IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1996

FILED

March 19, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 02C01-9508-CC-00243
	)	
vs.	)	Obion County
	)	
UNTWON BISHOP, and EMANUEL COBB.	)	Honorable William B. Acree, Jr., Judge
	)	
	)	
Appellants.	)	(Aggravated Robbery)
	)	

FOR THE APPELLANTS:

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REVERSED AND DISMISSED - UNTWON BISHOP
REVERSED AND REMANDED - EMANUEL COBB

OPINION FILED _____

JERRY L. SMITH, JUDGE

OPINION

The defendants, Untwon Bishop and Emanuel Cobb, were both convicted of aggravated robbery, a Class B felony, upon trial by jury in the Criminal Court for Obion County. As Range I offenders, each was sentenced to the minimum sentence of eight years. In this appeal of right the defendants contend that the evidence was insufficient to prove that they were the perpetrators of the robbery and also that the trial court committed plain error in giving a "dynamite charge" to the jury. Because we find that the evidence was insufficient to convict Untwon Bishop, we reverse his conviction and dismiss the case. Upon examination of the jury instructions we also find reversible error requiring a new trial for Emanuel Cobb.

The basic facts are not in dispute. On December 22, 1994, shortly after 11:00 p.m., a man dressed in a dark jacket, green jeans and wearing a ski mask, cloth gloves and dark glasses entered the Hardee's Restaurant in Union City, Tennessee. The restaurant had closed an hour earlier, and two employees were completing their work for the evening. Tracy Coble, the assistant manager, was in the office counting the receipts and finishing the paper work. Untwon Bishop, a defendant in this case, was cleaning in the kitchen. The robber, who carried either a shotgun or a rifle, forced Coble and Bishop into the freezer and made off with pay roll checks and approximately $1,900 in cash. An employee at the McDonald's next door saw a white car speed away from the Hardee's parking lot a few minutes after eleven o'clock. Coble told the police that she believed the robber was Emanuel Cobb and that, based on what had occurred earlier in the evening, she considered Untwon Bishop to be an accomplice. The police immediately arrested Bishop. They found Cobb three hours later asleep in bed at home and took him into

custody. He had only a few dollars in his pants pocket. The police conducted no search of Cobb's bedroom or house.

The grand jury indicted the defendants on February 6, 1995. The defendants retained an attorney to represent them. Six weeks later on March 16, the jury found both defendants guilty of aggravated robbery.[1] On March 29, 1995, the trial court sentenced each defendant to serve eight years in the Department of Corrections.

The identity of the person who committed the robbery and the complicity of Untwon Bishop were very much in dispute at trial. Coble identified Cobb as the robber, however there is little, if any, evidence which would implicate Bishop in the commission of the crime.[2]

Early in the evening on December 22, 1994, Coble, Bishop, and three other employees were working at Hardee's. Coble seldom worked the evening shift. Bishop, a high school senior, usually worked about 35 hours per week on the three to eleven shift. At some point in the evening, Bishop accidentally spilled grease on the kitchen floor. Coble was annoyed with him because of the mess it made. He spent a lot of the evening cleaning it up. Jamon Hyde, a friend and classmate of Bishop's, worked that evening but his shift ended about 8:00 p.m. At about the time that Jamon left, Bishop's older brother Ladarien arrived with Emanuel Cobb

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[1] The trial was held on March 15 and 16, 1995.

[2] Although Coble identified Cobb as the man who robbed her, no testimony connects Cobb with the white car leaving Hardee's after the robbery. Neither the cash, payroll checks, nor the weapon were ever found and there is no other physical evidence connecting Cobb with the robbery. Nevertheless for the reasons discussed infra., Coble's identification of Cobb is sufficient to sustain the verdict of guilt as to him.

and another friend, Shannon Huff.[3] Bishop came out and spoke briefly to his brother. Cobb walked away toward the restroom, and Bishop followed. Bishop and Cobb testified that they exchanged a few words about a girl in Hickman, Kentucky, and then Ladarien Bishop entered the restroom and told Bishop he'd better get back to work because Coble was not happy with him.[4] Bishop returned to the kitchen. Cobb, Ladarien Bishop, and Huff ordered, ate their dinner, and left.

At ten minutes before closing, Coble locked the entrance doors. One employee cleaned the dining room and the restrooms while another was responsible for the counter and drive-through areas.[5] The boyfriend of one of the employees was in the restaurant waiting to take her home. As the two completed their tasks, Coble checked the areas and excused them to go home shortly before eleven o'clock. She testified that she checked to make sure the west and east entrance doors were locked. She was particularly careful of the west door because if it were not closed properly it did not latch and could be pushed open from the outside. Bishop was still working in the kitchen. He was behind schedule because of the grease spill. Coble was also behind and she went to the office to count the money and complete the paperwork. She was in a hurry to get home.

According to Coble's testimony, Bishop received a telephone call just before eleven. The telephone is right outside the office door, and she heard him say something about "ten or fifteen minutes." After he hung up, he asked her if she could give him a ride home, and she said she would do so. Bishop returned to the

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[3] Both Ladarien Bishop and Shannon Huff testified at trial.

[4] Both Ladarien Bishop and Coble testified that she told Ladarien that Untwon Bishop might not be working there much longer.

[5] Neither of these employees testified at trial.

kitchen, but within a few minutes came back and told her he was going to the restroom. She was still busy at the computer and was facing away from the office door. At this point, Coble's testimony becomes confused. During direct examination, she testified that the dining room lights went out and then came back on. On cross, however, she said that all the lights went out and that only the dining room lights came back on. All lights except for those in the office are controlled by switches located in the dining area.[6]

Five or ten minutes after the lights were shut off, a man dressed in dark clothing came to the office door. The man was covered from head to foot, and she could not see his face because of the ski mask or tell whether he was black or white. He was carrying a long gun. She began to scuffle with the robber. He pulled her hair and pushed her down as she grabbed for the gun. At that point, Bishop came back from the kitchen and stepped in between them. He helped her up and told her "to do what he says." The robber forced them down the hall and into a freezer located at the back of the restaurant. He attempted to block the freezer door with a green dolly. Coble opened the door from the inside and pushed away the dolly. As she attempted to leave the freezer, the robber returned to the area and shoved her back inside. At this time he had removed the dark glasses, and she testified that she recognized his eyes as belonging to Emanuel Cobb.[7] Coble testified that despite having her hair pulled and being knocked down, she thought the robbery was a joke. Although she said she was terrified, she also said she

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[6] The practice was to turn all the lights off together with one sweep of the hand. Coble did not know which switch turned off which set of lights. She thought that the lights in the counter area were controlled by the same switch as those in the dining area. Apparently, separate switches control the two sets of lights.

[7] Cobb had previously been employed at Hardee's but Coble had not known him then. She had never spoken to him but she had seen him perhaps five times when he came into the restaurant.

wasn't sure it was a robbery until she discovered that the money was missing. She had heard about a prank played on another assistant manager and thought that this "robbery" was a similar prank. After the robber left, she checked the west entrance door and found that it was not securely latched. Although the door was closed, it could be opened by pushing against the door, without touching the push bar which operated the latch.

Bishop's version of events was somewhat different. He testified that he had used the restroom before the other employees had left and that Coble had not checked the restrooms and doors until after he had returned to the kitchen. He also stated that he received the telephone call after his trip to the restroom. The call was from Jamon Hyde who wanted to know if he needed a ride home. After checking with Coble, he told Hyde that he had a ride home and that he would be off work in about fifteen minutes. He and Hyde were planning to go to a club in Hickman after he got off work.[8] When Bishop was finishing up in the kitchen, all the lights went out and it became pitch dark. A few seconds later, he heard Coble scream. He ran forward to the office area and found her on the floor grabbing for the robber's weapon. He pulled her to her feet and told her "to do what the man said because it wasn't worth getting shot." When the police arrived, he described the robber as being of stocky build and wearing dark clothes including a dark ski mask and sunglasses.

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[8] Hyde 's testimony corroborated Bishop's testimony. Hyde testified that when he asked Bishop if he needed a ride home, Bishop checked with someone and then told him no, he had a ride. He also testified that when he called Bishop's home at eleven-thirty to see if Bishop were ready to go to Hickman, he found out about the robbery.

Cobb presented an alibi defense.[9] According to the testimony of Ladarien Bishop and Shannon Huff, the three young men were together until about ten o'clock when Huff dropped Cobb off at his aunt's house.[10] Cobb testified that he walked to his mother's house to use her telephone. When she wasn't home, he returned to his aunt's. As he arrived, he met his cousin, Tamara Ware, who was leaving to go to a club in Hickman, Kentucky for a pre-Christmas celebration with some friends. Ware testified that she and Cobb drove to Hickman together. After stopping briefly to see another cousin, they arrived at the club at about 11:00 p.m.[11] Howard Hensley, a plumbing contractor from Union City, owns the club in Hickman. He testified that he was taking identification at the door that night starting just before eleven. Cobb was a regular at the club; he and Hensley enjoyed kidding around and engaging in some horseplay. Hensley testified that Cobb and a "girl- friend" arrived just after eleven o'clock. He also testified that he was surprised the next day when he read that Cobb had been arrested because he knew Cobb had been at the club.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony

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[9] Cobb gave the names of a number of people to the police to support his alibi, but the police never made contact with any of them.

[10] Cobb was living with his aunt. His mother lived nearby.

[11] Cobb did not return to Union City with Ware. He left the club with his half-brother. Another friend drove him from his father's home in Hickman to Union City at about 2:30 a.m.

and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the defendant has the burden in this Court of illustrating that the evidence is insufficient to support the verdict 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, and any inferences which may be drawn from the facts, are insufficient to find the defendant guilty beyond a reasonable doubt. Id.

A criminal offense may be established exclusively by circumstantial evidence. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958); State v. Lequire, 634 S.W.2d 608 (Tenn. Crim. App. 1981); State v. Hailey, 658 S.W.2d 547 (Tenn. Crim. App. 1983). However, before an accused may be convicted of a criminal offense based upon circumstantial evidence alone, the facts and circumstances "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. 478, 484, 470 S.W.2d 610, 613 (1971). In other words, "[a] web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." Id.; State v. McAfee, 737 S.W.2d 304, 305 (Tenn. Crim. App. 1987).

We consider first the evidence against Emanuel Cobb. The only direct evidence connecting Cobb with the robbery is the eye witness identification by Tracy Coble. Cobb contends that this identification is completely unreliable. He

argues that the robber was completely covered, and that except for a few seconds while he roughly shoved her back into the freezer she never saw his eyes. Upon cross-examination, Coble admitted she didn't know the color of Cobb's eyes.[12] She was also unaware of a scar visible at the corner of one eye. She testified that she recognized his eyes by their shape. Moreover, Coble testified during cross-examination that all lights in the restaurant were out except for those in the office and the dining room. Since the freezer is located in the unlit portion of the building, her ability to see the robber's eyes is questionable. The record indicates that the police recovered none of the clothing she described and that neither the weapon nor the proceeds were located. Huff and Ladarien Bishop testified that Cobb was wearing light blue jeans when they left him at ten o'clock on the night in question.

Although the reliability of Coble's identification is questionable, the jury by its verdict resolved the question in favor of Coble's testimony. We are not free on appeal to revisit that issue. Therefore, we find the evidence sufficient to convict Cobb of aggravated robbery.

Next we consider whether the evidence in the record is sufficient to find Untwon Bishop guilty of aggravated robbery. What evidence there is against Bishop is entirely circumstantial and meager. However, the prosecution's proof must ensnare him in "[a] web of guilt . . . from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." State v. Crawford, 225 Tenn. 484, 470 S.W.2d at 610, 613; State v. McAfee, 737 S.W.2d at 305.

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[12] Defense counsel noted that Cobb's eyes are hazel, a rather unusual color for an African-American. Cobb testified that his eyes are hazel or light brown.

The record discloses that on December 22, Bishop arrived for work at 3:00 p.m. Sometime before 8:00 p.m., he accidentally spilled grease on the kitchen floor while attempting to clean the grease trap. Coble, the assistant manager, was angry about this mishap. At about 8:00 p.m., Ladarien Bishop, Shannon Huff, and Emanuel Cobb arrived at Hardee's to have supper, and, during this time, Bishop spoke briefly to Cobb in the restroom. Coble testified that at closing time she locked the entrance doors with her key and retested them when the other employees left. Testimony in the record also shows that the west door was difficult to latch and that, at times, it could be opened by someone outside the building. Coble testified that Bishop received a telephone call at about eleven o'clock and then went to the restroom. Shortly thereafter all the lights went out but, within moments, the dining room lights came back on. Five or ten minutes later the masked robber appeared. Coble, during this time, was working in the office with her back to the door. When Coble tested the west door after the robbery, the door was not securely latched and could be pushed or pulled open.

A jury's verdict may be based on a reasonable inference but it may not be founded on mere conjecture, possibility, or speculation. Mathis v. State, 590 S.W.2d 449, 454-455 (Tenn. 1979); State v. Anderson, 738 S.W.2d 200, 203 (Tenn. Crim. App. 1987). It is not enough to demonstrate that a fact may have been. The State must furnish some logical basis for the inference that it was or is. Ivey v. State, 210 Tenn. 422, 431-432, 360 S.W.2d 1, 5 (Tenn. 1962). The record contains no direct evidence connecting Untwon Bishop with the robbery. The record contains no proof that the robber, whoever he was, actually entered by the west door, although he may have exited that way. The restaurant has several doors. One witness testified that she saw two black men leaving by the drive-through door. The police found a door in the back of the restaurant that was not properly barred.

Coble did not see Bishop flick the light switch nor did she see him return from the restroom. The State presented no physical evidence that Bishop rather than the robber turned off the lights. We must therefore conclude that the circumstantial evidence in this case is not "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. at 484, 470 S.W.2d 610, 612. Untwon Bishop's conviction for aggravated robbery must also be reversed and the charge against him dismissed.

The defendants' second issue relates to the trial court's supplemental instruction when the jury announced it had reached an impasse. For the reasons discussed below we find that the trial court's supplemental jury charge was tantamount to a "dynamite charge" that impermissibly interfered with the jury's decision-making process.

The record shows that the jury retired to deliberate at 2:50 p.m. After less than an hour and a half, the jury returned to the court room. The foreman reported that they had reached a verdict on one defendant, but not on the other. Although nothing in the record indicates that the jury was at an impasse on the second verdict, the trial court must have believed that the jury was at least approaching deadlock because he gave the following charge:

> I'm going to ask you that you continue deliberations in an effort to agree upon a verdict and dispose of this case, and I have a few additional comments that I would like for you to consider as you do so.
>
> This is an important case. It has been expensive in time, effort, and money to both the defense and prosecution. The case has taken two days to try. If you should fail to agree on a verdict, the case is open and must be tried again. Obviously, another trial would only serve to increase the costs to both sides, and there is no reason to believe that the case can be tried again by

> either side better or more exhaustibly than it has been tried before you.
>
> Any future jury must be selected in the same manner and from the same source as you were selected, and there is no reason to believe that the case could ever be submitted to twelve men and women who are more conscientious and more impartial or more competent to decide the case, or that more clear evidence could be produced.

The trial judge then concluded with an instruction consistent with that found in the Tennessee Pattern Jury Instructions.[13] Defense counsel made no objection to the supplemental instruction.

After deliberating another hour and fifteen minutes, the jury again returned to the court room at 5:01 p.m. The foreman reported that they were making good progress, but had not yet reached a second verdict. At the request of the defendants, the trial judge asked the jury to continue commenting that

> This has been a long trial. We had 19 witnesses to testify and it took two days to try. It would probably have taken about six months if this were in California to go through 19 witnesses, but nevertheless, it has been time consuming. To retry the case would again create a long . . . another two days at least.

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[13] Tennessee Pattern Jury Instruction 15.22 provides:

> The verdict must represent the considered judgement of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view of reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with you fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose or returning a verdict.

T.P.I. Crim. 43.02

At the request of the defendants, the trial judge asked that the jury render the verdict it had successfully reached. The foreman then read the verdict finding Untwon Bishop guilty of aggravated robbery. When the judge asked the jurors to raise their hands to signify that this was their verdict, one juror declined. When the trial judge asked the juror whether or not she was certain of Bishop's guilt, she replied, "I'm going to say guilty, but I'm ready to go home so--but I'm going --"

At that point, the trial judge stopped her and asked the jury to return to its deliberations on both cases. Once again defense counsel raised no objections. At 5:48 p.m., the jury returned to the court room and announced that it had found both defendants guilty as charged. The trial court polled the jurors individually as to each defendant, and every juror responded "guilty."

The defense made no objection to the supplemental charge or the comments of the trial court. The lack of a contemporaneous objection to the content of an instruction does not necessarily constitute waiver if the issue is raised in the motion for new trial. Tenn. R. Crim. P. 30(b). The motion for new trial does not allege any error in the jury instructions, and the issue would generally be waived.[14] Tenn. R. App. P. 3(e), 36(a). An appellate court has the discretion to notice an error at any time if the error affects a substantial right of the accused. Tenn. R. Crim. P. 52(b). In this instance, justice requires that we address this issue.

[14] The record shows that David Hamblen, who represented the defendants at trial, withdrew after the trial court denied the motion for new trial.

Tennessee adopted its version of the Allen or "dynamite" charge in Simmons v. State, 198 Tenn. 587, 281 S.W.2d 487 (1955).[15] The Simmons charge exhorted the jurors to listen to the arguments of the other jurors "with a disposition to be convinced" and encouraged dissenters to ask themselves whether they might not "reasonably doubt" the correctness of their judgment as most members of the jury did not agree with them. Simmons v. State, 198 Tenn. at 595, 281 S.W.2d at 490. In Kersey v. State, our Supreme Court concluded that "the interests of justice demand the rejection of the "dynamite charge" as adopted in Simmons. Kersey v. State, 525 S.W.2d 139, 144 (Tenn. 1975). The Supreme Court recognized that the right to trial by jury must not be impaired or encumbered, and that "[a]ny undue intrusion by the trial judge into this exclusive province of the jury, is an error of the first magnitude." Id. See also Vanderbilt University v. Steely, 566 S.W.2d 853, 854 (Tenn. 1978). If a trial judge's effort to avoid a mistrial reaches the point [that] a single juror may be coerced into surrendering views conscientiously held, the jury's province is invaded and the requirement of unanimity is diluted. Kersey v. State, 525 S.W.2d at 144.

The Kersey court then adopted the instruction now found at Tennessee Pattern Jury Instructions 15.22 and sanctioned repeating the charge if a deadlock developed, provided it had been included in the main charge. Id. at 145. The court emphasized that "[s]trict adherence is expected and variations will not be permissible." Id., Vanderbilt University v. Steely, 566 S.W.2d at 854; Bass v. Barksdale, 671 S.W.2d 476, 485-86 (Tenn. App.), perm. to appeal denied (Tenn. 1984).

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[15] The charge originated first in Commonwealth v. Tuey, 62 Mass. 1 (1851) and came to national attention in Allen v. United States, 164 U.S. 492 (1896).

In Johnson v. Hardin, 926 S.W.2d 236 (Tenn. 1996), the Supreme Court recently considered the effect of a supplemental jury charge not unlike the one given by the trial judge in this case. The court found that the time, effort and money involved in a new trial was irrelevant to the jury's deliberations and that an instruction raising the specter of such matters was erroneous. Id. at 242; Vanderbilt University v. Steely, 566 S.W.2d at 854. No juror, the court stated, should be encouraged to abandon an honestly held conviction in order to save time and money. A hung jury is an important safeguard to liberty and may be the sole means by which a minority may stand against the oppression of overwhelming contemporary public sentiment. Johnson v. Hardin, 926 S.W.2d 236, 243. (Citations to other cases omitted).

The supplemental charge at issue in this case incorporated both the acceptable language found in pattern instruction number 15.22 and impermissible language encouraging the jurors to arrive at a verdict in order to save time and money. We are unable to conclude that the proper instruction canceled out the impermissible language. Since Kersey, our Supreme Court has consistently held that "strict adherence is required and variations will not be permissible." Johnson v. Hardin, 926 S.W.2d 236, 242. The supplemental instruction given in this case did not strictly adhere to the requirements imposed by our Supreme Court. Without question, the instruction was erroneous.

However, an error in jury instructions does not necessarily require reversal. Id. Reversal is appropriate only if the error was a material factor in producing the verdict. Id. Given the facts of this case, we conclude that the charge impermissibly interfered with the jury's decision making process and diluted the requirement of unanimity.

When the jury returned with the first verdict, the trial judge delivered his "dynamite" charge and sent them back to deliberate further. When they returned a second time, the foreman reported that they were making good progress on the second case. However, his response was belied by that of the single juror who refused to raise her hand when the judge asked if all jurors were in agreement on Bishop's guilt. Her words indicated that she would agree to a guilty verdict only because "she wanted to go home." The trial court once again reminded the jury of the time and expense that a new trial would entail and sent the jury back to deliberate on both cases. Within thirty minutes, the jury returned to the court room with guilty verdicts in both cases. Given the facts of this case, we are unable to conclude that the trial court's erroneous supplemental instructions did not materially affect the outcome. The verdicts in this case were not uncoerced and unanimous. This error requires reversal and a remand for a new trial for Emanuel Cobb.

Finding the evidence insufficient to support the conviction of Untwon Bishop, his conviction is reversed and dismissed. Due to the plain error in the trial court's supplemental jury instructions the case against Emanuel Cobb is reversed and remanded for a new trial

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JERRY L. SMITH

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
LYNN W. BROWN, SPECIAL JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 02C01-9508-CC-00243

vs.	)	Obion County
UNTWON BISHOP, and EMANUEL COBB.	)	Honorable William B. Acree, Jr., Judge
Appellants.	)	(Aggravated Robbery)

CONCURRING IN PART DISSENTING IN PART

BROWN, LYNN W.

I concur that the evidence in this case was insufficient to convict Untwon Bishop of robbery. Also, I concur that the jury instructions in this case amounted to a "dynamite" charge, which would require the reversal of the conviction

of Emanuel Cobb with resulting remand for new trial. However, I respectfully dissent from the majority opinion finding the evidence sufficient to convict Cobb of this robbery. For reasons stated below, I would reverse the case against Cobb and dismiss his conviction.

Without the victim's identification of Cobb, the only evidence against him is that he was present in the restaurant earlier in the evening and that he and Untwon Bishop went to the restroom at the same time.[16] No physical evidence ties him to the robbery. The circumstantial evidence in the record is not sufficient, by itself, for a rational juror to find Emanuel Cobb guilty beyond a reasonable doubt. However, as the state contends, Tracy Coble, the victim and an eye witness, unwaveringly testified that she believed Cobb was the man who robbed Hardee's that night. A reliable eye-witness identification is sufficient to support a conviction. State v. Strickland, 885 S.W.2d 85, 87, 88 (Tenn. Crim. App. 1993).

The real issue, therefore, is whether the evidence was sufficient for a jury to find beyond a reasonable doubt that Coble had correctly identified the defendant. State v. James Jackie Dodd, No. 03C01-9509-CC-00280 slip op. at 5 (Tenn. Crim. App., Knoxville, Oct. 22, 1996). Recently our supreme court promulgated a new jury instruction on identification. State v. Dyle, 899 S.W.2d 607, 612 (Tenn. 1995). Dyle was released on May 15, 1995, shortly after the notice of appeal was filed in this case. Cobb does not argue that the jury instruction on identification was erroneous. In fact, the instruction given by the trial court is similar to that promulgated in Dyle. The evidence in this case should be reviewed in light

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The case against Bishop is, of course, also somewhat dependent upon Coble's identification of Cobb. If Cobb was not the robber, then the circumstantial evidence against Bishop becomes less convincing.

of the factors the supreme court found relevant to judging the value of an identification in Dyle:

> (1) The witness's capacity and opportunity to observe the offender, including, among other things, the length of time available for observation, the distance, the lighting, and the witness's prior knowledge of the person who committed the crime.
>
> (2) The witness's degree of certainty, the circumstances under which the identification was made, and whether other outside factors might have influenced the identification.
>
> (3) The occasions, if any, on which the witness failed to make an identification of the defendant or identified someone else.
>
> (4) The occasions, if any, on which the witness identified the defendant and the circumstances surrounding such identifications.

State v. Dyle, 899 S.W.2d at 612.

Factors three and four are of little relevance in this instance. Coble immediately told the police that Cobb was the person who forced her into the freezer at gun point and took the money. Factors one and two require an assessment of the witness's degree of certainty, a consideration of any factors that might have influenced the identification, and an evaluation of the circumstances under which the person was observed and identified. Tracy Coble never wavered in her belief that the man who held the gun that night was Emanuel Cobb. However, it should be noted that Ms. Coble's statement to the first officer to arrive after the robbery was one of belief rather than positive identification of Mr. Cobb. The record indicates that she suspected it was Cobb from the beginning based on his stocky build.[17] She had seen Cobb four or five times although she had never spoken to him. Since she knew of a previous "robbery" and initially believed that

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[17] Coble told one of the police officers that she would never have struggled with the robber if she hadn't believed it was Cobb trying to pull a prank on her. On the other hand, she also said she was terrified and screaming.

this was a similar hoax, she expected the robber to be someone she knew. This expectation may have colored her identification to some extent. Coble had little time to observe the eyes of her assailant during the few seconds she was out of the freezer. According to her testimony, the freezer area was unlit and the lights from the office were behind the man who was shoving her back into the freezer. She admitted she didn't know the color of the Cobb's eyes and was unaware of any scar, although Cobb had a distinctive scar at the corner of his right eye.

Other than her complete and unwavering certainty at trial, there are no facts in the record from which a rational juror could conclude that Tracy Coble had correctly identified Emanuel Cobb beyond a reasonable doubt as the man who robbed Hardee's. The degree of certainty of her identification of Cobb was much more positive at trial than when she spoke to the first investigating officer. The robber's face was at all times obscured by a ski mask. When the victim first saw the robber she could not determine his race, because even his eyes were concealed by sunglasses. She was unable to identify his voice as she had never spoken with him. After the robber's sunglasses were off, Ms. Coble had only a few seconds in a darkened room to glimpse his eyes. At trial, she testified that she did not know what the color of his eyes, could not describe their shape, and could remember no visible scar. The fact that both the robber and Cobb were similar in height and weight is insufficient on this record to find beyond a reasonable doubt that Cobb was the man who pushed Coble into the freezer that night. Ms. Coble's testimony, although her sincerity is not doubted, does not in my opinion constitute a reliable identification of Cobb as the perpetrator of this robbery. The evidence in the record is legally insufficient to sustain Cobb's conviction for aggravated robbery.

For these reasons, I would reverse his conviction and dismiss the charge against him.

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Lynn W. Brown
Special Judge