

**STATE OF LOUISIANA**

\*

**NO. 2004-KA-0846**

**VERSUS**

\*

**COURT OF APPEAL**

**JOSEPH SMITH, JR.**

\*

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

\*

\*

\*\*\*\*\*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 442-321, SECTION "I"

Honorable Raymond C. Bigelow, Judge

\*\*\*\*\*

**Chief Judge Joan Bernard Armstrong**

\*\*\*\*\*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby, Judge Max N. Tobias Jr.)

Eddie J. Jordan, Jr., District Attorney  
Claire DeVidas, Assistant District Attorney  
619 South White Street  
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

Sandra C. Jenkins  
210 Baronne Street  
18th Floor, First National Bank of Commerce  
New Orleans, LA 70112

COUNSEL FOR DEFENDANT/APPELLANT

**CONVICTIONS AND SENTENCES AFFIRMED.**

The defendant, Joseph Smith, Jr., appeals from his conviction on two counts of armed robbery and his sentence of 49 ½ years at hard labor without benefits as a second offender on the first count and 30 years at hard labor without benefits on the second count. For the reasons that follow, we affirm the defendant's convictions and sentences.

The defendant was charged with two counts of armed robbery and one count of aggravated battery, to which he pled not guilty. The court heard and denied his motion to suppress the identifications. A twelve-person jury found him guilty as charged in both armed robbery counts and not guilty of the aggravated battery count. The State filed a multiple bill on January 9, 2004, and on February 12 the court found the defendant to be a second offender as to count one. On that count the court sentenced him to serve forty-nine and a half years at hard labor, and on the second count the court sentenced him to serve thirty years at hard labor. The court ordered that these sentences be served without the benefits of parole, probation, or suspension of sentence and that they be served concurrently. On that date the court also granted the defendant's motion for appeal.

Early on the morning of July 20, 2003 Mickey Terry was robbed at an ATM machine located at the corner of Napoleon and S. Claiborne Avenues. Shortly thereafter on the same morning, Joseph Lee was robbed at a gas station located at the corner of S. Claiborne Avenue and Milan Street. Det. Wade Bowser, who conducted the follow-up investigation of both robberies, testified that the defendant became a suspect in both robberies.

Approximately a month after the robberies, Det. Bowser compiled a photographic lineup that included the defendant's picture. He testified he showed the lineup to Mr. Terry, who chose the defendant's photo as that of the man who robbed him. Det. Bower testified that prior to viewing the lineup, Mr. Terry viewed a wanted flyer the police had made which included a still photograph taken by the bank's surveillance camera at the ATM machine. Det. Bowser testified that another officer showed the lineup to Mr. Lee. The detective stated that based upon Mr. Terry's identification, he began to obtain an arrest warrant for the defendant. However, other officers arrested the defendant before he could obtain the warrant.

On cross-examination, Det. Bowser admitted that the police report prepared in connection with the case indicated that Mr. Terry described his robber as approximately 5'8" tall, weighing 120 pounds, and Mr. Lee described his assailant as 5'6" tall and 150 pounds, while the defendant was

6' tall and weighed 150 pounds. He also admitted that there was no mention in the police report by either Mr. Terry or Mr. Lee of the perpetrator's having tattoos on his arms.

Mr. Terry testified that on the morning of the robbery, which occurred before dawn, he drove to the Bank One branch located at the corner of S. Claiborne and Napoleon Avenues to deposit a check at the ATM machine. Mr. Terry explained that there were separate entrances to the bank's drive-up teller windows and the ATM machine, and he inadvertently entered the one for the teller windows. He testified he parked his car in the teller lane and walked over to the ATM machine located at the edge of the bank property next to large ligustrum bushes. Mr. Terry testified that he deposited his check and then decided to withdraw \$20.00 from the machine. He stated that while he was waiting for the machine to give him his money, a man he identified as the defendant came from behind the bushes and started walking toward him. He stated that the defendant was slouching as he walked. Mr. Terry indicated that although the area was not well lit, there was a light at the ATM machine. He testified that the defendant asked him for a cigarette, and he told the defendant to get away from him. Mr. Terry stated that the money popped out of the machine as the defendant reached him, whereupon the defendant drew a gun and threatened to hit him in the head with it if he

did not give him the money from the machine. Mr. Terry complied, and the defendant hit him anyway. Mr. Terry threw an arm up to defend himself, and the blow fell on his arm and the back of his head. Mr. Terry testified that he then ran toward the bushes, while the defendant ran backward toward Napoleon Avenue, pointing the gun at him and tripping a few times over obstructions in the parking lot until he reached Napoleon, where he turned and fled.

Mr. Terry testified that he called 911 from the bank on his cell phone, and he then went home and called the police again from home. He stated that officers responded soon thereafter, mainly to see if he needed medical treatment, and they indicated they would return to take his statement. He testified that it was not until sixteen hours later, after repeated phone calls, that officers met with him to take his full statement. He testified that he later viewed a photographic lineup from which he chose the defendant's picture as that of the man who robbed him. He indicated that prior to looking at the lineup, he asked to view the still photo taken from the surveillance camera. He testified, however, that the photograph was so blurry that he could not tell anything about the robber. Mr. Terry testified he was 100% sure that the defendant was the man who robbed him. He admitted he did not see any tattoos on the defendant's arms, but insisted he was looking at the

defendant's face and the gun, not at his arms. He also admitted that the defendant looked shorter during the robbery, but he indicated the robber was slouching while he walked toward him. He testified that although the robber was wearing a hat, he could see braids hanging down below the hat. Mr. Terry positively identified the defendant as the man who robbed him.

Mr. Lee testified he had gotten off of work at 6:00 a.m. on July 20 and stopped for gas at the BP station at S. Claiborne and Milan. He testified that while he was pumping gas, a man walked past him and entered the convenience store at the station, and then another man whom he identified as the defendant walked up to him and demanded that he give him money. Mr. Lee testified he was not really paying attention and he hesitated, and the defendant lifted his shirt, showing a gun in his waistband, and again demanded money. Mr. Lee stated that the defendant pulled the gun and "racked" it. Mr. Lee pulled out his wallet and gave the defendant his money, which he estimated to be no more than \$20. Mr. Lee stated that the defendant then told him not to move, and began backing away while pointing the gun at him. Mr. Lee testified that as the defendant crossed one side of S. Claiborne, Mr. Lee walked to his truck, opened it, and pulled out his own gun. Mr. Lee fired at the defendant twice, missing him both times, and the defendant fled. Mr. Lee testified he could not follow the defendant

because he had thrown his keys into the truck when he reached for the gun. Instead, he waited at the gas station until police officers arrived.

Mr. Lee testified the robbery occurred at dawn. He testified that he described the robber to the responding officers, indicating the robber had a goatee and three or four large braids. He did not remember the description he gave the officers when they responded to the robbery call, but he did not see any tattoos because the robber was wearing a long-sleeved shirt. Mr. Lee testified that he accompanied police officers to the police station to try to compile a composite sketch of the robber. He later viewed a photographic lineup from which he identified the defendant's picture as that of the man who robbed him. He stated that he also viewed the wanted flyer. He admitted that he had previously testified that he "believed" the robber was the defendant, but he insisted that he still "believed" the defendant was the robber because he was positive that he was robbed by the defendant.

Sgt. Jeff Walls testified he showed the lineup to Mr. Lee, and Mr. Lee chose the defendant's photograph. Sgt. Walls stated that Mr. Lee immediately chose the photograph, indicating that he "felt" or "believed" the photograph was of the man who robbed him. Sgt. Walls was unable, however, to testify as to the exact words Mr. Lee used when he identified the defendant's picture. Sgt. Walls further testified that he arrested the

defendant when he saw him walking down the street. At that time, the defendant told him he lived at 1212 Clara Street.

Tiffany Habba, investigator for the district attorney's office, testified that she went to various other law enforcement agencies and Harrah's Casino to try to enlarge and enhance the still photographs from the ATM machine surveillance camera, but no agency could help her. She stated that the enlarged photograph the police made had been distorted somewhat by the enlargement process.

Gwendolyn Campbell appeared for the defense and testified she lived on LaSalle Street with the defendant at the time of the robberies. She testified that her younger child, who was also the defendant's child, became sick on July 18 and continued to be sick through July 20. Ms. Campbell insisted the defendant was with her and the sick child at the time of the robberies. She testified that she and the defendant were the only tenants at the complex where they lived, and the defendant would not leave her alone there. She testified that the defendant's grandmother lived at 1212 Clara Street. She testified that in December 2002, the defendant was shot in both knees, and as a result of these injuries he walked with a limp and could no longer run. Ms. Campbell admitted she had prior convictions for possession and distribution of crack cocaine. She also admitted that although she



believed her younger child was the defendant's child, she had named another man as the father in a suit for child support because she was not sure of the identity of the child's biological father. In addition, she admitted she never had told the police that the defendant was with her at the time of the robberies.

A review of the record reveals, as noted by the defendant, that there is no indication the court re-arraigned him on the aggravated battery count after the State amended it to reflect that the victim was Mr. Terry, not Mr. Lee. The notation on the bill of information shows the State amended the bill on October 24, 2003, the date of the suppression hearing. The defendant theorizes that the court was probably not aware that this amendment was made, even though at the beginning of the hearing the prosecutor indicated he needed to amend the bill. However, the transcript indicates that the prosecutor amended the bill at the conclusion of the hearing.

Nonetheless, there is no indication that the court re-arraigned the defendant after the State amended the bill. The defendant now states he was prejudiced by this omission, but he fails to indicate how he was prejudiced. However, any error in this omission, if indeed it did occur, is harmless because the defendant went to trial without having objected to the failure. La. C.Cr.P. art. 555. Furthermore, the defendant has not shown that he was

prejudiced by this amendment. It became apparent at the suppression hearing, held weeks before trial, that the aggravated battery was perpetrated on Mr. Terry, not Mr. Lee. In addition, the defense had a copy of the police report that showed the battery was perpetrated on Mr. Terry, not Mr. Lee. Likewise, counsel at the hearing was the same counsel at trial. Lastly, the defendant cannot show prejudice because the jury acquitted him of the aggravated battery count.

There were no other patent errors.

The defendant contends the trial court erred by denying his motion to suppress the identifications. He alleges the photographic lineups themselves were suggestive, and he further argues Det. Bowser's actions and comments led Mr. Terry to choose his photograph.

In State v. Lagarde, 2003-0606, pp. 15-16 (La. App. 4 Cir. 12/10/03), 861 So.2d 871, 881, this court discussed the standard for determining whether an identification should be suppressed:

A defendant seeking to exclude a photographic identification must prove two factors: 1) that the identification was unduly suggestive and 2) that there was a substantial likelihood of irreparable misidentification. *State v. Buchanan*, 463 So. 2d 660, 661 (La. App. 4 Cir. 1985). A photographic lineup is unduly suggestive if the photographs depict the defendant so singularly that the witness' attention is unduly focused on him. *Id.*

\* \* \*

To determine if there is a likelihood of misidentification, the jurisprudence has applied the following five-factor test enunciated in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977): (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. *State v. Jones*, 2002-1171 (La. App. 4 Cir. 6/26/02), 822 So.2d 205 (citing *Manson, supra*).

See also *State v. Lee*, 2002-2073 (La. App. 4 Cir. 1/15/03), 840 So.2d 1, and *State v. Simmons*, 99-1154 (La. App. 4 Cir. 12/6/00), 779 So.2d 856, where this court reiterated that a defendant must establish that an identification procedure was suggestive before the court looks to the Manson factors to determine whether to suppress an identification.

Here, the testimony of the victims and the officers who conducted the identifications basically tracked that which they gave at trial, as related above. In addition, Det. Bowser testified that the defendant became a suspect when he received information from another officer investigating an unrelated series of "smash and grab" robberies in the area. That officer apparently traced telephone numbers of calls placed from a stolen cell phone, and one of the numbers called was to the defendant's apartment on Clara Street. The officer ran the names of the recipients, culled out those

who had prior arrests and convictions, and printed their photos. The officer then distributed them to other officers working on robbery cases, and Det. Bowser noticed that the defendant resembled the man captured in the surveillance camera at the ATM where Mr. Terry was robbed. Det. Bowser then compiled a photographic lineup that included the defendant's photo and showed it to Mr. Terry. Det. Bowser testified that when he showed Mr. Terry the lineup, he told him that it contained a possible suspect, but he denied suggesting which photo Mr. Terry should choose. Det. Bowser stated that after he placed the lineup on the table for Mr. Terry to view, Mr. Terry looked at the lineup for a few minutes and then chose the defendant's photo.

At the hearing, besides recounting the robbery, Mr. Terry testified that when he viewed the lineup, he first asked to see the enlarged photograph that had been used in the wanted flyer. He testified, however, that the photo was blurry and did not help him. Mr. Terry testified that Det. Bowser told him that while viewing the lineup he could eliminate some suspects if it would help him narrow down the process, but there was no indication of which he should choose. Mr. Terry testified that he was 100% positive that the defendant was the person who robbed him.

Sgt. Walls testified he showed Mr. Lee the photographic lineup on

August 19, which was the day after the defendant was arrested. In addition to the testimony he later gave at trial, Sgt. Walls stated that when Mr. Lee chose the defendant's photo, he indicated that he "thought" or "felt" that the photo was of the man who robbed him. Sgt. Walls admitted he did not remember Mr. Lee's exact words.

After having described the circumstances of his robbery and the procedure used in the lineup, Mr. Lee testified that he told Sgt. Walls that the man depicted in photo #3 was the man who robbed him, and at the time of the hearing he still thought so.

On appeal, the defendant first argues that the lineup itself was suggestive. He refers to differences between photo #4 and those of the other five photographs, including the fact that the man in photo #4 does not have braids, has a lighter complexion, and has only a mustache, not a goatee. Perhaps this might have singled-out photo #4, but the defendant's photo was #3, which was much more similar to the other four photos. He next points to a difference in hairstyle of the man in photo #2, which he contends is the only one with hair parted down the middle. However, a middle part is also present on the man in photo #1. Contrary to the defendant's argument, taken overall, the photographs in the lineup all contain fairly consistent characteristics. All but #4 have braids; all but #4 have a goatee, although

some men have heavier facial hair than the others. There is nothing that particularly distinguishes the defendant's photograph (#3) from the others. As such, the lineup itself is not suggestive.

The defendant next contends that the identification procedures were tainted. Both at the suppression hearing and at trial the victims and the officers who conducted the lineups all testified that the victims chose the defendant's photograph in the absence of any force, coercion, promises, or suggestion on the officers' part. The defendant argues, however, that the procedure used with Mr. Terry was tainted because he was able to view the enlarged photograph, taken by the ATM surveillance camera, prior to viewing the lineup. In support, he cites State v. Martin, 595 So.2d 592 (La. 1992), where the Court found an out-of-court identification impermissibly suggestive because the officer who made the identification viewed only the defendant's photograph. Here, by contrast, Mr. Terry viewed an entire photographic lineup after having seen the enlarged surveillance photo. In addition, the surveillance photo was blurry, and Mr. Terry testified that it did not help in his identification. Also, there was nothing in the enlarged photograph that tied it to the defendant. Therefore, the fact that Mr. Terry viewed the photograph prior to viewing the lineup did not taint the identification procedure.

The defendant also argues that Det. Bowser's actions during Mr. Terry's lineup tainted the identification. He notes that Det. Bowser told Mr. Terry that the lineup contained a possible suspect. It is difficult to see how this statement tainted the identification because it would have been fairly obvious to Mr. Terry that a suspect's photo would have been included in the lineup. In addition, there is no indication that Det. Bowser indicated that photo #3 was that of the suspect.

The defendant notes that Det. Bowser noticed the differences between photos #2 and #4 from the rest of the photos because he stated Mr. Terry could eliminate them. However, a reading of the trial transcript shows that Mr. Terry did not testify that Det. Bowser told him he could necessarily eliminate those photos. Mr. Terry testified:

With this photographic lineup, he said – when I approached him, he said, “Look, you can eliminate certain people. You can even, like, try to eliminate No. 2, No. 4. You can say it's not this person, not that person.” And I said, “I'm 100 percent it's No. 3.”

Thus, it appears that Det. Bowser's use of “No. 2” and “No. 4” was illustrative, the same as “this person” and “that person”, rather than an attempt to eliminate possible suspects for Mr. Terry.

The defendant argues that Mr. Terry's identification was based solely on his having viewed the enlarged surveillance photograph, rather than upon

his recollection of the robbery. However, Mr. Terry specifically testified that the surveillance photograph was not helpful because it was blurry. Given the circumstances, it does not appear that the lineup itself or the procedure used in the lineup rendered the identification suspect. For the foregoing reasons, we conclude that the trial court did not err by refusing to suppress the identification made by Mr. Terry.

Likewise, there was no error in refusing to suppress Mr. Lee's identification. The lineup itself was not suggestive. The defendant argues that it appears Mr. Lee might have chosen photo #1 first and then changed his mind and chose #3. He notes that the back of the lineup shown to Mr. Lee shows he first wrote another number, crossed it out, and then wrote #3. It is unclear what number was written on the back originally, but it is possible that Mr. Lee had considered the position of what was really photo #3, at the right upper corner, to be position #1. Unlike the photo lineup shown to Mr. Terry, which had position numbers under each photo, the lineup shown to Mr. Lee did not have position numbers under the photos. In any event, neither Sgt. Walls nor Mr. Lee testified that he originally chose photo #1 and then changed his mind and chose photo #3.

The defendant next argues that Mr. Lee's statement that he "thought" or "believed" the defendant was his assailant showed a lack of conviction on



his part that the defendant was the person who actually robbed him. Both Sgt. Walls and Mr. Lee testified that Mr. Lee used the word “think”, “believe”, or “felt” that the man depicted in photo #3 was the man who robbed him. However, Mr. Lee’s testimony at both the suppression hearing and at trial unequivocally showed that he was positive that the defendant was his assailant.

The defendant finally points to the fact that Mr. Lee viewed the wanted flyer from Mr. Terry’s robbery to show that Mr. Lee’s identification was tainted. The defendant admits, however, that Mr. Lee identified the defendant on August 19 and did not view the wanted flyer until September 3.

The defendant has not shown that the trial court erred by denying his motion to suppress either of these identifications.

By his second assignment of error, the defendant argues that there was insufficient evidence to support his convictions for armed robbery. Specifically, he contends that the State failed to show he was the person who robbed either of the victims.

The test for determining the sufficiency of evidence to support a conviction was set forth in State v. Armstead, 2002-1030, pp. 5-6 (La. App. 4 Cir. 11/6/02), 832 So. 2d 389, 393:

In evaluating whether evidence is constitutionally

sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 588 So.2d 757 (La.App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall*, 523 So.2d 1305 La.1988). The reviewing court is not permitted to consider just the evidence most favorable to the prosecution but must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall*, 523 So.2d 1305; *Green*, 588 So.2d 757. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La.1992).

The defendant was convicted of two counts of armed robbery. In order to support these convictions, the State had to prove: (1) the taking, (2) of anything of value, (3) from a person or in the immediate control of another, (4) by the use of force or intimidation, (5) while armed with a dangerous weapon. *State v. Wix*, 2002-1493 (La. App. 4 Cir. 1/15/03), 838 So.2d 41. The defendant does not dispute that the State proved two armed

robberies occurred; indeed, there is ample evidence that money was taken from both Mr. Lee and Mr. Terry by the use of force, and that the perpetrator was armed with a gun. Instead, the defendant argues the State failed to prove he was the person who robbed either of the victims. When identity is disputed, the State must negate any reasonable probability of misidentification in order to satisfy its burden under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). State v. Edwards, 97-1797 (La. 7/2/99), 750 So.2d 893; State v. Woodfork, 99-0859 (La. App. 4 Cir. 5/17/00), 764 So.2d 132. The reviewing court must examine the reliability of an identification according to the test set out in Manson v. Brathwaite, as set forth above. See State v. Brealy, 2000-2758 (La. App. 4 Cir. 11/7/01), 800 So.2d 1116.

Here, the defendant again argues that the identifications of him were tainted and unreliable. He points to the fact that both victims initially described him as being much shorter than he is, and neither victim remembered seeing tattoos on the assailant's arms. Mr. Lee testified his assailant was wearing a long-sleeved shirt, which would have covered up his arms, but Mr. Terry described his assailant as having worn a short-sleeved T-shirt. The enlarged surveillance photograph taken from the ATM at the time of the robbery shows some smudges on the assailant's right forearm that could be a tattoo or could merely be a smudge caused by the

enlargement. In addition, Mr. Terry testified that the man who robbed him was slouching as he approached him. Although it was dark at the time Mr. Terry was robbed, he testified there was light coming from above the ATM machine and he was able to adequately view his robber. Mr. Lee testified that it was dawn when he was robbed, and he could clearly see his assailant. Both men indicated they were paying attention to their assailants, and each man estimated the duration of his robbery to be over a minute. They viewed the photographic lineups approximately a month after the robberies. In addition, each victim positively identified the defendant as the man who robbed him.

The defendant points out that the testimony of his alibi witness, added to what he calls the uncertainty of the identifications, provided a reasonable doubt that he was the perpetrator of the robberies. The jury was able to view the demeanor of the witnesses and apparently discounted Ms. Campbell's testimony that the defendant was with her, tending a sick child who might have also been his child, at the time of the robberies. There is nothing in the trial transcript to show that the jury abused its discretion in this credibility determination. See State v. Huckabay, 2000-1082 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093; State v. Harris, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So.2d 432.

In addition, the lack of physical evidence to link the defendant to either of the robberies is not fatal to his convictions. See State v. Marcantel, 2000-1629, p. 9 (La. 4/3/02), 815 So.2d 50, 56, where the Court stated: “[w] here there is no physical evidence to link a defendant to the crime charged, the testimony of one witness, if believed by the trier of fact, is sufficient support for a factual conclusion required for a verdict of guilty.” Here, the jury was aware of the discrepancy between the physical descriptions of the assailant and defendant’s description and it still chose to believe the victims’ testimony that the defendant was the man who robbed each of them. There is nothing in the record before this court to show that the jury abused its discretion by so finding. Therefore, viewing the evidence in the light most favorable to the prosecution, the jury could have found the defendant guilty of both counts of armed robbery beyond a reasonable doubt.

For the foregoing reasons, we affirm the defendant’s convictions on two counts of armed robbery and we affirm the sentences imposed by the trial court.

**CONVICTIONS AND SENTENCES AFFIRMED.**