Opinion issued September 17, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00733-CR

MARKELL DEON DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Case No. 1557764

MEMORANDUM OPINION

A jury convicted appellant, Markell Deon Davis, of capital murder, and, because the State did not seek the death penalty, the trial court assessed punishment

at confinement for life.[1] In three issues on appeal, appellant contends that (1) the trial court committed reversible error by denying his motion to suppress based on impermissibly suggestive in-court and out-of-court identifications and (2) the automatic punishment of life without parole violates the Eighth Amendment of the United States Constitution and Article I, section 13 of the Texas Constitution. We affirm.

BACKGROUND

Shelly Steward and Gerald Coleman participated in a "pill mill" scheme to obtain money. The men would "pick people up to take them to [pain clinics]" and "the clinics would give [them] kickbacks." Steward and Coleman would pick up their "patients," coach them about what to say at the clinic, drive them to the clinic, then escort them to a pharmacy to fill the prescription received from the clinic and pay the patient for their time. Steward and Coleman would then take the pills and sell them to a pre-arranged buyer. In addition to paying the patients, Steward and Coleman would sometimes pay people for referring patients. Patients received about $70 per clinic visit and referrers received about $30.

On July 3, 2017, Steward and Coleman picked up a patient, Carl Henegan, and took him to a clinic near I-45 in Houston. They left Henegan at the clinic with

[1] When a defendant is found guilty in a capital felony and the State has not sought the death penalty, a sentence of life without parole is mandatory. TEX. CODE CRIM. PROC. art. 37.071, § 1(a); TEX. PENAL CODE § 12.31(a)(2).

several other patients who had driven there on their own and went to pick up a female patient near Stella Link and the South Loop. When the female patient changed her mind, the men contacted Emilio Hernandez, who sometime acted as a referrer for them. Hernandez put them in touch with appellant, who had told Hernandez the day before that he was looking for a way to make some money.

On Hernandez's recommendation, Steward and Coleman picked up appellant, who they knew as "Black," at Sunrise Grocery Store near the Villages at Meyerland Apartments. Appellant got into Steward's car, sitting behind Steward, who was driving. On the drive to the pain clinic, Steward and Coleman coached appellant about what to say at the clinic. Once at the clinic, appellant identified himself as "Markell Davis," which Steward wrote down on a sticky note for the receptionist. The clinic, however, was not seeing any more patients that day, so appellant, Steward, and Coleman waited outside for the other patients, including Henegan, to finish their appointments.

Once Henegan was finished at the clinic, he got in the car with appellant, Steward, and Coleman to go fill his prescription. Steward was driving, Coleman was in the passenger seat, Henegan was sitting behind Steward, and appellant was sitting behind Coleman. After filling Henegan's prescription at Burke Pharmacy in Pasadena, Steward drove to a nearby Valero gas station and sold the pills to three women from Louisiana.

Steward took appellant to the Sunrise Grocery store where he picked him up, and then he planned to go to another pharmacy to get more pills for the women from Louisiana, who were following Steward in their car. While appellant was in the backseat, Steward told him he was sorry it did not work out. Coleman gave appellant $20 for his time, and the men decided to meet appellant two days later to try again.

As appellant was getting out of the car, he put his arm around Coleman's neck and began choking him. Appellant then pulled out a gun and demanded that they give him money, or he would shoot Coleman. Steward heard the first gunshot as he and Henegan "bailed out" of the driver's side doors and began running. Henegan fled to a nearby grocery store and Steward hid behind a nearby car.

Steward eventually returned to his car, where he found Coleman slumped back with a gunshot wound to his head. Steward got back in the car and drove a short distance away to the Nob Hill Apartments before pulling over, getting out of the car, and screaming for help, crying that his "brother" had been shot. Two women from the Nob Hill apartments responded to his calls: Morgan Williams called 9-1-1 and Anna Jordan began performing CPR on Coleman. Steward returned to the car while Jordan was performing CPR. She testified that Steward was hysterical and was on the phone asking someone to bring guns. Steward also took the money from Coleman's pocket and a couple of cell phones from the car and gave them to the women from Louisiana who had been following him and were still behind him. The

women eventually turned the items over to police. Williams reported that she saw a woman remove a gun from the car. No murder weapon was ever found.

Steward initially told police that the killing occurred during a marijuana sale gone wrong because he did not want to tell them about his "pill-mill" operation. He did, however, tell police that he believed the shooter to be a man he knew as "Black."

After his initial questioning by police, Steward called Hernandez, who had connected him with Black, and asked for Black's phone number.[2] When Steward googled the number, the name "Markell Davis" appeared, which Steward remembered to be the name Black used at the clinic. Steward then used that name to locate photographs of the man he knew as "Black" on Facebook. Steward then met with officers again and gave them the photographs of appellant that he had retrieved from Facebook. He did not tell police that Henegan was also in the car the day of the murder; but police discovered his involvement when surveillance footage from the Sunrise Grocery showed an additional passenger. When confronted with the surveillance footage, Steward told police about Henegan.

Not knowing that Henegan had participated in Steward's Google research, police officers presented him with a photographic array using one of appellant's Facebook photographs. Henegan said that he was "3000%" sure that the photograph

[2] Hernandez had previously given Black's number to Coleman.

of appellant that he saw in the array was the man named Black that he had been with in the car on the day of the murder. He also identified appellant at trial.

The police also showed the photographic array to Robyn Singh, a bystander who had been opening the curtains of her apartment at the Villages of Meyerland on the day of the murder when she heard a gunshot and saw people scattering from a car. She had previously told police that one of the men fleeing the car was a man she knew as Black, who lived or stayed at the Villages of Meyerland Apartments too. However, when presented with the photographic array, Singh testified that she "was not sure" and that she wanted to be one hundred percent sure.

Police arrested appellant and he gave a statement, in which he claimed that he did not know the area where the murder took place, even though he lived less than a block away. He claimed that on the day of the murder, he went to a park, then his cousin's house, and then back to the park. He also claimed that he was on the telephone with his girlfriend during the time of the murder, and he denied ever using the name Black. However, an analysis of appellant's phone records showed that he was not in the locations that he claimed to have been in; instead, the records showed him to be where Steward testified that appellant was—near the Sunshine Grocery store, then traveling down 610 and I-45 toward the pain clinic, then in an area of Pasadena near Burke Pharmacy, and finally, back in the area of the Villages of Meyerland Apartments. Text messages on appellant's phone refer to him by the

name "Black." And, although he talked to his girlfriend on the day of the murder, he was not on the phone with her during the time of the murder.

After a trial, at which Steward, Henegan, and Hernandez testified after being given use immunity and promised that their testimony, if truthful, would not be used against them in connection with any case involving the "pill mill" scheme, a jury convicted appellant of capital murder. The trial court assessed punishment at confinement for life because the State did not seek the death penalty. This appeal followed.

MOTION TO SUPPRESS IDENTIFICATIONS

In his first issue, appellant contends that "the trial court committed reversible error by denying [his] motion to suppress the impermissible suggestive out-of-court and in-court identifications." Specifically, he complains that the identification procedures were impermissibly suggestive because Steward had shown Henegan appellant's Facebook photo before police used the same photograph in the photographic array that they showed Henegan.

Standard of Review

We review a trial court's ruling on a motion to suppress evidence for abuse of discretion. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). A trial court abuses its discretion when its ruling is arbitrary or unreasonable. *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). We will affirm a trial court's ruling

on a motion to suppress if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009).

We apply a bifurcated standard when reviewing a trial court's ruling on a motion to suppress evidence. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). Under this standard of review, we afford "almost total deference to a trial court's determination of historical facts" if supported by the record. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We review the trial court's application of the law to those facts de novo. *See id.*

The trial judge is the sole trier of fact and exclusive judge of the credibility of the witnesses and the weight to be given to their testimony. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). Absent a showing that the trial court abused its discretion by making a finding unsupported by the record, we defer to the trial court's findings of fact and will not disturb them on appeal. *See State v. Johnston*, 336 S.W.3d 649, 657 (Tex. Crim. App. 2011).

Applicable Law

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 law. *See Simmons v. United States*, 390 U.S. 377, 384 (1968); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). An in-court

identification is inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification. *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008) (citing *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999)).

We employ a two-step analysis to determine the admissibility of an in-court identification when a defendant contends that suggestive pretrial identification procedures tainted the in-court identification. *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993); *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). First, we determine if the pretrial identification procedure was impermissibly suggestive. *Delk*, 855 S.W.2d at 706; *Santiago v. State*, 425 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). 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 Santiago*, 425 S.W.3d at 440. The defendant must prove both elements by clear and convincing evidence. *Barley*, 906 S.W.2d at 33–34. Only if we determine that the pretrial identification procedure is impermissibly suggestive do we examine whether it tainted the in-court identification. *Id.* at 34.

Analysis

Appellant contends that the pretrial identification procedure was impermissibly suggestive because, before the police used appellant's photograph in the photographic array, Henegan had already seen the photograph when Steward located it on Facebook and showed it to him. Appellant further argues that Henegan's out–of-court identification tainted his subsequent in-court identification.

We are guided by the Court of Criminal Appeals's opinion in *Rogers v. State*, 774 S.W.2d 247 (Tex. Crim. App. 1989), *overruled on other grounds, Peek v. State*, 106 S.W.3d 72 (Tex. Crim. App. 2003). In *Rogers*, several witnesses identified a capital murder suspect from a lineup the day after they had seen a newspaper picture of the defendant's arrest. 774 S.W.2d at 259. At trial, the witnesses again identified the defendant. *Id.* On appeal, the defendant complained that the trial court should have suppressed the witnesses' in-court identifications because they were tainted by the suggestive out-of-court photograph. *Id.*

In rejecting the defendant's argument, the Court reasoned:

> Given the absence of any official action contributing to the likelihood of misidentification in this case, the constitutional sanction of inadmissibility should not be applied, regardless of the extent to which any witness's in-court identification might have been rendered less reliable by prior exposure to the newspaper photograph.
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> . . . .
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> Since the police procedure was not itself suggestive, the fact that several eyewitnesses were exposed to a media photo of appellant one

> day before attending a police lineup might, at most, be taken to affect the weight, although not the admissibility, of their trial testimony.

Id. at 260 (citations omitted); *see also Perry v. New Hampshire*, 565 U.S. 228, 232 n.1 (2012) (noting that "what triggers due process concerns [regarding the admission of eyewitness identification] is police use of an unnecessarily suggestive identification procedure").

Here, as in *Rogers*, no evidence shows that the police had any part in Steward's independent research on Facebook, his discovery of appellant's photograph, or the presentation of that photo to Henegan before Henegan viewed the photographic array. Because appellant does not challenge the suggestiveness of the pretrial photographic array or the manner in which the police presented the array to Henegan, and because no state action was involved in Henegan's initial viewing of appellant's Facebook photo, appellant has failed to demonstrate that the out-of-court identification procedures in this case were impermissibly suggestive. *See Rogers*, 774 S.W.2d at 260; *Gilmore v. State*, 397 S.W.3d 226, 238 (Tex. App.—Fort Worth 2012, pet. ref'd) (concluding witnesses' viewing of defendant's picture in television news broadcast about shooting incident did not support determination that witnesses' identification of defendant as shooter was result of impermissibly suggestive identification procedures when no state action was involved in witnesses' viewing of defendant's photograph on news); *Craig v. State*, 985 S.W.2d 693, 694 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding sexual assault victim's in-court

identification of defendant was not subject to suppression on ground that victim's out-of-court identification from news report was result of unduly suggestive procedure, when there was no police involvement in news report); *see also Bell v. State*, No. 03-11-00247-CR, 2012 WL 3797597, at *6–9 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op., not designated for publication) (rejecting defendant's argument that witness's in-court identification was tainted by having previously viewed, without police arrangement, photograph on internet identifying defendant as suspect in offense).

Further, the record shows that Henegan had previously met appellant and that, on the day in question, he rode in the back seat of Steward's car with appellant when they went (1) to the pharmacy to fill the prescriptions, (2) to a gas station to sell the pills, and (3) to the Sunrise Grocery Store to drop off appellant. Henegan also saw appellant, during the offense, when appellant demanded the money from the pills, waived a gun, and threatened to shoot Coleman in the head. Henegan said that he was "3,000 percent sure" of his identification of appellant. The fact that Henegan saw the social media photograph of appellant before viewing the police's photographic array "might, at most, be taken to affect the weight, although not the admissibility," of Henegan's testimony and in-court identification of appellant. *See Rogers*, 774 S.W.2d at 260. Because appellant has not satisfied the first step of the analysis, we do not reach the second step, i.e., whether the procedure gave rise to a

very substantial likelihood of irreparable misidentification. *See Barley*, 906 S.W.2d at 34 (citing *Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988)).

Because the trial court properly denied appellant's motion to suppress Henegan's out-of-court and in-court identifications of appellant, we overrule appellant's first issue.

AUTOMATIC PUNISHMENT OF LIFE WITHOUTH PAROLE

In his second and third issues, appellant contends that the automatic punishment of life without parole violates the Eighth Amendment of the United States Constitution and Article I, section 13 of the Texas Constitution "because there is no vehicle for consideration of mitigating evidence which would justify a less severe sentence, either by a jury or by parole authorities."

Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016). Generally, all errors—even constitutional errors—may be forfeited on appeal if an appellant fails to object at trial. *Garza v. State*, 435 S.W.3d 258, 260–61 (Tex. Crim. App. 2014). To preserve a complaint that a sentence constitutes cruel and unusual punishment or violates due process and due course of law under the United States or Texas Constitutions, a defendant must make a timely, specific objection in the trial court. *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013); *Lucero v. State*, 246 S.W.3d 86, 98 (Tex. Crim. App.

2008); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *see also Gavin v. State*, 404 S.W.3d 597, 602–03 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Because appellant failed to raise any constitutional complaints regarding his statutorily mandated sentence in the trial court, he is not entitled to appellate review of those issues.[3]

We overrule appellant's second and third issues.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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[3] The United States Supreme Court and Texas courts of appeals have consistently held that statutes imposing an automatic life sentence without the possibility of parole for adult offenders are not facially unconstitutional. *See Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991) (holding that imposition of mandatory sentence of life in prison without possibility of parole does not violate Eighth Amendment's protection against cruel and unusual punishment); *Lopez v. State*, 493 S.W.3d 126, 139–40 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), *cert. denied*, 137 U.S. 1076, (holding mandatory life sentence, without possibility of parole, did not violate Eighth Amendment or article 1, section 13 of Texas Constitution, nor did it violate constitutional due process rights); *Modarresi v. State*, 488 S.W.3d 455, 466–67 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding penal code section 12.31(a)(2) did not impose cruel and unusual punishment prohibited by United States and Texas constitutions); *see also Duran v. State*, 363 S.W.3d 719, 721–23 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (concluding Eighth Amendment is not violated by unavailability of procedural mechanism to allow court or jury to consider mitigating factors under mandatory sentencing scheme contained within penal code's habitual offender statute).

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

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