Affirmed and Memorandum Opinion filed February 23, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01138-CR

JASON J. WINTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1035440

MEMORANDUM OPINION

A jury found appellant, Jason J. Winter, guilty of sexual assault of a child. *See* Tex. Penal Code Ann. § 22.011(a)(2)(A) (Vernon 2009). The trial court assessed punishment at seven years' confinement in the Texas Department of Criminal Justice, Institutional Division. In a single issue, appellant argues the trial court erred in admitting testimony that the complainant previously identified appellant in a photo array. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The complainant testified that in early April 2005, she was fifteen years old and had

run away from home. The complainant was staying with a friend named Courtney. One afternoon, at around 3 p.m., the complainant and Courtney decided to go to Sharpstown Mall in Houston, Texas. The girls took a Metro Bus to the mall, which dropped them off across the street from the mall's parking lot. While walking across the parking lot toward the mall, the girls encountered appellant sitting in the driver's seat of a flashy orange sport utility vehicle. Appellant called the girls over to his vehicle. The girls got inside the vehicle and began talking with appellant. Appellant offered the girls some marijuana, which they all smoked together. The complainant testified that after smoking and talking for approximately thirty minutes, appellant decided to call his friend Hollywood in Florida so Courtney could talk to him. While Courtney and Hollywood spoke over the phone, appellant asked the complainant questions about herself. Next, appellant told the girls that he was going to get them something to eat. Appellant purchased food to-go from a crawfish restaurant for Courtney and bought the complainant Chinese food from another restaurant. Appellant took the girls to a nearby Motel 6 where he rented a motel room. Inside the motel room appellant, the complainant and Courtney ate dinner and smoked marijuana. Appellant left the motel room and the girls stayed there for the night.

The girls woke up at approximately 11 a.m. the next day. Appellant stopped by the motel room and brought them more Chinese food. The three stayed in the motel room, smoking marijuana, watching television, and eating. Eventually, appellant told Courtney he was taking her to the airport so she could fly to Florida and meet his friend Hollywood. Courtney willingly left with appellant. The complainant stayed in the motel room until appellant returned at around 8:30 p.m. The complainant testified that when appellant returned he took her to Sharpstown Mall to shop for new clothing. Appellant took the complainant to three different stores, including a store called "Outfit Outlet" and another one called "5-7-9". While at "5-7-9," appellant asked a salesperson to find the complainant a revealing outfit. Appellant eventually purchased the complainant a short skirt and low-cut shirt. The complainant testified that she told appellant she felt uncomfortable in the clothing and he responded by telling her she looked good in them.

After going to the mall, the complainant testified that appellant took her to an America's Inn motel where she met a woman named "Diamond." The complainant gave the jury a detailed description of Diamond. At the motel, appellant requested the complainant change into her new clothing. After the complainant changed, appellant took the complainant and Diamond out to eat at a Denny's restaurant. When they arrived at the restaurant, appellant's behavior began to change. Up until this point, appellant had been, what the complainant described as, "extra friendly." At the restaurant, appellant became cruel and referred to the complainant and Diamond as "bitches." Appellant directed the complainant's and Diamond's behavior. Appellant would not allow the complainant to use the restroom by herself and required Diamond to follow the complainant into the restroom stall.

After dinner, they went to a third motel where Diamond met a man in the parking lot. Diamond got into the man's vehicle, he gave her money, and they went into one of the motel rooms. Appellant and the complainant waited in the parking lot for approximately thirty minutes until Diamond returned from the motel room. Diamond got back into appellant's vehicle and they returned to America's Inn. Appellant left the complainant and Diamond alone in the motel room. Diamond began encouraging the complainant to become a prostitute. The complainant refused and Diamond became angry. Diamond called appellant back into the motel room. Before appellant arrived, Diamond demanded that the complainant undress. Once appellant arrived, Diamond left the complainant and appellant alone in the room. Appellant forced himself on top of the complainant and had sexual intercourse with her.

The complainant testified that appellant took her back to the room at Motel 6 where she had stayed the previous night. Inside the motel room, appellant talked to the complainant about becoming a prostitute; the complainant eventually agreed to work for him. After she agreed, appellant left her alone in the room. The complainant watched out the motel window as appellant drove away and immediately called her mother. The complainant's mother arrived shortly thereafter and called the police.

Approximately a month later, agents with the Federal Bureau of Investigation (FBI) brought the complainant to the Children's Assessment Center (CAC) where a videotaped interview was conducted about the incident. During this interview, the complainant was shown a photo array of possible suspects. The forensic investigator at the CAC, who interviewed the complainant, failed to give the complainant any of the traditional warnings or instructions usually given by law enforcement before a witness views a photo array. The complainant immediately picked out appellant's photo and began cringing and crying. Additionally, before identifying appellant, the complainant gave a detailed description of the person who raped her. She described him as having a New York accent and wearing jewelry. She said the man was African-American, tall, muscular, and had many tattoos.

Appellant was charged with sexual assault of a child and a jury found him guilty. The trial court assessed his punishment at seven years' confinement. Appellant timely filed this appeal.

DISCUSSION

Appellant contends the trial court erred in admitting evidence that the complainant identified him in the photo array. Appellant claims the complainant's identification during the photo array was impermissibly tainted because the complainant was not given the proper admonishments before viewing the photo array and because appellant's photograph was not similar enough to the other photographs.

I. 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, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). When challenging the admissibility of a pretrial identification, an accused has the burden to show: (1) the out-of-court identification procedure was impermissibly suggestive, and (2) the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33. If a court finds that a pretrial identification

procedure was impermissibly suggestive, it must then consider the factors enumerated in *Neil v. Biggers* to determine whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).[1] A defendant bears the burden of establishing by clear and convincing evidence that the pretrial identification procedure was impermissibly suggestive. *Barley*, 906 S.W.2d at 33–34.

In regard to the first step, suggestiveness may be created by the manner in which a pretrial identification procedure is conducted. *Id*. at 33. For example, a police officer may point out the suspect or suggest that a suspect is included in a line-up or photographic array. *Id*. The content of a line-up or photographic array itself may be suggestive if the suspect is the only individual who closely resembles the description given by the witness. *Id*. Furthermore, an individual procedure may be suggestive or the cumulative effect of procedures may be suggestive. *Id*.

II. Standard of Review

In reviewing the trial court's decision on the admissibility of a pretrial identification, we defer to the trial court's rulings on mixed questions of law and fact if they turn on the credibility and demeanor of witnesses. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). We review *de novo* mixed questions of fact and law that do not turn on an evaluation of credibility and demeanor. *Id*. The question of whether a pretrial identification procedure was impermissibly suggestive is a mixed question of law and fact that does not turn on an evaluation of credibility and demeanor. *See id*. at 773. Accordingly, we apply a *de novo* standard of review. *Id*. However, the *Biggers* factors, used to determine whether an impermissibly suggestive identification procedure gives rise to a substantial likelihood of irreparable misidentification, are treated as historical issues of fact and are viewed in the light most favorable to the trial court. *Id*.

[1] These factors are: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty at the time of confrontation, and (5) the time between the crime and confrontation. *Biggers*, 409 U.S. at 199–200, 93 S. Ct. at 382.

The Court of Criminal Appeals has held appellate courts are not limited to reviewing only the evidence adduced at the admissibility hearing when considering the identification. *Webb v. State*, 760 S.W.2d 263, 272 n. 13 (Tex. Crim. App. 1988). An appellate court may review both the hearing testimony and evidence adduced at trial when determining the admissibility of a pre-trial identification. *Id*.

III. Analysis

Assuming without deciding that the pretrial identification procedure was impermissibly suggestive, we move directly to the second prong of our inquiry and determine whether the allegedly suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *See Brown v. State*, 64 S.W.3d 94, 101 (Tex. App.—Austin 2001, no pet.). In conducting this analysis, we look to the five *Biggers* factors for guidance. *Id*.; *see Biggers*, 409 U.S. at 199–200, 93 S. Ct. 375 at 382. The Court of Criminal Appeals has held that we are to treat the *Biggers* factors as issues of fact and review them in a light most favorable to the trial court's ruling. *Brown*, 64 S.W.3d at 101.

A. Opportunity to View

Applying the *Biggers* factors, we first note the complainant had an adequate opportunity to view appellant at the time of the offense. *Burkett v. State*, 127 S.W.3d 83, 88 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The complainant intially saw appellant in the Sharpstown Mall parking lot sometime in the afternoon. Subsequently, the complainant spent two days with appellant and had a high level of interaction with him. Appellant took the complainant out to eat, to the mall, and spent time with her in two different motel rooms. *See id*. (noting a victim had an adequate time to view the defendant when she saw him for about 15 to 20 seconds in broad daylight).

B. Degree of Attention

The record reveals the complainant paid a great deal of attention to appellant and her surroundings while she was in his custody. *See id*. The complainant was able to recall the first moment she met appellant in his orange sport utility vehicle until he

delivered her to the Motel 6 room on the second floor of the motel building. She remembered every meal they ate and specifically two of the stores he took her to at the mall. Additionally, the complainant gave a detailed description of a woman named "Diamond" whom the complainant met while she was with appellant. As seen in the factual recitation above, the complainant's description of the two days she spent with appellant was highly detailed.

C. Accuracy of Description

Before the complainant identified appellant, she gave a description of appellant to the forensic investigator. The complainant described him as a tall African-American male with a New York accent and many tattoos. The complainant also said appellant wore a lot of jewelry. This is an accurate description when compared to appellant's photograph and driver's license information, which shows his state of birth to be New York. Furthermore, the trial judge had an opportunity to view appellant and compare him to the complainant's description. Viewing this evidence in the light most favorable to the verdict we presume the trial court found the complainant's description accurately described appellant. *Loserth*, 963 S.W.2d at 773.

D. Level of Certainty

The level of complainant's certainty as to her identification was consistently high. *See id*. at 89. The complainant immediately began crying when she saw the photo of appellant and did not hesitate in her identification. *See Santos v. State*, 116 S.W.3d 447, 454–55 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (certainty regarding in-court identification can be inferred from how victim reacted to seeing the defendant). She also unequivocally identified appellant at trial. *See Burkett*, 127 S.W.3d at 89.

E. Time between Crime and Confrontation

The complainant identified appellant in the photo array one month after the sexual assault occurred. This short lapse of time between the sexual assault and photo identification provides support for the conclusion that the identification of appellant is reliable. *See Santos*, 116 S.W.3d at 455.

All the *Biggers* factors weigh in favor of finding the complainant's identification reliable. Therefore, we conclude no substantial risk of irreparable misidentification was created by the photo array. Accordingly, the trial court did not err in allowing testimony that the complainant previously identified appellant in a photo array. Therefore, we overrule appellant's sole issue on appeal.

CONCLUSION

Having overruled appellant's sole issue on appeal, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Mirabal.*
Do Not Publish — TEX. R. APP. P. 47.2(b).

* Senior Justice Margaret Garner Mirabal sitting by assignment.