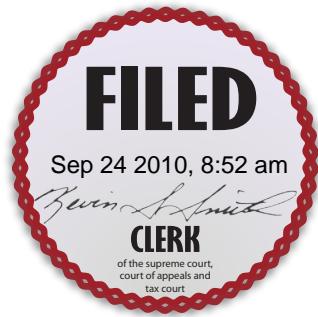


Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
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any court except for the purpose of
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collateral estoppel, or the law of the
case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JULIAN D. GRADY,)
)
Appellant-Defendant,)
)
vs.) No. 02A05-0912-CR-749
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0902-FB-28

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Julian Grady appeals his convictions for two counts of Class B felony robbery.

We affirm.

Issues

Grady raises three issues, which we restate as:

- I. whether the pre-trial and in-court identifications of Grady amounted to fundamental error;
- II. whether the trial court's failure to declare a mistrial was fundamental error; and
- III. whether there is sufficient evidence to support Grady's convictions.

Facts

On November 26, 2008, four men dressed in black, wearing masks, and carrying guns entered a Family Dollar in Fort Wayne. The men took money from store's safe and took a customer's purse. After the men left the store, the incident was reported to the police. In December 2008, a store employee, Ennis Brown, identified Grady from a photo array as one of the robbers. Shortly thereafter, a customer, Antawana Ingol, also identified Grady from a photo array.

On February 6, 2009, the State charged Grady with two counts of Class B felony robbery and one count of Class D felony pointing a firearm. A jury found Grady guilty as charged, and the trial court entered convictions on the two Class B felony counts. Grady now appeals.

Analysis

I. Identification Evidence

Grady argues that the trial court improperly admitted the photo arrays and Brown's and Ingol's in-court identifications. Brown and Ingol separately identified Grady as one of the robbers from photo arrays, and the photo arrays were admitted into evidence at trial. Brown and Ingol both identified Grady as one of the robbers during their trial testimony.

Because Grady did not object to Brown's and Ingol's pre-trial or in-court identifications, the issue is waived. See Hyppolite v. State, 774 N.E.2d 584, 594 (Ind. Ct. App. 2002). To avoid waiver, Grady argues that the admission of this evidence is fundamental error. Fundamental error is an error so prejudicial to the rights of the defendant that a fair trial is impossible. Glotzbach v. State, 783 N.E.2d 1221, 1226 (Ind. Ct. App. 2003). “Specifically, the error ““must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.”” Id. (citation omitted).

Grady argues that the photo arrays presented to Brown and Ingol were unnecessarily suggestive and created a substantial likelihood of misidentification. Grady contends that the photo arrays improperly showed only him dressed in black, that the photographs in the arrays did not include masked men, that the arrays were possibly shown to Brown and Ingol after they had seen Grady's photograph in the newspaper or on the news, that neither Brown nor Ingol identified Grady immediately after the robbery, and that neither had direct eye contact with Grady during the robbery.

We cannot say that because Grady wore black during the robbery, the photo arrays were required to depict only men wearing black shirts. Likewise, we cannot say that because Grady wore a mask during the robbery, the photo arrays should have included only pictures of masked men. As for the media coverage, Brown testified that he was “positive” he saw the newspaper picture sometime after he identified Grady in the photo array. Tr. p. 129. Although Ingol saw Grady’s photograph on the news associated with another robbery before she identified him in the photo array, she testified that she recognized him as one of the robbers when she saw him on the news. Regarding the timing of the identifications, both Brown and Ingol identified Grady from the photo arrays less than a month after the robbery. The fact that they did not identify Grady to police officers immediately after the robbery is of no significance. Finally, Brown’s and Ingol’s ability to make eye contact with Grady during the robbery goes toward the weight of the identification evidence, not its admissibility. We are not convinced that the admission of the photo arrays and the in-court identifications was erroneous, let alone fundamental error.

II. Mistrial

Grady argues that the trial court’s failure to declare a mistrial or give an admonishment during Ingol’s testimony was fundamental error. Specifically, while being questioned by defense counsel about seeing Grady’s picture on the news, the following exchange took place between Ingol and defense counsel:

Q. . . . Now you were aware of some photographs in the newspaper before the officer came out, Detective came out to show you photographs right?

A. No, I didn't see no photographs in the newspaper.

Q. Okay. When did you see them?

A. The news.

Q. On the news?

A. Yes, when it was a little robbery thing with the high speed chase, robbing the pizza place or whatever.

Q. Okay. Well you saw some photographs on television?

A. They were showing the guys that were arrested.

Q. On television. On television.

A. Correct.

Tr. p. 184. Grady argues, “the State did not admit the evidence and specifically advised each of their witnesses to avoid any mention of the prior robbery. However, the effect is the same. The burden on the Defendant was made impossible or at the very least made ‘intolerably enlarged.’” Appellant’s Br. p. 18. Grady claims that the trial court’s failure to declare a mistrial sua sponte was fundamental error.

Assuming Ingol’s reference to another robbery was inadmissible under Indiana Evidence Rule 404(b), we cannot conclude that Grady was denied fundamental due process by the trial court’s failure to declare a mistrial. See Glotzbach, 783 N.E.2d at 1226. Ingol was one of eight witnesses who testified against Grady, and she only briefly mentioned seeing him in the news. Ingol was one of five witnesses to the robbery who testified at trial and one of two witnesses who identified Grady prior to trial and at trial. Further, the jury viewed video of the robbery from two different cameras in the store.

Although the robbers were all dressed in black and wearing masks, several of the witnesses referenced one of the robber's height during their testimony. Grady is 6'10" tall. Given the evidence in this case, we cannot conclude that the trial court's failure to sua sponte declare a mistrial after Ingol's passing reference to another robbery was so prejudicial that it denied Grady a fair trial.

III. Sufficiency of the Evidence

Grady argues that there is insufficient evidence to support his convictions because the identification evidence by Brown and Ingol was incredibly dubious. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. We affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Under the incredible dubiosity rule, we may impinge on a jury's function to judge the credibility of a witness. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). "If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed." Id. "This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." Id. "Application of this rule is rare and the standard to be applied is whether the testimony is

so incredibly dubious or inherently improbable that no reasonable person could believe it.” *Id.*

Grady contends that Ingol confused him with another one of the robbers and questions Brown’s ability to identify him as the robber. This, however, is not a case where a sole witness presented inherently improbable testimony and there was a complete lack of circumstantial evidence. Specifically, five witnesses who were present during the robbery testified about it. Two of the witnesses specifically identified Grady as one of the robbers prior to trial and again at trial. The jury was also shown video of the robbery from two different angles. Finally, the witnesses described one of the robbers as “significantly taller,” the “tallest one,” the “tall guy,” and a “very tall man.” Tr. p. 118, 147, 177, 195. Grady is 6’10” tall. The jury was free to weigh any inconsistencies in Ingol’s and Brown’s testimony, but their testimony was not incredibly dubious. There was sufficient evidence to support Grady’s convictions.

Conclusion

Grady has not established that the admission of the identification evidence or the reference to another robbery amounted to fundamental error. There is sufficient evidence to support his convictions. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.