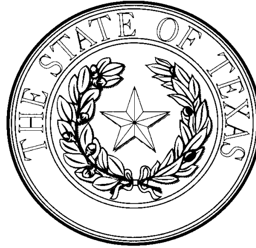
Opinion issued December 21, 2017.



In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00696-CR

JAMES LARRY COSBY, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 15-CR-1531

MEMORANDUM OPINION

A jury convicted appellant James Larry Cosby, Jr. of capital murder and the trial court assessed his punishment at life imprisonment. In two issues, Cosby argues

that (1) the photo array shown to a witness was impermissibly suggestive, and (2) the evidence is insufficient to prove venue. We affirm the trial court's judgment.

Background

In the early morning of March 7, 2014, a delivery driver discovered the bodies of Brittney Cosby, Cosby's daughter, and Crystal Jackson, Brittney's girlfriend, behind a convenience store dumpster on the Bolivar Peninsula in Galveston County, Texas. The convenience store is approximately one mile from the ferry that connects the Bolivar Peninsula to Galveston Island. The victims were known to have lived in Harris County.

There was suspicion that the bodies had been transported from Harris County to Galveston County. A detective with the Galveston County Sheriff's Office searched surveillance tapes from the Galveston and Bolivar ferry landings to see if the silver Kia SUV owned by Brittany and Crystal had been driven over the ferry. The detective testified that he observed a Kia SUV on the Galveston side of the ferry on March 6, 2014, at 9:18 p.m. The Kia SUV, which had a headlight out, was stopped and inspected by a ferry worker. The detective observed the KIA SUV exit on the Bolivar side of the ferry approximately twenty minutes later.

The ferry worker, Robert Ingram, testified at Cosby's trial that he pulled over a silver SUV sometime between 8 p.m. and 10 p.m. on March 6, 2014, on the Galveston side of the ferry. Ingram told the driver, an African-American male, that

the vehicle had a headlight out. At that point, the driver exited the SUV, inspected the light, and then popped the vehicle's hood. Ingram, who observed the driver from an arm's length away, decided that it was not necessary to have the SUV searched because he did not feel that the driver or the SUV posed a threat to the ferry boat, and he allowed the vehicle to board the ferry.

Ingram testified that officers showed him two separate photo lineups. Cosby's photograph was not included in the first photo lineup, which was administered on March 8th. During that lineup, Ingram identified someone other than Cosby as the man he spoke with on the ferry the night of March 6th. He signed a confidence statement and wrote he was 100% sure of his identification. Several days later, Seargent Balchunas showed Ingram a second photo lineup. After going through the array twice, Ingram identified Cosby as the driver of the SUV he stopped on the ferry. He signed a confidence statement in which he stated he was only 50% certain of his identification. Ingram expressed some concern about his identification of Cosby during the second photo lineup because he recalled that the man he spoke to on the ferry had hair and facial hair.[1] Cosby is bald and clean shaven in his photograph.

[1] Another witness, Rebecca Strimple, identified Cosby as the driver of the SUV from a different photo array. Cosby does not raise any appellate challenges with regard to Strimple's identification.

Impermissibly Suggestive Photo Array

In his first issue, Cosby argues that the admission of Ingram's in-court identification violated his Fourteenth Amendment right to due process because the second pretrial photo array shown to Ingram was impermissibly suggestive. *See* U.S. CONST. amend. IV.

A pretrial 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 the law. *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). The United States Supreme Court has provided a two-step inquiry to address this issue: (1) whether the out-of-court identification procedure was impermissibly suggestive; and if so, (2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968).

The defendant has the burden to establish by clear and convincing evidence that the pretrial procedure was impermissibly suggestive. *See Balderas v. State*, 517 S.W.3d 756, 792 (Tex. Crim. App. 2016). Suggestiveness may result from the manner in which a pre-trial identification procedure is conducted; the content of the line-up or photo array itself, as when the suspect is the only individual closely resembling the pre-procedure description; or the cumulative effect of the procedures

and photographs used. *See Barley*, 906 S.W.2d at 33. A photo array may be impermissibly suggestive if other participants are greatly dissimilar in appearance from the suspect. *See In re M.I.S.*, 498 S.W.3d 123, 132 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Minor discrepancies among lineup participants, however, will not render a lineup impermissibly suggestive. *Id.*; *see also Turner v. State*, 600 S.W.2d 927, 933 (Tex. Crim. App. 1980).

In this case, Cosby is only complaining about the content of the second photo array itself. Specifically, Cosby argues that the photo array shown to Ingram is impermissibly suggestive because Cosby and another man are the only two participants wearing heavy coats and he was the only participant not looking directly at the camera.

The photo array, which is part of the appellate record, is composed of six photographs of bald, African-American men with similar skin tones. All six of the men appear to be close in age and are wearing casual clothing. Five of the participants are wearing dark clothing, including Cosby. Cosby and another participant are the only ones wearing a jacket or coat. Two of the men are slightly closer to the camera than Cosby and the other three participants, and Cosby is the only participant glancing to the side. The other five participants are looking straight ahead. The backgrounds of the photographs are similar.

Given the significant similarities in these photographs, the minor discrepancies that Cosby points out with regard to the participants' clothing and gazes do not render the second photographic lineup shown to Ingram impermissibly suggestive. *See In re M.I.S.*, 498 S.W.3d at 132 ("A difference in the shirt colors or patterns does not, by itself, render a photographic lineup impermissibly suggestive."); *see also Turner*, 600 S.W.2d at 933 (stating that "neither due process nor common sense requires" that all lineup participants exactly match defendant's characteristics). Furthermore, Ingram was not asked if the participants' clothing or gaze influenced his identification of Cosby, and he did not express any concerns with regard to these factors when he made his pretrial identification of Cosby. *See generally Barley*, 906 S.W.2d at 33–34 (noting that even though photos had different backgrounds, "witnesses testified they had not noticed a difference when viewing the array the first time, or if they had, it did not influence their identification").

Accordingly, we hold that Cosby did not meet his burden of showing, by clear and convincing evidence, that the pretrial photo array shown to Ingram was impermissibly suggestive. *See Balderas*, 517 S.W.3d at 792.

Because we have concluded that the pretrial photo array was not impermissibly suggestive, we need not address whether the procedure created a substantial likelihood of misidentification. *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988).

We overrule Cosby's first issue.

Venue

In his second issue, Cosby argues that the evidence is insufficient to establish venue in Galveston County because the evidence demonstrates that Crystal was murdered in Harris County.

Generally, we review challenges to the sufficiency of the evidence in a criminal case under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318–20, 99 S. Ct. 2781, 2788–89 (1979). *See Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010)). This standard, however, is not applicable to challenges to the sufficiency of the evidence establishing venue because venue is not an essential element of the charged offense. *See Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014). Unlike the elements of an offense, the State only needs to prove venue by a preponderance of the evidence. TEX. CRIM. PROC. CODE ANN. art. 13.17 (West 2015). Proof of venue may be established by direct or circumstantial evidence, and the jury may draw reasonable inferences from the evidence. *Cox v. State*, 497 S.W.3d 42, 56 (Tex. App.—Fort Worth 2016, pet. ref'd).

Article 13.07 of the Code of Criminal Procedure states: "If a person receives an injury in one county and dies in another by reason of such injury, the offender may be prosecuted in the county where the injury was received or where the death

occurred, *or in the county where the dead body is found*." TEX. CRIM. PROC. CODE ANN. art. 13.07 (West 2015) (emphasis added). Because the undisputed evidence in this case demonstrates that Crystal's body was found in Galveston County, we hold that the State proved by a preponderance of the evidence that venue was appropriate in Galveston County.

We overrule Cosby's second issue.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale and Lloyd.

Do Not Publish. TEX. R. APP. P. 47.2(b).