

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-406

MARCH TERM, 2004

	} APPEALED FROM:
	} District Court of Vermont, Unit No. 1, Windham Circuit
State of Vermont	}
	}
v.	} DOCKET NO. 870-6-01 Wmcr
	}
Kirk Stutes	} Trial Judge: Karen Carroll
	}
	}

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a conviction, based on a jury verdict, of armed robbery, in violation of 13 V.S.A. § 608(a). He contends the trial court erroneously: (1) admitted an in-court identification of defendant as the robber; (2) excluded the use of a prior conviction to impeach a witness; and (3) solicited juror questions. We affirm.

Viewed most favorably to the judgment, State v. Muscari, 174 Vt. 101, 105 (2002) , the record evidence may be summarized as follows. On the afternoon of May 28, 2001, defendant and an acquaintance, Gary Steber, drove from New Hampshire to Brattleboro, Vermont. On the way, they stopped at a Wal-Mart, where defendant purchased a BB or pellet gun. The men checked into a Days Inn motel in Brattleboro in the late afternoon. Defendant left the motel that evening around 8:30 or 9:30 p.m., and returned shortly thereafter. At around this time, a man entered a McDonald' s restaurant down the road from the Days Inn, and ordered. After receiving his order, he asked Naomi May, the shift manager, to sit down with him. She sat down opposite the man, who then told her that he had a gun and planned to rob the store. The man accompanied her to the store office, forced her to open the safe, removed the money and placed it in a bag. Another employee, Kevin Jay, entered the office, observed the robbery, and tripped a silent alarm. The man then left the store and ran down the road in the direction of the Days Inn.

The police arrived shortly thereafter and interviewed the employees, who provided varying descriptions of the robber. Later that evening, defendant informed Steber that he " did McDonald' s." The police identified defendant as a suspect, and in late June, Ms. May selected defendant' s photograph from a photographic lineup. She also positively identified defendant as the robber at trial. The police seized a pellet gun from defendant which, according to several witnesses, matched the one used in the robbery. Following a jury trial, he was convicted of armed robbery. This appeal followed.

Defendant first contends the court erred in permitting the in-court identification of defendant by Ms. May, alleging that it was tainted by certain suggestive pre-trial procedures. The first allegedly suggestive procedure was the officers' " group interview" with Ms. May and other McDonald' s employees following the incident. This was not raised as a ground for excluding the identification at trial, however, and therefore was not preserved for review on appeal. State v. Fisher, 167 Vt. 36, 43 (1997). Defendant also suggests that " it is possible" the police utilized suggestive procedures in connection with the witness' s photographic identification of defendant, but defendant offers no factual basis to support such a claim.

Finally, defendant contends the witness was impermissibly influenced before trial by viewing defendant enter the courtroom accompanied by law enforcement officers during several pre-trial hearings that she had attended at the invitation of the victim' s advocate. The court found that although this was suggestive, it did not undermine the

reliability of the witness' s in-court identification because the witness had ample opportunity to view defendant during the robbery, gave a description of defendant to the police after the incident that was not " far off from his actual appearance," provided a fairly accurate description of defendant' s clothes, and selected defendant' s photograph from a photographic lineup about six weeks after the incident. Although the witness acknowledged that she was not 100% positive about her selection of defendant' s photograph, she testified that she was 99.9% sure, and the court noted that defendant' s appearance was somewhat different in the photograph (defendant was clean shaven) from his appearance on the day of the robbery (when he had a stubble of beard).

A suggestive pretrial identification procedure does not preclude the admission of identification testimony so long as the identification possesses sufficient indicia of reliability, measured by such factors as the witness' s opportunity to view the defendant at the time of the crime, the degree of attention paid by the witness, the accuracy of the description, the level of certainty demonstrated by the witness, and the time elapsed. State v. Findlay, 171 Vt. 594, 597 (2000) (mem.). The court properly considered these factors here, where the witness viewed defendant face-to-face for three to five minutes, gave a reasonably accurate description of defendant after the offense, and identified defendant from a photographic line-up, an identification that she believed was 99.9% accurate. In this case, the earlier identification at the photographic line-up, before the witness viewed the defendant in the court proceedings, was the most important factor. See United States v. Emanuele, 51 F.3d 1123, 1131 (3d Cir. 1995); United States v. Loeffler, No. Crim. A. 97-446, 1998 WL 254962, at *4 (E.D. Pa. April 23, 1998). On the record before us, therefore, we cannot conclude that the court erred in finding the witness' s in-court identification to be reliable.

Defendant next contends the court erred in precluding him from impeaching the State' s witness, Gary Steber, with a prior felony conviction of attempted theft. The court correctly ruled that the prior conviction did not involve " untruthfulness or falsification" under V.R.E. 609(a)(1), and therefore was inadmissible for impeachment purposes unless the court found, under V.R.E. 609(a)(2), that its probative value " substantially outweigh[ed] its prejudicial effect." The court found, in this regard, that the prior conviction of attempted theft did not involve truthfulness or falsification and therefore had little probative value, that the nature of the actual prior offense was unclear (there was a suggestion that it involved an attempted shoplifting), and could confuse the jury, and that its probative value did not therefore substantially outweigh its prejudicial effect.

The court' s ruling was discretionary and must be upheld if there was a reasonable basis for it. State v. Ashley, 160 Vt. 125, 130 (1993). Although defendant asserts that the prior conviction demonstrated the witness' s " dishonesty," and that Steber was a " crucial" witness, the crime was not presumptively admissible as involving an element of untruthfulness or falsification under V.R.E. 609(a)(1), and the witness - while testifying at one point as to defendant' s admission of the crime - was one of several strong witnesses for the prosecution, including Ms. May, who positively identified defendant as the perpetrator, and Kevin Jay, who identified the weapon seized from defendant as the one used in the robbery. Accordingly, we discern no basis to conclude that the court abused its discretion in precluding use of the prior conviction to impeach.

Finally, defendant contends the court' s solicitation of juror questions requires reversal. We recently upheld the practice of juror questioning with proper procedural safeguards, see State v. Doleszny, 2004 VT 9, & 1, and defendant raises no specific objection to any particular question or procedure at trial. Accordingly, the claim is without merit.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Paul L. Reiber, Associate Justice