**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| COMMONWEALTH OF PENNSYLVANIA, Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| --- | --- |
| v. | |
| TROY GARDNER, Appellant | No. 116 EDA 2012<br>No. 122 EDA 2012 |

Appeal from the Judgment of Sentence entered December 5, 2011,
in the Court of Common Pleas of Delaware County,
Criminal Division, at No(s): CP-23-CR-7481-2010 and CP-23-CR-7482-2010

BEFORE: BOWES, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: January 2, 2013

Troy Gardner ("Appellant") appeals from the judgment of sentence imposed after he was convicted of one count each of robbery and theft by unlawful taking at Docket No. 7481 of 2010, and one count each of robbery and theft by unlawful taking at Docket No. 7482 of 2010.[1] We affirm.

The trial court summarized the factual background as follows:

> Both robberies occurred within a few blocks of each other in East Lansdowne, Delaware County. The first occurred at the U.S. Produce and Mini Mart on January 20, 2010 [Docket No. 7482 of 2010]; the second occurred at the Exxon Station on April 17, 2010. [Docket No. 7481 of 2010]. After the first robbery took place, the police did not immediately identify the perpetrator, notwithstanding the complaint and information received from the victim of the crime, Narinda Kaur. After the second robbery on

[1] 18 Pa.C.S.A. §§ 3701(a)(1)(iv) and 3921(a), respectively.

*Retired Senior Judge assigned to the Superior Court.

> April 17, 2010, the East Lansdowne police department obtained information from the victim of the second robbery, Bakah Dahal, an attendant at the Exxon Station.
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> Shortly thereafter, the police were alerted to a similar robbery in an adjacent township, which produced a photograph of [Appellant], Troy Gardner. The photograph of [Appellant] matched the verbal descriptions of the perpetrator of both robberies in East Lansdowne, and the police prepared two separate photo arrays for the victims to review. Each photo array included the photograph of [Appellant], as well as seven other photographs, which were consistent with the menu options available from JNet to generate photo arrays for identification. In each case, the police testified that hundreds of photographs were reviewed by the police in preparation of the photo arrays in order to present photographs with individuals as closely similar to [Appellant] as was possible.

Trial Court Opinion, 4/20/12, at 2-3 (unnumbered).

Following the victims' review of the photo arrays, in which both Ms. Kaur and Mr. Bahal identified Appellant as the perpetrator, Appellant was arrested and charged with the aforementioned crimes. On May 3, 2011, Appellant filed a motion to suppress the victims' identification, asserting that the photo array was unduly suggestive. The trial court conducted a hearing on May 18, 2011, at the conclusion of which the trial court, on the record, determined that the photo array was not unduly suggestive. Additionally, on June 29, 2011, Appellant filed a motion to sever the two cases. Following a hearing July 25, 2011, the trial court, on the record, denied the motion to sever. On August 16, 2011, the trial court entered written orders denying both the suppression motion and the motion to sever.

A jury trial commenced on October 12, 2011. At the conclusion of trial, the jury found Appellant guilty of two counts of robbery (F-2), and two

counts of theft by unlawful taking. On December 5, 2011, the trial court sentenced Appellant at Docket No. 7481 of 2010, to 20 to 60 months of incarceration for robbery, with 3 years of consecutive probation, and at Docket No. 7482 of 2010, a consecutive 20 to 60 months for robbery, with 3 years of consecutive probation to run concurrent with the probation imposed at Docket No. 7481 of 2010, for an aggregate term of imprisonment of 40 to 120 months. The sentences for theft by unlawful taking merged with the robbery sentences. Appellant filed a timely notice of appeal. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

> I. WHETHER THE [TRIAL] COURT ERRED IN FAILING TO GRANT SUPPRESSION OF THE PHOTO ARRAY VIEWED BY THE VICTIMS IN THIS CASE AND THEIR SUBSEQUENT IN-COURT IDENTIFICATION OF [APPELLANT] SINCE THE PHOTO ARRAY WAS UNDULY SUGGESTIVE?
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> II. WHETHER THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT [APPELLANT] COMMITTED THE CRIME OF ROBBERY BY INFLICTING BODILY INJURY UPON ANOTHER PERSON OR BY THREATENING ANOTHER PERSON OR BY INTENTIONALLY PUTTING ANOTHER PERSON IN FEAR OF IMMEDIATE BODILY INJURY, DURING THE COURSE OF COMMITTING A THEFT?
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> III. WHETHER THE [TRIAL] COURT ERRED IN DENYING [APPELLANT'S] MOTION TO SEVER CASE NUMBER CP-23-CR-7482-2010 FROM CASE NUMBER CP-23-CR-7481-2010 SINCE, BY CONSOLIDATING THE TWO CASES INTO ONE TRIAL, [APPELLANT'S] ASSERTION OF MISIDENTIFICATION IN EACH CASE, WAS UNDULY COMPROMISED AND VIOLATED HIS DUE PROCESS RIGHTS?

Appellant's Brief at 8.

With regard to Appellant's first issue, our scope and standard of review from the denial of a suppression motion are well settled:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. [Because] the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

***Commonwealth v. Reese***, 31 A.3d 708, 721 (Pa. Super. 2011) (citations omitted).

Appellant claims that the identification results of the photographic array should have been suppressed because the photographic array was "unduly suggestive." Appellant's Brief at 12-14. Specifically, Appellant argues that the photograph of him is the only one in the array where teeth are visible, and that this detail is important because each victim, when providing a description of the perpetrator to the police, noted that he had protruding front teeth as a distinguishing characteristic. *Id*. We have explained:

> Whether an out of court identification is to be suppressed as unreliable, and therefore violative of due process, is determined from the totality of the circumstances. Suggestiveness in the identification process is a factor to be considered in determining the admissibility of such evidence, but suggestiveness alone does not warrant exclusion. Identification evidence will not be suppressed unless the facts demonstrate

> that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than the others, and the people depicted all exhibit similar facial characteristics.

***Commonwealth v. Fulmore***, 25 A.3d 340, 346 (Pa. Super. 2011) (citations omitted). "The question for the suppression court is whether the challenged identification has sufficient indicia of reliability to warrant admission, even though the confrontation procedure may have been suggestive." ***Commonwealth v. Bruce***, 717 A.2d 1033, 1036 (Pa. Super. 1998) (citations omitted). "This question is examined by focusing on the totality of the circumstances surrounding the identification." ***Commonwealth v. Sanders***, 42 A.3d 325, 330 (Pa. Super. 2012).

In ***Commonwealth v. Kendricks***, 30 A.3d 499, 504 (Pa. Super. 2011) (citations omitted), this Court recently explained that "[t]he variance between the photos in an array does not necessarily establish grounds for suppression of a victim's identification. Photographs used in line-ups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics. Each person in the array does not have to be identical in appearance. The photographs in the array should all be the same size and should be shot against similar backgrounds." ***See also Commonwealth v. Fulmore***, 25 A.3d 340 (Pa. Super. 2011); ***Commonwealth v. Kubis***, 978 A.2d 391 (Pa. Super. 2009).

Here, the trial court, addressing Appellant's assertion that the photographic array was unduly suggestive, explained:

> [A]t the time of the [suppression] hearing, as well as later at [the] time of trial, the Commonwealth witnesses confirmed that the victims of each crime immediately identified [Appellant] as the perpetrator of the robbery in question. Further, and most importantly, the victims also testified that [Appellant] was a regularly observed customer of the mini market and the Exxon station for months before the robberies took place. There was no hesitation in the identification of [Appellant] because the victims each had familiarity with [Appellant] from his pattern of prior conduct.
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> In the first case, Ms. Kaur testified that [Appellant] had been a regular customer at the mini market, and that he frequented the store as often as 2 to 3 times each day for 6 to 7 months before committing the robbery. In the second case, Mr. Dahal also testified that [Appellant] came into the Exxon station as a regular customer.
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> * * *
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> [T]he thrust of [Appellant's] argument is that the photographic array presented to the victims in each case was unduly suggestive because [Appellant] was the only individual depicted with his teeth prominently visible and with mouth open. The testimony of the officers made clear that in generating the JNet photographic arrays which were used, the officers were able to select the characteristics of the alleged perpetrator from a menu of options. In this respect, they selected traits consistent with [Appellant] and the victims' statements, with regard to skin color, hair, facial hair, etc. The system does not generate nearly identical photographs of various possible perpetrators; it generates photographs of individuals that are similar in appearance.
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> Most importantly, in both cases, once the photographic displays were presented to the victims, they identified [Appellant] immediately and primarily because they recognized [Appellant] as a regular customer of the establishment. There is no persuasive suggestion of record that any alleged inadequacies

> to the photographic arrays allowed the victims to be confused in their identification of [Appellant].

Trial Court Opinion, at 4/20/12, at 3-4 (unnumbered) (citations to notes of testimony omitted).

The trial court's analysis is supported by the record. "In determining whether a particular identification was reliable, the suppression court should consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his or her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. The opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis." ***Bruce***, 717 A.2d at 1037 (citations omitted).

At the suppression hearing, Officer Paul McGrenera of the East Lansdowne Police Department testified that Narinda Kaur, one of the victims, informed him that sometime between 4 p.m. and 5 p.m. on January 20, 2010, Appellant entered the Mini Mart, looked around at various products and exited the store. N.T., 5/18/11, at 9-12. Appellant then returned to the store, and demanded money from Ms. Kaur. *Id*. Ms. Kaur testified that she knew Appellant from previous encounters, and described him as a "black male", "five-feet seven inches, 160 to 170 pounds", "bald [with] facial hair", and "what you would consider an overbite." *Id*. at 9-14, 37. Additionally, Officer McGrenara testified that Ms. Kaur's father, whom

the Officer interviewed the day after the crime, stated that, based on Ms. Kaur's description, he knew who Appellant was from previous encounters. *Id*. Officer McGrenera testified that following his interview with Ms. Kaur, he presented her with a photo array on February 17, 2010, at which time Ms. Kaur picked out Appellant's photo "within seconds" and without hesitation. *Id*. at 34.

Officer John Meehan of the East Lansdowne Police Department testified that he interviewed the other robbery victim, Bakah Dahal, on April 19, 2010, following a report of the theft at the Exxon station. Officer Meehan testified that Mr. Dahal stated that he recognized Appellant because he was "a regular customer of the store" and provided a description that matched that of Appellant, who had been identified as a suspect in another robbery. N.T., 5/18/11, at 49-57. Officer Meehan prepared a photo lineup, which he presented to Mr. Dahal, who immediately identified Appellant. *Id*. at 63. Officer Meehan agreed on cross-examination that Mr. Dahal informed him that the perpetrator "appeared to have a severe problem with his teeth." *Id*. at 66.

Based on our independent review of the record, we conclude that under the totality of the circumstances, the photo arrays presented to Ms. Kaur and Mr. Dahal were not unduly suggestive. Both victims were familiar with Appellant prior to the crime. Both victims had sufficient opportunity to see Appellant's face during the commission of the crimes, and both victims

stated that they recognized Appellant. With respect to the photo arrays, all of the individuals depicted exhibited similar facial characteristics such as face shape, attire, facial hair, skin complexion, and hairstyle, and the pictures are taken against similar backgrounds, such that Appellant does not stand out. *See* Commonwealth Exhibits 1 and 2 - photo arrays. While Appellant is the only individual depicted with his teeth showing, under the totality of the circumstances, this did not create a substantial likelihood of misidentification rendering the photo array unduly suggestive. ***See Bruce***, 717 A.2d at 1037 (witness' opportunity to view the defendant before the commission of the crimes and at the crime scene, the accuracy of her description of the defendant, her quick and certain identification of defendant at the show-up, and the brief time between the crime and the show-up, provided sufficient indicia of reliability to warrant the admission of the identification evidence); ***Commonwealth v. Crork***, 966 A.2d 585, 588 (Pa. Super. 2009) (photo array which contained only one other man with light colored eyes was not unduly suggestive as all the people depicted exhibited similar facial characteristics and nothing about the defendant's photo, including the tone of his eyes, caused it to stand out); ***Commonwealth v. Blassingale***, 581 A.2d 183, 190 (Pa. Super. 1990) (identification of defendant by the victim was reliable because of the ample period of time in which to observe, favorable lighting conditions, and close proximity of the perpetrator at the time of the crime); ***Commonwealth v.***

***Griffin***, 412 A.2d 897, 900 (Pa. Super. 1979) (photographic identification which contained an element of suggestiveness, would not be excluded unless the totality of the circumstances shows that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification).

In his second issue, Appellant argues that the evidence was insufficient to establish that he committed the crime of robbery by inflicting bodily injury, or threatening or intentionally putting either victim in fear of immediate bodily injury, during the course of committing the thefts. Appellant's Brief at 15-21.

Our standard of review with regard to this challenge is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

***Commonwealth v. Devine***, 26 A.3d 1139, 1145 (Pa. Super. 2011).

Appellant was convicted of two counts of robbery graded as a felony of the second degree. An individual is guilty of robbery if "in the course of committing a theft, he … inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury." 18 Pa.C.S.A. § 3701(a)(1)(iv). "Bodily injury" is defined as "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301.

In ***Commonwealth v. Leatherbury***, 473 A.2d 1040, 1043 (Pa. Super. 1984), we explained that "[a]n aggressive act intended to place the victim in fear that he was in danger of immediate physical harm was sufficient to elevate an attempted theft to robbery, 18 Pa.C.S.A. § 3701(a)(1)(iv)." Here, Mr. Dahal testified that Appellant approached him at the cashier's area of the store, at 4 o'clock in the morning, when Mr. Dahal was alone. N.T., 10/12/11, at 163-196. When Mr. Dahal tried to lock a door to separate himself from Appellant, Appellant pushed the door open, grabbed Mr. Dahal very tightly by the hand and demanded money. *Id*. at 163-167. Mr. Dahal testified that Appellant made a hand movement in his pocket in a manner that led Mr. Dahal to believe Appellant had a weapon. *Id*. at 168. Appellant then demanded money and after Mr. Dahal opened the cash drawer, Appellant took the money and some cigarettes and fled. *Id*. at 168-170. Mr. Dahal testified that he felt "scared" at the time. *Id*.

Ms. Kaur testified that during the course of the robbery, she was in the store, alone, when Appellant, while standing "right in front of [her] face",

began to shout demands for money. N.T., 10/12/11, at 54-57. Appellant then moved towards her, pressing behind the counter and cornering her in an enclosed space. *Id.* at 58. She testified that she feared that Appellant would harm her, that Appellant's actions made her feel "very scared" and that she believed it was the "end of [her] life that day." *Id.* Given the foregoing, we agree with the trial court that there was sufficient evidence for the jury to convict Appellant of robbery pursuant to 18 Pa.C.S.A. § 3701(a)(1)(iv), on the basis that Appellant "intentionally put the victims in fear of immediate bodily injury during the course of committing the thefts."

In his third issue, Appellant argues that the trial court erred in denying his motion to sever the case at Docket No. 7481 of 2010, from the case at Docket No. 7482 of 2010. Appellant's Brief at 22-24. Appellant claims that the consolidation of the two cases compromised his assertion in each case that he was misidentified, suggested to the jury that the thefts occurred in the same manner, and violated his due process rights. *Id.*

The Pennsylvania Rules of Criminal Procedure provide:

> (1) Offenses charged in separate indictments or informations may be tried together if:
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> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
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> (b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. Rule 582(A)(1)(a) and (b) (formerly Pa.R.Crim.P. 1127). Additionally, Pa.R.Crim.P. 583, pertaining to the severance of offenses, states that "[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. Rule 583 (formerly Pa.R.Crim.P. 1128).

Our Supreme Court, considering Pa.R.Crim.P. Rules 582 and 583 together, set forth the following three-part test for deciding a motion to sever:

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the [trial] court must ... determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

***Commonwealth v. Collins***, 703 A.2d 418, 422 (Pa. 1997) c*iting* ***Commonwealth v. Lark***, 518 Pa. 290, 302, 543 A.2d 491, 496–97 (1988).

In addition, the Court explained:

> Whether or not separate indictments should be consolidated for trial is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant. ... Evidence of distinct crimes is inadmissible solely to demonstrate a defendant's criminal tendencies. Such evidence is admissible, however, to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the

> others. This will be true when there are shared similarities in the details of each crime.

***Commonwealth v. Keaton***, 729 A.2d 529, 537 (Pa. 1999) (citations omitted).

Here, the trial court explained its rationale for consolidating the cases as follows:

> In the present case, there were clear shared similarities in the details of each crime. Specifically, (1) the crimes occurred within a few blocks of each other; (2) the offenses were committed within a few months of each other; (3) in each case, [Appellant] waited until the store owner/operator was alone; (4) each robbery involved a sudden rush to the cash register with a demand for the money; (5) each robbery occurred in a small commercial establishment with which [Appellant] was familiar and was a frequent customer.
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> Further, the evidence of each case was easily distinguishable by the jury and was presented through the testimony of different police officers and victims. The similarities of the cases creates sufficient logical connection to render the consolidation of the trials proper.

Trial Court Opinion, 4/20/12, at 7 (unnumbered).

Our review of the record supports the trial court's determination that the consolidation of the two cases was not unduly prejudicial to Appellant, in light of the fact that separate witnesses testified as to the circumstances of each crime, and the circumstances of each crime were easily distinguishable to avoid the danger of confusion. Moreover, the evidence in each case would likely be admissible in a separate trial for the other, for the purpose of showing a common plan, scheme, or design, or to establish the identity of

the perpetrator. ***Keaton, supra***. Given the foregoing, we find no abuse of discretion by the trial court, and therefore affirm the judgment of sentence.

Judgment of sentence affirmed.