

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001909-MR

SHANTONIO TIJUAN SULLIVAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 04-CR-002920

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Shantonio Sullivan appeals from a judgment of conviction of second-degree robbery and first-degree persistent felony offender. After our review, we affirm the Jefferson Circuit Court.

FACTS

On August 23, 2004, shortly before 6:00 a.m., Patricia Dooley was keeping vigil in the labor and delivery waiting room on the third floor of Norton Hospital in Louisville, Kentucky, awaiting the birth of her grandson. She had been there for several

hours when appellant, Shantonio Sullivan, entered the room. They engaged in some banter and small talk. After several minutes, Sullivan said, "I'm sorry, ma'am," and proceeded to punch Ms. Dooley in the face before running away with her purse.

Ms. Dooley alerted the nurses on the third floor, and they issued a "Dr. Quick" call to the hospital's security guards, the code indicating that a security emergency had occurred. The call included a description of the assailant. Within minutes of the Dr. Quick call, a security guard spotted Sullivan coming out of a loading dock area. Sullivan matched the broadcast description, and the guard followed him. The security guard testified that he witnessed Sullivan discarding objects from his pockets. Those objects were later found to be items from Ms. Dooley's purse. The security guard asked Sullivan to remain on the street until the police arrived, and Sullivan agreed.

At first, Sullivan denied ever being in the hospital. However, after he heard the police officer and the security guard discussing a surveillance camera kept on the third floor, he admitted being there, explaining that he had been looking at the babies in the nursery.

Following Sullivan's admission, hospital staff transported Ms. Dooley to the scene where Sullivan and the police were waiting; she positively identified him as her assailant. Her purse was later found in a third floor stairwell that was limited to access to the loading dock – the same loading dock where Sullivan was first spotted by the security guard. Sullivan was subsequently arrested, tried, and convicted for second-degree robbery and first-degree persistent felony offender. He appeals those convictions.

THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW WHEN IT DENIED THE MOTION TO SUPPRESS THE SHOW-UP IDENTIFICATION AND THE SUBSEQUENT IN-COURT IDENTIFICATION BY THE ROBBERY VICTIM

Sullivan argues that the trial court erred in refusing to suppress the victim's show-up identification in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and his rights under Section Eleven of the Kentucky Constitution.

Show-up identifications are undertaken shortly after a crime occurs when the suspect is in police custody. Although such identifications are “inherently suggestive,” “they are nonetheless necessary under certain circumstances because they occur immediately after the commission of the crime and aid police in either establishing probable cause or clearing a possible suspect.” *Merriweather v. Commonwealth*, 99 S.W.3d 448, 451 (Ky. 2003). To off-set the suggestive nature of show-up identifications, the Supreme Court of Kentucky provided guidelines for determining whether a defendant's due process rights were violated by the identification process:

A conviction based on identification testimony following pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' The determination of whether the in-trial use of identification testimony violates due process involves a two-step process. First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. If so, “the identification may still be admissible if 'under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.’”

Dillingham v. Commonwealth, 995 S.W.2d 377, 383 (Ky. 1999) (citations omitted). In *King v. Commonwealth*, 142 S.W.3d 645 (Ky. 2004), our Supreme Court has directed that Kentucky courts scrutinize the charge of undue suggestiveness by examining the totality of the circumstances in light of five factors enumerated by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). The *Biggers* test includes the following criteria for consideration by a court: 1) the opportunity of the witness to view the criminal at the time of the crime, 2) the witness's degree of attention, 3) the accuracy of the witness's prior description of the criminal, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation. *Neil* at 199-200.

The standard of review for a motion to suppress evidence “requires that we first determine whether the trial court's findings of fact are supported by substantial evidence.” *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002), *citing* Kentucky Rules of Criminal Procedure 9.78.

Application of the *Biggers* Factors

First : The opportunity of the witness to view the criminal at the time of the crime.

In this case, the witness had considerable opportunity to view Sullivan. Although the waiting room was dimly lit, Ms. Dooley testified that she and Sullivan engaged in small talk, focusing on the phone in the room and the reasons that they both were there. She also stated that they struggled with her purse because she had it secured under her knees.

Second: The witness's degree of attention.

Ms. Dooley admitted to being sleepy, but she gave the security guard a description which accurately fit Sullivan. She asserted that she took time when identifying Sullivan at the scene in order to make certain that he was her assailant. She had been awake enough to maintain and to recall a conversation with Sullivan. The Supreme Court of Kentucky has pointed out that observation during the course of a crime is to be accorded more weight because of the intensity of the interaction between the victim and criminal. *Myers v. Commonwealth*, 499 S.W.2d 277, 280 (Ky. 1973). In this case, the shock of being punched in the face in a hospital would likely be “more definite and longer lasting than a casual meeting of him on the street.” *Id.*

Third: The accuracy of the witness's prior description.

Sullivan was apprehended at the scene wearing the clothes that Ms. Dooley had described. As the Commonwealth points out, Sullivan had thrown his jacket into the bushes in an attempt to confuse any witnesses and police. The appellant argues that Ms. Dooley's description was not accurate. At the suppression hearing, she had described him as having braids when he in fact did not. However, she did not mention braids in her initial description, the one immediately preceding his detention and arrest. As the trial court observed, “[The witness’s] testimony on this isolated point is insufficient to mandate fully excluding her testimony identifying Mr. Sullivan as her assailant.” Order at 4.

Fourth: The witness’s level of certainty at the time of the identification.

Ms. Dooley never wavered in her identification of Sullivan, and she expressed that she took extra time in order to be certain of her identification. While Sullivan questions her level of certainty, his reservations are merely speculative.

Fifth: The length of time between the incident and the identification.

In this case, only twelve to thirty minutes had elapsed. That short period of time did not constitute a sufficient basis to challenge the freshness of Ms. Dooley's recollection.

Assessing the totality of the circumstances in the light of the *Biggers* factors, we conclude that the trial court did not err by declining to suppress Ms. Dooley's identification of Sullivan.

THE TRIAL COURT DID NOT ERR BY DENYING JURY INSTRUCTIONS ON MISDEMEANOR RECEIVING STOLEN PROPERTY

Sullivan argues the trial court should have issued instructions to the jury directing them to consider the lesser misdemeanor charge of receiving stolen property. Regarding jury instructions in general, the Supreme Court of Kentucky has held: “The propriety of the instructions must always be determined by facts in the particular case.” *Snell v. Commonwealth*, 420 S.W.2d 127, 129 (Ky. 1967). Sullivan cites *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999), in which the Court observed: “In a criminal case, it is the duty of the trial judge to prepare and give . . . instructions applicable to every state of the case deducible or supported to any extent by the testimony.” However, Sullivan stopped short of finishing the rest of that citation in

which the Court elaborated as follows: “A defendant has a right to have every issue of fact **raised by the evidence** ... submitted to the jury on proper instructions.” *Id.*

(Emphasis added.) In *Crane v. Commonwealth*, 833 S.W.2d 813, 817 (Ky. 1992), the Supreme Court of Kentucky provided a standard for determining whether to include lesser charges in jury instructions:

While the trial court is required to instruct on lesser-included offenses to a crime charged, this duty only applies when it is “justified by” or “supported by” the evidence. ... Our cases have now established that an instruction on a lesser included offense is not required unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but yet conclude that he is guilty of a lesser included offense. (citations omitted)

In this case, Sullivan argues that the lesser charge of receiving stolen property should have been included in the jury instructions by noting that when he was arrested, the victim's belongings were on the ground next to him. Sullivan relies on the theory of a faulty identification by the victim to support his argument. However, the trial court had earlier determined that Ms. Dooley's identification was valid and reliable. The circumstances of the apprehension and arrest do not lead to the conclusion by a reasonable juror that anyone else could have stolen the property. Sullivan was seen leaving the hospital at an unusual exit; he hid his jacket; and the assault and theft occurred at a time of day when few people were on the streets. Most compelling, however, was the fact that Sullivan did not produce any evidence or testimony to support his alibi of the existence of a second-party thief or accessory. There was no evidence whatsoever to justify presenting to the jury an option as to the lesser charge of receiving

stolen property. Thus, the trial court did not err in denying the request for inclusion of the lesser charge in the jury instructions.

THE TRIAL COURT DID NOT ERR BY DENYING JURY INSTRUCTIONS ON MISSING EVIDENCE

The Commonwealth admits that it lost the surveillance videotape that was confiscated by the police from the third floor of the hospital. The trial court allowed the Commonwealth to inform the jury of the tape's existence but disallowed any testimony regarding its contents. Sullivan requested that the trial court provide the following jury instruction:

The Commonwealth has lost or released a videotape (sic) involved in this case. In your deliberations, you may infer, but you are not required to infer, that this evidence, if available, would be favorable to Shantonio Sullivan's case.

Appellant's Brief at 18, quoting TR I 157 (App. 15). The trial court denied his request.

The Supreme Court of Kentucky provided a comprehensive discussion of the evolution of the Commonwealth's law concerning jury instructions for missing evidence in *Estep v. Commonwealth*, 64 S.W.3d 805, 809-10 (Ky. 2002). In *Estep*, the court explained that the purpose of missing evidence instructions is “to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence.” *Id.* At 810. (Emphasis original). It continued: “the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional **and** the

potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.” *Id.* (Emphasis added.)

The parties in this case agree that the Commonwealth did not act in bad faith. It readily revealed during discovery that it had lost the videotape, and it did so again at the beginning of the trial. Sullivan's right to due process could not have been violated unless the videotape contained exculpatory evidence. However, Sullivan has never argued that the videotape might be exculpatory. Even though he did not admit to being on the third floor of the hospital until the police officer and the security guard **mentioned** the videotape, that admission would have been admissible regardless of the existence of a videotape. Additionally, the police officer told the judge (out of the jury's presence) that the videotape merely showed Sullivan walking in the hallway of the hospital's third floor, and Sullivan has not demonstrated why those images might be anything but neutral – far short of exculpatory.

We conclude that Sullivan's due process rights were not violated by the lack of missing evidence jury instructions. We affirm the decision of the Jefferson Circuit Court.

ALL CONCUR.

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