

Case Summary

Reymond Barnett (“Barnett”) appeals his conviction for Robbery, as a Class B felony,¹ and Criminal Confinement, as a Class B felony,² presenting two issues which we restate as:

- I. Whether the photo array used to identify Barnett before trial was impermissibly suggestive, thereby requiring exclusion of the photo array and the related witness identification of Barnett.
- II. Whether the statutory maximum sentence the court imposed on Barnett was inappropriate in light of the nature of Barnett’s offenses and his character.

We affirm.

Facts and Procedural History

On June 12, 2009, at around 9:55 a.m., Barnett entered the Porter Paints store at 10009 East Washington Street in Indianapolis. When James Skweres (“Skweres”), the store manager, approached him to ask if he needed any help, Barnett claimed he was looking for a paint color for his wife. Skweres turned to retrieve a paint color book.

As Skweres turned away, Barnett grabbed Skweres’s left shoulder and put a gun in his back. Barnett demanded that Skweres give him the money from the cash register, the store safe, and from Skweres’s own wallet. Skweres complied. Barnett also tore cables from the store’s computer system after asking Skweres whether the store had a camera or security system. After this, Barnett ordered Skweres to lock himself into the store bathroom for ten minutes, tore more cables from the computer system, and left the store.

Leaving the bathroom, Skweres followed Barnett into the parking lot and saw Barnett

¹ Ind. Code § 35-42-5-1.

² Ind. Code § 35-42-3-3.

get into a silver Chevrolet Cavalier (“Chevy”). Skweres informed a nearby construction crew that he had just been robbed, and the foreman instructed one of the workers, Steve Eaton (“Eaton”), to follow Barnett in a company truck. The worker followed, reaching speeds of around 100 m.p.h. in the pursuit before finally obtaining the license plate number from the Chevy.

The worker phoned the number to his foreman, who relayed the phone number to the Indianapolis Metropolitan Police Department (“IMPD”). IMPD soon found the Chevy a few blocks from the Porter Paints store and towed it away.

Barnett was arrested and charged with Robbery, Criminal Confinement, and Carrying a Handgun without a License, as a Class A misdemeanor enhanced to a Class C Felony for having committed a felony within fifteen years of the offense.³ Before the trial, Barnett moved to exclude the photographic lineup (“photo array”) used by IMPD to allow Skweres to identify Barnett on the ground that the photo array was impermissibly suggestive. The trial court denied the motion to exclude during the hearing and again at trial, and Barnett properly preserved his objection.

On November 18, 2009, after a jury trial, Barnett was convicted of Robbery, Criminal Confinement, and the misdemeanor count of Carrying a Handgun without a License. On December 2, 2009, judgments of conviction were entered only as to the Robbery and Criminal Confinement counts and Barnett was sentenced to twenty years’ imprisonment, to be served concurrently. This appeal followed.

³ I.C. § 35-47-2-1.

Discussion and Decision

The Photo Array

Barnett challenges his convictions on the grounds that the photo array from which Skweres identified Barnett was impermissibly suggestive and that Skweres's identification of Barnett during trial was based on that identification and thus should have been excluded from evidence. We review a trial court's evidentiary rulings for an abuse of discretion. Wells v. State, 904 N.E.2d 265, 269 (Ind. Ct. App. 2009), trans. denied. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court. Id.

Where, as here, a witness's pre-trial identification of a defendant from a photo array is at issue, the photo array and the witness's testimony about his pre-trial identification of the defendant are admissible unless the identification procedure was impermissibly suggestive. Farrell v. State, 622 N.E.2d 488, 493 (Ind. 1993). A photo array is impermissibly suggestive only if the defendant "stand[s] out so strikingly in his characteristics that he is virtually alone with respect to identifying features." Id. at 494. Even if the pre-trial identification procedure was impermissibly suggestive, an in-court identification of a defendant by the same witness is admissible unless the procedure "was so impermissibly suggestive and conducive to irreparable mistaken identification that the accused was denied due process of law under the Fourteenth Amendment." Harris v. State, 619 N.E.2d 577, 580 (Ind. 1993) (citations omitted).

In this inquiry the court "must first determine whether law enforcement officials

conducted the out-of-court procedure in such a fashion as to lead the witness to make a mistaken identification.” Id. (quotation marks and citation omitted). If, under the totality of the circumstances, there is no impermissibly suggestive identification procedure, both the pre-trial evidence and the in-court identification are admissible and the inquiry ends. Id. Otherwise, the pre-trial identification must be suppressed and the court must move on to determine whether the in-court identification should also be suppressed. Brooks v. State, 560 N.E.2d 49, 55 n.1 (Ind. Ct. App. 1990) (citing Norris v. State, 265 Ind. 508, 356 N.E.2d 204 (1976)), reh’g denied. Factors to be considered when determining whether the pre-trial identification procedure was impermissibly suggestive include (1) the witness’s opportunity to see the criminal during the crime, (2) the witness’s attentiveness, (3) the accuracy of the witness’s description of the criminal before the identification procedure, and (4) the witness’s degree of certainty as to the identification. Farrell, 622 N.E.2d at 493-94 (citing James v. State, 613 N.E.2d 15, 27 (Ind. 1993)).

Skweres’s pre-trial identification of Barnett from the photo array does not run afoul of the Fourteenth Amendment. Barnett asserts that the photo array is impermissibly suggestive because his photo in the black-and-white version of the photo array is darker than the others, making it “jump[] out at the viewer,” and because Barnett is wearing a necklace. (Appellant’s Br. 10.) But Barnett’s picture in the color version of the array is darker than the other photographs, and Detective Cincebox produced the black-and-white copy from a single run of the photocopier without any change to the tint control. Nor were the identifying characteristics of the individuals in the six photographs substantially different with respect to

build, skin color, hair style, clothing, or facial expression. Cf. J.Y. v. State, 816 N.E.2d 909, 913 (Ind. Ct. App. 2004) (reversing juvenile adjudication where black-and-white photos were used to identify juvenile defendants, whose clothing, posture and facial expressions set them apart from other juveniles in the photo array), trans denied. While Barnett was wearing a necklace and had a scar beneath his eye, neither Detective Cincebox nor Skweres noticed these until they were brought to their attention during the hearing on the motion to exclude.

Skweres testified at trial that he spent ten minutes with Barnett during the robbery and that each time he gave Barnett money, he turned to face Barnett. Skweres thus had ample opportunity to observe Barnett's facial features. Skweres's description of Barnett before Detective Cincebox showed him the photo array was also accurate: Skweres stated that he described Barnett as a black male around six feet tall with medium to large build and "scruffy" facial hair. (Tr. 66.) This largely matched Detective Cincebox's description of what Skweres told him shortly after the robbery occurred.

Skweres testified that he was "100%" certain that the photo was that of the robber—and the photo was Barnett's photo. (Tr. 92-93.) Skweres's pre-trial identification occurred on the same afternoon as the robbery itself. See Hardiman v. State, 726 N.E.2d 1201, 1205 (Ind. 2000) (holding admissible identification of a defendant from a photograph three months after the offense when the witness had interacted with the defendant and was present at the scene of the crime).

Finally, and importantly, the unusual black-and-white nature of the photo array was intended to avoid the possibility of an overly suggestive photo array.

In short, Detective Cincebox's efforts to produce a fair photo array, the independent bases for Skweres's identification, and the fact that what Barnett asserts were distinguishing features went unnoticed by both Detective Cincebox and Skweres all weigh against Barnett's claim of an impermissibly suggestive photo array. See Farrell, 622 N.E.2d at 494. Under the totality of the circumstances, therefore, we cannot agree with Barnett that the trial court abused its discretion in admitting the photo array, Skweres's and Cincebox's testimony about the photo array, or Skweres's in-court identification of Barnett.

Sentence

Barnett also contends that his sentence is inappropriate in light of the nature of his offense and his character. In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One

purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Id. at 1224.

As to the nature of his offense, Barnett used a gun to rob a store and the store manager and sought to force Skweres to lock himself into the store bathroom. Barnett attempted to disable store security measures even after being told there were none, presumably to prevent himself from being identified by police. He then led Eaton on a several-blocks-long chase in making his getaway, reaching speeds of 100 m.p.h., and later abandoned the Chevy.

Nor does Barnett’s character serve him well. Barnett was on parole from a prior robbery conviction when he committed the robbery in this case. Barnett has, in fact, two prior robbery convictions. He also has seven true juvenile adjudications, including several offenses that would have been chargeable as felonies if he had been an adult. Barnett went so far as to ask for a lower sentence because he was convicted of a robbery and not murder. While he has seven children whom he claims to support, he does not have custody of them and has never sought to establish paternity; instead he “freely support[s] them” on his own. (Tr. 257.) Weighing more clearly in Barnett’s favor is his enrollment at Ivy Tech State College after his release on parole in 2008.

Given the nature of the present offenses, Barnett’s history as a repeat offender, including two prior robberies, and his status as a parolee at the time of the present offenses, we do not consider the statutory maximum sentences imposed to be inappropriate. Barnett’s

support of his children and his post-parole enrollment at Ivy Tech are not so substantial as to offset his prior pattern of behavior and disregard for the requirements of his release on parole. We therefore decline to revise Barnett's sentence under Appellate Rule 7(B).

Conclusion

The photo array, testimony concerning the photo array, and in-court identification of Barnett were properly admitted into evidence by the trial court. Barnett's statutory maximum sentence is appropriate, and we decline his invitation to revise his sentence.

Affirmed.

RILEY, J., and KIRSCH, J., concur.