

Opinion issued February 8, 2018



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00936-CR

WAYMON JAESHELL STEPHERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 77949-CR**

MEMORANDUM OPINION

Appellant, Waymon Jaeshell Stepherson, was charged with two counts of aggravated robbery. He pleaded not guilty. The jury found him guilty and assessed punishment at 38 years' confinement. In three issues on appeal, Appellant argues (1) the trial court erred by denying his motion to suppress the photo array, (2) he

received ineffective assistance of counsel, and (3) the trial court erred by including enhancements in the punishment charge.

We affirm.

Background

Jaclyn Bond came home from work around 9:00 p.m. on May 7, 2015. She parked in her garage and stepped out of her car. Her now-husband, Jeremy Bond, came to the garage to greet her. A man came into the garage, pointed a gun at Jaclyn, and said, “Give me everything.” The man took Jaclyn’s purse, a bag she was carrying, and Jeremy’s phone. He then ran away.

Jeremy went inside and called 911. While he was reporting the incident, Jeremy saw a speeding car coming from the direction that the robber had run and reported that as well. Police arrived and Jeremy and Jaclyn gave a description of the robber. Jaclyn’s credit cards were used that night.

Detective C. Rogers was assigned to investigate the case. He obtained pictures of the video footage depicting the man using Jaclyn’s credit cards. He emailed three of the pictures to Jeremy. Jeremy responded, saying the person in the photographs appeared to be the same person that robbed them. Jaclyn saw the photos but did not positively identify the person as the robber due to the angle of the picture.

Detective Rogers later identified the car Jeremy saw speeding away after the robbery. Appellant is the owner of the car. Detective Rogers prepared a photo array

using Appellant's driver's license photograph and pictures of other men that look similar to Appellant. For the other men, Detective Rogers used pictures taken when they were taken into custody for offenses. He could not find any photographs of Appellant's face other than his driver's license picture.

Three days later, Jeremy and Jaclyn went to the police station to determine if they could identify the robber in a photographic array. The array was conducted by a different officer who did not know which of the men in the array was the suspect. Jaclyn initially focused on a person other than Appellant but concluded she was unsure if the robber was in the array. Jeremy identified Appellant as the robber, saying he had about 85% confidence that Appellant was the robber.

Appellant filed a motion to suppress the photo array, arguing the array was impermissibly suggestive. The trial court held a hearing.¹ At the end of the hearing, the trial court denied the motion to suppress, finding that the array was not impermissibly suggestive.

¹ The hearing was held after a jury had been impaneled but before evidence had been presented. At the conclusion of the hearing, the trial court declared a mistrial because a juror had been involved in an automobile collision. One month later, a new trial began.

Photo Array

In his first issue, Appellant argues the trial court abused its discretion by denying his motion to suppress the photo array based on the argument they were impermissibly suggestive.²

A. Standard of Review

We review de novo a trial court's ruling on the suggestiveness of a pre-trial photographic array. *Gamboa v. State*, 296 S.W.3d 574, 581 (Tex. Crim. App. 2009).

B. Analysis

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial denies the accused due process of law. *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). In order for a photo array to be impermissibly suggestive, the record must show that (1) the out-of-court identification procedure was impermissibly suggestive and (2) the 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). At the motion to suppress, the defendant must prove by clear and convincing evidence that the out-of-court identification procedure was

² Appellant couches this issue as a challenge to the legal sufficiency of the evidence supporting his conviction. The main thrust of appellant's argument, record citations, and legal citations in this issue, however, concern whether the photo arrays shown to the Bonds were impermissibly suggestive, which Appellant challenged at trial in a motion to suppress. We construe Appellant's issue, then, to be a complaint about the trial court's denial of his motion to suppress.

impermissibly suggestive. *Balderas v. State*, 517 S.W.3d 756, 792 (Tex. Crim. App. 2016).

Appellant presented three arguments for why the photo arrays were impermissibly suggestive, which he reasserts on appeal. First, Appellant argues that the photo arrays were tainted because the investigating officer had previously emailed photographs of just Appellant to the Bonds.³ Second, he argues the officer that presented the photo arrays did not follow the correct department procedure. Third, he argues that his photograph was dissimilar from the other photographs.

Four days after the robbery, Detective Rogers was assigned to investigate the case. He obtained images of a person using the stolen credit cards. He sent three of the images to Jeremy to see if that was the same person that robbed them. Jeremy responded, saying the person in the photographs appeared to be the same person that robbed them. Jaclyn saw the photos but did not positively identify the person as the robber due to the angle of the picture.

Three days later, Jeremy and Jaclyn went to the police station to determine if they could identify the robber in a photographic array. The array was conducted by a different officer who did not know which of the men in the array was the suspect.

³ Appellant does not complain that the emailed photographs were impermissibly suggestive themselves. Instead, Appellant argues that the photo array was impermissibly suggestive because the Bonds had previously viewed the emailed photographs of him.

Jaclyn initially focused on a person other than Appellant but concluded she was unsure if the robber was in the array. Jeremy identified Appellant as the robber, saying he had about 85% confidence that Appellant was the robber.

At the hearing on the motion to suppress, Jeremy testified that it was difficult to discern facial features from the emailed pictures. When asked if his analysis of the photo array was based in part on seeing the emailed pictures, Jeremy said he did not know. Jaclyn testified that she identified the person in the emailed pictures as the robber but did not identify him in the photo array.

An impermissibly suggestive analysis seeks to exclude identifications of the defendant based on suggestive comments and acts from law enforcement officers rather than on the witness's recollection. *See United States v. Wade*, 388 U.S. 218, 228–29, 87 S. Ct. 1926, 1933 (1967). Jaclyn did not identify anyone in the photo array. Accordingly, it cannot be said that her identification was based on any impermissibly suggestive procedure. *See id.*

For Jeremy, we hold Appellant did not establish that showing him the emailed pictures and then showing him a photographic array three days later was impermissibly suggestive. As Jeremy noted at the hearing, the angle of the emailed pictures made it difficult to discern facial features. Instead, Jeremy's identification of the robber from the emailed pictures was based on clothing and body shape.

When Jeremy was presented with the photo array, a different officer presented the array. That officer did not know who the suspect was. The picture of Appellant was different from the ones sent in the email, showing Appellant's face from a straightforward angle. Appellant's body features were not shown, and the clothing was different. *See Belcher v. State*, 661 S.W.2d 230, 232 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd) (affirming showing to complaining witness two different photo spreads—two days apart—that had different pictures of defendant in each).

In his second argument in the motion to suppress, appellant complained that the officer presenting the photographs did not follow the procedure set out by his department. Specifically, Appellant complained that the officer showed the pictures all at once instead of one at a time. He also, after showing the Bonds the pictures, asked them if they wanted to see them again instead of waiting for them to ask. The trial court observed at the end of the hearing, "I'm not bound by police department procedures. I'm bound by case law to look and determine whether or not the procedure that was used was impermissibly suggestive." On appeal, Appellant has presented no explanation for how these variations in procedure resulted in the array being impermissibly suggestive. *See id.* (rejecting complaint of pictures being shown all at once instead of one at a time).

Finally, Appellant pointed out during the hearing that Appellant's picture had a lighter background than the other images and that the image of him was sharper

than the other pictures. Detective Rogers testified that he used Appellant's driver's license photograph in the photographic array. For the other men, he used pictures taken when they were charged with offenses. He testified Appellant's driver's license picture was the only suitable picture of Appellant he could find. There are some differences between the background and sharpness in Appellant's photograph and the other pictures in the array. This is not enough, however, to establish that the array was impermissibly suggestive. *See Barley*, 906 S.W.2d at 33 (holding that "the procedures utilized might have been suggestive, but not *impermissibly* so" where photo array, out of necessity, contained photos with different lighting and background).

We overrule Appellant's first issue.

Ineffective Assistance of Counsel

In his third issue, Appellant argues that he received ineffective assistance at trial because his counsel should have objected to the admission of the photo array based on the difference in the background and sharpness between his photograph and the others used. As we have observed in Appellant's first issue, his attorney did raise this as a ground to suppress the photographic array. The trial court ruled on this ground, finding, "Further, in reviewing the photo lineup . . . I will find that the photos that were used were not dissimilar. . . . All six photos were very similar insofar as the individuals depicted [and] did not impermissibly suggest one

individual over . . . any of the six.” Because he objected to the admission of the photographic array and obtained a ruling, Appellant’s trial counsel cannot be ineffective for failing to do either of those things. *See* TEX. R. APP. P. 33.1(a).

We overrule Appellant’s third issue.

Punishment Enhancements

In his second issue, Appellant argues the trial court erred by submitting an enhanced punishment charge to the jury because the enhancements were not in the indictment. Appellant also concedes that this issue has not been preserved for appeal because no objection was presented at trial. *See id.*

We overrule Appellant’s second issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Radack, Higley, and Bland.

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