

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KJ 0756

STATE OF LOUISIANA IN THE INTEREST OF E. R.



Judgment Rendered: DEC 23 2009

**Appealed from the Juvenile Court
Parish of East Baton Rouge
State of Louisiana
Case No. 94,453**

The Honorable Kathleen Stewart Richey, Judge Presiding

**Katherine M. Franks
Abita Springs, Louisiana**

**Counsel for Appellant
E. R.**

**Hillar C. Moore, III
District Attorney
Jeanne Rougeau
Assistant District Attorney
Baton Rouge, Louisiana**

**Counsel for Appellee
State of Louisiana**

BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

GAIDRY, J.

A petition was filed alleging E.R., a child, to be delinquent based on the commission of one count of attempted first degree murder, a violation of La. R.S. 14:27 and 30; and three counts of armed robbery, violations of La. R.S. 14:64. E.R. denied the allegations of the petition and, after an adjudication hearing, was adjudicated a delinquent based on the three counts of armed robbery. The trial court found the evidence of attempted murder insufficient and dismissed the charge. At the disposition hearing, the trial court ordered E.R. committed to the custody of the Department of Public Safety and Corrections until his twenty-first birthday.

E.R. appeals, citing the following as error:

1. The trial judge erred in failing to grant the motion to suppress the identifications made by the three victims of the armed robbery. The identification procedures were suggestive and an analysis of the *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.3d 140 (1977) factors and the fact of a cross-racial identification makes the likelihood of misidentification great.
2. E.R. was denied Due Process when the evidence adduced against him was insufficient to sustain a conviction utilizing the *Jackson* standard of review. The trial judge erred in failing to grant a judgment of acquittal and in finding sufficient credible evidence to sustain a finding of delinquency for the offense[s] of armed robbery.

For the following reasons, we affirm the adjudication of delinquency and disposition.

FACTS

On July 18, 2008, Benjamin Desendorf, James Scullen, and Seth Fielding were sharing a residence located at 1510 Olive Street in Baton Rouge. At approximately 11:00 p.m., the three men had returned to the residence and were carrying groceries from a vehicle into the residence. As

they made their way from the carport to the door of the house, they were approached by a young male, subsequently identified as the juvenile, E.R.

E.R. asked the men if were interested in buying any drugs, but the men declined. E.R. then pulled a weapon and told them to empty their pockets and place the contents on the ground. They all complied. E.R. told them to step back, and he bent down and picked up all the items, which included Desendorf's cell phone, as well as change, wallets, and keys. After E.R. turned and left, the men ran to a neighbor's house to seek help in contacting the police. A few seconds later, E.R. emerged from an alley a few houses away and fired shots at the men before fleeing the area.

After the police arrived, the men provided a description of the robber as a black male, twenty years old or younger, approximately 5'6" or 5'7" tall, and clean shaven. According to the men, the robber was wearing dark shorts, a dark shirt, and a black hat.

Because of an out-of-state obligation, Scullen left Baton Rouge and was not in town during the investigation that resulted in E.R.'s arrest. On July 23, 2008, Detective Larry Walters met with Desendorf and Fielding. Desendorf provided Detective Walters with a printout of the incoming and outgoing calls on his cell phone for the day of the robbery and two days following. Detective Walters prepared a photographic lineup containing a picture of a suspect, whose name had arisen as possibly being involved. However, neither Desendorf nor Fielding selected that photograph as someone they remembered from the robbery. Desendorf did not select any picture in the lineup and Fielding selected the photograph of a "filler," a person who possessed similar characteristics of the description provided by the men at the scene.

Detective Walters began researching the phone numbers on Desendorf's phone records. As he researched the numbers contained in the phone records, he located James Robertson, who had been using the phone. Detective Walters met with Robertson and recovered Desendorf's phone. Robertson claimed to have purchased the phone from "some kid" in front of a store on Sixteenth Street on Saturday, July 19, 2008, at around 11:00 a.m. Detective Walters was able to establish when Robertson's possession of the phone began because the phone records corroborated Robertson's statement that at the time he obtained the phone, he called his own telephone number to ensure the phone worked. The cellular phone records indicated a call was made to Robertson's phone at 10:56 a.m. Detective Walters did not place Robertson's picture in a photographic lineup because Robertson did not match the physical description of the suspect as provided by the witnesses.¹

The investigation began to focus on E.R. after one of the people whose number had been called from Desendorf's cell phone after the robbery, but before Robertson obtained the phone, provided information to the police that E.R. had been involved in the robbery. A second photographic lineup was prepared, which included a photograph of E.R., and E.R. was taken into custody for questioning. During E.R.'s questioning, he admitted to having the cell phone, but claimed he obtained it from someone on Monday, July 21, 2008. Detective Walters confronted E.R. with information that calls were made to E.R.'s friends and acquaintances beginning approximately an hour after the robbery and lasting until 11:00 a.m. on Saturday, July 19, 2008. According to Detective Walters, the calls made after 11:00 a.m. on July 19, 2008 and until service was stopped on the phone were calls Robertson admitted to making.

¹ Robertson was older than a man in his twenties or younger, was approximately six feet tall, and weighed over two hundred pounds.

While E.R. was being questioned in the presence of his mother by Detective Walters, the second photographic lineup was shown to Desendorf and Fielding by another police officer. During this viewing, Fielding selected the photograph of E.R. as being the person who had robbed him. Desendorf could not select any picture in the lineup. As a result of Fielding's identification of E.R. as the robber, E.R. was taken into custody.

DENIAL OF MOTION TO SUPPRESS IDENTIFICATION

In his first assignment of error, E.R. argues the trial court erred in failing to grant his motion to suppress the identifications made by the three victims of the armed robberies.² E.R. argues the identification procedures were suggestive and that an analysis of the *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.3d 140 (1977), factors and the fact of a cross-racial identification made the likelihood of misidentification great.

On December 30, 2008, an adjudication hearing was scheduled in this matter. Desendorf, Fielding, and Scullen were all at the Juvenile Court Building in a general waiting area. At some point, they were asked to wait outside the courtroom. As the three men sat outside the courtroom, they all observed E.R. walk into the courtroom wearing leg shackles and clothes from the juvenile detention center. Because one of the State's witnesses was unable to testify at the adjudication hearing, the State obtained a continuance.

On January 13, 2009, a motion to suppress identification was filed on behalf of E.R. The motion sought to suppress any identifications of E.R. by the alleged victims during and subsequent to the December 30, 2008 "staged viewing" where the witnesses observed E.R. being escorted into the courtroom in leg shackles and a prison uniform. Through the motion to

² Only two of the victims, Fielding and Scullen, ultimately identified E.R. as the perpetrator of the armed robberies. Desendorf never identified anyone as the perpetrator.

suppress, E.R. argued that the December 30, 2008 viewing was in violation of his federal and state constitutional rights.

Suggestiveness of Identification Process

As a general matter, the defendant has the burden of proof on a motion to suppress an out-of-court identification. La. Code Crim. P. art. 703(D). To suppress an identification, a defendant must first prove that the identification procedure was suggestive. An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. However, even when suggestiveness of the identification process is proven by the defendant or presumed by the court, the defendant must also show there was a substantial likelihood of misidentification as a result of the identification procedure. *State v. Higgins*, 2003-1980, p. 19 (La. 4/1/05), 898 So.2d 1219, 1232-33, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

A hearing was conducted on the juvenile's motion to suppress the identifications of December 30, 2008. At the hearing, testimony was elicited from Desendorf, Fielding and Scullen, indicating that each understood when they saw E.R. entering the courtroom on that date, that he was the individual who had been charged with robbing them. However, there was no testimony elicited indicating that after this viewing they were asked by anyone from the police department or district attorney's office whether they recognized E.R. as the person who robbed them. Rather, the only testimony regarding an actual identification was from Scullen, who was asked by defense counsel during the hearing on the motion to suppress, whether he recognized E.R. as the individual who robbed him. In response to the defense counsel's question, Scullen testified that he recognized defendant as the perpetrator.

The jurisprudence indicates that when an immediate and definite identification results from inadvertent meetings between the victim and the suspect, and there is no indication of impropriety or suggestiveness, an out-of-court identification will be found both reliable and admissible. *State v. Johnson*, 94-1561, p. 7 (La. App. 1st Cir. 10/6/95), 664 So.2d 141, 145, writ denied, 95-2988 (La. 3/15/96), 669 So.2d 426. In denying the motion to suppress, the trial court found that the viewing of the juvenile by the witnesses was a fortuitous event and that there was no deception or nefarious motive in the circumstances that allowed the witnesses to observe the juvenile in shackles and prison clothing. However, the inadvertence of the observation of a suspect does not relieve the requirement of determining whether the identification process was suggestive. Assuming that the circumstances of observing the suspect entering the courtroom in shackles and prison clothing were suggestive because they unduly focused the witnesses' attention on the suspect, the juvenile still had to establish that there was a likelihood of misidentification in the identification procedure. *Higgins*, 898 So.2d at 1233.

Likelihood of Irreparable Misidentification

The Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977), held that despite the existence of a suggestive pretrial identification, an identification may be permissible if there does not exist a "very substantial likelihood of irreparable misidentification." Under *Manson*, the factors that courts must examine to determine from the totality of the circumstances, whether the suggestiveness presents a substantial likelihood of misidentification include: 1) the witness's opportunity to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of his prior description of the

criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation. *Manson*, 432 U.S. at 114-15, 97 S.Ct. at 2253.

At the outset we note that Desendorf admitted when he saw the robber produce a weapon, he stopped looking at him, and Desendorf was never able to identify anyone as the perpetrator. Fielding testified that he was able to get a good look at E.R., since E.R. approached them under the carport and the area was lit by a porch light. Scullen testified that he first noticed E.R. walking by the residence as they arrived. Scullen stated that the area under the carport where he observed E.R. closely was well-lit by a motion sensor floodlight over the driveway and by a streetlight. As for degree of attention, Scullen testified that the fact that E.R. was holding a gun only served to heighten his attention. Moreover, we note that the testimony of all the witnesses established that E.R. initially approached them seeking to sell them marijuana, and when they declined, he produced a weapon and ordered the men to empty their pockets. After they complied with the juvenile's orders, he told them to step away as he gathered the belongings from the ground.

The prior physical description of the suspect provided to the police was a black male perhaps twenty years old or younger, who was 5'6" or 5'7", and clean shaven. The line-up photograph of E.R., a black male, who was fifteen at the time of this offense, indicates he is clean shaven. Although his height is not listed on the photo line-up, the DVD of E.R.'s statement reflects the police officer commenting to E.R. after he indicated he would like to play basketball in his future that E.R. was not very big for a basketball player.

The next factor to consider in determining the likelihood of misidentification is the level of certainty demonstrated at the confrontation. Because the pretrial photographic lineup was not the subject of the motion to suppress, we only consider the in-court identifications of E.R. Fielding testified he was “certain” that E.R. was the person who robbed him. Scullen testified that because E.R. was pointing a gun at him during the robbery, he would “forever remember that face.” Scullen further testified that E.R. winked at him as he took the witness stand. Finally, we note that the crime occurred on July 18, 2008, and the witnesses identified E.R. in court as the perpetrator on February 13, 2009, seven months after the robbery.

In support of the motion to suppress identification, the defense presented testimony from Dr. Roy Malpass, who was accepted as an expert in experimental psychology. Dr. Malpass testified he reviewed police reports, photographic lineups, witness statements, and case summaries. Dr. Malpass opined that there were several factors present that would establish the identifications were unreliable. Dr. Malpass identified numerous issues that would “provide assistance based on [his] field of expertise.”³ These areas includes the scenario that a cross-racial identification was at issue; the circumstances of the event impacting the witnesses’ ability to recall; the effect of the presence of a weapon; the fact that two witnesses did not make an identification in a photographic lineup; the delay between the offense and the identification; the repeated exposure of the witnesses to the defendant (in a courtroom setting); the in-court identification of the defendant following such exposure; the evaluation of the strength of the identifications done

³ Dr. Malpass testified that the conclusions he determined in his experiments were based on averages of groups of people. Dr. Malpass acknowledged that people who offer expert testimony in this area do not offer ultimate opinions on the accuracy of witnesses. Dr. Malpass acknowledged on cross-examination that it was possible for a witness to look at a photograph in a lineup and identify a picture of someone who had perpetrated a crime against them.

through the confidence of the individual making the identification; and his research on the retro-respective effect on memory. We note that in denying the motion to suppress, the trial court, in its role as factfinder, was not persuaded by Dr. Malpass's testimony.

After considering the evidence in the record, we cannot say the defense established there was a substantial likelihood of irreparable misidentification. A trial court's determination of the admissibility of an identification should be accorded great weight and will not be disturbed on appeal unless the evidence reveals an abuse of discretion. *State v. Johnson*, 94-1561 at p. 7, 664 So.2d at 145.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, E.R. argues that the evidence presented against him was insufficient to sustain a conviction under the *Jackson* standard of review.

In a juvenile adjudication, the State must prove beyond a reasonable doubt that the child committed a delinquent act alleged in the petition. La. Ch. Code art. 883. The burden of proof, beyond a reasonable doubt, is no less severe than the burden of proof required in an adult proceeding. *State in the Interest of D.M.*, 97-0628, p. 4 (La. App. 1 Cir. 11/07/97), 704 So.2d 786, 789.

On appeal, the standard of review for the sufficiency of evidence enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), i.e., whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State proved the essential elements of the crime beyond a reasonable doubt, is applicable to delinquency cases. See La. Code Crim. P. art. 821. Further, in a juvenile

delinquency proceeding, an appellate court is constitutionally mandated to review the law and facts. See La. Const. art. 5, § 10(B). Accordingly, an appellate court must review the record to determine if the trial court was clearly wrong in its factual findings. *State in Interest of D.M.*, 97-0628 at pp. 4-5, 704 So.2d at 789-90.

Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64(A).

Viewing the evidence in the light most favorable to the prosecution, the evidence against E.R. establishes that shortly before midnight on July 18, 2008, a young black male approached Desendorf, Fielding, and Scullen as they unloaded groceries from their vehicle at the residence they shared at 1510 Olive Street. According to Desendorf, the young man was shorter than he and his companions. After his offer to sell the men drugs was declined, the juvenile produced a gun and ordered Desendorf, Fielding, and Scullen to empty their pockets and place the items on the ground. The three men complied and placed their personal items including cell phones, keys, and wallets containing bank cards and cash onto the ground. The juvenile picked up the items and fled the scene.

During the investigation, Desendorf obtained records showing calls made to and from his cell phone. The police recovered Desendorf's cell phone in the possession of James Robertson. Robertson's photograph was never placed in a lineup because at 6'4" tall and weighing 200 pounds, he did not match the physical description of the robber. Robertson claimed to have purchased the cell phone registered to Desendorf from "some kid." A review of records of calls placed on the phone after the robbery indicated

that phone calls were made to a phone registered to Robertson at 1:35 a.m. on July 19. Robertson was interviewed by the police and stated he obtained the phone at approximately 11:00 a.m. on Saturday, July 19, some twelve hours after the robbery. The phone records corroborated Robertson's statement to the police that he initially called his own number to verify the phone worked.

The investigation eventually led to E.R. E.R. admitted he possessed the phone that was identified as belonging to Desendorf. In the twelve hours prior to Robertson obtaining the phone, there are several calls placed to people with whom E.R. was known to associate, and E.R. admitted to making those calls. However, E.R. insisted he bought the phone from a "Mr. Alvin" outside of a grocery store on the Monday following the date of the robbery.

The State also solicited testimony from Stephanie Krygowski, who was E.R.'s juvenile probation and parole officer. According to Krygowski, E.R. was on parole at the time of this offense and as a condition of his parole, he wore an ankle bracelet monitoring device. E.R. had a curfew and had to be at home between 8:00 p.m. and 6:00 a.m. The records of E.R.'s monitoring device reflected that on the evening of July 18, 2008, he left his residence at 11:00 p.m. and returned at 3:13 a.m. on July 19. According to the record, the armed robbery was committed shortly before midnight on July 18, 2008.

On July 24, 2008, Fielding selected E.R.'s picture from a photographic lineup as the person who had robbed him less than a week earlier. At trial, both Fielding and Scullen identified E.R. as the individual who robbed them the night of July 18, 2008.

Based on the foregoing, we conclude the evidence would support a rational fact finder's conclusion that E.R. was the individual who robbed Desendorf, Fielding, and Scullen. Based on the record evidence, we cannot say the trial court's determination that E.R. was delinquent as a result of his commission of these offenses was clearly wrong.

This assignment of error is without merit.

**JUVENILE DELINQUENCY ADJUDICATION AND
DISPOSITION AFFIRMED.**