[Cite as *State v. Stetz*, 2011-Ohio-6516.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2011-A-0008**
RONALD G. STETZ, II,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 287.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellant).

Marie Lane, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, the state of Ohio, appeals from the decision of the Ashtabula County Court of Common Pleas, suppressing an out of court identification of the defendant-appellee, Ronald G. Stetz, II. The state argues that, although the practice of “showups” often proves highly unreliable, the totality of the circumstances in Mr. Stetz’s case produced a reliable identification, which should have withstood a suppression

challenge. Because we do not find the circumstances in this case to rise to the level of reliability the state suggests, we affirm the decision of the trial court.

{¶2} **Substantive Facts and Procedural History**

{¶3} On August 19, 2010, the Ashtabula County Sheriff's Department received a call about a suspicious vehicle parked in the weeds along Iten Industries' driveway. Deputy Niemi was dispatched to investigate, and, along the way, was informed by dispatch that the car had been reported stolen by its owner from a driveway in Kingsville Township. Deputy Niemi arrived on scene and observed the vehicle, a green Chevy Cavalier, in the weeds, with the keys still in the ignition.

{¶4} An employee of Iten Industries, Deborah Nemergut, reported seeing a white male with short brown hair, red shorts, and a red t-shirt get out of the car and walk across the road as she was arriving to work that morning. She only saw the back of this man, and was therefore unable to provide police with a facial description. Within 40 minutes of Ms. Nemergut's report, Sergeant Nelson observed Mr. Stetz walking on North Bend Road, not far from Iten Industries. He was shirtless, carrying a red t-shirt, and wearing gray shorts. His hair was short and brown. Sergeant Nelson stopped Mr. Stetz, verified that he did not live in the area, and observed that he had scratches on his legs and that his gray shorts were reversible, with red on the inside.

{¶5} Mr. Stetz was brought to Iten Industries for a "showup," where he was required to reverse his shorts and put on the red t-shirt. The police made Mr. Stetz stand roughly 50 feet away, and from that distance Ms. Nemergut identified Mr. Stetz as the individual who drove the car into the weeds. She did not, however, testify at the

suppression hearing. Instead, Deputy Niemi testified as to Ms. Nemergut's statements. She reported to the deputy that she had only seen the back of the man who emerged from the stolen vehicle. When asked at the "showup" whether Mr. Stetz was "the man you saw getting out of the car?" she responded, "I do believe so, yes."

{¶6} As a result of this "showup" identification, an Ashtabula County Grand Jury indicted Mr. Stetz for Receiving Stolen Property, a felony of the fourth degree in violation of R.C. 2913.51(A). Mr. Stetz entered a plea of not guilty and subsequently filed a motion to suppress the eyewitness identification. A hearing was held, and the trial court issued a judgment entry granting Mr. Stetz's motion to suppress, based on a conclusion that "there was substantial likelihood for misidentification."

{¶7} The state filed a timely notice of appeal, and now brings the following assignment of error:

{¶8} "The trial court erred in granting appellee's Motion to Suppress."

{¶9} **Standard of Review**

{¶10} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary,* 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, citing *State v. Molek,* 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. See, also, *State v. Mustafa* (Dec. 14, 2001), 11th Dist. No. 2000-P-0116, 2001 Ohio App. LEXIS 5661, *3-4. "Thus, '[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence.'"

McGary at ¶20, quoting *Molek* at ¶24, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 592; *City of Ravenna v. Nethken,* 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. "After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met." *McGary* at ¶20, quoting *Molek* at ¶24.

{¶11} We note the state does not assert that the trial court applied the incorrect law, nor that it made any errors in its factual findings. The state, instead, simply argues that the trial court's conclusions were incorrect. Because the trial court's findings are supported by competent credible evidence, and no argument exists to the contrary, we will accept the trial court's findings of fact as true.

{¶12} **Reliability of the Showup Identification**

{¶13} A "showup" identification is inherently suggestive. *State v. Martin* (July 31, 2001), 10th Dist. No. 99AP-150, 2001 Ohio App. LEXIS 3366, *8, citing *State v. Barnett* (1990), 67 Ohio App.3d 760.[1] The United States Supreme Court, recognized that "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous ***," but it concluded, based on its decision in *Stovall v. Denno* (1967), 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, that the admission of evidence of a "showup," without more does not violate due process. A suggestive or improper identification would be admissible if the

1. Research in the area of showups has demonstrated that a particular danger exists that witnesses will base identifications more on similarity of the clothing worn by the perpetrator and the suspect than similarity of facial features. *State v. Henderson* (2011), 208 N.J. 208, Report of the Special Master, filed June 21, 2010, 30.

trial court finds it reliable after consideration of the totality of the circumstances. *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401.

{¶14} Once the defendant demonstrates, and the trial court finds, that the procedure used was both suggestive and unnecessary, then the trial court considers *Biggers'* totality of the circumstances test. *State v. Brown* (Aug. 17, 1994), 1st Dist. No. C-930217, 1994 Ohio App. Lexis 3560.

{¶15} *"Reliability i*s the linchpin in determining the admissibility of identification testimony ***. The factors to be considered are set out in [*Biggers*]," and those factors are to be weighed against "the corrupting effect of the suggestive identification itself." (Emphasis added.) *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140.

{¶16} In *Biggers,* the court gave five factors to be considered in determining whether the identification was reliable in light of a suggestive identification procedure: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and, 5) the length of time between the crime and the confrontation. *Biggers* at 199-200.

{¶17} **Burden of Proof**

{¶18} It is well established that a defendant making an application to the trial court for an order pursuant to Crim. R. 47 ("Motions") has the initial burden which must be satisfied before the state's burden is invoked. *State v. Kuzma* (Dec.3, 1993), 11th

Dist. No. 93-P-0019, 1993 Ohio App. LEXIS 5768, *4, citing *Xenia v. Wallace* (1988), 37 Ohio St.3d 216.

{¶19} In *Xenia*, the Supreme Court of Ohio discussed the shifting of burdens as it relates to a challenge to a warrantless search or seizure. In that case, after the defendant was stopped by the police for speeding, he was asked to submit to a breathalyzer test. Even though the arrest report noted his strong odor of alcohol and failed sobriety test, the arresting officer did not testify to anything unusual or erratic about the defendant's driving, nor the events recorded in the arrest report. On appeal, the defendant alleged a lack of probable cause for the administration of the test. The issue before the court was which party had the burden of going forward with evidence to show probable cause, or lack thereof, for the alleged warrantless search and seizure. As noted by the court, burden of proof includes the burden of going forward with evidence (or burden of production), and the burden of persuasion, and it was the first of these burdens the court addressed in the case. *Xenia* at 219.

{¶20} The Supreme Court of Ohio allocated the burden of proof between the defendant and the state in a motion to suppress evidence obtained pursuant to a warrantless search or seizure. The defendant assumes the initial burden to "(1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Xenia* at paragraph one of syllabus. Once a defendant has met that burden, the prosecutor then "bears the burden of proof, including the burden of

going forward with evidence, on the issue of whether probable cause existed for the search or seizure." *Xenia* at paragraph two of syllabus.

{¶21} Although *Xenia* is an illegal search and seizure case, and not a challenged identification case, the manner of burden allocation should remain because the procedure for challenging admission of the evidence is the same. The existence of probable cause in a search case is rather analogous to the existence of reliability in an identification case (although the initial burden of establishing that a search was conducted without a warrant is easier to meet than establishing that a showup was impermissibly suggestive). Both provide for the admissibility of evidence that is otherwise tainted. In a search case, pursuant to *Xenia*, if the defendant meets the burden of demonstrating that a search was performed without a warrant, the burden of proof then shifts to the state to establish probable cause and legitimize the evidence. Applying the same burden-shifting principle to an identification case, if the defendant meets the burden of demonstrating the identification was impermissibly suggestive, then the state bears the burden of demonstrating its reliability, despite the suggestive nature.

{¶22} Indeed, this court has recognized such a shift of burden in identification cases. In *State v. Perry*, 11th Dist. No. 2002-T-0035, 2003-Ohio-7204, our court applied the *Xenia* principle of burden shifting, without expressly stating so, in the context of a challenge to an identification procedure. In *Perry*, we began with the recognition that the burden is on the defendant, as the party raising the challenge, to prove the inadmissibility of the identification evidence under the two-part *Biggers* test. *Perry* at ¶15. Without expressly stating so, we then applied the *Xenia* principle to the two-part

Biggers test: "[i]f the defendant fails to satisfy the first part of this burden, neither the trial court nor an appellate court need consider the totality of the circumstances. However, if the defendant satisfies his initial burden of proof, the burden of persuasion falls upon the state to show that the evidence is valid." Id., citing *Kuzma* at *5, quoting *State v. Hensley*, 75 Ohio App.3d 822, 829, citing *Xenia*. We reaffirmed the burden shifting in a subsequent identification case, *State v. Elersic*, 11th Dist. No. 2002-L-172, 2004-Ohio-5301, ¶88-90.

{¶23} In keeping with this general procedural framework for consideration of Crim. R. 47 suppression motions, and the doctrine of burden of proof, other courts have also articulated this burden shift in the context of identifications. The Sixth District, in *State v. Mominee* (Nov. 9, 1984), 6th Dist. No. OT-84-14, 1984 Ohio App. Lexis 11418, explained, "[o]nly if a due process violation is first shown, does the burden of proof with respect to the identification procedure shift to the prosecution to demonstrate by clear and convincing evidence that the witness' identification is an untainted, independent recollection of the perpetrator." Id. at *2, citing *United State v. Wade* (1967), 388 U.S. 218, 240, 87 S.Ct. 1926, 18 L.Ed.2d 1149.

{¶24} We clarify our prior decisions today and hold that, in a challenge to identification evidence, the initial burden is on the defendant to demonstrate that the showup was impermissibly suggestive and unnecessary. If the defendant fails to satisfy the first part of this burden, neither the trial court nor an appellate court need consider the totality of the circumstances. However, if the defendant satisfies his initial burden of proof, the burden of proof shifts to the state to demonstrate that, under the totality of the

circumstances set forth in *Biggers*, the identification was reliable even though the confrontation procedure was suggestive.

{¶25} **Reliability and *Biggers*' Totality of the Circumstances Test**

{¶26} Before embarking on the reliability analysis we must note that consideration of the necessity of the showup was not raised by either party below or on appeal. It would appear that necessity is not at issue here because there were no exigent circumstances such as a dying victim or an armed suspect at large.

{¶27} Mr. Stetz argued, and the trial court found, that a "one-man showup" identification in which the suspect is made to conform his clothing to the witness' description is inherently and impermissibly suggestive. We agree with the trial court. It is impossible to comprehend how re-dressing a suspect to conform to a witness' description is not inherently and unfairly suggestive. One-on-one identifications necessarily involve suggestiveness, especially when the police officer brings only one suspect to the scene. Unlike lineups or photo arrays, which offer the witness "fillers" to guard against guessing when the witness is unsure of the identification, a showup presents the witness with one choice, and the witness may feel compelled to make the identification. We have no evidence that the officers took any precautions before the showup to ameliorate the suggestive nature of the showup, such as cautioning the witness that the real suspect may or may not be present, and that the investigation will continue regardless of the results of the identification procedure that is about to be undertaken. The record is silent as to whether Mr. Stetz was in handcuffs, but it is clear he emerged from a marked police cruiser.

{¶28} Having met the first prong, the trial court, therefore, was obligated to consider the totality of the circumstances applying the *Biggers* standard to determine if, in this case, the circumstances of the identification support the trial court's determination that a substantial likelihood of misidentification existed.

{¶29} "The focus, under the 'totality of the circumstances' approach, is upon the reliability of the identification, not the identification procedures." *State v. Jells* (1990), 53 Ohio St.3d 22, 27, certiorari denied (1991), 498 U.S. 1111, 111 S.Ct. 1020, 112 L.Ed. 2d 1101. The minimal length of time between Ms. Nemergut's initial observation of the man in all red and the showup (approximately 40 minutes), and her general description of the man she saw suggest reliability. Other *Biggers* factors (or lack thereof) support the trial court's determination that the showup lacked reliability and presented a substantial likelihood of misidentification.

{¶30} Initially, we note that the eye-witness, Ms. Nemergut, did not testify at the suppression hearing, and thus was not available to Mr. Stetz for cross-examination. Instead, Deputy Niemi testified as to Mr. Nemergut's statements. Mr. Stetz was entitled to fully cross examine the identification witness, but that issue was not raised. See, e.g., *State v. Curry* (Aug. 29, 2000), 10th Dist. No. 99AP-1319, 2000 Ohio App. LEXIS 3875, *12. The state chose to offer only the officer's testimony to meet its burden of proof that the witness' identification was an untainted, independent recollection of the perpetrator; thus we turn to that testimony to examine the evidence presented as to the four remaining *Biggers* factors, in order to test the trial court's conclusions.

{¶31} **<u>Opportunity to View the Criminal and the Witness' Degree of Attention</u>**

{¶32} The trial court found that Ms. Nemergut's opportunity to view the individual who got out of the car was not clear from the evidence submitted during the suppression hearing. Ms. Nemergut stated to the deputy that she saw the individual "get out of the car and walk across the road as she was pulling into the parking lot. He walked right by her when she was pulling in." It was estimated the distance from which she initially viewed the individual was roughly 40 feet. Deputy Niemi related that Ms. Nemergut had only seen the back of the man; *she did not see his face*. See *State v. Martin* (1998), 127 Ohio App.3d 272, 276 (affirming a trial court's suppression of a showup identification where, among other deficiencies in the state's evidence, there was "no evidence that the eyewitness even had an opportunity to observe the perpetrator's face, let alone that that opportunity was extensive, and of good quality").

{¶33} No other evidence was presented regarding Ms. Nemergut's opportunity to view the individual and her degree of attention, such as the length of time she observed him, or whether she was distracted by other tasks, such as parking, which would have diminished the attention she paid to the man.

{¶34} **Witness' Prior Description**

{¶35} Deputy Niemi testified that Mr. Nemergut described the individual she observed as "a white male with brown hair, red t-shirt, red shorts ***." This was a very general description and provided no unique identifiers related to the individual's physiology. She provided no estimation of height, weight or build. When Sergeant Nelson came upon him, Mr. Stetz was wearing gray shorts and was shirtless; his brown hair and Caucasian complexion were all that remained in terms of similarities with Ms.

Nemergut's description. Before presenting Mr. Stetz for the "showup," the sheriff's deputies made Mr. Stetz conform his appearance to Ms. Nemergut's description. Given the lack of any other unique identifiers, the likelihood of Ms. Nemergut identifying any brown-haired, Caucasian male dressed in all red as the individual she observed was quite considerable, thus creating a substantial possibility of misidentification under the circumstances.

{¶36} **Level of Certainty Expressed by Witness**

{¶37} Deputy Niemi testified that when asked whether Mr. Stetz was the same person she saw getting out of the car, Ms. Nermgut stated "I do believe so, yes." The trial court found this statement to be "fair and candid, especially since she also stated she saw the back of him, suggesting that her observation was somewhat limited." Her response, although fair and candid, was not emphatic, nor particularized or substantiated.

{¶38} **Totality of the Circumstances**

{¶39} Given the very general nature of Ms. Nemergut's description of the individual she observed, the lack of evidence related to the length of time she observed him or level of attention she paid to her observation, her failure to observe the individual's face, and the less than clearly assured confirmation of identification she provided, we cannot say that the trial court erred in finding that the circumstances surrounding Mr. Stetz' identification failed to lend such reliability to the exercise so as to overcome the inherently suggestive nature of a showup.

{¶40} This unreliability is further underscored by the fact that Mr. Stetz was made to conform his appearance to the general description Ms. Nemergut provided, and no individualized markers were observed by Ms. Nemergut or used to identify Mr. Stetz. Further, the state failed to present any evidence of techniques available to ameliorate the suggestive nature of a showup discussed earlier. Therefore, we find that there was competent, credible evidence to support the trial court's decision that the showup identification procedure used in this case established a substantial likelihood of misidentification.

{¶41} We recognize that there may be a temptation to rely on extrinsic corroborating evidence to substantiate a position that an initially suggestive showup identification was ultimately reliable. In an identification suppression analysis, however, the question is not whether other factors lead the police to believe they have the correct person (that evidence is for the jury's consideration at trial); the question is whether this particular out-of-court identification was suggestive in nature, and whether, after consideration of the totality of the circumstances, the identification was reliable under *Biggers.* Reliability is determined by a thorough analysis of the identification itself; it must stand or fall upon the *Biggers* factors. Circumstantial evidence may not be used to bootstrap reliability.

{¶42} In upholding the trial court's well-reasoned and substantiated determination that the identification was inadmissible, we do not tie the state's hands behind its back. The state still has other tools at its disposal to successfully try this case, such as presentation of circumstantial evidence to corroborate Ms. Nemergut's

initial report to the police. We simply affirm the trial court's removal of unreliable evidence from the equation in order to protect the process.

{¶43} The state was unable to demonstrate reliability under these particular circumstances. And, "[w]hile the [dissent] is 'content to rely on the good sense and judgment of American juries,'" characteristics which we agree are the hallmarks of the American jury system, we must acknowledge "the impetus for *Stovall* and *Wade* was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony." *Brathwaite* at 125-126 (Marshall, J., dissenting).

{¶44} The identification evidence was correctly suppressed by the trial court. The state's sole assignment of error is without merit and the judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶45} The majority, guided by the presumption that "showup" identifications are inherently suggestive, errs by upholding the trial court's decision to grant Stetz' Motion to Suppress Deborah Nemergut's identification of him in a one-person "showup" conducted immediately after his apprehension. Furthermore, the majority distorts the settled law of Ohio with respect to "showup" identifications to uphold the suppression of Nemergut's identification, despite the nearly unanimous consensus of federal and state

decisions which uphold the admissibility of "showup" identifications in situations such as presented herein. Accordingly, I respectfully dissent.

{¶46} The majority opinion refers several times to the inherently suggestive nature of "showup" identifications. This proposition, however, is contrary to the United States Supreme Court's pronouncement that "the admission of evidence of a showup ***without more*** does not violate due process." *Neil v. Biggers* (1972), 409 U.S. 188, 198 (emphasis added).[2] Consistent with the United States Supreme Court's position, the Ohio Supreme Court has held: "There is no prohibition against a viewing of a suspect alone in what is called a 'one-man showup' when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy." *State v. Madison* (1980), 64 Ohio St.2d 322, 332, quoting *Bates v. United States* (C.A.D.C.1968), 405 F.2d 1104, 1106. As the Ohio Supreme Court explained, "police action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh." Id.

{¶47} The position of the Ohio Supreme Court with respect to "showups" reflects the position of virtually every jurisdiction in the United States. See, e.g., *United States v. Hawkins* (C.A.7, 2007), 499 F.3d 703, 707 (a "showup" is not "unduly suggestive"

---

2. The majority refers to research demonstrating that particular dangers exist that witnesses will base identifications more on the similarity of clothing worn by the suspects rather than their physical features. Supra, at ¶13, fn. 1. This "research" is being introduced on appeal by the majority through the judicial opinion of another state's court. It was not presented as any form of evidence introduced at trial or argued in the court below and would not be admissible under the *Daubert* standard.

when used to confirm that "an individual apprehended close in time and proximity to the scene of a crime is, in fact, the suspected perpetrator of the crime") (citations omitted); *Fuller v. Schultz* (S.D.N.Y.2007), 572 F.Supp.2d 425, 442 ("prompt showup identifications by witnesses following a defendant's arrest at or near the crime scene have been generally allowed and have never been categorically or presumptively condemned") (citation omitted); *State v. Henderson* (2009), 208 N.J. 208, 260 ("'the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours' because 'the benefits of a fresh memory seem to balance the risks of undue suggestion'") (citations omitted).

{¶48} The majority spends several pages explaining why, within the framework of Crim.R. 47, "the initial burden is on the defendant to demonstrate that the showup was impermissibly suggestive and unnecessary." Supra, at ¶24. The short answer is simply that there is no prohibition against such identifications. There are many Ohio appellate decisions that could be cited for the proposition that the burden is on the defendant to demonstrate a very substantial likelihood of irreparable misidentification, requiring the suppression of the identification. *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, at ¶41, citing *State v. Taylor*, 3rd Dist. No. 1-03-20, 2003-Ohio-7115, at ¶32, and *State v. Green* (1996), 117 Ohio App.3d 644, 652-653; *State v. Poindexter*, 2nd Dist. No. 21036, 2007-Ohio-3461, at ¶11 ("the accused bears the burden of showing that the identification procedure was 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification' and that the

identification itself was unreliable under the totality of the circumstances") (citations omitted).

{¶49} The majority maintains that Stetz' "showup" was "inherently and impermissibly suggestive" because he was made "to conform his clothing to the witness' description."[3] In fact, Stetz was only made to wear the clothing found in his possession right-side out. Stetz was found holding a red shirt and wearing grey shorts. Sergeant Kerry Nelson conducted a pat down, felt Stetz' wallet, but could not retrieve it because the pockets were on the inside of the shorts, i.e., the shorts were inside out. With Stetz' permission, Sergeant Nelson pulled back the shorts and realized they were red. Stetz was not made to dress to conform to Nemergut's identification, rather, he was made to wear his clothes they way they were supposed to be worn. It is difficult to comprehend how this could be construed as unfairly suggestive.

{¶50} Contrary to the majority's conclusion, federal and state courts have consistently held that such a procedure does not render the identification unduly suggestive. *Willis v. Garrison* (C.A.4, 1980), 624 F.2d 491, 494, fn. 2 ("[i]dentifications have been held proper in cases where the robber was wearing a mask or scarf over his face at the time of the crime and the witness has been able to identify the suspect only after the suspect's face has been partially covered in a similar manner") (citations omitted); *State v. Tyler*, 10th Dist. Nos. 94APA03-282 and 94APA03-283, 1994 Ohio

---

3. The majority claims this was the finding of the trial court. In fact, the trial court did not make any finding that the procedure used in Stetz' identification was so impermissibly suggestive as to require an analysis of the totality of the circumstances. Like the majority, the trial court presumed any "showup" to be inherently suggestive and proceeded immediately to a consideration of the totality of the circumstances. In this context, the trial court noted that the defendant being made to dress so that his appearance matched the witness' description "ma[de] it more difficult to assess the reliability of the identification."

App. LEXIS 6075, at *39-*43 (rejecting the argument that the identifications "were unduly suggestive because they were based upon viewing defendant in the ball cap found in the defendant's apartment"); *People v. Brisco* (2003), 99 N.Y.2d 596, 597 (holding that a crime-scene "showup" was not unduly suggestive "when defendant, who was wearing tan shorts and no shirt, was asked to hold a pair of maroon shorts," which "belonged to defendant [and] were found at the house where he was located"); *State v. King* (Mo.App.1988), 748 S.W.2d 47, 49 ("[t]here was nothing unreasonable or unduly suggestive about placing on defendant's head a cap found in his possession at the time of his arrest which matched the description given by both witnesses of the cap he was wearing at the time of the offense forty-five minutes earlier").

{¶51} Finally, the majority notes that there was "no evidence that the officers took any precautions before the showup to ameliorate the suggestive nature of the showup," and that the "record is silent as to whether Mr. Stetz was in handcuffs." Given that Stetz bore the burden of demonstrating that the procedures used were unnecessarily suggestive, any absence of evidence on these matters should be construed in the state's favor. Cf. *State v. Duke*, 2nd Dist. No. 23110, 2009-Ohio-5527, at ¶10 (noting that the United States Supreme Court has decidedly rejected the argument that "evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure").

{¶52} In the absence of any evidence that the procedure used to identify Stetz was unduly suggestive, the analysis should cease and the trial court's Judgment be

reversed. *Green*, 117 Ohio App.3d at 652-653 (where the defendant fails to demonstrate that "the [identification] procedure employed was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification," the trial court "need not consider the totality-of-the-circumstances test set forth in *Neil v. Biggers*"), citing *State v. Blackwell* (1984), 16 Ohio App.3d 100, 103; *State v. Hall*, 2nd Dist. No. 10-CA-23, 2011-Ohio-635, at ¶10 (citations omitted).

{¶53} Assuming, arguendo, that the procedure used was unfairly suggestive, the totality of all the circumstances in the present case support the reliability, and, thus, the admissibility of the identification.

{¶54} Stetz' identification occurred within forty minutes of the witness' observation of him, a circumstance which the authorities discussed above acknowledge as tending to increase the probability of an accurate identification.[4]

{¶55} The evidence presented at the hearing was that the witness had a reasonable opportunity to view Stetz ("he walked right by her") and was able to positively identify him ("she believed the defendant was the individual [she had seen]"). The majority describes this as a "less than clearly assured confirmation of identification." Supra, at ¶39. I disagree. Deputy Joe Niemi testified that several Iten Industries employees "had observed a white male with short brown hair, red t-shirt, red shorts, leave the car and walk across US 20 going behind the abandoned gas station toward the woods." Deputy Niemi continued: "One employee, in particular, did get a look at the person who left the car, that was Deborah Nemergut. The other employees that I talked

4. This significance of the close temporal proximity between the witnessed event and the identification was recognized by Deputy Niemi, who explained that "due to the short time frame of the crime occurring and the witness's information, we brought [Stetz] back to the scene for a show-up."

to who saw the individual leave the car, didn't pay close enough attention to where they could either identify a person or not identify a person, they just saw him. *** And the only person who said they got a good enough look to say yes or no was Miss Nemergut." A fair reading of the testimony indicates that Nemergut was confident that she was able to positively identify the suspect, even before Stetz was presented to her.

{¶56} The majority also faults Nemergut's description of Stetz as "a very general description," without "unique identifiers related to the individual's physiology." Supra, at ¶35. Again, I disagree. The description of the suspect as a white male with short brown hair, wearing a red t-shirt and red shorts, contains sufficient physiological information on which to base an identification (further corroborated by other circumstances discussed below). This is also the conclusion reached in many other Ohio appellate decisions. *State v. Shelby*, 2nd Dist. No. 21910, 2008-Ohio-202, at ¶13 (witness observed the suspect passing through her window and identified him 30 to 45 minutes later based on his "gender, race and clothing"); *State v. Taylor*, 9th Dist. No. 94CA005984, 1995 Ohio App. LEXIS 3019, at *7-*8 (witness was unable to view the suspect's face, but identified him based on "skin color, hair style, and general dress"); *State v. McIntosh*, 10th Dist. No. 89AP-301, 1989 Ohio App. LEXIS 3669, at *8 (witness did not observe the suspect's facial features but, "a short time after having seen him," was able to identify him based on his "general stature, clothing, and complexion"); cf. *Willis*, 624 F.2d at 494-495 (although the witness "was unable to identify [the suspect] based upon the latter's facial characteristics, *** height, weight and clothing are acceptable elements of identification, and this is especially true when the confrontation takes place shortly after

the crime when it may reasonably be inferred that the suspect is dressed as he was at the time of the robbery").

{¶57} The accuracy of Nemergut's identification is further corroborated by the fact that, in addition to her description of the suspect, the sheriff's deputies were able to quickly locate Stetz based on her description of the direction in which he was walking. Nemergut told Deputy Niemi that Stetz was walking toward North Bend Road. Sergeant Nelson began to search the area and observed Stetz "walking up North Bend Road." He testified that Stetz "was the only person on foot" in this "heavily wooded area." Deputy Niemi estimated that North Bend Road was "maybe half a mile" from Iten "through the woods." Stetz was located about forty minutes after Deputy Niemi received the initial dispatch. Both deputies described Stetz as having fresh scratches on his legs, as if he had been running through the woods. These corroborating circumstances weigh heavily in favor of the reliability of Nemergut's identification. *Shelby*, 2008-Ohio-202, at ¶13 ("the fact that [the suspect] was the only person in the area, dressed in the clothes [the witness] described *** further reinforces the reliability of her identification").

{¶58} The majority, however, dismisses these circumstances as a "temptation to rely on extrinsic corroborating evidence *** to bootstrap reliability." Supra, at ¶41. The fact that the deputies were able to locate Stetz, in the area and in a timely manner, based on Nemergut's description of the direction he was walking is not extrinsic evidence, it is part of the substance of her description of the suspect, as much as her description of him as a white male with short brown hair, wearing a red t-shirt and shorts.

{¶59} The United States Supreme Court has emphasized that "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114; *Biggers*, 409 U.S. at 199 (a reliable identification is admissible despite the use of an unnecessarily suggestive identification procedure). Some of "the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199-200. Contrary to the majority's position, this analysis does ***not*** "stand or fall upon the *Biggers* factors." Supra, at ¶41. Rather, the reliability determination must be based on "the totality of the circumstances." *Stoval v. Denno* (1967), 388 U.S. 293, 302. Moreover, "each case must be considered on its own facts." *Simmons v. United States* (1968), 390 U.S. 377, 384. Cf. *United States ex rel. John v. Casscles* (C.A.2, 1973), 489 F.2d 20, 24 ("[t]hese [*Biggers*] factors *** are hardly exclusive, for as has been said, one must look to the totality of circumstances") (citation omitted).

{¶60} Under *Biggers*, a witness' accurate description of the suspect's location may properly be considered in assessing reliability, as it relates to "the accuracy of the witness' prior description of the criminal." 409 U.S. at 199. Regardless of whether Nemergut's description of Stetz' location is one of the *Biggers* factors, that description is part of the totality of the circumstances bearing on the reliability of her identification. Accordingly, it may and should be considered.

{¶61} In sum, the proper use of a "showup" has been deemed "a useful -- and necessary -- technique" when it occurs at the scene of a crime and soon after its commission. *Henderson*, 208 N.J. at 259. This is so because it "may be necessary *** to quickly confirm the identity of a suspect, or to ensure the release of an innocent suspect." *Brisco v. Ercole* (C.A.2, 2009), 565 F.3d 80, 88; *State v. Romero* (2007), 191 N.J. 59, 78 ("a prompt showing of a detained suspect at the scene of arrest has a very valid function: to prevent the mistaken arrest of innocent persons") (citation omitted). Given the facts of the present case, I concur with the Second Circuit United States Court of Appeals, that "rather than excoriate the law enforcement officials involved for conducting an unduly suggestive procedure, one might commend them for their immediate efforts to ascertain and release innocent people." 565 F.3d at 91 (citation omitted).

{¶62} The present "showup" identification did occur at the scene of the crime soon after its commission and may be deemed reliable under the totality of the circumstances. As there is no justifiable reason for its suppression, I dissent and would reverse the judgment of the lower court.