

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01162 COA

JAMES ANDREW FISHER II

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

SAMUEL H. WILKINS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS NATURE OF THE CASE: FELONY: BURGLARY OF AUTOMOBILE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE 6 YEARS IN THE MDOC, PAY COURT COST, FEES & ASSESSMENTS

MANDATE ISSUED: 6/24/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

The Circuit Court of Rankin County sentenced Appellant to serve 6 years in the custody of the Mississippi Department of Corrections after a jury convicted him of automobile burglary. Aggrieved,

the Appellant appeals and contends: (1) The trial court erred by refusing to declare a mistrial when testimony suggesting prior criminal activity was admitted into evidence; (2) The in-court identification of defendant was impermissibly tainted; and (3) The conviction was against the overwhelming weight of the evidence. We find no error and affirm the conviction and sentence.

FACTS

In the early morning hours of December 4, 1992, Michelle Weaver saw a light flash outside her Summit Ridge home located in the Crossgates subdivision of Brandon. From her garage bedroom, Weaver peered out the window and saw a man inside her vehicle. Weaver awakened her mother and step-father and told them that someone was attempting to steal her vehicle. Weaver's step-father ran outside, saw the man in Weaver's vehicle, and yelled at him. The man ran and Weaver's step-father pursued him until he fell and injured his hand.

Weaver's mother telephoned the police, and officers were dispatched to Weaver's residence. Officer Lawless, on routine patrol when he heard the radio dispatch regarding the burglary, proceeded to search the Crossgates area for suspicious activity. During the search, Lawless saw a van traveling from the area where the burglary occurred. Lawless attempted to stop the van, but the van traveled for approximately one-quarter of a mile before it came to a halt. When the van had come to a stop, Lawless asked the driver of the van to present his driver's license. The Appellant, driver of the van, was recognized by Lawless as a prior acquaintance.

Another officer appeared at Weaver's residence and interviewed Weaver and her family. Weaver and her step-father told the officer about the events which had transpired, but were unable to describe the individual seen running from the vehicle. After the officer had departed, Weaver and her family went inside the house and began to talk about the incident over coffee. During the discussion, Weaver and her step-father described the clothing and the appearance of the individual seen running from Weaver's vehicle. Weaver's mother telephoned the police when she realized that her daughter and husband could describe the individual seen running from the vehicle. Weaver and her step-father told officers that the suspect wore a stripped shirt and blue jeans.

Lawless told the investigator that he stopped the Appellant in the area where the burglary occurred, and he was wearing a stripped shirt and wet tennis shoes. Thereafter, the investigator went to Appellant's residence and asked for the shirt he was wearing when Officer Lawless stopped him. The Appellant gave the investigator the shirt and agreed to go to the police station for questioning.

At the station, the Appellant told officers that prior to the stop, he had been watching television at a friend's residence and was on the way to his home, also located in the Crossgates subdivision. The Appellant was photographed and permitted to leave.

Appellant's photograph and the photographs of five other individuals with similar physical characteristics were shown to Weaver and Weaver's step-father. Both Weaver and her step-father identified the Appellant as the perpetrator of the crime. At trial, Weaver and her step-father also identified Appellant as the man seen running from Weaver's vehicle.

ANALYSIS OF THE ISSUES AND DISCUSSION OF THE LAW

DID THE TRIAL COURT ERR BY DENYING APPELLANT'S MOTION FOR NEW TRIAL WHEN TESTIMONY SUGGESTING PRIOR CRIMINAL ACTIVITY WAS ADMITTED INTO EVIDENCE?

On direct examination, Officer Lawless described the circumstances leading to his stop of Appellant on the morning of the burglary. During his testimony, Officer Lawless said:

I pulled the van over of course for being suspicious activity in the area due to a burglary that had occurred. I identified Mr. Fisher, ask him for his driver's license. At that point I recognized Mr. Fisher, I've had dealings with Mr. Fisher as an acquaintance in the past, and I told him the reason I was stopping him was because

Then, Appellant's counsel objected and moved for a mistrial. The court overruled the objection and denied the motion for mistrial. Appellant argues that it was error for the court to deny the motion for mistrial because the officer's statement regarding being acquainted with Appellant suggested that Appellant had a prior history of criminal activity and that on December 4, 1992, he acted in conformity with his criminal character. When we consider the context of Officer Lawless' statement, we are unable to conclude that Officer Lawless' prior acquaintance with Appellant was occasioned by law enforcement activities. Officer Lawless specifically stated that he recognized Appellant because he was an acquaintance. This statement does not suggest that the acquaintance resulted from Appellant's prior criminal activities, if any. Moreover, we find nothing in the record, which suggests that the prosecution sought to introduce evidence of Appellant's prior criminal history. Thus, we find Appellant's argument to be lacking in merit.

II.

WAS THE IN-COURT IDENTIFICATION IMPERMISSIBLY TAINTED?

The Appellant argues that substantial credible evidence supporting the in-court identification does not exist under the totality of the circumstances. Appellant's challenge to the identification is predicated upon the fact that Weaver and her step-father discussed the identity of the suspect before providing police with the description. In essence, the Appellant asserts that the description provided by Weaver and her step-father was impermissibly suggestive and tainted the in-court identification.

"Reliability" is the linchpin for determining the admissibility of identification testimony. *Powell v. State*, 566 So. 2d 1228, 1238 (Miss. 1990) (citation omitted). Reliability is primarily measured by the eyewitness's opportunity to view the perpetrator of the crime. If the eyewitness had an opportunity to view the perpetrator of the crime, the method used for identifying the defendant recedes in importance in inverse ratio to the intelligence of the witness and the opportunity to view the perpetrator. *Powell* 566 So. 2d at 1237 (Miss. 1990) (citation omitted). Thus, the discussion between Weaver and her step-father has little significance if each had an opportunity to view the perpetrator of the crime. From the testimonies of Weaver and her step-father, we discern that they had an opportunity to view the perpetrator of the crime.

Weaver testified that she saw a man in the front seat of her car from the windows of the garage

bedroom. The vehicle was parked directly in front of the windows with the dome light on. Weaver's step-father testified that when Weaver awoke him and stated someone was in her vehicle, he turned the light on at the front door and went outside. The dome light in Weaver's vehicle was on, and the perpetrator was leaning over the steering wheel. The proximity of the cars to the garage bedroom and the lighting conditions described by Weaver and her step-father afforded them an opportunity to view the perpetrator. Under the totality of the circumstances, we find substantial credible evidence supporting the in-court identification. This assignment of error lacks merit.

III.

WAS THE JURY'S VERDICT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

The Appellant argues that the verdict was against the overwhelming weight of the evidence because the testimony of alibi witnesses revealed that Appellant was elsewhere at the time the burglary occurred. The standard of review applied to Appellant's challenge is:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part that the evidence, taken in the light most favorable to the verdict, no reasonable hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

The evidence most favorable to the verdict includes (1) Officer Lawless' testimony that he stopped the Appellant within the vicinity of the burglary, and he was wearing a stripped shirt; (2) Weaver and her step-father's testimony that the perpetrator wore a stripped shirt; and (3) Weaver and her step-father's positive identification of Appellant as the perpetrator of the crime. When we consider this evidence, we find that a reasonable hypothetical jury could find defendant guilty beyond reasonable doubt. Even though the testimony of defense witnesses indicated that Appellant was elsewhere at the time of the burglary, the jury was free to accept or reject the testimony as credible. Apparently, the jury found the testimonies of the alibi witnesses incredible. Our deferential standard of review requires us to accept the jury's credibility determination. Therefore, the verdict was not contrary to the overwhelming weight of the evidence.

In conclusion, we find Appellant's appeal to be lacking in merit and therefore, affirm the judgment and sentence of the trial court.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY OF CONVICTION OF AUTO BURGLARY AND SENTENCE OF 6 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH DIRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.