

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000068-MR

DATE 9/17/09 Kelly Klaber D.C.
APPELLANT

DAVID MOSS

V. ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
NO. 07-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On November 28, 2007, Appellant, David Moss, was convicted in Muhlenberg Circuit Court of one count of second-degree burglary, one count of second-degree robbery, and being a first-degree persistent felony offender. He was sentenced to twenty years in prison. Appellant now appeals his conviction as a matter of right.¹

BACKGROUND

On April 2, 2007, at around 3:15 a.m., Rose Mary Buchanan awoke in her bed and noticed a shadow in the hallway outside her bedroom. She attempted to call 911 with her cell phone, but before she could complete the

¹ Ky. Const. § 110(2)(b).

call, a man grabbed her wrist and took away the phone and asked her where her money was. Although she did not have any lights on in her bedroom, she testified that the bedroom door was open and the light in the hall bathroom was on.

Ms. Buchanan testified that she believed that her purse was in the kitchen, so she got out of bed and went down the hallway to the kitchen with Appellant behind her in the hallway. At this point in time, Ms. Buchanan admitted that she had not seen the man's face, but could tell that the intruder was a large man.

Once in the kitchen, Ms. Buchanan stated that there was a light on in her pantry which illuminated the room, and a "torch light" (later described as a standing lamp) on in her living room, which was adjacent to her kitchen and dining room. She retrieved her purse from one side of the kitchen and dumped its contents onto the counter. Ms. Buchanan did not have any cash, but she offered the intruder her debit card and food stamp card. She testified that at this time, the intruder was standing two to three feet from her and with the pantry light, she was able to see his face when she offered him her cards.

From there, she testified that the intruder moved into the living room and stood by the lamp for about 30 seconds, approximately six feet from where she stood. She stated that she could see him in the light and that he then asked her for jewelry. She told him she was poor and had none. At this point, one of Ms. Buchanan's sons came running into the kitchen. She testified that at this point, the intruder moved further into the living room and she followed

him because she was concerned he might be going down the hall to a room where her other two children were sleeping. She stated that the intruder then took her backpack and cell phone and left through the front door.

Ms. Buchanan did not have a landline, so she went to her sister's house to call the police. During this call, Ms. Buchanan gave a description of the man. At 4:05 a.m., Sheriff's Deputy Terry Nunley arrived at Ms. Buchanan's sister's home and took her written statement where she described the intruder as a black male in his 40s or 50s who smelled like smoke. She said he was big, approximately 200-300 pounds, wearing a dingy white shirt, and maybe some facial hair. Subsequent to the statement, she told Deputy Nunley that the man was also wearing some type of hat, which she called a "doo rag." Shortly thereafter, Deputy Nunley received communication from the Central City Police that a man that fit Ms. Buchanan's description had been taken into custody and he asked Ms. Buchanan if she thought she could identify the man who had broken into her home. She thought that she could, so Ms. Buchanan and Deputy Nunley traveled to the intersection of Highway 431 and the Western Kentucky Parkway. When Ms. Buchanan and Deputy Nunley arrived, while she sat in the backseat of Deputy Nunley's car, the police brought Appellant, in handcuffs, in front of the car's headlights. From the back seat, Ms. Buchanan identified him as the man who had broken into her home. Deputy Nunley then arrested the man, who was wearing a dingy shirt and a "doo rag" type hat on his head.

Twenty-six days later, Deputy Nunley brought a photo lineup with six photos to Ms. Buchanan's home. She again identified Appellant as the man who had broken into her home on April 2, 2007.

On May 23, 2007, the circuit court held a hearing on Appellant's motion to suppress both out-of-court identifications Ms. Buchanan made. After hearing testimony from Ms. Buchanan and Deputy Nunley, the trial court denied the motion to suppress, after applying the factors set forth in Neil v. Biggers, 409 U.S. 188 (1972) and looking at the totality of the circumstances.

Appellant was thereafter tried by a Muhlenberg Circuit Court jury. At trial, Appellant presented testimony of Dr. Solomon Fulero, who testified as to eyewitness identifications and reliability concerns, in particular, the unreliability of cross-racial identifications, as occurred in this case. Appellant was found guilty of one count of second-degree burglary, one count of second-degree robbery, and being a first-degree persistent felony offender. He was sentenced to twenty years in prison.

On appeal, Appellant alleges that the trial court erred by failing to suppress both out-of-court identifications by Ms. Buchanan. We disagree and affirm the ruling of the trial court.

ANALYSIS

When reviewing a trial court's denial of a motion to suppress, we utilize the standard set forth by the United States Supreme Court in Ornelas v. United States, 517 U.S. 690, (1996), which was adopted by this Court in Adcock v. Commonwealth, Ky., 967 S.W.2d 6 (1998). The approach in Ornelas is a two-

step process. First, we review factual findings using the clearly erroneous standard. Strange v. Commonwealth, 269 S.W.3d 847, 849 (Ky. 2008). That is, we must determine whether the findings of fact are supported by substantial evidence. RCr 9.78. Second, we review *de novo* the trial court's application of the law to the facts. Strange, 269 S.W.3d at 849.

During the suppression hearing, Ms. Buchanan and Deputy Nunley testified as to the events of the morning of April 2, 2007. As summarized above, we discern no clear error regarding the pertinent factual findings.

As we have noted before, show-up identifications are generally disfavored due to their inherent suggestiveness and likelihood of misidentification, but they are necessary under certain circumstances, because they “occur immediately after the commission of the crime and aid police in either establishing probable cause or clearing a possible suspect.” Merriweather v. Commonwealth, 99 S.W.3d 448, 451 (Ky. 2003). To determine the reliability of an identification and whether the identification violated a defendant’s due process rights, despite a suggestive identification procedure such as was used in this case, we examine the five factors outlined in Neil v. Biggers, 409 U.S. 188 (1972), which include: 1. the opportunity of the witness to view the criminal at the time of the crime; 2. the witness’ degree of attention; 3. the accuracy of the witness’ 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. Id. at 199.

Ms. Buchanan had several opportunities to view the intruder during the burglary and robbery. According to her testimony, she was with the intruder for approximately three minutes in the kitchen and living room. Both rooms had lights on that allowed her to see his face. While in the kitchen, she stood just two or three feet away from him and was able to view his face when she offered him her debit card and food stamp card. When he moved into the living room, he stood next to the lamp and she was again able to view his face.

Ms. Buchanan paid close attention to the intruder. She observed his face from only a couple of feet away while in the kitchen and watched him while he stood in the living room.

Her description of the intruder was very similar to that of Appellant. She told police the intruder was a black male in his 40's or 50's, that he was 200-300 pounds, had a dingy shirt on, maybe had some facial hair, and he had a doo rag on his head. Appellant is a black male who was 46 years old at the time of his arrest. He weighed between 200 and 300 pounds, had facial hair, was wearing a dingy shirt and was wearing a hat as described by Ms. Buchanan.

At the show-up, Ms. Buchanan was very confident that Appellant was the intruder in her home. Finally, the show-up occurred within two hours of the crime. The intruder entered Ms. Buchanan's home around 3:15 a.m. and the show-up took place at 4:53 a.m.

Other circumstances enhance the reliability of Ms. Buchanan's identification. On the way to the show-up, Deputy Nunley did not refer to the

Appellant as a suspect. He only stated that the police had someone who matched the description Ms. Buchanan had given of her intruder. Appellant was picked up approximately one mile from Ms. Buchanan's residence in a rural, unpopulated area in the early morning hours. The five factors in Biggers and the totality of the circumstances indicate that Appellant's due process rights were not violated by the show-up identification.

With regard to the later photo lineup, we recognize that subsequent identifications can be tainted because the "witness thereafter is apt to retain in his memory the image [of the person identified at the first misidentification] rather than of the person actually seen." Simmons v. United States, 390 U.S. 377, 383-84 (1968). However, in this case, considering the factors as discussed above and the totality of the circumstances, we cannot say that the photo lineup identification was unreliable.

Accordingly, we affirm the decision of the trial court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Joshua D. Farley
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601