

Affirmed and Memorandum Opinion filed January 27, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-00698-CR

JESSE WARREN IVEY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1170304**

MEMORANDUM OPINION

Appellant Jesse Warren Ivey appeals his conviction for aggravated robbery, claiming the evidence is factually insufficient to support his conviction and that the trial court reversibly erred in overruling appellant's motion to suppress identification. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Police officers were dispatched to an apartment complex to investigate a call regarding an aggravated robbery. The officers learned from the complainant, Marino Rosales, that while he and two friends, Hosea Morales and Herman Aguilar, were in the

apartment complex parking lot, a tan-colored Impala automobile approached. As the vehicle neared, one of its five occupants inquired whether Rosales “had a staring problem.” According to Rosales, three men exited the vehicle and donned bandanas over their faces. One of the men wore a purple Los Angeles Lakers jersey and red shoes; this man pointed a gun at Morales and demanded money and jewelry and then demanded the same from Aguilar. A man with a “funky” eyebrow, wearing a white shirt and white baseball cap, approached Rosales with a gun and demanded money and jewelry. Two other men, one of whom Rosales recognized as a schoolmate, remained in the vehicle. The men returned to the vehicle when Rosales and his friends refused to hand over money and valuables. As they drove away, the men fired shots from the vehicle.

A tow-truck driver witnessed the events and observed the Impala exit the apartment complex parking lot. He saw gunfire coming from the passenger-side rear window, where a man in a baseball hat fired a revolver out of the window toward the apartment complex. The tow-truck driver called authorities and reported the vehicle’s license plate number. He followed the Impala and was able to see the driver, the front seat passenger, and a rear passenger who wore a baseball hat.

Officers later located the Impala in a driveway of a nearby residence. The officers noted that the hood of the vehicle was warm to the touch and observed live ammunition rounds in the back seat. The officers located appellant in one bedroom of the home, pretending to be sleeping even though he was fully clothed. Appellant was wearing a purple and yellow Los Angeles Lakers jersey and red athletic shoes; he was perspiring. Officers located two other men who were pretending to be asleep even though they were fully clothed, and one man hiding in a bathtub. Officers located a fifth person, who wore a white baseball cap and a white shirt, hiding on the roof of the home.

Officers brought Rosales and his friends to the residence to view the five individuals detained. They identified four of them, including appellant, as the men they had encountered in the parking lot. The tow-truck driver arrived at the residence and also identified three of the men as the ones he saw in the Impala. At trial, the tow-truck driver

could not positively identify appellant as one of the individuals he identified on the night of the incident.

Appellant was charged by indictment with the felony offense of aggravated robbery. Before trial, appellant filed a motion to suppress the complainant's identification of him. The trial court denied appellant's motion to suppress.

At trial, appellant testified that he did not participate in the robbery because he was outside the residence smoking when he saw the Impala pull into the driveway. The occupants of the vehicle urged him to move inside the home; there, appellant saw the occupants with two guns. Appellant claimed he was smoking marijuana when he saw police officers arrive at the residence and that he panicked and went inside.

The jury found appellant guilty of the charged offense and assessed punishment at ten years' confinement.

SUFFICIENCY OF THE EVIDENCE

Appellant claims in his second issue that the evidence is factually insufficient to support the jury's verdict. While this case was pending on appeal, a majority of the judges of the Texas Court of Criminal Appeals determined that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. Oct. 6, 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, JJ.); *id.* at 914–15 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality).¹ Therefore, in this case we will review the evidence under the standard set out in *Jackson v. Virginia*.

¹ Nonetheless, this does not alter the constitutional authority of the intermediate courts of appeals to evaluate and rule on questions of fact. See TEX. CONST. art. V, § 6(a) ("[T]he decision of [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.").

In evaluating a sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The trier of fact "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

A person commits the offense of robbery if, in the course of committing theft and with the intent to obtain and maintain control of property, that person "(1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." TEX. PENAL CODE ANN. § 29.02 (West 2003). The offense becomes aggravated robbery if the person committing the robbery uses or exhibits a deadly weapon. *Id.* § 29.03(a)(2) (West 2003).

Rosales testified that he feared for his life by the assailants' use of guns when they demanded money and jewelry from the group. Rosales described one of the assailants as a man wearing a purple athletic jersey and red shoes who held a gun to Rosales' friends' heads. The tow-truck driver who observed the events reported the Impala's license plate number to authorities. Officers located the vehicle at a nearby residence; the hood of the vehicle was still warm, and officers could see live ammunition in the backseat of the

vehicle. Officers located appellant inside the residence, pretending to be asleep; appellant was wearing clothing that matched the description of the clothing worn by one of the occupants of the Impala.

At the residence where the Impala was located, Rosales identified appellant as one of the assailants. Additionally, in court, Rosales positively identified appellant as one of the assailants he encountered in the parking lot.² The testimony of a single eyewitness is sufficient to support a felony conviction for aggravated robbery. *See Johnson v. State*, 176 S.W.3d 74, 77–78 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (holding that evidence was legally sufficient to support conviction for aggravated robbery based on a complainant's testimony and identification). Therefore, a rational trier of fact could have found the elements beyond a reasonable doubt. *See id.* at 77.

Appellant claims that Rosales's identification of him was based solely on his clothing and that Rosales was unable to identify him in court. Contrary to appellant's claim, Rosales made a positive, in-court identification of appellant as one of the occupants of the Impala. Although Rosales testified he could not remember appellant's exact conduct, Rosales testified about the conduct of the assailant who wore the purple sports jersey. Officers testified that after they detained appellant, who was clad in attire that matched Rosales's description of the clothing worn by one of the assailants, Rosales identified appellant at the residence as one of the individuals in the Impala. Rosales testified that he identified appellant because he remembered appellant from the incident and from identifying him at the residence where the Impala was found. Evidence as to the identity of an accused may be proven through direct or circumstantial evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) (concluding evidence sufficient to support conviction based on testimony by a complainant who identified perpetrator by clothing).

² In his first issue, which we address below, appellant argues that the procedure by which the complainants identified appellant was impermissibly suggestive. However, in a sufficiency review, a reviewing court must consider all evidence, whether properly or improperly admitted at trial, that the jury was permitted to consider. *Moff v. State*, 131 S.W.3d 485, 488, 489 (Tex. Crim. App. 2004).

Appellant points out that all of the assailants wore bandanas from the cheekbone down and that Rosales had only a limited opportunity to observe appellant. Even if Rosales was unable to view appellant's facial features and even if his identification of appellant was less than certain, these matters go toward the weight of the evidence and not to its admissibility. *See Garza v. State*, 633 S.W.2d 508, 513 (Tex. Crim. App. 1982) (involving witnesses who were unable to observe accused's face, but were able to see clothing and general physical characteristics). Appellant also points to the fact that the tow-truck driver was unable to identify appellant in court because he could not remember; according to the record, the tow-truck driver saw only three people in the Impala. The jury, as sole fact-finder, could determine the credibility of witnesses' testimony and decide the weight to be given to testimony. *See Garza*, 633 S.W.2d at 514 (concerning witnesses' identification of accused).

Appellant also points to the testimony of his girlfriend and grandmother in support of his claims that he did not commit the charged offense, because he was in their presence at times close to when the offense was alleged to have occurred. Alibi evidence is just one factor for the jury's consideration, and an evaluation of such evidence turns on credibility and demeanor. *See Johnson*, 167 S.W.3d at 78; *Davis v. State*, 831 S.W.2d 839, 842 (Tex. App.—Dallas 1992, pet. ref'd). Thus, the jury was free to accept or reject appellant's alibi evidence. *See Vasquez v. State*, 67 S.W.3d 229, 236–39 (Tex. Crim. App. 2002); *Johnson*, 176 S.W.3d at 78. We will not disturb the jury's determination.

Because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is sufficient to support appellant's conviction for aggravated robbery. *See Vasquez*, 67 S.W.3d at 238–39. Therefore, we overrule appellant's second issue challenging the sufficiency of the evidence.

SUPPRESSION OF IDENTIFICATION EVIDENCE

In his first issue, appellant claims the trial court reversibly erred in overruling his motion to suppress the complainant's pretrial identification of him. According to appellant, the procedure in which the complainant identified him was impermissibly

suggestive because the complainant and his friends were in a patrol unit together and could hear one another discuss the identification, and this exchange served to reinforce any identification.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor, but review de novo the trial court's application of the law to the facts as resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman*, 955 S.W.2d at 89. When, as in this case, there are no written findings of fact in the record, we uphold the ruling on any theory of law applicable to the case and presume the trial court made implicit findings of fact in support of its ruling so long as those findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). We view a trial court's ruling on a motion to suppress in the light most favorable to the trial court's ruling. *Wiede*, 214 S.W.3d at 24. If supported by the record, a trial court's ruling on a motion to suppress will not be overturned. *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

An in-court identification is inadmissible if it has been tainted by an impermissibly suggestive pretrial identification procedure. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999). We consider, under the totality of circumstances, whether the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *See Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008). Because admissibility of identification testimony hinges on reliability, for the in-court identification to be inadmissible, appellant must prove by clear and convincing evidence that the in-court identification was unreliable.

See id. If the indicia of reliability outweigh the influence of an impermissibly suggestive pretrial identification, in-court identification testimony is admissible. *Id.* at 608.

For purposes of our analysis, we presume that the on-scene identification procedure was impermissibly suggestive, and we turn to the second step of the analysis to determine whether this procedure rendered the in-court identification unreliable under the totality of the circumstances. In conducting this analysis, we must weigh the corrupting effect of the impermissibly suggestive on-scene identification procedure against the following factors to determine whether the in-court identification is admissible:

- (1) The witness's opportunity to view the perpetrator at the time of the crime;
- (2) The witness's degree of attention;
- (3) The accuracy of the witness's prior description of the perpetrator;
- (4) The level of witness certainty at the time of the confrontation; and
- (5) The lapse of time between the alleged act and time of confrontation.

Ibarra, 11 S.W.3d at 195.

The evidence adduced at the suppression hearing, when viewed in the light most favorable to the trial court's ruling, shows the following:

- Rosales and his two friends gave detailed descriptions of their assailants to responding officers. The descriptions were the same.
- Near the crime scene, officers located the vehicle as identified by the color, model, and license plate number given to officers. Appellant, wearing the same clothing as described by Rosales to officers, was found in the immediate vicinity—inside the home where the assailants' vehicle was parked.
- Within one hour of the initial police response at the crime scene, officers brought Rosales and his friends to the residence to view appellant and others detained there. The tow-truck driver also arrived at the residence to view the people who were detained.

- While Rosales and his friends remained in the back of the patrol unit,³ other officers lined up the five individuals detained from the residence and shined a spotlight on them; appellant was wearing a purple sports jersey and red athletic shoes. Within five minutes, Rosales and his friends positively identified him as one of the men they encountered in the parking lot. According to the officer, neither Rosales nor his friends seemed hesitant in their identification of appellant. All three of them were positive in their identification of appellant, and had a high level of certainty.
- According to the testimony from Rosales, the tow-truck driver, and the officer who conducted the on-scene identification, the officer did not suggest to the witnesses that they were to identify anyone or that the people detained committed any offense. When Rosales, Morales, and Aguilar identified appellant, the officers cautioned them to be truthful and indicated that they did not have to make any identification.
- Rosales testified that he identified appellant based on what he remembered from the incident.

Rosales had an opportunity to view the assailants at the time of the robbery and provided detailed descriptions of the perpetrators to the officers. The descriptions, when measured against the individuals he later identified as the assailants (including appellant), proved very accurate. Furthermore, these precise and accurate descriptions of the assailants suggest he had a high degree of attention during the incident. Moreover, he demonstrated a high level of certainty at the time of the on-scene identification. Finally, the lapse of time between the act and the time of the confrontation was only about an hour, which strongly suggests that Rosales's memory was fresh and his ability to recall and identify were optimal.

Weighing this strong evidence of reliability against what we presume for purposes of analysis was the unduly suggestive nature of the on-scene identification procedure, we conclude that no substantial risk of irreparable misidentification was created so as to deny appellant due process. *See Santos v. State*, 116 S.W.3d 752, 757 (Tex. App.—Houston

³ Although appellant asserts that the witnesses could have collaborated in their identifications, no evidence suggests that the men did so. In fact, Rosales denied speaking with his friends about the descriptions of the assailants or the identification of appellant. The officer denied hearing Rosales or his friends discussing anything during the identification procedure.

[14th Dist.] 1992, pet. ref'd) (holding that identification procedure did not create substantial risk of irreparable misidentification). Under the totality of circumstances, the on-scene identification procedure did not render the in-court identification unreliable. Accordingly, we conclude that the trial court did not abuse its discretion by denying appellant's motion to suppress. We overrule appellant's first issue.

The trial court's judgment is affirmed.

/s/ **Kem Thompson Frost**
 Justice

Panel consists of Justices Anderson, Frost, and Brown.

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