IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CALVERT RAUB ANDERSON, JR., Appellant.	No. 42154-2-II UNPUBLISHED OPINION

Johanson, A.C.J. — Calvert Raub Anderson, Jr., appeals his jury trial conviction for theft of a motor vehicle. He argues that the trial court erred when it denied his motion to suppress an eyewitness identification based on an impermissibly suggestive identification procedure involving the use of a single photograph. Because Anderson fails to show that the trial court erred in finding that the identification process did not create a substantial likelihood of irreparable misidentification, we affirm.

FACTS

On January 1, 2011, at about 11:00 am, Regnol Coiteux's car was stolen while it was warming up outside his home. Two of Coiteux's neighbors, Nicholas Wagner and Mackie Perryman, later identified Anderson as the person who took the car. The State charged Anderson with theft of a motor vehicle.

I. Motion to Suppress Identification

Before trial, Anderson moved to suppress Wagner's identification, arguing that the identification procedure leading to Wagner's identification was impermissibly suggestive and, therefore, violated his (Andersons') Fifth and Fourteenth Amendment rights. Following a suppression hearing at which Thurston County Deputy Sheriff Thomas Tinsley testified, the trial court found:

> 1. On January 1, 2011 at about 11:00 a.m., victim Regnol Coiteux reported that someone had stolen the car [Coiteux] had left running in front of victim's residence.
> 2. Deputy Tom Tinsley arrived a few minutes later to investigate the car theft. Deputy Tinsley interviewed the victim who thought that his neighbor, witness Nicholas Wagner, may have seen something, because Wagner had been working in his yard taking down Christmas lights when the car had been stolen.
> 3. Tinsley then found and interviewed Wagner, who told Tinsley that he had been working out in his yard when he saw another neighbor, Mackie Perryman, talking to a male in a gray hoody sweatshirt just prior to the theft. Wagner described the male as medium complexioned, average height and weight, with a goatee, and in his mid-twenties. Tinsley estimated that Wagner had been about 30 feet away from the male when the male was talking with Perryman.
> 4. Wagner told Tinsley that Perryman and the male eventually separated, and the male walked up to victim Coiteux's unattended car, which had the motor running, and yelled towards Coiteux's residence three times "I'm going to steal your car!" The male then entered Coiteux's car and drove away.
> 5. Tinsley then interviewed witness Perryman, who confirmed that the male had spoken to him and had exited the residence at 736 Edelweiss prior to their chat.
> 6. Tinsley then went to 736 Edelweiss and interviewed Nicole Haas and her younger sister who told Tinsley the male's name was Calvert Anderson. Nicole further stated that Anderson was 27 years of age.
> 7. Tinsley located a jail booking photo of Calvert Raub Anderson . . . and pulled the picture up onto his mobile computer screen. As Tinsley went to show Wagner the picture on his screen, Wagner exclaimed, even before Tinsley could ask Wagner a question, "That's him! That's the guy who was shouting, 'I'm stealing your car!'" Wagner explained to Tinsley that the picture on Tinsley's computer screen was a picture of the guy who took Coiteux's car.

Clerk's Papers (CP) at 3-4.

Based on these findings,[1] the trial court concluded that (1) Anderson had failed to show that the identification procedure was impermissibly suggestive; and (2), even if the procedure was impermissibly suggestive, the "totality of the circumstances" showed that it did not "give rise to a substantial likelihood of irreparable misidentification." CP at 4-5. The trial court denied Anderson's motion to suppress.

In addition, in its oral ruling, the trial court addressed the five factors courts use to determine if there was a substantial likelihood of irreparable misidentification that are "set forth in [*State v. Linares*, 98 Wn. App. 397, 989 P.2d 591 (1999), *review denied*, 140 Wn.2d 1027 (2000)]." Verbatim Report of Proceedings (VRP) (May 9, 2011) at 27. First, it addressed "the opportunity of the witness to view the criminal at the time of the crime," finding that Wagner had a good opportunity to observe the man who took Coiteux's car because he (Wagner) was only about 30 feet away and the man's behavior would have caused someone nearby to "focus[] on that individual." VRP (May 9, 2011) at 28. Second, the court addressed "the witness's degree of attention," stating that although Wagner had been engaged in other activity at the time, he had observed the man who took the car twice—first when the man was talking to another neighbor and then when the same man was yelling in front of Coiteux's car, which would have caught Wagner's attention. VRP (May 9, 2011) at 28. Third, the court noted that there was "no descriptor that varies from the actual description of the defendant in this particular case," and

[1] Anderson does not challenge any of these findings. Accordingly, they are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

concluded that Wagner's "description was accurate in every respect." VRP (May 9, 2011) at 28. Fourth, the court addressed "[t]he level of certainty demonstrated at the confrontation," noting that Wagner told the deputy that he believed he could identify the person if he saw him again before Wagner ever saw the photograph. VRP (May 9, 2011) at 28. And fifth, the court addressed, "[t]he time between the crime and the confrontation," noting that "a short period of time . . . approximately an hour" passed between Wagner seeing the man take the car and Wagner's identification. VRP (May 9, 2011) at 29. Based on these factors, the trial court concluded that Anderson had failed to make a substantial showing of irreparable misidentification.

II. Trial

At trial, Coiteux testified that on the morning of January 1, he had gone inside his house while his red 1998 Ford Escort was warming up, leaving the car unlocked and running. When he looked out of his window less than five minutes later, he saw his car driving away. Coiteux called the police. When a deputy arrived, Coiteux told the deputy that one of his neighbors, Wagner, was outside when the car was stolen.

Wagner testified that, on the morning of January 1, he was in his yard taking down his Christmas lights, when he saw a man across the greenway talking to a neighbor on Edelweiss Street; Wagner then saw the man approaching across the greenway near his property. The man walked past Wagner's house to Coiteux's idling car. The man stood next to the rear passenger side of the car and "call[ed] out," 'I'm going to steal this car"; he then walked to the driver's side of the car and again said, "'I'm going to steal this car.'" VRP (May 16, 2011) at 40-41. After waiting a "couple seconds," the man opened the driver's door; announced, "'I'm stealing this

car," a third time; got into the car; and "sped off." VRP (May 16, 2011) at 41. Believing that this was a joke, Wagner did not call the police.

Later that day a deputy contacted him about the theft. Wagner testified that he had identified Anderson in the single photograph the deputy showed him; he then identified Anderson in the courtroom. On cross-examination, Wagner admitted that although he had identified Anderson, he had never been closer than 20 to 25 feet to Anderson, he had been engaged in taking down his Christmas lights at the time, he was never face to face with the person who took the car, he never conversed with the person, and the deputy did not show him an array of photographs.

Perryman testified that he was outside warming up his own car on the morning of January 1, when he noticed a man he had seen in the neighborhood "a couple times before" leaving a house across the street from Perryman's house on Edelweiss. VRP (May 16, 2011) at 56. The man approached him and asked for a ride, stating that he believed that the police were coming. Perryman told the man that he did not want to be involved in "'[w]hatever [was] going on'" and to go away. VRP (May 16, 2011) at 52. The man left and walked across a "green space" that was near Perryman's residence. VRP (May 16, 2011) at 53.

Perryman left for work a few minutes later. As he stopped at a nearby crossroad, a "smaller," red car approached him from behind. VRP (May 16, 2011) at 54-55. The red car was going so fast, Perryman thought it would "rear-end" him, but it drove past him, crossed the intersection, drove down an embankment, and then drove in to "a bushy area." VRP (May 16,

2011) at 54. As the car passed, Perryman "noticed a face in the car" that "kind of look[ed] like the guy [he] was just speaking to." VRP (May 16, 2011) at 54. About a week after the incident, Perryman identified Anderson as the man he had encountered that day from a photograph that a deputy showed him. He also identified Anderson in the courtroom. Anderson never challenged Perryman's identification.

Deputy Tinsley testified that Wagner had informed him that the man who took the red car had been talking to Perryman before approaching the car. Deputy Tinsley also testified that he had interviewed Nicole Hass at the residence across the street from Perryman, which was 736 Edelweiss. Based on the information he got from Haas, Deputy Tinsley located Anderson's photograph on his computer. When he showed Walker and Perryman Anderson's photograph, they both identified the man in the photograph as the man they had seen on January 1.

Anderson did not present any witnesses. The jury found Anderson guilty of motor vehicle theft. Anderson appeals his conviction.

ANALYSIS

Anderson argues that the trial court erred in admitting Wagner's identification testimony because (1) the identification procedure was impermissibly suggestive "as a matter of law," (2) the trial court failed to analyze the five *Biggers*[2] factors, and (3) the identification procedure was so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification. Br. of Appellant at 6. Because the trial court addressed the *Biggers* factors on the record and properly concluded that there was no substantial likelihood of irreparable

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

misidentification, we disagree.

I. Standard of Review and Due Process Test

We review a trial court's denial of a CrR 3.6 motion to suppress "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial 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), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)). Unchallenged findings of fact are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

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." *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (citing *Linares*, 98 Wn. App. at 401). We employ a two-part test to determine the admissibility of an out-of-court identification. *Vickers*, 148 Wn.2d at 118. First, the defendant must show the identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118 (citing *Linares*, 98 Wn. App. at 401). If the defendant establishes that the procedure was impermissibly suggestive, we then consider whether the challenged procedure created "a substantial likelihood of irreparable misidentification." *Vickers*, 148 Wn.2d at 118 (citing *Linares*, 98 Wn. App. at 401).

II. *Biggers* Factors

Even assuming that the presentation of a single photograph is impermissibly suggestive as a matter of law, *see State v. Maupin*, 63 Wn. App. 887, 896-97, 822 P.2d 355, *review denied*, 119 Wn.2d 1003 (1992), Anderson is not entitled to relief unless he can also show that this "'suggestiveness created a substantial likelihood of irreparable misidentification.'" *State v. Ratliff*, 121 Wn. App. 642, 649, 90 P.3d 79 (2004) (quoting *Maupin*, 63 Wn. App. at 897). This he fails to do.

In determining whether there is a substantial likelihood of irreparable misidentification, Washington courts examine the five *Biggers* factors: "(1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the degree of certainty demonstrated at the line up, and (5) the time between the crime and the line up." *Ratliff*, 121 Wn. App. at 649 (citing *Maupin*, 63 Wn. App. at 897); *see also Vickers*, 148 Wn.2d at 118; *Linares*, 98 Wn. App. at 401. Although the trial court did not address these factors in its written findings of fact and conclusions of law (likely because it concluded that the identification procedure was not impermissibly suggestive), it expressly addressed these factors, which it referred to as the *Linares* factors, in its oral ruling.[3]

In addressing the first factor, the trial court found that Wagner had a good opportunity to observe the man who took Coiteux's car because Wagner was only 30 feet away and the man's

[3] Although a trial court may err when it fails to enter written findings of fact and conclusions of law, such error is harmless if the court's oral findings are sufficient to permit appellate review. *State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993).

strange behavior would have caused someone nearby to "focus[] on that individual." VRP (May 9, 2011) at 28. We agree. Although Wagner was busy in his yard when the man first approached, Wagner clearly stopped what he was doing and focused on the man. The record also shows that the contact occurred at about 11:00 am, in daylight, and that the two were only about 30 feet apart. These facts support a finding that Wagner had an excellent opportunity to view the man who took the car.

The trial court then addressed the second factor, "the witness's degree of attention." VRP (May 9, 2011) at 28. It noted that although Wagner had been engaged in other activity at the time, he had observed the man twice, first talking to another neighbor and then yelling in front of Coiteux's car, which clearly caught his attention. Again, the trial court's unchallenged findings of fact support this conclusion. Not only had Wagner watched the man from the time he first saw the man with Perryman, Wagner described the man's behavior and actions in great detail—indicating a significant degree of attention. Thus, these facts support a finding that Wagner was devoting much of his attention to the man who approached Coiteux's car.

As to the third factor, the accuracy of Wagner's prior description of the man, the trial court noted that there was no indication that Wagner's description was different from the defendant's appearance. The suppression hearing record does not contain any evidence regarding whether Wagner's description of Anderson was correct or not. Accordingly, this factor is neutral.

The trial court also addressed the fourth factor, "[t]he level of certainty demonstrated at the confrontation." VRP (May 9, 2011) at 28. The court noted that Wagner had told the deputy that he believed he could identify the person if he saw him again before ever seeing the photograph. Additionally, Wagner immediately, without hesitation and without any prompting from the deputy, identified Anderson's photograph. These facts support a finding that Wagner's level of certainty was high.

Finally, the trial court addressed "[t]he time between the crime and the confrontation," noting it was "certainly a short period of time . . . approximately an hour." VRP (May 9, 2011) at 29. Deputy Tinsley's testimony supports this finding. This relatively short gap in time weighs in favor of the admissibility of the identification evidence.

Of the five factors, four weigh in favor of admissibility and one is neutral. Thus, Anderson has failed to show that the trial court erred when it found that the identification procedure's suggestive nature did not create a substantial likelihood of irreparable misidentification. Accordingly, the trial court did not err in admitting Wagner's identification testimony.

Furthermore, because Perryman also identified Anderson as the man who stole the car, Wagner's testimony was cumulative and any potential error in admitting it was harmless.[4]

[4] A constitutional evidentiary error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error; the State bears the burden of establishing harmless error in this context. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.