

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1996**

STATE OF TENNESSEE,)
)
 Appellee)
 vs.)
)
 CECIL ROBERTS,)
)
 Appellant)

No. 01C01-9508-CC-00253

COFFEE COUNTY

Hon. Gerald L. Ewell, Sr., Judge

(Indecent Exposure)

FILED

June 20, 1996

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Appellate Court Clerk**

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Cecil Roberts, appeals from a judgment of conviction entered by the Circuit Court of Coffee County. The appellant pled guilty to one count of indecent exposure, a class B misdemeanor. The trial court sentenced the appellant to six months incarceration in the county jail. The court then ordered the appellant to serve 15 days of his sentence in the county jail and the balance on probation. As a condition of his plea, the appellant reserved the right to appeal as a certified question of law the trial court's denial of his motion to suppress identification evidence. See Tenn. R. App. P. 3(b); Tenn. R. Crim. P. 37(b).¹

FACTUAL BACKGROUND

On the afternoon of January 4, 1994, Debra Simmons was en route to a day care center to pick up her son. Another vehicle pulled up beside Ms. Simmons'. Simmons was able to clearly see the driver of the other vehicle. The driver of the vehicle, later identified as the appellant, began to wave at Ms. Simmons. At the suppression hearing, Simmons described the appellant's waving as a "nice sort of gesture." Minutes later, as she exited the day care center with her son, Simmons noticed the appellant's car parked behind her car. At this point, the appellant asked Simmons to approach his car. The appellant remained seated in his car. When Simmons drew near, the appellant, in extremely lewd and offensive terms, asked that she perform oral sex on him. The appellant's genitals were exposed. Simmons responded angrily and then returned to her vehicle.

¹We note that the admissibility of identification evidence is a dispositive issue in this case due to the lack of other sufficient evidence connecting the appellant with the commission of the offense.

The incident was reported to the Manchester Police Department the following day. Simmons informed the police that the perpetrator had been wearing brown coveralls and a two-toned hat on which was inscribed "Manchester Water and Sewer Department." She further described the perpetrator as "blond [with] facial hair, mustache, beard, and ... red-faced which appeared high blood pressure type[,] and "stocky built." Detective Mark Yother, the investigator in this case, testified at the suppression hearing that he was familiar with the appellant prior to this incident. He stated that Ms. Simmons' description was "very accurate," and that he immediately recognized the appellant from Simmons's description of the appellant and the appellant's car.

On January 12, 1994, Simmons was shown a photographic line-up consisting of six white males. All six had facial hair and all but one were wearing ball caps. Yother testified that the police did not inform Simmons that they were aware of a suspect or that a suspect was included in the array. Nevertheless, Simmons immediately identified the appellant. Moreover, she indicated that she was "100 percent certain" that the appellant's photograph was the correct one. The record does reflect that the appellant was the only person in the photographic array who was wearing a Manchester Water and Sewer Department ball cap. However, at the suppression hearing, Simmons stated that her identification was based upon the appellant's facial features and not upon the logo on his ball cap. Indeed, she asserted that she "didn't focus on his clothing at all."

At the conclusion of the hearing, the trial court denied the motion to suppress Simmons' identification of the appellant. The trial court observed:

Balancing the degree of reliability determined by the application of the Biggers factors cited in the Meeks case against the corrupting effect of the suggestive identification, the Court concludes that despite a suggestive identification procedure the identification was based on the victim's observation at the time of the incident and not induced by the conduct of the investigative procedure and

concludes therefore that the identification testimony may be admitted in Court.

Moreover, the court found that even if the identification was inadmissible, “the circumstances [of this case] do not indicate that there is a substantial likelihood of [irreparable] misidentification.”

ANALYSIS

The Tennessee Supreme Court has adopted the standard for determining the admissibility of identification evidence set forth by the United States Supreme Court in a line of cases, including United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967), Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967), Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967), and Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972). See Bennett v. State, 530 S.W.2d 511, 512-515 (Tenn. 1975); Sloan v. State, 584 S.W.2d 461, 466-470 (Tenn. Crim. App. 1978); Rippy v. State, 550 S.W.2d 636, 639-640 (Tenn. Crim. App. 1977). A violation of due process has occurred if the court finds that the identification procedure was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Proctor v. State, 565 S.W.2d 909, 911-912 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1978).² “[R]eliability is the linchpin in determining the admissibility of identification testimony [pursuant to principles of due process].” Manson, 432 U.S. at 114, 97 S.Ct. at 2253. A finding that the pre-trial identification was unreliable will also require the exclusion of a subsequent in-court identification by the same witness. Id. See also State v. Philpott, 882 S.W.2d 394, 400 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. Davis, 872 S.W.2d 950, 956 (Tenn. Crim. App.), perm. to appeal denied,

²In Manson v. Brathwaite, the Supreme Court noted that, short of a case in which there is a substantial likelihood of irreparable misidentification, courts should “rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” 432 U.S. 98, 116, 97 S.Ct. 2243, 2254 (1977).

(Tenn. 1993); Sloan, 584 S.W.2d at 470. The court must view the totality of the circumstances. Proctor, 565 S.W.2d at 911-912. In Biggers, the Supreme Court announced factors to be considered in determining whether a violation of due process has occurred:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness' degree of attention at the time of the crime;
3. the accuracy of her prior description of the criminal;
4. the level of certainty demonstrated at the confrontation; and
5. the time elapsed between the crime and the confrontation.

409 U.S. at 199-200, 93 S.Ct. at 382. See also Philpott, 882 S.W.2d at 400.

Initially, we note that the trial court's findings of fact following a suppression hearing are conclusive on appeal unless the evidence preponderates against the judgment. Davis, 872 S.W.2d at 956. In the instant case, the record clearly supports the trial court's findings. Although the identification procedure was suggestive, Ms. Simmons had two separate opportunities to view the appellant in the daylight; she testified that, on the second occasion, her full attention was focused on the appellant; she gave a "very accurate" description of the appellant to the police; and she was "100 percent certain" of her identification of the appellant only eight days after the commission of the offense. Finally, it is apparent from the record that Simmons did not identify the appellant on the basis of his hat.³ We conclude that the

³The appellant also argues that the appellant was not sufficiently similar in physical appearance to the other men included in the photographic array. This court has observed: Where a criminal defendant's photograph is in a lineup of other photographs, courts, in determining suggestiveness, look to whether the police attempted to influence the witness; whether the photograph recurs in the group; the number of photographs; and the manner of selection. The disparity in appearance among the persons depicted is also a major consideration, although it is recognized that there is no requirement that the persons be identical.

State v. Miller, No. 02C01-9107-CC-00162 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1992)(citation omitted). We simply note that any suggestiveness in this case was insufficient to undermine the reliability of the identification. "The identification may stand even though the procedure employed may have in some respects fallen short of the ideal, providing that the procedure when viewed in the totality of its own circumstances meets the fundamental test of fairness." United States v. Cooper, 472 F.2d 64, 66 (5th Cir.), cert. denied, 414 U.S. 840, 94 S.Ct. 96 (1973).

identification of the appellant was reliable.

Accordingly, we affirm the judgment of conviction.

DAVID G. HAYES, Judge

CONCUR:

JERRY L. SMITH, Judge

WILLIAM S. RUSSELL, Special Judge