IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66849-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
HOWARD LEE ROSS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 30, 2012
	)	

Lau, J. — Howard Ross challenges his conviction for second degree burglary, arguing that a showup identification procedure was impermissibly suggestive. We conclude, however, that the trial court properly determined the showup did not violate Ross's due process rights by creating a substantial likelihood of misidentification. We also reject Ross's claim that the record raised doubts about his competency to stand trial. Accordingly, we affirm.

FACTS

The State charged Ross with one count of second degree burglary. Prior to trial, he moved to suppress a showup identification. The trial court's findings of fact, entered

after the CrR 3.6 hearing, are essentially undisputed and establish the following sequence of events.

Shortly after 7 p.m. on December 8, 2010, Aaron Aiu, a loss prevention officer at the Bellevue Nordstrom store, watched a man enter the sportswear department. The man approached to within 10 to 12 feet of Aiu and stopped at a Gucci display for about 15 seconds. Aiu described the man as African-American, about 6'2" tall and 170 pounds, with black hair, and wearing a Mariners jacket, white shirt, dark denim pants, and dark shoes.

When the man took two bags and a hat from the Gucci display without looking at the price tags, Aiu became particularly attentive and followed the man as he walked past several cash registers and then left the store without paying for the items. The man ignored Aiu's commands to drop the items and got into a tan four-door sedan. As the car drove away, Aiu advised another security officer of the man's description, the description of the car, and the car's license plate number and asked him to call the police.

About four minutes later, Bellevue Police Officer Chris Nygren saw a car matching Aiu's description. The car stopped, and a man wearing a sports team jacket and dark pants got out of the passenger side, carrying a bag in his hand. Nygren told the man to stop. As Nygren approached, he noticed a Gucci symbol on the bag. Nygren then placed the man, appellant Howard Ross, in handcuffs.

Bellevue Police Officer Shawn Curtis responded to Officer Nygren's location and confirmed that Ross matched the broadcast description. Curtis also saw two Gucci

bags on the ground nearby. The Nordstrom price tags and security devices were still attached.

Curtis drove back to the Nordstrom store and picked up Aiu for a showup. Curtis advised Aiu that the police had detained someone and read the following admonishment to Aiu:

> You're being asked to look at a suspect. The fact that this suspect is being shown to you should not influence your judgment. You should not conclude or guess that the suspect committed the crime just because you're being shown the suspect. You are not obligated to identify anyone. It is just as important to relieve an innocent person from suspicion as it is to identify guilty persons. Please do not discuss this case with other witnesses nor indicate in any way if you have identified a suspect.

Report of Proceedings (RP) (Mar. 7, 2011) at 18-19.

Curtis and Aiu arrived for the showup about 23 minutes after Aiu reported the crime. Before the patrol car came to a stop, Aiu immediately and positively identified Ross as the man who had taken the Gucci items. During the showup, Ross stood about 10 feet away from Aiu and about 5 to 10 feet away from Nygren's police car. After the identification, Officer Curtis placed Ross under arrest.

The trial court denied Ross's motion to suppress, concluding that the showup procedure was not unduly suggestive and that, in any event, there was no substantial risk of misidentification.

Following the trial court's suppression ruling, Ross waived his right to a jury trial and agreed to a bench trial based on stipulated evidence. The court found Ross, who was the subject of a current Nordstrom trespass warning, guilty as charged of second degree burglary. In its oral ruling, the court noted that it did not need to rely on the

showup identification to find that Ross was the man who entered the Bellevue Nordstrom and took the Gucci items. The court imposed a 22-month standard range sentence.

DECISION

Ross contends that the trial court violated his due process rights when it denied his motion to suppress an impermissibly suggestive and unreliable showup identification. He argues that without the showup identification, the evidence was insufficient to establish his presence in the Bellevue Nordstrom.

We review the trial court's decision on a motion to suppress to determine whether substantial evidence supports the findings of fact and whether those findings, in turn, support the conclusions of law. See State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). We review conclusions of law de novo. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

An out-of-court identification procedure satisfies due process if it is not so impermissibly suggestive as to give rise to "a substantial likelihood of irreparable misidentification." State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999). A defendant claiming a due process violation must first establish that the identification procedure was "unnecessarily suggestive." State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987); see also State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If the defendant satisfies this threshold burden, the court then assesses whether, under the totality of the circumstances, the procedure was so suggestive as to create a substantial likelihood of irreparable misidentification.

The key factor in determining admissibility is whether sufficient indicia of reliability supported the identification despite any suggestiveness. 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 making this assessment, the court considers all relevant factors, including (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. Linares, 98 Wn. App. at 401; Neil v. Biggers, 409 U.S. 188, 198–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

Ross maintains that the showup here was impermissibly suggestive because police told Aiu that they may have stopped the suspect and then conducted the showup with Ross in handcuffs, standing near a police car and next to the Gucci items taken from the store. But contrary to Ross's suggestion, a showup is not per se impermissibly suggestive. Guzman-Cuellar, 47 Wn. App. at 335. The mere fact that the defendant is standing handcuffed near a police car does not render the showup unnecessarily suggestive. Guzman-Cuellar, 47 Wn. App. at 336 (defendant standing handcuffed and about 15 feet from police car did not render showup unnecessarily suggestive). Officer Curtis's detailed admonishment before the showup reinforced the principle that Aiu was not obligated to identify anyone and that the fact the police had stopped a suspect should not influence his judgment.

Moreover, the evidence supports the trial court's determination that the

identification was reliable despite any suggestiveness in the procedure. First, as the trial court found, Aiu had a reasonably good opportunity to see the suspect. Aiu watched the man for about 15 seconds as he walked directly toward him and then stopped at the Gucci display. The store was well lit, and Aiu stood about 10 to 12 feet away as the suspect took the items and then turned to leave. Aiu then followed closely behind the suspect as he walked out the store and got into a car. Aiu estimated that his total contact with the suspect lasted about two minutes.

Second, as a trained and experienced security officer, Aiu's job involved paying attention as he watched the customers. Aiu testified that he paid particularly close attention once he saw the suspect pick up the Gucci items without looking at the price tags.

Third, Aiu provided a generally accurate description of the suspect and his clothing, including his coat, shirt, and shoes. Aiu's description of the car and license plate number was also accurate. Ross argues that this factor does not favor reliability because Aiu described the suspect as having black hair and being 6'2". Ross points to evidence indicating that he is 5'11" and that the suspect was wearing a hat that covered his hair. But such minor discrepancies do not undermine the general accuracy of Aiu's description or affect the admissibility of the identification. See Manson, 32 U.S. at 117 (weight to be given identifications with some questionable features is for the trier of fact).

Fourth, Aiu immediately and positively identified Ross before the police car even stopped. The area was well lit by a streetlight, and Aiu was about 10 feet away and

could clearly see Ross and his clothing.

Fifth, only a short time—about 23 minutes—elapsed between the theft and the showup. See Roger, 44 Wn. App. at 516 (six hours between offense and showup "well within the permissible range").

Under the circumstances, substantial evidence supports the trial court's findings on the factors supporting reliability. Those facts, in turn, support the conclusion that there was no substantial likelihood of misidentification. Aiu's identification was therefore admissible.[1]

Ross contends that when assessing reliability, the trial court should also consider the cross-racial nature of an identification. But because Ross failed to raise this contention below, the trial court had no opportunity to address the issue in conjunction with the facts of this case. We therefore decline to consider the issue for the first time on appeal. See State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); RAP 2.5(a).

Ross next contends that his conviction must be reversed because the trial court failed to conduct a competency hearing. The trial court must order a competency examination whenever there is "reason to doubt" a defendant's competency. RCW 10.77.060(1). A defendant is competent to stand trial if he or she has the capacity to understand the nature of the proceedings and to assist in his or her own defense. State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991); RCW 10.77.010(15).

[1] Because Aiu's identification was admissible, we do not address the trial court's determination that even without the identification, the evidence was sufficient to support Ross's conviction.

The trial court necessarily has discretion in determining whether there is a "reason to doubt" the defendant's competency; there are no definitive signs of incompetency that will invariably require a hearing. State v. O'Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979). Factors the court may consider in making this determination include "the 'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.'" In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

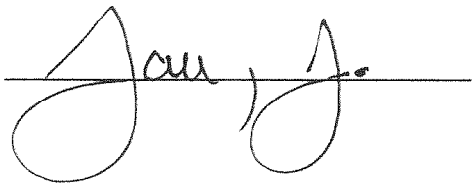
Ross alleges two incidents should have raised a doubt about his competency. The first involves Ross's statements to Officer Curtis shortly after his arrest. In his report, Curtis stated that Ross made several "out of place remarks," accusing Curtis of "micro-chipping" him and asserting that he was "going on a spaceship." Ex. 1, at 1. But Curtis noted that Ross's behavior was consistent with someone who had taken a stimulant or hallucinogen. Neither defense counsel nor Ross referred to this incident at the time of trial, and nothing in the record suggests that whatever may have afflicted Ross at the time of arrest had any effect on his competency at the time of trial. Curtis's comments in the arrest report did not raise any doubts about Ross's competence.

Ross also points to comments he made to the trial judge about learning certain information through "ESP" and what "they" had told him. RP (Mar. 8, 2011) at 57. But the isolated, single reference to ESP and vague allusions to "they" occurred during a colloquy with the court about Ross's decision to proceed on the basis of stipulated evidence. Viewed in context, the references are ambiguous at best and appear to be

little more than Ross's attempt to communicate his confidence and belief that he will prevail whether he goes to trial or not.

Moreover, it is apparent throughout the lengthy and detailed colloquy, as well as during two earlier colloquies in which he explained in detail his decision to waive a jury trial and not to testify at the CrR 3.6 hearing, that Ross fully understood the rights that he was waiving, that he responded appropriately to the court's questions and explanations, and that he was able to communicate effectively with his counsel. Indeed, Ross repeatedly exhibited a sense of humor that the trial court clearly recognized. Under the circumstances, the record does not raise any doubts about Ross's competency to stand trial. The trial court did not abuse its discretion in not ordering a competency hearing.

Affirmed.



WE CONCUR: