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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000671-MR

ROY EDWARD JACKSON III

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 13-CR-001176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

JONES, JUDGE: This matter is before us following Appellant Roy Edward Jackson III's conditional guilty plea entered in Jefferson Circuit Court. As part of his plea, Jackson reserved the right to appeal the circuit court's denial of his pretrial suppression motion. Finding no abuse of discretion, we AFFIRM.

I. Background

On April 23, 2013, a Jefferson County grand jury returned an indictment charging Jackson with nineteen counts of second degree burglary in violation of KRS 511.020; one count of first-degree burglary in violation of KRS 511.030; one count of receiving stolen property valued over \$10,000 in violation of KRS 514.110; and being a persistent felony offender in the first degree pursuant to KRS 532.080.

One of the second degree burglary counts, Count 20, charged Jackson with "knowingly and unlawfully entering or remaining in a dwelling located at 2 Mockingbird Place, with the intent to commit a crime." Mr. William Johannes resided at that address. Prior to the indictment, Mr. Johannes identified Jackson as the individual who broke into his home on January 21, 2013.

The trial court appointed counsel to represent Jackson. Thereafter, Jackson moved the trial court to suppress Mr. Johannes's out-of-court identification and to preclude him from making any in-court identification of Jackson on the basis that the out-of-court identification procedures utilized by investigators were unduly suggestive. The trial court conducted a suppression hearing on Jackson's motion.

The Commonwealth called Detective Chris Horn in support of its position that Mr. Johannes was not unduly influenced during the identification process. Detective Horn testified that he is employed by the Louisville Metro Police Department and was assigned to investigate the January 21, 2013, break-in at 2 Mockingbird Place.

Detective Horn explained that he conducted two different identification sessions with Mr. Johannes. The first session took place on January 23, 2013, at Mr. Johannes's residence. During the first session, Mr. Johannes was shown a photograph pack containing six pictures. Each picture showed a young, dark-haired, Caucasian male with some visible facial hair. Mr. Johannes did not make a positive identification, but indicated that the individual in the first photograph "closely resembled the suspect." The individual in the first photograph is David Brooks; Jackson's photograph was the fourth one in the array.

Jackson was arrested on other charges on January 25, 2013, at which time he was photographed as part of the booking process. Detective Horn obtained a more recent photograph and assembled a second photograph pack. The second photograph pack contained the more recent photograph of Jackson as well as photographs of five other individuals closely resembling Jackson. Mr. Brooks, whom Mr. Johannes had previously identified as "strongly resembling" the suspect, was not included in the second array. On January 29, 2013, Detective Horn simultaneously presented the photographs to Mr. Johannes and asked him if any of the individuals "look familiar back when you had the burglary on January 21." After briefly examining the photographs, Mr. Johannes told Detective Horn that one of the individuals certainly did look familiar. He then identified the individual in photograph number two as that person. Photograph number was a picture of Jackson.

Jackson called Dr. Keith Lyle, an eyewitness identification expert, in support of his motion to suppress. Dr. Lyle testified that an initial short exposure to an individual is not enough to establish a "robust" face memory. Additionally, Dr. Lyle explained that when trying to identify an individual after-the-fact, the brain will register familiarity, but will not tell a person the source of that familiarity. This can lead to what Dr. Lyle identified as "source confusion." He believes that source confusion could have resulted in Mr. Johannes's identification of Jackson. According to Dr. Lyle, it is quite possible that Mr. Johannes identified Jackson as familiar because he previously viewed his photograph, not because he recognized him from the actual encounter during the break-in.

Following the hearing, the trial court denied Jackson's motion to suppress. The trial court concluded that "under the totality of circumstances" Mr. Johannes's identification was reliable. In support of this conclusion, the trial court made the following findings:

First, Johannes had a remarkably clear opportunity to observe his assailant, who entered his home without permission, spoken [sic], and stood in his kitchen. Nothing obstructed his view. He was in close proximity to the perpetrator. And the lighting was apparently sufficient. Johannes spoke to the criminal and told him to exit. He then watched the would-be burglar flee. Johannes exhibited a consistent level of high attention during the event. During the first photopack, Johannes showed some uncertainty, but that photopack contained an older photograph of Jackson that was taken prior to the crime alleged in the indictment. When showed the more recent photograph of Jackson in the second photopack, Johannes exhibited certainty with regard to his identification of Jackson. The photograph depicted

Jackson as a heavier man, with more facial hair, and darker marks on his face. It was proximate in time to the crime. Finally, no significant time lapse has occurred here. The burglar confronted Johannes on January 21, 2013. Horn showed him the first photopack two days later, on January 23. He presented the second photopack a week later, on January 29. The eight days between the crime and the identification is not significant.

This appeal followed.

II. Standard of Review

We review the trial court's decision on the admissibility of evidence under an abuse of discretion standard. *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004). Under this standard, we will not disturb the trial court's ruling unless it was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. Analysis

The Due Process Clause forbids the admission of identification testimony where there exists a “very substantial likelihood of irreparable misidentification.” *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (hereinafter "*Biggers*"); *Oakes v. Commonwealth*, 320 S.W.3d 50, 56 (Ky. 2010); *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999). A suggestive pre-trial identification can impermissibly taint later in-court identifications by the same witness. *Moore v. Commonwealth*, 569 S.W.2d 150, 153 (Ky. 1978).

In Kentucky, to evaluate the admissibility of an in-court identification by a witness following an allegedly suggestive pre-trial identification by the same witness, we follow the two-step approach outlined by the United States Supreme Court in *Biggers*. See *Grady v. Commonwealth*, 325 S.W.3d 333, 353 (Ky. 2010).

In *Grady*, the Kentucky Supreme Court explained the analysis as follows:

when a defendant alleges that an in-court identification has been tainted by a pre-trial identification, a court must answer two questions: (1) was the first, pre-trial identification unduly suggestive; (2) if the pre-trial identification was unduly suggestive, does there exist an independent basis to support the reliability of the in-court identification so that the unduly suggestiveness of the pre-trial identification becomes moot.

Id. To determine whether an independent basis of reliability exists, the court must consider, under the totality of the circumstances, the five *Biggers'* factors: 1) the opportunity of the witness 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 confrontation. *Id.*; *King*, 142 S.W.3d at 649; *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995).

As required, the trial court conducted a hearing on Jackson's suppression motion. See *Northington v. Commonwealth*, 459 S.W.3d 404, 409 (Ky. App. 2015). Following the hearing, the trial court made factual findings in accordance with *Biggers*. Those findings are consistent with the evidence of

record. Based on that evidence, we are in agreement with the trial court that an "independent basis of reliability exists" to support Mr. Johannes's identification.

Additionally, we do not believe the fact that Mr. Johannes was shown two photograph packs, both depicting Jackson, is enough to render his identification so unreliable as to make it inadmissible. In *Duncan v. Commonwealth*, 322 S.W.3d 81, 96 (Ky. 2010), the Kentucky Supreme Court explicitly rejected the notion that successive photograph arrays displaying the defendant are always unduly suggestive, particularly where at least a few days have elapsed between the two identifications and different photographs of the defendant are utilized. *Id.* In *Duncan*, the Court determined that a gap of three days was "substantial." In this case, we are dealing with a gap of six days. Based on *Duncan*, we cannot conclude that the temporal proximity between the two arrays was unduly suggestive. Additionally, just as in *Duncan*, two different pictures of Jackson were used in the arrays. As observed by the trial court, Jackson looks different in each photograph. The second photograph, which was taken closer in time to the crime at issue, shows Jackson with a fuller face, more facial hair, and a different hairstyle than the first photograph. Given the differences between the two photographs, we cannot conclude that Mr. Johannes was shown what amounted to a mere repetition of the first photo. "[T]hat fact plus the amount of time between the two viewings convince us that the photo identification process was not unduly suggestive. The trial court did not abuse its discretion by so ruling." *Id.*

IV. Conclusion

For the reasons set forth above, we AFFIRM the Jefferson Circuit Court.

ALL CONCUR.

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