

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA, )  
 )  
 Appellant, )  
 vs. )  
 STEVEN CORY LYMEN, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

No. S-2011-765

**SUMMARY OPINION**

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
JUL 18 2012

**SMITH, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Steven Cory Lymen was charged with Second Degree Burglary in violation of 21 O.S.2001, § 1435, in the District Court of Tulsa County, Case No. CF-2011-1023. Lymen was bound over at preliminary hearing and filed a pretrial motion to suppress the in-court identification. After a hearing, the Honorable James M. Caputo granted Lymen's motion to suppress and motion to dismiss the case. The State appeals.

The State raises one proposition of error in support of its appeal:

I. The District Court's ruling to sustain Defendant's Motion to Quash and Suppress the State's Evidence for failing to follow the established policy of the Tulsa Police Department in showing photos of the Defendant to a witness was erroneous.

After thorough consideration of the entire record before us, including the original record, transcripts and briefs, we find that the law and evidence do not require relief.

The State appeals under 22 O.S.2011, § 1053(5), which allows for expedited State appeals where a trial court has suppressed or excluded evidence and appellate review would be in the best interests of justice. This statutory provision

was added to allow the State to bring what is essentially an interlocutory appeal, where evidence has been suppressed but the case continues. Lymen's case was dismissed. Whatever relief this Court may grant, it cannot include remanding the case for further proceedings. As the case has been dismissed, § 1053(5) is not the appropriate avenue for this appeal. *State v. Love*, 2004 OK CR 11, ¶ 1 n. 1, 85 P.3d 849, 849 n. 1. The appropriate statutory section for the State's appeal of the trial court's decision dismissing the case is § 1053(4), judgment quashing for insufficient evidence in a felony. 22 O.S.2011, § 1053(4).<sup>1</sup>

We review a trial court's decision to suppress evidence for abuse of discretion. *State v. Pope*, 2009 OK CR 9, ¶ 4, 204 P.3d 1285, 1287. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. The State has failed to show that the trial court abused its discretion. The trial court found that the initial identification was unduly suggestive and tainted the subsequent in-court identification. The State argues that, where a pre-trial identification is unduly suggestive, a subsequent in-court identification may be admissible if it is established as independently reliable under the totality of the circumstances. *Pennington v. State*, 1995 OK CR 79, ¶ 33. 913 P.2d 1356, 1365-66. Factors include: (1) the witness's prior opportunity to observe the defendant during the crime; (2) the witness's degree of attention; (3) the accuracy of the prior

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<sup>1</sup> Lymen appears to argue that the appeal should be considered under § 1053(3), a reserved question of law. This is inappropriate because a reserved question of law requires either a judgment of acquittal or an order of the court expressly barring further prosecution, and the order dismissing the case did not expressly bar further prosecution. *State v. Campbell*, 1998 OK CR 38, ¶ 8, 965 P.2d 991, 992-93.

identification; (4), the witness's level of certainty; and (5) the time between the crime and confrontation. *Id.* The State relies on the evidence at preliminary hearing to argue that these factors are met. All this information was available to the trial court, from the preliminary hearing transcript, when it considered the motion to suppress. Upon considering the evidence and argument, the trial court concluded that the subsequent in-court identification was not independently reliable. This conclusion is not clearly against the logic and effect of the facts presented.

### **DECISION**

The State's appeal from the District Court order suppressing evidence and dismissing the case is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE JAMES M. CAPUTO, DISTRICT JUDGE

#### **ATTORNEYS AT TRIAL**

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**OPINION BY: SMITH, J.**  
**A. Johnson, P.J.: Concur**  
**Lewis, V.P.J.: Concur in Results**  
**Lumpkin, J.: Concur in Results**  
**C. Johnson, J.: Concur**

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