

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-1129**
VERSUS * **COURT OF APPEAL**
LARRY M. LEGANIA * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 404-717, SECTION "I"
HONORABLE RAYMOND C. BIGELOW, JUDGE
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JUDGE MAX N. TOBIAS, JR.
* * * * *

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr. and Judge David S. Gorbaty)

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CONVICTION AND SENTENCE AFFIRMED

On 8 February 1999, the defendant, Larry M. Legania, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. Legania entered a plea of not guilty. On 22 April 1999, he was tried by a twelve-member jury that found him guilty as charged. The trial court denied the defendant's motion for new trial on 6 August 1999. The State filed a multiple bill. On 24 September 1999, the trial court found the defendant to be a second felony offender. He was sentenced to forty-nine and one-half years at hard labor without benefit of parole, probation, or suspension of sentence. The trial court denied the defendant's motion for reconsideration of sentence on 1 October 1999.

STATEMENT OF THE FACTS

Officer Charles Baehr testified that on 24 December 1998, at approximately 3:00 p.m., he investigated a report of an armed robbery in the 3600 block of Kent Drive in Algiers, New Orleans. He stated that he met with James Williams who told him that he had been robbed by two black

males from the neighborhood. Baehr further testified that Williams told him that one of the males was named Larry. Larry was later identified as the defendant. The defendant had come up and asked for the time. Williams told the officer that he looked down at his pager to see what the time was and that when he looked up, the defendant was pointing a gun at him. The defendant demanded money, and Williams gave him two hundred dollars. Williams identified the second man as someone named Daren who stood in the street during the robbery and said nothing. Baehr stated that Williams told him that the two men fled on foot toward Mansfield Street. Baehr testified that they got the defendant's address, went there, and saw the defendant who matched the description given by Williams. The defendant was taken in a police car to Williams' home. Williams identified the defendant as the person who had robbed him. Baehr stated that Williams had described the robber as being light skinned, "tallish, muscular but skinnyish," and with a tattoo between his eyes. On cross-examination, the officer testified that Williams had told him and his partner that the robbery had occurred within an hour of their arrival. Baehr further testified that when he arrested the defendant, the defendant was not wearing the clothes that Williams had described him as wearing.

James Corey Williams testified that shortly after midnight on 23

December 1998 [ergo, on 24 December 1998], he was headed toward his grandmother's house when he was approached by two men. One of them asked him for the time. After he looked down to check the time, he looked up to see the defendant with a gun. Williams testified that the defendant ordered him to lie on the ground and demanded Williams' money. He gave the defendant his money, which Williams said was two hundred dollars in cash that his mother had given him earlier that day [on 23 December 1998]. He said that the defendant threatened to kill him and that the second man told the defendant that they should leave, which they did shortly afterward. Williams testified that he described the robber as having gold teeth showing and tattoos in the middle of his forehead and under his eyes. Williams stated that the area was brightly lit. He stated that a few hours after the robbery, one of his neighbors came over to tell him that he had seen the defendant standing in front of his house. Williams said that he called the police because he was afraid and wanted the police to get the defendant. He denied being a drug dealer. On cross-examination, Williams stated that he did not know where the defendant lived until one of his neighbors told him. He also stated that when the police arrived, he went with them to show them where the defendant lived. He also told them that he knew the two men and that someone told him who the defendant was. He stated that he knew the other

man who participated in the robbery from the neighborhood. Williams said that he showed the police where Daren Simmons, the other person who was with the defendant, lived. Williams admitted that he did not identify the defendant in court at a previous hearing. When asked why, he explained that he was not paying attention to the area where the defendant was sitting.

Robin Mitchell, the defendant's aunt, testified that the defendant was her nephew and that he, his siblings, and his mother lived with her and her children at 3731 Mansfield Street. She stated that she knew Williams because her son played with his younger brother. She testified about an incident in which her son and Williams' brother had been arrested for selling crack cocaine to an undercover police officer. She also testified that one time when she was driving, Williams asked her to pull over. She told him at that time that she did not want to buy any drugs and that she was looking for her son. She stated that Williams told her that he did not know where her son was and that Williams was angry. She also testified that when the police searched the house after arresting the defendant, no gun or money was found.

Shawn Mitchell testified that he knew Williams and Williams' younger brother, Byron, and that Williams tried to get him and Byron to sell drugs in August 1998.

Byron Williams testified on rebuttal that he, Shawn Mitchell, and an individual named Gregory were arrested for trying to sell crack cocaine to an undercover police officer. Byron stated that as they were walking to the store, they had found a green bag containing crack cocaine on the ground. Byron further stated that while he was in the store, Shawn and Gregory flagged down a car and that they called him out of the store. He gave the bag of crack cocaine to Shawn. Shawn went to the person in the car. Byron said that as they walked away, the police arrived and arrested them.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant complains that the trial court erred in denying his motion to suppress the identification. He argues that the identification procedure was suggestive and gave rise to a likelihood of irreparable misidentification.

When reviewing an out-of-court identification procedure for its constitutionality and its admissibility in court, an appellate court must first make a determination of whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification. Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977); State v. Prudholm, 446 So.

2d 729 (La. 1984); State v. Hankton, 96-1538 (La. App. 4 Cir. 9/16/98), 719 So. 2d 546. If the court finds in the affirmative, the court must then decide whether under all of the circumstances the suggestive procedure gave rise to a substantial likelihood of misidentification. Id. In Manson v. Braithwaite, the Supreme Court set forth a five-factor test to determine whether the identification was reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. See also Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

Although a one-on-one confrontation between the suspect and the victim is generally not favored, it is permissible when justified by the overall circumstances, especially when the accused is apprehended within a relatively short time after the crime and is returned to the crime scene. State v. Grubbs, 93-2559 (La. App. 4 Cir. 10/25/94), 644 So. 2d 1105; State v. Walters, 582 So. 2d 317 (La. App. 4 Cir. 1991). Such an identification is proper because prompt confrontation between the suspect and the victim promotes fairness by assuring reliability of the identification because the victim's memory is still fresh and allows the expeditious release of innocent

suspects. State v. Robinson, 404 So. 2d 907 (La. 1981); State v. Bickham, 404 So.2d 929 (La. 1981); State v. Williams, 420 So.2d 1116 (La. 1982).

Delays of up to several hours between an offense and the one-on-one show-up have been held sufficiently prompt to fall within exigent circumstances. See State v. Amos, 550 So.2d 272 (La. App. 4 Cir. 1989); State v. Guillot, 526 So.2d 352 (La. App. 4 Cir. 1988); State v. Valentine, 570 So.2d 533 (La. App. 4 Cir. 1990). In State v. Everridge, 523 So.2d 879 (La. App. 4 Cir. 1988), this court found a one-on-one show-up that took place two days after the offense was not unduly suggestive because, inter alia, the victim had gotten a good look at the perpetrator.

At the hearing on the motion to suppress the identification, Williams was asked if he saw the person with the tattoos and bald head who robbed him. Williams stated that he wore glasses and that he could not see from “back here.” He did not have his glasses with him. Williams walked around the courtroom, and he stated that he did not see anyone with tattoos. Williams also stated that the robber had gold teeth. After Williams was unable to pick out the defendant in the courtroom, the trial judge had the defendant stand up and show his teeth. Williams then identified the defendant as the robber. The State pointed out that the defendant fit Williams’ description “to a ‘T’.” The trial judge confirmed for the record

the identification.

Although the one-on-one confrontation between defendant and Williams took place some fifteen hours after the robbery, it does not appear that this procedure gave rise to a substantial likelihood of irreparable misidentification. Williams testified that he had seen the defendant before; and, the record shows that defendant fit the description given by Williams. The robbery took place in a place reasonably well lit. Williams recognized the robber as being from the neighborhood in which they both lived. Williams described the robber as a light-skinned black male, tall, somewhat skinny, somewhat muscular, head shaven, a tattoo between his eyes, and gold front teeth. The defendant matched the description. It does not appear that the trial court erred in denying the motion to suppress the identification.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant complains that the trial court erred in denying his motion for new trial which was based on improper and prejudicial comments made by the State during closing argument. A review of the closing argument transcript shows that no objections were made by the defendant's counsel at any point during the State's closing argument. The failure to object precludes appellate review of

the issue. La. C.Cr.P. art. 841. Additionally, the defendant's motion for new trial was based upon La. C.Cr.P. art. 851(5) which sought a new trial on the grounds that the ends of justice would be served even though the defendant may not be entitled to a new trial as a matter of legal right. A trial court's ruling on a motion for new trial based on Article 851(5) is not reviewable on appeal. State v. Lewis, 97-2854 (La. App. 4 Cir. 5/19/99), 736 So. 2d 1004, writ denied 99-2694 (La. 3/17/00).

Accordingly, this assignment of error is without merit.

CONCLUSION

The defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED