

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0879

STATE OF LOUISIANA

VERSUS

BRADLEY J. TALBERT

Judgment Rendered: February 14, 2007

On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Livingston
State of Louisiana
Docket No. 19264

Honorable Ernest G. Drake, Jr., Judge Presiding

Scott M. Perrilloux
District Attorney
Leslie Austin
Assistant District Attorney
Livingston, LA
Morgan Griggs
Assistant District Attorney
Amite, LA

Counsel for Appellee
State of Louisiana

Mary E. Roper
Baton Rouge, LA

Counsel for Defendant/Appellant
Bradley J. Talbert

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Bradley J. Talbert, was charged by bill of information with carjacking, a violation of LSA-R.S. 14:64.2. He pled not guilty and moved to suppress the identification. Following a hearing, the trial court denied the motion to suppress. Defendant was tried by a jury and convicted of the lesser and included offense of unauthorized use of a motor vehicle, a violation of LSA-R.S. 14:68.4. Defendant was sentenced to ten years at hard labor. He now appeals, urging in a single assignment of error that the trial court erred in denying his motion to suppress the identification. Finding no error, we affirm defendant's conviction and sentence.

FACTS

On the night of New Year's Eve 2004, Terry Sistrunk and his fiancée, Tracey Rhodus, returned to their Denham Springs apartment and saw a black male inside Sistrunk's truck, which had been parked in the complex parking lot. When Sistrunk approached and asked what the man was doing in his truck, a brief struggle ensued before the man fled the area on foot. Sistrunk chased the man, but was unable to catch him. Sistrunk returned to the apartment. Upon inspection of his truck, Sistrunk realized that his toolbox and some of his tools were missing. Sistrunk then used Rhodus's car, a Mustang convertible, to drive around the area in search of the perpetrator. As he passed by the CarQuest store located down the street from his apartment, Sistrunk observed a black male seated inside a red Geo in the store's parking lot. Although the individual clearly was not the same individual that he had chased earlier, Sistrunk decided to stop to investigate. Since the individual had fled on foot empty-handed, Sistrunk believed he must have had an accomplice who assisted in stealing the toolbox and tools. Sistrunk pulled into the parking lot and asked the man what he was doing.

The man stated that his vehicle had run out of gas. As Sistrunk conversed with the man, he observed what he recognized as his Craftsman toolbox and drill in the rear of the Geo. Sistrunk immediately recognized the toolbox as his based upon a tear on the sticker. When Sistrunk told the man that the items in the car belonged to him, the man started the vehicle and attempted to leave. Sistrunk held on to the vehicle's door, reached inside the vehicle and somehow managed to turn it off. A struggle ensued. The man ultimately pushed Sistrunk down, got into Rhodus's Mustang, and drove away, leaving the Geo behind.

Later, when the police arrived and searched the Geo, they discovered several personal items bearing defendant's name. These items included a State of Louisiana identification card, a social security card, two check stubs, and an organizer that contained defendant's name and address. The Geo was determined to be insured by a Denise Stuart of 5667 Denova Street in Baton Rouge, the same address listed on defendant's personal identification.

With this information, Officer Brad Ford of the Livingston Parish Sheriff's Office, the investigating officer, went to the Livingston Parish jail and got a picture of defendant. Officer Ford then returned to Sistrunk's apartment, showed him the picture, and asked if he had ever seen the individual in the picture. Sistrunk immediately advised that the individual in the picture was the same person he had struggled with and who had taken off in Rhodus's Mustang.

Several days later, Sistrunk reported to the Livingston Parish Sheriff's Office and requested that charges be instituted against defendant. The matter was turned over to the detective division. Detective Ken McMorris then compiled a photographic lineup containing defendant's photograph and

presented it to Sistrunk. Sistrunk immediately and unequivocally identified defendant as the perpetrator. Defendant was subsequently arrested. Sistrunk also positively identified defendant as the perpetrator in open court during the trial.

ASSIGNMENT OF ERROR DENIAL OF MOTION TO SUPPRESS

In his sole assignment of error, defendant contends the trial court erred in denying his motion to suppress the identification the victim made while viewing a single photograph. Defendant maintains this identification procedure was unduly suggestive and unreliable. Defendant further asserts that this improper identification procedure tainted the subsequent identification made from the photographic array and the in-court identification. Thus, he argues that the trial court erred in failing to suppress each of the identifications. In response, the state asserts that even if the initial identification procedure was suggestive, considering the facts and circumstances of the offense, there was no likelihood of misidentification. Thus, the state contends, the trial court did not err in denying the motion to suppress.

An identification procedure is suggestive if it unduly focuses a witness's attention on the suspect. **State v. Neslo**, 433 So.2d 73, 78 (La. 1983); **State v. Robinson**, 386 So.2d 1374, 1377 (La. 1980). Our jurisprudence permits testimony of a prior identification to support the present in-court identification. Even in tainted pretrial identifications, our courts have rejected a per se exclusionary rule and have adopted the same reliability test used for in-court identification. In **Manson v. Brathwaite**, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court allowed evidence of a suggestive pretrial identification from a single

photograph by an undercover police agent after determining that it was reliable. In that decision the court concluded that “reliability is the linchpin in determining the admissibility of identification testimony [.]” Reliability is to be determined by the totality of the circumstances. **Manson v. Brathwaite**, 432 U.S. at 114, 97 S.Ct. at 2253.

Thus, a defendant attempting to suppress an identification must prove the identification was suggestive *and* that there was a substantial likelihood of misidentification by the eyewitness. Even should the identification be considered suggestive, that alone does not indicate a violation of the defendant’s right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Reed**, 97-0812, pp. 4-5 (La.App. 1 Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. An in-court identification may be permissible if there is not a “very substantial likelihood of irreparable misidentification.” **State v. Martin**, 595 So.2d 592, 595 (La. 1992). See also State v. Jones, 94-1098, p. 6 (La.App. 1 Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320. Single-photograph identifications should be viewed in general with suspicion. **Jones**, 94-1098 at p. 5, 658 So.2d at 311. See Simmons v. U.S., 390 U.S. 377, 383, 88 S.Ct. 967, 970-71, 19 L.Ed.2d 1247 (1968).

If the identification procedure is determined to be suggestive, courts look to several factors to determine, from the totality of the circumstances, if the suggestive identification presents a substantial likelihood of misidentification. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s 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. **Martin**, 595 So.2d at 595 (citing **Neil v. Biggers**, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)). Against these factors is to be weighed the corrupting effect of the suggestive identification itself. **Martin**, 595 So.2d at 595. A trial court's determination of the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. **Reed**, 97-0812 at p. 5, 712 So.2d at 576.

Upon review of the record in this case, we find that the initial identification procedure used by Officer Ford was both suggestive, because the single photograph unduly focused Sistrunk's attention on defendant as the suspected perpetrator, and unnecessary, because there was no emergency or exigent circumstance involved. See **Martin**, 595 So.2d at 595. When asked why he chose to use a single photograph, Officer Ford replied, "[i]t was just for me, really. I was just wanting to make sure this was the person that I was going to go look for." There was absolutely no exigency involved. Officer Ford could have waited to present the victim with a complete photographic display, as Detective McMorris did a few days later.

Having determined that the single-photograph identification was both suggestive and unnecessary, the **Biggers** factors must be considered to determine if the victim's ability to make an accurate identification outweighs the corrupting effect of the challenged identification procedure. Analyzing the reliability of the in-court identification in this case under the totality of the circumstances, this court finds it to be reliable. We find that the indicators of Sistrunk's ability to make an accurate identification significantly outweigh the corrupting effect of the single-photograph identification.

The record before us confirms that Sistrunk had ample opportunity to view the perpetrator face-to-face in the well-lit parking lot prior to and during the commission of the offense. The perpetrator did not wear a mask over his face or attempt to conceal his identity. Sistrunk, who initially approached the perpetrator in connection with his personal investigation regarding the stolen tools, spoke directly with the perpetrator regarding his presence in the area and then regarding the toolbox observed inside the Geo. Thus, it is clear that Sistrunk's degree of attention was high. Also, there was no evidence that Sistrunk ever demonstrated any doubts about his identification of defendant as the perpetrator. In fact, in both pretrial identification procedures and at the trial, Sistrunk's level of certainty was unwavering. Each time, Sistrunk immediately, positively, and unequivocally identified defendant. Only a short time elapsed between the encounter and Sistrunk's identification of defendant from the photograph. Furthermore, as previously noted, defendant's identification and other personal property were recovered from the Geo left at the scene. Thus, under these circumstances, we find there did not exist a substantial likelihood of misidentification. The trial court did not err or abuse its discretion in denying the motion to suppress. Accordingly, this assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.