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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-1134-MR

DATE 11-10-05 EIA/Gow/HPD

JAMES LAWSON

APPELLANT

V.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
2004-CR-0169

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Lawson of second-degree burglary, theft by unlawful taking less than \$300 and being a first-degree persistent felony offender. He was sentenced to a total of twenty years in prison.

The questions presented are whether the trial judge erred when he overruled the motion to suppress the victim's out-of court and in-court identification of the defendant; whether the evidence was sufficient to sustain the convictions; and, whether the closing argument by the prosecutor was unduly prejudicial.

The victim testified about the burglary that occurred at his home at approximately 11:00 p.m. He explained that after his son alerted him to hearing the garage door being opened, he found the door ajar about two feet. Upon further inspection, the victim

discovered an individual on his driveway loading tools into a cooler. The intruder fled when the victim gave chase. When police presented the victim with a photograph later that night, he positively identified Lawson as the burglar. He also identified Lawson in-court. The victim valued the tools and other items taken from his attached garage at \$305.

Among other things, police recovered a pill bottle and a pack of generic cigarettes from the flight path taken by the intruder. The pill bottle bore the name James Lawson and the cigarettes were the identical brand recovered from him when he was arrested.

The defendant testified in his own defense and completely denied the charges. He claimed that another individual had stolen his pill bottle earlier that day. The jury convicted Lawson of second-degree burglary, theft by unlawful taking less than \$300 and for being a second-degree persistent felony offender. He was sentenced to ten years on the burglary charge, twelve months and a \$500 fine for the misdemeanor, and twenty years for being a persistent felony offender, for a total of twenty years. This appeal followed.

I. Identification by the Victim

Lawson argues that the trial judge erred when he overruled his motion to suppress the victim's out-of court and in-court identification. We disagree.

Defense counsel filed a motion before trial which in part sought to suppress evidence of both the out-of-court and in-court identification of Lawson by the victim. He claimed that the identification procedures used by the police were so suggestive that they denied the defendant due process. A hearing was held on that motion and the victim was the principal witness to testify on this issue.

At the suppression hearing, the victim testified to the facts leading up to his discovering the intruder. He further explained that the intruder turned to face him when he yelled and proceeded towards him. The victim stated that he had sufficient time and lighting to see the face of the individual, noting that there was a street light across the road from his house. The individual fled the area when the victim gave chase.

Among other items, the victim testified that a pill bottle bearing the name James Lawson was found in the flight path taken by the burglar. The victim told police that the burglar was wearing a red T-shirt, red hat, shorts and white tube socks. About 1½ to 1¾ hours later, a police officer presented a single photograph to the victim and he had no doubt that the individual was the burglar.

The photograph shown the victim at the suppression hearing was similar, but not the same, as the one he was shown the night of the burglary. He indicated that the original photograph was larger and taller than the one introduced at the hearing. The latter is a jail intake photo with the defendant's name typed at the top. The victim acknowledged that on the night in question the police told him that James Lawson's name was on the pill bottle. However, he could not recall whether the original photograph contained the defendant's name, he only remembered the picture.

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), establishes "a two-prong due process test," Wilson v. Commonwealth, 695 S.W.2d 854, 857 (Ky. 1985), under which the court "must first determine whether the confrontation procedures employed by the police were 'suggestive.'" Id. If not, the analysis ends and the identification testimony is allowed. King v. Commonwealth, 142 S.W.3d 645, 649 (Ky. 2004). If the trial judge concludes otherwise, he must then assess the probability

that the witness would make an irreparable misidentification, based on the totality of the circumstances. Neil, *supra*; Wilson, *supra*.

Neil identifies five factors to be considered in evaluating the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of identification; and, (5) the length of time between the crime and the confrontation.

Here, the trial judge recognized the controlling precedent and applied that precedent to the facts of the case. He concluded that the use of a single photograph in these circumstances was unduly suggestive, but that the victim could still reliably identify the person despite the improper identification procedure. Examining the five factors set out in Neil, he found that the witness had a frontal view of the person who fled and that there was a light on the street; that the victim paid attention to how the individual looked; that the victim was able to describe the clothing and physical size of the person; that the victim had no doubt about the identification of the individual; and, that the victim identified the suspect in less than two hours time.

Under all the circumstances, we must agree with the determination by the trial judge that the single photograph was unduly suggestive. We also agree with his conclusion that the victim could still reliably identify the person despite the improper identification procedure. His findings of fact as they relate to the five factors set out in Neil are supported by substantial evidence and thus are conclusive. Having carefully reviewed the record, we find no error in the decision of the trial judge to overrule the motion to suppress the identification of the defendant by the victim.

II. Sufficiency of the Evidence

Lawson contends that the evidence was constitutionally insufficient to sustain his conviction. We disagree.

On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

Here, the victim positively identified the defendant both out-of-court and in-court. He provided the police with a list of items taken from his garage as well as their value. A prescription bottle bearing the name James Lawson was found in the path taken by the individual when he fled. Also found on the flight path was a pack of generic cigarettes, the same type recovered by police when Lawson was arrested. The victim described the burglar as wearing a red T-shirt and red cap. Police later found a red T-shirt in the pickup truck belonging to Lawson's brother, the same truck in which the defendant was seen riding in earlier that day.

Again, having carefully reviewed the record, it is clear that the Commonwealth presented sufficient evidence to support the convictions. The trial judge properly denied the motion by Lawson for a directed verdict.

III. Closing Argument

Lawson complains that the closing argument by the prosecution was unduly prejudicial. He raises four separate incidents which we will address separately.

First, Lawson asserts the prosecutor impermissibly related a personal experience he had with an intruder to make the point that a victim will remember such an individual. There was no objection to this argument and further review pursuant to RCr 10.26 is unwarranted.

Second, Lawson claims that the prosecutor commented on facts not in evidence when he indicated that a police dispatcher had received information that a person wearing a red cap and red shirt was at the homeless shelter earlier that day. Defense counsel objected, claiming that the dispatcher never testified to that. The prosecutor responded that he thought there was such testimony, but that he would straighten it out. No further relief was requested. Consequently, any objection to these comments was waived. Cf. Wilcher v. Commonwealth, 566 S.W.2d 812 (Ky. 1978).

In any event, the prosecutor did not misstate evidence during his closing argument. The investigating police officer had testified that the initial description from the dispatcher was that the male burglary suspect was wearing a red hat and red shirt. He was later given information at the police department that an individual matching that description had been seen earlier that day at the homeless shelter. These alleged misstatements are more accurately characterized as interpretations of the evidence. In his closing remarks, a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt. Bills v. Commonwealth, 851 S.W.2d 466 (Ky. 1993).

Third, Lawson alleges that the prosecutor impermissibly commented on the credibility of the witnesses. Particularly, that he improperly advised jurors that a police officer was more credible than the defendant, a convicted felon, because the police officer risked his career if he lied on the stand.

The prosecutor is entitled to attack a defendant's credibility if the defendant testifies as a witness on his own behalf. Tamme v. Commonwealth, 973 S.W.2d 13, 38 (Ky. 1998). The defense position throughout the trial was that the police officer was not telling the truth about what actually happened. The prosecutor was entitled to give an invited response. See Foley v. Commonwealth, 953 S.W.2d 924, 940 (Ky. 1997).

Fourth, Lawson contends that the prosecutor improperly commented that "they know this is a preposterous story they're telling." We disagree. A prosecutor may comment on tactics, may comment on evidence and may comment on the falsity of the defense position. Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1987), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989).

Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the trial. Soto v. Commonwealth, 139 S.W.3d 827, 873 (Ky. 2004). In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair. Id. Here, there was no error with regards to any of the statements. Obviously, because there was no individual error, there is no basis to claim any type of cumulative error.

Lawson received a fundamentally fair trial. He was not denied any of his due process rights under the state or federal constitutions.

The judgment of conviction is affirmed.

All concur except Johnstone, J., who concurs in result only.

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