IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHAWN MICHAEL CASEY, Appellant.	No. 66819-6-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2012

Leach, C.J. — Shawn Casey appeals his conviction for residential burglary. He claims that the court should not have allowed the victim to identify him at trial because she had been unable to identify him previously. He also complains that the court failed to enter findings of fact and conclusions of law on his suppression motion. Because Casey fails to show that the identification procedure was impermissibly suggestive, we affirm the conviction. Because the court did not hold a formal suppression hearing, no written findings were necessary. In his statement of additional grounds, Casey maintains that the court erred in denying his motion for a mistrial due to juror misconduct. Because the juror's brief exchange with a prosecution witness did not prejudice Casey, the court correctly denied this request.

Background

On May 30, 2010, Mari Iseman saw a man attempting to crawl through her living

room window. The intruder fell (or jumped) out the window, and Iseman spoke to him before he left her yard. She watched the man meet up with two other individuals and walk away from the area.

Later that day, police escorted Iseman to a busy street corner nearby where they were speaking to several people of interest, including Casey. From the back of a patrol car, Iseman could not identify anyone as the man she had seen inside her home, although she did recognize two people wearing the same clothes she had seen on the burglar's companions. Pretrial, Casey moved to preclude Iseman from identifying him in court as the perpetrator, on the basis that she had been unable to identify him before and that both the showup and the in-court identification were impermissibly suggestive. The judge allowed the in-court identification, and a jury convicted Casey of residential burglary. He appeals.

Standard of Review

We review a trial court's decision on a motion to suppress to determine whether the findings are supported by substantial evidence[1] and whether those findings, in turn, support the conclusions of law. We review conclusions of law de novo.[2]

Analysis

Casey argues that the court should have excluded Iseman's identification testimony. He based his motion to prohibit Iseman's in-court identification upon the fact that she did not identify him as the perpetrator during a police showup on the day

[1] State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997).

[2] State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

of the crime. Thus, he asserted that the in-court identification would be impermissibly suggestive because (1) she might recognize him from the showup and incorrectly attribute his face to her memory of the crime, and (2) Iseman would presumably identify whoever was seated at the defense table as the perpetrator.

Due process requires any out-of-court identification procedure not be "'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'"[3] We employ a two-part test to determine the admissibility of an out-of-court identification.[4] First, the defendant must show the identification procedure was impermissibly suggestive.[5] If the defendant fails to make this showing, the inquiry ends.[6] If the defendant establishes that the procedure was impermissibly suggestive, the court then considers whether the challenged procedure created "a substantial likelihood of irreparable misidentification."[7] Examples of impermissibly suggestive pretrial identifications include police officers telling a victim during a lineup which person had been arrested for the crime[8] and showing witnesses photo arrays including multiple shots of the same person.[9]

By contrast, the procedure employed here was not suggestive. After the burglary, police drove Iseman to a street corner in her neighborhood where they had

[3] 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)).
[4] Vickers, 148 Wn.2d at 118.
[5] Vickers, 148 Wn.2d at 118.
[6] Vickers, 148 Wn.2d at 118.
[7] Vickers, 148 Wn.2d at 118.
[8] State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985).
[9] Simmons v. United States, 390 U.S. 377, 382-84, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

stopped Casey and his two companions. Iseman stayed in the police car during the showup, which meant she viewed the suspects from a distance. She also noted that there were about a dozen people in the area watching the police activity. With all this going on, she remembers seeing the police talking to two people who matched the clothing description of Casey's two companions. At trial, Iseman testified that she was unclear if the police showed her two people or three. Regardless, she did not positively identify a suspect at that time. While we do not assume the lack of a positive identification that day provides clear evidence that the procedure was not suggestive, Casey points to nothing in the record that supports his theory that the showup was impermissibly suggestive. Indeed, if Iseman did not see him at the showup, then Casey's claim that the showup tainted her memory of the burglary fails.

Even if Casey could show the pretrial identification was suggestive, we find Iseman's in-court testimony was reliable. In determining the reliability of eyewitness identification, we consider (1) the witness's opportunity 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 witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation.[10] Casey argues that the eight-month lapse between the crime and the trial, along with Iseman's description of the burglar as "darker-complected, possibly Hispanic," show that her identification is unreliable. Based upon the totality of the circumstances, we disagree. Iseman spoke to the intruder at close range in broad daylight. At trial, she was very confident that

[10] Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

Casey was that man. Even though he had a lighter skin tone than she had described to police, she recognized his facial features. Overall, Iseman's identification presents sufficient indicia of reliability to support the judge's decision not to suppress. The infirmities Casey identifies provide a basis for cross-examination, not suppression.

Casey alternatively argues that the in-court identification procedure itself is impermissibly suggestive and warrants reversal. Both state and federal courts have firmly rejected this argument on many occasions.[11] Again, Casey urges us to conduct a reliability analysis, but the test he cites from Manson v. Brathwaite[12] only weighs such factors in the context of an impermissibly suggestive identification to determine if the procedure caused an irreparable misidentification. As noted by the court in Manson,

> Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[13]

Casey also claims that the court erred by failing to enter written findings of fact and conclusions of law on the motion to suppress. But CrR 3.6(b) only requires written findings of fact and conclusions of law if the trial court conducts an evidentiary hearing. Despite the parties' dispute over whether the showup identification procedures may

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[11] See e.g., United States v. Bush, 749 F.2d 1227, 1232 (7th Cir. 1984) (suggestive circumstance of having defendant sit at counsel table does not establish a due process concern regarding an in-court identification); State v. Smith, 36 Wn. App. 133, 138-40, 672 P.2d 759 (1983) (identification not unduly suggestive where a black defendant was seated alone at defense counsel table with no other black persons nearby).

[12] 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[13] Manson, 432 U.S. at 116.

have tainted Iseman's memory of the event, both sides agreed that having Iseman testify at a suppression hearing could prejudice any identification she made at trial. Therefore, the trial court did not conduct an evidentiary hearing and was not required to enter written findings of fact and conclusions of law. CrR 3.6(a) does require a court to enter a written order setting forth its reasons for determining no evidentiary hearing was required. However, failure to enter this order is harmless error if, as here, the court's oral ruling provides sufficient evidence to permit meaningful appellate review.

In his statement of additional grounds for review, Casey argues that the trial court either should have granted a mistrial or substituted an alternate juror when a juror disclosed an accidental ex parte communication with a prosecution witness. We review a trial court's ruling on a motion for a mistrial for an abuse of discretion.[14] In assessing alleged juror misconduct, the trial judge necessarily acts as "both an observer and decision maker."[15] Because such "'fact-finding discretion'" allows the judge to weigh the credibility of jurors, we must accord the court's decision substantial deference.[16]

A court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds.[17] A trial court should grant a mistrial only if the defendant has been so prejudiced that nothing short of a new trial could ensure a fair trial.[18] Although prejudice is presumed where misconduct has occurred, that presumption may

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[14] State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

[15] State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

[16] Jorden, 103 Wn. App. at 229 (quoting Ottis v. Stevenson-Carson Sch. Dist., No. 303, 61 Wn. App. 747, 753, 812 P.2d 133 (1991)).

[17] State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009).

[18] Gamble, 168 Wn.2d at 177 (citing State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000)).

be overcome by an adequate showing that the conduct did not affect the deliberations.[19] A decision of whether the alleged misconduct exists and is prejudicial is a matter within the discretion of the trial court.[20]

Here, one juror found herself walking next to a prosecution witness as they both were leaving the building. The juror said hello and thanked the witness for her testimony that day. The witness did not even respond with a greeting. The juror did not discuss the encounter with any other jurors, and when interviewed by the court, she stated the contact did not influence her own decision-making in the case. Because no substantive communication about the case occurred and the juror was not personally biased by the encounter, we find no abuse of discretion in the court's decision not to grant a mistrial.

Casey's remaining additional grounds all relate to the credibility of the prosecution's witnesses. Because we defer to the trier of fact on issues of witness credibility,[21] we do not consider such issues on appeal.

Conclusion

Because Iseman's in-court identification of Casey did not deprive him of a fair trial and the issues raised in his statement of additional grounds are without merit, we affirm.

Leach, C.J.

[19] Depaz, 165 Wn.2d at 856.

[20] Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

[21] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

WE CONCUR: