AFFIRMED as MODIFIED and Opinion Filed October 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00004-CR
No. 05-20-00005-CR
No. 05-20-00006-CR
No. 05-20-00007-CR
No. 05-20-00008-CR

BRYAN JERUADE SMITH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F19-21350-V, F15-72292, F15-76820, F16-70019 & F15-72305

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Reichek
Opinion by Justice Reichek

While on probation for multiple offenses, Bryan Jeruade Smith was charged with aggravated robbery. After a jury convicted him of the offense, the trial court assessed punishment, enhanced by a prior felony conviction, at thirty years in prison and revoked his probation in the earlier offenses based, in part, on the new conviction and assessed punishment in those cases.

In a single issue on appeal, appellant argues the complainant's identification of him at the aggravated robbery trial was tainted by an impermissibly suggestive lineup, which rendered his conviction erroneous and led to the improper revocation of his probation. In a cross-issue, the State asks us to modify the judgment in the aggravated robbery case to reflect a plea and finding of true to the first enhancement paragraph. For reasons set out below, we overrule appellant's issue and sustain the State's cross-issue. We modify the judgment in Cause No. 05-20-00004-CR and affirm as modified; we affirm the remaining judgments.

FACTUAL BACKGROUND

On May 23, 2016, appellant pleaded guilty to three robberies (Cause Nos. 05-20-00005-CR, O5-20-00006-CR and 05-20-00007-CR), and theft of a person (Cause No. 05-20-00008-CR). In each case, the trial court deferred a finding of guilt and placed appellant on probation. Three years later, appellant was arrested, and subsequently indicted, for aggravated robbery. Soon after, the State filed motions to revoke appellant's probation and proceed with adjudications of guilt, alleging several violations of his community supervision conditions, including the commission of the new offense.

At the aggravated robbery trial, the complainant, Z.B., testified he lived in a townhome with his brother and another person. He was alone in the home in the early morning hours of May 24, 2019 when he was awakened by a knock at the door. Z.B. looked out the peephole and saw two men, who asked for his brother. Z.B.

recognized one of them, Jordan Todd, as a friend of his brother's. He did not recognize the second man.

As Z.B. opened the door, the two men "bum-rushed" him. Z.B. said that the second man, who he identified at trial as appellant, put a gun to his face. Z.B. "went to the ground" thinking he was about to be shot. Z.B. was able to look at his assailant's face and noticed that one of his eyes was closed, "like just a little bit closed." As appellant held him at gunpoint, Todd hit him in the head. The men demanded Z.B.'s wallet and PIN number to his ATM card. They led him upstairs where Todd collected items from the apartment, such as Z.B.'s laptop, speakers, and TV.

Appellant then directed Todd to go to a nearby bank and withdraw money from Z.B.'s account. Appellant told Todd if he was not back in three minutes, he would shoot Z.B. Z.B. said that while Todd was gone, appellant sexually assaulted him at gunpoint. The assault stopped when appellant heard Todd return about ten minutes later. Todd withdrew $800 from Z.B.'s account, and the men left with the money and property. Before leaving, they warned Z.B. not to report the incident to the police.

Z.B., fearful the men would be waiting for him in the front, climbed out of a window at the rear of the home and went to his mother's house. From there, he contacted the police and, among other things, described the unknown assailant as having a visible injury to one of his eyes. One week later, Z.B. identified appellant

from a six-photograph lineup as the person who robbed him at gunpoint and sexually assaulted him, and said he was 85% certain it was him. At trial, Z.B. testified, "it was him."

After hearing the testimony of Z.B. and other witnesses, the jury convicted appellant of aggravated robbery. Appellant elected for the trial court to assess punishment. After a fingerprint expert testified at punishment, the trial court recessed the matter until a pre-sentence investigation report could be completed. When court resumed, a probation officer testified to appellant's various violations of his conditions of probation, and appellant's mother testified on his behalf. After hearing the evidence, the trial court assessed punishment at thirty years in prison. The court also found as true the allegations in the State's motions to revoke, adjudicated appellant guilty on the prior offenses, and assessed punishment at fifteen years in prison for each of the robberies and two years in state jail for theft.

ANALYSIS

In his sole issue, appellant contends the trial court erroneously admitted Z.B.'s in-court identification of him because it was tainted by an impermissibly suggestive photo lineup. He argues the trial court's refusal to suppress the identification resulted in an erroneous conviction for aggravated robbery, which the court then relied on to revoke his community supervision.

Prior to Z.B.'s testimony, appellant sought to suppress the in-court identification, arguing in part that some of the men depicted in the lineup "don't

really look" like him because they do not all have a "one-eye injury." Thus, he argued, the lineup was not "the best lineup that the State could have presented and that is prejudicial." After reviewing the exhibit containing the lineup photographs, the trial court overruled the objection.

An in-court identification that has been tainted by an impermissibly suggestive pretrial identification is inadmissible. *Loserth v. State*, 963 S.W.2d 770, 771–72 (Tex. Crim. App. 1998). We employ a two-step analysis in determining whether an in-court identification has been tainted. First, we determine if the pretrial procedure was impermissibly suggestive. *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993). Second, if we conclude that the procedure was impermissibly suggestive, we then determine if the impermissibly suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *See id.; Santiago v. State*, 425 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). The defendant must prove both elements by clear and convincing evidence. *See Barley v. State,* 906 S.W.2d 27, 33–34 (Tex. Crim. App. 1995); *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Only if we determine that the pretrial identification procedure is impermissibly suggestive do we examine whether it tainted the in-court identification. *Barley*, 906 S.W.2d at 34.

A pretrial procedure may be suggestive, but that does not necessarily mean it is impermissibly so. *Id*. Suggestiveness may be implicated by the manner a pretrial identification procedure is conducted, as in suggesting a suspect is included in the

array, or by the content of the photo array itself, such as when the suspect is the only individual who closely resembles the pre-procedure description. *See id.* at 33. A photo lineup is considered unduly suggestive if the appearance of the other participants is greatly dissimilar from the suspect. *Withers v. State,* 902 S.W.2d 122, 125 (Tex. App.—Houston [1st Dist.1995, pet. ref'd). A suspect may be greatly dissimilar in appearance from the other participants based on a distinctly different appearance, race, hair color, height, or age. *See id.* However, minor discrepancies among lineup participants will not render a lineup impermissibly suggestive. *See Partin v. State,* 635 S.W.2d 923, 926 (Tex. App.—Fort Worth 1982, pet. ref'd).

Here, appellant does not complain about the process used by the officer in conducting the photo lineup; he challenges only the content of the photographs used in the array. He argues that Z.B. provided one "salient factor" to identify his assailant, his eye was "a little bit closed," a description he contends "rules out four of the other photographs contained in the line-up." We disagree.

The exhibit is contained in our record. It reveals six photographs of Black men, all of whom have an "eye issue" with the same eye as appellant, the right eye. Five of the photographs depict persons with an eye that is partially closed; only one of the photographs show a man whose eye is entirely shut. Thus, contrary to appellant's contention, this feature did not render the photographs unduly suggestive. Moreover, the photographs show men similar in age, race, and features, all with short hair and facial hair. The photos are the same size, have the same

camera angle, appear to have been taken from the same distance, reflect the same lighting, and have the same blue background. Having reviewed the photographs, we conclude there is nothing distinctive about appellant's photo in the lineup as compared to the others, nor did his particular eye injury stand out from the others in any significant way. We conclude the photographic array was not impermissibly suggestive. Because appellant has not satisfied the first step of the analysis, we do not consider the second step. *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988) (concluding that challenged pretrial identification procedure was not impermissibly suggestive obviates need to assay whether it creates substantial likelihood of misidentification). We overrule appellant's sole issue.

In a single cross-issue, the State asks us to modify the judgment in Cause No. 05-20-00004-CR to reflect a plea and finding of "true" to the first enhancement paragraph, rather than the second paragraph. The indictment alleged one enhancement paragraph, and the record shows that appellant pleaded true to the paragraph. The State did not allege a second paragraph.

We have authority to correct a judgment below to make the record "speak the truth" when we have the necessary data and information to do so. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the judgment in Cause No. 05-20-00004-CR to reflect that appellant pleaded true to the State's first enhancement paragraph, the trial court found the first enhancement paragraph true, and the second paragraph is not applicable.

We affirm as modified the trial court's judgment in Cause No. 05-20-00004-CR and affirm the judgments in the remaining causes.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRYAN JERUADE SMITH, Appellant No. 05-20-00004-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F19-21350-V. Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> To reflect (1) a Plea of True to the 1st Enhancement Paragraph, (2) a Finding of True to the 1st Enhancement Paragraph, and (3) N/A to Plea and Finding to 2nd Enhancement Paragraph

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered October 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRYAN JERUADE SMITH, Appellant

No. 05-20-00005-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F15-72292-V.
Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

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

Judgment entered October 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRYAN JERUADE SMITH, Appellant No. 05-20-00006-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F15-76820-V. Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

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

Judgment entered October 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRYAN JERUADE SMITH, Appellant No. 05-20-00007-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F16-70019-V. Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

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

Judgment entered October 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BRYAN JERUADE SMITH, Appellant No. 05-20-00008-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 292nd Judicial District Court, Dallas County, Texas Trial Court Cause No. F15-72305-V. Opinion delivered by Justice Reichek; Justices Whitehill and Pedersen, III participating.

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

Judgment entered October 16, 2020