

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1030

Appellee

Trial Court No. CR0200902722

v.

Carl Brown

DECISION AND JUDGMENT

Appellant

Decided: February 11, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kathryn J. T. Sandretto, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that denied appellant's motion to suppress and found him guilty of one count of burglary. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On August 30, 2009, Toledo police officers responded to a call reporting a burglary at 219 Oakland. The 9-1-1 call was made by Rhonda Pettaway, who observed three black males breaking into her neighbor's home. Pettaway gave police a description of a black male she saw leaving the house carrying a television. She stated that the man was wearing white shoes, white pants, a white shirt and a blue jacket with stripes on the sleeves. Within a few minutes, police located three black males in a residential front yard a few blocks from the burglary. One of the men – appellant Carl Brown – was wearing clothing that fit the description given by Pettaway. Appellant was sitting on the ground about 25 feet away from a television. When appellant was patted down, a remote control was found in his pocket. Based on the witness' description and the evidence found on appellant's person, police brought Pettaway to see if she could place any of the men at the scene of the burglary. Pettaway identified appellant as the man she saw carrying the television out of her neighbor's house. Appellant was arrested and charged with one count of burglary in violation of R.C. 2911.12(A)(2) and (C).

{¶ 3} Appellant was indicted on the burglary charge and on November 13, 2009, filed a motion to suppress the identification. A hearing was held on the motion and on November 19, 2009, the motion was denied. Trial began on January 5, 2010, and on January 6, 2010, the jury found appellant guilty of the burglary charge. Appellant was sentenced to seven years incarceration.

{¶ 4} Appellant sets forth the following assignments of error:

{¶ 5} "1. The Trial Court erred when it denied Appellant's motion to suppress evidence.

{¶ 6} "2. Appellant's conviction falls against the manifest weight of the evidence."

{¶ 7} In support of his first assignment of error, appellant asserts that the identification procedure was unreliable and unnecessarily suggestive. Appellant seems to infer that Pettaway's identification of him when he was apprehended should be deemed unreliable because she did not give the police a physical description of the suspect when she called 9-1-1. Appellant further argues that the practice of using a one-on-one identification is inherently suggestive and has been "widely condemned."

{¶ 8} It is well-established that when considering a motion to suppress, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. It is similarly well-established that an appellate court will not disturb a trial court's decision on a motion to suppress so long as the decision is supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting those facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Luckett*, 4th Dist. Nos. 09CA3108, 09CA3109, 2010-Ohio-1444, ¶ 8, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 9} The legal standard to be met in this case is two-fold. First, the defendant must demonstrate that the challenged identification was unnecessarily suggestive. *State v. Freeman*, 8th Dist. No. 85137, 2005-Ohio-3480, ¶ 18. If that burden is met, we must then decide "whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Torres*, supra, ¶ 80, citing *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325.

{¶ 10} The practice of a one-person "show-up" may be suggestive under certain circumstances. See *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 24. However, Ohio courts have held that under some circumstances, such as when the show-up occurs shortly after the time of the crime, the identification could be very accurate. *State v. Madison* (1980), 64 Ohio St.2d 322, 332, citing *Bates v. United States* (C.A.D.C. 1968) 405 F.2d 1104, 1106. Therefore, we must consider whether, under the totality of the circumstances, the identification of appellant was reliable in this case. In so doing, we must consider several factors, including (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness, and (5) the length of the time between the crime and the confrontation. *State v. Thompson*, 8th Dist. No. 79938, 2002-Ohio-2390, ¶ 14-20, citing *Neil v. Biggers* (1972), 409 U.S. 188.

{¶ 11} At the suppression hearing, the state presented the testimony of Pettaway and several police officers. Pettaway initially saw appellant in the victim's yard as she

drove home after work at approximately 2:00 a.m. on August 30, 2009. Pettaway testified that when she first saw appellant outside her neighbor's house he was standing under an outdoor spotlight about 15 feet away from her. At that time, she looked directly into appellant's face. She drove around the block and then stopped in a parking lot across the street, watching as appellant ran toward another house. Pettaway then saw appellant return to the victim's house and come out carrying a television. She also observed two other black males leave the house carrying boxes. She continued to watch as appellant walked toward a side street with the television on top of his head; she then called 9-1-1.

{¶ 12} After reviewing the circumstances surrounding the identification of appellant in this case, we find that the record contains competent, credible evidence to support the trial court's finding that Pettaway's identification of appellant was not unreliable or unnecessarily suggestive. When Pettaway initially observed appellant, he was standing under an outdoor yard light. The record shows that Pettaway identified appellant for the police within approximately 30 minutes of the burglary. She stated that she identified appellant without any prompting from the police officer. Pettaway testified that when she identified appellant she was "100 percent sure" he was the man she saw carrying the television because "it was still fresh in my mind." Further, Pettaway's initial description of the suspect's clothing was consistent with appellant's attire when he was apprehended.

{¶ 13} Accordingly, we find that the trial court did not err by denying appellant's motion to suppress. Appellant's first assignment of error is not well-taken.

{¶ 14} In support of his second assignment of error, appellant challenges the weight of the evidence against him, citing the lack of any fingerprint evidence and the fact that Pettaway did not provide a description of appellant's facial features when she called 9-1-1. Appellant further asserts that there was only one witness to the crime and claims that her testimony alone is not sufficient to convict him of burglary beyond a reasonable doubt. Appellant again challenges the one-on-one identification; however, because we have already found that the identification was properly admitted, that argument is without merit.

{¶ 15} In determining whether a judgment was against the manifest weight of the evidence, an appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The court then sits as a "thirteenth juror" and determines whether the factfinder lost its way, resulting in a manifest miscarriage of justice, such that the conviction must be reversed. *Id.*

{¶ 16} Appellant was convicted of burglary in violation of R.C. 2911.12(A)(2), which states that "* * *[n]o person, by force, stealth, or deception, shall * * * trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense * * *."

{¶ 17} At appellant's trial, the state presented the testimony of five Toledo Police Department officers, witness Rhonda Pettaway, and Simmie Barksdale, the victim. The defense did not call any witnesses.

{¶ 18} Officer William White testified that he responded to the victim's house, searched the premises and talked to Pettaway. White observed signs of forced entry and indications that items had been removed from the home. He further testified that he contacted a detective who determined that it was not necessary to collect fingerprints since officers had apprehended three suspects, stolen items had been located and identified by the victim, and the eyewitness had identified one of the suspects. Officer Shawn Mohler testified that he responded to the scene with Officer White. Mohler broadcast Pettaway's description of the suspect as wearing white clothing and a dark jacket with stripes, and then began to search the area on foot.

{¶ 19} Officer Donald O'Brien, who patrolled the area after the burglary was broadcast, identified appellant at trial as the individual he observed a few minutes after the burglary sitting near the street about 25 feet from a television. The officer noticed appellant because his clothing matched the description given of one of the suspects. O'Brien approached appellant for questioning; when the officer patted appellant down, he found a remote control in one of appellant's pockets.

{¶ 20} Officer Lawrence Emery testified that he responded to the vicinity and stopped when he observed Officer O'Brien approaching a male subject that matched the description of one of the suspects.

{¶ 21} Sergeant Thomas Morelli testified that when he responded to the scene Pettaway gave him her description of one of the suspects. Because three suspects had already been detained, Morelli contacted a detective to determine whether he should conduct a one-on-one identification. The one-on-one was authorized and Morelli drove Pettaway to the location where the suspects were being held. Morelli testified that he told Pettaway that several individuals had been detained and that they may or may not have been involved in the burglary. He explained that she should let him know whether or not she could identify any of the individuals and that if she could not, that was "fine" and the police crews would continue looking for suspects. Morelli further testified that Pettaway was able to immediately provide a "very positive" identification of appellant as one of the men involved in the burglary.

{¶ 22} As she had at the suppression hearing, Pettaway testified that she observed a man directly outside the victim's house as she drove by on her way home from work. The man was wearing white shoes, white pants, a white shirt, and a dark jacket; she stopped and watched because she was wondering why he was there. Pettaway suspected that the victim, whom she knew, was not home because his car was not in the driveway. She then saw the man leave the yard and head toward another house. Pettaway drove around the block looking for the man. She again drove past the house and stopped in a parking lot across the street. At that time, Pettaway noticed two other men carrying boxes from the house. As she continued to watch, she saw a man she identified in court as appellant go into the house and come out carrying a television. Pettaway then went to

another neighbor's house and called the police. She testified that she had a clear view of appellant's face and clothing because the victim's house has a large outdoor spotlight which was on at the time. Pettaway further testified that when she was taken to the scene of the arrest she was able to identify appellant with certainty as the man she saw leave the house with the television. The identification occurred no more than 30 minutes after Pettaway observed the burglary. Pettaway was not able to identify the other two men as having been at the victim's house.

{¶ 23} Simmie Barksdale, the victim, testified that when he returned home on the night of the burglary he saw that his front door had been kicked in. He also saw that a television, radio, DVD player with remote and some other items had been taken. Barksdale testified that he did not know appellant and that appellant did not have permission to enter his home and take his property on the night of the burglary.

{¶ 24} Based on the testimony summarized above and the applicable law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge of burglary. See *Thompkins*, supra. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 25} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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