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RENDERED: NOVEMBER 22, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000500-MR

LORENZO CORNELL LEE — APPELLANT

V.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
INDICTMENT NOS. 04-CR-00338 AND 05-CR-00206

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Christian Circuit Court jury convicted Lorenzo Lee of first-degree robbery and of being a persistent felony offender in the second degree (PFO II) and fixed his punishment at twenty-five years' imprisonment. The trial court entered judgment accordingly. Lee appeals to this court as a matter of right.[1]

Lee contends that the judgment should be reversed because (1) the trial court erred by allowing the victim to testify at trial about her single-person show-up identification and make an in-court identification of Lee; and (2) the trial court erred by failing to dismiss the PFO II charge, which Lee argues

[1] Ky. Const. § 110(2)(b).

resulted from prosecutorial vindictiveness. Finding no reversible error, we affirm the judgment.

I. BACKGROUND.

A man wearing a ski mask and carrying a handgun entered the E-Z Money Exchange on Ft. Campbell Boulevard in Hopkinsville, Kentucky. Freedom David was working there alone. The man ordered David to open the safe. David informed him that there was no safe, but she opened the door to the fire-proof file cabinet where money was kept and pointed to the money. The robber took the money and told David to give him the security tape. After she told him that they had not put in a tape that day, he forced her to get under her desk, told her to count to one hundred, and then he left the store. After he left, David got out from under her desk and watched him get into his vehicle. She wrote down the vehicle's license plate number and called 911 to report the robbery and the license plate number.

The 911 call came at 3:48 p.m. At 3:58 p.m., police officers stopped a vehicle driven by Lee with the same license plate number as David reported. Police arrested Lee at 4:01 p.m., ordering him out of the car and placing him in handcuffs. At 4:03 p.m., other police officers picked up David at E-Z Money and transported her to the scene of the stop for an identification, arriving at approximately 4:12 p.m. The officers transporting David told her that other officers had pulled over a vehicle matching her description and that "the person in question" would be there for her to see if that was the robber.

When David arrived, the police car she was in stopped briefly and she saw Lee for "just a second" from a position that required her to view him from

across the car and across an officer. She identified Lee as the robber. A later search of Lee's car produced several items related to the robbery, including a money bag, a ski mask, a BB gun, and a receipt for the gun.

Lee told police that a man named Leonard Anderson had borrowed his car immediately before the robbery and that Lee had been at Wal-Mart when the robbery was committed. Lee complains that police never investigated Anderson or any other potential suspect, never investigated whether Wal-Mart surveillance tapes corroborated his presence there, and never conducted fingerprinting or DNA testing on the items found in his car.

The Christian County grand jury indicted Lee charging him with first-degree robbery. He filed a motion to suppress David's show-up identification because of the suggestive manner in which it was procured. The trial court denied the motion following an evidentiary hearing.

Lee was then tried by jury and convicted of the robbery charge. The jury recommended a sentence of thirteen years' imprisonment. Lee filed a pro se motion for new trial, alleging ineffective assistance of counsel. On the day set for sentencing, the trial court met in chambers with Lee and counsel for both sides and announced that it would grant Lee a new trial on other grounds. According to the court, the jury that convicted Lee included a juror who was not an American citizen and, therefore, unqualified for jury service. The record does not reveal how the trial court obtained the information about the unqualified juror; but, apparently, Lee had not been previously aware of that fact. The Commonwealth never objected to the court's granting Lee a new trial.

In light of this ruling, the trial court then addressed Lee about a possible resolution of the case by plea agreement. The court observed that because of the trial, both sides had the benefit of knowing what one jury thought of the case. The court suggested to Lee that he might explore plea bargaining with the Commonwealth. The Commonwealth's Attorney stated emphatically that the Commonwealth would offer the same thirteen-year sentence that the jury had recommended, and not anything less. He further asserted that he would pursue an indictment against Lee for PFO if Lee elected not to accept this offer. Lee quickly responded that he would not accept the offer but would proceed to trial. The trial court concluded that although it had contemplated allowing the parties time to negotiate, it would simply set the date for the new trial because the parties' unequivocal statements indicated that further negotiation was pointless.

Shortly after the in-chambers meeting, the grand jury returned a PFO II indictment. Lee moved to dismiss it alleging prosecutorial vindictiveness. The trial court conducted a hearing on Lee's motion at which the Commonwealth's Attorney asserted that he sought the PFO II indictment at that time rather than earlier because he had only recently received certified copies of the other robbery convictions from Tennessee. The prosecutor also reminded the court that he assured Lee that he would seek a PFO II indictment if Lee pursued another jury trial in lieu of accepting the Commonwealth's plea offer. Lee asserted that the Commonwealth's Attorney knew about his Tennessee convictions when Lee was first indicted for the Hopkinsville robbery, and he argued that the prosecutor's waiting until after the granting of the new trial to seek the PFO indictment demonstrated vindictiveness for asserting his

constitutional rights. The trial court stated that it "made no finding of prosecutorial vindictiveness" and denied Lee's motion, although it acknowledged that the Commonwealth could have originally indicted Appellant as a PFO without certified copies of his prior convictions.

On retrial, Lee was convicted of robbery and PFO II. This time, the jury fixed punishment at twenty-five years' imprisonment.

II. ANALYSIS.

A. The Out-of-Court and In-Court Identifications.

Lee contends that the trial court erred by allowing David (1) to testify to her out-of-court identification because it resulted from an unduly suggestive show-up procedure, and (2) to identify him in court because her in-court identification was tainted by the invalid initial out-of-court identification. Preservation of the in-court identification issue is questionable; but we will address both contentions, nevertheless.

1. Out-of-Court Identification.

As we have said before, "[a] single-person-show-up identification is inherently suggestive . . . ."[2] But this sort of identification is not always inadmissible. Rather, the court must consider whether the totality of the circumstances indicates a probability that the witness has made an "irreparable misidentification."[3] In resolving this question, the court must weigh five factors: "[1] the opportunity of the witness to view the criminal at the time of the crime,

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[2] Rodriguez v. Commonwealth, 107 S.W.3d 215, 218 (Ky. 2003).

[3] *Id.*

[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 confrontation, and [5] the length of time between the crime and the confrontation."[4]

Applying these factors to the facts of this case, we conclude that the trial court did not err in denying Lee's motion to suppress David's identification at the site of the traffic stop. David had a sufficient, though not ideal, opportunity to view the robber at the time of the crime. She testified to being able to see his eyes and eyebrows and finding these features particularly distinctive and memorable, despite the ski mask.[5] She admitted that the robber was only in the store for a few minutes at most. Nonetheless, there is no indication that she was not able to observe his coloring, build, and other identifying characteristics at that time since the crime occurred during daylight hours; and she could see the robber getting into his car outside, as well as during the course of the robbery.

Lee cites David's testimony that her mind was in many places at once to argue that she must have been too distracted to make reliable observations at the time of the crime. But we have noted that victims robbed at

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4 Fairrow v. Commonwealth, 175 S.W.3d 601, 608-609 (Ky. 2005) (quoting Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

5 *See* Savage v. Commonwealth, 920 S.W.2d 512, 513-514 (Ky. 1995) (victim had sufficient opportunity to view robber despite grocery bag over his head since his moustache, hair color, and stature were still visible).

gunpoint (such as David) necessarily tend to "focus[] their attention on the events and circumstances surrounding the robbery."[6]

Lee points to various inconsistencies in David's descriptions of the robber to the police, for example: her failure to see a scar on one eyebrow, her differing estimates of the robber's weight and height, and her different memories of the colors of the clothes the robber was wearing. While we acknowledge that David may not have articulated an exact description, she, nonetheless, apparently identified the robber's general coloring, style of dress, and build.

Lee concedes that David said she was sure that he was the man who robbed her, but he argues that her assertion of certainty "must be viewed skeptically due to the suggestiveness of the show-up and the various descriptions given of the robber." Nonetheless, her certainty weighs in favor of the reliability of the identification.

As for the time between the crime and the confrontation, this was established to be within a half hour at the most. On other occasions, we have found longer periods of time, such as two hours, to be sufficiently close in time between the crime and the confrontation to indicate reliability of the identification.[7] So this factor weighs heavily toward the reliability of the identification.

Furthermore, Lee's being found in possession of money stolen from E-Z Money, as well as a ski mask, BB gun, and the receipt for the BB gun, also

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[6] Rodriguez, 107 S.W.3d at 218.

[7] *See, e.g.*, Rodriguez at 218 (finding witnesses' memories to still be very fresh two hours after robbery at show-up); Merriwether v. Commonwealth, 99 S.W.3d 448, 451 (Ky. 2003) (two-hour time frame between robbery and show-up found to be significantly short enough to indicate reliability).

points to the reliability of the identification. Lee's argument that Leonard Anderson had committed the robbery and left the items in the car seems somewhat incredulous because Lee was apprehended in the car just ten minutes after the 911 call in a location nine minutes away from the E-Z Money store according to the police account of how long it took them to drive David from the scene of the crime to the scene of the stop.

While we agree with Lee that identification by lineup at the police station may be better practice, we recognize that single person show-up procedures are "necessary in some instances because they occur immediately after the commission of the crime and aid the police in either establishing probable cause or clearing a possible suspect[.]"[8] The facts of the case before us indicate both that the show-up occurred immediately after the crime and that it aided the police in establishing probable cause or clearing a possible suspect. Just ten minutes after the 911 call reporting the robbery, Lee was apprehended while driving the vehicle matching the description and license plate number given by the victim. David testified that police had told her they had stopped the car she had described and would take her to the scene of the stop to see if the "person in question" was the one who robbed her. By referring to Lee as the "person in question," the police did not indicate that he was the person who robbed the store but simply indicated that he was the person driving the car when

[8] Savage, 920 S.W.2d at 513.

it was stopped. The identification occurred so soon after the robbery that it could practically be considered part of the same event.[9]

Given the totality of the circumstances, we find the trial court did not err in allowing David to testify to her out-of-court identification.

2. In-Court Identification.

Lee fails to show how this issue was preserved for review. He filed a motion to suppress the out-of-court identification only and fails to cite to the record to show that he objected to the in-court identification when made. Furthermore, the in-court identification cannot be excluded as "fruit of the poisonous tree" since we have not concluded that the out-of-court identification was procured in violation of Lee's rights.

Also, Lee cannot point to any specific facts (such as being the only African-American in the courtroom) that would show that the in-court identification procedure was unduly suggestive, other than pointing out he was the only person seated at the defense table with counsel. We note that the case of United States v. Archibald,[10] which Lee cites for the proposition that the defendant's presence at the defense counsel table is "obviously suggestive to witnesses asked to make in-court identifications," is distinguishable because the defendant in Archibald actually requested an in-court lineup procedure for the identification and cited specific facts, such as being the only African-American in the courtroom.[11]

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[9] Stidham v. Commonwealth, 444 S.W.2d 110, 112 (Ky. 1969).

[10] 734 F.2d 938, 941 (2nd Cir. 1984).

[11] *Id.*

Furthermore, we also note that the Archibald court found any error in the suggestiveness of the procedure for the in-court identification to be harmless because photo identification testimony independently established the defendant's identity as the perpetrator.[12] Similarly, in the instant case, given the reliability of the out-of-court identification, we find any error in the allegedly suggestive nature of the in-court identification to be harmless, as well as unpreserved.

We find no reason to disturb the trial court's judgment on the basis of the admission of David's testimony concerning her out-of-court identification or her in-court identification.

B. Prosecutorial Vindictiveness.

We find that the trial court did not abuse its discretion in denying the motion to dismiss the indictment for prosecutorial vindictiveness. The trial court's factual finding regarding lack of prosecutorial vindictiveness is not clearly erroneous; and it is supported by substantial evidence—namely, the Commonwealth's Attorney's statement that he presented Lee's case for indictment as a PFO II after the first trial because he did not receive certified copies of Lee's Tennessee convictions until that point.[13]

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[12] *Id.*

[13] Federal courts in recent years have applied an abuse of discretion standard of review to lower court rulings regarding motions to dismiss indictments for alleged prosecutorial vindictiveness; although, these courts have also acknowledged a history of reviewing such rulings under a clearly erroneous standard—especially regarding the trial court's factual findings concerning whether prosecutors actually acted with vindictiveness. *See, e.g.,* U.S. v. Poole, 407 F.3d 767, 772 (6th Cir. 2005). While we know of no Kentucky state case regarding the applicable standard of review for trial court rulings on motions to dismiss indictments for prosecutorial vindictiveness, we note that rulings on motions to dismiss indictments are generally

Lee asserts that he "was penalized for successfully challenging the verdict of the first trial"; for "not accepting the substance of the verdict, even though infirm"; and for "declining to plead guilty, which he rejected in order to exercise his constitutional right to be tried again, this time by a properly empanelled jury." Having thoroughly examined the record, we find no indication that the Commonwealth pursued the PFO II indictment in retaliation for Lee's having the original jury verdict overturned. Admittedly, Lee had filed a motion for new trial, alleging ineffective assistance of counsel. But the trial court never ruled upon these grounds. Rather, the trial court granted him a new trial based upon other grounds, of which Lee was apparently unaware before the hearing—namely, the unqualified juror having sat in his case. And the Commonwealth made no objection to Lee's new trial on this ground or to the original jury verdict being overturned. So this case is not analogous to cases in which enhanced charges were brought after a defendant successfully challenged the judgment against him. This case appears more analogous to a case in which enhanced charges were brought against a defendant after he received a mistrial due to a hung jury in the initial trial, such as our recent case of Commonwealth v. Leap.[14] As in Leap, the trial court granted a new trial in the instant case due to

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subject to abuse of discretion standard of review with factual findings subject to clearly erroneous standard. Commonwealth v. Deloney, 20 S.W.3d 471, 474 (Ky. 2000) (reviewing trial court's ruling on motion to dismiss indictment based on double jeopardy grounds where defendant had been granted mistrial due to witness alluding to his parole status in contravention of court order; denial of motion to dismiss indictment was upheld under abuse of discretion standard while the trial court's finding of fact that witness acted inadvertently was reviewed under clearly erroneous standard).

[14] 179 S.W.3d 809 (Ky. 2005).

factors outside Lee's control; thus, the prosecutor could not have been retaliating against Lee for being granted a new trial.[15]

Even if vindictiveness were presumed because Lee received a longer sentence after the original jury verdict was overturned,[16] we conclude that the evidence was sufficient to overcome this presumption.

Having concluded that the prosecutor did not act to retaliate against Lee for obtaining the relief of overturning the initial jury verdict, we do note that the Commonwealth's Attorney explicitly threatened to seek the PFO indictment against Lee if he did not agree to a plea bargain but instead sought to go to trial again. A prosecutor's threatening to pursue an otherwise legitimate indictment against a defendant for violation of repeat-offender laws if the defendant does not accept a plea bargain for another charge does not violate the defendant's right to due process.[17] As stated by the United States Supreme Court,

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional. . . ." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as

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[15] *Id.* at 813.

[16] *See* Poole, 407 F.3d at 776 (holding that even if presumption of vindictiveness should apply, government had rebutted presumption by "objective information in the record to justify the increased sentence or additional charges.").

[17] Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) ("[w]e hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.").

the accused is free to accept or reject the prosecution's offer.[18]

As the trial court found, the prosecutor was justified in seeking the PFO indictment against Lee because this charge is supported by Lee's previous robbery convictions. Lee was offered the chance to avoid being indicted as a PFO upon acceptance of a plea bargain for a sentence identical to that recommended by the jury in the first trial. Since he was clearly free to accept or reject the plea offer, Lee has no valid basis to claim an error.

III. CONCLUSION.

For the foregoing reasons, the judgment of the Christian Circuit Court is hereby AFFIRMED.

All concur.

COUNSEL FOR APPELLANT:

Randall L. Wheeler
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint E. Watson
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601

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[18] *Id.* at 363 (citations omitted).