

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs April 9, 2002

STATE OF TENNESSEE v. TERRANCE BURKE

Appeal from the Criminal Court for Shelby County
No. 98-07582 Chris Craft, Judge

No. W2001-01462-CCA-R3-CD - Filed May 29, 2002

A Shelby County jury convicted the defendant, Terrance Burke, of aggravated robbery. On appeal, he challenges the sufficiency of the convicting evidence and the trial court's denial of his pretrial motion to suppress the victim's identification of him via a photographic line-up. Discerning no reversible error, we affirm the conviction.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

James M. Gulley, Memphis, Tennessee, for the Appellant, Terrance Burke.

Paul G. Summers, Attorney General & Reporter; John H. Bledsoe, Assistant Attorney General; William L. Gibbons, District Attorney General; and Jennifer Nichols, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant's conviction resulted from the January 15, 1998 aggravated robbery of Marilyn Holland, who was then a cafeteria worker at the Caldwell Elementary School in Memphis. *See* Tenn. Code Ann. § 39-13-401(a) (1997). The defendant moved pretrial to suppress the victim's identification of him following a photographic line-up. The trial court denied the motion. At trial, the victim both identified the defendant as her robber and stated that she had identified his picture in the photographic line-up. The defendant did not testify at trial. Following the jury's verdict of guilty, the trial court sentenced the defendant to twenty years in the Department of Correction as a multiple offender. We find no merit in his appellate claims that the convicting evidence was insufficient and that the trial court erred in denying the motion to suppress.

In the light most favorable to the state, the evidence at trial showed that the victim arrived at work at about 8:00 a.m. on January 15, 1998, parked her black 1992 Cadillac Seville in

the lot behind the school cafeteria, and began walking toward the cafeteria door. Before reaching the steps that led to the door, she saw a young man running toward her. She started to run but stumbled before reaching the steps. The young man reached her before she could open the door. He put a gun to her head and demanded twice that she surrender her car keys. After she refused, he said, “[B]itch, if you don’t give me them keys I’m going to blow your brains out.” Fearing for her life, the victim then threw the keys on the ground. The defendant took them, unlocked and started the car, and sped away.¹

In describing the assault with the gun, the victim testified, “He was right up on me. He was standing next to me. I was face to face with him.” She feared for her life.

The victim testified that the robbery occurred in good daylight. Upon inquiry by the investigating police officer just after the crime was committed, the victim described the robber as being a black male, approximately sixteen years of age, medium height, with thick lips and a jheri curl hairstyle. He wore jeans, white tennis shoes, and a blue jacket with yellow stripes that reminded the victim of bumblebee stripes. He wore no hat. She testified that she told the officer that, by virtue of his thick lips, the robber “favored” another young man, Lafayette Miller, who had robbed her about a year before.

The officer testified that the victim gave him a “very thorough description” of the robber, but the officer testified that the victim said that the robber wore a gray skull cap. A second officer, a detective, testified from his notes that the victim said that the robber was the same person, Lafayette Miller, who had robbed her a year before, but the officer acknowledged that he may have misinterpreted the victim’s meaning in referring to a resemblance between her recent assailant and Lafayette Miller.

When asked during her trial testimony if she could identify the robber, the victim pointed to the defendant seated near counsel’s table. She testified that she never believed that the January 15, 1998 robber was Lafayette Miller. She explained that Mr. Miller had attended Caldwell Elementary School, and she knew him during the years that he came through the cafeteria line. She reflected that he never seemed to have money to buy cookies, and she would give him cookie money. She had never seen Terrance Burke prior to the January 15 robbery.

After the police had “developed” the defendant as a suspect, they asked the victim to view a photographic line-up on February 7, 1998. She went to the police station where she read and signed a list of instructions for viewing the line-up.² She testified that no one gave her any hints

¹ The car was recovered two or three days later with broken windows and the radio missing.

² The instructions advised the victim that the line-up would contain photographs of persons of similar descriptions in similar poses, that there is no significance to the order of the photographs, that the victim was not to assume that anyone depicted in the array was involved in the offense, and that no one is to “give [the victim] any hints
(continued...)

or suggestions. She looked at the photo array and testified that she “went straight to Terrance Burke’s picture.” The victim wrote a memorandum of her identification beside the defendant’s picture and signed it. In her trial testimony, she identified the photographic array, the legend that memorialized her selection of the defendant’s picture, and her signature.

The officer who administered the photographic line-up testified at trial that he gave the victim no hints or suggestions and endeavored to present her with a photo array that depicted persons of similar appearance. Lafayette Miller was not included in the array.³ The officer testified that “[a]s a matter of fact, the moment I set the spread down, it was just like maybe a half a second she pointed straight at the person she felt and she thought was responsible.” She pointed to the defendant’s picture and signed her selection.

Lewis Burke, the defendant’s father, testified for the defense that during the month of January, 1998 the defendant worked every day except Sunday for him in the family-owned car-repair shop. He testified that the defendant lived with him and rode to work with him every Monday through Saturday morning during January, 1998, but Mr. Burke did not specify the time the defendant arrived at work. In rebuttal, the state presented a clerk with the Shelby County Sheriff’s Department, who testified that the defendant was arrested and confined in the jail on January 19, 1998 and was not released prior to the end of that month.

As a function of providing context for understanding the evidence introduced at the hearing on the defendant’s motion to suppress the line-up identification, we have presented the trial evidence first. At the pretrial hearing on the motion to suppress, the victim testified that she went to the police station to view the photo array relative to the January 15, 1998 robbery outside Caldwell Elementary School. She read and signed the instructions for the line-up, selected the defendant’s picture, and signed her selection. She testified that no suggestions were made to her and that she had no doubt about her selection. She said that she identified the defendant’s picture because he was the person who robbed her and not because he resembled Lafayette Miller. She denied that she told an officer that the robber looked like Mr. Miller, only that his features – especially his lips – “favored” those of Mr. Miller.

In the defendant’s first issue, he challenges the sufficiency of the convicting evidence. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced at trial is sufficient “to support the finding by the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). This rule is applicable to

²(...continued)

or suggestions or attempt to influence [the] identification in any way.” The instructions also stated that the victim is to make no identification unless she is “positive of such identification.”

³ A deputy criminal court clerk testified that Lafayette Miller was convicted of aggravated robbery on December 29, 1998 and was sentenced to serve eight years in the Department of Correction. Apparently, the state offered this evidence to show that Mr. Miller could not have committed the January 15, 1998 offense.

findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App.), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining the sufficiency of the convicting evidence, this court does not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. *Id.* In *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973), our supreme court said, “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.”

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. *Id.*

The defendant was charged with and convicted of aggravated robbery, a Class B felony. *See* Tenn. Code Ann. § 39-13-402 (1997). “Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” *Id.* § 39-13-401 (1997). As charged in the indictment in the present case, aggravated robbery “is robbery . . . [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon.” *Id.* § 39-13-402(a)(1) (1997). Theft is committed by one who, “with intent to deprive the owner of property, . . . knowingly obtains or exercises control over the property without the owner’s effective consent.” *Id.* § 39-14-103 (1997).

The victim testified cogently that Terrance Burke accosted her outside the elementary school, put a gun to her head, and threatened to “blow her brains out” if she did not surrender her car keys. Fearing for her life, she threw down the keys, and the defendant took them, unlocked and started her car, and drove away. The car, substantially damaged, was recovered two or three days later. We hold that this evidence is sufficient to establish the elements of aggravated robbery, including the subsumed elements of robbery and theft. Our task as an appellate court is not to re-weigh the evidence or assess the credibility of witnesses who testified in person before the trier of fact. When a verdict of guilty follows the presentation of proof sufficient to establish the elements of the offense, we must assume that the trier of fact accredited the state’s evidence.

Now, we address the defendant's grievance about the trial court's denial of his motion to suppress the line-up identification.

To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967 (1968). In *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972), the Supreme Court identified five factors for assessing reliability of an identification. They are: (1) the opportunity of the witness to view the perpetrator at the time of the offense, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the time between the crime and the identification. *Id.* at 199-200, 93 S. Ct. at 411.

To determine whether a photographic line-up was so unnecessarily suggestive as to violate principles of due process, this court examines the totality of the circumstances existing at the time of the identification procedure. *State v. Cribbs*, 967 S.W.2d 773, 795 (Tenn. 1998) (appendix). “[A]n appellate court should uphold a trial court’s decision on a motion to suppress, unless the evidence in the record [, including the proof adduced both at the suppression hearing and at trial,] preponderates against the finding.” *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998); *see State v. Munn*, 56 S.W.3d 486, 493 (Tenn. 2001); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

In the present case, the state scores well with all five of the *Neil v. Biggers* factors. The victim stood “face to face” with the defendant during the robbery and had an excellent opportunity to observe him. Her trial testimony bespoke a riveted attention upon the defendant’s face as he held the gun to her head. Despite her apparent confusion over whether the defendant wore a skullcap, her early description of the defendant was detailed and generally accurate.⁴ At both the pretrial hearing and the trial, the victim evinced strong certainty that the defendant was the man who robbed her on January 15, 1998. Finally, the time lapse between the daylight robbery and the photo identification was only three weeks. Thus, as a whole, the record before us solidly supports the trial court’s denial of the motion to suppress.

Finding no error in the proceedings below, we affirm the defendant’s conviction.

JAMES CURWOOD WITT, JR., JUDGE

⁴ We comment that the defendant does “favor” Lafayette Miller, based upon the photos of the two men contained in the record.