IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65716-0-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
QUOC K. LU,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 30, 2012
	)	

LAU, J. — The results of a suggestive identification procedure may still be admitted if the procedure was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. In this case, the trial court ruled that any suggestiveness in the identification procedure was outweighed by facts demonstrating the challenged identification's reliability. Because Quoc Lu's challenges to that ruling and the sufficiency of the evidence lack merit, we affirm his convictions for second degree burglary, malicious mischief, and possession of cocaine.

FACTS

Around 5:40 a.m. on December 20, 2009, Connerilius Myles arrived for work at a

laundromat in South Seattle. As he parked his truck, a Hispanic male wearing a black hooded sweatshirt with white writing across the chest passed within a few feet of the truck. Myles watched as the man walked to a spot near the Magic Dragon restaurant, which is several doors down from the laundromat. Myles thought that the man looked out of place given the time of day, the way he was standing, and the way he was staring at Myles.

Myles entered the laundromat, turned off the alarm system, and walked back to the front door. He saw the Hispanic man run down Andover Street and turn left at the corner of Rainier Avenue South. Myles noticed broken glass outside the Magic Dragon that had not been there minutes earlier.

Around the same time, Ronald Glew parked his car 75 to 100 yards away from the Magic Dragon. He saw a man wearing a black, hooded jacket walk over to the Magic Dragon. The man looked around and then dropped his shoulder before going "straight through the door." Report of Proceedings (May 4, 2010) (RP) at 249. Glew estimated the man spent 30 seconds to 1 minute inside the restaurant before running out the door and heading down Andover Street.

Seattle Police Officer David Lindner coincidentally turned into the lot where Glew and Myles had parked. Lindner saw a Hispanic male jogging down Andover Street, wearing all black with a hood covering his head. Glew flagged down Lindner, told him what had happened, and described the man and his escape route. Lindner immediately left to look for the suspect but could not find him. Police units then set up

a containment area until a K-9 unit arrived.

At 6:11 a.m., King County Sheriff's Deputy Randall Potter arrived with his dog, Panzer, and began to search the area. Panzer tracked the suspect's scent down Andover Street, onto Rainier Avenue South, and then up a stairwell to a house located about two blocks from the Magic Dragon. Panzer found Lu leaning up against the house. He was wearing a black hooded sweatshirt with white writing across the chest. Lindner recognized Lu as the person he had seen running down Andover Street. Lindner detained Lu and waited for Myles and Glew to arrive for a show-up identification.

Myles arrived for the show-up at 6:20 a.m. He identified Lu without hesitation, stating, "[T]hat's him, that's him." RP at 225. Glew arrived shortly thereafter. He also identified Lu, but did so after learning that Myles had positively identified him. Police arrested Lu and found a crack pipe in his pocket. Residue in the pipe tested positive for cocaine.

The State charged Lu with second degree burglary, malicious mischief, and possession of cocaine. Prior to trial, Lu moved to suppress Myles's and Glew's identifications, arguing they were impermissibly suggestive. The court suppressed Glew's identification but admitted Myles's. The jury convicted Lu as charged. He appeals.

DECISION

Lu first contends the trial court erred in denying his motion to suppress Myles's

identification. Citing authorities criticizing single person show-up procedures, he argues for the first time on appeal that such procedures "are intrinsically impermissibly suggestive" and asks us to reexamine our prior decisions and hold that his show-up "was impermissibly suggestive." Appellant's Br. at 10. We need not revisit our previous decisions[1] because even when a procedure is impermissibly suggestive, its results are still admissible if the procedure is not "'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'" State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (quoting State v. Linares, 98 Wn.App. 397, 401, 989 P.2d 591 (1999)). We conclude the court in this case did not err in concluding that any suggestiveness in the show-up was outweighed by indicia of the identification's reliability.

The results of a suggestive identification procedure are admissible if the circumstances demonstrate sufficient reliability to overcome any suggestiveness. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). In making this determination, a trial court must consider "'(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)). We review

[1] We have previously held that show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).

the denial of a suppression motion to determine whether substantial evidence supports the challenged findings and whether the findings support the court's conclusions of law. State v. Cole, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004) (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Conclusions of law are reviewed de novo. Mendez, 137 Wn.2d at 214.

Here, the trial court considered the requisite factors and entered the following findings and conclusions of law:

> 4. In the case of the identification made by M[y]les, the . . . reliability factors outweigh any suggestiveness inherent in the show-up procedure. The evidence established that M[y]les did have an opportunity to view the suspect and that his attention was focused on the suspect. His prior description of the suspect was generally accurate. He was quite certain when making his identification. Finally, no more than 40 minutes had elapsed since he had seen the suspect at the scene.[2]
>
> 5. The out-of-court identification made by M[y]les is thus not impermissibly suggestive and is admissible in the State's case in chief. . . .

Lu advances three challenges to the findings and conclusions, none of which are persuasive.

First, he challenges the court's finding that Myles had an adequate opportunity to view him. The record amply supports the court's finding. Myles first observed Lu as he backed into his parking space. After he parked, he watched Lu pass directly in front of his truck. He then watched as Lu walked to a spot near the Magic Dragon restaurant. Shortly after Myles entered his workplace, he saw Lu run away from the restaurant, turn right on Andover Street, and then turn left on Rainier Avenue. Thus,

[2] We review a finding of fact that is incorrectly designated a conclusion of law for substantial evidence. State v. Norris, 157 Wn. App. 50, 67 n.11, 236 P.3d 225 (2010).

contrary to Lu's assertions, Myles viewed him for a relatively substantial period of time.

Second, Lu claims Myles's "description was not entirely accurate" because Lu is Asian and Myles described him as Hispanic. Appellant's Br. at 12. But that discrepancy was Myles' only error. He correctly described Lu as a male wearing a black, hooded sweatshirt with white writing across the chest. The record supports the trial court's finding that Myles' description of Lu was "generally accurate."

Finally, Lu contends Myles' identification is unreliable because he spoke to Glew about "the details they observed" before viewing Lu in the show-up, and because the court's suppression of Glew's identification suggests the court "had suspicions about the impermissibly suggestive nature of the show-up identifications . . . ." Appellant's Br. at 12-13. The finding Lu cites for his claim that Myles and Glew discussed their observations merely states, "Glew asked Myles if he had seen the suspect in front of the stores, and Myles said that he had." This finding does not undermine the reliability of Myles's identification, nor does the court's suppression of Glew's identification. The court suppressed Glew's identification for reasons unrelated to Myles's.

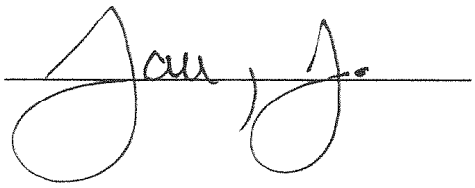
Lu next contends his malicious mischief conviction is not supported by sufficient evidence. He argues that the State failed to prove damage exceeding $750 as required by RCW 9A.48.080. We disagree.

A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding $750. RCW 9A.48.080. Damage includes the reasonable cost of

repairs to restore the injured property to its former condition. State v. Gilbert, 79 Wn. App. 383, 385, 902 P.2d 182 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the victim testified that the door to his restaurant was broken, and while he no longer had the repair receipt, he remembered paying "about $780." RP at 327. Viewed in a light most favorable to the State, the victim's testimony was sufficient to prove the value element of the offense beyond a reasonable doubt.

Affirmed.



WE CONCUR: