

Opinion issued December 29, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00787-CR

JOSHUA JAVON JACKSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Case No. 1210218

MEMORANDUM OPINION

A jury convicted appellant Joshua Javon Jackson of the felony offense of aggravated robbery with a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 29.02, 29.03(a)(2) (West 2011). The jury assessed punishment at 20 years in prison.

Jackson challenges the legal sufficiency of the evidence to support his conviction, and he argues that the trial court erred by admitting identification evidence and by denying his motion to quash the enhancement paragraph of the indictment. We affirm.

Background

On a clear Sunday morning in January 2008, Marsha Nowotny left her apartment and got into her sport-utility vehicle. She left the driver's side door open while she placed some items on the front passenger seat. As she turned toward the steering wheel and reached for the door, her hand bumped into a person and she felt the barrel of a gun against her neck. The man holding the gun demanded all her money, called her vulgar names, and threatened to kill her. Fearing for her life, Nowotny gave the man three dollars from her ashtray. The man also took her wallet, which held credit cards and personal photos but no additional cash. With the gun still pressed against Nowotny's neck, the man pulled the trigger twice. At trial, Nowotny described a popping sound made by the gun, which was apparently unloaded. She testified that the man again threatened to kill her. Then he reached across her and took her mobile phone from the passenger seat. As he did this, he pointed the gun between her eyes. Nowotny also testified that when the man reached across her to grab her phone, he looked straight at her

and she could see his whole face. Nowotny later provided a general description of the robber as being a young African-American man of average build.

Sergeant R. Minchew of the Harris County Sheriff's Office was assigned to investigate. After the robbery, Nowotny became aware of two unauthorized charges on her credit card, one at a restaurant and one for the utility bill for Raquell Green, who lived approximately a mile away from Nowotny. Minchew spoke with Green by telephone and found her to be cooperative, though she feared for her safety. After speaking with Green, Minchew identified appellant Joshua Jackson as a suspect in the robbery.

Using computer software that identified African-American men approximately the same age as Jackson, Minchew prepared a photographic line-up that included Jackson and five other men. Minchew showed the photographic line-up to Nowotny and instructed her that she was not obligated to identify anyone. Without any hesitation, Nowotny identified Jackson and wrote "100%" and her initials beside his photograph.

Jackson was charged with aggravated robbery. At trial, Nowotny identified Jackson as the person who had robbed her, saying she was "100 percent" certain and had no doubt in her mind. Green testified that Jackson paid her utility bill in January 2008. She testified that Jackson had gained some weight and his facial skin had lightened, but otherwise he looked the same at trial as he did in January

2008, including having a mustache and slight beard. Minchew testified about the photographic line-up and Nowotny's certainty in identifying Jackson. On cross-examination, Jackson's counsel questioned Minchew on how the other five photographs were selected, pointing to visible differences, such as the fact that some men had slight mustaches and other men were clean shaven. Minchew repeatedly testified that the photographs were derived from a computer search for black men of a certain age, that it was his practice to reject anomalous photographs, and that he did not consider the other five photographs shown alongside Jackson's to be anomalous.

Finally, Jackson testified in his own defense. He said that on the day of the robbery he was with the mother of his children and their young son at home watching movies. He testified that he went to a friend's apartment, played video games from approximately 10:30 a.m. to 11:30 a.m., and, when he left, found Nowotny's purse in the bushes. Jackson testified that he gave the contents of the purse, including Nowotny's credit cards, to Green, with whom he was intimately involved. He denied having pointed a gun at Nowotny, and he testified that he was innocent.

The jury found Jackson guilty of aggravated robbery with a deadly weapon. Although the indictment included an enhancement paragraph for a juvenile conviction for a crime that was a state jail felony, the jury was not instructed to

assess punishment in accordance with the habitual offender statute. Rather, the jury was instructed that the punishment range for aggravated robbery was five to 99 years in prison and a fine not to exceed \$10,000. In addition, the jury was instructed that it could recommend community supervision upon a finding that Jackson had never been convicted of a felony. The jury sentenced Jackson to 20 years in prison without imposition of a fine. Jackson appeals, challenging the sufficiency of the evidence, Nowotny's identification, and the trial court's failure to quash the enhancement paragraph of the indictment.

Analysis

I. Sufficiency of the evidence

In his first issue, Jackson challenges the sufficiency of the evidence to support his conviction for aggravated robbery. We review the legal sufficiency of evidence to support a criminal conviction to determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). As the exclusive judge of the facts, the jury may believe or disbelieve all or any part of a witness's testimony. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). The jury, which heard testimony from the complainant, was in the best position to weigh the evidence, and on appeal the court will defer to the jury's

assessment of credibility under these circumstances. *See Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997).

A person is guilty of aggravated robbery if, in the course of committing theft and with the intent to obtain or maintain control of property, he intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death and used or exhibited a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 29.02, 29.03(a)(2). Jackson argues that the evidence tending to prove his guilt is overwhelmingly outweighed by his testimony in which he declared his innocence.

A conviction may be based on the testimony of a single eyewitness. *See, e.g., Santiago v. State*, No. 01-09-00723-CR, 2011 WL 5617747, at *6 (Tex. App.—Houston [1st Dist.] Nov. 17, 2011, no pet. h.). Nowotny identified Jackson in court and in a photographic line-up that was presented to her days after the robbery. Both times she identified Jackson with absolute certainty as the man who had robbed her. At trial, she said that Jackson held a gun to her head, threatened to kill her, demanded her money, and took her money, her purse, and her mobile phone. She testified that Jackson’s actions placed her in fear for her life. Based on Nowotny’s testimony, which the jury was entitled to believe, a rational jury could have found the essential elements of aggravated robbery beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Chambers*, 805 S.W.2d at 461. Although Jackson testified, denying any role in the crime, it was for the jury

to determine whether to believe Nowotny's testimony or Jackson's denial. *See Chambers*, 805 S.W.2d at 461. We hold that the evidence was legally sufficient to support the jury's verdict, and we overrule Jackson's first issue.

II. Admissibility of in-court identification

In his second issue, Jackson contends that the trial court erred by allowing Nowotny's in-court identification testimony. Jackson contends that the photographic line-up shown to Nowotny was impermissibly suggestive and tainted her later in-court identification.

“[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law.” *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967)). The admissibility of an in-court identification is determined by a two-step analysis: “1) whether the out-of-court identification procedure was impermissibly suggestive; and 2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification.” *Id.* at 33 (footnote & citations omitted). “An analysis under these steps requires an examination of the ‘totality of the circumstances’ surrounding the particular case and a determination of the reliability of the identification.” *Id.* We review the trial court's factual findings deferentially, but we review de novo the trial court's legal determination of

whether the reliability of an in-court identification has been undermined by an impermissibly suggestive pretrial identification procedure. *See, e.g., Loserth v. State*, 963 S.W.2d 770, 773–74 (Tex. Crim. App. 1998).

The manner in which a pretrial identification procedure is conducted may make it improperly suggestive. *Barley*, 906 S.W.2d at 33. For example, it was improperly suggestive for a law enforcement officer to show a witness a single photograph of a person identified as the person in custody and under indictment for the murder of her husband. *See Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993).

Sgt. Minchen testified that he created the photographic line-up based on Nowotny's general description of a young African-American man of average build and using computer software to search for other men approximately the same age. All of the men in the photographic line-up were African-American. Jackson contends that the photographic line-up was impermissibly suggestive because of the differences among the photographs placed beside his photograph. Some had facial hair, some did not; all wore street clothes, although their shirts were not all the same color; and slight variations in their skin tone were apparent in the photographs. "Although every photographic array must contain photographs of individuals who fit the rough description of the suspect, it is not essential that all individuals be identical in appearance." *Burkett*, 127 S.W.3d at 127 (citing *Buxton*

v. State, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985)). “Neither due process of law nor common sense requires such exactitude.” *Id.* (citing *Giesberg v. State*, 945 S.W.2d 120, 125–26 (Tex. App.—Houston [1st Dist.] 1996, pet. ref’d). Accordingly, we hold that the contents of the photographic array were not impermissibly suggestive, and we overrule Jackson’s second issue.

III. Motion to quash enhancement paragraph of the indictment

Finally, in his third issue, Jackson contends that the trial court erred by denying his motion to quash the enhancement paragraph of the indictment. Jackson argues, based on the habitual offender statute, that his juvenile state-jail felony adjudication cannot be used to enhance his punishment for aggravated robbery. *See* TEX. PENAL CODE ANN. § 12.42(e) (West Supp. 2011) (providing that state jail felony cannot be used to enhance punishment for first degree felony).

However, at the punishment phase, the jury was not instructed about sentencing based on an enhancement paragraph, and the judgment, likewise, does not reflect trial on an enhancement paragraph. Rather, the jury was instructed on the unenhanced penalty range for a first degree felony, five to 99 years in prison and up to a \$10,000 fine. *See* TEX. PENAL CODE ANN. § 12.32 (West 2011). Because the jury considered only the unenhanced penalty range, even if we were to assume that the trial court erred in denying Jackson’s motion to quash the enhancement paragraph, he could not prove that such an error was harmful. *See*

TEX. R. APP. P. 44.2(b) (stating that errors that do not affect substantial rights must be ignored); *Mercier v. State*, 322 S.W.3d 258, 264 (Tex. Crim. App. 2010) (applying harmless error analysis to substantive defects in charging instrument). We overrule Jackson's third and final issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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