

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

STATE OF WASHINGTON,)	No. 66163-9-I
)	
Respondent,)	
)	
v.)	
)	
ABDIKADIR A. KHALIF,)	UNPUBLISHED OPINION
DOB 03/03/93,)	
)	
Appellant.)	FILED: November 14, 2011
)	

Ellington, J. — Abdikadir Khalif was adjudicated guilty of residential burglary. He contends the State’s case rested on an impermissibly suggestive out-of-court identification. Even assuming the show-up identification was suggestive, it did not create a substantial likelihood of misidentification, and the court did not err in admitting it. We affirm.

FACTS

When Amanda Schmidt, Lance Stevens, and their infant daughter returned home one evening just before 10:00 p.m., they heard unusual loud noises. Schmidt stepped onto the front porch to determine if the noises were coming from outside and realized the sounds were coming from the roof directly above her. Stevens followed Schmidt outside. The area was illuminated by the porch light. A man jumped off the rooftop above them and landed in a flower bed about five or six feet in front of

Schmidt. Schmidt and Stevens were able to see the back of the intruder as he “bunny hop[ped]” down some terraced flower beds until he reached the sidewalk and fled.¹

Stevens immediately called 911. He described the intruder as young, African-American, with a slim build, and close to six feet tall. He said the person was wearing jeans and a blue Denver Nuggets basketball jersey bearing the name and number of player Carmelo Anthony. Schmidt spoke to the operator and confirmed Stevens’ description, adding that the intruder had short, dark, curly hair, and that the number on the back of the jersey was a “12 or something.”²

Police officers went to the house and the surrounding area. Within minutes of receiving the report of the interrupted burglary, Officer Roberto Sabay saw Khalif walking with a companion near a car wash a few blocks away. Khalif was wearing a Carmelo Anthony Denver Nuggets jersey and jeans. Khalif’s companion was wearing a red hooded sweatshirt. Both men were visibly sweating although it was nighttime and was not hot outside.

The police officer detained Khalif and his companion. During a weapons frisk, a medallion Schmidt received as a teaching award was found in Khalif’s companion’s pocket.

Five to ten minutes after arriving at the house, a police officer asked Schmidt to accompany him to the car wash to identify a potential suspect. According to Schmidt, the officer said something “along the lines of we have a suspect that was found in the

¹ Report of Proceedings (RP) (Sept. 9, 2010) at 103.

² Ex. 20. The actual number on the jersey was 15.

close area and we think he meets the description you gave.”³ Schmidt said the officer also told her that a second person was with the individual who matched her description and told her about the medallion that person was carrying. Schmidt knew immediately that the medallion described was hers, and she believed the officers told her about it before she arrived at the car wash, although she could not be absolutely certain of the chronology.

When Schmidt arrived at the car wash, a police officer illuminated Khalif with the light from a patrol car. Schmidt asked the officers to turn Khalif around. Schmidt said she knew instantly that Khalif was the person she had just seen jump off her roof, because he had “exactly the same shirt and exactly the same haircut and exactly the same build.”⁴

The State charged Khalif with residential burglary. Khalif moved to suppress the out-of-court identification on the basis that the procedure was impermissibly suggestive. Following a CrR 3.6 hearing, the trial court found that although the “identification procedure was unnecessarily suggestive,” there was no “substantial likelihood of irreparable misidentification.”⁵

Schmidt identified Khalif again in court as the person who she saw jump off her roof. She testified she was able to recognize him based on the shape of his head and his build. The trial court adjudicated Khalif guilty as charged.

DISCUSSION

³ RP (Sept. 9, 2010) at 109.

⁴ Id. at 115.

⁵ Clerk’s Papers at 14.

A trial court's decision to admit evidence of an out-of-court identification is within the sound discretion of the court and subject to an abuse of discretion standard of review.⁶ The test is deferential and requires us to determine whether there are tenable grounds or reasons for the trial court's decision to admit the out-of-court identification.⁷

Evidence of an out-of-court identification is admissible if it is not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.⁸ A two-step inquiry applies. First, the defendant must show that the identification procedure was suggestive.⁹ If the defendant makes this showing, the court must assess whether, under the totality of the circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification.¹⁰ The following factors are relevant to this determination: “(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 [identification]; and (5) the duration between the crime and [identification].”¹¹ If the trial court's findings on the reliability factors are supported by

⁶ State v. Kinard, 109 Wn. App. 428, 432, 36 P.3d 573 (2001).

⁷ Id.

⁸ State v. Eacret, 94 Wn. App. 282, 285, 971 P.2d 109 (1999); 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)).

⁹ Kinard, 109 Wn. App. at 433.

¹⁰ Vickers, 148 Wn.2d at 118.

¹¹ Kinard, 109 Wn. App. at 434 (quoting State v. Barker, 103 Wn. App. 893, 905, 14 P.3d 863 (2000)); see also Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

substantial evidence, we will not disturb the court's ruling.¹²

Khalif's argument on appeal primarily relates to the first part of the inquiry. He asserts that as a general matter, show-up identifications are inherently suggestive.¹³ He argues that the identification in this case was particularly so because police officers told Schmidt they had detained a suspect who matched the description she gave, and also told her about the medallion his companion possessed.¹⁴

But even if we assume suggestiveness as found by the trial court, the reliability factors support the trial court's conclusion that the identification was nonetheless admissible. The record confirms that Schmidt had a good view of the intruder "in macro" as he fled the scene and her attention was highly focused on him.¹⁵ Schmidt was "100 percent" certain about the accuracy of her identification on the night of the incident.¹⁶ There was a short period of time, less than 20 minutes, between the crime and the identification and Schmidt had a "fresh, clear memory" of the intruder.¹⁷

¹² Kinard, 109 Wn. App. at 434.

¹³ This court has previously determined that show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987).

¹⁴ Khalif additionally maintains that the trial court should have drawn an unfavorable inference from the State's failure to call a law enforcement witness who could have testified about what information was provided to Schmidt before the show-up identification. It does not appear that Khalif raised this argument below, nor does it appear that a missing witness inference has any applicability in this context. Moreover, in making this argument, Khalif is merely offering another reason why he believes the identification procedure was suggestive. The trial court found that it was, and for purposes of our analysis, we assume the court was correct.

¹⁵ RP (Sept. 9, 2010) at 135.

¹⁶ Id. at 118.

¹⁷ Id. at 130.

Schmidt provided details that were largely accurate, especially regarding the intruder's "distinctive" clothing and physical appearance.¹⁸ The court expressly found Schmidt credible.

Khalif contends Schmidt's opportunity to see the intruder was insufficient to allow reliable identification. He points out that Schmidt watched the intruder for less than a minute and saw him only from behind. He also insists that his companion more closely matched Schmidt's description, and there is reason to doubt Schmidt's identification of him because the police did not ask Schmidt to identify his companion.

But the trial court took these facts into account when it assessed the totality of the circumstances. The court noted that Schmidt had an adequate opportunity to view the intruder. The court observed that Schmidt's vantage point provided a good view of the intruder's body as a whole and her ability to see his clothing was "excellent."¹⁹ The court also expressly considered the fact that Schmidt told the 911 operator that the suspect had hair that was less than one inch long, but not a "buzz cut," and that aspect of her description was arguably more consistent with Khalif's companion, whose hair was a little longer than Khalif's.²⁰ But the court weighed this arguable inconsistency against the countervailing consideration that Schmidt specifically said that one of the reasons she positively identified Khalif was because his hair was exactly as she remembered it. The court also weighed the fact that even if Khalif's

¹⁸ Id. at 104.

¹⁹ Id. at 135.

²⁰ Ex. 20.

hair was marginally longer than she described it, Schmidt was extremely accurate with respect to other significant details.

In sum, the facts cited by the trial court support its ruling that there was not a substantial likelihood of misidentification. The court's findings are supported by substantial evidence in the record. The court did not abuse its discretion in admitting the out-of-court identification.

Affirmed.

Edmonton, J.

WE CONCUR:

Grosse, J.

Cox, J.