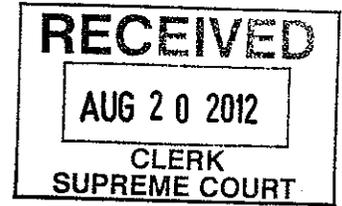


Commonwealth of Kentucky
Supreme Court
No. 2011-SC-000325-D
(No. 2010-CA-000670)



DARBY ASHLEY BARNES

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Kimberly Bunnell, Judge
Indictment No. 09-CR-01031

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

Attorney General of Kentucky

DAVID B. ABNER

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served August 20, 2012 as follows: by mailing to the trial judge, Hon. Kimberly Bunnell, Judge, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507; by sending electronic mail to Hon. Kimberly H. Baird, Assistant Commonwealth's Attorney; and by delivery through Kentucky Messenger Mail to Hon. Gene Lewter, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

David B. Abner
Assistant Attorney General

INTRODUCTION

Appellant, Darby Barnes, was convicted by a jury of Second Degree Burglary and being a First Degree Persistent Felony Offender and was sentenced to fifteen years imprisonment.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal are adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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COUNTERSTATEMENT OF THE CASE

On May 24, 2009, Katherine Manning was house-sitting for the owners of a home at 417 Lake Shore Drive in Lexington, Kentucky. (VR 1 (March 1, 2009) at 11:41:55-11:44:29). The owners of the home were in Chicago, and they had asked Manning to feed their cat and water their plants. (Id.). On that Sunday—May 24th—Manning went to Lake Shore Drive at 10:00 am and then again at 7:00 pm. When she arrived at 7:00 pm, she watered the plants in the front of the house for about ten to twenty minutes. After this, she went to feed the cat inside the house. (Id. at 11:44:40-11:46:44). Before she went into the house, she remembered that there were plants on the back deck that she had not watered. (Id. at 11:46:45-11:47:07).

Manning went around back and stepped onto the stairs of the deck. (Id.). On a level above her was a sliding glass door that led into the home. Manning saw the blinds on this door moving. She then saw a man bent over, removing the wooden pole that secured the door. She said, “Hello, hello. Who are you? Are you supposed to be here?” The man did not say anything, stood up, and disappeared into the house. (Id. at 12:02:35-12:03:55).

The man, stated Manning, looked at her in shock and disappeared. She became frightened and walked away from the house. (Id. at 12:05:10-12:05:20). Manning described the man as having short dark hair, black-rimmed glasses, a dark colored shirt, and olive or khaki shorts. She also stated that he was about 18-22 years old, short, around 5'9”, and 160 pounds. (Id. at 12:05:42-12:05:56; 12:25:27-12:26:35). The man was only a few feet away from Manning when she encountered him at the back door. (Id. at 12:07:03-12:07:18).

Manning first called a friend, then her father. Her father advised her to call 911. (Id. at 12:07:37-12:08:48). Manning walked to the front of the house and noticed that a pink bicycle, which had been in the yard when she arrived, was gone. (Id.) Manning did not go into the house until the police arrived. (Id. at 12:09:21-12:09:56). When inspecting the house, Manning and the police noted that the cat door in a back door was damaged. (Id. at 12:11:57-12:12:25). Also, a glass panel on the back door was broken out and the door was unlocked. (Id. at 12:12:26-12:14:19).

The owners of the home returned the next day after being called by Manning. (Id. at 2:21:53-2:22:02). The owners noted that the master bedroom had been disturbed. The drawers of a dressing table had been taken out and thrown on the bed. Also, all of the drawers in a closet dresser had been thrown on the floor. The owners discovered that a least twenty pieces of jewelry were missing. None of the pieces had been recovered at the time of trial. (Id. at 2:22:05-2:23:01).

On May 25, 2009, the day after Manning reported the intruder, Detective Franz Wolff of the LMPD showed a six photo line-up to Manning at her parent's home. Manning did not recognize anyone in the line-up. (Id. at 2:26:40-2:27:33). On June 15, 2009, Wolff, with two other officers, canvassed the area around Lake Shore Drive, searching for an individual who fit the description Manning had given to them. (Id. at 2:28:50-2:29:35).

Detective Wolff saw Appellant on Lake Tower Drive, a block from Lake Shore Drive, and stopped to speak with him because he matched Manning's description. Appellant stated that he had been on Lake Shore Drive on May 24, 2009, looking for

friends he had lost touch with. He was knocking on doors of houses to see if the friends lived there. (Id. at 2:29:50-2:34:05). Detective Wolff took a picture of Appellant that day. (Id. at 2:29:50-2:30:22).

The next day, Detective Wolff brought a second six photo line-up to Katherine Manning. Det. Wolff testified that it was standard procedure to choose five photos to go along with the suspect's photo from among persons who had similar physical characteristics, such as glasses. (Id. at 2:35:18-2:37:19). Manning chose Appellant from the photo line-up without hesitation. (Id. at 2:43:50-2:44:33). Det. Wolff asked Manning if she was 100% positive that this was the person she had seen on May 24th. Manning said, "Yes." Det. Wolff asked her to look at the other pictures for a moment. She did and reiterated that the photo she had chosen was the man she saw. (Id. at 12:19:49-12:20:03).

Appellant was subsequently arrested and indicted for Second Degree Burglary and for being a First Degree Persistent Felony Offender. (TR at 1-2). (Appellant was also indicted for two counts of Receiving Stolen Property over \$300 that were later severed from this case.) A jury found Appellant guilty of Second Degree Burglary and being a First Degree Persistent Felony Offender. (TR at 106 and 113). The jury recommended a total of fifteen years. (TR 114). The trial court sentenced Appellant in accordance with the jury's recommendation. (TR 118-122). Appellant filed a timely notice of appeal. (TR 130). The Court of Appeals, in an unpublished opinion, affirmed the trial court's judgment and sentence. (Barnes v. Commonwealth, 2010-CA-000670-MR (May 20, 2011)).

ARGUMENT

I.

APPELLANT'S ARGUMENT CONCERNING THE COLOR PHOTOGRAPH IS NOT PRESERVED FOR REVIEW AND DOES NOT RISE TO THE LEVEL OF PALPABLE ERROR.

Appellant argues that a second photo shown to Katherine Manning after she had picked out Appellant from a photo line-up tainted her in-court identification of Appellant. (Appellant Brief at 5). Appellant characterizes this issue as “partially preserved” by Appellant’s suppression motion pertaining to the photo line-up on which a separate pre-trial hearing was conducted and the motion overruled. (TR 43-46). The issue raised by Appellant in his brief, however, was not raised at this hearing. Appellant notes this in his brief. (Appellant Brief at 8). Appellant had raised a motion in limine to any reference to this photo having been taken at the jail. The Commonwealth agreed that no mention would be made of where it was taken. (VR 1 (March 1, 2009) at 9:08:08).

When Manning testified at trial, she was shown Commonwealth Exhibit 7—an 8 x 10 color photograph of Appellant. Manning stated that she had seen the photo before. (VR 1 (March 1, 2010) at 12:21:05-12:21:15). Appellant stated he did not know that Manning had seen the photo before. He objected to Manning identifying Appellant from this picture since she had already identified him from the picture in the photo line-up. Without a ruling from the court, the Commonwealth agreed not to ask Manning any questions about the photo. (*Id.* at 12:21:50-12:25:07). At no point did Appellant argue

that the officer showing this picture to Manning after her identification of Appellant somehow tainted her in-court identification of him.

Appellant did not preserve this issue for appeal by objecting to it at trial.

Thus, this Court must review the issue under RCr 10.26 which provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Under RCr 10.26, known commonly as the “palpable error” rule,” the required showing is “probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” Martin v. Commonwealth, 207 S.W3d 1, 3 (Ky. 2006). “What it really boils down to is that if upon consideration of the whole case this Court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.” Abernathy v. Com., 439 S.W.2d 949, 952 (Ky. 1969), *overruled on other grounds*.

The law on the admissibility of identification evidence is well-settled. An out-of-court identification may be challenged as a violation of due process, which excludes a pretrial identification if it is “unnecessarily suggestive and conducive to irreparable mistaken identification.” Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967). If the pretrial confrontation violated due process, then not only is proof that the defendant was identified at the pretrial confrontation inadmissible, but also the witness may not identify the defendant at trial.

The United States Supreme Court, in its decision in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), set forth the test for determining whether a pretrial confrontation violates due process. In Neil, the Court held that even though a show-up may have been suggestive, the in and out-of-court identifications are still admissible where there was “no substantial likelihood of misidentification.” Id. at 201, 93 S.Ct. at 383. An out-of-court identification was held not to violate due process if under the “‘totality of the circumstances’ the identification was reliable.” Id. at 199, 93 S.Ct. at 382. Therefore, the emphasis in Neil was on the reliability of the identification itself. The test was set forth in the following language from the opinion:

We turn, then, to the central question, whether under the ‘totality of the circumstances’ the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Id. at 199-200, 93 S.Ct. at 382; see also Savage v. Commonwealth, 920 S.W.2d 512, 513-14 (Ky.1995).

Thus, there is a two-part test for determining whether a pretrial confrontation violates due process. First, the court must ask whether the pretrial identification procedure was impermissibly suggestive. If it was not, then evidence of the out-of-court identification is admissible. However, if the pretrial confrontation was suggestive, then the court must proceed to the second part of the test. In the second part, the court must “assess the possibility that the witness would make an irreparable

misidentification [at trial], based upon the totality [of] the circumstances and in light of the five factors enumerated in [Neil]" Wilson v. Commonwealth, 695 S.W.2d 854, 857 (Ky. 1985).

The photo line-up was not unduly suggestive but done properly. Appellant argues that the subsequent showing of a second color photo to Manning at some undetermined time after the photo line-up but before trial impermissibly tainted her in-court identification.

The Court of Appeals due to the incomplete record of exactly when Manning viewed the photograph, relied on Grady v. Commonwealth, 206 S.W3d 343, 350 (Ky. 2006) to recognize a presumption that the photo line-up was unduly suggestive. (Slip Opinion at 7). However, the Court found that this presumption was "defeated by the second inquiry [in Neil] regarding the reliability of Ms. Manning's in court identification," (Slip Opinion at 8). The Court's reasoning was as follows:

Our conclusion is supported by the five factors outlined in Neil, which serve as a balancing test for determining the likelihood of misidentification.

First, Ms. Manning testified that she had "a good five to eight seconds" to view the intruder at the time of the crime. She saw him in a one-on-one setting in which she indicated that she did not expect to find anyone else present at the house.

Second, Ms. Manning testified that although the encounter was brief, she spent a few highly focused seconds attempting to determine the man's identity. She further testified that she had previously encountered an unexpected man at the home while house-sitting. That man had turned out to be the homeowners' friend who was also asked to check on the house while they were out of town. Ms. Manning explained that she focused intently on the intruder to determine whether he was the same visitor as before.

As to the third Neil factor, Barnes argues that Ms. Manning's initial

description does not match some of Barnes' key features, including his height, age, and tattoos. However, her testimony included reasonable explanations for the inaccuracies in her description. Ms. Manning testified that she described the man she saw to be approximately 5'9" because she saw that he was short. She explained that the height she gave in her description was what she considered to be of a short man. She further testified that she was standing several feet below the intruder as she was climbing the steps of the deck when she saw him and that their positioning could have skewed her estimation at his height.

With respect to her estimation of Barnes' age, she explained that the man she saw did not have facial hair and therefore—to her—looked younger than Barnes actually is. She testified that, in her opinion, Barnes' "features just stuck out to me as being young." Ms. Manning also indicated that Barnes' tattoos were covered by the clothing he wore on the day of the encounter. Her description did, however, accurately describe Barnes' weight and a close description of his glasses, although she described them as being black when in fact they were brown.

Ms. Manning did state several times during her testimony that the man she saw did not have facial hair, but on one instance during cross-examination she indicated that she could not tell whether the man she saw had facial hair. While Ms. Manning's testimony was inconsistent, we do not believe it rises to the level of manifest injustice. Likewise, given the fact that facial hair is an ever-modifiable feature, we do not believe that Ms. Manning's identification was unreliable because she identified a photograph in which Barnes had at least some facial hair.

As to the fourth factor under *Neil*, Ms. Manning identified Barnes without hesitation in the first line-up in which his photograph was included. The police presented Ms. Manning with a line-up the day after the incident which did not contain a photograph of Barnes, and Ms. Manning indicated that the man she saw was not pictured. Additionally, Ms. Manning was still able to identify Barnes with certainty approximately eight months after their initial encounter.

Finally, with respect to the fifth factor in *Neil*, the time between the crime and the confrontation was relatively short. Ms. Manning identified a photograph of Barnes within approximately three weeks of the crime. (Slip Opinion at 8-10)

Thus, under the factors in *Neil* the in-court identification was reliable and no error, palpable or otherwise, occurred or as the Court stated: "Barnes did not suffer a

manifest injustice because the evidence does not support a likelihood of misidentification.” (Slip Opinion at 10).

II.

NO ERROR OCCURRED BY ALLOWING THE FORENSIC WITNESS TO TESTIFY THAT THE FINGERPRINT TAKEN FROM THE SCENE WAS NOT A MATCH

Appellant argues that the trial court should not have allowed the forensic witness to testify that the partial print taken from the burglary scene only matched on four points. (Appellant Brief at 14). Appellant concedes that it was proper for the Commonwealth to ask the forensic expert if the print was or was not a match. (Appellant Brief at 14). However, he argues that “when the Commonwealth combined the evidence of how many identifiable points it takes to call a match with how many identifiable points were found in this case, it moved into irrelevant prejudicial territory.” (*Id.* at 16).

The forensic witness testified that he attempted to lift a print off a jewelry box in the master bedroom. He examined the print to see if it could be used for identification. There were only four points on the lifted print, so he could not do any comparison between this print and Appellant’s fingerprint. A minimum of ten points are required to do a comparison analysis. (VR 1 (March 1, 2009) at 1:57:44-2:05:10). Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Miller v. Eldridge, 146 S.W.3d 909, 914

(Ky. 2004). The Court of Appeals rejected Barnes' argument in a well-reasoned analysis that corresponded with the Commonwealth's argument on appeal:

It is important to note that there is no universally accepted number of matching points required for proper identification. United States v. John, 597 F.3d 263, 275 (5th Cir.2010). Also, analysis of fingerprints is a technical skill not possessed by most lay people. See Brawner v. Commonwealth, 344 S.W.2d 833, 836 (Ky.1961). In Fields v. Commonwealth, 274 S.W.3d 375 (Ky.2008), FN3 the Kentucky Supreme Court addressed a defendant's argument that a trial court improperly admitted fingerprint evidence that, after analysis, was not identified as those of the defendant. Id. at 406. The argument in Fields, like Barnes' argument, was that the fingerprints were not relevant because they were not a match. The Kentucky Supreme Court did not agree. Instead, the Court noted that "results of tests performed on fingerprints found at the crime scene are, of course, relevant to a determination of [a defendant's] guilt ... we are unable to fathom how [a defendant is] prejudiced by fingerprints that [are] never identified as his." Id. Moreover, fingerprint evidence and testimony regarding its analysis rebuts any claims of "shoddy police work." Id.

FN3. Overruled on other grounds by Childers v. Commonwealth, 332 S.W.3d 64 (Ky. Dec 16, 2010), as modified on denial of rehearing (Mar 24, 2011).

Likewise in Barnes' case, the Commonwealth had an interest in bolstering the credibility of all of the evidence by explaining the police work involved in collecting and analyzing fingerprints. The Commonwealth's witness testified as to his forensic unit's general policy that they require ten "points" to call a fingerprint a "match." He also testified that he was only able to obtain a partial print. Because the matching point system of fingerprint analysis perhaps varies from one department to another or from one analyst to another, it was relevant for the witness to testify as to how he arrived at his conclusion that in this case the print was not a "match." He determined that it was not a "match" for two reasons: (1) because only four points matched, and (2) because it was only a partial print.

Issues regarding the accuracy of fingerprint evidence in a particular case generally go to the weight and credibility of the evidence and are best left to the finder of fact, not an appellate court. John, 597 F.3d at 276 (quotations omitted); Hornsby v. Commonwealth, 263 Ky. 613, 92 S.W.2d 773 (1936). Barnes had every opportunity to cross-examine the witness regarding the point-matching analysis and in doing so to further instruct the jury regarding the weight of fingerprint evidence. Given this, we cannot say that the trial

court abused its discretion in allowing the testimony.

Assuming arguendo that even if we determined the trial court abused its discretion, the error would have been harmless because the testimony was that the print could not be considered a match. Additionally, this case involved an eye-witness identification. In light of our prior determination that no error regarding allowing Ms. Manning's identification, we find that the admission of the fingerprint analysis was harmless to the outcome of the case.

Since no prejudice could have accrued to Barnes even if the testimony was erroneously admitted, the trial court's judgment and sentence should be upheld.

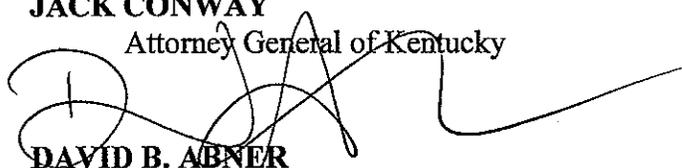
CONCLUSION

For all of the foregoing reasons, this Court should affirm the Barnes' convictions.

Respectfully Submitted

JACK CONWAY

Attorney General of Kentucky



DAVID B. ABNER

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40061-8204
(502) 696-5342

Counsel for Commonwealth

APPENDIX

<u>Description</u>	<u>Appendix No.</u>
1) Ky. Supreme Court, 2011-SC-000325-D, Order Granting Discretionary Review Entered February 25, 2012	1
2) Ky. Court of Appeals, 2010-CA-00670-MR, Opinion Affirming Rendered May 20, 2011	2-15