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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000659-MR

MARK T. BOGER — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 03-CR-00200

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: A Boyd Circuit Court jury convicted appellant, Mark Boger, of robbery in the second degree. On appeal, Boger asserts that the trial court erred by failing to suppress a witness identification of him which he alleges resulted from a flawed show-up identification procedure, and by failing to enter

[1] Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

a directed verdict. For the reasons stated hereafter, we affirm.

On May 15, 2003, witness Kenny Kitts and his wife were in an Ashland shopping center parking lot when they observed that a purple Chevrolet Camaro was following a man who appeared to be repeatedly looking into parked cars and then returning to the passenger side of the Camaro. The Kitts followed the Camaro around the parking lot and watched as the passenger approached a woman who was loading groceries into her SUV, leaving her purse clearly visible. The Kitts honked their horn and the passenger jumped into the Camaro. The Kitts recorded the Camaro's license plate number and used a cellular phone to contact 911. While on the phone with a 911 dispatcher, they heard screams from a few aisles away and Kitts ran in that direction, observing that the Camaro passenger was attempting to grab the purse of an older woman who was resisting her attacker. At the same time a 911 dispatcher who was ordering food from a nearby fast-food restaurant heard the victim's screams and saw a man tugging at her purse, pulling her from the front of her car into the traffic aisle of the parking lot.

Less than an hour later, law enforcement officials in Scioto County, Ohio, stopped two men in a purple Camaro bearing the reported license plate number. The dispatcher witness then accompanied police to the location of the car. The driver was

seated in a police cruiser and the passenger remained in the car. The dispatcher, although she had not seen the face of the man grabbing the victim's purse, identified the man seated in the passenger's seat as the man she had seen thirty to seventy-five minutes before in the shopping center parking lot.

A jury convicted Boger of second-degree robbery and, in accordance with the jury's recommendation, he was sentenced to eight years' imprisonment. This appeal followed.

Boger first argues that the court erred by failing to suppress the dispatcher's identification of him as being the result of an unduly suggestive show-up procedure. However, this issue was not preserved at trial, and Boger is not entitled to relief in order to avoid manifest injustice.[2]

The parties agree that the dispatcher's show-up identification of him must be analyzed under the five factors set forth in *Neil v. Biggers*.[3] Under *Biggers* the court must look at

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the

[2] RCr 10.26.

[3] 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See also Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1996).

> confrontation, and the length of time between the crime and the confrontation.[4]

Here, the dispatcher witness testified that she heard a woman scream, that she looked toward the source of the screams, and that she saw a man wearing blue jeans, a red shirt, and a blue, perhaps denim, shirt. The dispatcher responded affirmatively when defense counsel stated,

> "...because you do security, you were paying particular attention to gather all the facts that you could, that's what you're trained to do. . . . You were concerned enough that you walked from there to here [referring to black board diagram] at a brisk pace to get closer, correct?"

The dispatcher admitted that she did not see the man enter a vehicle, but that she asked other bystanders whether he had entered the purple Camaro which was occupied by two men and which came from the direction in which the man had run. However, the dispatcher was able to see the face of the driver and testified that the Camaro's driver who looked at her as he drove past.

The dispatcher testified that her identification was based on the clothing the Camaro passenger was wearing, as well as his build. She also positively identified the driver of the car as the man who had driven the car through the parking lot.

[4] *Biggers*, 409 U.S. at 199-200, 93 S.Ct. at 382.

We find the *Biggers* test was satisfied by the evidence presented at trial. The dispatcher who observed the attack is also a security guard who testified that she paid greater attention to the situation so that she might retain facts useful in identifying the attacker. Her description of the attacker's clothing was consistent with the apparel worn by Boger at the time of his stop in Ohio. The dispatcher expressed a high degree of certainty when identifying Boger based on the clothing and build of the man she had seen thirty to seventy-five minutes earlier. Thus, the trial court did not err by failing to suppress the dispatcher's identification of Boger as the perpetrator of the robbery.

Boger's final argument is that the court erred by failing to grant a directed verdict due to the Commonwealth's failure to establish the element of force or threat of force necessary in establishing second-degree robbery. Again, this issue was not preserved at trial, and Boger is not entitled to relief in order to avoid manifest injustice.[5]

KRS 515.030 (1) states in pertinent part:

> A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

[5] RCr 10.26.

Boger argues no evidence was presented by the Commonwealth that the attacker "ever used or directed force towards" the victim's body and that, in the absence of "any bodily contact, it is absurd to hold that the act of grabbing an inanimate object, such as a purse, constitutes a 'use of force.'"

However, the issue of what constitutes the use of force was previously addressed in *Commonwealth v. Davis*,[6] where the court stated: "It is not so much the extent and degree of violence which makes the crime as the success thereof. Any force which is sufficient to take the property against the owner's will is all that is necessary to make up the crime of robbery."[7] In the instant case, the testimony of both the victim

[6] 23 Ky.L.Rptr. 1717, 66 S.W. 27, (1902).

[7] Although *Commonwealth v. Davis* was decided long before the adoption of our current penal code, the court in *Davis* referred to Blackstone's definition of robbery which states: "'the felonious and forcible taking from the person of another of goods or money of any value by violence or by putting him in fear.'" This definition is comparable to the current definition of robbery contained in KRS 515.030. Further we are persuaded to continue to follow the precedent set in *Davis* as other jurisdictions have more recently analyzed this issue and have made similar findings. *See, e.g., U.S. v. Rodriguez*, 925 F.2d 1049, 1052 (7th Cir. 1991) (In a case where keys were removed from the belt of a postal work the court stated: "Although the amount of force or violence used to take the keys from Mr. Pyrzynski was rather minimal, there was sufficient evidence for a rational trier of fact to conclude that a robbery did occur. Mr. Pyrzynski's key chain was attached to his clothing, and Mr. Rodriguez had to pull the chain once or perhaps twice to snatch the keys. Courts have upheld robbery convictions when the item taken is 'so attached to the person or his clothes as to require some force to effect its removal.'"(citations omitted)); *People v. Davis*, 935 P.2d 79, 84 (Colo.App. 1996) ("[t]o remove an article of value, attached to the owner's person or clothing, by a sudden snatching or by stealth is not robbery unless the article in question (e.g., an earring, pin or watch) is so attached to the person or his clothes as to require some force to effect its removal." (citation omitted)); *People v. Taylor* 129 Ill.2d 80, 84, 541 N.E.2d 677,679, 133 Ill.Dec. 466, 468 (Ill. 1989) ("[s]ufficient force to constitute robbery may be found when the article taken is 'so attached to the person or clothes as to create resistance, however slight.'" (citation omitted)).

and bystanders clearly established that the victim's purse was wrenched from her as she resisted her attacker. Indeed, the victim was drug from the front of her car into the traffic aisle of the parking lot. We find that the court did not err by denying Boger a directed verdict.

For the foregoing reasons the trial court's judgment is affirmed.

ALL CONCUR.

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