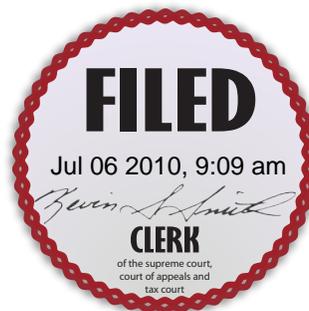


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ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FRANK BYERS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0910-CR-966

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49G06-0902-FA-26273

July 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Frank Byers appeals his convictions for Class A felony burglary, Class B felony robbery, and Class C felony criminal confinement. He contends that (1) the trial court erred in admitting evidence from a show-up identification because it was unduly suggestive and (2) the State failed to present sufficient evidence to prove his convictions beyond a reasonable doubt. We conclude that (1) the show-up identification was not unduly suggestive to rise to the level of fundamental error, so the trial court did not err in admitting the evidence and (2) the show-up identification is sufficient to sustain Byers' convictions. We therefore affirm.

Facts and Procedural History

On February 17, 2009, John Wylie left his Indianapolis apartment between 10:00 and 11:00 p.m. to return DVDs he had checked out from the public library near his home. As Wylie walked down the alley by his apartment toward the library, he was confronted by two men later identified as Byers and Kenneth Wilson. Byers asked to see the DVDs Wylie was carrying, and when Wylie refused, Byers took the DVDs out of his hand. Wilson then hit Wylie in the head, knocked him off his feet, and knocked his glasses off. As Wylie tried to recover his glasses, Byers went through Wylie's pockets and took his wallet, keys, cell phone, and a pack of cigarettes as Wilson held Wylie down to prevent him from moving. The men threatened to kill Wylie if he fought with them.

After Byers and Wilson left with Wylie's belongings, Wylie began walking back to his apartment thinking "that was a safe place for [him] to go." Tr. p. 51. As Wylie reached the edge of his yard, he was hit in the back of the head and knocked down face

first onto the ground. Wylie looked up from the ground to find Byers and Wilson again. Byers told Wylie they were going to use Wylie's keys to enter his house. Wylie refused to inform Byers and Wilson which key would unlock his apartment and told them to "figure it out on their own." *Id.* at 52. Byers and Wilson responded to Wylie's refusal by hitting, punching, and kicking Wylie as he was still on the ground. Wylie was attacked for about ten or fifteen minutes. Meanwhile during Wylie's beating, Byers and Wilson told Wylie that "[i]f you fight us, argue with us, we will shoot you." *Id.* at 53. He briefly stood up to try to defend himself, but one of the men hit Wylie in the face with a beer can and knocked him off his feet again.

Byers and Wilson were able to determine which key unlocked Wylie's apartment. Wilson dragged Wylie inside the apartment and pushed him down onto his couch while Byers searched around the apartment for items to take. The men then told Wylie to "lay face down on the floor or they would kill [him]." *Id.* at 56. Byers and Wilson searched Wylie's apartment for about ten minutes and left with Wylie's desktop computer and DVD player.

As soon as the assailants left, Wylie went to a Village Pantry convenience store to call the police. Indianapolis Metropolitan Police Department Officer Jason Ehret responded to Wylie's call. Officer Ehret arrived at the Village Pantry to find Wylie shaken and disheveled. Wylie gave Officer Ehret descriptions of the two assailants, which were relayed to the dispatcher. He told Officer Ehret two white males had robbed him. Wylie described one of the assailants as "one white male younger, mid-twenties, tall, about five eleven, thin build, approximately one fifty, one sixty pounds, dark jeans

with some type of logo on the back pocket, and a hooded sweatshirt.” *Id.* at 85. The other assailant was described as a “white male, shorter, . . . stockier, about five eight, roughly two hundred, two hundred ten pounds, scruffy, scruffy beard, mustache, and he was wearing a bluejean [sic] jacket and bluejeans [sic] and . . . tan boots.” *Id.* Officer Ehret then transported Wylie back to his apartment where they met with Officer Christopher Kunz.

Approximately twenty minutes after the initial dispatch of Wylie’s descriptions, Officer Jay Travis saw two suspects, later identified as Byers and Wilson, who matched the descriptions and were approximately “twenty or thirty feet” from Wylie’s apartment. Appellant’s App. p. 17; Tr. p. 114. Officer Travis stopped the two individuals, handcuffed and detained them, and waited for backup. Officer Ehret was first to arrive as backup and found that the apprehended suspects “basically perfectly fit[] the description Mr. Wylie gave [him].” Tr. p. 87.

When Wylie mentioned, among other items, that his cell phone was taken by the assailants, Officer Kunz, who had stayed with Wylie at his apartment, had the control operator call Wylie’s cell phone. As the operator made the call, Officer Travis, who was still with the detained suspects, heard a cell phone ringing in the right pocket of Wilson’s jacket, and Officer Travis recognized the control operator’s number as the number calling. Detective Brian Hofmeister, who had arrived approximately ten minutes after the apprehension of the suspects, answered the cell phone and confirmed that it was the control operator on the line.

Afterward, Detective Hofmeister went to Wylie's apartment to speak with Wylie and Officer Kunz. Detective Hofmeister then brought Wylie to where the suspects were detained, which was an area "very well lit" with the spotlights of the police cars. *Id.* at 91. With certainty, Wylie identified Byers and Wilson as the two men who had robbed him in the alley and burglarized his home. *Id.* at 115.

As a consequence of Byers' and Wilson's attacks, Wylie sustained much pain from two cracked ribs, a mark from a beer-can blow to his head, injuries to his wrists, and bruising around his right temple and eye. *Id.* at 59-63, 108; State's Exs. 12, 13.

The State charged Byers with Class A felony burglary, Class B felony robbery, and two counts of Class C felony criminal confinement (first count for removal of Wylie from outside his residence to inside his residence by force or threat of force that resulted in bodily injury, and second count for confinement of Wylie by making him lie on the floor without his consent that resulted in bodily injury). A jury trial was held in August 2009, and the jury found Byers guilty of the first three counts but not guilty of the second count of criminal confinement. The trial court sentenced Byers to thirty years for Class A felony burglary, ten years for Class B felony robbery, and four years for Class C felony criminal confinement. The court ordered the sentences to be served concurrently, for an aggregate term of thirty years in the Department of Correction. Byers now appeals.

Discussion and Decision

Byers raises two issues on appeal. First, he contends that the trial court erred in admitting evidence from the show-up identification that occurred not far from the crime scene soon after Wylie's descriptions of the two assailants were dispatched because it

was unduly suggestive. Second, he contends that the State failed to present sufficient evidence to prove his convictions beyond a reasonable doubt.

I. Show-Up Identification

Byers first argues that the trial court erred by admitting an unduly suggestive show-up identification. Byers concedes that he failed to object at trial to the admission of the show-up identification and thus must establish fundamental error on appeal. Generally, “a claim of error must be raised during trial in order to be available as an issue on appeal.” *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009), *reh’g denied*. “Failure to [raise the claim of error during trial] results in waiver of our review of the issue on appeal.” *Haycraft v. State*, 760 N.E.2d 203, 212 (Ind. Ct. App. 2001), *reh’g denied, trans. denied*. Therefore, Byers’ failure to raise an objection to the admission of the show-up identification results in waiver of the issue.

However, even though the issue is waived, if error in the admission of evidence is such that it “makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm,” an appellate court may grant relief due to fundamental error. *Clark*, 915 N.E.2d at 131 (citing *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002)). “Fundamental error applies only when the actual or potential harm ‘cannot be denied.’” *Id.* (quoting *Benson*, 762 N.E.2d at 755).

We review claims that a show-up identification was unduly suggestive by examining the totality of the circumstances surrounding the identification, including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the

witness's degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Lyles v. State*, 834 N.E.2d 1035, 1044-45 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*.

Our Supreme Court has stated that one-on-one confrontations like show-up identifications are not *per se* improper. *Gray v. State*, 563 N.E.2d 108, 110 (Ind. 1990), *reh'g denied*. "Identifications of a freshly apprehended suspect have been held to be not unnecessarily suggestive despite the suggestive factors unavoidably involved in such confrontations because of the value of the witness's observation of the suspect while the image of the offender is fresh in his mind." *Lewis v. State*, 554 N.E.2d 1133, 1135 (Ind. 1990), *reh'g denied*.

In examining the totality of the circumstances surrounding Wylie's identification of Byers, we note that even though Wylie's glasses were knocked off during the first attack, he recovered them and put them back on by the time of the second attack. Tr. p. 80-81. In addition, there is no indication in the record that Wylie suffered any head trauma that impaired his memory or that Wylie was intoxicated. *Id.* at 76. While the alley was dark, Wylie had the opportunity to witness the assailants in the light of his apartment during the burglary. Thus, Wylie had a sufficient opportunity to observe Byers at the time of the crime.

Wylie provided accurate descriptions of his assailants to the degree that approximately twenty minutes after the initial dispatch of the description, Officer Travis apprehended Byers and Wilson a block or less from where the crimes occurred. When

Officer Ehret arrived at the location where the suspects were apprehended, he asserted Byers and Wilson “basically perfectly” fit Wylie’s descriptions.

Although the timing of events is not precisely indicated in the record, the record does indicate that while Officer Kunz was still taking Wylie’s statement from him in his home, Officer Travis apprehended Byers and Wilson, and Detective Hofmeister arrived within ten minutes of their apprehension. Detective Hofmeister left to get Wylie, who then unequivocally identified Byers and Wilson as the assailants. *Id.* at 115. At trial, Wylie was shown photographs of Byers and Wilson taken the night of the crimes, and he was able to identify Byers and Wilson with “one hundred percent” certainty as the men who were responsible for the crimes against him. *Id.* at 66-68, 79. Based on the totality of the circumstances, we conclude that the show-up identification was not unduly suggestive. *See Gray*, 563 N.E.2d at 109-10 (upholding show-up identification where defendant was only person at scene not wearing police uniform, was in handcuffs, and was identified at a location different from where robbery occurred); *Lyles*, 834 N.E.2d at 1045 (upholding show-up identification where defendant was only person present and was presented for identification in handcuffs standing between two police officers at the end of a line of police cars); *Adkins v. State*, 703 N.E.2d 182, 185 (Ind. Ct. App. 1998) (upholding show-up identification where defendant was only person present who was not a police officer, was in handcuffs, and stood next to police car). Therefore, the show-up identification was admissible, and the trial court did not commit error, much less fundamental error, by admitting it.

II. Sufficiency of the Evidence

Byers next argues that without the admission of the show-up identification, there was no evidence from which a reasonable trier of fact could have found him guilty beyond a reasonable doubt.

In reviewing sufficiency of the evidence claims, we do not reweigh the evidence or judge the credibility of the witnesses. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). We examine only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* “We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.” *Id.*

We first note that the show-up identification was properly admitted and can thus be used to support Byers’ convictions. Therefore, Byers’ sufficiency argument fails. Nevertheless, he highlights a few inaccuracies in Wylie’s description of the assailants and notes that Wylie was unable to identify either Byers or Wilson in person at trial.

As for the inaccuracies, such as the fact that Byers was wearing tennis shoes rather than work boots and Wilson had dark hair with areas of grey rather than black hair, State’s Ex. 12, this is merely a request to reweigh the evidence. In addition, the fact that Wylie was unable to identify Byers and Wilson in person at trial, which took place just over six months after the crimes, does not detract from the reliability of Wylie’s show-up identification. *See Hester v. State*, 512 N.E.2d 1110, 1111-12 (Ind. 1987) (upholding sufficiency of evidence where witness gave accurate description of defendant, which led to defendant’s arrest, and witness positively identified defendant on day of incident, but witness was unable to identify defendant during trial). This argument is another request

to reweigh the evidence, which again we will not do. The evidence is sufficient to support Byers' convictions for Class A felony burglary, Class B felony robbery, and Class C felony criminal confinement.

Affirmed.

NAJAM, J., and BROWN, J., concur.