

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1582
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONNIE LYNN FOWLER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:92-CR-177-Y
- - - - -
(March 23, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Because Ronnie Lynn Fowler did not move for acquittal, this Court's review of his claim that the evidence was insufficient to support his conviction for robbing Bibi Shadia is limited to determining "whether there was a manifest miscarriage of justice, that is, whether the record is `devoid of evidence pointing to guilt.'" United States v. Daniel, 957 F.2d 162, 164 (5th Cir. 1992) (citation omitted).

Shadia did not testify that Fowler was not the robber, she

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

was merely unable to make an in-court identification of him. Shadia testified that Fowler's coloring and build were like the robber's but that she was uncertain whether his features were similar. Moreover, Shadia's testimony that the robber was a "full size" and a few inches taller than she was not inconsistent with the testimony of the other victims that the robber was between 5'8" and 5'10", stocky, and muscular and who were sure that Fowler was the robber.

Identity may be established by inference and circumstantial evidence. United States v. Royals, 777 F.2d 1089, 1091 (5th Cir. 1985). If corroborating or other connecting evidence exists, identification by resemblance is sufficient to support a conviction. United States v. Ezzell, 644 F.2d 1304, 1306 (5th Cir. 1981). The other victims' descriptions of the robber's physical appearance and his actions were sufficiently similar to Shadia's to supply the requisite corroborating evidence regarding Fowler's identity. Each of the victims was making a night deposit of a commercial nature after driving up to the night deposit box. Four victims testified that the assailant was a black man wearing pantyhose over his face and dark clothes and was wielding a weapon. Thus, the record is not devoid of evidence that it was Fowler who robbed Shadia, and no miscarriage of justice occurred.

Fowler's claim of ineffective assistance of counsel cannot be resolved on direct appeal because it was not raised in the district court, thereby enabling the district court the opportunity to develop the record on the merits. United States

v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). This portion of the appeal is DISMISSED WITHOUT PREJUDICE to Fowler's right to raise the issue in a 28 U.S.C. § 2255 motion. Id.

The judgment of the district court is AFFIRMED.