

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 1787

STATE OF LOUISIANA

VERSUS

RAYMOND GRAHAM

Judgment Rendered: JUL 03 2014

On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 11-11-0480, Section 7

Honorable Donald R. Johnson, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.



GUIDRY, J.

Defendant, Raymond Graham, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. He pled not guilty and waived his right to a jury trial. Prior to trial, the trial court denied defendant's motion to suppress his identification. Following a bench trial, defendant was found guilty as charged. He filed a motion for new trial, but the trial court denied that motion. Subsequently, the trial court sentenced defendant to twelve years at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court later denied defendant's motion to reconsider sentence. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On October 20, 2011, Michael Pitts (the victim) was walking down East Washington Street in Baton Rouge when a young black male approached him on a bicycle. The male began to ask Pitts about his phone and the contents of his pockets. After a brief conversation, the male maneuvered his bicycle in front of Pitts, pulled a semiautomatic handgun, and aimed the gun at Pitts's abdomen. He asked Pitts for his cell phone and wallet. Pitts complied with the assailant's request, but the male returned Pitts's wallet when he saw that there was no cash inside of it. The male rode off on his bicycle only to return a few seconds later to instruct Pitts to remove the passcode from his phone. Pitts again complied, and the male rode away. When Pitts eventually reached his home, his mother called the police and he reported the robbery.

On October 31, 2011, Pitts was again traveling down East Washington Street, this time accompanied by his brother. As the two passed down the street, Pitts saw the male who had robbed him. He reported the male's presence and description to Officer Cody David of the Baton Rouge Police Department. Officer David drove to the area of East Washington Street where Pitts reported seeing the robber. He saw

two black males sitting on a corner. One of the males immediately fled on foot. That male (defendant) was eventually apprehended after a brief foot pursuit and residential search. Pitts later identified defendant in a photographic lineup as the person who had previously robbed him. He reiterated that identification at trial.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant argues that the trial court erred in denying his motion to suppress and his motion for new trial. He argues that the photographic lineup identification procedure used by the police was suggestive and unduly focused on him.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887, p. 11 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 09-1589, p. 6 (La. 12/1/09), 25 So. 3d 746, 751.¹

A defendant attempting to suppress an identification must prove *both* that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. State v. Prudholm, 446 So. 2d 729, 738 (La. 1984); see La. C.Cr.P. art. 703(D). Single photograph identifications should be viewed in general with suspicion. State v. Harper, 93-2682 (La. 11/30/94), 646 So. 2d 338, 341. An identification procedure is unduly suggestive if, during the procedure, a witness's attention is focused on the defendant. State v. Hawkins, 572 So. 2d 108, 112 (La. App. 1st Cir. 1990). However, even should the identification be considered suggestive, this alone does not indicate a violation of the defendant's right to due process. It is the likelihood of misidentification which violates due process, not merely the suggestive identification

¹ In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. State v. Chopin, 372 So. 2d 1222, 1223 n.2 (La. 1979).

procedure. See State v. Jones, 94-1098, p. 6 (La. App. 1st Cir. 6/23/95), 658 So. 2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So. 2d 320.

The standard to be used for determining the admissibility of an in-court identification is whether, under the totality of the circumstances, the suggestive identification procedure led to a substantial likelihood of irreparable misidentification. With the deletion of the word “irreparable,” the standard serves as well for admissibility of testimony concerning out-of-court identifications. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972). See Jones, 94-1098 at p. 6, 658 So. 2d at 311.

In Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977), the U.S. Supreme Court concluded that “reliability is the linchpin in determining the admissibility of identification testimony....” The Manson court adopted the Neil v. Biggers analysis and listed factors to be considered in determining whether a photographic identification was reliable: (1) the witness's opportunity to view the defendant at the time the crime was committed; (2) the degree of attention paid by the witness during the commission of the crime; (3) the accuracy of any prior description; (4) the level of the witness's certainty displayed at the time of identification; and (5) the length of time elapsed between the crime and the identification. These factors are to be weighed against the corrupting effect of the suggestive procedure and identification. Jones, 94-1098 at p. 6, 658 So. 2d at 311. See State v. Martin, 595 So. 2d 592, 595 (La. 1992).

In his brief, defendant argues that the six-photograph lineup was unduly suggestive for three reasons. First, he argues that he is the only person in the lineup to be shown wearing red. Second, he asserts that his photograph depicts his face at a distance farther from the camera than the five other individuals. Finally, defendant contends that he is shown as having a thin frame, while the others are all far larger men.

Baton Rouge Police Detective Ira Roberts testified at defendant's motion to suppress hearing. He was the individual who prepared the six-photograph lineup using mugshots of defendant and five other black males. He testified that defendant wore a reddish-orange shirt in the photograph of him used in the lineup. Of the other five individuals pictured in the lineup, two wore orange prison shirts; one wore an orange t-shirt; one wore a reddish-orange shirt (similar to defendant's); and the last wore a white shirt. Detective Roberts stated that orange is the most common shirt color found in lineup photographs. He further testified that defendant's photograph does not appear to be a close-up photograph of his face, and maybe one of the other five photographs was more zoomed in than the others. Detective Roberts stated that he specifically swapped out certain photographs selected by his computer program in order to create a relative uniformity in shirt color and appearance.

Officer Cody David testified at the motion to suppress hearing and at trial that he presented the photographic lineup to the victim under Detective Roberts's supervision. He stated that he did not believe he presented the lineup in a suggestive manner, and that he read a standardized lineup statement to the victim. Furthermore, although both defendant and the victim were present at the police station at the time Officer David presented the lineup, Officer David stated that the victim was not even aware that defendant was in custody at the time he was presented with the lineup. Detective Roberts explained that due to the layout of the police station, the victim would have been unable to see defendant at any point after his arrest.

Our review of the six-photograph lineup reveals that defendant's picture was located in the bottom-left, fourth position. As Detective Roberts testified, at least five of the pictured individuals (including defendant) are wearing shirts of varied shades of orange. While some differences are present in the exact shades of the shirts, these differences are not themselves substantial. The photograph in the fifth position appears more zoomed in than the rest, and the only clothing visible in that picture is a

small portion of a white shirt collar. The six individuals depicted all appear to be young black males. Defendant's photograph is not zoomed in or out substantially compared to the photographs of the four individuals, outside of position five. Finally, because the photographs depict nothing farther down than the upper chest or shoulders of any of the individuals, it is difficult to say that defendant's frame appears especially thin compared to any of the other individuals.

Based on all the above information, we do not find that the lineup itself was unduly suggestive. Similarly, we cannot find that the procedure used in presenting the lineup was unduly suggestive. Detective Roberts took great care to compose a lineup consisting of six young black males, five of whom wore shirts of a similar color, and five of whom are at a relatively similar distance from the camera. The outlying individual, who was the same in both instances, was not defendant. Further, Officer David presented the lineup to the victim only after reading him a standardized statement instructing him not to pick anyone unless he was sure of the person's identity as his robber. We find nothing in the identification procedure that placed undue attention on defendant.

Moreover, even if we were to find that the identification procedure was unduly suggestive, defendant fails to prove a substantial likelihood of misidentification as a result of the procedure. The victim testified that his interaction with defendant during the robbery lasted approximately five minutes – ample time for him to view defendant. Further, the victim quickly and unequivocally identified defendant as his robber when he viewed the lineup. Finally, the time elapsed between the crime and identification was relatively short - less than two weeks.

Based on the above, we conclude that there was no substantial risk of misidentification. Accordingly, the trial court did not err or abuse its discretion in denying defendant's motion to suppress or motion for new trial.

This assignment of error is without merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant asserts that the trial court erred in imposing an excessive sentence.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See State v. Hurst, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So. 2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So. 2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Hogan, 480 So. 2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So. 2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. See La. C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. State v. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a

sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982).

Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. La. R.S. 14:64(B). The trial court sentenced defendant to twelve years at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now argues that his sentence is excessive in light of his youth, his lack of a felony history, and his father's death.

Prior to sentencing defendant, the trial court ordered a presentence investigation report ("PSI"). The trial court considered that PSI at the time of defendant's sentencing. The court noted that although defendant apparently had no adult felony convictions, he had a history of repeated criminality in the juvenile system. The court also noted the pending criminal matter that defendant faced. Considering those issues specifically and the record as a whole, the trial court ultimately imposed the near-minimum sentence of twelve years at hard labor, without benefit of parole, probation, or suspension of sentence.² On the record before us, we cannot say that the trial court erred or abused its discretion in imposing the instant sentence on defendant.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

² We also note that prior to trial, defendant rejected a plea offer from the state wherein he could have accepted a sentence of ten years, presumably with the attendant restriction of benefits, and also received a dismissal of another pending charge. The sentence ultimately imposed by the trial court in this case is not substantially different from the sentence offered to defendant as part of this proposed plea bargain.