IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK DOUGLAS DENHAM — APPELLANT

VS. — NO. 2006-KA-0725-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. THE APPELLANT WAS NOT DENIED THE RIGHT TO CONFRONTATION.

II. NO EVIDENCE OF THE APPELLANT'S PRIOR BAD ACTS AND/OR CRIMES WAS ADMITTED INTO EVIDENCE.

III. THE PRE-TRIAL PHOTO LINE-UP WAS NOT IMPERMISSIBLY SUGGESTIVE, NOR WAS THE IN-COURT IDENTIFICATION TAINTED.

IV. THE TRIAL COURT PROPERLY REFUSED PROPOSED INSTRUCTION D-2.

STATEMENT OF FACTS

On March 3, 2005, after lunching with his wife and mother-in-law, Sheila Mathis, Nelson Peden returned to Mathis' house while the ladies went on a shopping excursion. Before entering the house, Peden smoked a cigarette underneath the carport. T. 109. As he was smoking he saw a man, who he identified approximately two hours later as Patrick Douglas Denham, run from behind the house, across the yard, to a nearby parked car. T. 110. As Peden jumped in his car to chase the burglar, Denham drove through the yard where Peden got a good look at his face. T. 111-12. During the car chase, Denham made a U-turn, running Peden off of the road. T. 113. Peden testified that at this point he got another good look at Denham's face. T. 114. Peden resumed the chase, but eventually lost sight of Denham's vehicle. T. 114. At some point in the chase, Peden called his wife to tell her to call 911 because her mother's house had been burglarized. T. 115. As Peden returned to Mathis' house, he also called 911 to report the incident. T. 115. Police officers arrived at Mathis' house, and Peden gave an initial statement to Officer Teck. T. 160. Within the next two hours, Peden was then asked to view a photo lineup at the police department where he positively identified Denham as the burglar. T. 116-18.

Crime scene investigator Denise Ruple determined that a utility room window appeared to be the burglar's point of entry and dusted the widow for fingerprints. T. 201. Ruple transferred the fingerprints she pulled from the window onto an index card which she delivered to the Mississippi Crime Laboratory. T. 202-03, 205. It was later determined that one of the fingerprints which was lifted from the inside of the utility room window belonged to Denham. T. 228.

On November 16, 2005, Denham was convicted by a Forrest County Circuit Court jury of burglary of a dwelling. C.P. 55. He was sentenced as a habitual offender to serve a term of twenty-five years in the custody of the Mississippi Department of Corrections. C.P. 56.

SUMMARY OF THE ARGUMENT

Denham claims that he was denied his right to confrontation because he was prohibited from cross-examining Jamie Bush, a Mississippi Crime Lab employee. However, Bush did not testify at trial, nor were any testimonial hearsay statements entered into evidence. Therefore, no confrontation clause violation could have occurred.

Denham argues that the trial court erred in admitting evidence of other crimes or bad acts. This simply did not happen. Denham was considered a possible suspect in other burglaries, but the jury was never informed of this fact. As part of their investigation of the other burglaries, the Forrest County Sheriff's Department had photographs of Denham and his vehicle. These photographs were admitted into evidence, but the jury never heard why the photographs had been taken. Accordingly, Denham's M.R.E. 404(b) argument must fail.

Denham also argues that the photographic line-up from which Peden positively identified him was impermissibly suggestive and, therefore, tainted Peden's in-court identification. However, Denham does not explain how the standard photographic line-up was suggestive, which is necessary before he can claim that the in-court identification was tainted. Even if the line-up had been impermissibly suggestive, which it was not, the evidence fully supports a finding that Peden's in-court identification of Denham was completely reliable.

The trial court properly refused proposed instruction D-2 as having no foundation in the evidence. The instruction referred to Peden's trial testimony as inconsistent with his prior statements. Denham's brief is devoid of any reference to the record which illustrates inconsistencies between Peden's testimony and prior statements because none exist.

ARGUMENT

I. THE APPELLANT WAS NOT DENIED THE RIGHT TO CONFRONTATION.

Denham argues that his right to confrontation was violated because he did not have the opportunity to cross-examine Jamie Bush, the section chief of the crime lab's latent print section. However, because Bush did not testify at trial and no testimonial hearsay statements attributed to Bush were entered into evidence, no confrontation clause violation could have occurred.

Denise Ruple, a crime scene investigator for the Hattiesburg Police Department, processed the crime scene. T. 195. Ruple dusted for fingerprints a window which she believed to be the burglar's point of entry. T. 201. The prints she pulled from the window were transferred onto a fingerprint card which she delivered to the Mississippi Crime Lab. T. 202, 203, 205-06. Detective Jeff Byrd subsequently took Denham's palm prints and fingerprints which were sent to the crime lab to be compared to the fingerprints found at the crime scene. T. 215. Paul Wilkerson, a latent fingerprint examiner at the Mississippi Crime Lab, was tendered as an expert in fingerprint identification with no objection. T. 220. After comparing fingerprints found at the crime scene with Denham's known fingerprints, Wilkerson concluded that a fingerprint left on the interior of a window of Mathis' home was made by Denham's left middle finger. T. 228.

Criminal defendants have a fundamental constitutional right to be confronted with the *witnesses who testify against them*. U.S. Const. amend. VI; Miss. Const. of 1890, Art. 3, §26. This right applies to in-court testimony as well as testimonial hearsay, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him. **Rubenstein v. State**, 941 So.2d 735, 754 (¶46) (Miss. 2006) (citing **Crawford v. Washington**, 541 U.S. 36, 53-54 (2004)). "[T]he purpose of the Confrontation Clause is 'to advance the accuracy of the truth determining process .

. . by assuring that the trier of fact has a satisfactory basis for evaluating the trust of a prior statement.'" **Id.** (quoting **Lanier v. State**, 533 So.2d 473, 488 (Miss.1988)).

Denham's claim is disingenuous as no prior statement attributable to Bush was presented to the jury. Rather, the jury heard only that Bush performed the initial examination at the crime lab. T. 223. Bush's report was not admitted into evidence, nor were his findings ever articulated to the jury. By no stretch of the imagination can Bush be considered a witness who testified against Denham. Accordingly, no confrontation violation occurred.

Although Denham styles his first assignment of error as a confrontation clause violation, his actual argument concerns the "failure to have Mr. Bush testify." Appellant's brief at 8. "[N]either the appellant, nor the court, instructs the State what witnesses that party shall put on the stand or how that party shall present its case." **Ahmad v. State**, 603 So.2d 843, 847 (Miss. 1992) (citing **Hickson v. State**, 512 So.2d 1 (Miss. 1987)). This issue is without merit.

II. NO EVIDENCE OF THE APPELLANT'S PRIOR BAD ACTS AND/OR OTHER CRIMES WAS ADMITTED INTO EVIDENCE.

The Forrest County Sheriff's Department considered Denham a possible suspect in other burglaries the department was investigating. T. 59. During the investigation of these burglaries, Sheriff's Deputy Nick Calico pulled Denham over and photographed him as well as his vehicle. T. 59. Prior to trial, defense counsel moved to have the photographs excluded, arguing that they were evidence of other crimes or bad acts. The court overruled the motion after ascertaining that Calico would not reference the fact Denham was a possible suspect in other burglaries. T. 60, 61. Calico's trial testimony revealed only that he had previously encountered Denham and had the opportunity to photograph him and his vehicle. T. 97-101. The photo of Denham's vehicle was entered into evidence as Exhibit 12. T. 98. During Peden's testimony, he identified the vehicle depicted in Exhibit 12 as the vehicle in which Denham fled the crime scene. T. 111.

The admissibility of evidence of other crimes or bad acts committed by the defendant is governed by M.R.E. 404(b). **White v. State**, 842 So.2d 565, 573 (¶24) (Miss. 2003). "The reason for the rule is to prevent the State from raising the inference that the accused has committed other crimes and is therefore likely to be guilty of the offense charged." **Id.** Denham asserts that evidence of his prior bad acts and other crimes was presented through Calico's testimony. However, Calico did not testify as to Denham's other crimes or bad acts. In fact, Calico specifically stated that during his encounter with Denham he was not engaged in any illegal conduct. T. 103. Accordingly, M.R.E. 404(b) is wholly inapplicable.

III. THE PRE-TRIAL PHOTO LINE-UP WAS NOT IMPERMISSIBLY SUGGESTIVE, NOR WAS THE IN-COURT IDENTIFICATION TAINTED.

The day before trial defense counsel filed a motion to preclude Peden from making an in-court identification of Denham. C.P. 35. Defense counsel unsuccessfully argued that none of the witnesses had identified Denham in person, so no foundation existed for an in-court identification. T. 55-56. On appeal, Denham claims that Peden's in-court identification of Denham was tainted by an unduly suggestive out-of-court identification.

After authorities responded to the 911 call, and within two hours of the burglary, Peden was asked to view a photographic line-up at the police station. T. 118. Peden positively identified Denham from the line-up, stating that he was one-hundred percent sure about his identification. T. 117, 150. "Pretrial photograph identifications have been generally upheld if the witnesses view the photographs separately and if there is no emphasis placed on certain photographs as opposed to others." **Isom v. State**, 928 So.2d 840, 847 (¶23) (Miss. 2006) (quoting **Burks v. State**, 770 So.2d 960, 963 (Miss.2000)). The line-up included photographs of five individuals, and nothing in the record, nor in the appellant's brief, indicates that any emphasis was placed on any of the photographs. See Exhibit 17. Peden subsequently identified Denham in court as the man he chased from Mathis' home. T. 114.

Citing **Neil v. Biggers**, 409 U.S. 188 (1972), Denham incorrectly states that the five **Biggers** factors are used to determine whether a line-up is impermissibly suggestive. Appellant's brief at 11. It must first be shown that the out-of-court identification was impermissibly suggestive before the **Biggers** factors even come into play. **Wilson v. State**, 574 So.2d 1324, 1327 (Miss. 1990) (citing **Jones v. State**, 504 So.2d 1196, 1199 (Miss. 1987)). The court then examines the **Biggers** factors "to determine whether the in-court identification is sufficiently reliable to overcome the taint of the

prior improperly attained identification." **Ellis v. State**, 667 So.2d 599, 605 (Miss. 1995) (quoting **Gayten v. State**, 595 So.2d 409, 418 (Miss.1992)). Denham fails to articulate any reason why the photographic line-up was impermissibly suggestive, and instead jumps right in to a faulty **Biggers** analysis. The State respectfully submits that Denham takes this approach because there was absolutely nothing about the photographic line-up which could be construed as suggestive, much less impermissibly so. Accordingly, the inquiry should end here. However, should this honorable Court find any reason to reach the **Biggers** factors, the State would offer the following analysis of the **Biggers** factors to show that the in-court identification was sufficiently reliable and admissible.

Opportunity of the witness to view the criminal at the time of the crime. While Peden was smoking a cigarette underneath the carport of Mathis' home, he saw Denham run from behind the house to his nearby parked car. T. 110. Denham came within ten to fifteen feet of Peden, and Peden was able to get a good look at Denham's face. T. 112. During the car chase, after Denham made a u-turn and ran Peden off of the road, Peden got another "real good look" at Denham's face. T. 114.

The witness' degree of attention. Considering the fact that a complete stranger was running from his mother-in-law's home, it is reasonable to believe that Peden was paying a great deal of attention to Denham. Further, Peden engaged Denham in a car chase, which likewise requires a great deal of attention.

The accuracy of the witness' prior description of the criminal. Peden described Denham as a black male with facial hair, who was six foot or taller and weighed approximately two-hundred pounds. Exhibit19. There is no evidence in the record to show Denham's actual height and weight. However, exhibits 11 and 17 do depict Denham as a black male with facial hair.

The level of certainty exhibited by the witness at the confrontation. Peden stated that he was

one-hundred percent certain in his identification of Denham in the photographic line-up. T. 117, 150.

The time between the crime and the confrontation. Peden positively identified Denham in the photographic line-up only two hours after commission of the crime. T. 118.

Because Peden positively identified Denham in a non-suggestive photographic line-up, the subsequent in-court identification was not tainted. Furthermore, an application of the **Biggers** factors shows that the in-court identification was sufficiently reliable.

IV. THE TRIAL COURT PROPERLY REFUSED PROPOSED INSTRUCTION D-2.

Denham offered the following instruction at trial. "You have heard the evidence that Nelson Peden made statements prior to trial that are inconsistent with his testimony at this trial. If you believe inconsistent statements were made by Nelson Peden, you may consider, [sic] the inconsistencies in evaluating the believability of Nelsen [sic] Peden's testimony." C.P. 53. The trial court properly refused the instruction as having no foundation in the evidence. T. 245.

A defendant is entitled to a jury instruction which presents his theory of the case, unless the instruction incorrectly states the law, is fairly covered elsewhere in the instructions, or lacks foundation in the evidence. **Phillipson v. State**, 943 So.2d 670, 671 (¶6) (Miss. 2006). The refused instruction incorrectly states that Peden's statements made prior to trial were inconsistent with his trial testimony. On appeal, Denham simply makes a conclusory statement that Peden's testimony was inconsistent, without offering any illustration or citations to the record to support this assertion. The reason is clear - there is simply nothing in Peden's pre-trial statement, Exhibit 19, which can be construed as inconsistent with his trial testimony. Accordingly, the trial court was correct in refusing proposed instruction D-2 as having no foundation in the evidence.

CONCLUSION

Denham was afforded the opportunity to fully confront and cross-examine all witnesses who testified against him. The jury heard no evidence other crimes or bad acts committed by Denham. The witness who caught Denham red-handed positively identified him from a standard, non-suggestive photo line-up and at trial. Finally, jury instruction D-2 had no foundation in the evidence and was, therefore, properly refused. Because no reversible error was committed in the trial court, the Appellee asks this honorable Court to affirm Denham's conviction of burglary of a dwelling and sentence of twenty-five years in the custody of the Mississippi Department of Corrections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LaDonna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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