NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2762**
VERSUS	*	**COURT OF APPEAL**
BYRON L. CHARLES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 414-326, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Defendant, Byron Charles, appeals his conviction of simple robbery. For the reasons that follow, we affirm.

Charles was charged with simple robbery on May 9, 2000. He pled not guilty. The court heard and denied his motion to suppress the evidence. On June 21, 2000, after Charles had waived his right to trial by jury, he was tried by the court and found guilty as charged. The trial court denied his motions for new trial and for post verdict judgment of acquittal, and sentenced him to three years at hard labor. The State filed a multiple bill, to which Charles pled guilty. After vacating the previous sentence, the court sentenced him to three and one-half years at hard labor.

Charles now appeals on the grounds that the evidence was insufficient to convict him and that his counsel was ineffective for failing to file a motion to suppress the identification of him by the alleged victim.

STATEMENT OF FACTS

Blair Girtley, a hearing-impaired adult male, testified through a sign language interpreter that he works at night from 11:00 p.m. until 7:30 a.m., and he rides the bus to work. On the evening of April 5, 2000, at about

10:00 p.m., Girtley was walking from his apartment in Gretna down Behrman Highway to the bus stop when he observed a black male riding toward him on a bicycle. Because he is always cautious at night, Girtley kept his eye on the bicyclist and even turned his head to watch him after he had ridden past Girtley. At this point, the man on the bike stopped, turned around, and propositioned Girtley, who testified he could smell alcohol or beer on the man's body. Girtley told the man no, he did not want to have sex because he was married, and then kept walking and tried to ignore him. The bicyclist continued to talk to Girtley, however, following him and making repeated sexual advances. Then, the man grabbed Girtley and threw him into the woods, putting his arm around Girtley's neck and twisting Girtley's arm behind his back. The man took Girtley's wallet and wedding ring, and then fled on the bicycle as Girtley screamed.

Girtley testified that the man who robbed him was wearing a hat, a San Francisco 49er's jacket, and blue or black pants, and was riding a small, round bike. He then identified the defendant in court as being that man, stating: "I still remember his face very clearly. I'll never forget it."

After being robbed, Girtley went to a nearby friend's house, where he called the police. Girtley spoke briefly with the officer, who arrived fifteen minutes later, and gave an initial description of the perpetrator as being slim

(about 5’8” tall and 160 pounds), bald, without a mustache or goatee, wearing a blue cap and a red San Fransico 49er’s jacket. Girtley said he knew the perpetrator was bald because he had removed his hat at one point and asked Girtley to touch his head.

Girtley then telephoned his parents, who came to pick him up at his friend’s home and drove him to his own apartment, where he told his wife what had happened. Girtley called the police again to inform them that he had changed locations, and Deputy Davis Hentz of the Jefferson Parish Sheriff's Office arrived at Girtley’s residence to take a report. With some difficulty, Girtley related the facts of the case to Hentz using his sister as an interpreter; however, when Hentz learned that the robbery had occurred in Orleans Parish, rather than in Jefferson, he told Girtley that he needed to go to the Fourth District station to make a report. Girtley testified that he did not tell any of the officers he spoke with that night that the perpetrator had asked him for sex.

Approximately two hours after he interviewed Girtley, while on patrol, Deputy Hentz observed a man wearing a baseball cap, a 49er's jacket and black pants standing in front of a Circle K on Behrman Highway in Jefferson Parish. The deputy pulled into the lot and saw what he described as a 24 or 26-inch mountain bike lying in front of the store.

The deputy questioned the man and ran his name through the computer. When he discovered that the suspect had an outstanding municipal attachment, the deputy arrested him. Hentz then notified another deputy, who went to Girtley's home about 2:00 a.m. and told him the police had arrested "the man". The officer then drove Girtley to the Circle K. Girtley remained in the police vehicle, while the suspect stood outside the store with the vehicle's bright lights shining on him. Girtley testified that he immediately recognized the man as the same one who had robbed him, and he told the police this. Girtley stated that the man at the Circle K was wearing the same clothes, a 49er's jacket, a blue cap and dark pants. Girtley said he was not sure what color shoes the robber was wearing because he was "just paying attention to his face." At this point Girtley again identified Charles in court, saying that he was positive the defendant was the man who had robbed him and reiterating that he would never forget his face.

Deputy Hentz testified further that upon conducting a search incident to arrest, he had located a crack pipe in Charles's right shoe. The deputy stated that he had placed the pipe on top of his vehicle, and then had forgotten to retrieve it before he drove off. Apparently the pipe was never recovered.

Hentz also explained that he arrested the defendant at the Circle K on

Behrman Highway in Jefferson Parish, which is approximately one-half mile from where the incident occurred, on Behrman Highway just over the Orleans Parish line. He did not collect the bicycle or the defendant's clothes as evidence because Charles was arrested as a fugitive from Orleans Parish, and the normal procedure in that circumstance is just to transport the arrestee to central lockup in Orleans. Apparently, the New Orleans Police Department did not recover the clothes either, as they were not introduced at trial.

Hentz also identified the defendant in court as the man he had arrested that night. He further stated that the lighting outside the Circle K that night was very good, and that Girtley had spontaneously recognized Charles on sight and had identified him as the perpetrator before being asked. On cross-examination, Hentz testified that he remembered Girtley describing the items that were taken from him as a watch and some jewelry. Hentz stated that none of Girtley's property was found on the defendant. Hentz also testified that he did not detect evidence that Charles had been drinking at the time he was arrested.

ERRORS PATENT

A review of the record reveals a potential error patent. The trial court

sentenced defendant within twenty-four hours of denying his motion for new trial and post verdict judgment of acquittal. La. C.Cr.P. art. 873 requires a twenty-four-hour delay between the denial of a motion for new trial, or in arrest of judgment and sentencing, unless the defendant waives such delay. A defendant may implicitly waive the waiting period for imposing sentence by announcing his readiness for the sentencing hearing. In the instant case, the defense counsel responded in the affirmative when the trial court inquired whether it could proceed with sentencing. See State v. Jefferson, 97-2949, p. 4 (La. App. 4 Cir. 4/21/99), 735 So.2d 769, 772. We therefore find no error patent.

ASSIGNMENT OF ERROR ONE

Defendant contends the evidence was insufficient to convict him. The standard of review for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

In order to convict a defendant of simple robbery, the State must prove that the defendant did the following: (1) took something of value (2)

belonging to another (3) from the person of another (4) by use of force or intimidation. State v. Florant, 602 So.2d 338 (La.App. 4th Cir. 1992).

Charles contends that a rational trier of fact could not have found him guilty in light of the number of errors and inconsistencies propounded in the trial. Chief among these is the State's failure to present as evidence the clothes the defendant was wearing when he was arrested. Charles further notes the discrepancy between Girtley's testimony that his assailant rode a small bicycle and Deputy Hentz's testimony that the defendant was in possession of a 24 or 26 inch mountain bike. Charles argues that this discrepancy is compounded by the fact the bicycle was not collected as evidence by Deputy Hentz. Other inconsistencies pointed out by Charles include the fact that Deputy Hentz did not detect that the man he arrested had been drinking, but Girtley testified that his assailant appeared drunk. Finally, Charles notes that Deputy Hentz testified that Girtley reported his watch as having been stolen in the robbery, but Hentz did not recall anything about a ring being taken; whereas, Girtley clearly testified that the robber took his wedding ring and wallet, not his watch.

Despite these discrepancies, we nevertheless conclude that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the defendant guilty of simple robbery. Because

several hours passed between the time of the robbery and the time Charles was apprehended, the fact that he did not appear drunk and that he did not have any of the stolen items in his possession is of no moment. Moreover, while the failure to introduce the defendant's clothes or bicycle is unusual, any doubt about his guilt could have easily been overcome by the credibility of Girtley's story and the strength and certainty of his identification of Charles, particularly his repeated testimony that he would never forget the face of his assailant. Indeed, the trial judge commented on the record that she believed the testimony of the victim. Accordingly, we reject defendant's argument that the evidence was insufficient to convict him.

ASSIGNMENT OF ERROR TWO

Charles, who was represented by one attorney at the motion to suppress hearing and a different attorney at trial, contends that he received ineffective assistance of counsel. With regard to the hearing, defendant argues his counsel was ineffective for failing to file a motion to suppress the identification. Additionally, Charles contends his trial counsel was deficient in that he failed to obtain or introduce evidence and/or witnesses (which Charles contends were available) to show that Charles was not wearing a 49er's jacket or a cap when he was taken into custody in Orleans Parish.

Finally, Charles argues his trial counsel failed to object to Deputy Hentz's testimony concerning his discovery of the crack pipe.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. State v. Prudholm, 446 So.2d 729 (La. 1984); State v. Johnson, 557 So.2d 1030 (La. App. 4th Cir. 1990). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. State v. Seiss, 428 So.2d 444 (La. 1983); State v. Landry, 499 So.2d 1320 (La. App. 4th Cir. 1986).

A defendant's claim of ineffective assistance of counsel is to be assessed by a two-part test: the defendant must show that counsel's performance was deficient and that the deficiency prejudiced defendant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fuller, 454 So.2d 119 (La. 1984). Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. Strickland, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the

defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So.2d 191, 199 (La. App. 4th Cir. 1992).

With regard to Charles's threefold-based claim of ineffective assistance of counsel, we find that the record is insufficient for this court to render a determination. For instance, while it is clear from the transcripts of the motion hearing and the trial that both the defendant's attorneys were aware that his clothes were not collected as evidence, there is nothing in the record to confirm Charles's assertion that either counsel was aware of any evidence or witnesses that could have established that the suspect was not wearing the clothes in question when he arrived in Orleans Parish. This matter is best left for a determination in post-conviction proceedings, where the defendant will have an opportunity to establish the pertinent facts through an evidentiary hearing in the trial court. We therefore decline to rule on the ineffective assistance of counsel claim at this time.

CONCLUSION

Accordingly, the defendant's conviction is affirmed.

AFFIRMED