

Keith Emory MOSER v. STATE of Arkansas  
CR 85-102 696 S.W.2d 744

Supreme Court of Arkansas  
Opinion delivered October 7, 1985

1. CRIMINAL PROCEDURE — IDENTIFICATION BEFORE TRIAL — SUGGESTIVE ELEMENTS IN BEFORE-TRIAL IDENTIFICATION VIOLATES DUE PROCESS. — If there are suggestive elements in the before-trial identification procedure that make it all but inevitable that the victim will identify one person as the criminal, the procedure is so undermined that it violates due process.
2. CRIMINAL PROCEDURE — BEFORE-TRIAL IDENTIFICATION NOT IMPERMISSIBLY SUGGESTIVE. — Where the police showed the victim pictures of six young, caucasian men with dark skin, dark hair, and dark eyes, and four of the six had a mustache, including appellant, whom the victim identified as her assailant, without the police trying to influence her in any way, the before-trial identification procedure was not impermissibly suggestive.
3. EVIDENCE — DISCREPANCY IN TESTIMONY OF POLICE AND PROSECUTRIX REGARDING IDENTIFICATION PROCEDURE — DISCREPANCY GOES TO CREDIBILITY. — Where the police asked the prosecutrix to look at a file of photographs on two occasions, and she identified the appellant in the second group, the fact that she testified that she identified him after looking at 20 or 25 photographs and the police testified that she picked him from the second group of only six photographs does not indicate that the photospread was impermissibly suggestive, but, instead, the discrepancy goes to the credibility of the witnesses.
4. EVIDENCE — RELIABILITY OF IDENTIFICATION TESTIMONY — FACTORS TO BE CONSIDERED. — Among the factors which may be considered in determining whether identification testimony is reliable are: opportunity to observe the person charged with the crime; the lapse of time between the crime and the identification; the occurrence of misidentification; discrepancies between the descriptions given the police and the accused's actual description; the certainty of the witness in identifying the accused; and the facts and circumstances regarding the identification and all matters

relating to it.

5. EVIDENCE — ADMISSIBILITY OF PROSECUTRIX'S TESTIMONY CONCERNING IDENTIFICATION — RELIABILITY. — The prosecutrix's testimony was reliable and therefore admissible where she testified that the defendant was in her bedroom 15 to 20 minutes during the rape; there was a lattice partition with two-inch holes in it between her bedroom and the adjoining room where a 100-watt lightbulb was burning, and, therefore, she had sufficient light and time to view her assailant; she identified a photograph of him only four days after the crime; and she was certain in the identification.
6. EVIDENCE — ADMISSIBILITY OF IDENTIFICATION EVIDENCE — STANDARD OF REVIEW. — A trial court's ruling on the admissibility of identification evidence will not be reversed unless it is clearly erroneous.

Appeal from Pulaski Circuit Court; *John Langston*, Judge; affirmed.

*William R. Simpson, Jr.*, Public Defender, and *Jerry Sallings*, Deputy Public Defender, by: *Donald K. Campbell*, Deputy Public Defender, for appellant.

*Steve Clark*, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. The sole assignment of error in this case is that the trial court improperly admitted evidence of appellant's identification before trial. We find no error and affirm the convictions for rape, burglary, and breaking and entering.

Identification proceedings customarily involve two steps. First, the trial judge is required to examine the before-trial identification procedure so that he can rule on whether that procedure was impermissibly suggestive or unreliable in any manner. If the trial judge finds that it was not impermissibly suggestive or unreliable, the second step is taken. In the second step, the jury weighs the evidence under the instructions of the court. Both steps were taken in the case at bar, and the appellant was found guilty. He argues that the trial judge committed error in step one because the identification evidence was (1) impermissibly suggestive and (2) unreliable.

[1] If there are suggestive elements in the before-trial identification procedure that make it all but inevitable that the victim will identify one person as the criminal, the procedure is so

undermined that it violates due process. *Foster v. California*, 394 U.S. 440 (1969); *Glover v. State*, 276 Ark. 253, 633 S.W.2d 706 (1982). There were no such suggestive elements in this case.

[2] On the morning after the crimes were committed, the police asked the prosecutrix to look through a filebox of facial photographs to see if she could identify her assailant. Appellant's photograph was not in the group of pictures. The prosecutrix said that her assailant's photograph was not among those that she had examined. Four days later, according to the police, appellant's photograph was placed in a group of six photographs for the prosecutrix to examine. The prosecutrix saw the appellant's picture and told the police, "This is the man." The six pictures did not suggest the appellant as the criminal. Each picture was of a young caucasian man with dark skin, dark hair, and dark eyes. Additionally, four of the six, including appellant, had moustaches. None of the testimony suggests that the police tried to influence the prosecutrix's identification of appellant.

[3] The appellant points out that the police description of the photospread and the prosecutrix's description are not the same because she thought she looked at twenty or twenty-five photographs on the occasion she identified the appellant's photograph. This discrepancy in the number of photographs does not indicate that the photospread was impermissibly suggestive. Instead, it goes to the credibility of the witnesses. See *Harrison v. State*, 276 Ark. 469, 637 S.W.2d 549 (1982).

[4] The appellant next argues that the before-trial identification was unreliable. Among the factors which may be considered in determining whether identification testimony is reliable are: opportunity to observe the person charged with the crime; the lapse of time between the crime and the identification; the occurrence of misidentification; discrepancies between the descriptions given the police and the accused's actual description; the certainty of the witness in identifying the accused; the facts and circumstances regarding the identification and all matters relating to it. *Glover v. State, supra*.

The prosecutrix testified that she was awakened around 3:00 a.m. by the squeaking of her bedroom floor. She saw an intruder and started to get up. He hit her in the mouth and said, "You know what I want." He spent the next 15 to 20 minutes

raping her.

[5, 6] The prosecutrix testified that a light with a 100-watt lightbulb was burning in the adjoining room. The wall between the two rooms was a lattice partition with two-inch holes in it. Therefore, the prosecutrix had sufficient time and light to view her assailant; she identified a photograph of him only four days after the crime, and she was certain in the identification. A trial court's ruling on the admissibility of identification evidence will not be reversed unless it is clearly erroneous. *Kellensworth v. State*, 278 Ark. 261, 644 S.W.2d 933 (1983). The trial court's ruling was not clearly erroneous.

Affirmed.

PURTLE, J., not participating.

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