STATE OF LOUISIANA	*	**NO. 2005-KA-0164**
VERSUS	*	**COURT OF APPEAL**
DWIGHT PATTERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 433-891, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Edwin A. Lombard
* * * * * *

(Court composed of Judge James F. McKay III, Judge Max N. Tobias Jr., Judge Edwin A. Lombard)

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AFFIRMED

The defendant/appellant, Dwight Patterson, appeals his conviction for first-degree murder, a violation of La. Rev. Stat. 14:30. After careful review of the record in light of the applicable law and arguments of the parties, the defendant's conviction and sentence are affirmed.

Facts and Procedural History

Officer Christopher Russell of the New Orleans Police Department (NOPD) sustained a fatal gunshot wound while responding to an armed robbery call in the early morning hours of August 4, 2002.

Shortly before Officer Russell and his trainee-partner, Officer Mary Colon, were dispatched on the armed-robbery call, Willie Wilbon entered the Tango Lounge, 1801 Spain Street, located at the corner North Roman Street, walked up to the bar, ordered a Heineken, spoke with some people, and then went to the restroom. Upon leaving the restroom, Wilbon picked up his beer and asked Peggy Pritchett, the bartender, to "buzz" him out of the electronically controlled door. Ms. Pritchett complied and as Wilbon exited the lounge he held the door open to allow three men armed with guns

to enter. The first gunman (subsequently identified as the defendant) wore a white tee-shirt and shouted orders at the other gunmen, the bartender, and the sixteen lounge patrons. He demanded that Ms. Pritchett give him the money from the cash register and threatened to kill her several times. The lounge patrons, after being forced to remove their clothes and lay on the floor, were robbed of their money, jewelry, and other valuables. One of the patrons, Oleatha Washington Perkins, was playing video poker in the back room when the gunmen entered the bar and managed to conceal herself behind a video poker machine while she dialed 911 alerting the police to the robbery in progress. The information that an armed robbery was in progress was dispatched to Officers Russell and Colon who were on patrol in a marked police vehicle. Officer Russell drove towards the lounge, turning onto Spain Street from North Claiborne Avenue and driving slowly past North Roman Street until he stopped in front of the club. Officer Colon, sitting in the passenger seat of the patrol car, looked into the lounge and saw three people, two standing by the bar and another to the right of the bar.

With the arrival of the police in front of the lounge, the gunmen attempted to leave the lounge. Two of the gunmen attempted to find an exit through the ceiling while the defendant ordered the bartender to “buzz” him out the front door. As the defendant emerged from the front door, he stared

directly at Officer Colon, walked a couple of steps toward the police vehicle and then raised his hand, revealing a gun. Officer Colon yelled to Officer Russell that the defendant was armed and ducked down in her seat as the defendant began shooting at the patrol car. Looking over towards the driver's side of the vehicle, Officer Colon saw the door open and Officer Russell lying on the ground motionless. The two other gunmen (later identified as Michael Davis and Bradley Armstrong), unsuccessful in finding an alternative exit from the lounge, emerged through the front door, running down the sidewalk and behind a building. The defendant quickly followed the other two gunmen and Officer Colon went to Officer Russell's assistance, calling for help. Upon the arrival of the emergency medical service, Officer Colon rode with her partner in the ambulance to Charity Hospital where he was pronounced dead shortly after arrival. Neither Officer Russell nor Officer Colon discharged their firearms during the incident.

Meanwhile, other police officers arrived on the scene. Davis was quickly apprehended hiding in bushes around the corner from the lounge with a .380 automatic weapon, jewelry, and money taken in the robbery in his possession. As the police investigation proceeded, the bartender (Ms. Pritchett) and lounge patrons were interviewed, as police officers searched

the crime scene and vicinity for evidence. More than four hours after the incident, Detectives McMullen and Jeff Jacobs were investigating the vehicles parked near the lounge and observed, through an open side-vent window of a black Chevrolet S-10 truck with tinted windows parked on the North Roman Street near the front door of the lounge, a person sitting in the driver's seat of the vehicle. As the detectives approached the truck to investigate its occupant, they saw that an additional person was seated in the front passenger seat. Accordingly, the detectives opened the front door of the truck and ordered the two men to exit the vehicle. Shortly thereafter, Ms. Pritchett walked out of the lounge accompanied by Sergeant Anderson and recognized the man (later identified as Willie Wilbon) sitting nearest to the door as "Billy" the person who held the door open for the three gunmen. She spontaneously identified him to Sergeant Anderson who immediately alerted Detective McMullen. Sergeant Anderson escorted Ms. Pritchett back into the lounge and Detective McMullen advised the two men they were under investigation for armed robbery and of their constitutional rights. The black truck, registered to Bradley Armstrong, was impounded. Later that day at the police station, Ms. Pritchett and Officer Colon separately identified the defendant in photographic lineups as the shooter.

A search warrant was obtained the next day and, pursuant to the

warrant, Detectives John Ronquillo and Collin Arnold recovered jewelry and identification cards reported stolen by the lounge patrons, as well as a white tee-shirt and a Witness .40 caliber semi-automatic pistol, later determined to be the murder weapon from the truck. Subsequent scientific tests detected gunpowder residue on the white tee-shirt and DNA evidence connected it to the defendant.

The defendant, indicted with co-defendants, Willie Wilbon, Michael Davis, and Bradley Armstrong, pleaded not guilty at his arraignment on October 16, 2002. After a hearing, the trial court denied the defendant's motion to suppress identification and evidence and the case against the defendant proceeded to trial in July 2004. After a seven-day jury trial in which both Officer Colon and Ms. Pritchett identified him as the gunman who fired the fatal gunshot at Officer Russell and demonstrative evidence connecting the defendant to the white tee-shirt was admitted, the defendant was found guilty as charged. After the sentencing phase of the trial, the jury recommended life imprisonment at hard labor without benefits. The defendant's motion for a new trial was denied and, after the defendant waived delays, the trial judge sentenced the defendant to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence.

The defendant's appellate counsel timely filed this appeal, raising

three assignments of error: (1) the trial court erred in denying his motion to suppress the identification; (2) the defendant was deprived of his right to a fair and impartial trial due to the prejudicial comments by the trial judge directed to defense counsel throughout the trial; and (3) the State failed to establish a proper chain of custody as to blood samples taken from the defendant. In addition, the defendant filed a *pro se* brief raising two additional assignments of error: (1) the defendant's arrest was without probable cause and, accordingly, the resulting detention of the defendant and search of the Chevy S-10 truck were unconstitutional; and (2) the trial court erred in allowing a one-on-one identification of the defendant during trial by one of the State's witnesses.

Counsel's Assignment of Error Number 1

The defendant contends that the bartender's identification in the photographic lineup was rendered impermissibly suggestive by her "show up" identification of the defendant on the morning after the shooting and that the trial court erred in denying his motion to suppress identification.

To suppress an identification, the 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 where the suggestive nature 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 739; *Manson v. Braithwaite*, 432 U.S.98 (1977). 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. *Manson*, 432 U.S. at 115.

The trial judge held an evidentiary hearing on motions, including the defendant's motion to suppress the identification, on March 28, 2003. Sergeant Anderson and Ms. Pritchett both testified at the hearing. According to Sergeant Anderson, Wilbon was sitting with the defendant on the ground next to the truck when Ms. Pritchett emerged from the lounge and spontaneously identified the nearer of the two men (Wilbon) as "Billy," the person who held the door open for the three gunmen. Sergeant Anderson

immediately took Ms. Pritchett back into the lounge and did not question her as to whether she saw the second man by the truck or whether she could identify him. Concomitantly, Ms. Pritchett testified that when she emerged from the lounge she saw two men sitting on the ground by a truck and recognized the man sitting nearest to her as "Billy" but that she could not see the face of the second man. Later that day at the police station, she identified the defendant as the shooter in a photographic lineup.

Accordingly, there is no evidence that Ms. Pritchett saw the defendant's face outside the lounge on the morning of the incident or that the identification procedure employed by the police was unduly suggestive. The defendant failed to sustain his burden of proof and the trial court did not err in denying his motion to suppress the identification. This assignment of error is without merit.

Counsel's Assignment of Error Number 2

The defendant also contends that he did not receive a fair and impartial trial due to prejudicial comments directed towards defense counsel by the trial judge during the trial. Article 772 of the Louisiana Code of Criminal Procedure provides "The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving

an opinion as to what has been proved, not proved, or refuted." Unless the reviewing court is thoroughly convinced that the jury was influenced by the remarks and that they contributed to the verdict, a verdict will not be set aside because of improper remarks by the judge. *State v. Gallow,* 338 So.2d 920, 922 (La. 1976) (citations omitted).

A review of the trial record in this case is replete with antagonistic discussions between defense counsel and the trial judge. However, these discussions were either held in the judge's chambers or in a bench conference, outside the presence of the jury. Comments made by the trial judge and defense counsel in the presence of the jury related solely to the admission of evidence and rulings on objections by the trial judge. Thus, while the record reveals a substantial amount of antagonism between the trial judge and defense counsel, it cannot be said that the relationship between the trial judge and defense counsel influenced the jury and contributed to the verdict. The trial record indicates that trial judge was fair and impartial in ruling on objections and admissibility of evidence in front of the jury. Moreover, the evidence against the defendant was substantial; three eyewitnesses testified that the defendant was involved in the armed robbery of the Tango Lounge and two eyewitnesses identified him as the person who shot Officer Russell. Accordingly, this assignment of error is

without merit.

Counsel's Assignment of Error Number 3

The defendant contends that the trial court erred in denying his Motion for a New Trialbased on his claim that the chain of custody for a blood sample taken from the defendant, which served as the basis for DNA evidence linking him to the murder weapon, was not established by the State at trial.

Admission of demonstrative evidence at trial requires either visual identification, *i.e.,* by testimony at the trial that the object exhibited is the one related to the case, or by chain of custody, *i.e.*, by establishing the custody of the object from the time it was seized to the time it was offered in evidence. *State v. Sweeney,* 443 So.2d 522, 528 (La. 1983) (citation omitted). The law does not require that the evidence as to custody eliminate all possibilities that the object has been altered. *Id.* Rather, it sufficient to establish that it is more probable than not that the object is the one connected with the case; lack of positive identification or a defect in the chain of custody goes to the weight of the evidence rather than to its admissibility. *State v. Sam*, 412 So.2d 1082, 1086 (La. 1982) (citation omitted).

In this case, the defendant asserts that the trial court erred in denying his motion for a new trial because there "was no testimony from DNA

expert Karen Lewis-Holmes, how the vial of what was purported to be the appellant's blood came from. Neither did Teresia Lamb nor James Podboy explain how, where or when a blood sample was obtained from the appellant."

A review of the record indicates that Karen L. Holmes of the NOPD, a laboratory technician qualified and accepted as an expert in the field of Molecular and Forensic DNA analysis, testified that she analyzed a swatch taken from the neckline of a tee-shirt retrieved from the Chevy S-10 truck in which the defendant was found on the morning of the incident and compared it to the blood reference sample taken from the defendant. Notably, defense counsel failed to object contemporaneously to the admission of this evidence or the State's failure to produce testimony as to when, where and how a blood sample was taken from the defendant. Moreover, although the defendant is correct that the State failed to produce testimony concerning who took the blood sample, when the blood sample taken and how it was sent to the Crime Lab for testing, there is testimony by Karen Lewis Holmes of the NOPD Crime Lab identifying the blood sample as that of the defendant. Because a defect in the chain of custody does not preclude the admissibility of the evidence but goes to the weight of the evidence presented, we do not find that the trial judge abused his discretion in denying

the defendant's motion for a new trial. This assignment of error is without merit.

Pro Se Assignment of Error Number 1

In his first *pro se* assignment of error, the defendant contends that all evidence against him – including the evidence seized from the truck pursuant to a search warrant – should have been excluded because his initial detention was an illegal seizure and arrest without probable cause in violation of the Fourth Amendment and the Fourteenth Amendment of the U.S. Constitution, and Article 1, § 16 of the Louisiana Constitution.

In order for evidence to be excluded at trial, an illegal search or seizure must have taken place that resulted its discovery. *Mapp v. Ohio*, 367 U.S. 643 (1961). While an arrest requires probable cause, an investigatory stop requires only the lesser standard of reasonable suspicion enunciated in *Terry v. Ohio*, 392 U.S. (1968); La. Code Crim. Proc. art. 215.1. An investigatory stop, like an arrest, is a complete restriction of movement, but for a shorter period of time. *See U.S. v. Merritt*, 736 F.2d 233, 229 (5th Cir. 1984); *State v. Bailey*, 410 So.2d 1123, 1125 (La. 1982). In making a brief investigatory stop the police still " 'must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *State v. Kalie*, 96-2650 (La. 9/19/97), 699 So.2d 879, 881 (*quoting U.S. v.*

Cortez, 449 U.S. 411, 417 (1981)). Probable cause to arrest exists when the facts and circumstances known to the arresting officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. *State v. Wilson*, 467 So.2d 503 (La. 1985), *cert. den. Wilson v. Louisiana*, 474 U.S. 911 (1985).

The facts which form the basis for probable cause to issue a search warrant must be contained "within the four corners" of the affidavit. *State v. Duncan*, 420 So.2d 1105, 1108 (La. 1982). A magistrate must be given enough information to make an independent judgment that probable cause exists for the issuance of the warrant. *State v. Manso*, 449 So.2d 480, 482 (La. 1984), *cert. denied, Manso v. Louisiana*, 469 U.S. 835 (1984). Upon review, this Court must determine only whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him that there is a reasonable probability that contraband will be found. *Manso,* 449 So.2d at 482.

In the present case, the defendant and co-defendant Wilbon were found sitting in a truck parked near the entrance of the lounge on the morning of the robbery and shooting. The vehicle was identified as not

belonging to any of the customers or employees of the lounge. These circumstances gave the police officers reasonable suspicion to order Wilbon and the defendant out of the pickup truck. Shortly after the two men were removed from the vehicle and told to sit on the ground near the truck, Ms. Pritchett walked out of the lounge and spontaneously identified Wilbon as a participant in the robbery. At that point, the officers had probable cause to believe that both Wilbon and the defendant were involved in the robbery and shooting. A warrant to search the truck was obtained the following day based on an application setting forth sufficient information to establish probable cause that evidence concerning the armed robbery and shooting would be found in the vehicle. Thus, there is no merit to the defendant's argument that he was illegally seized and arrested without probable cause or that the evidence seized pursuant to the search warrant should have been excluded from trial.

Pro Se Assignment of Error Number 2

In his second *pro se* assignment, the defendant asserts that the trial court erred in allowing Everett Routte, one of the lounge patrons, to identify him at trial as one of the perpetrators. At the end of direct examination by the State, Mr. Routte testified that the person sitting at the table, identified as the defendant, was the perpetrator who entered the lounge first with a .357

magnum. The defendant failed to object to this testimony and, accordingly, we are precluded from reviewing this issue on appeal. *See* La. Code Crim Proc. art. 841.

Conclusion

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.