

Opinion filed January 8, 2009



In The

# Eleventh Court of Appeals

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No. 11-07-00210-CR

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**LESLIE KNIGHT, Appellant**

**V.**

**STATE OF TEXAS, Appellee**

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**On Appeal from the 258th District Court**

**Polk County, Texas**

**Trial Court Cause No. 19,204**

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## MEMORANDUM OPINION

The jury convicted Leslie Knight of aggravated assault with a deadly weapon and assessed his punishment at sixty years confinement. We affirm.

There is no challenge to the sufficiency of the evidence. The victim, Reginald Smith, is an inmate at the Polunsky Unit, Texas Department of Criminal Justice Institutional Division. The victim testified at trial that on April 22, 2006, he was stabbed by another inmate. The victim identified appellant from a photo lineup as the person who stabbed him, and he also identified appellant in court as the person who stabbed him.

In his sole issue on appeal, appellant argues that the trial court erred in failing to suppress the testimony and evidence pertaining to the photo lineup. Whether the trial court erred in admitting into evidence a witness's identification of the accused involves a mixed question of law and fact. *Loserth v. State*, 963 S.W.2d 770, 772-73 (Tex. Crim. App. 1998); *Tasby v. State*, 111 S.W.3d 178, 185 (Tex. App.—Eastland 2003, no pet.). We extend great deference to the trial court's resolution of the historical facts pertinent to the case. *Loserth*, 963 S.W.2d at 773; *Tasby*, 111 S.W.3d at 185. However, the consequences arising from those historical facts are reviewed de novo. *Loserth*, 963 S.W.2d at 773-74; *Tasby*, 111 S.W.3d at 185.

To determine whether the trial court erred in admitting the evidence pertaining to the photo lineup, we must first consider whether the pretrial identification procedure was impermissibly suggestive. *Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). Second, if the procedure was impermissibly suggestive, we determine whether the procedure gave rise to a very substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33. The defendant bears the burden to prove these two elements by clear and convincing evidence. *Barley*, 906 S.W.2d at 34.

Raymond Burttt testified that he is a certified peace officer and works at the Polunsky Unit for the Office of the Inspector General. Officer Burttt investigated the assault. At the hearing on appellant's motion to suppress, Officer Burttt testified that appellant was identified as a suspect in the assault based upon the victim's description. The victim told Officer Burttt that he did not know the name of the person who stabbed him but that he lived in "15 Cell." The victim also stated that the person had "gold in his mouth" and that he was a black male. Officer Burttt identified appellant as being housed in 15 Cell. Officer Burttt viewed the surveillance tape and confirmed the victim's statement.

Officer Burttt asked Nina Saucier, a criminal analyst for the special operations group, to compile a photo lineup. Saucier compiled the lineup from the TDCJ database. Officer Burttt was unaware if the other photos were of inmates housed at the Polunsky Unit or other units in the TDCJ system. Officer Burttt testified that, when he showed the photo lineup to the victim, the victim identified appellant "without hesitation" as the person who stabbed him.

The victim testified at the hearing on appellant's motion to suppress that he saw the person who stabbed him. The victim told Officer Burttt that the person who stabbed him was "a black dude

with gold in his mouth stayed in 15 Cell.” The victim testified that he was able to identify the person who stabbed him from the photo lineup Officer Burttt showed him.

Officer Burttt and the victim both testified without objection at trial that the victim identified appellant from the photo lineup as the person who stabbed the victim. The victim also identified appellant in court as the person who stabbed him.

Appellant complains that the photo lineup was impermissibly suggestive because appellant was the only person in the lineup who was present at the time of the offense and could have committed the assault. Appellant contends that appellant was the only “familiar” face in the lineup and that the other photos were not of inmates from appellant’s “pod.” Appellant further argues that a live lineup from other inmates in the “pod” was available and would have provided a lineup that was not impermissibly suggestive.

Officer Burttt did not know whether the other inmates in the photo lineup were housed in the Polunsky Unit. The victim testified at trial that he recognized two other inmates in the photo lineup. The record shows that the victim gave Officer Burttt a description of the person who stabbed him as well as the cell in which the person lived. A photo lineup was compiled of inmates with similar characteristics. There is nothing in the record to suggest that the photo lineup was impermissibly suggestive. Appellant’s sole issue on appeal is overruled.

The judgment of the trial court is affirmed.

JIM R. WRIGHT  
CHIEF JUSTICE

January 8, 2009

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,  
McCall, J., and Strange, J.