

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

STATE OF WASHINGTON,)	
)	No. 63769-0-1
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
DWAYNE ERIC BRYANT,)	
)	
Appellant.)	FILED: <u>September 20, 2010</u>

spearman, j. — Dwayne Bryant contends the trial court erred by admitting impermissibly suggestive lineup and in-court identifications of Bryant as the person who robbed Zachary Foster. We hold the identifications at issue in this case contain sufficient indicia of reliability, and affirm.

FACTS

Zachary Foster was walking to his apartment from work. While crossing the street, two men approached him. One grabbed his left arm and said, “[g]ive me your shit.” The man walked Foster to the street corner, repeatedly demanding all of Foster’s belongings. The man pulled what appeared to be a handgun partway out of his pocket. Foster was next to the man during this entire incident, and Foster’s attention was focused on the man’s face throughout the incident, with the exception of the time the

man flashed the gun.

Foster placed all of his belongings on the ground. The man grabbed the belongings and turned to leave. As Foster turned to move away, the man struck him in the jaw, and Foster fell to the ground. The two men fled. Although it was dark, the attack occurred under streetlights. Foster returned to his apartment and called the police, who arrived within five minutes. Despite his injury, Foster was calm when he described the attacker to the Officer Michael Connors. Within ten minutes of the crime, Foster provided a very detailed description of the attacker. Foster described him as a black male, about 6' 1", medium build, a "scruffy" beard ("like he hadn't shaved in a few days"), short black hair with a tight black do-rag, about 20 years old, and wearing an oversized green hoody and dark blue jeans.

The description reminded Officer Connors of the defendant Dwayne Bryant, who Connors had seen in the neighborhood earlier that day. In his car, Connors keeps a binder with photos of individuals he has encountered in the neighborhood, who he believes to be "troublemakers." One of the photos was a black and white picture of Dwayne Bryant. Within 30 minutes of the crime, Officer Connors showed Foster the photo of Bryant. He also showed Foster a black and white photo of a second man from the binder, as well as color video clips of footage of four other African American individuals. The four individuals in the video clips were younger than the man Foster described, and their clothing, hairstyle, and weight differed. From this montage assembled by the officer on the scene, Foster indicated the photo of Bryant "looked just like" his assailant. Foster was "very adamant" that Bryant was the person who had just

robbed him.

The officer arrested Bryant. Bryant's clothing and appearance matched the description given by Foster. The State charged Bryant with first-degree robbery and second-degree assault. The defense moved to suppress the identification from the photomontage. After a CrR 3.6 hearing, Judge Jim Rogers found the montage was impermissibly suggestive:

1. The montage identification of the defendant by witnesses is inadmissible because the identification procedures were impermissibly suggestive.
2. The Court concludes that the black and white booking photographs [sic] of Dwayne Bryant was unduly suggestive as one of two booking photographs shown in conjunction with the in-car live video images of four individuals in plain clothes and shown from the knees up in front of a patrol car.
3. The Court finds that the second photograph does not look like the defendant, which necessarily directed attention to the defendant's black and white booking photograph.

The court, however, also concluded that an in-court identification would be admissible, because "there is not a substantial likelihood of irreparable misidentification that would taint a subsequent in-court identification."

In light of this ruling, the State conducted a lineup identification to see if Foster would be able to again identify Bryant as his assailant. Foster was "confident" his attacker was Bryant. The defense moved to suppress both this identification and any identification at trial, arguing both were tainted by the initial improper identification. Judge Michael Fox, the assigned trial judge, conducted the second suppression hearing. At the hearing, the State presented photographs of the lineup. Bryant called

Dr. Geoffrey Loftus, an expert witness on eyewitness identification.

Dr. Loftus opined that Foster would have had a difficult time with his initial ability to form a memory of his attacker, given Foster was under great stress, streetlights are of limited value in providing illumination, and “people aren’t as good at identifying members of other races” as they are “members of their own race.” Dr. Loftus thus agreed with Judge Rogers that the montage was impermissibly suggestive. Dr. Loftus further testified that the lineup was faulty because (1) Bryant was the only person common to the montage and the lineup; (2) the lineup was not conducted using double blind procedures; and (3) it was done simultaneously rather than sequentially. Judge Fox denied the motion to suppress the lineup.

At trial, Judge Fox permitted the defense to argue the eyewitness identification was faulty. As such, Dr. Loftus testified at trial consistent with his testimony at the motion to suppress. The jury heard testimony from both Foster and the arresting officer that when shown the photograph of Bryant shortly after the robbery, Foster indicated that Bryant looked like the robber. Judge Fox instructed the jurors not to consider this as evidence that Bryant was involved with the robbery; rather, it was to be considered only as evidence that Foster was shown Bryant’s photo shortly after the incident. Foster testified he identified Bryant at the lineup, and denied he was thinking of the earlier photo when selecting Bryant. Bryant testified in his own defense, and denied robbing or assaulting Foster. The jury acquitted Bryant of the assault charge, but convicted him of first-degree robbery. Bryant appeals.

DISCUSSION

Bryant argues the original photomontage tainted the lineup identification and Foster's in-court identification of Bryant. A trial court's decision to admit evidence of an out-of-court identification is within the sound discretion of the trial court and subject to an abuse of discretion standard. State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001). "[T]he test, a deferential test, is whether there are tenable grounds or reasons for the trial court's decision" to admit evidence of an out-of-court identification. Id. For the reasons described herein, we hold the trial court's admission of the out-of-court lineup identification and the in-court identification was based on tenable grounds.

Evidence of an out-of-court identification is admissible if it is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999) (citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). A two-step inquiry is required when determining whether an out-of-court identification is impermissibly suggestive. First, the defendant must show that the identification procedure was suggestive. Kinard, 109 Wn. App. at 433. A procedure is suggestive if it directs undue attention to a particular person. Eacret, 94 Wn. App. at 283. Generally, courts have found lineups to be impermissibly suggestive only when the defendant is the sole possible choice given the witness's earlier description. State v. Ramires, 109 Wn. App. 749, 761, 37 P.3d 343 (2002). If the defendant fails to meet the initial burden of showing the lineup was impermissibly suggestive, the inquiry ends. Id.

Second, if the defendant demonstrates the lineup is impermissibly suggestive, the court must determine whether, under the totality of the circumstances, the identification

contained sufficient indicia of reliability despite the suggestiveness. Id. In considering whether an identification contains a sufficient indicia of reliability, a trial court must consider the following factors:

(1) the opportunity of the witness to view the criminal at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Kinard, 109 Wn. App. at 434 (quoting State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000)).

Bryant contends the lineup was impermissibly suggestive because he was the only individual common to both the montage and the lineup. This fact alone, however, does not render a lineup inadmissible. See, United States v. Davenport, 753 F.2d 1460, 1463 (9th Cir. 1985) (“[t]he fact that [the defendant] was the only individual common to the photo spread and the lineup cannot, without further indicia of suggestiveness, render the lineup conducive to irreparable misidentification”).

But even if we assume the original photo montage was suggestive, application of the facts in this case to the above-described factors shows the lineup identification contained sufficient indicia of reliability. Although Foster identified Bryant as his attacker at the lineup approximately three and a half months after the crime, the record shows that Foster had ample opportunity to view his attacker at the time the crime was committed, as his attacker forced him to walk with him across the street; Foster's attention was focused on his attacker's face throughout the incident, with the exception of the time the man flashed the gun; Foster's detailed description of his attacker matched Bryant; and Foster was “confident” that Bryant was his attacker. As such, the

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trial court's decision to admit the lineup identification and the in-court identification was based on tenable grounds.

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Affirmed.

Spencer, J.

WE CONCUR:

Leach, A.C. J.

Appelwick, J.