

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1995 SESSION

FILED

January 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, * C.C.A. # 03C01-9501-CR-00004
APPELLEE, * HANCOCK COUNTY
VS. * Hon. James E. Beckner, Judge
LELAN BAILEY, * (Forgery)
APPELLANT. *

For the Appellant:

Joyce Ward
Assistant Public Defender
1609 College Park Drive
Morristown, TN 37813-1618

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Eric Christiansen
Assistant District Attorney
Suite 306
1104 Tusculum Boulevard
Greeneville, TN 37743

OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Lelan Bailey, appeals as of right from his conviction for forgery in an amount less than \$1,000. The trial court imposed a Range I sentence of two years.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for our review:

(1) whether the trial court erred by failing to suppress the identification testimony of Terry Hart; and

(2) whether the trial court erred by refusing to allow Lawrence Smith to testify as an investigative expert familiar with handwriting analysis.

We affirm the judgment.

In early February of 1994, the defendant used his computer to draft a check for \$250 on the account of CJ&S Trucking Company. He signed the name "Robert Mason" to the check and purchased a carton of cigarettes at Greene's Supermarket in Sneedville.

Terry Hart, the cashier at Greene's, testified that the defendant passed her the check on Sunday, February 6, 1994. She acknowledged that her acceptance of the check, without first obtaining identification, violated store policy and explained that she was a new employee and was very busy at the time of the transaction. Ms. Hart testified that she specifically remembered the defendant because he was the only one who had come into the market that day that she did not

know personally. She described the defendant as an older man with "grey-like" hair, a beard, and glasses, and recognized the check as the one she had cashed because it bore her initials. Ms. Hart also testified that she was asked if she could identify the defendant when she attended the preliminary hearing. After observing the defendant for some five to ten minutes from the doorway of the clerk's office, she made a positive identification. Ms. Hart identified the defendant a second time at the trial.

David Mize, who had pled guilty to passing a forged CJ&S check and been promised probation, testified that he had known the defendant for approximately four years. He testified that he and his cousin had gone to the defendant's residence in Middlesboro, Kentucky, on a Sunday in February to play cards and drink beer. He recalled returning to the defendant's house on the next day, at which time the defendant asked them to join him in a trip (of about 20 miles) to Sneedville. Before leaving, the defendant placed a white envelope in his pocket. Upon arriving in Sneedville, the men drove to a local grocery store, where the defendant handed Mize a CJ&S check written for \$225 and instructed him to purchase a carton of cigarettes and a twelve pack of beer and return with the change. Mize testified that the defendant told him to return to the car if he was asked by the clerk on duty to produce identification.

Mize testified that the defendant received possession of the checks when the wife of CJ&S owner, Chester

Wolfe, asked that he dispose of several outdated documents, including the checks. He stated that he believed that the defendant had signed the \$225 check, but was uncertain because he had been drinking heavily that day. Mize testified that after the first check was cashed, the men drove to Greene's, where the defendant passed the larger check. Upon completion of the transaction, the men returned to the defendant's residence in Middlesboro to continue their card game. Later, Mize observed a number of cigarette cartons, several twelve packs of beer, an Apple computer, a typewriter, and a fax machine in the downstairs area of the defendant's residence.

Clarence Johnson, owner of Greene's, testified that he did not deposit the \$250 check because he had a "gut feeling" that something was not right. After determining that the CJ&S account had been closed for some time, Johnson reported the problem to Deputy Norman Wolfe of the Hancock County Sheriff's Department.

Robin Lee, a cashier at Commercial Bank in Middlesboro, confirmed that the CJ&S account had been closed since 1987. She further testified that the name Robert Mason had never been listed as an authorized signatory on the account.

Deputy Wolfe obtained information from the Claiborne County Sheriff's Department which, in conjunction with a discussion with Ms. Hart, led to the arrest of the defendant. Officer Wolfe acknowledged that the arrest warrant alleged

that the check was passed on Sunday, February 6, 1994, and the indictment alleged that the transaction was "on or about Monday, February 7, 1994." Deputy Wolfe admitted that he had not compared Mize's signature to the one on the \$250 forged check, despite the fact that Mize had pled guilty to passing the first check.

The defendant claimed that on the weekend of February 6, 1994, he was at his daughter's home working on a wheelchair ramp. The defendant denied having written or passed the check to Greene's Supermarket and asserted that he had never been in Sneedville until his arrest. He acknowledged that Mize and his cousin had played cards at his residence but could not recall the date of their visit. The defendant admitted having previously done work for Chester Wolfe at his mortuary but claimed to have no knowledge of CJ&S. While conceding that he owned a computer, the defendant contended that he did not know how to use it. He took issue with Ms. Hart's claim that he wore a beard. The defendant had no beard when he was arrested and photographed several days after the passing of the check.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292,

295 (Tenn. Crim. App. 1978). The relevant question on appeal is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e). The same rules apply to convictions based upon circumstantial evidence. A criminal offense may be established exclusively by circumstantial evidence. Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958); Duchac v. State, 505 S.W.2d 237 (Tenn. 1973).

A forgery has been committed when one "forges a writing with intent to defraud or harm another." Tenn. Code Ann. § 39-14-114(a). The term "forge" includes the making or passing of a written instrument. Id. Here, Terry Hart made a positive identification of the defendant as having passed the forged check. Although Mize claimed the transaction took place a day later, he confirmed that the defendant had passed the check at Greene's Supermarket and testified that the defendant had possession of a computer, typewriter, and fax machine at the time the check was written. While the defendant claimed to have no knowledge of the checks or of CJ&S, he did admit having performed services for the company's owner, Chester Wolfe.

The defendant bases much of his argument on the discrepancy in the date provided by Ms. Hart and that provided by the codefendant Mize. Mize did, in fact, testify that the incident occurred on February 7 but he also acknowledged that

he had been intoxicated for the two days he spent with the defendant.

From all of this, including both direct and circumstantial evidence, the jury concluded that the defendant committed the crime. In our view, there was a rational basis for the conclusion.

I

The defendant next asserts that the trial court erred by failing to suppress the identification testimony of Terry Hart. He claims that the process utilized was unduly suggestive. The state concedes that the identification process was suggestive, but nevertheless contends that the testimony was admissible because the reliability of the identification was great.

To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner that it created a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377 (1968). In Neil v. Biggers, 409 U.S. 188 (1972), the Supreme Court held that an identification procedure, even though suggestive, will not negate the identification of the defendant when the identification procedure is nonetheless reliable. The controlling factors are as follows:

- (1) the opportunity of the witness to view the criminal at the time of the offense;
- (2) the witness' degree of attention;
- (3) the accuracy of the witness' prior

description of the individual;

(4) the level of certainty demonstrated by the witness at the confrontation; and

(5) the time between the crime and the confrontation.

Id. at 199. The degree of reliability of the identification, as indicated by these factors, should be assessed in light of the suggestiveness of the identification procedure and the totality of the circumstances to determine whether a violation of due process has occurred. Sloan v. State, 584 S.W.2d 461, 466 (Tenn. Crim. App. 1978).

The manner in which Ms. Hart identified the defendant was clearly suggestive. The trial court so ruled. The question is whether the identification process was so suggestive as to cause a "substantial likelihood of irreparable misidentification."

Some of the factors weigh favorably for the state. Ms. Hart had paid particularly close attention to the defendant because he was the only customer of the day she did not know. She explained that she had grown up in Sneedville, a very small town, and knew most everyone living there. Before seeing the defendant in the courtroom, she recalled that he was an older gentleman with grayish hair, a beard, and glasses. She also remembered the specific item he had purchased. Upon seeing the defendant at the preliminary hearing, Ms. Hart expressed confidence in her identification. She expressed that same certainty at trial.

Other factors weigh towards exclusion of the evidence. Four months had passed between the time of the offense and the initial identification. Ms. Hart described the defendant as having a beard. A photograph some ten days after the arrest showed that he had no beard. A state witness testified that the defendant did not have a beard at the time of the offense.

On balance, however, the victim's opportunity to observe the defendant, her recollection that he was the single customer that she did not know personally on the day of the offense, and her relative certainty the defendant had passed the forged check persuade us that a misidentification was unlikely. In our view, the trial court properly admitted the identification testimony. See State v. Sentron Jerome Smith, No. 03C01-9310-CR-00345 (Tenn. Crim. App., at Knoxville, October 13, 1994), perm. to app. denied, (Tenn. 1995) (admitting identification testimony despite suggestive atmosphere created by allowing the defendant to be identified while items in his possession were being inventoried on the trunk of a police cruiser and he was seated inside); see also State v. Larry Brown, No. 89-53-111 (Tenn. Crim. App., at Nashville, August 25, 1989), perm. to app. denied, (Tenn. 1989) (admitting identification testimony despite suggestive atmosphere created when the defendant was taken to the hospital where the victim was being treated to allow her to identify him).

The defendant's final contention is that the trial court erred by refusing to allow Lawrence Smith to testify as an investigative expert in handwriting analysis. The state disagrees.

Expert testimony is, of course, permissible under the Tennessee Rules of Evidence:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702. In order to qualify as an expert, the witness must have experience, training, or education within an area of expertise beyond the scope of common knowledge. See Kinley v. Tennessee State Mutual Ins. Co., 620 S.W.2d 79 (Tenn. 1981). The trial judge has broad discretion in determining the admissibility of expert testimony. Baggett v. State, 220 Tenn. 592, 421 S.W.2d 629 (1967); see also State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991). When the trial court has concluded that a witness qualifies as an expert, that decision will not be overturned absent an abuse of discretion. State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987).

The defendant argues that he had offered Smith as an expert in the manner in which handwriting comparisons are conducted. A statement on the record belies that assertion:

Ms. Ward: Your Honor, he has specialized training in identification of similarities in handwriting, and, although, he will not

qualify as a handwriting expert, he will be of assistance to the jury in telling the jury what it is that you look for in comparison of handwritings and in that regard he has done some investigation and is prepared to testify regarding the similarities of the handwriting on the check that has been introduced against Mr. Bailey and on Mr. Mize's who has admitted to some involvement in this. I believe that would be helpful to the jury.

Clearly, defense counsel asked Smith to testify in the realm of handwriting analysis when she asked that he be allowed to testify about similarities in the handwriting on two different documents. Neither the state nor the defendant employed a handwriting expert to analyze the relevant signature on the check. Thus, testimony about how the analysis should have been made would not have been helpful to the jury in reaching its conclusion.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

Cornelia A. Clark, Special Judge