

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-04-011
 :
 - vs - : OPINION
 : 12/21/2009
 :
 COTY J. HELTSLEY, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM EATON MUNICIPAL COURT
Case No. 2008 CRB 00703

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Coty J. Heltsley, appeals the denial of a motion to suppress from the Preble County Court of Common Pleas.¹

{¶2} On July 27, 2008, the Preble County Sheriff's Office received a complaint about a "peeping tom" at the Preble County Fair. According the victim, while using the port-o-let at

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

the fairgrounds, she observed a young man peering at her through the ventilation shaft from an adjacent port-o-let. She testified that the perpetrator was a young man and that she saw his face, eyes, round cheeks, hair color, and that he was tall in stature. She further stated that she was approximately two or three feet from him and that she saw him for approximately three seconds before he fled the area. The following day, the sheriff's office received another complaint. Earlier, the sheriff's office had been contacted by the port-o-let company, reporting that the screens to the ventilation shafts in the port-o-lets had been repeatedly damaged and/or removed and that the port-o-lets had been moved around from where the company originally positioned them.

{¶3} As a result, the sheriff's office began a stakeout of the port-o-lets on the afternoon of July 29, 2008. Captain Thornsby of the Preble County Sheriff's Office stationed himself in a camper across from the port-o-lets to observe any suspicious activity. Around 4:30 p.m., the captain observed appellant "hanging around, looking around, acting nervous" outside the port-o-lets. Appellant then left and returned around 6:00 p.m. Appellant went inside one of the port-o-lets for approximately ten minutes. Thornsby notice that, after exiting, appellant continued to act nervous. Shortly thereafter, appellant entered a second portable toilet for about two or three minutes. The captain further observed that "every time somebody would walk by the bathrooms, [appellant] would walk around to the back of the bathrooms, or he would sit down on a trailer close to the bathrooms. Thornsby then saw appellant begin to push the port-o-lets together. Appellant went in and out of them and adjusted the structures seven or eight times over a period of 30 minutes, closing the three or four foot gap.

{¶4} Appellant then went inside a port-o-let. A 10 to 12-year-old girl entered the port-o-let beside the one occupied by appellant. Thornsby, assisted by other uniformed officers, approached the port-o-let occupied by appellant, knocked on the door, and

requested that appellant exit. Thornsbery heard no response, so he pulled the door open. According to the captain, appellant observed appellant with his pants down with what appeared to be an erection. Appellant told Thornsbery that he was going to the restroom. The captain questioned appellant about what he had observed that afternoon, but appellant denied it. Thornsbery noted that the vents in both port-o-lets had been broken and that there was an unobstructed view between the port-o-lets. Appellant was read his *Miranda* rights and taken to the sheriff's office at the fairgrounds. At the office, appellant admitted breaking the vents and spying on at least two women for the purpose of sexual gratification. Appellant also admitted to Thornsbery that a woman saw his face.

{¶5} The captain called the victim, requesting that she provide a written statement. While there, she was asked if she could identify the offender. When the deputies showed appellant to the victim, the victim stated that she recognized him immediately, without hesitation. The officer testified that the victim stated, "absolutely, one hundred percent that she was positive that that's the subject that was looking in on her as she was using the restroom."

{¶6} Appellant was charged with one count of criminal mischief in violation of R.C. 2909.07(A)(1) and one count of voyeurism in violation of R.C. 2907.08(A). Appellant filed a motion to suppress, challenging the eyewitness identification. Following a hearing, the trial court denied appellant's motion. Appellant entered a plea of no contest to the charge of voyeurism and the state dismissed the criminal mischief charge. The trial court accepted the plea and found appellant guilty of voyeurism. Appellant received a 30-day suspended jail sentence, a \$350 fine with \$100 suspended, and two years of probation. Further, appellant was classified as a Tier I sex offender and ordered to pay \$648 in restitution to the Preble County Fair Board. Appellant timely appeals, raising two assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF OHIO."

{¶9} In his first assignment of error, appellant argues that the seizure in the port-o-let by the Preble County Sheriff's deputies was an unreasonable violation of the Fourth Amendment. Appellant argues that he has a reasonable expectation of privacy in the use of the portable toilet.

{¶10} Since the instant issue was not raised at the trial level, our review is limited to a plain error standard. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100.

{¶11} The Preble County Sheriff's Office received complaints of a "peeping tom" at the port-o-lets at the Preble County Fair. Additionally, the port-o-let company informed the sheriff's office of tampering with the port-o-lets, including changing positions of the port-o-lets and removal of the ventilation screens. Appellant was observed acting suspicious around the port-o-lets for a long duration of time, exiting and entering multiple times, walking around the structures when being used by others, and physically moving the structures closer together creating an unobstructed view between the port-o-lets. Additionally, the victim positively identified appellant as the perpetrator. Even if appellant had a reasonable expectation of privacy and the seizure in this case was improper, after review of the record we cannot say

that the outcome of the instant matter would have been different.

{¶12} Appellant's first assignment of error is overruled.

{¶13} Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE REGARDING SUGGESTIVE IDENTIFICATION PROCEDURES USED BY THE POLICE."

{¶15} In his second assignment of error, appellant challenges the identification by the victim. Appellant urges that the identification in this case was unnecessarily suggestive and unreliable under the totality of the circumstances since appellant was the only individual presented to the victim and a law enforcement officer was present with appellant.

{¶16} Appellate review of a trial court's ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of the witnesses. *State v. Smith*, 80 Ohio St.3d 89, 105, 1997-Ohio-355; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. An appellate court must defer to the trial court's factual findings if they are supported by competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 593, appeal dismissed, 69 Ohio St.3d 1488. Accepting the trial court's factual findings, the appellate court determines "without deference to the trial court, whether the court has applied the appropriate legal standard." *Anderson* at 691.

{¶17} In order to suppress an identification, the court must find that the procedure employed was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 198-199, 93 S.Ct. 375, 381-382. "While the practice of showing suspects singly to witnesses for identification is widely condemned, whether such procedure violates due process depends on the totality of the

surrounding circumstances." *Zanesville v. Osborne* (1992), 73 Ohio App.3d 580, 586, citing *Stovall v. Denno* (1967), 388 U.S. 293, 87 S.Ct. 1967.

{¶18} The factors to be considered in determining whether the identification was reliable 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." *Biggers* at 199, 93 S.Ct. at 382.

{¶19} Although appellant was singly presented to the victim, we find no evidence that the identification was so overly suggestive as to give rise to a substantial likelihood of misidentification. The victim stated that she had the opportunity to view the perpetrator for three seconds from a distance of three feet. She claimed that she could clearly see the perpetrator's face, eyes, round cheeks, and hair color, and that he was tall in stature. When asked whether appellant was the perpetrator, the victim recognized him immediately, without hesitation. According to Captain Thornsbery, the victim stated, "absolutely, one hundred percent that she was positive that that's the subject that was looking in on her as she was using the restroom." Further, the victim identified appellant as the perpetrator again at the motion to suppress hearing. See *State v. Grays*, Madison App. No. CA2001-02-007, 2001-Ohio-8679.

{¶20} Appellant's second assignment of error is overruled.

{¶21} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Heltsley*, 2009-Ohio-6749.]