

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

STATE OF WASHINGTON,)	
)	No. 63253-1-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
SAID ALI,)	
)	
Appellant.)	
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		FILED: <u>September 20, 2010</u>

Spearman, j. — Said Ali was convicted of five counts of robbery in the first degree, two counts of attempted robbery in the first degree, and one count of assault in the first degree. The trial court admitted evidence that four of his victims identified him in a police lineup. Ali appeals, arguing that the identification procedure was impermissibly suggestive, because he was the shortest, youngest, and lightest man in the lineup and one of only two who spoke with a particular accent. The procedure was not improperly suggestive. The majority of the other men in the lineup were within three inches of his height, 20 pounds of his weight, and three years of his age. And the victims who identified him all said that their identification was not based on his accent. We also reject Ali’s claim that his trial counsel was ineffective for not seeking severance, and

his challenge to the sufficiency of the evidence on counts 2, 3, and 4. We affirm.

FACTS

Ali was charged by amended information with five counts of robbery in the first degree, two counts of attempted robbery in the first degree, and one count of assault in the first degree for his role in a series of attacks and robberies in North Seattle in April and May 2008.

The acts underlying count 1, robbery in the first degree, occurred in the early morning hours of April 23, 2008. At 1:48 a.m., five men in a car drove by Stephanie Martin and yelled or made a “cat call.” Shortly thereafter, she heard the sound of car doors closing. Three individuals approached her, two from behind. She became frightened. The man in front of her pointed a knife at her. Martin had the opportunity to get a good look at the individual’s face because he was in front of her and talking to her. She described him as black, 5’7” or 5’8” in height, and wearing a hooded sweatshirt and hat. She later identified this man as Ali. He took her cell phone, then shoved her into the bushes. She screamed. The men ran away.

Shortly thereafter the acts underlying count 2, robbery in the first degree, count 3, assault in the first degree and count 4, attempted robbery in the first degree, occurred. At 1:55 a.m., a green car carrying several men pulled

alongside Carl Halliburton and Jonathan Douglass, who were on the sidewalk. Halliburton saw a group of people further north, and decided to head in their direction for safety. But the green car and a black car pulled into a parking lot, and approximately 11 men got out and encircled Halliburton and Douglass. The men demanded money.

Some of the men kicked and punched Halliburton, trying to knock him to the ground. Others attacked Douglass. Halliburton realized he had been stabbed, and was bleeding. He grabbed a metal bar from a truck bed, and began swinging it. The attackers tried to rob Douglass, and also tried to stab him with a knife. One of the attackers pulled out a pistol and pointed it towards Halliburton and Douglass. The attackers fled when police cars approached.

Halliburton and Douglass later identified Ali as one of the men in the group. Halliburton testified that Ali “was definitely one of the lead combatants in the confrontation,” and he “stood out the most because he was directly in front of me the whole time. That would be kind of like the ring leader, if you will.” He also testified he was “a hundred percent positive he was directly involved in the confrontation of me getting assaulted.” Douglass also testified that Ali was one of four men who initially approached him, then assaulted and robbed him.

The attackers stole Halliburton’s two cell phones, his coat, and his house keys. Halliburton was later taken to a hospital and underwent surgery for two

stab wounds to his stomach. He suffered a lacerated liver and a broken nose, and remained in the hospital for five days.

Halliburton found a cell phone that one of the attackers had dropped. Police later determined that it belonged to Daniel Melancu, Ali's acquaintance. Later that night, an unidentified person called Melancu's cell phone from Halliburton's stolen cell phone. Halliburton answered, and heard a man with a Middle-Eastern or African accent. Martin's stolen cell phone also called Melancu's dropped cell phone.

The acts underlying count 5, robbery in the first degree and count 6, attempted robbery in the first degree, occurred just before midnight on April 30, 2008. Joshua Longbrake and Mackenzie Rollins were walking together at Green Lake when they were approached by three men wearing dark clothing. One was armed with what appeared to be a handgun. The suspect with the gun, who Longbrake later identified as Ali, pointed it toward Longbrake's head and said, "This isn't a game," and instructed them to lie down on the ground. Longbrake and Rollins complied. The men searched their pockets, taking Longbrake's wallet containing cash and credit cards, and his cell phone and jacket. Ali struck Longbrake in the head with the gun.

The acts underlying count 7, robbery in the first degree, occurred shortly thereafter, at 12:57 a.m. in a University of Washington parking lot. Two men

approached Katherine Terpstra and stole her purse. The men got into a car. Terpstra screamed that she had been robbed and chased her assailants' car. She was able to recall a partial license plate number. University Police officers heard her shouting, and saw a blue car stop to pick up a man in a light-colored sweater. When police stopped the car, three men were inside. The driver was Ali's acquaintance Abel Chane. The front passenger was Ali. The rear passenger provided a false name. Officers found Terpstra's purse under a pillow behind the driver's seat. They also found a black BB gun that looked like a semi-automatic pistol under the front passenger seat where Ali was seated, along with a bloody paper towel. Officers lined up the vehicle's occupants, and Terpstra looked at the men through a camera equipped with zoom lens, in an effort to identify them. Terpstra identified Ali as the man who robbed her. Ali was arrested.

After his arrest, Ali gave a statement to police that was audio and video recorded, in which he acknowledged being present during some of the robberies and the assault. Regarding Terpstra's robbery, Ali claimed he was in the car with Chane and a man he called Sharmaki, but stepped out of the car and did not see what happened. When asked about the assault on Halliburton and Douglass, Ali acknowledged he was present, but denied involvement. He blamed the stabbing on Melancu.

Officers subsequently interviewed Ali a second time. Ali again confirmed he was present during the attacks on Halliburton and Douglass. He repeated that Melancu was cut on his hand, and blamed the earlier robbery of Martin on men he called Siyad and Abdirzak. He later denied being present during the attack on Halliburton and Douglass. He was thereafter released.

The acts underlying count 8, robbery in the first degree, occurred on May 27, 2008, at approximately 12:20 a.m. Colin Walker was walking on Fremont Avenue when two men approached him. A man Walker later identified as Ali asked to borrow his cell phone. Walker agreed. While Walker was watching Ali, the other man hit Walker in the head and knocked him to the ground. The men beat him until he was unconscious. They stole his backpack, computer, and cell phone. Walker was taken to the hospital and treated for his injuries, which included a concussion. On June 4, 2008, Walker identified Ali in a photomontage. Cell phone records from Walker's stolen phone revealed that calls were placed to Ali's associates following the theft.

On June 5, 2008, Seattle Police Robbery Unit detectives arrested Ali. On June 11, officers arranged a lineup procedure, during which Ali and five other men were shown to a group of victims, including Martin, Halliburton, Douglass, and Longbrake. All four identified Ali as one of their assailants. Halliburton subsequently identified Ali in a photomontage as well.

Prior to trial, Ali brought a CrR 3.6 motion to suppress evidence of the witnesses' lineup, show-up, and photomontage identifications. The trial court denied Ali's motion to suppress and entered oral and written findings of fact and conclusions of law.

Ali also objected to the State's motion to consolidate count 8 with the remaining counts. The trial court allowed consolidation, and entered related findings and conclusions.

A jury convicted Ali as charged on all counts, and found by special verdict that he or an accomplice was armed with a deadly weapon during two robberies and the assault. The trial court imposed a standard range sentence. Ali appeals.

DISCUSSION

Lineup Identification Procedure

Ali first asserts that the lineup identification procedure was suggestive and created a very substantial likelihood of irreparable misidentification. Ali's argument is not persuasive.

An identification procedure violates due process if it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58

(2002) (citing State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)). A defendant must first establish that the identification procedure was suggestive. Vickers, 148 Wn.2d at 118; Linares, 98 Wn. App. at 401. If the identification procedure was suggestive, we additionally inquire whether that fact gave rise to a substantial likelihood of irreparable misidentification. State v. Maupin, 63 Wn. App. 887, 896-97, 822 P.2d 355 (1992).

Specifically, Ali argues that the lineup was impermissibly suggestive, because he was the shortest, youngest, and thinnest man, and was one of only two men with an accent.¹ We disagree.²

The trial court identified the following facts as undisputed:

4. On June 11, 2008 Seattle Police Detective Craig and Sgt. Aratani prepared a lineup in furtherance of their investigation of other robbery charges that are part of these consolidated charges. The defendant was the suspect. Det. Craig solicited incarcerated volunteers from the King County jail to join Ali in this lineup. They were all black men. Their identifying information and lineup positions are evidenced in State's exhibit 7, which is incorporated herein by reference.
5. Participant Bazen Kassahum had an African type foreign accent, as did Ali. [Participant Timothy Ewald] may have had a Spanish accent. Other participants had different sounding dialects, although American.

¹ The men in the lineup were asked to say the phrases "Do you have the time," and "This isn't a game."

² Neither Ali nor the State assert the applicable standard of review. Division Three of this court has held that appellate courts review the admissibility of identification procedures for an abuse of discretion. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). Other cases have held that the standard of review for police identification procedures is de novo. State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986); see also State v. Taylor, 50 Wn. App. 481, 485, 749 P.2d 181 (1988). We find admission of the evidence proper under either standard.

6. Victim Halliburton described his assailant as having an East African accent. Douglas [sic] and Martin indicated some of their assailants spoke with a foreign accent. Victim Rollins recalled an African accent. Victim Longbrake described a typical American accent.

7. The physical description of the perpetrator ranged from 5'7-6'1", 150-180 lbs. All described the perpetrator as black.
...
10. Sgt. Aratani gave the directions at the lineup. He has participated in hundreds of lineups and has been the robbery sergeant for 15 years. Observers were asked to make their own decisions, and not to consult with anyone when making their determination.

11. [A public defender] was assigned to represent Mr. Ali in the lineup process He noted no difficulty speaking or communicating with Mr. Ali, but noted him to have an accent that was not European or Asian, but rather African or Arabic. He noted nothing irregular visually. When he heard the lineup participants speak the two assigned phrases, he noted #1 and #2 both spoke with noticeable accents, and the other four appeared to be native born speakers. He took note of his observations. Other than the notation of accents of #1 and #2, he did not note anything else, including anything noteworthy about physical descriptions. He has participated in 20-30 lineups over the 30 some years he has been a criminal defense attorney.

12. Photographs were taken of the line-up, admitted in exhibits 8, 9 and 10.³ No video was taken of the procedure. The court reviewed and considered the Line-up Information Sheet, which the court incorporates by reference.
...

22. The lineup observers were interviewed about the impact if any

³ These exhibits are not part of the appellate record.

of the speech upon their selection. None indicated that their choice was based on the words spoken and the fact of any accent.

The trial court made the following findings as to the disputed facts:

3. To the extent Ali had an accent, it is not strong. The variance in the lineup participants' speech had little, if any impact on the observers, given the variety of initial descriptions of their speech and their post-selection interviews.
4. [N]othing was done by anyone in law enforcement to indicate to the observer which individual was the suspect.

Based on these facts, the trial court concluded that the lineup was not impermissibly suggestive, and comported with due process requirements. The court admitted the evidence of the victims' identifications of Ali.

Substantial evidence supports the trial court's findings. Where substantial evidence in the record supports challenged facts, those facts are binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Neeley, 113 Wn. App. 100, 104-105, 52 P.3d 539 (2002). The Line-Up Information Sheet provides substantial evidence that Ali's physical appearance did not create a suggestible lineup. While Ali was the youngest man in the lineup, two were less than one year older than he was, one was less than two years older, and one was less than three years older. Although Ali weighed the least, two others outweighed him by 10 pounds or less, and two outweighed him by only 20 pounds. And while Ali claims he was the shortest man, he was not. One man was shorter than he was, two were only an inch taller, and one was three inches taller.

Substantial evidence also supports the trial court's finding that Ali's accent did not result in a suggestible lineup. The witnesses' statements reveal that they identified Ali based on his physical features and not his accent. Martin testified that her identification of Ali was based on his appearance, not on his voice. Douglass testified that he recognized Ali's face as soon as Ali entered the room. Longbrake testified that when Ali entered the room he immediately remembered his face. Halliburton similarly recognized Ali as soon as he entered, based on his height and his face. When asked whether Ali's voice impacted his identification, Halliburton answered "No. He was well identified prior to speaking."

The trial court's finding that the lineup procedure was not suggestive is supported by substantial evidence.⁴ Ali's claim to the contrary is unavailing.⁵

Ineffective Assistance of Counsel

Ali next claims that he was prejudiced by his trial counsel's failure to move

⁴ Because the procedures were not suggestive, there was no substantial likelihood of misidentification. Maupin, 63 Wn. App. at 897.

⁵ Ali argues that every show-up, photomontage, and in-court identification should have been suppressed, but failed to adequately raise these claims of error. Ali does not provide any argument other than his claim that the lineup was suggestive, which we conclude is unsupported. Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review by appellate court. RAP 10.3(a)(5) and (6); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Ali did not identify these issues in his assignments of error or issue statements. We will not review a claimed error not included in an assignment of error or associated issue statement. RAP 10.3(g).

Moreover, the trial court found that these identifications were not suggestive. Ali did not challenge this finding. Unchallenged findings are verities binding on appeal. Hill, 123 Wn.2d at 647; Neeley, 113 Wn. App. at 105.

to sever the charges against him for separate trials. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance (1) was deficient and (2) prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). It is unnecessary for us to address both prongs of the Strickland test if the defendant makes an inadequate showing as to either prong. State v. Standifer, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987) (citing Strickland, 466 U.S. at 697). Deficient performance is that which falls below an objective standard of reasonableness. In the Matter of the Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We conclude that Ali's counsel's performance did not fall below an objective standard of reasonable competence. Ali's counsel specifically objected to the court's joinder of separate counts before trial, but the court ruled that such joinder was proper, and entered the following written findings:

Joinder . . . is appropriate because the offenses are based on a series of acts connected together or constituting parts of a single scheme or plan.

...

Severance is not necessary to promote a fair determination of the

defendant's guilt or innocence of each offense.

Given counsel's timely objection and the trial court's ruling, Ali fails to demonstrate that his counsel was ineffective for failing to move to sever.

Moreover, Ali does not demonstrate prejudice. To establish prejudice from counsel's failure to move to sever, Ali must demonstrate that the motion would have been granted and that the outcome of the proceeding would have been different. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009); Standifer, 48 Wn. App. at 125-26. Ali demonstrates neither.

The motion to sever would not have been successful. The facts of this case do not support severance, because the crimes were of the same or similar character, and joinder was not manifestly prejudicial. See, e.g., State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (counts of sexual abuse of one victim need not be severed from counts involving a second victim because acts were of similar character); State v. Mitchell, 30 Wn. App. 49, 55, 631 P.2d 1043 (1981) (six burglaries were properly joined because they were of same or similar character). Ali's series of strong-arm robberies, attempted robberies, and assault in conjunction with a robbery were, likewise, of a similar character. Because the trial court would have rejected a motion to sever, Ali also fails to demonstrate that the results of the proceeding would have been different had counsel moved to sever.

Ali has not demonstrated either unreasonable performance by his trial counsel, or prejudice. His claim of ineffective assistance of counsel fails.

Sufficiency of the Evidence

Ali next contends that there was insufficient evidence to support his convictions for the first degree robbery⁶ and first degree assault⁷ of Halliburton (counts 2 and 3), and the attempted first degree robbery⁸ of Douglass (count 4). We disagree.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable in determining the sufficiency of the evidence.

⁶ A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he or she is armed with a deadly weapon, or displays what appears to be a firearm or other deadly weapon; or inflicts bodily injury. RCW 9A.56.200. RCW 9A.56.190 defines "robbery," in pertinent part, as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

⁷ A person is guilty of assault in the first degree if he or she assaults another with any deadly weapon, with intent to inflict great bodily harm. RCW 9A.36.011.

⁸ "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

The trial court instructed the jury on accomplice liability, and the prosecutor argued that Ali could be convicted as an accomplice for his role in the crimes against Douglass and Halliburton. To convict Ali as an accomplice, the evidence only needed to show that Ali solicited, commanded, encouraged or requested another individual to commit the charged crimes, or aided or agreed to aid in planning or committing the crime. State v. Berube, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003) (citing RCW 9A.08.020(3)(a)).

The evidence, viewed in the light most favorable to the State, would allow a reasonable juror to find Ali guilty of counts 2, 3, and 4 beyond a reasonable doubt. Halliburton and Douglass both testified that they were approached and encircled by a group of men, including Ali, who attacked them. Halliburton testified that Ali was the “ring leader,” and one of the “lead combatants” who initiated the confrontation and that he was “a hundred percent positive he was directly involved in the confrontation of me getting assaulted.” Douglass also testified that Ali was one of four men who assaulted him and tried to rob him.

Circumstantial evidence also supports Ali’s convictions. Martin testified that Ali robbed her earlier that evening, wielding a knife. This evidence allows the inference that Ali possessed a knife that evening. In addition, Douglass

testified that when he regained consciousness after the attack, he saw a man holding what appeared to be a semiautomatic pistol. Police later found a similar-looking gun under the car seat where Ali was seated.

This evidence supports a reasonable inference that Ali acted as a principal or an accomplice in the crimes against Halliburton and Douglass. Ali's challenge to the sufficiency of the evidence fails.

We affirm.

Spencer, J.

WE CONCUR:

Dupre, C. S.

Becker, J.