

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 65818-2-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
ANTHONY EUGENE HEROD,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 17, 2012
_____)	

Becker, J. — Anthony Herod appeals his convictions for two counts of first degree robbery. The State’s proof included eyewitness identification testimony by the robbery victims. It was disputed whether the victims were shown a police car video of the fleeing robber before or after they saw Herod at a show-up shortly after he was apprehended. We conclude the trial court did not abuse its discretion by declining to resolve this dispute, the show-up did not create a substantial likelihood of misidentification, and the admission of the witness identifications at trial did not violate due process. The convictions are affirmed.

According to testimony at trial, the robbery occurred about 11 p.m. on April 24, 2009. Matthew Tundo and Navin Pai were returning to Pai’s BMW convertible after attending the Ballard Jazz Festival. As they approached the car, Pai saw a man standing nearby, talking on his phone. Pai unlocked the car

from a distance of 20 feet using his key fob. As Pai began to get in, the man rushed up and pulled out a handgun. At gunpoint, he demanded and obtained from Pai and Tundo their cell phones, wallets, and the car keys, then drove off in the BMW.

Pai borrowed a cell phone from a passerby and telephoned 911 to report the robbery. A description of the assailant and the stolen vehicle was immediately broadcast over police radio. About 10 minutes later, Officers Ted Cablayan and Brian Kokesh spotted the stolen car elsewhere in Ballard. Officer Cablayan switched on the siren and flashing lights. The BMW began to accelerate. The officers gave chase. They followed the BMW as it turned down a dirt-paved, dead-end alley. The driver stopped the car, got out, and climbed over a fence. The driver's flight from the BMW was captured on the officers' in-car video recording device.

Officer Cablayan reported the driver's description and direction of travel over the police radio. Once reinforcements arrived, approximately 12 to 15 officers conducted a search. They soon found Herod, who had been hiding inside a van parked in a residential driveway approximately 30 yards from the scene of the abandoned BMW. One of the victims' wallets was with him. Minutes later, Tundo and Pai were escorted to Herod's location. There, they saw Herod standing beside a police car with a spotlight from one of the patrol cars shining on him. He was handcuffed with two officers holding his arms. Both Pai and Tundo positively identified Herod as the man who robbed them.

Herod was charged with two counts of first degree robbery. Before trial, Herod moved to suppress the identifications. The trial court held an evidentiary hearing and ruled orally that the identifications were admissible. During trial, both Pai and Tundo were permitted to testify about the show-up identification on the night of the robbery and were allowed to identify Herod in court as the man who robbed them. A jury convicted Herod as charged. He now appeals, contending the show-up was impermissibly suggestive and the victims' identifications were not otherwise reliable.

CRIMINAL RULE 3.6 FINDINGS OF FACT

Herod's first assignment of error concerns his motion under CrR 3.6 to suppress the witness identifications. If an evidentiary hearing is conducted on a motion to suppress identification evidence, the court is required by the rule to enter written findings of fact and conclusions of law. CrR3.6(b). Here, the court conducted a pretrial hearing. The court did not take testimony, but did review Herod's offer of proof and a certification for determination of probable cause. The court entered findings and conclusions after the trial. Herod contends the court failed to resolve a critical factual issue created by a conflict between Pai's testimony and Tundo's.

According to Pai's testimony, the two victims were first taken to the site where Herod was being held and asked whether he was the robber, and next were taken to the abandoned BMW where police showed them the video footage of the fleeing individual.¹ Tundo's testimony is not entirely clear on this point,

but can be understood as indicating that before they identified Herod, police showed them the video footage.²

The written findings provide in pertinent part:

The Disputed Facts: . . . Whether Mr. Tundo and Pai were shown an in car video depicting a “chase” and abandoning of Mr. Pai’s car before or after the show up identification is also contested.

FINDINGS AS TO THE DISPUTED FACTS: The Court does not make findings as to when a video may have been shown to Mr. Pai and Tundo, but does make conclusions with regard to admissibility of the evidence generally (see below).

The court then concluded the identification procedure was suggestive, but not impermissibly so, and there was not a substantial risk of misidentification. The court found “that although officers should not have shown a video of the defendant to the victims (if they did do so) prior to them making the identification, the identification was sufficiently reliable despite that being done.” The court also noted that the trial testimony “shed further light” on the video issue, “as Mr. Tundo indicated that the video only showed the individual’s back side as he was running from police and then scaling a fence.” At trial, the judge commented that because the video “didn’t show the guy’s face,” Tundo “couldn’t have mixed him up with the video.”

Generally, where findings are required, they must be sufficiently specific to permit meaningful review. In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Herod contends the result of the trial court’s failure to resolve the disputed issue about when the victims saw the police video is that we cannot

¹ Report of Proceedings (July 21, 2010) at 61-65.

² Report of Proceedings (July 20, 2010) at 87-88.

engage in meaningful review of the ultimate decision to admit eyewitness identification testimony by the victims. We disagree. The written findings and the related oral comments make the court's analysis sufficiently clear. The court did not think it was important to decide the exact timing of the showing of the video because, even if it did occur before the witnesses identified Herod, their identification was sufficiently reliable. A remand for entry of more complete findings—the remedy requested by Herod—is unnecessary.

SHOW-UP IDENTIFICATION

Herod argues that the show-up identification procedure used by Seattle police was impermissibly suggestive and the admission of evidence about the show-up at trial violated his due process rights. This court reviews de novo alleged violations of due process. In re Detention of Fair, 167 Wn.2d 357, 362, 219 P.3d 89 (2009).

To establish a due process violation in an identification procedure, a defendant must first show the procedure was unduly suggestive. State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000). Show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966, review denied, 108 Wn.2d 1027 (1987). Generally, a show-up identification held shortly after a crime and in the course of a prompt search for the suspect is permissible. State v. Springfield, 28 Wn. App. 446, 447, 624 P.2d 208, review denied, 95 Wn.2d 1020 (1981), overruled in part on other grounds by State v. Freeman, 153 Wn.2d

765, 108 P.3d 753 (2005).

After the defendant establishes that an identification procedure was suggestive, the court then considers whether the procedure was so suggestive as to create a “substantial likelihood of irreparable misidentification,” or whether, on the other hand, the identification was reliable despite the suggestive procedure used. Neil v. Biggers, 409 U.S. 188, 198-200, 93 S. Ct. 375, 34 L. Ed. 401 (1972), quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). In this analysis, the “key inquiry in determining admissibility of the identification is reliability.” State v. Rogers, 44 Wn. App. 510, 515-16, 722 P.2d 1349 (1986), citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). In determining the reliability of an identification, courts consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (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. Biggers, 409 U.S. at 199-200; Brathwaite, 432 U.S. at 114 (restating the Biggers factors); Linares, 98 Wn. App. at 401. As our Supreme Court has recognized, the development of these reliability factors was intended “to facilitate the admission of identification testimony, not hamper it.” State v. Vaughn, 101 Wn.2d 604, 609, 682 P.2d 878 (1984) (discussing Brathwaite).

Even if an identification appears weak after consideration of the factors, it

may nonetheless be admissible; the weight to be given an identification presents a question for the jury to resolve. Brathwaite, 432 U.S. at 117. Judgment regarding the credibility of witnesses and the weight of evidence is the exclusive function of the jury. Rogers, 44 Wn. App. at 517, citing State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

If the identification carries a substantial likelihood of misidentification, it violates the defendant's right to due process of law. Biggers, 409 U.S. at 197-98. Here, the trial court found that the identification procedure was suggestive, but not impermissibly so. After considering the Brathwaite reliability factors, the court determined the identifications were reliable.

Herod challenges this determination, emphasizing Tundo's testimony about being informed the "suspect" had been detained and his testimony that he saw the video before the show-up. This testimony is not dispositive. As the trial court recognized, the procedure used may well have suggested that the police believed Herod was the individual who committed the robbery. The question is whether the identifications were nonetheless reliable. We conclude they were. First, both Pai and Tundo had a good opportunity to view the assailant at the time of the robbery. Tundo was standing only about five feet away. He testified that he got an uninterrupted look at the man's face for at least 30 seconds. Pai, on the driver's side, was also able to get a good look at the man's face from only a foot away once he stepped out of the car and handed over the keys. The area was lit by streetlights and the car's interior dome light cast additional light on the

robber as he sat down in the BMW.

Second, the witnesses both demonstrated a good degree of attention to the man's appearance. Pai admitted that he initially focused on the gun, but he was able to describe the robber's clothing, hair, and complexion. Tundo was unable to see the gun at first, so it did not distract him until it was actually pointed at him. Although the two men had both consumed alcohol during the evening, there is no reason to suspect their powers of observation were impaired.

Third, the descriptions of the robber provided by Pai and Tundo matched Herod's appearance in significant detail. They said the robber was wearing a dark jacket; Herod was found with a black jacket. They said the robber's head was closely shaved; a police photograph and the video from the night in question showed him with a nearly bald hairstyle. There were some inconsistencies as to skin color; they described the robber as dark-skinned and Hispanic, while Herod is neither. But as Pai testified, the lighting may have distorted his perceptions of color. These inconsistencies do not substantially undermine the reliability of the identifications made by the witnesses.

Fourth, both witnesses demonstrated total certainty during the show-up. They could observe him clearly under the bright police light. Tundo told the officers he was "confident" that he had made a correct identification, and Pai stated he was "very certain."

Finally, only a very short time—approximately 45 minutes—elapsed

between the robbery and the show-up identification. See Rogers, 44 Wn. App. at 516 (finding a six-hour delay within permissible range).

An additional indicator of reliability is that the officers conducting the show-up separated Tundo and Pai. Cf. Velez v. Schmer, 724 F.2d 249, 252 (1st Cir. 1984) (finding reliability undermined where witnesses were permitted to view suspect jointly, “doubtless viewing petitioner and commenting, reassuringly, together.”) Moreover, the officers instructed the witnesses not to assume that Herod was the robber merely because he was in police custody. Cf. Velez, 724 F.2d at 251 (describing the officer’s comment upon presenting the suspect, “This is him, isn’t it?” as “particularly suggestive” and “totally unnecessary”).

On these facts, the reliability of the witnesses’ identification of Herod outweighed the harm of suggestiveness. Therefore, the identifications were properly admitted.

Affirmed.

Becker, J.

WE CONCUR:

Dupri, C. J.

Edenborn, J.