

STATE OF LOUISIANA

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NO. 2000-KA-0304

VERSUS

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COURT OF APPEAL

CHRIS R. COSSE

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT, ORLEANS PARISH
NO. 390-711, SECTION "D"
HONORABLE FRANK A. MARULLO, JUDGE

PATRICIA RIVET MURRAY
JUDGE

(Court composed of Judge William H. Byrnes, III, Judge Steven R. Plotkin,
and Judge Patricia Rivet Murray)

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AFFIRMED

20000304OP1

Chris R. Cosse appeals his conviction for the first degree murder of James Reed, a violation of La. R.S. 14:30 A. We affirm for the reasons that follow.

FACTS

On May 19, 1997, at about 6:00 a.m., Sharon Bowlston responded to a knock on the front door of the second floor apartment she shared with her two children and her fiance, James Reed. She saw Chris Cosse, a man she had met on three or four prior occasions, and knew that he was Reed's

friend. When she saw him through the peephole, she went to get Reed. She returned to her bedroom to finish dressing for work. A few minutes later, Bowlston went back toward the door to check on Reed. She saw him in the hallway with Cosse holding a gun to his neck. Cosse told her "Bitch, back off." She backed into her bedroom.

Cosse then made Reed lie on the floor at the foot of the bed. Cosse held the gun on Reed most of the time, but would also point it at Bowlston when she would move or say anything. He told Bowlston to tie Reed's hands with her sock. She tried, but told Cosse that the socks would not fit. He then told her to get one of the scarves she used for her hair to tie Reed's hands. Bowlston went to her dresser and got a scarf. She tied Reed's hands behind his back. She intentionally tied them loosely, so that he could break free if Cosse could be distracted.

During this time, Cosse accused Reed of "playing" with him. He also demanded money from Reed. Bowlston told Cosse there was money in the dresser and asked him, if she gave him the money would he leave and not hurt anyone. She then took almost one hundred dollars out of a dresser drawer and handed it to Cosse. Cosse took the money, then shot Reed in the head. He ordered Bowlston to get onto her knees, which she did. Then he ordered her to lie down. While she was getting down, Cosse shot her in the

jaw. Bowlston got as far under the bed as she could, then played dead.

Cosse then fled.

While Cosse was holding the gun on Reed and Bowlston, Bowlston's two children, ten-year-old Janai Bowlston and fifteen-year-old Joseph Dedmond, observed and heard some of the events. Both children testified that they recognized the man with the gun as "Chris," a friend of Reed's whom they had met before. They further testified that the lighting was good, and "Chris" was wearing no hat or mask on the morning of the shooting.

Janai testified that she saw Cosse with a gun pointed at her mother. When Cosse saw her, he pointed the gun at her and told her to "get back in the f---ing room." On her way back to her room, Janai heard a gunshot.

Joseph testified that he woke up when he heard his mother scream in the hallway. He further testified that he saw Cosse pointing the gun at Reed and Bowlston. He testified that he did not call for help from his room because his phone made a noise which Cosse would have heard. He was peeking into his mother's bedroom when he heard his mother offer to give Cosse money if he would go away and not hurt anyone. When his mother walked to the dresser to get the money, Joseph went back to his room. He heard water running and went back to the hallway outside of his mother's bedroom. He saw Reed lying on the floor. He heard Cosse say the "B"

word, then saw him shoot Reed. At that point, Joseph ran out the front door to get help. He heard a second shot after he ran out. Joseph found a friend on the first floor who ran back with him to help Reed.

Bowlston, meanwhile, managed to get to a neighbor, though she was bleeding badly from the mouth and could barely speak. She called the police herself, but told the police operator that she did not know the name of the shooter, because she was afraid for herself and her children. She then tried to calm Joseph and keep him away from Reed. Eventually, she passed out.

Officer Keith Joseph was the first to arrive at the scene. He found one victim, Bowlston, lying by the front door. He found the second victim, Reed, lying on the floor near the foot of the bed. Both victims appeared to be bleeding from gunshot wounds to the head. Officer Joseph recognized Bowlston, as he used to live near one of her relatives. Bowlston could not speak, but communicated with Officer Joseph by shaking her head. She indicated to him that she knew who shot her. She also indicated that others were in the residence. Officer Joseph called EMS to transport Reed and Bowlston to the hospital. He did not see Janai, but did see Joseph and tried to calm him down.

Officer Tyrone Robinson was another officer who arrived on the scene shortly after the incident. Officer Robinson also spoke with Joseph

and attempted to calm him. Through Joseph he developed the name of "Chris." The officers developed the last name, "Cosse," through a person who would not give his or her own name. The officers also got a physical and clothing description of the perpetrator.

Detectives George Waguespack and Donald Bass did follow-up investigation. After the victims were transported to the hospital, Det. Waguespack took Joseph to the district station and presented him with a lineup of six individual photographs. Joseph seemed upset, nervous and scared to the detective, and did not identify anyone. A few hours later, Det. Bass showed Joseph another set of photographs, including one of Chris Cosse from Jefferson Parish records, but Joseph again declined to identify anyone, saying the photos were bad. The next morning, Det. Waguespack and Det. Bass met with Joseph at the hospital, before he visited his mother. At that time, he selected a picture of Chris Cosse as the perpetrator.

The next day, Bowlston identified Cosse from the same photographic lineup as Joseph. Because Bowlston was intubated and her jaw was wired shut at the time, she nodded her head to indicate that she recognized the perpetrator in the lineup. However, the officers and Bowlston all testified that she signed the back of the lineup herself and identified Cosse as the perpetrator. A few days later, Bowlston's sister took Janai to the district

station where she identified Cosse as the perpetrator from yet another compilation of photographs.

The witnesses noted that, after the shooting, Joseph went to stay with his father's sister while Janai went to stay with her mother's sister. Bowlston was in the hospital, still unable to speak. None of the family members had the opportunity to speak to the others prior to their individual identification procedures.

The physician who performed the autopsy testified that Reed died of two gunshot wounds to his head. Toxicology tests revealed that Reed had no discernible illegal drugs in his system at the time of death. The lack of powder burns near the entrance wounds indicated that the gun was fired from at least two and one-half to three feet away from the victim.

Following Joseph's identification of Cosse on the day after the shooting, Dets. Waguespack and Bass applied for an arrest warrant for Cosse and a search warrant for his apartment. The officers were notified that Cosse had been arrested on the warrant and was being held in the Port Sulphur jail. They proceeded to Port Sulphur and transported Cosse back to Orleans Parish. Although they were told that Cosse had been advised of his *Miranda* rights, the officers again advised Cosse of his rights as they put him in their car to return to Orleans Parish. While in the police car, Cosse told the

officers that he knew why they arrested him, but that he did not know anything about it. He told them that he saw two masked men leaving the apartment when he got there. He further told them that, when he went inside and saw what happened, he ran away.

At trial, Cosse took the stand and admitted several prior convictions, including two burglaries, an attempted burglary, and two counts of armed robbery. He admitted pleading guilty to the armed robberies, but testified that he did not use a gun. He insisted that he had never owned or used a gun.

Cosse testified that he and Reed became friends when they served time together. He further testified that he sold heroin for Reed. He testified that he would pick up drugs from Reed at the apartment Reed shared with Bowlston. He testified that he was on his way to get more drugs to sell on the morning of the murder. He maintained his previous story, that he saw two masked men leaving the apartment as he entered. He testified that he was afraid to stay and help his friend because no one would believe him due to his record.

Cosse further testified that he ran away to relatives in the country because he was afraid people were after him. Cosse testified that he told his young cousin what he had seen. She alerted relatives who were police

officers. Those officers then came with other officers and arrested him.

Bowlston testified in rebuttal that Reed worked as an assistant to a mechanic. She acknowledged that Reed had been in prison for shoplifting. She testified that Reed did not use drugs or sell drugs. She further testified that she had seen no drugs in her apartment, and Reed never told her to avoid looking in any particular places there.

ERRORS PATENT

A review of the record for errors patent indicates that there are none.

ASSIGNMENT OF ERROR ONE

Cosse asserts that the trial court erred in denying his motion to suppress the identifications.

The law regarding the admissibility of identification testimony was recently summarized in *State v. Thibodeaux*, 98-1673 (La. 9/8/99), 750 So.2d 916, *cert. denied*, ___ U.S. ___, 120 S.Ct. 1969 (2000):

As a general matter, the defendant has the burden of proof on a motion to suppress an out-of-court identification. La.Code Crim. Proc. art. 703(D). To suppress an identification, a defendant must first prove that the identification procedure was suggestive. *State v. Prudholm*, 446 So.2d 729, 738 (La.1984). An identification procedure is suggestive if, during the procedure, the witness' attention is unduly focused on the defendant. *State v. Robinson*, 386 So.2d 1374, 1377 (La.1980). However, even when suggestiveness of the identification process is proven by the defendant or presumed by the court, the defendant must also show that there was a substantial likelihood of misidentification as a result of the identification procedure. *State v. Prudholm*, 446 So.2d at 738.

The Supreme Court held in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977), 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 which courts must examine to determine, from the totality of the circumstances, whether the suggestiveness presents a substantial likelihood of misidentification include: 1) the witness' opportunity to view the criminal at the time of the crime; 2) the witness' 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. *Id.*

98-1673 at pp. 20-21, 750 So.2d at 932. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion; it may also consider any pertinent evidence given at trial of the case. *State v. Nogess*, 98-0670, p. 11 (La. App. 4th Cir. 3/3/99), 729 So.2d 132, 137. A trial court's determination on the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Bickham*, 404 So.2d 929 (La. 1981).

Cosse argues that the identifications by Joseph Dedmond and Janai Bowlston were tainted because they described him as having salt and pepper hair, and he was the only one in the lineups with salt and pepper hair. He further notes that Joseph did not identify him until the third procedure, and

that neither Joseph nor his sister Janai got a good look at the perpetrator, but rather saw him only fleetingly as they ran back and forth down a hallway.

However, the testimony of the eyewitnesses and the officers conducting the lineups indicates that the officers made no improper suggestion as to whom the witnesses should select. In addition, the lineup composites contained in the appellate record demonstrate that all of the individuals have relatively similar characteristics. Contrary to the contentions in Cosse's brief, the individual at position number one in the lineup composite from which Joseph Dedmond identified the appellant also appears to have salt and pepper hair. Accordingly, the argument that the lineup shown to Joseph Dedmond was suggestive is without merit.

Furthermore, Dedmond's testimony indicates that he observed the perpetrator for an extended period of time. His attention was focused on the perpetrator, his mother and his stepfather. The lighting was good. He viewed the perpetrator from a relatively close distance and again as the perpetrator fled. He described the perpetrator in detail. The identification was made the day after the crime. He further testified that he was certain of his selection. Det. Bass testified that Dedmond was extremely upset when he was first asked to make an identification within a couple of hours of witnessing the shooting of his mother and stepfather, which could explain

his reluctance. Finally, Dedmond recognized the perpetrator as someone he knew by name and had seen recently, and indicated a level of certainty indicating reliability. Accordingly, even if the photo lineup could be considered suggestive, there was little likelihood of misidentification.

A different composite was used for the lineup with Janai Bowlston. In that composite, the appellant appears to be the only individual with salt and pepper hair. However, as with the identification by Dedmond, consideration of the *Manson* factors does not suggest a likelihood of misidentification. Janai testified that she got a good look at the perpetrator, looking directly into his face as he told her go back to her own room. She identified Cosse within a week after the crime. Most importantly, she recognized the perpetrator as the man named "Chris" who she saw with her stepfather the night before the shooting.

Moreover, each of the three eyewitnesses, separately and without an opportunity to confer, identified Cosse's photo as that of the shooter, and all three testified to prior acquaintance with him. All three were extensively cross examined regarding the details of their initial descriptions of the perpetrator and the photo lineups shown to them. In addition, each of the lineups were published to the jury for assessment against the testimony of the witnesses as well as the defendant's appearance. Accordingly, Cosse has

failed to establish that admission of the identification testimony was erroneous.

ASSIGNMENT OF ERROR TWO

Cosse next argues that he is entitled to a new trial because a portion of Bowlston's testimony was not recorded and was thus omitted from the trial transcript.

Article 1, Section 19 of the Louisiana Constitution provides that the right of appellate review from a felony conviction shall be "based upon a complete record of all evidence upon which the judgment is based." Additionally, the U.S. Supreme Court has recognized a defendant's right to a complete transcript of the trial proceedings, particularly when counsel on appeal was not counsel at the trial. *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424 (1964). However, while "[m]aterial omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal...., inconsequential omissions or slight inaccuracies do not require reversal." *State v. Hoffman*, 98-3118, p. 49 (La. 4/11/00), 768 So.2d 542, 586, *cert. denied*, ___ U.S. ___, 121 S.Ct. 345 (2000) (citations omitted).

Cosse argues that the omission at issue here is like that in *State v. Diggs*, 93-0324 (La. App. 4th Cir. 6/29/95), 657 So.2d 1104, where the unavailability of a narcotics officer's complete testimony was found to

necessitate a new trial. In *Diggs*, the defendants were convicted of distribution of cocaine based upon alleged sales to undercover police officers. While three officers had participated in the undercover operation, only two of them testified at trial. For one of the officers, there was no record of his cross examination or redirect, if any; only the beginning of his direct examination was transcribed. This court held that this omission necessitated a new trial because it could not be determined whether the missing testimony was substantial or inconsequential, or whether any objections or motions had been made during the officer's testimony.

The facts presented here are clearly distinguishable from those in *Diggs*. The missing portion of transcript is not from the State's case-in-chief, but instead occurred when Sharon Bowlston was called as a rebuttal witness in response to Cosse's testimony that Reed was dealing illegal drugs in the days prior to the shooting. Defense counsel was attempting to portray the victim as a drug dealer to make Cosse's claim that he had seen two masked men running from the apartment more credible. During cross examination of Bowlston, as she was being questioned regarding her direct knowledge of Reed's daily activities, the court reporter changed audio tapes, resulting in a break in the testimony. Because there was no change in the topic of the questions and answers, however, it is readily apparent that the

interruption was brief. More importantly, it is clear that the missing testimony did not bear directly on Cosse's guilt or innocence, but was instead meant to discredit the victim. Accordingly, the missing portion of transcript is an inconsequential omission which does not require reversal.

CONCLUSION

For the reasons assigned, Cosse's conviction and sentence are affirmed.

AFFIRMED