

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001809-MR

HAROLD BEARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 13-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: Harold Beard appeals from the September 30, 2013, final judgment and sentence of imprisonment of the Fayette Circuit Court. That judgment found Beard guilty of one count of second-degree robbery and two counts of unlawful imprisonment, and sentenced him to a total of five-years' incarceration. Beard challenges the trial court's denial of his motion to suppress certain evidence. We affirm.

In 2013, Beard was indicted for two counts of robbery, first degree; two counts of unlawful imprisonment, first degree; and two counts of kidnapping an adult. The charges stemmed from events that took place in the early morning hours of November 11, 2012. On the evening prior, Victor Villagrana and Marco Robles met two women at a local Lexington establishment and then escorted the women back to Villagrana's apartment. Once there, one of the women, later identified as Shaunacey Turner, requested that they continue the evening at her house. The group then proceeded to Turner's house at 723 Charles Avenue.

Upon entering the residence, Villagrana and Robles were confronted with two men bearing shotguns. One man was identified as a tall, thin black male wearing black gloves, a black mask, and black clothing. The other man, later identified as Beard, was described as being a shorter, stockier black male wearing a red and black shirt and black mask. The two assailants forced Villagrana and Robles upstairs, bound their hands and mouths with duct tape, and took their wallets and cell phones. After approximately ten to fifteen minutes, the men removed the duct tape, took the victims downstairs, and forced them to drink an unknown liquid, later identified as Visine. The assailants informed the victims that they would kill them if they called the police and then ordered the victims back into Villagrana's vehicle.

Beard then removed his mask, got into the backseat of Villagrana's car, held a gun to Villagrana, and instructed him to drive. Villagrana drove as instructed until he stopped at a red light. Beard directed Villagrana to continue

driving, at which point Villagrana turned and informed Beard that he could not continue because the light was red. At this time, Beard exited the vehicle and got into a grey sports car, which then sped off. Villagrana and Robles then returned to Villagrana's apartment where they contacted the police.

Officer Christopher Carrington responded to Villagrana's and Robles' call. Officer Carrington went to Villagrana's apartment where he spoke with the two men and acquired the description given above of their assailants. Officer Carrington then followed Villagrana's directions to 723 Charles Avenue and parked several houses away. Villagrana and Robles remained in Officer Carrington's cruiser while Officer Carrington and several other officers approached the residence to conduct a knock and talk investigation. Due to the presence of a dog on the front porch, the officers knocked at the back door, at which time Beard exited through the front door. Beard, who was wearing a black and red shirt, was detained by officers. Officer Carrington then came to the front of the house where he received permission from Turner to search the residence.

During the search of the residence, police discovered two black masks and several long strips of used duct tape. Following the search, Officer Carrington escorted Beard, Turner, and Damien Happy from the house so that a show-up identification could be performed. Officer Carrington returned to his vehicle and instructed Villagrana and Robles to inform him if they recognized anyone. Officer Carrington then moved his vehicle closer to Turner's house, stopped approximately one house away, and shined his spotlight on the three individuals he had removed

from the residence. Villagrana and Robles immediately identified Beard and Turner. The victims acknowledged that Happy had similar characteristics as the second assailant, but admitted that he kept his mask on the entire time, and that they therefore could not positively identify him. Beard's indictment followed.

Beard filed a motion to suppress the show-up identification. A suppression hearing was held, during which the trial court heard the testimony of Officer Carrington and Beard. As a result of that testimony, Beard's motion was denied. Beard entered into a conditional guilty plea on August 16, 2013, reserving his right to challenge the denial of his suppression motion. Beard was found guilty of one count of second-degree robbery and two counts of unlawful imprisonment, and sentenced to a total of five-years' imprisonment. The remaining charges were dropped. This appeal followed.

Our review of a trial court's ruling on a motion to suppress is two-fold. First, the factual findings are deemed conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78. If unsupported by substantial evidence, the trial court's factual findings are deemed clearly erroneous. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Second, we conduct a *de novo* review to determine whether the trial court's decision was correct as a matter of law. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006).

Beard's sole argument on appeal is that the show-up identification conducted on the evening of November 11, 2012 was unreliable and should have

been suppressed. Show-up identifications are indisputably inherently suggestive. Nonetheless, show-up identifications have been held to be necessary in some instances because they take place immediately after the commission of the crime and assist the police in properly identifying suspects. *Savage v. Commonwealth*, 920 S.W.2d 512, 513 (Ky. 1995). Although suggestive, a show-up identification may still be admissible if, under the totality of the circumstances, the identification is found to be reliable. *Commonwealth v. Parker*, 409 S.W.3d 350, 353 (Ky. 2013). Reliability should be determined by the trial court by assessing the possibility of an irreparable misidentification based upon five factors. *Id.* Those factors, enumerated in *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972), are:

- (1) the opportunity of the witness to view the defendant;
- (2) the witness's degree of attention; (3) the accuracy of any prior descriptions; (4) the level of the witness's certainty when confronting the defendant; and (5) the time between the crime and the confrontation of the defendant.

Id.

In the case presently before us, the trial court found that the show-up identification of Beard was undoubtedly suggestive. The trial court then identified the five *Biggers* factors and applied the facts at hand to those factors in order to determine the reliability of the identification. In doing so, the trial court made the following findings: the victims had a sufficient opportunity to view Beard during the robbery both in the residence and the vehicle, and with and without his mask;

the victims were able to focus a sufficient degree of attention on Beard to properly identify him; the victims provided sufficient and accurate descriptions of their assailants; the victims showed a high level of immediate certainty when they identified Beard; and the amount of time between the commission of the crime and the show-up identification was brief enough to encourage reliability. The trial court then concluded that, in light of the totality of the circumstances, the identification was reliable.

Our review of the record confirms that the trial court's findings of fact were supported by substantial evidence. RCr 9.78. In addition, the trial court's application of the law to those facts was correct as a matter of law. *Roberson*, 185 S.W.3d 634. Accordingly, we hold that the trial court did not err when it denied Beard's motion to suppress.

For the foregoing reasons, the September 30, 2013, final judgment and sentence of imprisonment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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