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(A Mythical Appeal With an Equally Mythical Opinion)

by Richard P. Gilbert*

We are told that the children of today are exposed through television to violence and crime which is packaged and delivered into the home, generally, free of charge, under the heading of entertainment. There are those who oppose the violence of television and who cry out for a "return to yesteryear, the days of fairy tales and Mothergoose so that we may instill in our children what we learned."

We herein examine Mothergoose's "Goldilocks," a harmless story for children - or is it? Suppose Goldilocks, instead of making good her escape from the home of the three bears, had been apprehended. Suppose further she had been charged and convicted, and as long as we are so supposing, let's go one more step and suppose it all happened in Maryland. The writer suggests that if the case were appealed the Court's opinion might read as follows:

The case was argued before LEARNED, STRAIT AND WORDY, JJ. *Per Curiam.*

THE FACTS

The record reveals that Mr. & Mrs. Bear, accompanied by their minor son, left their residence to go for a walk in the forest while a meal, prepared for the family by Mrs. Bear, was cooling. Apparently, the appellant, a small girl named Goldilocks, a/k/a Goldy Locks, happened upon the Bear home shortly after the Bears had departed. The front door was, according to appellant, "open." She went into the house. She then sat in the chairs that she discovered in the living room, trying each of them for comfort and finally setting upon that used by the minor child of the Bears. Goldilocks' olfactory organ detected the aroma of the dinner that Mrs. Bear has set out to cool, whereupon Goldilocks sampled from each of the three bowls that were on the kitchen table. She completely devoured the food that had been placed in the smallest of the bowls.

Appellant then began to explore the house. She "bounced" on each of the three beds that she located on the second floor. She, without removing so much as her shoes, slipped into the smallest of the beds and fell asleep.

Meanwhile, a pigeon, unidentified in the record except by the code name "Stooly," advised the Bears to, "Go back! Go back!"

The family promptly returned to their dwelling where they discovered that someone had been sitting in each of the living room chairs. Two of the bowls of porridge, the meal prepared by Mrs. Bear, were either "drowned in milk" or "swimming in treacle." The third bowl was empty. Alarmed at the fact that someone had entered the house while they were absent, the Bears quickly commenced an inventory in order to ascertain whether anything had been taken. The bedrooms were inspected. In Mr. Bear's room, the quilts had been thrown on the floor. Mrs. Bear discovered that her sheets were "mussed" and her cosmetics were strewn about the room. Her lipstick was missing. The minor Bear suddenly discovered the appellant in his bed. When the family gathered around the bed, the appellant awoke. She tangled Mrs. Bear in the sheets, gingerly avoided the grasp of Mr. Bear, and fled the house at full speed. The Bears followed in hot pursuit but eventually lost her trail in the forest. The police were summoned and furnished with a description of the intruder. Subsequently, acting upon information received from an unidentified confidential informant, Goldilocks was apprehended. All three of the Bears identified Goldilocks through the use of a photographic lineup and she was then charged. The Grand Jury of Baltimore City indicted Goldilocks in a multiple count indictment alleging that she: 1) broke and entered the dwelling house of the Bears, a violation of Md. Ann. Code, art. 27, § 31A;[1] 2) stole goods valued at less than $300, a violation of Md. Ann. Code art. 27, § 341(a);[2] 3) received "stolen money, goods or chattels under the value of $100, knowing it to be stolen." Md. Ann. Code art. 27, § 467;[3] 4) acted as a rogue and vagabond, a violation of Md. Ann. Code art. 27, § 490;[4] 5) trespassed for the purpose of invading the privacy of the occupants, a violation of Md. Ann. Code art. 27, § 580; 6) entered a bawdyhouse, Md. Ann. Code art. 27, § 15(f).[5]

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[1]The offense is a misdeameanor punishable by imprisonment for not more than three (3) years or a fine of not more than $500 or both.

[2]A misdemeanor punishable by imprisonment for not more than 18 months or a fine of not more than $100 or both. Md. Ann. Code art. 27, § 342(f)(2). Prior to Laws 1976, ch. 294, § 1, the maximum fine was $100. Effective July 1, 1979, there is a new comprehensive theft statute. *See* Laws 1978, ch. 849. New section 341 consolidates the prior crimes of larceny, larceny by trick, larceny after trust, embezzlement, false pretenses, shoplifting and receiving stolen property into the crime of "theft."

[3]*See* n. 2, *supra.* The penalty for the offense is the same as that prescribed for violating section 341.

[4]The offense is a misdemeanor and carries a maximum penalty of three (3) years imprisonment.

[5]Subsection (f) proscribes entering a structure or building "for the purpose of prostitution, lewdness or assignation." The penalty is not more than one year, a fine of $500, or both.

A jury, presided over by Judge I. M. Mean, in the Criminal Court, convicted Goldilocks of counts 1, 2, 3, and 5. She was adjudged to be not guilty of count 4, and the jury handed down no decision with respect to count 6. *Ergo,* under our law, the "no decision" or "draw" allows the State, should it so desire, to try the appellant again on that count. Md. Rule 759 d.[6] A pool of the jury at the appellant's request, Md. Rule 759 e, sustained the verdict as announced.

After a motion for a new trial was argued and denied, the appellant was committed to the jurisdiction of the Division of Correction for a total of six years; *i.e.,* three years on count 1; one year, count 2; two years, count 3. Sentence on count 5 was suspended generally.

In this Court, Goldilocks asserts:

1. The trial judge erred in not suppressing the pre-trial photographic line-up.
2. The trial judge erred in imposing cruel and unusual punishment.
3. She was denied a fair and impartial trial because of the incompetency of her trial counsel.
4. The evidence is insufficient to support the convictions.
5. The larceny and receiving verdicts are inconsistent.
6. She was denied her constitutional right to a speedy trial.
7. The court erred in not waiving the appellant to the jurisdiction of the Juvenile Court.

We shall discuss the issues in the order that appellant posited them to us.

I.
PHOTOGRAPHIC LINE-UP.

Prior to trial, the appellant, in one of a series of motions filed in accordance with Md. Rule 736, sought to suppress the photographic identification the Bears had made of her. Md. Rule 736 a 2. At the hearing conducted by Judge Mean, evidence was adduced showing that Goldilocks had been placed in a line-up, the line-up was photographed and that photograph was later shown to each of the three Bears, individually and out of the presence of each other. All three readily identified the appellant as the person who fled from their home after having been awakened by them.

The difficulty with the identification is, as appellant argues, and the State agrees, that it was "impermissively suggestive" and, consequently, violative of *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Estep v. State,* 14 Md. App. 53, 286 A.2d 187 (1972); *Crenshaw v. State,* 13 Md. App. 361, 283 A.2d 423 (1971, *cert. denied,* 264 Md. 746 (1972); *Smith v. State,* 6 Md. App. 59, 250 A.2d 285 (1969), *cert. denied,* 397 U.S. 1057 (1970).

It is apparent from the photograph that the appellant, with her golden hair falling in locks about her shoulders, was placed with a group of four other persons; all were male. One had a crew-cut, one was bald-headed, one was red-headed, and one had long black, shoulder length hair, as well as a flowing beard. Judge Mean, without assigning a reason, overruled the motion to suppress the photographic identification, thus proving, as Jim Oigan[7] often stated, "Trial judges must do or die, appellate judges have to reason why."

Indubitably, the photographic identification should have been suppressed. To opine that it was "impermissibly suggestive" is to understate. The line-up procedure utilized did more than offer a "suggestion" of identification; it pointed directly to the appellant and stopped just short of having her wear a neon sign around her neck identifying her as the perpetrator of the crimes. Indeed, under the circumstances, such a sign would have amounted to "gilding the lily." The failure to suppress was blatant error. Nevertheless, the error does not cry out for reversal because there was evidence that the Bears grounded their in-court identification of the appellant upon their observation of her while she was asleep in the bed belonging to minor Bear, as well as the opportunity to see her during her successful effort to flee the scene. Each of the Bears told the court and jury at trial that their identification was not in any wise influenced by the photograph of the line-up, but rather by their independent observations.

The Supreme Court of the United States, in *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), enunciated five factors that are to be considered in evaluating the likelihood of misidentification under the "totality of the circumstances." Those factors are:

> [1] the opportunity of the witness to view the criminal at the time of the crime,
> [2] the witness' degree of attention [to the offender],
> [3] the accuracy of the witness' prior description of the criminal,
> [4] the level of certainty demonstrated by the witness at the confrontation,
> [5] the length of time between the crime and the confrontation." 409 U.S. at 199-200, 93 S.Ct. at 382, 34 L.Ed.2d at 411.

[6]Md. Rule 759 d provides that "When there are two or more counts, the jury at any time may return a verdict with respect to a count as to which it has agreed, any count as to which the jury cannot agree can be tried again."

[7]*See* n. 1, Van Schaik v. Van Schaik, 35 Md. App. 19, 369 A.2d 133 (1977).

See also Foster v. State, 272 Md. 273, 323 A.2d 419 (1974); *Dobson v. State,* 24 Md. App. 644, 335 A.2d 124 (1974); *Witcher v. State,* 17 Md. App. 426, 320 A.2d 701 (1973).

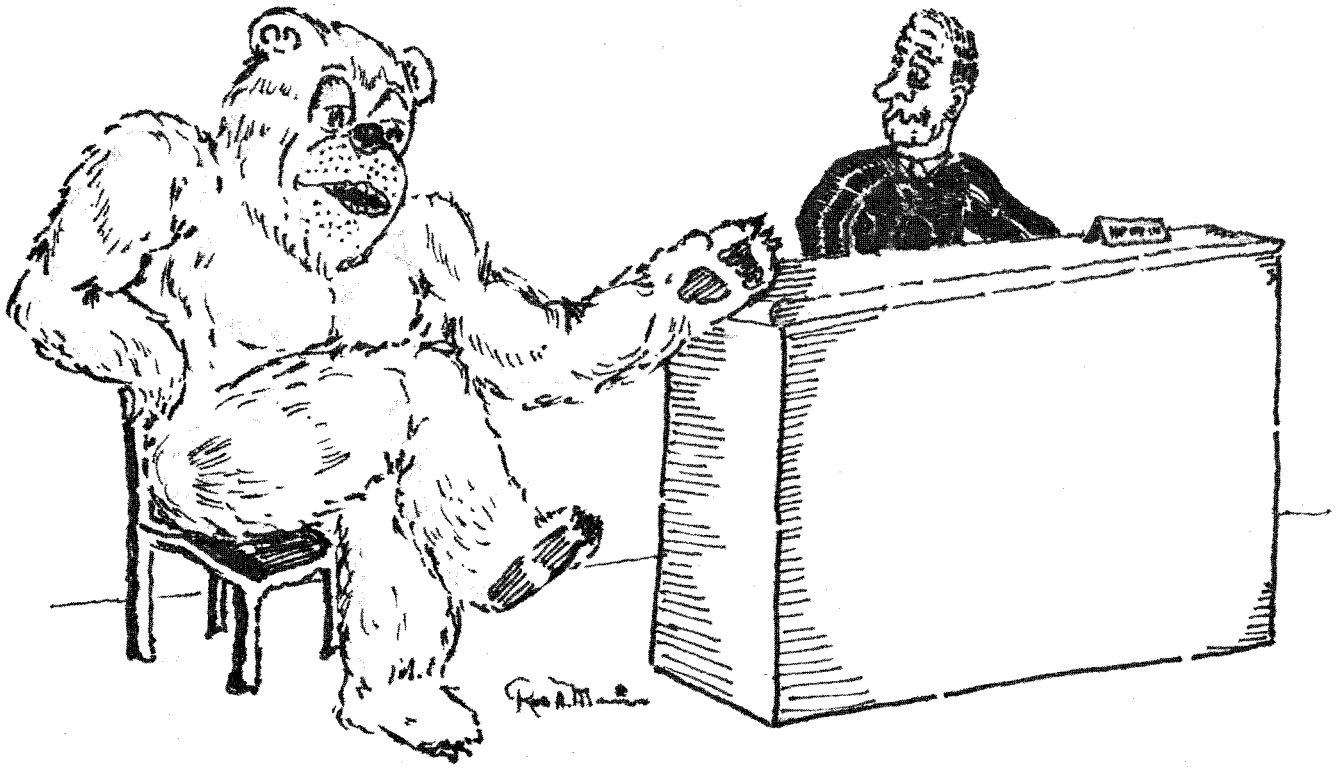
Our constitutionally mandated, independent review of the evidence relative to the identification of the appellant by the Bears discloses that they did, indeed, have ample opportunity to observe the appellant while she lay sleeping in the bed of the youngest Bear. The witness's description of the appellant as given to the police immediately following the incident matched that of appel- read and stated he understood. However, he refused to appellant when she was found in the bed. Moreover, the identification of Goldilocks by all three Bears was unequivocal and immediate. Although there is no evidence as to the length of time between the crime and the identification of appellant by the victims, on balance, the State has met its burden under *Neil v. Biggers, supra.* Therefore, even though the failure to suppress the photographic identification was error, that error was, under the peculiar circumstances of this case, harmless beyond a reasonable doubt. *Dorsey v. State* 276 Md. 638, 350 A.2d 665 (1976).

II.
THE SENTENCE

The sentence meted to the appellant falls within the statutory limits. There is nothing within the record to indicate that the terms imposed were dictated by passion, ill will, or other unworthy motive. *Mahoney v. State,* 13 Md. App. 105, 281 A.2d 421 (1971), *cert. denied,* 264 Md. 750, *cert. denied,* 409 U.S. 978 (1972). *See also Johnson v. State,* 9 Md. App. 37, 262 A.2d 325 (1970); *Minor v. State,* 6 Md. App. 82, 250 A.2d 113 (1969). The contention is devoid of merit.

III.
INCOMPETENCY OF COUNSEL

The allegation that trial counsel was incompetent is grounded on the admission of the photographic identification and the failure to move to dismiss the indictment on the basis of a denial of a speedy trial. We note that counsel did all he could reasonably be expected to do to prevent the admission of the photographic identification. The assertion that he was somehow incompetent because that evidence was improperly admitted is without any justification. Furthermore, we have already seen that the



admission of the photographic identification was, while error, harmless beyond a reasonable doubt. *Dorsey v. State, supra.*

In any event, the issue of competency of counsel was not raised and decided in the trial court. It is not before us. Md. Rule 1085. If appellant is aggrieved by the type of legal representation she received from her attorney, she has adequate means of seeking redress through the Post Conviction Procedure Act. Md. Ann. Code art. 27, § 645A.

We shall address the matter of speedy trial *infra.*

IV.
THE SUFFICIENCY OF THE EVIDENCE.

We have set out at length, in the recitation of the facts, the evidence as produced at trial. It would be redundant to repeat it. Suffice it to say that the evidence, as recounted above, if believed by the trier of fact, is sufficient to sustain the convictions. The test for the "sufficiency of the evidence in a criminal case is whether the admissible evidence adduced at trial shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged." *James v. State,* 14 Md. App. 689, 288 A.2d 644 (1972); *King v. State,* 14 Md. App. 385, 287 A.2d 52 (1972); *Frankis v. State,* 11 Md. App. 534, 275 A.2d 532 (1971). Patently, the evidence meets the test.

V.
INCONSISTENT VERDICTS.

Goldilocks asserts that she cannot be guilty of larceny of goods and also guilty of receiving those self-same goods. She argues that the trial judge should have granted a dismissal as to one of the offenses. We agree. A defendant cannot be both a thief and receiver of the same goods. *Beard v. State,* ____Md. App. ____, 399 A.2d 1383 (1979); *Cross v. State,* 36 Md. App. 502, 374 A.2d 620 (1977), *rev'd on other grounds,* 282 Md. 468, 386 A.2d 757 (1978); *Hinton v. State,* 36 Md. App. 52, 373 A.2d 39 (1977); *Fletcher v. State,* 231 Md. 190, 189 A.2d 641 (1963); *Hardesty v. State,* 223 Md. 559, 165 A.2d 761 (1960); *Bell v. State,* 220 Md. 75, 150 A.2d 908 (1959); *Heinze v. State,* 184 Md. 613, 42 A.2d 128 (1945). When, as here, the jury renders inconsistent verdicts, the better practice is to ask "the jury to return to the jury room and, if they were intent upon returning a verdict of guilty" of larceny, then to return a verdict of not guilty to the receiving. *McDuffie v. State,* 12 Md. App. 264, 278 A.2d 307 (1971). Deviations from the "better practice" have been allowed, however, by the Court of Appeals and this Court. When the trial judge has imposed but one sentence on the inconsistent verdicts, the defendant suffered no prejudice, and no new trial was warranted. *McDuffie v. State, supra; Novak v. State,* 139 Md. 538, 115 A. 853 (1921). The fallacy, if any, in that reasoning is that concurrent sentences *may* affect parole so that it would seem to be more advisable either to return the jury to the jury room for reconsideration or for the trial judge to grant a judgment of acquittal on the receiving count. *McDuffie v. State, supra.*

Because, in the matter *sub judice,* the verdicts were inconsistent, the trial judge should have instructed the jury to reconsider its action with respect to the inconsistent counts. Alternatively, he should have granted a judgment of acquittal on the receiving charge. Nevertheless, inasmuch as the judgments are being vacated for reasons hereinafter set forth, the matter is largely academic.

VI.
DENIAL OF A SPEEDY TRIAL.

As interesting as this penultimate issue would be, it is not before us inasmuch as it was not raised in the trial court. No motion to dismiss because of a failure to provide appellant with a speedy trial was ever made. We do not consider it. Md. Rule 1085. The appellant, however, is not left without a manner in which to test the denial of a speedy trial. This is so because, for the reasons stated in part VII of this opinion, the judgments are vacated. At the appropriate time appellant may seek dismissal of the charges on the premise that she has been denied a speedy trial. We are not to be understood, however, as indicating that the charges should be dismissed for failure to afford appellant a speedy trial. We merely point out

that she will have an opportunity to file and argue the appropriate motion.

VII.
WAIVER

Ultimately, Goldilocks complains that Judge Mean erred in refusing to waive her case to the Juvenile Court. The trial judge observed that Goldilocks was well beyond the age limitations of the Juvenile authorities, stating that she was around when he was a child. Thus, he concluded that she, of necessity, was an adult and, therefore, subject to the jurisdiction of the Criminal Court.

Ordinarily, persons under the age of 18 years are subject to the exclusive jurisdiction of the juvenile court for acts which, if committed by an adult, would constitute a crime. Md. Courts and Judicial Proceedings Code Ann § 3-804(a) states flatly that the juvenile court has "exclusive original jurisdiction over a child alleged to be delinquent." There are, however, exceptions to section 3-804(a). Sections 3-804(d) and (e) provide:

> "(d) The court does not have jurisdiction over:
>
> (1) A child 14 years old or older alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed pursuant to § 594A of Article 27;
>
> (2) A child 16 years old or older alleged to have done an act in violation of any provision of the Transportation Article or other traffic law or ordinance, except an act that prescribes a penalty of incarceration;
>
> (3) A child 16 years old or older alleged to have done an act in violation of any provision of law, rule, or regulation governing the use or operation of a boat, except an act that prescribes a penalty of incarceration;
>
> (4) A child 16 years old or older alleged to have committed the crime of robbery with a deadly weapon as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed pursuant to § 594A of Article 27.
>
> (e) If the child is charged with two or more violations of the Maryland Vehicle Law, another traffic law or ordinance, or the State Boat Act, allegedly arising out of the same incident and which would result in the child being brought before both the court and a court exercising criminal jurisdiction, the court has exclusive jurisdiction over all of the charges."

None of the offenses allegedly committed by Goldilocks falls within the scope of the exceptions to Courts art. § 3-804(a). Thus, it appears that the charges should have originated in the juvenile court. If the State desires to prosecute Goldilocks in a criminal court, they must first obtain a waiver of jurisdiction by the juvenile court judge. Courts art. § 3-817. Current Courts art. § 3-807 proscribes prosecution for a criminal offense of any child under the age of 18, unless the juvenile court has waived jurisdiction. If the accused is over age 21 at the time the matter is taken before the juvenile court, even though the offense was committed while the accused was a child, the court still has "exclusive original jurisdiction but only for the purpose of waiving it." This does not mean, however, that waiver is mandatory. *In re Appeals. Nos. 1022 & 1081,* 278 Md. 174, 178-79, 359 A.2d 556 (1976). The court is still required, irrespective of the fact that the accused is over 21 years of age, to conduct the waiver hearing required by section 3-817.

Sometimes, as here, the State, because of the nature of the offense and the age of the accused, proceeds directly to the criminal courts. If the charges against the accused are such as to vest jurisdiction exclusively in the Criminal Court, Courts art. § 3-804(d)(1) or (d)(4), the court *may,* pursuant to Md. Ann. Code art. 27, § 594A(a), invoke what has become known stylistically as "Reserve Waiver" and transfer the case to the juvenile court, provided the criminal court believes the waiver to be in the best interest of the child.

In the instant case, Goldilocks requested a "Reserve Waiver", but it was denied. The denial was, as we have seen, correct, but merely because of form, not substance. None of the charged offenses falls within those over which the Criminal Court possesses exclusive control. *See* Courts art. § 3-804(d)(1) and (d)(4). The Criminal Court should have dismissed the indictment for lack of jurisdiction over the person. Md. Rule 736 a 2.

It may well be, as the State argues, that the vacating of the judgments is largely academic, because the juvenile court will waive jurisdiction. On the other hand, it may not. It is not for us to say. The defect, however, being jurisdictional in nature, precludes trial in the Criminal Court until and unless a valid waiver is exercised by the juvenile court.

What we have said with respect to waiver by the juvenile court applies only if Goldilocks is 15 years of age or older. Courts art. § 3-817(a)(1). While it would seem that she has long since passed that young and tender age, there nevertheless remains the possibility, however remote, that she belongs to that select few consisting of Orphan Annie, Winnie Winkle, Superman, Lois Lane, Popeye, Olive Oil, and others, for whom time stands still. If that be the case, the juvenile court must retain jurisdiction. Courts art. § 3-817(a)(1).

We vacate the judgments and remand the case to the Criminal Court with instruction that it dismiss the indictments against Goldilocks.

JUDGMENTS VACATED.