Affirmed and Memorandum Opinion filed March 10, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00610-CR

MICHAEL JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 49345

MEMORANDUM OPINION

Appellant Michael Jackson was convicted of murder. Punishment was assessed at life imprisonment. On appeal, he challenges the trial court's failure to suppress a suggestive out-of-court identification. He also contends the evidence was legally and factually insufficient to support his conviction. We affirm.

FACTS

The complainant, Frederick Robinson, died after being shot twice in the head at close range. The shooting occurred at approximately 7:30 p.m. on April 2, 2008, as Robinson was walking toward the intersection of West Fuqua and West Ridgecreek in Fort Bend County.

A number of witnesses identified appellant as the shooter at trial. Daishawn Gillespie and her boyfriend, Corey White, were walking in the area at the time of the shooting. Gillespie testified that when she heard the first gunshot, she looked down the street and saw Robinson lying on the ground. The only person near him was appellant, whom she observed holding a gun. Gillespie recognized appellant as the boyfriend of White's sister. She also described appellant as having dreadlocks at the time.

Gillespie testified that she heard the second shot without seeing the shooter. She later admitted to giving police detectives four or five different versions of the incident. In one of these accounts, she stated that appellant was the person who killed Robinson.

White testified that just before the shooting, he observed Robinson walking towards him and Gillespie on West Ridgecreek. He further claimed that appellant was some distance in the background. White denied seeing the shooter when he heard the first gunshot. After Robinson fell to the ground, however, White witnessed appellant shoot Robinson at point blank range. White testified that it was still daylight outside and there was no one else in the vicinity.

Shauna Gatewood was driving down West Ridgecreek when she witnessed the shooting. The street lamps were still turned off and she testified that the sun had not completely set. In the available light, she was able to observe three people walking as a group behind another individual. Gatewood believed that all four were males. According to Gatewood, the leader snuck up behind the lone individual and shot him with a pistol.

Gatewood made a u-turn on West Ridgecreek after witnessing the first shot. The shooting occurred in the driveway of one of her friends, and Gatewood said she felt an obligation to reexamine the shooter for identification purposes. When she turned around, she witnessed the group of three standing over the complainant and talking to each other before the shooter fired again. She said she looked at the shooter "long enough to tell you the structure of his face."

Later that evening, Gatewood offered police detectives a description of the shooter. She testified that the leader of the group was "way taller" than the other three, describing him further as an African American with a dark complexion, slender build, and medium-length dreadlocks that were below his ears but above his shoulders. Although she testified that she was "not good in inches," she estimated his height to be somewhere between six feet and six-foot-one. Appellant's offense report indicated that he was six-foot-seven.

A few days after the shooting, Gatewood identified appellant as the shooter in a six-person photo spread. Three of the men in the photo spread had dreadlocks, and the rest wore their hair in braids. All six had hair at least as long as their ears, and none had hair that extended past their shoulders.

Appellant moved to suppress the identification as being impermissibly suggestive. In a hearing on the motion, Gatewood testified that the identification took place in a police patrol car outside her local nail salon. The officers presented her with the photo spread facedown and asked her to examine the photos. Because her nails were wet, she asked the officers to turn the photo spread over for her. Gatewood testified that the officers did not suggest her selection or point to appellant's picture when they revealed the photo spread. According to Gatewood, the officers merely told her, "[I]f you have any doubts about it, don't worry about it, we ain't going to pressure you."

The trial court denied the motion to suppress, and Gatewood later identified appellant as the shooter in open court. She conceded that appellant was much taller than six feet, but she added, "Well, when you're driving, I really can't see it."

The State also produced testimony from Ronnie Ray, a youth minister who had become somewhat acquainted with appellant through his close friendship with the White family. Ray testified that he learned of the shooting shortly after its occurrence. Later that evening, he received a phone call from appellant requesting help from a nearby motel. When Ray picked him up, appellant entered his truck and twice told him, "I killed that [expletive]." Ray took appellant to a friend's apartment, where he later contacted the police.

In the short time preceding his arrest, Ray said that appellant decided to cut off his dreadlocks. The State offered additional evidence that appellant attempted to conceal his identity. Roger Chappell, one of the arresting officers, testified that once appellant was in custody, he gave two false identities before finally revealing his real name.

ISSUES PRESENTED

In his first issue, appellant contends the trial court erred in allowing Gatewood's in-court identification, positing that her out-of-court identification was impermissibly suggestive. In his second issue, he contends the evidence was legally and factually insufficient to support his conviction. Because a finding of legally insufficient evidence would require us to reverse and render judgment of acquittal, we examine that issue first.

SUFFICIENCY OF THE EVIDENCE

Appellant asserts, without analysis, that the evidence is legally insufficient to support a conviction for murder. He also argues in detail that the evidence is factually insufficient, questioning certain inconsistencies in the testimony as well as the credibility of the witnesses.

During the pendency of this appeal, the Texas Court of Criminal Appeals decided that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion). Accordingly, we review appellant's second issue under the standard announced in *Jackson v. Virginia*, 433 U.S. 307 (1979), asking only whether the evidence against him was legally sufficient to sustain a verdict beyond a reasonable doubt. *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

When reviewing the sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 433 U.S. at 319. Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id*.

To obtain a conviction for murder, the State was required to prove that appellant (1) intentionally or knowingly caused the death of an individual; or (2) intended to cause serious bodily injury and committed an act clearly dangerous to human life that resulted in the death of an individual. Tex. Penal Code Ann. § 19.02(b)(1)–(2) (West 2010).

We conclude that the record contains ample evidentiary support to sustain appellant's conviction. Three witnesses identified appellant as the shooter. Ray testified

that appellant admitted to killing a person on the night of the offense. Appellant also cut off his dreadlocks and supplied two false names to officers following his arrest. *Cf. Yost v. State*, 222 S.W.3d 865, 875 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (holding that evidence of concealment may reflect a defendant's consciousness of guilt for the charged offense). Viewing the evidence in the light most favorable to the verdict, a rational juror could have found every element of murder beyond a reasonable doubt. Appellant's second issue is overruled.

OUT-OF-COURT IDENTIFICATION

In his remaining issue, appellant contends the trial court erred in denying his motion to suppress Gatewood's out-of-court identification.

A two-step analysis is used to determine whether the trial court should have suppressed a pre-trial identification. *Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995) (citing *Simmons v. United States*, 390 U.S. 377 (1968)). We first consider whether the out-of-court identification was impermissibly suggestive. *Id.* If so, we then consider whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Id.* This analysis requires an examination of the totality of the circumstances surrounding the particular case and a determination of the reliability of the identification. *Id.*

Appellant attacks the reliability of the pre-trial identification on a number of grounds. He criticizes the "non-professional" setting in which Gatewood examined the photo spread. He also criticizes the photos themselves, contending only half of the featured males had dreadlocks. Of the three with dreadlocks, appellant further asserts that one of the men appeared significantly younger than the others.

When we determine the suggestiveness of an out-of-court identification, we examine primarily the manner in which the pre-trial procedure was conducted, as well as

the content of the line-up or photo spread. *Burns v. State*, 923 S.W.2d 233, 237–38 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). The procedure is suggestive, for instance, when the police point to the suspect or suggest that a suspect is included in the line-up or photo spread. *Ibarra v. State*, 11 S.W.3d 189, 196 (Tex. Crim. App. 1999). The content may also be suggestive when the suspect is the only person in the line-up or photo spread who closely resembles the description given by the witness. *Brown v. State*, 29 S.W.3d 251, 254 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Even if the identification was suggestive, appellant has the burden of showing by clear and convincing evidence that the identification was *impermissibly* so. *Barley*, 906 S.W.2d at 33–34.

Appellant does not explain how an identification procedure is suggestive simply because it is conducted in the backseat of a patrol car. The officers specifically advised Gatewood that she was under no pressure to make a selection. Appellant has failed to show how the pre-trial identification was tainted by any action on the part of the officers.

Similarly, appellant has not shown that the content of the photo spread was impermissibly suggestive. All six photographs depict African-American men with dark complexions and hair that extends at least as long as their ears. Although only three of them wore their hair in dreadlocks, due process does not require that the individuals exhibit features exactly matching those of the accused. *See Colgin v. State*, 132 S.W.3d 526, 532 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). Rather, a photo spread must simply depict individuals who fit a rough description of the suspect. *Wilson v. State*, 15 S.W.3d 544, 553 (Tex. App.—Dallas 1999, pet. ref'd). Appellant has not demonstrated by clear and convincing evidence that the remaining individuals exhibited physical traits so unlike his own as to render the photo spread impermissibly suggestive.

Because we conclude that the out-of-court identification was not impermissibly suggestive, we do not address the merits of appellant's argument that Gatewood's

identification resulted in a substantial likelihood of irreparable misidentification. Appellant's first issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.
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