

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000670-MR

DARBY ASHLEY BARNES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 09-CR-01031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: Darby Barnes appeals his conviction from the Fayette Circuit Court in which the jury entered a guilty verdict on one count of second-degree burglary and found him guilty as a first-degree persistent felony offender. After a careful review of the record, we affirm.

¹ Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 24, 2009, Kathryn Manning² arrived at 417 Lakeshore Drive in Lexington to water plants and feed the cat while the family who resided at that address was out of town. Before entering the house, Ms. Manning spent some time outside, watering the plants around the perimeter of the house. As she reached the back of the house, she heard a noise from the direction of the sliding glass door on the back of the house. She was standing on the lower steps of the deck several feet away from the door and saw a man inside the house bending down to remove the security rod from the sliding door track. She called out to him. When he looked up and saw her, he dropped the security rod and retreated into the house where Ms. Manning could no longer see him. Ms. Manning made several telephone calls, one of which was a call to 911. She then went around to the front of the house. The front door was open, but Ms. Manning did not see the man again.

When the police arrived, Ms. Manning described the man she saw as white, 5'9" tall, 160 pounds, approximately 18-22 years old, and wearing black-rimmed glasses. Forensic detectives attempted to take fingerprints from a jewelry box in the master bedroom that seemed to have been disturbed, but they were only able to lift a partial print. The next day, on May 25, 2009, Detective Franz Wolff showed Ms. Manning a six photograph line-up. None of the men in the line-up wore glasses in the photographs. Ms. Manning did not identify anyone in the line-up as the man she saw at the house.

² The record is inconsistent regarding the spelling of Ms. Manning's first name. For purposes of this opinion, we have adopted the spelling indicated on Ms. Manning's subpoena.

On June 16, 2009, Detective Wolff and two other officers were patrolling the Lakeshore area. They noticed two men talking outside the Lake Tower apartment complex, adjacent to Lakeshore Drive. Detective Wolff noticed that one of the men wore dark-rimmed glasses as described by Ms. Manning. Detective Wolff asked both men for identification. He learned that the man with the glasses was the appellant, Darby Barnes, and that Barnes lived in the Lake Tower apartment complex. Detective Wolff arrested Barnes on an outstanding warrant. At the time and scene of arrest, Detective Wolff took several photographs of Barnes, including several close photographs of him.

Detective Wolff again presented Ms. Manning with a photograph line-up, this time including Barnes' photograph, as well as five other photographs of men wearing glasses. Ms. Manning identified Barnes without hesitation as the man she had seen at 417 Lakeshore Drive on May 24, 2009.

Barnes was charged with one count of burglary in the second degree and one count of a persistent felony offender charge. Before trial, Barnes moved to suppress any testimony concerning an identification of Barnes as the perpetrator of the burglary, including the results of the photograph line-up and any in-court identifications. The trial court overruled Barnes' motion, except to preclude in-court identifications by any witness other than Ms. Manning.

At trial, Ms. Manning testified as to her identification of Barnes in the photograph line-up and again made an in-court identification of Barnes' photograph in the same line-up. The Commonwealth then showed her a larger,

color, 8x10” photograph of Barnes, taken on the same day as the smaller photograph used in the line-up. Ms. Manning testified that she had seen the larger, color photograph before. It is unclear from the record exactly when she viewed the larger photograph. Ms. Manning also identified Barnes by pointing to him in the courtroom.

The Commonwealth also introduced fingerprint evidence found at the residence. The Commonwealth’s witness indicated that the fingerprint was not a “match” to Barnes, and proceeded to explain the process of matching at least ten “points” of a fingerprint to obtain a true match. Barnes objected to this testimony on relevance grounds, particularly to the portions of testimony indicating that four points of the fingerprint matched Barnes’ fingerprint. The trial court overruled Barnes’ objection and allowed the witness to explain the matching process, without specifically calling Barnes’ print a “match.”

Ultimately, the jury returned a guilty verdict. Barnes was sentenced to a maximum term of five years, enhanced to fifteen years for a persistent felony offender status. Barnes moved for a directed verdict on the persistent felony offender status, and the trial court overruled the motion.

Barnes now appeals his conviction, claiming he was denied due process on three grounds: (1) that allowing Ms. Manning’s pretrial and in-court identifications constituted palpable error under RCr 10.26; (2) that the trial court abused its discretion in allowing the testimony regarding the four matching

fingerprint points; and (3) that he was entitled to a directed verdict on the persistent felony offender enhancement.

II. ANALYSIS

A. APPELLANT SUFFERED NO PALPABLE ERROR OR MANIFEST INJUSTICE IN THE WITNESS' PRETRIAL OR IN-COURT IDENTIFICATIONS.

Kentucky Rule of Criminal Procedure (RCr) 10.26 provides as follows: “A palpable error which affects the substantial rights of a party may be considered ... by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

[T]he requirement of “manifest injustice” as used in RCr 10.26 ... mean[s] that the error must have prejudiced the substantial rights of the defendant, ... *i.e.*, a substantial possibility exists that the result of the trial would have been different....

[The Kentucky Supreme Court has] stated that upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief.

Castle v. Commonwealth, 44 S.W.3d 790, 793-94 (Ky. App. 2000) (internal quotation marks omitted). Thus, the defendant’s burden to demonstrate palpable error is high, and he must show more egregious prejudice than he would in demonstrative reversible error. *Grady v. Commonwealth*, 325 S.W.3d 333, 355 (Ky. 2010) (citing *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006)).

The Kentucky Supreme Court has outlined a two-step process in determining whether identification testimony violates a defendant's due process rights. *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004) (citing *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999) (quoting *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986)); see also *Simmons v. United States*, 390 U.S. 377, 384 (1968). The first inquiry regards the pre-identification encounter to determine if it was unduly suggestive. *King*, 142 S.W.3d at 649 (citations omitted). If it was not, then the identification testimony should be allowed. *Id.* If, however, the court finds the pre-identification encounter was unduly suggestive, the second inquiry is whether the identification was nevertheless reliable under the totality of the circumstances. *Id.* The second inquiry involves consideration of five factors articulated by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id.* Those five factors are: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Id.*; see also *Savage v. Commonwealth*, 920 S.W.2d 512, 513-14 (1995) (adopting the *Neil* factors).

As to the first question, Barnes carries the burden of demonstrating that the photograph identification materials were unduly suggestive. *Grady*, 325 S.W.3d at 354. He argues that because Ms. Manning had previously viewed the

large, color photograph of him some time before her in-court identification, that viewing bolstered her in-court identification.

While not directly on point with the facts herein, we find the analysis in *Grady*, 325 S.W.3d 333, highly instructive. In *Grady*, materials used for a pre-trial lineup were lost before the defendant had an opportunity to scrutinize their content. The Kentucky Supreme Court decided that under those circumstances it was necessary to recognize a rebuttable presumption that the materials were unduly suggestive. *Id.* at 354.

We believe that the rebuttable presumption in *Grady* can be extended to apply to the circumstances presently under review. Here, the record is incomplete regarding when Ms. Manning viewed the larger, color photograph of Barnes, and defense counsel informed the court that he was unaware that Ms. Manning had been shown this photograph. Thus, using the rationale of *Grady*, we will indulge in a rebuttable presumption that the larger color photograph of Barnes was unduly suggestive.

Regardless of this presumption, there was no error given the totality of the circumstances. *Id.* (“[T]he pre-trial line-up becomes totally irrelevant if a court determines that there is an independent basis of reliability for the in-court identification. . . .”); *see also Manson v. Brathwaite*, 432 U.S. 98 (1977).

Therefore the presumption that the pre-trial identification was unduly suggestive in this case is defeated by the second inquiry regarding the reliability of Ms.

Manning’s in-court identification. Our conclusion is supported by the five factors

outlined in *Neil*, which serve as a balancing test for determining the likelihood of misidentification.

First, Ms. Manning testified that she had “a good five to eight seconds” to view the intruder at the time of the crime. She saw him in a one-on-one setting in which she indicated that she did not expect to find anyone else present at the house.

Second, Ms. Manning testified that although the encounter was brief, she spent a few highly focused seconds attempting to determine the man’s identity. She further testified that she had previously encountered an unexpected man at the home while house-sitting. That man had turned out to be the homeowners’ friend who was also asked to check on the house while they were out of town. Ms. Manning explained that she focused intently on the intruder to determine whether he was the same visitor as before.

As to the third *Neil* factor, Barnes argues that Ms. Manning’s initial description does not match some of Barnes’ key features, including his height, age, and tattoos. However, her testimony included reasonable explanations for the inaccuracies in her description. Ms. Manning testified that she described the man she saw to be approximately 5’9” because she saw that he was short. She explained that the height she gave in her description was what she considered to be of a short man. She further testified that she was standing several feet below the intruder as she was climbing the steps of the deck when she saw him and that their positioning could have skewed her estimation at his height.

With respect to her estimation of Barnes' age, she explained that the man she saw did not have facial hair and therefore --to her--looked younger than Barnes actually is. She testified that, in her opinion, Barnes' "features just stuck out to me as being young." Ms. Manning also indicated that Barnes' tattoos were covered by the clothing he wore on the day of the encounter. Her description did, however, accurately describe Barnes' weight and a close description of his glasses, although she described them as being black when in fact they were brown.

Ms. Manning did state several times during her testimony that the man she saw did *not* have facial hair, but on one instance during cross-examination she indicated that she could not *tell* whether the man she saw had facial hair. While Ms. Manning's testimony was inconsistent, we do not believe it rises to the level of manifest injustice. Likewise, given the fact that facial hair is an ever-modifiable feature, we do not believe that Ms. Manning's identification was unreliable because she identified a photograph in which Barnes had at least some facial hair.

As to the fourth factor under *Neil*, Ms. Manning identified Barnes without hesitation in the first line-up in which his photograph was included. The police presented Ms. Manning with a line-up the day after the incident which did not contain a photograph of Barnes, and Ms. Manning indicated that the man she saw was not pictured. Additionally, Ms. Manning was still able to identify Barnes with certainty approximately eight months after their initial encounter.

Finally, with respect to the fifth factor in *Neil*, the time between the crime and the confrontation was relatively short. Ms. Manning identified a photograph of Barnes within approximately three weeks of the crime.

We conclude that, under the totality of the circumstances, Barnes did not suffer a manifest injustice because the evidence does not support a likelihood of misidentification.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY REGARDING FINGERPRINT ANALYSIS.

Next, Barnes essentially argues that evidence of a fingerprint analysis that reveals anything short of ten matching “points” is not relevant and should be inadmissible. However, he provides no authority for such an argument, and for the reasons outlined below, we disagree.

Abuse of discretion is the proper standard of review of a trial court’s evidentiary rulings. *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Eldridge*, 146 S.W.3d 909, 914-15 (Ky. 2004). With regard to fingerprint evidence, several evidentiary considerations make it impossible to conclude that the trial court abused its discretion in allowing the testimony in this case.

It is important to note that there is no universally accepted number of matching points required for proper identification. *United States v. John*, 597 F.3d

263, 275 (5th Cir. 2010). Also, analysis of fingerprints is a technical skill not possessed by most lay people. *See Brawner v. Commonwealth*, 344 S.W.2d 833, 836 (Ky. 1961). In *Fields v. Commonwealth*, 274 S.W.3d 375 (Ky. 2008),³ the Kentucky Supreme Court addressed a defendant's argument that a trial court improperly admitted fingerprint evidence that, after analysis, was not identified as those of the defendant. *Id.* at 406. The argument in *Fields*, like Barnes' argument, was that the fingerprints were not relevant because they were not a match. The Kentucky Supreme Court did not agree. Instead, the Court noted that "results of tests performed on fingerprints found at the crime scene are, of course, relevant to a determination of [a defendant's] guilt...we are unable to fathom how [a defendant is] prejudiced by fingerprints that [are] never identified as his." *Id.* Moreover, fingerprint evidence and testimony regarding its analysis rebuts any claims of "shoddy police work." *Id.*

Likewise in Barnes' case, the Commonwealth had an interest in bolstering the credibility of all of the evidence by explaining the police work involved in collecting and analyzing fingerprints. The Commonwealth's witness testified as to his forensic unit's general policy that they require ten "points" to call a fingerprint a "match." He also testified that he was only able to obtain a partial print. Because the matching point system of fingerprint analysis perhaps varies from one department to another or from one analyst to another, it was relevant for the witness to testify as to how he arrived at his conclusion that in this case the

³*Overruled on other grounds by Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. Dec 16, 2010), as modified on denial of rehearing (Mar 24, 2011).

print was not a “match.” He determined that it was not a “match” for two reasons: (1) because only four points matched, and (2) because it was only a partial print.

Issues regarding the accuracy of fingerprint evidence in a particular case generally go to the weight and credibility of the evidence and are best left to the finder of fact, not an appellate court. *John*, 597 F.3d at 276 (quotations omitted); *Hornsby v. Commonwealth*, 263 Ky. 613, 92 S.W.2d 773 (1936). Barnes had every opportunity to cross-examine the witness regarding the point-matching analysis and in doing so to further instruct the jury regarding the weight of fingerprint evidence. Given this, we cannot say that the trial court abused its discretion in allowing the testimony.

Assuming *arguendo* that even if we determined the trial court abused its discretion, the error would have been harmless because the testimony was that the print could not be considered a match. Additionally, this case involved an eye-witness identification. In light of our prior determination that no error regarding allowing Ms. Manning’s identification, we find that the admission of the fingerprint analysis was harmless to the outcome of the case.

C. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT REGARDING THE PERSISTENT FELONY OFFENDER CONVICTION.

Appellant argues that the Commonwealth did not meet its burden of proving every element of the persistent felony offense. The Commonwealth introduced evidence of two prior felony convictions. The first was a ten-year sentence entered on October 25, 1993. The second was a five-year sentence,

enhanced by five years, entered on August 2, 2005. The jury was instructed that Barnes could be found guilty as a persistent felony offender if the jury found:

That he had completed service of the sentence imposed on the convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted or was discharged from parole or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted.

In other words, to find guilt, the jury had to find that Barnes completed or was released from either of the two previous sentences between May 24, 2004 and May 24, 2009. Barnes argues that because the Commonwealth did not introduce evidence of his completion or release dates for the prior sentences, it would have been impossible for the jury to determine which offense met the requirement. Therefore, he argues that the trial court should have entered a directed verdict in his favor. We disagree.

In reviewing a denial of a directed verdict, we must determine if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Therefore we review the trial court's decision for plain error.

The Kentucky Supreme Court has also made clear that direct proof of the elements of PFO is unnecessary and reasonable inferences from the available evidence are sufficient. *Moody v. Commonwealth*, 170 S.W.3d 393, 398 (Ky. 2005); *see also Shabazz v. Commonwealth*, 153 S.W.3d 806, 813-14 (Ky. 2005)

(citing *Martin v. Commonwealth*, 13 S.W.3d 232, 235 (Ky. 1999)). In *Shabazz*, the Court found that evidence of a prior conviction within five years of the current offense was enough to formulate a reasonable inference that the defendant was on probation from a prior sentence at the time of the current offense. 153 S.W.3d at 815. The Court noted that “even though this reasonable inference is one likely to be arrived at through ... ‘simple subtraction’ ... such subtraction, when combined with competent evidence, is sufficient to create a reasonable inference in this case.” *Id.*

The Commonwealth introduced competent evidence of Barnes’ prior felony convictions, sentencing dates and lengths of those sentences by reading from the certified conviction exhibits. Through simple subtraction, it is reasonable to infer that Barnes’ 2005 sentence was entered after May 24, 2004, and thus within five years of his current offense. We do not find such an inference clearly unreasonable.

Accordingly, the judgment of the Fayette County Circuit Court is affirmed.

ALL CONCUR.

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