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RENDERED: MARCH 17, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000587-MR

CLAUDE ISAAC — APPELLANT

V.

ON APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 13-CR-00266-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Claude Isaac appeals as a matter of right from a judgment of the Pike Circuit Court sentencing him to twenty years' imprisonment for first-degree robbery and theft by unlawful taking, value $500.00 or more. Ky. Const. § 110(2)(b). Isaac alleges six errors by the trial court: 1) the refusal to sever Isaac's case from that of his co-defendant Gillespie; 2) the denial of Isaac's motion to continue the trial; 3) the denial of Isaac's motions for mistrial and new trial based on a juror issue; 4) the ruling allowing a witness to make an in-court identification; 5) the refusal to give a missing evidence instruction; and 6) the denial of Isaac's motion for directed verdict. For the following reasons, we affirm the judgment and sentence of the Pike Circuit Court.

FACTS AND PROCEDURAL HISTORY

During the evening of November 12, 2013, a group of men gathered to play poker at a residence located in Tinker Fork Hollow. Among those participating were Claude Isaac, Anthony Gillespie, and Thomas McNeil. McNeil later recounted to police that Isaac and Gillespie arrived together on a green Honda Forman four-wheeler. According to McNeil's statement to the police, Isaac was wearing brown coveralls and a black scarf around his neck and Gillespie was wearing a light blue coat, brown pants, and light brown suspenders.[1] Isaac and Gillespie were still together at the home when McNeil left for the evening.

The following morning, McNeil was outside his home when he witnessed Isaac and Gillespie drive by on the four-wheeler. The pair appeared to be wearing the same clothes that they had on the previous evening. The only change to their attire was that both men were now using face masks and scarves. When McNeil last saw the pair, Isaac was driving down the road headed toward Header Branch Creek. Later that morning, Isaac and Gillespie were observed by Deno France driving towards the town of Virgie. France later recalled that the four-wheeler was green and that one of its riders was wearing brown coveralls and the other had a black scarf wrapped around his face.

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[1] The recording of McNeil's description of Isaac and Gillespie's clothing to the police was played to the jury. In his trial testimony, McNeil described Isaac's clothes as "tan automotive work coveralls." Additionally, he indicated that the top and bottom of Isaac's clothing were "light brown." With regard to Gillespie, McNeil testified that his description to police was in error and that he was wearing light-blue jean colored coveralls, blue pants, and a tan suspender set.

At approximately 9:38 a.m. that morning, Isaac and Gillespie arrived at the Virgie branch of the U.S. Bank. Gillespie entered the bank armed with a handgun, while Isaac remained on the four-wheeler. When Gillespie entered the bank, the following individuals were present: Danita Reynolds, branch manager; Robyn Robinson, the bank teller at window number one; Jennifer Osbourne, the bank teller at window number two; and Sylvia Stone Bartley, a customer. Upon entering, Gillespie pointed his handgun at Bartley and demanded money from Robinson. Robinson complied giving Gillespie the money he demanded. The amount of money stolen in the bank robbery was between eight and nine thousand dollars. That amount did not include two hundred dollars that Gillespie also seized from the counter, money which belonged to Bartley. After obtaining the money, Gillespie exited the bank and drove away with Isaac on the four-wheeler.

When interviewed by police, Robinson and Reynolds were unable to identify the driver of the four-wheeler, other than to say that he had a slender build. Robinson was able to give a description of the gunman to the police, describing him as wearing tan coveralls, a black jacket, a toboggan, and a bandana around his face.

Approximately an hour and a half after the bank robbery, McNeil learned of the robbery through the use of a police scanner. McNeil decided to contact the police and met with Detective Tackett of the Kentucky State Police. During their meeting, McNeil viewed the surveillance video from the U.S. Bank. After watching the video, McNeil informed Detective Tackett that the two men in the

surveillance video were wearing the same clothing as had Isaac and Gillespie when he last saw them.

The day of the robbery, Isaac visited Hall's Community Market located near Wheelwright, Kentucky. Isaac walked into the store wearing a light brown, tan, or beige-colored coveralls, a hoodie, and a ball cap. Carrie Hall, one of the owners of the store, thought Isaac was oddly dressed, because he was almost entirely covered to such an extent that she could barely see his eyes. Carrie Hall subsequently viewed the video of the bank robbery and recognized Isaac as the driver of the four-wheeler in the robbery. Carrie's husband, Greg Hall, also observed Isaac enter his store through the use of the store's surveillance system. Later, after learning that police had arrested a suspect (Isaac) in the robbery case in the store's parking lot, Greg Hall reviewed his store's surveillance video. Upon doing so, Hall recognized the suspect as being the same individual who had been in his store on November 13, 2013.

Isaac was charged with first-degree robbery, theft by unlawful taking (value $500.00 or more), and also charged as being a Persistent Felony Offender (PFO) in the second degree. After the jury returned a guilty verdict for the charges of first-degree robbery and theft by unlawful taking, Isaac entered into a plea agreement with the Commonwealth. In exchange for pleading guilty to being a persistent felony offender in the second degree the Commonwealth recommended a penalty of twenty years. The trial court sentenced Isaac in conformance with the agreement. Isaac now appeals as a matter of right.

ANALYSIS

I. The Trial Court Properly Denied Isaac's Motion For Severance.

Isaac argues that the trial court abused its discretion in denying his motion to sever his case from that of his co-defendant Gillespie. Isaac's claim is multifaceted. First, he argues that he was prejudiced due to the type of proof offered against Gillespie. Second, he argues that he was prejudiced by the difference in the weight of the evidence against Gillespie and himself. Finally, Isaac argues that the failure to sever the cases forced him to move to suppress exculpatory evidence.[2]

Kentucky Rule of Criminal Procedure (RCr) 9.16 requires that a trial court "grant separate trials of defendants or provide whatever other relief justice requires" if either the defendant or the Commonwealth is prejudiced by joinder.[3] RCr 8.31. Prejudice in this context constitutes that which is "unnecessarily or unreasonably hurtful." *Romans v. Commonwealth*, 547 S.W.2d 128, 131 (Ky. 1977).[4]

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[2] Isaac's last argument regarding severance also includes an argument that the trial court should have alternatively granted his motion to continue. That argument will be addressed in a separate portion of this opinion.

[3] RCr 8.31 was previously RCr 9.16. Effective January 1, 2015, RCr 9.16 was deleted and the text of the rule was shifted to RCr 8.31. As Isaac was charged and tried when the previous version of RCr 9.16 was still in effect, we will refer to it in the present case.

[4] Isaac cites the Court to *Hardin v. Commonwealth*, 437 S.W.2d 931 (Ky. 1968), *superseded by statute*, KRS 532.080, *as recognized in Colwell v. Commonwealth*, 37 S.W.3d 721 (Ky. 2000) to support his argument "that there are certain things that warrant severance of the parties if certain rights are strained." While *Hardin* is not on point, we interpret Isaac's argument to be that the trial court's decision to deny the motion to sever caused Isaac undue prejudice.

We review the trial court's decision to deny severance of a joint indictment under an abuse of discretion standard. *Burdell v. Commonwealth*, 990 S.W.2d 628, 634 (Ky. 1999) (citing *Humphrey v. Commonwealth*, 836 S.W.2d 865 (Ky. 1992)). "[T]hat discretion will not be disturbed unless clear abuse and prejudice are shown." *Keeling v. Commonwealth*, 381 S.W.3d 248, 270 (Ky. 2012) (quoting *Schambon v. Commonwealth*, 821 S.W.2d 804, 809 (Ky. 1991)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Daugherty v. Commonwealth*, 467 S.W.3d 222, 231 (Ky. 2015) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Isaac argues that he suffered undue prejudice due to the testimony of Bartley, a customer at the bank during the robbery. In her testimony, Bartley acknowledged spending time with Gillespie from the time he was an infant until he was about three years of age. Due to this experience she testified she was able to identify one of the bank robbers as having the same eyes as those of Gillespie as a young child. During Isaac's cross-examination of Bartley she initially refused to look at Isaac, indicating "I can, but it's very hard because I know those eyes." Isaac's trial counsel then advised her that he represented Isaac, not Gillespie. Recognizing her error, Bartley acknowledged that she had never seen Isaac prior to the trial.

Isaac alleges that this testimony was prejudicial on a number of levels. First, Isaac argues that he was prejudiced by Bartley's initial misidentification of him, *i.e.*, "I know those eyes." Second, Isaac alleges he was prejudiced by

Bartley's statement that she did not want to look at him. Third, Isaac was unaware until several days before trial that Bartley had previously known Gillespie. Had Isaac been aware of their prior history he alleges he would have been better able to investigate the facts of their relationship and obtain relevant discovery. Each of these arguments is meritless.

As to Bartley's misidentification of and refusal initially to look at Isaac, both items were fully addressed during the trial. Once Isaac's trial counsel followed up with Bartley about the identity of his client, it was clear that she did not claim to know Isaac or recognize him. While her testimony was damaging to Gillespie, clearly it did not incriminate Isaac.

Similarly, Isaac was not prejudiced by Bartley's revelation prior to trial that she had previously spent time with Gillespie when he was an infant and toddler. As noted by Isaac, Bartley did not disclose her prior relationship with Gillespie to the police during their investigation. However, prior to trial Isaac was alerted to the history of Gillespie and Bartley's relationship which afforded him the opportunity to prepare for that testimony. Isaac had sufficient opportunity to prepare if the Commonwealth decided to inquire of Bartley as to whether she could identify Gillespie. The trial court's decision to not grant the defendants separate trials did not infringe on Isaac's ability to cross examine Bartley.

Isaac also alleges that he was prejudiced by the difference in the weight of the evidence against Gillespie and himself.[5] It is well established that "the mere fact that evidence competent as to one defendant but incompetent as to the other may be introduced is not alone sufficient to establish such prejudice as to require the granting of separate trials." *Hoskins v. Commonwealth*, 374 S.W.2d 839, 842 (Ky. 1964). Moreover, Isaac fails to cite any precedent for the proposition that a perceived difference in the strength of the evidence against each individual defendant is grounds for granting separate trials. Even if there were such precedent, the evidence given by the Halls based on their observation of Isaac in their convenience store on the day of the robbery and upon viewing the surveillance tape of the U.S. Bank robbery was arguably as compelling, perhaps more so, then Bartley's evidence as to Gillespie. Isaac's claims concerning the alleged disparate weight of the evidence are wholly insufficient to demonstrate that he suffered undue prejudice due to the trial court's decision to not grant the defendants separate trials.

Isaac's final claim regarding severance concerns the recovery and testing of a handgun. The morning of trial, the parties met with the trial court in chambers to discuss logistical issues and outstanding motions. Gillespie made

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[5] Throughout this section of his argument, Isaac lists examples of the weakness of the Commonwealth's case and perceived differences in the weight of the proof against Gillespie and himself. His examples include: 1) no witnesses from the U.S. Bank were able to testify as to the race or gender of the driver of the four-wheeler; 2) Detective Jason Merlo of the Kentucky State Police disagreed with the conclusion of Officer Tommy Fouts of the Pikeville City Police Department that Isaac was using the same four wheeler to commit the robbery that he had been seen riding weeks before; 3) Thomas McNeil did not believe Isaac to be the four-wheeler driver from the robbery; and 4) Gillespie was unable to be initially located by the police, whereas Isaac was publicly apprehended.

an oral motion to exclude mention during trial of a handgun obtained by the Kentucky State Police in a residence that Gillespie had been staying in. There was some speculation that the gun might have been used in an unsolved robbery that occurred in Meta, Kentucky. Isaac joined Gillespie's motion and mentioned that he had previously filed a motion to suppress the handgun as well.[6] With the Commonwealth having no objection to excluding reference to the handgun, the trial court granted the motion.

Shortly thereafter, Isaac made a motion to have the trial court sever the defendants' cases. Isaac argued that the just excluded handgun might connect Gillespie to a second robbery and that it could be potentially exculpatory.[7] Isaac admits that "the underlying factual basis for this claim of error is not well-developed." As far as we can discern from the record, Isaac desired to obtain the forensic results for the handgun, so as to tie it to Gillespie. Isaac

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[6] Three days before the trial Isaac filed a motion to suppress, where he requested that the trial court suppress "[t]he firearm obtained in this matter and any reference thereto or how it was found. As grounds, the gun is being tested and the results have not come back and this would be unduly prejudicial to the Defendant." It seems clear that Isaac had no standing given it was Gillespie's residence and his gun, not Isaac's.

[7] In his argument for severance to the trial court, Isaac embraces two seemingly contradictory positions. Prior to making his argument for severance due to the existence of the handgun, Isaac had filed a motion to suppress seeking to bar any reference to the handgun during trial. Further, the morning of trial he joined Gillespie's motion to exclude reference to the handgun. He reiterated his support for excluding any reference to the handgun during his argument for severance, indicating that he did not plan to bring up the handgun. At the same time, Isaac sought to obtain further information about the handgun with the purpose of eliciting testimony about it from the Kentucky State Police (KSP), which he believed could be exculpatory. Isaac explains these decisions arguing that he was forced to suppress the handgun and the circumstances surrounding its collection "in an attempt to mitigate the already insurmountable prejudice and disparity of the weight and type of the evidence between the codefendants."

would then seek to tie Gillespie to the unrelated robbery in Meta, Kentucky, to establish Gillespie as a career criminal. Additionally, Isaac would seek to have the KSP testify about surveillance conducted against Isaac, to show that he could not have been involved in the Meta, Kentucky robbery.

The trial court properly denied Isaac's motion for severance. Isaac's argument for severance, premised on the existence of the handgun, is based on speculation and inadmissible evidence. It is not disputed that the recovered handgun was not used in the robbery charged in the case at bar. Additionally, even if the handgun could be tied to Gillespie through the use of forensic science, Isaac's use of that evidence to show Gillespie's criminal disposition or prior bad acts would be improper under our Rules of Evidence. Finally, even if admissible, the evidence would have no bearing on Isaac's role in the Virgie robbery, a robbery clearly involving two perpetrators. In short, it would not have been exculpatory. The trial court rightly refused to sever the defendants' cases based on speculative and irrelevant evidence.

II. The Trial Court Properly Denied Isaac's Motion to Continue the Trial.

Isaac also alleges that the trial court erred in denying his motion for a continuance. Isaac argued that he needed a continuance to see the results of the forensic testing on the handgun which he had just agreed to have excluded from the trial. The trial court properly denied the request.

Pursuant to RCr 9.04, the trial court "upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial." RCr 9.04. However, the trial court has broad discretion in either granting or

refusing a continuance. *Pelfey v. Commonwealth*, 842 S.W.2d 524 (Ky. 1993). The denial of a motion for continuance does not provide grounds for reversing a conviction "unless that discretion has been plainly abused and manifest injustice has resulted." *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006) (quoting *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976).

Generally in considering whether a continuance should have been granted, the Court examines the unique facts and circumstances of a case in relation to the factors identified in *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (2001). However, a review of the *Snodgrass* factors is unnecessary in this case, as Isaac's motion to continue was procedurally deficient and facially meritless.

To begin, Isaac failed to comply with the affidavit requirement of RCr 9.04. RCr 9.04 requires that "[a] motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it." Isaac's oral motion was not accompanied by the required affidavit. It is well established that it is not error for a trial court to deny a motion to continue for failing to comply with the affidavit requirement of RCr 9.04. *Sussman v. Commonwealth*, 610 S.W.2d 608, 613 (Ky. 1980); *McFarland v. Commonwealth*, 473 S.W.2d 121, 122 (Ky. 1971).

In addition to Isaac's procedural failings, his continuance motion was substantively meritless. To support his motion to continue, Isaac was required

to state the materiality of the evidence he expected to obtain and to demonstrate he had exercised due diligence to obtain it. He failed on both counts.

First, Isaac failed to state how the evidence he sought was material to the proceedings. Isaac requested the continuance in order to obtain the results of forensic testing on a handgun, but as discussed above, the handgun which was being tested was agreed by all parties *not* to be the same weapon used during the robbery. Rather, Isaac argued that the handgun might tie Gillespie to an unrelated robbery, and seemingly hoped to use the handgun and that unrelated crime to demonstrate Gillespie's criminal disposition.

Even if we were to assume all of the following: 1) forensic science could identify Gillespie as having possessed the handgun; 2) the handgun would link Gillespie to the unrelated robbery; and 3) the trial court deemed that information admissible in the case at bar (a highly unlikely occurrence), the evidence was still not material. Isaac and Gillespie were charged with committing a bank robbery, with Gillespie serving as the trigger man and Isaac as the getaway driver. The Commonwealth presented sufficient evidence of the involvement of both men in the robbery. Even assuming the evidence obtained from an unrelated handgun would have been admitted, it would never have served to exculpate Isaac. *Cf. Anderson v. Commonwealth*, 63 S.W.3d 135, 137-138 (Ky. 2001) (reversal for trial court's denial of a continuance, where the defendant did not timely receive specific pieces of evidence which may have contained exculpatory information.)

Second, Isaac failed to demonstrate the exercise of due diligence to obtain test results from the handgun, which was in the possession of the Kentucky State Police. While Isaac claims that the trial court's denial of his continuance motion cut short his investigation, it is unclear from the record what, if any, investigative actions Isaac had undertaken. Instead, this Court is left with little more than Isaac's unsupported speculation about the evidence that he hoped to obtain. In sum, the trial court properly denied Isaac's motion for continuance as it was procedurally defective and substantively meritless.

III. The Trial Court Properly Denied Isaac's Motions For a Mistrial or Alternatively For a New Trial Based on a Juror Issue.

Isaac also alleges error based on the trial court's refusal to grant a mistrial or in the alternative a new trial due to a juror's alleged failure to disclose pertinent information on his juror qualification form. Bobby Varney was one of the jurors selected to decide Isaac's case. On his juror qualification form, Varney was asked, "[h]ave you or a family member been a defendant, witness or complainant in a criminal case?" Varney responded to the question by checking the box labeled no.

After the trial, Isaac filed a motion for judgment notwithstanding the verdict (JNOV), a motion for new trial, and a motion for mistrial. One of the issues raised in the motions was that Varney failed to disclose that his wife had been a witness to a bank robbery. Isaac alleged that had he been aware of this information that he would have struck Varney and that the non-disclosure violated Isaac's right to a fair trial. In response to Isaac's motion, the trial court conducted a hearing.

During the hearing, the trial court was informed that Varney's wife was a witness to a bank robbery that had occurred at the U.S. Bank in South Williamson, Kentucky.[8] The Williamson robbery case was pending when Isaac's case went to trial. Additionally, it was revealed that counsel for Isaac represented one of the defendants in the Williamson robbery and that he had been provided with discovery which listed Varney's wife as a potential witness. After hearing argument from Isaac and the Commonwealth, the trial court denied Isaac's post-conviction motions.

"[T]he trial judge is in the best position to determine the nature of alleged juror misconduct and the appropriate remedies for any demonstrated misconduct." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky. 2006) (quoting *United States v. Sherrill*, 388 F.3d 535, 537 (6th Cir. 2004)). In denying Isaac's motion, the trial court concluded that the juror qualification form might have been confusing to Varney. In particular, the confusion was due to the term "witness," which the trial court admitted could apply to a person who had seen a crime occur or to someone who had testified during trial. Certainly the language "been a . . . witness . . . in a criminal case" supports the latter reading. As a result the trial court was unwilling to conclude that Varney's questionnaire answer was a deliberate attempt to answer a material question untruthfully.

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[8] Varney was not called by Isaac to testify at the hearing. While not dispositive, his testimony would have been useful in fully investigating the answers given on his jury questionnaire. Practitioners should ensure that a well-developed record is prepared to the extent possible.

On review, the question is whether Varney's failure to note his wife being a witness to a robbery is grounds for a new trial. This Court employs a three-pronged test to determine whether a new trial should be granted in this type of situation. "First, a material question must have been asked. Second, the juror must have answered the question dishonestly. And finally, the truthful answer to the material question would have subjected the juror to being stricken for cause." *Taylor v. Commonwealth,* 175 S.W.3d 68, 74–75 (Ky. 2005).

As to the first prong, the question of whether either Varney or one of his family members has ever been a defendant, witness or complainant in a criminal case is material. The question is material as it seeks to determine whether a prospective juror has a potential bias that warrants examination by the parties. However, as to the second prong, we cannot say that Varney answered the question dishonestly. As the trial court pointed out, Varney may have been confused by the language in the jury questionnaire. The terms "witness" in "a criminal case" could have multiple meanings in this context, and we are unable to conclude given the information present in the record that Varney's answer constituted dishonesty.

Additionally, even if Varney's answer were determined to be dishonest, Isaac has failed to meet the third prong of the test by showing that a "truthful" response would have led to Varney being struck for cause. The mere fact that Varney's wife had been a witness to an unrelated robbery is insufficient to justify Varney's excusal. This Court has repeatedly held that the fact that a juror or the juror's family member has been the victim of a crime similar to that

charged against the defendant, does not automatically warrant excusal. *See e.g. Richardson v. Commonwealth*, 161 S.W.3d 327, 330 (Ky. 2005) (juror was a victim of sexual abuse); *Woodall v. Commonwealth*, 63 S.W.3d 104, 118 (Ky. 2001) (juror was sister of a rape victim). Automatic removal is unnecessary where the trial court is able to conclude that the juror could "objectively evaluate the evidence relating to all counts of the indictment and render a fair verdict." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 346 (Ky. 2004) (quoting *Whalen v. Commonwealth*, 891 S.W.2d 86, 88 (1995), *overruled in part on other grounds by Moore v. Commonwealth*, 990 S.W.2d 618 (Ky. 1999).

The trial court's determination that Varney's answer on the juror qualification form might have been a result of confusion rather than dishonesty is not clearly erroneous and, in any event, even if Varney had provided information about his wife's involvement as a witness to a robbery the trial court would not have been required to strike Varney for cause. The three-pronged test in *Taylor* was not satisfied and a new trial is not mandated on these grounds.

IV. The Trial Court Properly Permitted a Witness to Make an In-Court Identification of Gillespie.

Isaac also alleges that the trial court erred by permitting Bartley to make a courtroom identification of his co-defendant Gillespie. In particular, Isaac argues that the identification should have been barred due to the unreliable nature of courtroom identification, lack of proper foundation, lack of any prior identification of Gillespie by Bartley, and because the identification caused him

undue prejudice. Despite his "everything but the kitchen sink" attack on the in-court identification, Isaac's argument relies solely on *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972). This reliance on *Biggers* is entirely misplaced because that case does not apply here.

In *Biggers*, the United States Supreme Court established a two-prong due process test for evaluating an identification by a witness following impermissible suggestive pretrial procedures such as a line-up or photo array. In *Wilson v. Commonwealth*, 695 S.W.2d 854 (Ky. 1985), this Court described the requirements of the *Biggers* test. First, "when examining a pretrial confrontation, this [C]ourt must first determine whether the confrontation procedures employed by the police were 'suggestive'." *Id.* Second, if the Court concludes that those procedures were suggestive, "we must then assess the possibility that the witness would make an irreparable misidentification, based upon the totality [of] the circumstances and in light of the five factors enumerated in *Biggers*." *Id.*

The *Biggers* test only applies where there was a pretrial confrontation. *Thompson v. Commonwealth*, 2004 WL 2624165, 6 (Ky. 2004).[9] During redirect Bartley testified that prior to trial she had not reviewed any photographs of Gillespie. Additionally, she was clear that she had not seen Gillespie during

[9] As CR 76.28(4)(c) permits citation of unpublished Kentucky appellate decisions, rendered after January 1, 2003, "if there is no published opinion that would adequately address the issue before the court."

the pendency of the case. Given this testimony, it would appear Bartley never made a pretrial identification of Gillespie.[10]

Plainly, Isaac errs in requesting that this Court evaluate whether the in-court identification made during trial was unduly suggestive under the *Biggers* test. Due to there being no pretrial identification an application of the *Biggers* factors is simply unnecessary. Further, as there was no suggestion of any pretrial taint, the in-court identification made by Bartley was admissible and any challenge by Isaac was properly the subject of cross-examination.[11]

V. The Trial Court Properly Denied Isaac's Request for a Lost or Missing Evidence Instruction.

Isaac argues that the trial court erred in refusing to instruct the jury as to lost or missing evidence. On the day of the bank robbery, Isaac was alleged to have visited Hall's Community Market. The owners of the store, Carrie and Greg Hall, testified at trial regarding the clothing that Isaac wore while in their store. They testified that Isaac was wearing brown coveralls, a hoodie, and a baseball cap, and their description of Isaac's clothing matched that of the bank robber who stayed outside with the four-wheeler. The Halls made the connection when they viewed the surveillance tape of the bank robbery.

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[10] Additionally, Isaac concedes in his reply brief that there was no line-up or other "pretrial" identification of Gillespie by Bartley.

[11] Neither party raised the issue of standing, assuming there had been facts justifying application of *Biggers* but it is clear that a defendant has standing to challenge the admission of evidence only when his own rights have been violated. *See, e.g., Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Sims*, 845 F.2d 1564 (11th Cir. 1988).

A copy of the surveillance video from Hall's Community Market was sent to the Kentucky State Police. However, when the Kentucky State Police reviewed the surveillance video three weeks later, they discovered that the video depicted the wrong time period. Before an accurate copy of the correct surveillance video could be obtained, the store's surveillance system had automatically overwritten the recording from the day of the robbery. Isaac argues that the failure of the Kentucky State Police to preserve this evidence warranted a missing evidence instruction.

A missing evidence instruction serves to cure any Due Process violation attributable to the destruction or loss of exculpatory evidence, where dismissal or suppression of the relevant evidence is unwarranted. *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002). However, "the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." *Id.* Additionally, "[a]bsent a showing of bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999), citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333 (1988).

There was no evidence of bad faith on behalf of the Kentucky State Police regarding the loss of the surveillance video from Hall's Community Market. The police obtained a copy of what they believed to be the relevant portion of the surveillance video, but due to a recording error at the store, the recording

that the police received did not cover the relevant time period. Isaac does not suggest that the police failed to obtain the correct surveillance video due to a plan or intentional act. Rather, the actions of the police in failing to obtain the correct surveillance video at most constituted mere negligence. As there was no proof of bad faith on the part of the police, Isaac's due process rights were not violated by the denial of a missing evidence instruction.

VI. The Trial Court Properly Denied Isaac's Motion for a Directed Verdict of Acquittal.

Isaac alleges that the trial court erred in denying his motions for directed verdict, as there was insufficient evidence for the jury to conclude that he was guilty beyond a reasonable doubt. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a conviction without proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S. Ct. 2781 (1979). "The question on appeal is whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citing *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991)). In contrast, questions concerning "the credibility of witnesses and the weight to be given to sworn testimony are for the jury to decide." *Young v. Commonwealth*, 50 S.W.3d 148, 165 (Ky. 2001) (citing *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999).

Isaac argues that the testimony of Carrie Hall, Greg Hall, and Officer Tommy Fouts concerning Isaac's clothing lacked the necessary specificity for the jury to find Isaac guilty beyond a reasonable doubt.[12] In particular, Isaac states that they were unable to identify the type, style, or brand of clothing worn. The testimony concerning Isaac's clothing, in conjunction with other evidence, was sufficient for a reasonable juror to find Isaac guilty beyond a reasonable doubt. The jury was able to hear testimony from multiple sources concerning the clothing worn by Isaac during the robbery or shortly thereafter, as well as his whereabouts during the relevant timeframe. Isaac's arguments concerning the lack of specificity in the descriptions of his clothing are more appropriate for a trier of fact than for an appellate court. The directed verdict motion was properly denied.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence of the Pike Circuit Court.

All sitting. All concur.

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[12] Isaac also makes several arguments, unrelated to his argument concerning his clothing, to demonstrate that there was insufficient evidence to conclude he was guilty. Those arguments include that Officer Fouts was mistaken in his conclusion that Isaac was using the same four-wheeler to commit the robbery that he had seen Isaac driving prior to the robbery; Thomas McNeil's trial statement that he did not believe that the driver of the four-wheeler was Isaac; and Bartley's confusion regarding Gillespie and Isaac during the trial. None of these arguments warrants reversal for insufficiency of evidence.

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