IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FILED

January 26, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE	)	NO. 01C01-9503-CR-00061
	)	
Appellee	)	DAVIDSON COUNTY
	)	
vs.	)	HONORABLE THOMAS H. SHRIVER
	)	CIRCUIT COURT JUDGE
MICHAEL L. KINDALL and	)	
ROBERT L. PARHAM	)	(AGGRAVATED ROBBERY)
	)	
Appellants	)	

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OPINION FILED: _____

AFFIRMED
Robert E. Corlew, III, Special Judge

O P I N I O N

This is an appeal by defendants Michael Kindall and Robert Parham from a judgment of the Davidson County Criminal Court, in which both defendants were convicted of aggravated robbery on June 28, 1994. The robbery in question occurred at approximately 1:30 a.m. on July 2, 1993, as the victim, Charles Mosely, Jr., a diabetic, was returning to his father's home from a convenience store where he had purchased candy with which to raise his blood sugar level. Two men approached Mosely as he walked to the store and again as he returned. As they spoke to Mosely the second time, one of the men revealed a handgun. After leading Mosely to the side of a nearby house, they robbed him of his jewelry and a small amount of cash. The victim was then told to leave. A shot was fired which the victim testified he heard pass by his ear, at which point he ran to his father's house.

On August 5, 1993, Mosely identified the two appellants from separate, six-person photographic lineups. He also identified them in court. After a jury found the appellants guilty, Kindall was sentenced to ten years in prison, and Parham was sentenced to eight years with seven years to be served on probation.

Appellant Kindall puts forth three assignments of error. First, he contends that the Trial Court erred in allowing a photographic lineup to be entered into evidence and shown to the jury, because he alleges his appearance was sufficiently different so as to make it impermissibly suggestive. Second, Kindall contends that the Trial Court committed reversible error in allowing the victim's father to testify to hearsay. Finally, Kindall asserts that the evidence was insufficient for a conviction.

Appellant Parham similarly asserts the Trial Court erred in admitting and publishing to the jury an unduly suggestive photographic lineup, his objection being based on the contention that a police officer told Mosely one of the pictures was, in fact, of one of the men who robbed him. Parham also assigns error to the fact that the Trial Court refused to exclude the lineup or grant a continuance based on the State's failure to comply fully with Rule 16 of the *Tennessee Rules of Criminal Procedure*.

We find no reversible error, after considering each of these issues, and we therefore affirm the convictions.

There is always the danger of misidentification in using a photographic identification

procedure. That danger is increased if the police indicate to the witness that the person who committed the crime is included in the array of pictures or when the photograph of the individual is in some way emphasized. *Simmons v. United States*, 390 U.S. 377, 383 (1968). Appellants Parham and Kindall, respectively, claim that these dangers were realized in the lineups used in this case. On cross examination Charles Mosely, Jr., and Detective Roll, who investigated the crime and conducted the photographic lineups, were asked if Mosely had been told by any officers that one of the men who robbed him was pictured in the lineup. Both witnesses testified that this definitely did not happen. Parham's attorney suggests Mosely answered otherwise at the preliminary hearing. Kindall contends that his photograph was emphasized because he was the only light-skinned person included in the lineup.

A due process violation in the conduct of such a procedure depends on the totality of the circumstances surrounding it, and to be excluded from trial the photographic identification procedure must have been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers,* 409 U.S. 188, 198 (1972); *Simmons,* 390 U. S. at 384; *Stovall v.Denno*, 388 U.S. 293, 302 (1967). Under this totality of the circumstances standard there are five factors to be considered in evaluating the likelihood of misidentification. They are: (1) the opportunity of the witnesses to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' 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*, 409 U.S. at 199. Therefore, a determination is first made as to whether the identification was suggestive. If so, it is excluded unless found to be reliable under the *Neil* analysis. This standard has been adopted and applied in Tennessee. *Forbes v. State*, 559 S.W.2d 318, 322 (Tenn. 1977); *Bennett v. State*, 530 S.W.2d 511, 514-515 (Tenn. 1975). Appellants claim the standard is met in this cause.

We hold that the record does not support a finding that the police made the statements alleged by Parham. Therefore, no suggestiveness was shown, and Parham's assignment of error is meritless. We find that Kindall's picture does stand out somewhat from the other five photographs in that lineup, partly due to his skin tone and partly due to the quality of the photograph. It draws attention to itself and therefore must be considered suggestive to some extent. That is, however, only the first step in the inquiry. We hold that the identification was reliable, despite some suggestiveness, when

analyzed under the factors set out in *Neil v. Biggers, supra.*

The record indicates that Mosely had ample opportunity to view the criminals at the time of the crime. They met in the street, spoke to one another under the street lights, and walked some distance together as they spoke. This occurred twice, first as Mosely walked to the convenience store and again as he returned. Mosely's degree of attention undoubtedly was piqued when a gun was drawn on him, which happened while still in the street under the lights. Certainly his attention remained high as they led him from the street to the side of the house where he was robbed of his possessions. The victim's prior description, while somewhat general, was consistent with his later identifications of the defendants. Mosely identified both appellants from their respective photographic lineups with certainty and without hesitation, stating "That's him right there," indicating the picture of Kindall, and "That's him," as he pointed at Parham's photograph. Finally, approximately one month passed between the crime and the confrontation. This is not so long as to bring the reliability of the identification into doubt in light of the other factors noted here.

The Supreme Court of the United States has held it is clear from its *Stovall-Simmons-Neil* line of cases that "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). If the challenged photographic identification is reliable, then testimony as to it and any identification in its wake is admissible. *Id*. at 110 n.10. In this case there was no substantial likelihood of misidentification. The identification was reliable and was properly admitted. This issue is without merit.

Turning to Parham's remaining issue, it appears that Detective Roll retained the original lineup and supplied photocopies of it to the District Attorney and to defense counsel. However, Parham's attorney asserts the quality of the photocopy was so poor as to be unusable. The District Attorney attempted, unsuccessfully, to retrieve the original from Detective Roll prior to trial. Detective Roll did bring the original to court on the day of the trial. Parham's position is that Rule 16 of the *Tennessee Rules of Criminal Procedure* was violated, and the Trial Court erred in not excluding the lineup or granting a continuance so defense counsel could examine it and prepare any objections.

Rule 16(a)(a)(C) clearly required the prosecution to make available the photographic lineup it planned to use at trial. The rule states:

Upon request of the defendant, the state shall permit the defendant to inspect and

> copy or photograph books, papers, documents, photographs, tangible object, ... or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of his defense or are intended for use by the state as evidence in chief at the trial....

Rule 16(a)(1)(C), *Tennessee Rules of Criminal Procedure*. Because the discovery request is to the State, the duty to disclose extends not only to material in the immediate custody of the prosecution, but also to statements in the possession of the police which are normally obtainable by exercise of due diligence, that is, a request to all officers participating in the investigation or preparation of the case. *State v. Davis*, 823 S.W.2d 217, 219 (Tenn. Crim. App. 1991); *State v. Hicks*, 618 S.W.2d 510, 514 (Tenn. Crim. App. 1981).

The Trial Court recognized there was a Rule 16 violation at the beginning of the trial when it was established that defense counsel had not seen the original photographic lineup. Notably, this was the first time this problem was brought to the attention of the Trial Court. The transcript shows counsel for the appellant Parham did not file a pretrial motion because she believed she would soon receive the lineup, something that never happened. Nevertheless, it remains important that the Trial Court was not asked to address the problem until moments before the jury was to be impaneled and proof presented. Rule 16(d)(2) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms or conditions as are just.

Rule 16(d)(2), *Tennessee Rules of Criminal Procedure*. The sanction to be applied for non-compliance must fit the circumstances of the individual case. *State v. Cadle*, 634 S.W.2d 623, 625 (Tenn. Crim. App. 1982). In some instances mere inspection, even if just prior to trial, may serve to protect the defendant's interest. *Id.*

In his brief, Parham cites *Cadle* in support of his contention that the Trial Court's remedy was inadequate. The present case is distinguishable from *Cadle* however. In *Cadle* defense counsel was completely unaware of the existence of the State's evidence which was not disclosed until after the jury was selected. *Id.* at 624. Furthermore, we found in that case the truthworthiness of the evidence, a taped phone conversation, was very much in question and the defense was entitled to

have it analyzed. *Id*. at 625-626. In the case at bar, by contrast, the defense knew the nature of the State's evidence for some time, knew how the evidence would be used at trial, and knew the possible objections which might be raised. There was nothing to be done with the lineup in the nature of having it tested as you would a controlled substance or analyzed as you would a tape recording.

Evidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with Rule 16 and that the prejudice cannot be otherwise eradicated. *State v. Garland*, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981) *perm. app. denied*. The Trial Court compelled the State to produce the original lineup as soon as it learned of the Rule 16 violation, and then it gave the defense time to examine the photographs and raise any objections. The Trial Court felt this was sufficient to remedy the situation, and we agree. This issue is without merit.

In Kindall's next assignment of error, he claims that the Trial Court committed reversible error in allowing the victim's father, Charles Mosely, Sr., to testify, over defense counsel's objection, to what Charles Mosely, Jr., said moments after the robbery took place. Upon entering his father's house, the victim immediately said, "Daddy, I've been robbed. I've been robbed." Rule 801(c) of the *Tennessee Rules of Criminal Procedure* defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Not every statement made to a witness by a third person is excluded. *Richter v. State*, 438 S.W.2d 362, 365 (Tenn. Crim. App. 1968). In *State v. Miller*, 737 S.W.2d 556 (Tenn. Crim. App. 1987), we held that the Trial Court properly admitted the statements of an out-of-court declarant which prompted the police officer to investigate a car lot for a possible burglary. *Miller*, 737 S.W.2d at 559. We said it was "clearly not hearsay" because it only showed the officer's reason for going to the car lot, not to prove the matter asserted. *Id*.

Similarly, in the case at bar, the Trial Court allowed this statement only for the purpose of letting the witness explain what he did next, visit the scene of the robbery, and not for the truth that the victim was robbed. The Trial Court instructed the jury to consider the statement for that purpose only. However, the statement in this case, "Daddy, I've been robbed," is more prejudicial than the out-of-court statement at issue in *Miller*. The statement here goes directly to one of the elements which must be proved by the State. If the occurrence of the robbery was not in dispute and that element of the crime had been stipulated to exist, then the statement might properly be admitted as non-hearsay. Under the circumstances, we must hold that the testimony of Mr. Mosely, Sr., was

hearsay.

Having found it to be hearsay, we now turn to the question of whether it was admissible under an exception to the rule. The State asserts the statement was properly admissible under the excited utterance exception. Rule 803(2), *Tennessee Rules of Evidence*. In order to qualify under this exception, the declarant must have made the statement in an excited state due to a startling event, and the statement must have been a spontaneous reaction to the occurrence, not the result of reflective thought, so as to minimize the opportunity for conscious fabrication. *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 561, 126 L. Ed. 2d 461 (1993); *State v. Payton,* 782 S.W.2d 490, 494 (Tenn. Crim. App. 1989) *perm. app. denied; State v. Meadows,* 635 S.W.2d 400, 404 (Tenn. Crim. App. 1982).

Certainly, being robbed at gunpoint and shot at is a startling event, and there is no reason to believe that Mosely was in anything but an excited state as he ran from the scene. The record shows that it was only a short distance to his father's home, and it appears to have taken only a couple of minutes, probably less, to run that distance. Further, Mr. Mosely, Sr., testified that his son was "all pale and scary looking" when he entered the front door and made the statement that he had been robbed. It is clear that the statement was a spontaneous reaction to a violent crime and not the result of reflective thought. Therefore, it was admissible as an excited utterance.

Appellant Kindall further asserts there was insufficient evidence to support a conviction. He bases his contention on some apparent inconsistences between Mosely's testimony at the preliminary hearing and his testimony at trial which allegedly should have created reasonable doubt in the minds of the jury.

Rule 13(e) of the *Tennessee Rules of Appellate Procedure* states that "findings of guilt in criminal actions ... shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." More importantly, due process under the Fourteenth Amendment requires this standard. *Jackson v. Virginia*, 443 U.S. 307, 317-318 (1979). However, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn from the proof. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Oody*, 823 S.W.2d 554, 558 (Tenn. Crim. App. 1991). When the jury returns a guilty verdict, approved by the trial judge, it accredits the testimony of the State's witnesses and resolves all conflicts in testimony in favor of the theory of the State. *State v. Hatchett*, 560 S.W.2d

627, 630 (Tenn. 1978); *Oody*, 823 S.W.2d at 558. It is not the function of this Court to reweigh evidence adduced at trial. *Hatchett*, 560 S.W.2d at 630; *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973).

The inconsistencies cited by the appellant are relatively minor. Did the victim speak to a young lady on his way to the store? Did the victim or the assailant remove the necklaces from the victim's neck? Were the two men who robbed him standing in the street or in the yard when they spoke to him? No additional evidence was offered by the defense. On the other hand, the victim identified the appellants consistently and without any doubt, both in the photographic lineups and in court, as the men who robbed him. The jury approved all testimony of Mr. Mosely, Jr., when it returned a guilty verdict. We find that any rational trier of fact could have found these defendants guilty beyond a reasonable doubt. This issue is without merit.

Therefore, the decision of the Trial Court is hereby affirmed.

AFFIRMED.

ROBERT E. CORLEW, III
SPECIAL JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID H. WELLES, JUDGE

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Appellants	)	

JUDGMENT

Came the Appellants, Michael Kindall and Robert Parham, by counsel, and also the Attorney General on behalf of the State, who submitted this cause to the Court upon briefs and the entire record on appeal from the Circuit Court of Davidson County; and upon consideration thereof, this Court finds that the judgment of the Trial Court should be affirmed.

In accordance with the opinion filed herein, it is ordered and adjudged by this Court that the judgment of the Trial Court is hereby affirmed. This cause is remanded to the Circuit Court of Davidson County for collection of costs accrued below.

Costs of appeal will be paid by the Appellants, Michael Kindall and Robert Parham, for which let execution issue.

GARY R. WADE, JUDGE
DAVID H. WELLES, JUDGE
ROBERT E. CORLEW, III, SPECIAL JUDGE