IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

JAMES ROBERT DAY,)
Appellant,)
v.) CASE NO. 38028
THE STATE OF NEVADA,)
Respondent.)

FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada

2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:**

James Tufteland
Clark County District Attorney's Office
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3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:** Same as (2) above.

4. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:** None

5. **Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement:**

On or about April 22, 2000, Robert Day (the Defendant) was arrested and charged with Robbery With Use of a Deadly Weapon and Burglary While in Possession of a Deadly Weapon. The Defendant filed a Motion to Dismiss the Information based on the failure of the prosecution to obtain and preserve the identity of a material witness who allegedly would have supported the Defendant's story (Appellant's Appendix 017, 026). That motion was denied by the court (Recorder's Transcripts 3-12-01) and the matter was tried by jury on March 13 and 14, 2001. The Defendant was found guilty of both charges.

Prior to trial, the State filed an Amended Information alleging habitual criminal status (A.A.- 014). A Second Amended Information was filed subsequent to trial, again alleging habitual criminal status, but modifying the prior convictions alleged (A.A. - 064). The Defendant was sentenced on May 9, 2001, and over the Defendant's objection, the court ordered that he be treated as a habitual criminal. The Defendant was sentenced to the maximum term of 300 months and a minimum of 120 months with 382 days credit for time served.

6. **Statement of facts. Briefly set forth facts material to the issues on appeal only if dissatisfied with statement set forth in the fast track statement:**

On April 22, 2000, Karen Walker, who was employed at the Parkway Inn Motel located at 5201 S. Industrial, Las Vegas, Nevada, was robbed shortly before 1 p.m. (Trans. Vol. I, p. 8). Ms. Walker testified that the robber came behind the counter where she was working and told her to open the cash drawers (R.T. I-12). The robber was holding a knife with a two and one half to three inch blade (R.T. I-13). She said that he removed all of the paper money from the drawer and stuffed it into his pockets (A.A. 014). Ms. Walker described the robber as having salt and pepper grey hair, a mustache, approximately her height and age (5'5" and 52 years old) and wearing blue jeans and a blue and white t-shirt (R.T. I-38-39). Officer Huffmaster, the first officer on the scene, obtained a description from Ms. Walker which was broadcast to other police. Ms. Walker told Huffmaster that the robber was "late 40's, grey hair, blue shirt and jeans" and that the robber had no tattoos (R.T. I-51, 53).

Approximately 20 minutes later, Sgt. Flaherty saw the Defendant and said he matched Ms. Walker's description of the robber (R.T. I-82; R.T. II-24). The Defendant was not wearing a shirt and was walking around a truck stop next to the Wild Wild West Casino on Tropicana Avenue, (RT. II-25). Sgt. Flaherty approached the Defendant and asked to speak with him (R.T. I-84). At the time the Defendant was speaking with a truck driver whose identity has never been determined (R.T. II-25, 26). Shortly after Sgt. Flaherty approached the Defendant, the Defendant took off running across Tropicana

(R.T. I-91) climbed into a truck which was parked across the street to hide and was physically pulled from the truck by Sgt. Flaherty and other officers (R.T. I-88-90). Sgt. Flaherty searched the Defendant and found $1,018.55 in his pockets, (R.T. II-29) the majority of the money being crumpled up in the Defendant's pocket (R.T. I-91). The Defendant also was in possession of a small knife with a 2" blade (R.T. II-14). Ms. Walker was brought to the scene of the arrest where she identified the Defendant as the robber (R.T. I-42-43).

At trial, Ms. Walker disclosed that one of the police officers had given her a picture of the Defendant, so she could show co-workers in the event the Defendant returned. (R.T. I-44-45). Ms. Walker also testified that she had seen the Defendant maybe ten times or so prior to the date of the robbery when he would rent a room at the motel (R.T. I-18). Furthermore, she stated that she had occasional conversations with the Defendant concerning these rooms (R.T. I-20).

The State was never able to determine exactly how much money was taken in the robbery. Officer Huffmaster said that he was told and wrote in his report that the amount taken was $1,051 (R.T. I-56). Ms. Walker said that there was "just over $1,000" in the cash drawers (R.T. I-12). Billy Ramirez, the general manager of the motel, testified that he did not remember the exact amount of money taken but that it was "a little over a $1,000" (R.T. I-65). Ms. Walker testified that all but $12 was returned by police (R.T. I-18). The $1,018.55 which was found in the Defendant's pocket was returned to Mr. Ramirez (R.T. I-14, 65-66).

The Defendant testified that he worked as a "lumper," a day laborer who assists truck drivers in loading and unloading their cargo (R.T. II-40). He also would occasionally go out on the road with a trucker for longer periods of time (R.T. II-40). He testified that lumpers congregate in the area of a truck stop on Tropicana Avenue, though they are often chased away from that property by Wild Wild West security (R.T. II-45).

The Defendant testified that on April 22, 2000, he had just returned from a week on the road with another trucker and had been paid $650 in cash (R.T. II-43). On April

22, he picked up a job as a lumper for another truck driver whose name he did not know (R.T. II-43, 46). Allegedly, he and two other lumpers helped the driver deliver a load in Las Vegas and returned to the truck stop (R.T. II-46). The Defendant further testified that he and some other lumpers began to drink beer and shoot craps while they waited for the driver to cash a comp check so that he could pay them for their work (R.T. II-48). The Defendant alleges that he won some money gambling and was then paid by the driver (R.T. II-49-50). The Defendant then testified that it was at this time that Sgt. Flaherty appeared (R.T. II-49-50). The Defendant then said that he ran when he learned Sgt. Flaherty was police because he believed there was a parole violation warrant for his arrest (R.T. II-39, 53).

7. **Issue on appeal.**

1. The Court did not err in denying the Defendant's Motion to Dismiss due to the State's failure to preserve the identity of a witness.

2. The Court did not err when it allowed the District Attorney to elicit from Sgt. Flaherty statements made by the unidentified truck driver.

3. Ms. Walker's in-court identification of the Defendant was not impermissibly tainted.

8. **Legal Argument, including authorities:**

I. THE COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO DISMISS

The Defendant argues that the court erred when it denied his Motion to Dismiss due to the State's failure to preserve the identity of the truck driver with whom the Defendant was conversing with when approached by Sgt. Flaherty. The Defendant relies on Brady v. Maryland, 373 U.S. 83 (1963) for the proposition that the State must produce any exculpatory evidence, or evidence which is material to either guilt or innocence or to punishment.

The Defendant's reliance on Brady is misplaced. The Court in Brady stated, "We now hold that the suppression by the prosecution of evidence favorable to an accused

upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. In the present case, the Defendant never requested nor did the State suppress evidence that was favorable to the defense. The statement made by the truck driver was inculpatory and in no way favorable to the Defendant. Thus, the State had no duty to produce such evidence.

In addition, the Defendant's actions made it impossible for Sgt. Flaherty to investigate the truck driver. When Sgt. Flaherty made contact with the Defendant and the truck driver and stated there had been a robbery, the Defendant took off running. Sgt. Flaherty's only option was to leave the truck driver as well as his car running with the door open, and give chase (R.T. II-34). After apprehending the Defendant, the truck driver was not where Sgt. Flaherty had last seen him (R.T. II-34) As such, Sgt. Flaherty could not have obtained any additional information from the truck driver due to the Defendant's actions.

The Defendant's argument might be interpreted as a claim that the State lost evidence or in the alternative a failure to preserve evidence. The District Court's decision to deny the Defendant's motion is supported by the ruling in Daniels v. State, 1998 WL 154721 (Nev.). In Daniels, the Supreme Court distinguished between evidence lost by the State and the State's failure to preserve evidence. The Supreme Court held that it would apply a two-part test when the State fails to preserve evidence. The first part requires the defendant to show that the evidence was "material," meaning that there is a reasonable probability that, had evidence been available to the defense, the result of the proceedings would have been different. If the evidence was material, then the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. If the failure to gather evidence was the result of mere negligence, no sanctions are involved. If it is the result of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. In cases of bad faith, the dismissal of the

charges may be an available remedy based on an evaluation of the case as a whole. Daniels, at 3.

In the instant case, the Defendant fails to establish that the truck driver's testimony was material. Instead, the Defendant only makes bare and unfounded conclusions as to what the truck driver's testimony might have been. Furthermore, the Defendant assumes that this testimony would have been favorable to his case even though the only statement made by the truck driver was inculpatory. It is reasonable to believe that the truck driver would have waited for Sgt. Flaherty to return from chasing the Defendant if he possessed any exculpatory information.

The Defendant also has failed to establish that Sgt. Flaherty's failure to investigate the truck driver was negligent, grossly negligent, or done in bad faith. Instead, the Defendant attempts to show that the failure to investigate the truck driver prejudiced his case. The Defendant relies on Deere v. Nevada, 100 Nev. 565, 566, 688 P.2d 322, 323 (1984) for the proposition that he need only make some showing that it could be reasonably anticipated that the evidence sought would be exculpatory. The Defendant's bare and unfounded assertions as to what the truck driver's testimony might have been do not satisfy this threshold.

II. THE COURT DID NOT ERR WHEN IT ALLOWED THE STATE TO ELICIT FROM SERGEANT FLAHERTY THE STATEMENTS MADE BY THE TRUCK DRIVER

The Defendant argues that the court erred when it allowed Sgt. Flaherty to disclose the statement made by the truck driver. The Defendant asserts that this statement was hearsay and as such inadmissable.

The Defendant's argument is without merit because the truck driver's statement cannot be defined as hearsay. Hearsay is defined as, "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Federal Rule of Evidence 801.

In the present case, the truck driver's statement was an out-of-court statement, however, it was not made for the truth of the matter asserted. Instead, the truck driver's

statement was offered to show its effect on the hearer. Specifically, the statement was offered to show its effect on Sgt. Flaherty and why he did not further investigate the trucker.

Sgt. Flaherty spoke with the truck driver only after he had made contact with the Defendant (R.T. II-33) The purpose of Sgt. Flaherty's conversation with the truck driver was to ensure that he had stopped the person who had committed the robbery (R.T. II-33). Based on the truck driver's statement and its effect on Sgt. Flaherty, Sgt. Flaherty returned his attention to the Defendant. It was only upon returning to the Defendant and stating that there had been a robbery, that the Defendant took off running (R.T. II-34).

The truck driver's statement was not only permissible but was required when defense counsel inquired as to Sgt. Flaherty's failure to further investigate the truck driver and his failure to locate the Defendant's t-shirt. Defense counsel opened the door to the statement when it repeatedly raised these issues.

III. MS. WALKER'S IN-COURT IDENTIFICATION OF THE DEFENDANT WAS NOT IMPERMISSIBLY TAINTED

The Defendant argues that Ms. Walker's identification of the Defendant was impermissibly tainted. The Defendant first argues that Ms. Walker's description of the robber was "a fairly generic description," (Defendant's Fast Track Statement). From what Officer Huffmaster remembered, Ms. Walker described the Defendant as being male in his 40's, with gray hair and wearing a blue shirt and jeans (R.T. I-51). The description given to Sgt Flaherty consisted of "a white male, mid 40's , blue jeans and a white and blue, I believe, striped shirt, with a mus-[sic]." The Defendant states that he matches these descriptions only in that he is a white male with a gray hair and a mustache. The Defendant's argument is without merit because Ms. Walker's description was sufficiently accurate. Because of its accuracy, Sgt. Flaherty was able to identify the Defendant while he was on Tropicana Avenue (R.T. I-82).

The Defendant attempts to bolster his argument by stating that Ms. Walker erroneously described the Defendant as being approximately her height and age. In truth,

Ms. Walker is 5'5" tall and 52 years old while the Defendant 45 years old and six inches taller. It is the State's contention that these descriptions were quite accurate. Ms. Walker cannot be expected to precisely state the Defendant's exact height and age. Her description was merely an estimate and should not be considered as a precise description.

The Defendant also argues that Ms. Walker's identification of the Defendant is flawed because she did not remember seeing any scars, marks or tattoos on the Defendant (R.T. I-41) when he does have some tattoos on his arms. However, even though Ms. Walker did not remember seeing any markings on the Defendant, her identification was accurate enough for Sgt. Flaherty to identify the Defendant. Therefore any reference of markings was insignificant.

The Defendant next argues that Ms. Walker's in-court identification was tainted because she had been given a picture of the Defendant after the robbery and that circumstances surrounding her one-on-one identification were unduly suggestive.

While courts have decided that one-on-one identifications of defendants can be unduly suggestive, they have by no means found that they are inadmissible in court. In fact, even if the one-on-one identification is unnecessarily or unduly suggestive, the court must nevertheless admit it if it determines that the identification is reliable. Gherke v. State, 96 Nev. 581, 613 P.2d 1028, (1980). In order to make that determination, a court may look at the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Gherke at 584.

A show-up identification is fine so long as it's sufficiently reliable to overcome an unnecessarily suggestive procedure. Bias v. State, 105 Nev. 869, 872, 784 P.2d 963, 966 (1989). The key is whether the identification was reliable. Bias at 872. The following factors clearly support a finding that Ms. Walker's identification of the Defendant was reliable.

1. Ms. Walker had ample opportunity to view the Defendant at the time he robbed the motel.

When the Defendant robbed the motel, Ms. Walker stated that she saw the Defendant behind the desk (R.T. I-9) and testified that the Defendant was right beside her when she first saw him (R.T. I-12). She also was able to observe the Defendant as he ran from the scene as well as while she pursued him (R.T. I-16). In addition, Ms. Walker was previously familiar with the Defendant. Ms. Walker testified that she had seen the Defendant "maybe ten times or so" before the day of the robbery because he would stay at the motel (I R.T-18). Thus, Ms. Walker not only had ample time to observe the Defendant, but she also was familiar with the Defendant.

2. Ms. Walker's description of the Defendant was accurate.

Ms. Walker's description of the Defendant was sufficiently accurate as previously argued. Those arguments are incorporated herein.

3. The length of time between the crime and the confrontation was around 20 minutes, thus Ms. Walker's memory was fresh and reliable.

In People v. Mascarenas, 666 P.2d 101 (Colo. 1983), a one-on-one identification was allowed because of the freshness and accuracy of the witness's memory. Similar to the present case, only a short amount of time had elapsed between the crime and the confrontation.

In addition, the court in Bias v. State, 105 Nev. 869, 872, 784 P.2d 963, 966 (1989), determined that the identification was sufficiently reliable to overcome the unnecessarily suggestive procedure in which it was procured. This was so even though the victim was told by police that they believed the defendant was a suspect and brought the witness in to view him. Additionally, the witness wasn't even one hundred percent (100 %) sure if it was the right person until the defendant spoke. Although only four (4) hours elapsed between the crime and the identification, the court reiterated that the test for reliability is based on the totality of the circumstances.

Ms. Walker's one-on-one identification of the Defendant was made only after she: had observed him commit the robbery; was previously familiar with him; and described him quite accurately to the police. She then identified him to the police around twenty (20) minutes after the robbery (R.T. I-41). In light of these factors, Ms. Walker's identification of the Defendant was sufficiently reliable to overcome any unnecessarily suggestive procedure and the court in admitting the identification at trial.

As long as it is established that the identification of a defendant is independently reliable, even an unconstitutional one-on-one identification will not preclude the witness from identifying the defendant in court. Goudeau v. State, 637 P.2d 859 (Okla. 1981). The reasoning behind this is that the most important concern, when admitting evidence, is reliability. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Furthermore, identification testimony is simply evidence. Manson at 113. Such evidence is admitted frequently. It is then up to counsel to cross examine witnesses and argue in summation about any factors that exist which may create doubt about the reliability of that identification. Manson at 114.

Ms. Walker's one-on-one identification of Defendant was, for the reasons already stated, correctly admitted as evidence. However, even if there had been error on the part of the trial court, Ms. Walker's in-court identification of the Defendant was nevertheless admissible since the basis for that identification had been independently established during her testimony at trial.

Ms. Walker testified that she had seen the Defendant "maybe 10 times or so" before the time of the robbery. This shows that Ms. Walker had an independent basis, totally aside from the one-on-one identification, from which to base her identification of the Defendant in court. There was no reason to doubt the reliability of such testimony.

9. **Preservation of the Issue. State concisely your response to appellant's position concerning the preservation of issues on appeal:**

Issue I and II are properly preserved. Issue III has not been preserved as defense counsel failed to object at the time of the in-court identification.

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 28th day of August 2001.

STEWART L. BELL
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By: _____
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Fast Track Response to the attorney of record listed below on this 28th day of August 2001.

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