AFFIRM; and Opinion Filed November 2, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01496-CR

THOMAS LEE ARLEDGE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1632919-T

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Thomas Arledge appeals his conviction for aggravated robbery. In three issues, appellant challenges the admission of photographic line-up results and in-court identification of appellant, and the trial court's denial of his request for a mistrial. We affirm the trial court's judgment. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

On November 19, 2015, Dana Sparling and Kenneth Delagarza were working at an EZ Pawn Shop in Irving. At approximately, 9:35 a.m. two men entered the shop. One waited by the door, while the other walked up to the counter, retrieved a gun from his backpack, and pointed it at Sparling, and stated, "Open the cash drawer." Sparling complied with the demand and opened the safe. The perpetrator then made Sparling empty all of the contents of the safe into his

backpack.

Upon seeing the robbery unfold, Delagarza activated a silent alarm. The second robber approached him and pointed a gun at his head and said, "Don't move." He forced Delagarza to unlock the jewelry cases and empty their contents into his backpack.

Jeffrey Martin, a customer, arrived at the pawn shop while the robbery was in progress. When he opened the door, he heard someone say, "Get on the Ground," and saw a man across the store pointing a gun at him. Martin fled from the store and called the police.

After the robbers took possession of all of the shop's money and jewelry, they forced Sparling and Delagarza into the shop's back room and made them lay on the floor. The robbers then left the shop and Sparling locked the front door and called the police. The robbery was captured on the store's video surveillance system. The robbers took 112 pieces of jewelry, valued at approximately $112,000 and over $5,000 in cash. The police department's pawn shop detail, which keeps a database of pawn activity that officers use to locate stolen property, discovered appellant and his mother had pawned, at other pawn shops, some of the items that had been stolen from the EZ Pawn Shop in Irving on December 19, 2015.

Detective Schingle was the lead investigator on the case. He presented photographic arrays to Sparling and Delagarza separately on the same day. Each array contained six photos, one of which was a photo of appellant. The photos were arranged in a stack, and Schingle presented them to the witnesses one at a time. The photos shown to Delagarza were in a different order than the photos shown to Sparling. Sparling, positively identified appellant as one of the perpetrators. Delagarza later tentatively identified appellant.

Appellant was charged with the offense of aggravated robbery, enhanced by a prior conviction for an aggravated robbery that occurred in 2007. The conviction followed a two day trial during which the jury heard from nine witnesses, including Detective Schingle, Sparling,

and Delagarza. Appellant did not testify.

During the punishment phase of trial, in addition to presenting evidence of the enhancement offense, the State presented evidence that appellant had robbed another EZ Pawn Shop on Greenville Avenue on December 14, 2015, five days before the robbery of the Irving store. At the conclusion of the punishment phase of trial, the jury returned a verdict assessing punishment at confinement for thirty years. This appeal followed.

DISCUSSION

I. Photographic Array

In his first issue, appellant contends the trial court erred in admitting evidence of three photo line-up identifications because they were unusually suggestive. Appellant filed a motion for identification hearing to determine whether the out-of-court identifications were the result of unconstitutionally suggestive procedures.

The trial court heard the motion, as to the identifications made by Sparling and Delagarza, outside the jury's presence and prior to its being sworn. Detective Schingle testified that during his investigation of the robbery, he spoke with Sparling and Delagarza. He showed each of them separately six sequential photographs to see if they recognized any of the individuals as perpetrators of the robbery. Before showing them the photos, Schingle explained that the person may or may not be in the photographs, may have facial hair, and clothing could have changed. Sparling made a positive identification of appellant, and Delagarza made a tentative identification. In putting together the photo array, Schingle pulled pictures of appellant and five other individuals who have similar physical appearances. They were presented to Sparling and Delagarza in different orders. At the conclusion of the hearing, the trial court judge denied the motion concluding "I find that the photo line-up is not so unusually suggestive as to constitute a tainted line-up." The State subsequently offered Sparling and Delagarza's pre-trial

line-up identifications into evidence, and appellant affirmatively stated, "No objection" to the evidence.

Because appellant affirmatively stated "No objection" to the admission of Sparling's and Delagarza's identification of him from the photo array, he waived error, if any, in the admission of same. *See Allen v. State*, No. 05-08-0112-CR, 2010 WL 3171784, at *7 (Tex. App.—Dallas Aug. 12, 2010, pet. ref'd) (mem. op., not designated for publication) (citing *Dean v. State*, 749 S.W.2d 80, 82–83 (Tex. Crim. App. 1988) ("When an accused affirmatively asserts during trial that he has 'no objection' to the admission of the complained of evidence, he waives any error in the admission of evidence despite the pretrial ruling.")). Accordingly, we overrule appellant's first issue as to Sparling's and Delagarza's line-up identifications.

Prior to commencing the punishment phase of trial, appellant renewed his motion concerning the line-up as being unduly suggestive. The trial court judge gave appellant "the same ruling as before" insofar as those identifications were concerned. The trial court heard testimony from Miguel Castillo, a shift manager of the EZ Pawn Shop on Greenville Avenue that had been robbed on December 14, 2015, concerning his pre-trial identification of appellant as a perpetrator of that robbery before Castillo was allowed to testify to the jury. Castillo testified he met with the detective to view a photographic array.[1] He looked through the photographs and recognized appellant as one of the robbers. At the conclusion of the hearing, appellant objected to Castillo's identification of appellant as unduly suggestive in violation of his constitutional rights. The trial court overruled appellant's objection and gave appellant a running objection to evidence of Castillo's pre-trial identification of appellant.

In considering the trial court's ruling, we take into consideration the criteria for reviewing whether a line-up was impermissibly suggestive. Suggestiveness may be created by the manner

[1] The detective on that case appears to have been Detective Mayorca, not Detective Schingle.

in which the pretrial identification procedure is conducted, for example, by police pointing out the suspect or suggesting that a suspect is included in the line-up or photographic array. *Herrera v. State*, 682 S.W.2d 313, 317 (Tex. Crim. App. 1984). A line-up is considered unduly suggestive if other participants are greatly dissimilar in appearance from the suspect. *Withers v. State*, 902 S.W.2d 122, 125 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (citing *United States v. Wade*, 388 U.S. 218, 232–33 (1967). For instance, a lineup is suggestive when the accused is placed with persons of distinctly different appearance, race, hair color, height, or age. *Foster v. California*, 394 U.S. 440, 442–43 (1969).

Appellant contends the photographic array shown to Castillo was unduly suggestive because appellant's head shot was larger than the others. The record before us shows the head shot of appellant, in the array shown to Castillo, was not appreciably larger than the other photographs shown to Castillo and was similar in size to one of the other photos. Moreover, all of the photographs were of black males with facial hair, most of whom have tattoos on their necks. There is nothing distinctive about appellant's photo in the sequential line-up presented to Castillo. In addition, appellant has failed to show by clear and convincing evidence that under the totality of the circumstances, the line-up gave rise to a substantial likelihood of misidentification. Castillo testified that he had viewed still photographs from the shop's surveillance cameras, taken during the robbery, which include photographs of appellant, and that he had taken a cell phone picture of the assailant exiting the shop. Under the circumstances in the instant case, the trial court did not abuse its discretion in holding that the out-of-court identification procedures were not impermissibly suggestive and in admitting Castillo's line-up identification of appellant. We overrule appellant's first issue as to evidence of Castillo's out-of-court identification of appellant.

II. In-Court Identification

In his second issue, appellant contends the trial court erred in allowing Castillo to identify him in-court because Castillo had been advised that the perpetrator of the offense was being tried and appellant was the only person who was not formally dressed in the courtroom when Castillo identified him.

A defendant who contends on appeal that a trial court erred in allowing an in-court identification of him has a difficult and heavy burden to sustain, for unless it is shown by clear and convincing evidence that a complaining witness' in-court identification of a defendant as the assailant was tainted by improper pre-trial identification procedures and confrontations, the in court identification is always admissible. *Jackson v. State*, 628 S.W.2d 446, 448 (Tex. Crim. App. 1982).

We have concluded that Castillo's pre-trial identification of appellant as a perpetrator of the Greenville Avenue EZ Pawn Shop robbery was not tainted by improper pre-trial identification procedures. Moreover, at trial Castillo recounted the robbery of that shop. He explained that there were two perpetrators, one of whom told other store employees to open all of the jewelry cases and empty them, while the other put a gun to his head and told him to open the safe and give him the money and jewelry. The robbery was captured on the store's surveillance video. Castillo viewed the video and still pictures from the camera footage. From the still pictures, which were admitted into evidence during Castillo's testimony without objection, Castillo clearly saw the man who held the gun to his head. Because Castillo's pre-trial identification was not tainted and because Castillo had before him at trial the still photographs of appellant, he could easily identify appellant as a perpetrator of the Greenville Avenue shop robbery regardless of how he was dressed or his knowledge that he would be present in the courtroom. Thus, the trial court did not abuse its discretion in admitting Castillo's in-court

identification of appellant as a perpetrator of the Greenville Avenue EZ Pawn Shop robbery. Accordingly, we overrule appellant's second issue.

III. Motion for Mistrial

In his third issue, appellant contends the trial court abused its discretion in denying his request for a mistrial after Schingle alluded to an extraneous offense in violation of a motion in limine. When the prosecutor questioned Schingle about what he did after he received a listing of all the property taken, Schingle answered, "I got with our pawn shop detail. Well, Mr. Arledge had come into this investigation through another offense. So I got a listing of his name and another person's name and said 'Hey, these two offenses kinda look similar.'" The trial court sustained defense counsel's objection to Schingle's answer, instructed the jury to disregard the answer, but denied appellant's motion for a mistrial.[2]

We review a trial court's denial of a motion for mistrial under an abuse-of-discretion standard. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). A mistrial is an extreme remedy for prejudicial events that occur at trial and should be exceedingly uncommon. *Woodring v. State*, No. 05-06-00920-CR, 2007 WL 1064324, at *2 (Tex. App.—Dallas Apr. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (citing *Hudson v. State*, 179 S.W.3d 731, 738 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). A trial court's instruction to disregard can render harmless testimony referring to extraneous offenses "unless it appears the evidence was so clearly calculated to inflame the minds of the jury or is of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind." *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992). A court should review the particular facts of the case in determining whether a given error requires a mistrial. *See Ladd*, 3

[2] Appellant objected to the statement as "being outside the scope of acceptable evidence that's required to be admitted at this time. It's an allegation of some extraneous. We object to it."

S.W.3d at 567.

In cases comparable to the present case, courts have held a curative instruction sufficient to render objectionable testimony harmless. *See, e.g.*, *Kemp,* 846 S.W.2d at 308 (holding State's witness's reference to defendant's prior incarceration rendered harmless by curative instruction); *Gardner v. State*, 730 S.W.2d 675, 696–97 (Tex. Crim. App. 1987) (holding witness's testimony during State's cross-examination that, when defendant was in the penitentiary, he had stomach problems attributable to drug withdrawal was not so inflammatory as to require a mistrial); *Barney v. State*, 698 S.W.2d 114, 124–25 (Tex. Crim. App. 1985) (holding State's witness's answer that victim did not like defendant because "he was an ex-con" was improper reference to extraneous offense, but cured by jury instruction); *Campos v. State,* 589 S.W.2d 424, 427–28 (Tex. Crim. App. 1979) (holding witness's testimony, during State's cross-examination, that defendant was arrested and jailed on an extraneous offense was cured by jury instruction); *Bledsoe v. State,* 21 S.W.3d 615, 624 (Tex. App.—Tyler 2000, no pet.) (holding detective's testimony, during questioning by State, that detective served warrant on defendant at county jail was cured by instruction when State did not solicit response or emphasize the testimony to the jury, and detective did not elaborate on reasons for the incarceration).

Prior to trial, the prosecutor advised Schingle not to talk about other offenses. The prosecutor's question does not appear to have been designed to elicit a discussion about the pawn shop detail. Schingle's answer was nonresponsive to the questioned posed. The trial court immediately instructed the jury to disregard the statement, and there was no further mention of an extraneous offense during the guilt-innocence phase of trial. Schingle's testimony that "these two offenses kinda look similar" was not so inflammatory that the jurors could not follow the court's instructions to disregard it. The trial court did not abuse its discretion in denying appellant's motion for mistrial. We overrule appellant's third issue.

CONCLUSION

We affirm the trial court's judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THOMAS LEE ARLEDGE, Appellant	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-16-01496-CR V.	Trial Court Cause No. F-1632919-T. Opinion delivered by Justice Schenck.
THE STATE OF TEXAS, Appellee	Justices Lang and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 2nd day of November, 2017.