

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

FILED

May 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. #03C01-9507-CR-00205
APPELLEE,	*	HAMILTON COUNTY
VS.	*	Hon. Douglas A. Meyer
TOMMY NORWOOD,	*	(Robbery)
APPELLANT.	*	

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For the Appellee

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Tommy Norwood, was convicted of robbery, a class C felony. As a Range III, persistent offender, he was sentenced to eleven years in the Department of Correction. On appeal, he challenges the sufficiency of the evidence and the trial court's failure to suppress identification testimony. We find no error and affirm the judgment of the trial court.

In the early morning hours of October 15, 1993, the victim, Buddy Gentry, was driving to his home in Chattanooga, Tennessee, when his car ran out of gas. Gentry coasted his car to a stop near the 23rd Street Flea Market. He walked to a gas station on Dodds Avenue and filled a can with gasoline. As he returned to his car, he was approached by the appellant, who asked for a light. The appellant then struck Gentry in the face, causing Gentry to fall to the ground. The appellant threatened to "hurt" Gentry and held him on the ground. The appellant went through Gentry's pockets, and he took his wallet and some loose change.¹ The appellant then fled.

Gentry returned to his car, put the gasoline in it, and drove home. He called the police and gave them a description of the man who robbed him. He told officers that the assailant had been wearing a brown plaid shirt and brown corduroy trousers. Gentry was later shown several photographs by Chattanooga Police Detective Bobby Dodd. Gentry selected the appellant from the series of photographs. He later identified the appellant at the preliminary hearing, and he also identified the appellant at trial.

Gentry insisted that he got a "good look" at the appellant because there was a street light near the scene and light from a nearby building. Gentry could not, however, recall the exact street he was on or the names of any of the businesses in the area. He

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The amount of money taken was between eight and nine dollars.

did not recall testifying at the preliminary hearing about “flashing lights,” nor did he remember telling the police that the appellant’s shirt had been “blue or brown.”²

Detective Bobby Dodd testified that he was driving west near 19th Street and Watkins Avenue at approximately 3:00 a.m. The area was a few blocks north of 23rd and Randolph. Dodd stopped to talk to “a tall, black male” and to run a check for any outstanding warrants. As he did, Dodd saw the appellant walking north on Watkins. Dodd knew the appellant, and he gestured for him to stop.³ Dodd talked to the appellant and ran a check for outstanding warrants. The appellant said he “was in a hurry” and “had to go.” He was carrying a trash bag liner and appeared to be nervous.

After the appellant left, Dodd received the report about the robbery that had occurred near 23rd and Randolph. The description of the assailant, specifically, his clothes, appeared to match the appellant. When Dodd was unable to find the appellant, he drove to the victim’s home where a patrolman was taking Buddy Gentry’s statement. Dodd returned the following day to show Gentry a series of photographs. According to Dodd, Gentry selected the appellant’s photograph “immediately.” On cross examination, Dodd said that the man he had been talking to when he saw the appellant was six feet six inches tall, had been wearing “all dark clothing,” and “obviously” did not match the description of the assailant. He said that the area near 23rd Street was “well lit” with street lights and direct light from nearby buildings.

²

On direct and cross examinations, Gentry acknowledged that he had two prior felony convictions, one for criminal damage to property and one for theft. The convictions occurred in Georgia in 1985.

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Dodd testified out of the jury’s presence that he had arrested the appellant on prior occasions.

When the sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). In determining the sufficiency of the evidence, this court does not reweigh the evidence, id., and this court does not substitute its inferences for those drawn by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956).

Robbery “is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a). A person “acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-302(a). A person “acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” Tenn. Code Ann. § 39-11-302(b).

Here, the evidence overwhelmingly supports the jury’s verdict with respect to the elements of the offense. The appellant’s main contention is that the evidence did not support the victim’s identification of him as the assailant. We disagree. The victim said that he got a good look at the appellant during the offense. He gave a description of the appellant immediately after the offense and selected the appellant from a series of photographs. The victim also identified the appellant at the preliminary hearing and at the

trial. The jury was well within its prerogative to accredit the prosecution's evidence in this regard.

In support of his argument, the appellant claims that the victim recanted his testimony after trial. At the hearing on the motion for a new trial, the victim testified that he made a written statement after the trial, which stated, in part: "I testified that [the appellant] was the person who robbed me. I was wrong." However, the victim also testified that he was convicted of an offense after the trial and incarcerated on the same floor of the prison as the appellant. The appellant "forced" him to write the statement and the victim did so out of fear. The victim reiterated that the appellant was the man who robbed him, just as he had testified at trial. For obvious reasons, the trial court rejected the written "recantation" and overruled the motion for a new trial. See State v. Phillip Lloyd Herndon, No. 03C01-9303-CR-00098 (Tenn. Crim. App., Knoxville, May 11, 1994)(court rejected recanted testimony).

Accordingly, the evidence was sufficient for the jury to have found that the appellant committed robbery. The appellant is not entitled to relief on this ground.

II

The appellant argues that the trial court erred in failing to suppress the victim's in court identification. He claims that the photographic lineup was prejudicial, that the victim's identification was unreliable, and that the victim made a written recantation after the trial. The State maintains that the trial court properly overruled the appellant's motion to suppress the identification. We agree.

A pretrial confrontation procedure violates due process if, under the totality of the circumstances, the procedure is "unnecessarily suggestive and conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 302 (1967). If a

procedure is unduly suggestive, the question is whether the identification was nonetheless reliable. Neil v. Biggers, 409 U.S. 188, 199 (1972). In Biggers, the Court listed factors to be considered in analyzing the reliability of the identification:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness's degree of attention at the time of the crime;
3. the accuracy of the witness's prior description;
4. the level of certainty demonstrated at the confrontation; and
5. the time elapsed between the crime and the confrontation.

409 U.S. at 199. If a court determines that under the Biggers standard a pretrial confrontation was so impermissibly suggestive that it violated an accused's right to due process, both out of court and in court identifications are excluded. Sloan v. State, 584 S.W.2d 461, 470 (Tenn. Crim. App. 1978); see State v. Philpott, 882 S.W.2d 394, 399 (Tenn. Crim. App. 1994).

Here, the appellant failed to show that the photographic array shown to the victim was suggestive. The array consisted of photographs of six men who were similar in appearance. The photographs were "mug shots" depicting the individuals' faces and shoulders. All of the men had similar hair styles and mustaches. The backgrounds in the photographs were the same. The victim testified that he was shown the photos by Detective Dodd. Dodd did not suggest any of the photographs to Gentry. Both Gentry and Dodd testified that Gentry immediately selected the appellant's photograph. Thus, there was nothing suggestive about the identification procedure. See State v. Philpott, 882 S.W.2d at 399, n. 6.

Moreover, the Biggers factors support a finding that the identification was reliable. The record indicates that the victim had a face to face confrontation with the appellant at the scene. There was light from streetlights and nearby buildings. The victim gave a description of the appellant immediately after the offense. According to Detective

Dodd, the victim's description of the assailant's clothes matched those worn by the appellant. Dodd also said that the victim "immediately" selected the appellant from a photographic array on the day after the offense. The victim subsequently identified the appellant at the preliminary hearing and at trial. Accordingly, the appellant is not entitled to relief on this ground.

The judgment is affirmed.

William M. Barker, Judge

Gary R. Wade, Judge

David H. Welles, Judge