

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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

2002-SC-0888-MR

FINAL

DATE 3-11-04 ELLAGrowett, D.C.

YULLIN LEE SANDIFER

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
2001-CR-1286

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Yullin Lee Sandifer, was convicted of first-degree robbery by a Fayette County jury and received a sentence of twenty years' imprisonment. His appeal comes before this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant asserts the following errors: 1) the introduction of an in-court identification and a photographic identification denied Appellant a fair trial; 2) the trial court improperly failed to enter a directed verdict of not guilty; and 3) the prosecutor's improper comments unfairly prejudiced Appellant.

On Friday, November 2, 2001, Appellant visited Melissa Davidson at Dennis Shadoan's residence. Neither Shadoan nor Davidson knew Appellant's real name, only that he was referred to as "Big U." During this time, Shadoan was conversing with his roommate, Leonard Sowers, and had his share of the rent, about \$225, on the kitchen table. Appellant left the apartment an hour later.

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On Friday, November 2, 2001, Appellant visited Melissa Davidson at Dennis Shadoan's residence. Neither Shadoan nor Davidson knew Appellant's real name, only that he was referred to as "Big U." During this time, Shadoan was conversing with his roommate, Leonard Sowers, and had his share of the rent, about \$225, on the kitchen table. Appellant left the apartment an hour later.

The next evening, Appellant phoned Shadoan and asked if he could come back over for a few drinks. Appellant identified himself by referring to his presence the night before. Shadoan noticed that the name "Sandifer" was displayed on his caller ID. Appellant arrived about twenty minutes later. Appellant and Shadoan sat at the kitchen table and talked for a few minutes until Appellant drew a small pistol and demanded Shadoan's money. Shadoan managed to retreat into the bathroom. Appellant fired through the bathroom door and grazed Shadoan's right thigh. Leonard Sowers phoned 911 after hearing the gunshot and screaming.

Police arrived at the scene and interviewed Shadoan and Melissa Davidson soon afterwards. Police were able to obtain a photograph of Appellant after running the name "Sandifer" through Detention Center Records. Davidson identified Appellant as "Big U," the man who had visited Shadoan the previous night. Shadoan was shown an array of six photographs on a single sheet of paper and identified Appellant.

Appellant was indicted for first-degree robbery on December 19, 2001, in Fayette County. On May 21, 2002, the trial court denied Appellant's motion to suppress any identifications derived from the photographic line-up. Appellant was tried on September 10, 2002, and final judgment was entered on October 8, 2002.

Eyewitness Identifications

On appeal, Appellant argues that the trial court erred by allowing the eyewitness identifications into evidence. Kentucky courts have consistently applied the Biggers test when considering the admissibility of eyewitness identifications. Roark v. Commonwealth, Ky., 90 S.W.3d 24, 28 (2002). The Biggers test consists of a two-pronged inquiry: 1) whether the identification procedure was unduly suggestive, and 2) whether under the totality of the circumstances, the identification was reliable despite

the suggestive procedure. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

The trial court heard arguments and extensive testimony from the investigating officer regarding the identification procedure at the suppression hearing. After hearing arguments, the trial court denied the motion to suppress because the identification was not unduly suggestive under the circumstances. We agree.

Appellant argues that the photographic line-up was unduly suggestive because he was the only person in the line-up with braids and one of only two people wearing jackets. We find this argument unpersuasive for several reasons. First, the investigating officer testified at the suppression hearing that he instructed the witnesses not to take clothing or hairstyle into account when making an identification. Secondly, Shadoan had seen Appellant the night before. On the night of the robbery, Shadoan and Appellant sat and talked for a couple minutes before the robbery happened. Finally, the line-up identification occurred just four hours after the incident took place. We conclude that the identification procedure was not unduly suggestive. There was no error.

Motion for a Directed Verdict

In his second assignment of error, Appellant argues that the trial court improperly failed to enter a directed verdict of acquittal. Appellant asserts that no reasonable jury could have found him guilty of first-degree robbery based on the testimony at trial. Appellant specifically refers to certain inconsistencies in Shadoan's statements and allegedly defective police work. We disagree.

When ruling on a motion for directed verdict, the trial judge must make all fair and reasonable inferences in favor of the Commonwealth. Commonwealth v. Benham,

Ky., 816 S.W.2d 186 (1991). Secondly, if the evidence is sufficient for a reasonable juror to conclude the accused is guilty beyond a reasonable doubt, then a directed verdict should not be granted. Id. A trial court should only grant a directed verdict if it would be clearly unreasonable, based on the evidence as a whole, for a jury to find guilt. Id.

Appellant has not demonstrated such a complete lack of evidence as to bring the jury's verdict into question. Appellant merely attacks the credibility of Shadoan's testimony. The weight and credibility of a witness's testimony is a matter for the jury to decide. Commonwealth v. Cox, Ky., 837 S.W.2d 898 (1992). Additionally, "[i]t is sufficient if the victim's testimony taken as a whole could induce a reasonable belief by the jury that the crime occurred." Id. at 900. In light of the evidence, we find that a reasonable jury could find Appellant guilty beyond a reasonable doubt. The trial court did not err by denying Appellant's motion for a directed verdict.

Improper Comments

For his final assignment of error, Appellant argues that he was denied a fair trial because the Commonwealth's Attorney made an improper comment regarding facts not in evidence during Appellant's closing argument. This issue is unpreserved for appellate review.

Appellant made reference to the Commonwealth's inability to produce the phone records to physically demonstrate that Appellant called Shadoan's home. At this point the Commonwealth objected and made the following statement, ". . . I don't know if we could get those records, I think that [Appellant's remark] is an incorrect statement." The trial judge responded that he would let the jury decide the issue. Appellant did not

object or request an admonition to the jury, but simply continued with his closing argument.

We find that Appellant received a fundamentally fair trial to which he is entitled. A fundamentally fair trial does not necessarily mean a perfect trial. Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). Furthermore, Appellant has not demonstrated the manifest injustice requisite for relief under the palpable error rule. RCr 10.26.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

All concur.

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