

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 2484

STATE OF LOUISIANA

VERSUS

JIMMY RAY SMITH

Judgment Rendered: May 8, 2009

**Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 06-06-0050**

Honorable Anthony Marabella, Judge Presiding

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Jimmy Ray Smith**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

The defendant, Jimmy Ray Smith, was charged by bill of information with one count of armed robbery, a violation of LSA-R.S. 14:64 (Count 1), and one count of possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1 (Count 2). The defendant entered a plea of not guilty. After trial before a jury, the defendant was found guilty as charged.

The State subsequently instituted habitual offender proceedings. Following a hearing, the trial court adjudicated the defendant a second felony habitual offender. The trial court sentenced the defendant on Count 1 (armed robbery) as a second felony habitual offender to a term of eighty years at hard labor without benefit of parole, probation, or suspension of sentence. The trial court also sentenced the defendant on Count 2 (felon in possession of a firearm) to a term of fifteen years at hard labor without benefit of probation, parole, or suspension of sentence, to be served consecutively to his sentence on Count 1.

Defendant appeals, citing the following as error:

Did the district court commit reversible error when it permitted the State to use a photographic lineup in which [defendant's] picture was placed directly in the middle of the lineup and positioned in such a way as to draw the witness[es'] attention to his picture as oppose[d] to the [other] five men in the lineup?

We affirm the defendant's convictions, habitual offender adjudication, and sentence on Count 1. We vacate the sentence on Count 2 and remand for resentencing.

FACTS

On January 12, 2006, Sharon Lott was working at the Hibernia Bank branch on Government Street in Baton Rouge. Lott customarily worked supervising the tellers behind the counter, but had stepped across the lobby to use a phone at the assistant manager's desk. While Lott was on the phone, she looked directly out of the windows that made up the side of the building. Lott, who was familiar with the

pedestrian traffic near the bank, noticed a black male, whom she described as an unfamiliar person, walking on the side of the bank. Lott noticed the man was dressed in black pants and a black shirt with some type of writing on it. The man looked directly at her through the windows for a period of two to three seconds.

Lott lost sight of the man, but only a few seconds later, a man dressed in the same clothes entered the lobby of the bank, pulling a ski mask over his face and holding a gun. The man ordered everyone to get down and announced he was robbing the bank. Lott got down on the lobby floor and the man jumped over the tellers' counter and ordered the tellers to fill a bag he had brought in with money. The tellers complied and also placed into the bag a dye packet that would explode a short time after it left the premises.

Following the robbery, the police were called to the scene and an investigation ensued. Several days following the robbery, Lott was shown a photographic lineup, but could not pick out the individual she had seen outside the bank. Lott viewed a second photographic lineup in March, but again was unable to identify any of the men pictured as being involved in the robbery.

In the meantime, Paul Barbin, an officer of the armed robbery division of the Baton Rouge Police Department, had developed defendant as a suspect in this robbery. Barbin prepared a photographic lineup that included a picture of defendant. On April 5, 2006, Lott viewed this lineup and selected the defendant's picture as the person she saw outside of the bank right before the robbery. Both Lott and Barbin testified that no one made suggestions or influenced Lott in selecting the defendant's picture. At trial, Lott also identified the defendant as the individual she saw outside the bank just before the robbery. She commented that his hair length at trial was longer than at the time of the robbery.

At trial, Barbin explained that he had access to two photographs of the defendant, the one he placed in the lineup and another one in which the defendant

had shoulder-length hair. Barbin used the picture where the defendant had shorter hair. He conceded that the photograph shows the defendant standing somewhat further away from the camera than the customary distance in these types of pictures. Barbin explained that he had not taken the picture of the defendant and that the photograph was all he had to work with. In challenging the fairness of the lineup, defense counsel elicited testimony that Lott had described the robber as wearing a black shirt with lettering on it and pointed out that, in the lineup picture of the defendant, he was wearing a shirt with lettering, although of a different color. However, Lott herself disputed that this coincidence was the basis for her selection of the defendant's picture.

Barbin explained that he purposefully placed the defendant's picture in the number 5 slot of the lineup (second row, middle) to get the victim to look at all of the pictures. Barbin explained that in his experience, people view lineups as if they are reading, starting from left to right and top to bottom.¹

SUGGESTIVE LINEUP

In the defendant's sole assignment of error, he argues the district court committed reversible error by allowing the State to present "tainted, suggestive evidence" to the jury regarding Lott's identification of the defendant as the perpetrator of these crimes.

In reviewing the record, we note that although the minute entry of July 3, 2007, indicates the trial court heard evidence and denied a motion to suppress, the record does not contain the motion to suppress or a transcript of the hearing on the

¹Although not at issue on appeal, the State presented the testimony of Alyson Saadi, an expert in DNA analysis, that the bag recovered near the bank with the dye and cash had been tested for DNA samples. Saadi was able to obtain a DNA profile, which included a major and minor contributor, from the bag and compare that profile to the swab taken from the defendant. Saadi concluded that there was only a one in five trillion probability that the major contributor of the DNA profile taken from the bag came from someone other than the defendant.

motion to suppress.² A party moving for appeal must request transcription of that portion of the proceedings necessary for review in light of the assignments of error urged. LSA-C.Cr.P. art. 914.1A; State v. Washington, 533 So. 2d 989, 993 (La. App. 1st Cir. 1988); State v. Vampran, 491 So. 2d 1356, 1364 (La. App. 1st Cir.), writ denied, 496 So. 2d 347 (La. 1986). There is no indication that the defense made any effort to ensure that the transcript of the hearing on the motion to suppress was included in this record; thus, there is nothing to review.

Moreover, we note that during Lott's trial testimony, the prosecutor presented State Exhibit 2, which Lott identified as the third photographic lineup she viewed (the one containing the defendant's picture). After Lott testified that she had selected photograph number five (the defendant's picture), the prosecutor moved to offer, file, and introduce State Exhibit 2 into evidence. Notably, when the trial court inquired whether there was any objection by defendant, defense counsel replied, "No objection, your honor."

An evidentiary issue is not preserved for appellate review, unless a contemporaneous objection to the evidence was entered. See LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841.³ Because the defendant failed to contemporaneously object to the introduction of the lineup, this alleged error was not preserved for appeal. However, in an abundance of caution, because the July 3, 2007 minute entry provides, at best, a minimal indication that there was some objection to the photographic lineup, we note that we have reviewed the trial

²We further note that defense counsel's brief fails to mention the existence of a motion to suppress evidence. Rather, defense counsel's brief states with regard to this assignment of error, "Naturally, Defense counsel objected to the State's use of this photographic lineup as being prejudicial, but the district court rejected the notion that the lineup was prejudicial, and allowed the State to present this evidence to the jury." Defense counsel's brief fails to provide any record reference concerning an objection to the photographic lineup.

³As the record does not contain a written motion to suppress, LSA-C.Cr.P. art. 841(B) is not applicable.

testimony and the photographic lineup itself and conclude that there was no impropriety in the preparation or showing of the lineup.

To suppress an identification, a defendant must first prove that the identification procedure was suggestive. An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. However, even where suggestiveness of the identification process is proven by the defendant or presumed by the court, the defendant also must show that there was a substantial likelihood of misidentification as a result of the identification procedure. State v. Higgins, 2003-1980, p. 19 (La. 4/1/05), 898 So. 2d 1219, 1232-33, cert denied, 546 U.S. 883, 126 S. Ct. 182, 163 L. Ed. 2d 187 (2005).

In reviewing the trial transcript, we find no evidence that the lineup itself or the procedure utilized by the police was suggestive. First, although defendant's picture shows slightly more of his upper body than the rest of the individuals pictured in the lineup, Barbin testified this slight difference was due to the fact that at the time the particular photograph was taken, the defendant happened to be standing further away from the camera than most subjects stand. Second, there is nothing in the record to suggest that the fact that the defendant is pictured wearing a shirt with writing on it, and that Lott described him as wearing a shirt with lettering on it at the time of the robbery, constitutes anything other than a mere coincidence. Lott testified that she would not have identified the defendant as the perpetrator due to this similarity. Third, Barbin testified that he placed the defendant's picture in position number 5 to ensure that the witness viewed all of the photographs before making an identification. Barbin testified that in his experience, witnesses view photographic lineups in the same manner as they read, moving from left to right and down the page.

Considering the testimony in the record, we cannot say the trial court erred in admitting the photographic lineup. There is no indication in the record that the

lineup was prepared or conducted in an improperly suggestive manner. This assignment of error is without merit.

REVIEW FOR ERROR

In conducting our review for errors under LSA-C.Cr.P. art. 920(2), we note the trial court failed to impose the mandatory fine as required for convictions of possession of a firearm by a convicted felon of not less than one thousand nor more than five thousand dollars. LSA-R.S. 14:95.1(B). Accordingly, the defendant's convictions and habitual offender adjudication and sentence on Count 1 are affirmed. However, his sentence on Count 2 is vacated and the matter is remanded to the trial court for resentencing in accordance with LSA-R.S. 14:95.1(B).

**CONVICTIONS AFFIRMED; HABITUAL OFFENDER
ADJUDICATION AND SENTENCE ON COUNT 1 AFFIRMED;
SENTENCE ON COUNT 2 VACATED AND REMANDED FOR
RESENTENCING.**