

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON ANTHONY EVANS,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 233021

Calhoun Circuit Court

LC No. 94-2738 FC

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was charged with one count of armed robbery MCL 570.529 and one count of felony firearm MCL 750.227b¹. Following a jury trial, defendant was convicted of armed robbery and sentenced to 20 to 40 years' imprisonment. Defendant appeals as of right and we affirm.

I. Basic Facts and Procedural History

This case arises out of an armed robbery of a Burger King restaurant on July 15, 1994. The central issue at trial was whether the witnesses properly identified defendant as the perpetrator. All of the witnesses testified that at some point during the lunch rush, a tall black male wearing a white hooded sweatshirt with the hood pulled up onto his head and fastened securely around his face entered the restaurant, waited in line, then approached the counter, brandished a weapon and demanded that two cashiers give him the money out of their cash registers. During the incident, one of the cashiers called for the store manager who proceeded to the front counter area. When he arrived, defendant pulled back the hammer, pointed the gun directly at the store manager and told him to "get out". Defendant then reached over the counter, took money out of one of the cash registers, stuffed the money into his pockets and fled.

Witnesses testified that when defendant left the premises, he went toward the apartment complex located directly behind the Burger King. Sheila Evans testified that in July of 1994 she was having an affair with defendant and that he stayed at her apartment on the evening of July

¹ The trial court granted a directed verdict on the felony firearm charge because the firearm that defendant employed in the robbery was incapable of firing a "dangerous projectile," thus not a "firearm" as that term is defined in MCL 750.222(d).

14, 1994. The next day, Ms. Evans testified that she sent defendant to Burger King to purchase some food. When defendant returned, Ms. Evans indicated that he left a second time and did not advise as to his destination. When defendant returned a second time, Ms. Evans stated that he came in through the back door, stopped in the kitchen and then proceeded downstairs into the basement area. Thereafter, defendant had a friend drive Ms. Evans and defendant to the grocery store. Ms. Evans testified that defendant paid for the groceries in cash which totaled over two hundred dollars.

Pursuant to an anonymous tip, police learned that an individual matching the description of the perpetrator left the area behind the Burger King in a dark blue station wagon with a push lawn mower in the rear. When police stopped the vehicle in which defendant was a passenger, he was coming back from the grocery store in a dark blue station wagon with a push mower in the back. When the police stopped the vehicle, one of the officers recognized defendant as the perpetrator of another unrelated robbery and arrested defendant. Incident to defendant's arrest, police searched his person and discovered a large amount of cash in his pockets. In his left pocket, defendant had \$480.00 and in the right pocket, he had \$91.00. Police also discovered a receipt for groceries totaling \$210.42. In addition, Ms. Evans consented to a search of her purse wherein police discovered \$140.00 in cash. The amount of money discovered on defendant's person, plus the amount expended for groceries and the \$140.00 located in Ms. Evans' purse was within \$20.00 of the total amount stolen from the Burger King restaurant during the armed robbery.

Once police arrested defendant for the unrelated robbery, and approximately seventy-five to ninety minutes after the Burger King robbery, police officers took both Ms. Crider and Ms. West to the apartment complex located directly behind the Burger King to see if either Crider or West could positively identify the perpetrator. Crider and West remained in the police cruiser while the officer drove them around the complex and allowed them to observe individuals standing around in the area. Crider testified that many people were standing around and that the police did not specifically point anyone out. Whereas Crider pointed out someone that she thought resembled the perpetrator, West was unable to specifically identify anyone at this time. When Crider pointed out an individual that she thought resembled the robber, Crider testified that the police officer asked whether she was sure and told her to look around to be certain. The individual that Crider pointed out to police was defendant.

Crider testified that although defendant was dressed differently when she observed him at the apartment complex, he "just stood out" and that she just "remembered him from seeing him in the store." Both Crider and West positively identified defendant as the perpetrator at trial.

Upon execution of a search warrant for Ms. Evans' house, police recovered a small, dark semiautomatic handgun located in the back portion of the oven/broiler area and discovered a white hooded sweatshirt at the foot of the basement stairs. In addition, police also recovered items addressed to defendant at Ms. Evans' apartment.

Police arrested defendant and he was charged with one count of armed robbery and one count of felony firearm. After hearing all of the evidence, the jury convicted defendant of armed robbery. The trial court sentenced defendant to 20 to 40 years' imprisonment.

II. The In-Field Identification

First, defendant argues that the trial court erred by declining to suppress the in-field identification. We disagree.

To the extent that a lower court's decision on a motion to suppress evidence is based on the trial court's factual findings, this Court will review those findings for clear error. *People v. Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). A trial court's finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). However, we review de novo the trial court's final decision on a motion to suppress. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

On-the-scene identifications are reasonable, "indeed indispensable police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance." *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997). Except where the police have "very strong evidence" that the individual stopped is the perpetrator, *Winters*, *supra* at 726-727, the police may conduct an on-the-scene identification without the presence of counsel. See *People v Libbett*, 251 Mich App 353, 412; 650 NW2d 407 (2002) (quoting *Winters*, *supra* at 726-727.) "Strong evidence exists where the suspect . . . has confessed or presented the police with either highly distinctive evidence of the crime or a highly distinctive personal appearance." *Libbett*, *supra* at 412 (quoting *Winters*, *supra* at 727.)

After considering the evidence, the trial court determined that when the on-the-scene identification occurred, the police did not have "strong evidence" indicating that defendant perpetrated the Burger King robbery. The trial court noted that defendant had not confessed and that he did not necessarily possess any distinct characteristics to connect him to the robbery that occurred at the Burger King approximately an hour and a half earlier. To be sure, the only thing that prompted police to stop defendant was the information contained in an anonymous phone call. As the trial court properly noted, when police stopped defendant pursuant to the anonymous tip, they did not have sufficient evidence at that point in time upon which to place defendant under arrest for the Burger King robbery. Thus, when the police initially stopped and arrested defendant, they did not have "strong evidence" linking defendant to the robbery at issue. Accordingly, the in-field identification was necessary to allow the police to immediately determine whether there was a "reasonable likelihood" that defendant perpetrated the crime, or whether defendant was "merely an unfortunate victim of circumstance." *Libbett*, *supra* at 411.

Although defendant suggests that the in-field identification was unduly suggestive, defendant does little to develop his argument on appeal. Notwithstanding, an identification procedure that is unduly suggestive and thus susceptible to irreparable misidentification violates a defendant's right to due process. *Williams*, *supra* at 542. To successfully challenge a pretrial identification procedure, defendant must establish that the procedure was "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.*

In the case sub judice, a review of the record demonstrates that the police merely drove the witnesses around the apartment complex and inquired whether they could identify the perpetrator. There is nothing in the record to suggest that the police singled defendant out in any manner and then inquired whether he was the culprit. On the contrary, Ms. Crider testified that at no time did the police ever single anyone out but rather told her to look around carefully to make certain that her identification was accurate. The record is devoid of any evidence whatsoever to indicate that the in-field identification procedure was unnecessarily suggestive thus violative of defendant's right to due process. We find that the trial court did not clearly err by denying defendant's motion to suppress the identification.

III. Sufficiency of the Evidence

Next, defendant submits that there was insufficient evidence presented to find him guilty of armed robbery beyond a reasonable doubt and that his conviction should be reversed. Again, we disagree.

To convict a defendant of armed robbery, the prosecutor must establish (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon" *People v Rodgers*, 248 Mich App 70, 706-707 (2001). On appeal, defendant submits that the prosecutor failed to present sufficient evidence that defendant was the individual that committed the crime. Defendant's argument lacks merit.

At trial, Scott Dando, the store manager, unequivocally testified that when he approached the front of the store, the perpetrator pointed the gun directly at him, told him to "get out," proceeded to take money out of two cash registers and then shove the contents into the pockets of the white-hooded sweatshirt that he wore. At trial, Mr. Dando testified that he had "no doubt" that defendant was the individual that robbed the Burger King on July 15, 1994.

Consistent with Mr. Dando's testimony, Ms. Kirkbride, one of the employees present when the robbery occurred, similarly testified that the perpetrator approached the counter, presented the weapon, ordered two cashiers to open their registers and then pointed the gun directly at Mr. Dando. Ms. Kirkbride also testified that she was able to get a good look at the perpetrator during the robbery and testified that she could positively identify the culprit. When asked to do so, Ms. Kirkbride identified defendant.

Although the testimony provided by Dando and Kirkbride sufficiently establish that defendant committed armed robbery, we note that the record contains the testimony of five separate witnesses all of whom positively and unambiguously identified defendant as the perpetrator at trial. Considering the evidence presented in a light most favorable to the prosecutor indeed establishes the essential elements of armed robbery beyond any reasonable doubt.

Affirmed.

/s/ William C. Whitbeck

/s/ Harold Hood

/s/ Kirsten Frank Kelly