

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2002-SC-0626-MR

DATE 1-8-04 EIA Gravit, D.C.

ANTHONY LAMONT HUTCHINSON

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 02-CR-00187

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING FOR A NEW TRIAL

This matter-of-right appeal arises from a guilty verdict of a Fayette Circuit Court jury convicting Appellant, Anthony Lamont Hutchinson, of first-degree robbery, two counts of first-degree wanton endangerment, and for being a second-degree persistent felony offender (PFO). We reverse and remand for a new trial.

On October 29, 2001, following a conversation with an acquaintance, Linda Bacon, the victim herein, was walking back to her motor vehicle when an individual, allegedly Appellant, pulled at her purse and mentioned something about money. Bacon had a brief verbal exchange with this individual, and then continued to walk toward her vehicle. As Bacon entered her vehicle, she inadvertently pressed the automatic lock and window buttons, thereby mistakenly unlocking the doors and rolling down the windows. The individual then reached into the passenger-side window seemingly in an attempt to take Bacon's purse, which Bacon had placed in the passenger-side seat after

entering the vehicle. According to Bacon's testimony, the individual stated that he was "strapped," meaning that he carried a firearm on his person. Bacon stated the weapon was tucked in the waistband of the individual's pants and that both the handle and the trigger of the weapon were plainly visible. Bacon then proceeded to drive away in an attempt to escape from this individual. As she was driving away, the individual discharged his weapon multiple times in the vehicle's direction. There were children within close proximity as this incident transpired.

On February 18, 2002, the Fayette County grand jury returned an indictment charging Appellant with the following counts: (1) robbery in the first degree; (2) possession of a handgun by a convicted felon; (3) wanton endangerment in the first degree (as to Linda Bacon); (4) wanton endangerment in the first degree (as to other persons); and (5) for being a PFO in the second degree. The handgun possession charge was subsequently dismissed by the trial court.

Following a jury trial in the Fayette Circuit Court, Appellant was convicted on one count of first-degree robbery, two counts of first-degree wanton endangerment, and for being a second-degree PFO. Appellant was sentenced to a term of imprisonment in the state penitentiary totaling twenty years. He therefore brings the instant appeal as a matter of right. Ky. Const. § 110(2)(b).

The first two assignments of error concern the in-court identification of Appellant made by the victim, Linda Bacon. First, Appellant contends that the trial court committed reversible error in failing to hold a suppression hearing regarding Bacon's in-court testimony identifying him as the perpetrator. Second, he contends that he was denied due process of law under both the federal and state constitutions by the admission of the in-court identification. We cannot agree with either contention;

nonetheless, we must reverse for a new trial because the jury was improperly instructed.

Appellant asserts that a suppression hearing on identification procedures out of the jury's presence is required under Kentucky law. For authority, Appellant cites to Moore v. Commonwealth, Ky., 569 S.W.2d 150 (1978), where this Court stated that when "there is a substantial basis for the claim that a forthcoming in-court identification is tainted by an improper pretrial identification procedure, a suppression hearing, if affirmatively requested, should be conducted." Id. at 153. Additionally, in Francis v. Commonwealth, Ky., 468 S.W.2d 287 (1971), our predecessor court held that a trial court erred by denying a defendant's request for a hearing outside the presence of the jury to determine if a witness' in-court identification was influenced by a police lineup.

However, the preceding opinions are not applicable here as no pretrial identification or confrontation procedure was conducted. The police did not employ a showup, lineup, or photographic display in order to get the victim to identify Appellant. In his reply brief, Appellant argues that the police "short-circuited the process" by providing Appellant's name and description to Bacon, instead of using a formal procedure to ascertain if she "truly had an independent recollection of the perpetrator." Essentially, Appellant is arguing that Bacon should have been required to participate in a police-sanctioned pretrial identification procedure, such as viewing a lineup or an array of photographs. While it oftentimes may be preferable for a crime victim to participate in a confrontation or identification procedure, such as a lineup, the failure to hold a procedure of the like does not amount to a violation of Appellant's due process rights. See Code v. Montgomery, 725 F.2d 1316, 1320 (11th Cir. 1984); Branch v. Estelle, 631 F.2d 1229, 1234 (5th Cir. 1980). Moreover, Appellant's argument seems to

insinuate "that there was something intolerably prejudicial in the fact that an identifying witness was made aware of who the defendant was before she took the stand." State v. Ober, 359 A.2d 624, 626 (N.H. 1976). However, "[t]his is not sufficient to invalidate an in-court identification." Id.; United States v. Davis, 487 F.2d 112, 122 (5th Cir. 1973), cert. denied, 415 U.S. 981, 94 S. Ct. 1573, 39 L. Ed. 2d 878 (1974). Indeed, we find nothing to indicate that Bacon's in-court identification of Appellant was tainted in any fashion.

"A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable." Watkins v. Sowders, 449 U.S. 341, 349, 101 S. Ct. 654, 659, 66 L. Ed. 2d 549 (1981). However, it is our belief that "such a determination" is not "constitutionally necessary" under the circumstances of the present case. Id. In other words, Appellant was not entitled to a hearing regarding the victim's in-court identification.

With respect to the admissibility of the in-court identification, Appellant complains, inter alia, about the "many discrepancies in Bacon's continually changing story." However, it is within the jury's province to assess the sincerity of a witness' testimony. Leigh v. Commonwealth, Ky., 481 S.W.2d 75, 79 (1972). The reliability or correctness of Bacon's in-court identification of Appellant and her credibility as a witness are questions that the jury is best suited to consider. As the United States Supreme Court stated in Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed 2d 140 (1977), "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Id. at 116, 97 S. Ct. at 2254.

Furthermore, we do not agree with Appellant's assertion that the totality of the

circumstances suggests Bacon's in-court identification is not reliable. During her testimony at trial the victim stated that she was only a few feet away from the perpetrator and got a good look at him. She positively identified Appellant as the perpetrator. Any inconsistencies in Bacon's testimony could have been and were addressed via cross-examination. "[W]here there has been no pretrial identification procedure and the defendant is identified in court for the first time, the defendant is not deprived of a fair trial because the defense counsel is able to explore weaknesses and suggestiveness of the identification in front of the jury." People v. Medina, 208 A.D.2d 771, 772, 617 N.Y.S.2d 491, 492-493 (N.Y. App. Div. 1994).

In sum, considering the totality of the circumstances particular to this case, we conclude that the trial court did not abuse its discretion in failing to hold a suppression hearing regarding Bacon's in-court identification of Appellant. We further conclude that admission of the in-court identification did not deny Appellant his rights to due process.

Next, Appellant argues that it was error for the trial court to not direct a verdict of acquittal concerning the first-degree wanton endangerment charge as to the victim. (Appellant assigns no error with regard to the first-degree wanton endangerment charge as to other persons). He asserts that the firing of the handgun in the direction of the victim's automobile constituted part of the act of first-degree robbery, and therefore, it could not be prosecuted as a separate charge. We disagree.

In support of his assertion, Appellant cites to our decision in Marshall v. Commonwealth, Ky., 625 S.W.2d 581 (1981). In that case, we found a double jeopardy violation where the charge of first-degree wanton endangerment was based on evidence that the appellant therein pointed a pistol at customers and employees during the course of robbing a pharmacy. Id. at 582. Additionally, in Whorton v.

Commonwealth, Ky., 570 S.W.2d 627 (1978), rev'd on other grounds, Kentucky v. Whorton, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), we held that it was error for the wanton endangerment charge to be submitted to the jury based on the fact that the appellant had fired a shot into the ceiling of a restaurant during the course of a robbery. Id. at 631; see also, Gilbert v. Commonwealth, Ky., 637 S.W.2d 632 (1982), cert. denied, Gilbert v. Kentucky, 459 U.S. 1149, 103 S. Ct. 794, 74 L. Ed. 2d 998 (1983).

Appellant's reliance on the above cases is misplaced. Unlike Marshall and Whorton, the shots here were not fired during the course of a robbery. There was evidence presented at trial indicating that no shots were fired until after Bacon's vehicle had sped away from Appellant. Bacon testified that she could see the handle and trigger of a handgun on Appellant's person when Appellant attempted to take her purse from her vehicle. As the Commonwealth correctly notes, this evidence was adequate to support a charge of first-degree robbery. See Lambert v. Commonwealth, Ky. App., 835 S.W.2d 299 (1992). Taking this evidence into account, it necessarily follows that the offense of first-degree wanton endangerment as to the victim was separate and distinct from the commission of the robbery.

Following a consideration of the evidence as a whole, and applying the directed verdict test set forth in Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), we hold that it was clearly not unreasonable for the jury to find Appellant guilty under the third count of the indictment. Id. at 187. As the prosecution undoubtedly produced more than a mere scintilla of evidence, this case was submitted to the jury in an appropriate manner. Id. at 188. There was no error.

Appellant's final issue pertains to the trial court's decision to not follow the

misdemeanor sentencing procedure set forth in Commonwealth v. Philpott, Ky., 75 S.W.3d 209 (2002). Defense counsel moved the trial court to employ this procedure. However, because Philpott was not yet final at the time, the trial court denied the motion. The trial court also stated that it could not perceive of any prejudice to Appellant arising from its decision to not employ the procedure. Appellant filed a timely motion for a new trial, citing Philpott, which was then final, thus preserving the issue for review by this Court. We must therefore reverse this matter for a new trial at which the jury shall be properly instructed.

Accordingly, for the aforementioned reasons, we hereby reverse the judgment of the Fayette Circuit Court and remand for a new trial.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur.
Wintersheimer, J., dissents without separate opinion.

ATTORNEY FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601-1133

ATTORNEYS FOR APPELLEES:

A. B. Chandler, III
Attorney General
Capitol Building
Frankfort, KY 40601

Courtney J. Hightower
Assistant Attorney General
Office of the Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204