliding all the way around the car and ultimately all going down to the ground together. RP 478, 481. This was in contrast with what he said when he was interviewed by the defense prior to trial. In this version, he made no mention of circumnavigating the car prior to going to the ground. RP 508, RP 537.

Mr. Harris also could not remember details regarding the identification procedure. Mr. Harris had no recollection that the police used a spotlight during the show-up. RP 516. Instead, he told the jury

that "[t]he only lights that were there were the overhead lights, the streetlights and the police car lights." RP 495. This was in contrast to the police testimony regarding the use of spotlights, which all of the officers involved in the identification procedure agreed were used. RP 356, RP 384, RP 398. He also told the jury spotlights were not used during the identification procedure. RP 515.

Mr. Harris's description of the firearm was also wrong, despite his certainty the firearm he saw in the courtroom was the same one used against him when he was robbed. Mr. Harris first testified he could only identify the firearm by a barrel which was pointed at him. RP 499. He told the jury he was not trying to look at it. RP 499. He also told the jury he did not get a good look at the gun. RP 499-500. He described the firearm as a 9mm Glock. RP 501.[5] The firearm seized by the police was a .45 caliber semi-automatic. RP 339.

Mr. Harris moved from a state of uncertainty to being certain the firearm shown to him in the courtroom was the same one used to rob him. When the State showed him the firearm recovered from the arrest scene, Mr. Harris was "100 percent sure" the firearm the State

[5] Mr. Harris claimed familiarity with firearms because he had been in the military. RP 501.

showed him was the same one used to rob him. RP 501. While he could not identify the firearm well during defense interview, by the time of trial, he felt that because he had time to think about everything, that his memory of the firearm had improved. RP 539. In fact, even though Mr. Harris was sure the firearm he saw was a 9 mm Glock, he was also sure the firearm that the police showed him was the same one, even when it was actually a different caliber. RP 339. These memory lapses and inconsistencies are significant, as they demonstrate the inability of the witness to properly recall the procedure and why an identification instruction was necessary.

The circumstances of the identification procedure were also suggestive. *Wade*, 388 U.S. at 241. An instruction would have allowed Mr. Ibrahim to properly argue this defense. The procedure took place in close proximity to Mr. Harris' stolen vehicle, with the firearm he believed had been used against him in sight. RP 539-540. Each of the suspects were in handcuffs and stood next to an officer during the show-up. RP 451. A spotlight was shown on them and numerous officers were on the scene. RP 381.

"Reliability is the lynchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. Mr. Harris did

not engage in a deliberative process when he identified the men arrested as his assailants. He took no time to identify the three men arrested by the police as those who had robbed him. He told the jury the identification was immediate. RP 542. The police witnesses agreed, saying he took no hesitation in identifying each of the men arrested as his assailants. RP 403.

With "social science increasingly casting doubt on the reliability of cross-racial identification, our courts must carefully guard against misidentification." *Allen*, 176.Wn.2d at 633 (Madsen, concurring). Mr. Harris identified his assailants as ethnically distinct from himself, describing them as from Africa and with "immigrant accents". RP 479-80. Mr. Harris' description to the 911 operator of some of the clothing the assailants were wearing was different from what the men who were arrested were wearing. RP 513-14. Their age was not similar, one was described as 15 to 16. RP 407.

While Mr. Harris was sure he had been robbed by Mr. Ibrahim and his co-defendants, he admitted that his assailants looked different from the men on trial. He told the jury the men who robbed him all looked the same age, while it was clear at trial Mr. Ali was older than his co-defendants. RP 498. In his original description of the assailants,

he believed the man holding the firearm was 15 to 16 years old. RP 518. To Mr. Harris, the men all looked young. RP 519. At trial, he acknowledged they did not all look young and at least one had gray hair. RP 533.

d. The failure of the court to properly instruct the jury entitles Mr. Ibrahim to a new trial.

The court's denial of the request for an identification instruction constitutes reversible error. Under the stress of a gunpoint robbery, Mr. Harris gave a description of three men, including one who he described as a teenager. When he was giving a statement to one of the deputies, he heard over the radio that the suspects in his robbery had been apprehended and that he should confirm that they were in fact his assailants. Mr. Harris was then taken to where the men were arrested, saw his car and a firearm and made immediate identifications of each person. While he was pretty sure of his identifications at the beginning of his testimony, by its conclusion, he had no doubt that the men arrested, including Mr. Ibrahim, were the men who had robbed him. Many of the factors that contribute to wrongful convictions are present in this identification procedure. Show-ups are inherently suggestive procedures. *Ramires*, 109 Wn.App. at 761. This procedure had many of the hallmarks that required an instruction. Mr. Harris' admitted

opportunity to observe his assailants was limited. RP 536. It was unclear whether his identification was the result of his memory or Dep. Bartolo's description of the offenders which he took from the CAD report. RP 407. The identification was inconsistent with regard to Mr. Harris' description of the men, all of whom he described as young and one of whom he described as a teenager. RP 407. He had never met any of the men before that night. RP 469. The totality of the circumstances surrounding this identification required an instruction. The jury should have been instructed upon the factors that should be used to determine if the eyewitness identification was unreliable.

The failure to properly instruct the jury was not harmless error. While substantial evidence existed to establish Mr. Ibrahim was in a car stolen from Mr. Harris, the only evidence that he had participated in a robbery of that car was Mr. Harris' positive identification. Indeed, there were many questions regarding the reliability of the identification. Defense counsel was unable to argue in full why the jury should doubt the identification without an instruction identifying what the jury should scrutinize.

Because the court failed to properly instruct the jury on identification evidence, this court should reverse this matter and vacate Mr. Ibrahim's conviction. He is entitled to a new trial.

F. CONCLUSION

This Court should reverse Mr. Ibrahim's conviction and order a new trial. This Court should order suppression of the show-up identification procedure as unduly suggestive. If this Court determines that identification evidence is admissible at Mr. Ibrahim's new trial, it should require the trial court to instruct the jury on the factors to consider when evaluating the reliability of eyewitness testimony.

DATED this 16th day of December 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. ABDISHAKUR IBRAHIM, Appellant.	)))))))))	NO. 73413-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ABDISHAKUR IBRAHIM 382427 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2015.

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