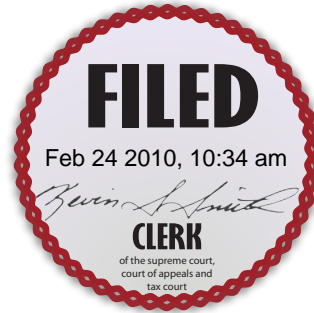


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

T.B.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0906-JV-496
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0902-JD-339

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

T.B., a juvenile, appeals a restitution order and the true finding that he committed an act that would be Battery,¹ as a Class A misdemeanor, if committed by an adult. We affirm the true finding, but reverse the restitution order.

Issues

T.B. raises three issues which we consolidate and restate as follows:

- I. Whether the juvenile court abused its discretion by admitting a witness' in-court identification of T.B.; and
- II. Whether the juvenile court abused its discretion in ordering restitution without evidence to support its order.

Facts and Procedural History

A.C. was a student at Arsenal Technical High School. On December 4, 2008, during the passing period preceding the last class of the day, a group of students collected in a hallway and refused to leave. There ensued some communication between students in A.C.'s classroom and the students in the hallway. After class, A.C.'s classmates exited toward one set of doors while A.C. used a side door so that she could go straight to her bus. Four boys followed her outside. A.C. turned toward them; two of the boys held her arms; and T.B. hit A.C.'s left eye with a closed fist.² A.C. saw T.B.'s face and looked into his eyes. T.B. was one of the students A.C. had seen outside her classroom less than an hour earlier.

¹ Ind. Code § 35-42-2-1.

² A.C. suffered bruising, a scratch below her left eye, and a scratched and swollen eyeball. It took two weeks to a month for her injuries to heal.

Within minutes, A.C. told Indianapolis Public Schools Police Officer Robert Hardiman (“Hardiman”) about the incident and identified the perpetrator as an African-American male – tall and skinny with a short haircut. At the time, A.C. did not know the juvenile’s name.

Hardiman used A.C.’s description and school surveillance video to assist him in preparing a photo array of six school-issued identification cards, including T.B.’s. Less than a week after the incident, Hardiman met with A.C. to show her the array. Before doing so, the officer told her that, “a young man had already got in trouble, fitting the description of what [A.C.] gave him.” Transcript at 24. A.C. looked at the array and identified T.B. as the perpetrator.

According to deputy prosecutor Rebecca Meyer, another deputy prosecutor emailed Hardiman on February 17, ten weeks after the incident, to request the surveillance video. The next day, Hardiman responded that “the tape was no longer in the system.” Id. at 1.

Alleged to have performed an act that would be Battery if committed by an adult, T.B. moved to dismiss the allegation based upon the destruction of the surveillance video. Immediately prior to the denial hearing, the juvenile court heard argument regarding T.B.’s motion and denied it.

Over T.B.’s objection, A.C. testified regarding the incident and identified T.B. as the perpetrator, stating that she was “100% sure” that it was T.B. who hit her. Id. at 31.

The juvenile court made a true finding that T.B. committed the act as alleged. At a subsequent disposition hearing, the juvenile court placed T.B. on probation and ordered him

to pay forty dollars in restitution.

T.B. now appeals the true finding and the restitution order.

Discussion and Decision

I. Admission of Evidence

We review a trial court's decisions on the admission of evidence for an abuse of discretion. Vasquez v. State, 868 N.E.2d 473, 476 (Ind. 2007). We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

T.B. argues that the juvenile court abused its discretion and violated his Due Process rights by admitting into evidence A.C.'s in-court identification of T.B. and the photo array she reviewed the week of the incident. Specifically, T.B. asserts that the pre-hearing, photo-array identification was impermissibly suggestive because Hardiman told A.C. that one of the six young men in the array "had already got in trouble, fitting the description of what [A.C.] gave him." Tr. at 24. He further argues that the photo-array identification violated his Due Process rights because the State destroyed what T.B. considers to be exculpatory evidence – the surveillance video Hardiman used to prepare the photo array. Finally, T.B. argues that A.C.'s in-court identification was inadmissible because it was tainted by the suggestive nature of the photo-array identification. Because we determine that A.C. had an independent basis for her in-court identification of T.B. we need not address the other contentions of T.B.

"[A] witness who participates in an improper pretrial identification procedure may identify the defendant in court if the totality of the circumstances shows clearly and

convincingly that the witness has an independent basis for the in-court identification.”

Young v. State, 700 N.E.2d 1143, 1146 (Ind. 1998). The following are factors to be used in making this determination:

the amount of time the witness was in the presence of the perpetrator, the distance between the two, the lighting conditions, the witness’ degree of attention to the perpetrator, the witness’ capacity for observation, the witness’ opportunity to perceive particular characteristics of the perpetrator, the accuracy of any prior description of the perpetrator by the witness, the witness’ level of certainty at the pre-trial identification, and the length of time between the crime and the identification.

Hardiman v. State, 726 N.E.2d 1201, 1205 (Ind. 2000); Young, 700 N.E.2d at 1146.

Even assuming, as T.B. contends, that the photo-array identification was improper, the evidence nonetheless supports the conclusion that A.C. had an independent basis for identifying T.B. in court. A.C. testified that she got a clear look at the perpetrator. She saw him both before and after the last class of the day. She testified that she was “100% sure” that it was T.B. who hit her. Tr. at 31. In addition, she testified as follows:

Q: [A.C.], how many of the other males that were present at the time that [T.B.] hit you, were you facing?

A: Zero.

Q: [T.B.] was the only one that you were facing?

A: Yes.

Q: Okay. And were the . . . So were the other males in, in front or behind you?

A: Behind.

Q: Okay. And what makes you certain, absolutely certain that it was [T.B.] that hit you?

A: Cause I seen his face. I looked into his eyes.

Id. at 43.

In considering the factors identified by the Indiana Supreme Court in Young and Hardiman, A.C. was briefly in the perpetrator's presence before and after the last class of the day. They were obviously quite close, as the perpetrator hit her with his fist. The perpetrator was the only person in front of A.C. and they looked directly at each other. The incident occurred outside immediately after school, so the record supports the inference that the lighting was reasonably good. A.C. had cause to pay close attention to the perpetrator because he had just struck her left eye with enough force to cause swelling of the eyeball. Finally, A.C. testified that she was "100% sure" that T.B. was the perpetrator. Id. at 31. Based upon the totality of the circumstances, we conclude that there was an independent basis for A.C.'s in-court identification of T.B., regardless of whether the pre-hearing identification was improper.

II. Restitution

T.B. argues that the juvenile court abused its discretion in ordering him to pay restitution without receiving evidence to support its order. On appeal, the State agrees. Appellee Brief at 10. We therefore reverse and remand for the juvenile court to vacate its restitution order.

Conclusion

The juvenile court did not abuse its discretion in admitting evidence regarding T.B.'s

identity. However, as the State concedes on appeal, the juvenile court abused its discretion in ordering restitution without evidence to support its order.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BROWN, J., concur.