

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-644
 : (C.P.C. No. 08CR-12-8615)
 Tremain R. Hogan, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Scott & Nemann Co., LPA, and *Adam Lee Nemann*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Tremain R. Hogan, appeals from a judgment of the Franklin County Court of Common Pleas, in which the trial court, following this court's remand in *State v. Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385 ("*Hogan I*"), denied appellant's motion to suppress identification and reinstated the jury's verdicts finding appellant guilty of rape, attempted rape, and kidnapping. For the following reasons, we affirm.

{¶ 2} By way of background, appellant was indicted in 2008 for one count of rape, two counts of attempted rape, and one count of kidnapping. Defendant moved to

suppress the victim's pretrial identification, arguing that the procedures used in obtaining identification violated due process. The trial court overruled the motion, finding that the identification procedure was not impermissibly suggestive.

{¶ 3} The matter proceeded to trial wherein the evidence established that J.B. was raped by appellant while walking home after work. J.B. testified that appellant grabbed her from behind, threatened to kill her, and pushed her into a wooded area. The assailant pulled J.B.'s pants down, inserted his finger into her vagina, and attempted to insert his penis into her vagina and anus. J.B. escaped from the assailant when a car passed by and illuminated the area. J.B. ran to a nearby restaurant, and the police were called. The jury found defendant guilty of all counts, and the trial court imposed an aggregate prison term of 19 years.

{¶ 4} In a timely appeal to this court, appellant challenged the denial of his motion to suppress, the admission of what he alleged to be evidence of prior bad acts, the weight and sufficiency of the evidence, and the trial court's claimed failure to merge appellant's kidnapping offense with his rape and attempted rape offenses. *Hogan I*. This court sustained the assignments of error pertaining to the denial of appellant's motion to suppress and merger, but overruled the remaining assignments of error.

{¶ 5} With respect to the pretrial identification procedure, this court found the photo array procedure used by the investigating authorities to be impermissibly suggestive. *Hogan I* at ¶ 25. However, this court recognized that suggestiveness alone does not require suppression and that the identification testimony may still be admissible "if the witness can demonstrate an independently reliable basis for the identification." *Id.* at ¶ 28, citing *Neil v. Biggers*, 409 U.S. 188, 198-199, 93 S.Ct. 375 (1977). Because the trial court did not address this question, we ordered a limited remand for such a determination. Our remand instruction stated the following:

Because of the trial court's initial ruling on the motion to suppress, the trial court never addressed the question of whether or not J.B. had a reliable, independent recollection of her attacker and that appellant was her attacker. This issue remains to be resolved if J.B.'s identification testimony is to be used in subsequent proceedings. The trial court can determine whether an additional hearing is necessary at which the issue of J.B. having an independently reliable basis

for her identification can be fully explored. If such an independently reliable basis is proven, then the initial jury verdicts and judgment of guilt can be reinstated.

Id. at ¶ 29.

{¶ 6} In accordance with our limited remand instruction, the trial court held an evidentiary hearing on April 11, 2011 to determine whether J.B. had a reliable basis for her identification. Appellant presented the testimony of Dr. Solomon Fulero, an attorney and professor of psychology, who testified as an expert regarding eyewitness identification procedures and memory retention. The state presented the testimony of J.B., who again provided her account of the assault and subsequent identification of appellant.

{¶ 7} The parties submitted briefing following the hearing, and on May 24, 2011, the trial court issued a decision denying appellant's motion to suppress and reinstating the jury's guilty verdicts. The trial court found that a reliable basis for J.B.'s identification existed based on the totality of the circumstances and the factors set forth in *Biggers*. At a resentencing hearing held July 6, 2011, the trial court merged defendant's kidnapping offense with his rape and attempted rape offenses pursuant to the remand order.

{¶ 8} Defendant now appeals, advancing two assignments of error for our consideration:

First Assignment of Error:

The trial court violated the Appellant's right to a trial by jury, when it reinstated a jury verdict after remand, by assuming the jury would have reached the same verdict, despite the suppression of key eyewitness evidence testimony by the 10th District Court of Appeals.

Second Assignment of Error:

The trial court erred by failing to suppress the victim's in-court eyewitness identification of the Appellant on remand.

{¶ 9} In his first assignment of error, appellant argues that the trial court violated his right to a jury trial when it reinstated the jury's guilty verdict on remand. Appellant claims that our decision in *Hogan I* required the suppression of the identification testimony presented at trial and that the trial court erroneously reinstated the guilty

verdicts based on "*less* evidence than was presented to the jury during the first trial." (Emphasis sic.) (Appellant's brief, 10.) We disagree.

{¶ 10} At the outset, this court did not order the suppression of identification testimony in *Hogan I*. Although we found the identification procedure to be impermissibly suggestive, we recognized that admission of the identification testimony is nevertheless permissible "if the witness can demonstrate an independently reliable basis for the identification." *Hogan I* at ¶ 28, citing *Biggers* at 198-199. As our prior decisions recognize, the suggestiveness of the identification procedure and the reliability of the identification are two separate determinations a trial court must make before admitting or excluding identification evidence. *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, ¶ 47. Because the trial court in this case did not address the second question of reliability, we ordered a limited remand for that purpose. *Hogan I* at ¶ 29.

{¶ 11} Contrary to appellant's argument, a suggestive identification procedure does not automatically require suppression of the identification itself. "Even when the police use such a procedure * * *, suppression of the resulting identification is not the inevitable consequence." *Perry v. N.H.*, ___ U.S. ___, 132 S.Ct. 716 (2012), citing *Manson v. Brathwaite*, 432 U.S. 98, 112-113 (1977); *Biggers* at 198-199. "Instead, the trial judge must screen the evidence for reliability *pretrial*' by determining whether the procedure created " 'a very substantial likelihood of irreparable misidentification.' " (Emphasis added.) *Perry*, quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967 (1968). This standard applies when challenging the admissibility of the subsequent in-court identification and, with the deletion of "irreparable," the out-of-court identification itself. *Biggers* at 198.

{¶ 12} Because this court did not suppress any identification testimony in *Hogan I*, the trial court did not reinstate the jury's guilty verdicts with *less* evidence so as to violate appellant's right to a jury trial, as appellant now contends. Once the trial court determined that J.B. had an independent, reliable basis for her identification, it was required to deny appellant's motion to suppress and reinstate the jury's guilty verdicts.

{¶ 13} In fact, our remand order prohibited the court from doing anything other than reinstating the jury's verdicts once it found J.B.'s identification to be reliable. "When a case is remanded to a trial court, that court 'may not consider the remanded case for any

other purpose, may not give any other or further relief, may not review for apparent error, and may not otherwise intermeddle with it except to settle so much as has been remanded.' " *State v. Maxwell*, 10th Dist. No. 02AP-1271, 2004-Ohio-5660, ¶ 13, quoting *State ex rel. Natl. Elec. Contrs. Assn. v. Ohio Bur. of Emp. Servs.*, 10th Dist. No. 97APD07-895 (Sept. 16, 1999).

{¶ 14} To the extent appellant challenges the remand instruction in *Hogan I*, he cites no authority requiring a court of appeals to order a retrial with every remand. A limited remand without retrial is permissible, and oftentimes necessary, when dispositive issues are unaddressed by the trial court. *See State v. Keith*, 10th Dist. No. 08AP-28, 2008-Ohio-6122, ¶ 40 (limited remand instructing trial court to address merits of defendant's motion to suppress and reinstate the verdict "[i]n the event the trial court denies the motion to suppress"); *State v. N.D.C.*, 10th Dist. No. 06AP-790, 2007-Ohio-5088, ¶ 36 (limited remand to determine whether admission of evidence under rape shield statute and vacate or reinstate the jury's verdict accordingly); *see also State v. Boggs*, 63 Ohio St.3d 418, 424 (1992).

{¶ 15} Accordingly, appellant's first assignment of error is overruled.

{¶ 16} Appellant's second assignment of error challenges the merits of the trial court's decision denying his motion to suppress on remand. Specifically, appellant claims that the trial court should have suppressed J.B.'s pretrial and in-court identification because J.B. did not possess an independent, reliable basis for her identification.

{¶ 17} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. When considering a motion to suppress, the trial court assumes the role of fact finder and, accordingly, is in the best position to resolve factual questions and evaluate witness credibility. *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). As such, an appellate court must accept the trial court's factual findings if they are supported by competent, credible evidence. *Burnside* at ¶ 8, citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the reviewing court must then independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

{¶ 18} Given our limited remand instruction in *Hogan I*, the narrow issue before the trial court was whether J.B. had a reliable basis for her identification of appellant. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson* at 114. In determining reliability, courts must consider the totality of the circumstances, including the following factors identified by the United States Supreme Court in *Biggers*: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the witness' level of certainty in making the identification; and (5) the length of time between the crime and the identification. *Biggers* at 199-200. The defendant bears the burden of proving that the identification was unreliable. *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶ 14.

{¶ 19} An examination of the *Biggers*' factors in this case supports the trial court's conclusion that J.B. had a reliable basis for her identification. J.B. had sufficient opportunity to view appellant during the rape, which she estimated lasted approximately ten minutes. J.B. stated that she saw appellant's face repeatedly, including when he first approached her, when he ordered her to perform oral sex, and when he was on top of her as she was on her back. According to J.B., appellant was not wearing a mask or concealing his face. Although it was dark outside, J.B. stated that "it wasn't that dark," and she could still see appellant's face because of street lights, the lights of nearby businesses, and the headlights of a car that shone "really bright" on appellant's face while he was on top of her. (Remand Tr. 71, 73.) J.B. stated that she paid particular attention to appellant's face during the attack because she wanted to give an accurate description to investigating authorities. Similar to the victim in *Biggers*, J.B. faced her assailant "directly and intimately." *Biggers* at 200.

{¶ 20} Additionally, J.B.'s prior description of appellant was largely consistent and accurate regarding appellant's height, build, facial hair, and clothing. While appellant alleges certain discrepancies in her descriptions, these variations were slight, especially in light of the accurate descriptions concerning appellant's build, braided hair, cap, and clothing. Moreover, J.B. was confident in her identification, stating she was "100 percent sure, very sure." (Remand Tr. 74.) J.B. further testified that she would never forget the face of the person who raped her. (Remand Tr. 75.)

{¶ 21} Although appellant argues that J.B.'s testimony is suspect because she was unable to definitively identify appellant in the surveillance video, this fact only strengthens the reliability of her identification. As we have stated before, "[h]er failure to identify an individual in the first array indicates she was not vulnerable to whatever suggestiveness may have been inherent in the photo array, thus bolstering her reliability." *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, ¶ 48 (10th Dist.), citing *Biggers* at 412. This is especially so given that J.B. identified appellant only one week after the attack, which is relatively close in time. See *State v. Taylor*, 8th Dist. No. 90001, 2008-Ohio-3455, ¶ 95 (identification was "close in time" when it occurred eight days after the robbery); *State v. Gales*, 2d Dist. No. 24059, 2011-Ohio-2682 (eight days weighed in favor of reliability); *State v. Poulson*, 10th Dist. No. 09AP-778, 2010-Ohio-3574, ¶ 46 ("five days is more than adequate"); *State v. Koester*, 10th Dist. No. 88AP-594 (Mar. 28, 1989) (11 days considered a "short length of time").

{¶ 22} After considering the totality of the circumstances and weighing the factors listed above, we find that appellant did not meet his burden of establishing that J.B.'s testimony was unreliable. Appellant's sole witness, Dr. Fulero, merely expressed his own opinions as to the general potential for misidentification in a given case, but he could not opine as to J.B.'s own likelihood of misidentification. Because J.B.'s testimony demonstrated that there was neither a very substantial likelihood of misidentification during the pretrial identification procedure, nor a very substantial likelihood of irreparable misidentification at trial, we find, as stated in *Biggers*, that "[t]he evidence was properly allowed to go to the jury." *Biggers* at 201. Accordingly, appellant's second assignment of error is overruled.

{¶ 23} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
