

File No: 147756-1-D
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

TREVOR JEFFREY McKORT

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE GALATI

COPY

Crown Counsel:	A. Netting
Defence Counsel:	M. Mines
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	August 10, 2005

[1] THE COURT: Thank you. All right. Well, I am in agreement with both counsel that the thing, the issue here is whether the Crown's case is made out with respect to the identification of this accused, Mr. McKort, as the perpetrator of the robbery events described by Mr. Armstrong.

[2] I am going to say at the outset that I agree with Ms. Netting, at least, to this extent. Mr. Armstrong was a very credible witness. I found that he was candid in chief, and if anything, notwithstanding -- and please take no offence, Mr. Mines, but withstanding your cross-examination of him, if anything, his credibility in my mind not only withstood that cross-examination, I was even more impressed by his demeanour after the cross-examination.

[3] The description he gave and he gave roughly at the time or shortly after the time that the events took place, was as detailed a description as one could reasonably expect in the circumstances, where there is not something obvious to comment on, where there is not -- for example, if the person is bald or has perhaps a bald spot, one would expect the witness to comment on that, and if he or she did not, the weight given to that witness' description would be adjusted accordingly and diminished accordingly. I make the point with respect to scars. The failure to note a scar that is not there is of no

assistance.

[4] But in any event, as far as Mr. Armstrong's description was concerned as best as we can test it, which is basically not at all because there is nothing else to test it against, but the description that he gave at the time, I thought was a fairly reasonable description, notwithstanding that he did not make any note of eye colour or facial characteristics as Mr. Mines has referred to them.

[5] Now, having said that, when an eyewitness -- I agree with Mr. Mines that when an eyewitness describes a person or he actually even describes an event, they are essentially giving an opinion based on their perception and memory. The grounds for that person's opinion are difficult to assess because they involve internal thought processes, and you cannot compare them to something that you can see, touch or hear.

[6] Honesty -- and as I have said, I found Mr. Armstrong to be credible and certainly I found him to be honest -- but honesty does not equal reliability. A credible eyewitness is not necessarily a reliable eyewitness. I may be stealing that phrase directly from one of the cases that I have not read recently, but I am sure that that is the law.

[7] Further, coupled with the other factors pointed out here

by Mr. Mines, is that perception is negatively influenced by stress. There is no doubt about that. Having a knife six inches or six to nine inches away from your throat and having to turn over your money, and Mr. Armstrong admitted that he was stressed to some degree. He was just quarrelling with Mr. Mines as to the extent in his mind of the stress. He was not in fear of his life, as he put it, but he was certainly in fear enough to hand over his money rather than try to resist. There is no question that there were some stressors, a fairly big one from the looks of that knife, at operation on the night in question when he was robbed.

[8] Another factor is that recollection is prone to influence by factors such as suggestion. Now, there really is no suggestion in this case. Ms. Netting, as you pointed out, this is not a case where the police have perhaps unwittingly poisoned the identification process by reinforcing an incorrect identification or possibly doing that. There is none of that here, but what there is is expectation.

[9] I think it is reasonable, Mr. Mines, your submission that whether it was a sense of closure or otherwise, it is reasonable to want the person that has done something to you to be brought to justice, and that might -- I am no psychologist, but I can see that that might be something at

play as one of those internal processes I talked about when a person formulates an opinion as to who it was that did this thing to.

[10] I cannot off the top of my head think of anything else. I was and still am to some degree, troubled somewhat by the identification by Mr. Armstrong three days later. I do not exactly know what to make of that. If there was any corroboration of his initial -- what did he call it? -- the picture he took in his mind initially, if there was any external corroboration of that, then in my mind the subsequent identification three days later when the event is still relatively fresh in his mind, and so that snapshot would still be relatively fresh in his mind, that would tend to corroborate further the identification process, I would think.

[11] But in this case, where there really is nothing in between, all we have are those mental processes that we cannot explore, and the law as I understand it is that in these circumstances, because of the frailties of eyewitness evidence, is that it is dangerous to convict unless there is something that would tend to confirm the initial identification, and here really the initial identification was not at the time of the offence. It was three days later, but there is nothing to confirm it, as said. There is nothing to

-- we do not have a machine that could take that snapshot of the picture Mr. Armstrong had in his mind.

[12] Now, having said all of that I think you can all see where this is going, but I have to say that, Mr. McKort, I think you are probably guilty. I think it probably was you that robbed Mr. Armstrong here, but based on the evidence before me and the application of the law to that evidence, it is too dangerous to convict. I have got a reasonable doubt. The charge is dismissed.

[13] MR. MINES: Thank you, Your Honour.

[14] MS. NETTING: Thank you, Your Honour.

(REASONS FOR JUDGMENT CONCLUDED)