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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

JUN 13 2011

IN AND FOR THE COUNTY OF MOHAVE

VIRLYNN TINNELL
CLERK SUPERIOR COURT

BY: PSG DEPUTY

HONORABLE STEVEN F. CONN
DIVISION 3
DATE: JUNE 9, 2011

SC*
VIRLYNN TINNELL, CLERK

CORRECTED COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,
Plaintiff,

vs.

JOHN CHARLES MCCLUSKEY,
Defendant.

No. CR-2010-00823

The Court has reviewed the testimony and evidence presented at the evidentiary hearing on June 7, 2011. The Court has considered the arguments of counsel at the above hearing. The Court has now watched Exhibits 2 and 3 in their entirety. The Court had previously ruled that the line-up itself which was used to identify the Defendant was not unduly suggestive. The Court did not rule on the issue of whether the procedure followed in showing the line-up to the 2 alleged victims was itself unduly suggestive. The Court now addresses that issue.

As indicated above, the Court has now reviewed both Exhibit 2 and 3. Exhibit 2 showed what happened in Room 1 from approximately 7:44 a.m. to 8:45 a.m. on July 31, 2010. Exhibit 3 showed what happened in Room 3 from approximately 7:44 a.m. to 10:13 a.m. on July 31, 2010. After spending 3½ hours watching these DVDs, the Court found itself wondering which was more disconcerting, that it had spend that amount of time to see what was probably about 20 minutes of relevant conduct or that both the prosecutor and witness could have asserted so confidently that [REDACTED]

[REDACTED] was not in the room when [REDACTED] viewed the line-ups. Giving them the benefit of the

doubt, the Court will assume that they have not viewed the DVDs of those procedures recently and the witness is simply mistaken about what happened over 10 months ago.

It is obvious from reviewing Exhibit 3 that both alleged victims were together in Room 3 for about half an hour before Detective Conway came in, at which time he interviewed [REDACTED], using [REDACTED] to interpret. Detective Conway then said he had some photos that he wanted to show them, he left and returned in about 25 minutes. He asked [REDACTED] to move back against the wall and he can clearly be seen sliding his chair backward and disappearing from the bottom of the frame. He then proceeded to go through the 3 line-ups with [REDACTED]. On at least 3 or 4 occasions one can see what appears to be [REDACTED] foot or knee intruding into the bottom of the frame while [REDACTED] is viewing the line-ups, almost like a sound boom seen at the top of the frame of a really low-budget monster movie. When [REDACTED] finished viewing the line-ups, [REDACTED] reappeared in the frame. It is obvious that he simply slid his seat forward to the table at which Detective Conway and [REDACTED] were seated. There is no indication that [REDACTED] had actually left the room and the evidence seems to be overwhelming that he in fact stayed in the room. To the extent relevant, the Court makes the factual determination that [REDACTED] was present in the room while [REDACTED] viewed the line-up in which he identified the Defendant.

That fact, however, does not in and of itself mean that the procedure was unduly suggestive. [REDACTED] presence in the room had no effect on [REDACTED] identification of the Defendant. He was at least several feet away and there was no evidence that he was communicating with [REDACTED] whose attention was clearly focused on Detective Conway and the photographs that he was viewing. The State has proven by clear and convincing evidence that the procedure by which [REDACTED] identified the Defendant was not unduly suggestive.

The presence of [REDACTED] during [REDACTED] viewing of the photographs was something

that could have easily been avoided and certainly had the potential of tainting any subsequent identification that he would have made. However, the evidence established that [REDACTED] grasp of English was not very good. It was certainly impaired enough that Detective Conway needed [REDACTED] to interpret while communicating with [REDACTED]. It is unlikely that [REDACTED] understood the number of any photo that was being identified by [REDACTED]. It was also clear that [REDACTED] viewed the photos one by one, not in the "6-pack" format in which they were actually submitted as exhibits at the hearing. He also was viewing them sitting flat on the table, where they probably could not be seen from where [REDACTED] was seated, both because of them facing up and because [REDACTED] was partially blocking his view. There is no evidence that [REDACTED] held up the photos and pointed to one in a manner that could have been seen and interpreted by [REDACTED]. The Court determines as a factual matter that [REDACTED] could not have known prior to viewing the line-ups himself who had been identified or not identified by [REDACTED].

Having [REDACTED] assist [REDACTED] in viewing the line-ups right after he had gone through the process himself was clearly not the recommended protocol to follow. Because of the language barrier, there was probably not an immediately obvious alternative. The issue, of course, is not whether the procedure followed is one that law enforcement agencies would seek to emulate but whether it was unduly suggestive under all the circumstances. There is no evidence that [REDACTED] in any way influenced [REDACTED] in making his identification. He is not seen to point to any individual photo or to direct [REDACTED] to make a particular decision. The Court acknowledges that if the communications between the 2 were in fact in Punjabi it is unlikely that the Court or Detective Conway or counsel would know if [REDACTED] was communicating to [REDACTED] who he should identify. There is no evidence, however, that [REDACTED] did anything other than make his own independent identification of the Defendant. The State has proven by clear and convincing

evidence that the procedure by which [REDACTED] identified the Defendant was not unduly suggestive.

Assuming for the sake of argument that an appellate court would disagree with the above findings by the Court, it considers the factors under Neil v. Biggers. The witnesses had several hours to view the Defendant in a confined space, although it is unclear how well lit that circumstance was. Their attention would have understandably been focused on the suspects because their eventual fate may have been unknown to them. Although their descriptions of the suspects included the types of discrepancies and inconsistencies one might expect, they were not blatantly inaccurate. It is not clear what degree of certainty either alleged victim expressed with regard to any of his identifications and it appears that this opinion was sought from neither at the time. The alleged victims were viewing the photos within probably 5 hours of last seeing the suspects. The Court determines that the totality of the circumstances surrounding the identification process weigh against the suppression of either alleged victim's identification of the Defendant.

IT IS ORDERED denying the Defendant's Motion to Suppress Out of Court and Any in Court Identification of the Defendant.

cc:

Mohave County Attorney*

Mohave County Public Defender*
John Pecchia

Mohave County Jail*

Honorable Steven F. Conn*
Division 3