Affirmed and Memorandum Opinion filed December 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00914-CR

JEFFERY ALLEN QUINN, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1157169

MEMORANDUM OPINION

A jury convicted appellant, Jeffery Allen Quinn, of aggravated robbery. The jury sentenced appellant to five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises two issues on appeal. In his first issue, he argues the evidence was not factually sufficient to support the conviction. In his second issue, appellant contends the trial court erred by refusing to grant him a mistrial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of February 20, 2008, Eduardo Najera and Charles Rosok were working at a Sprint cellular telephone store[1] on Veterans Memorial Drive in North Houston. (3 RR 17-18) Both men were checking their email when four young African-American men entered the store. (3 RR 105) Rosok testified that three of the men had t-shirts over their faces and three carried pistols. (3 RR 105)

Najera testified that one of the men came up to him and brandished a gun near his face while the other men walked past him towards the back of the store. (3 RR 26-27) The man holding the weapon on Najera did not cover his face, but did put the hood of his shirt on top of his head. (3 RR 28) Najera testified he and the man engaged in a verbal exchange during which he was looking at the man's face. (3 RR 29) The four men stole merchandise, Najera's jewelry and wallet, and Rosok's personal cell phones, wallet, personal keys, and the store's key. (3 RR 39, 110)

On March 5, 2008, Deputy Ronald Fleming of the Harris County Sherriff's department met with Najera and Rosok. Fleming privately showed each witness a photo array for identification of potential suspects. (3 RR 79) Najera identified appellant as the man who held him at gunpoint. Najera circled his choice and initialed the photo. (3 RR 48) At trial, Najera testified that he had no doubts that the man in the photo was the one with the gun. (3 RR 48) Najera, however, was unable to make a live identification of appellant in the courtroom. (3 RR 50) Rosok was unable to identify any person in the photo array. (3 RR 115)

[11] There was testimony that the store was not actually owned by Sprint, but carried Sprint products or was an exclusive Sprint dealer. That testimony is not relevant to the issues presented in this appeal.

Appellant's defense rested on a case of mistaken identity. Appellant did not testify in his own defense, but did call witnesses. Sandra Kinnerson testified that her son, Clinton Broadway, was appellant's friend for a number of years. (3 RR 125) She stated that appellant frequently spent the night in her home during February 2008. (3 RR 126) Kinnerson testified she could not be sure he slept over at her home on February 19, 2008, and did not know where he was the morning of February 20, 2008.

Broadway testified appellant slept at his home on February 19, 2008, and stayed with Broadway throughout the next day, February 20, 2008. (3 RR 135) Broadway testified that he remembered because he and appellant went to a pawn shop on February 20, 2008, at approximately 4:00 p.m. to pawn Broadway's Play Station Portable. He stated they pawned the item because they needed money for gasoline. (3 RR 136-137) He testified that neither he nor appellant had any money prior to pawning the Play Station. (3 RR 138)

The State successfully argued that because appellant put on a mistaken identity defense, the State was entitled to provide evidence of an extraneous offense. Thus, the jury also heard evidence that on February 28, 2008, a Game Stop store in North Houston was also robbed by four young African-American men. (4 RR 1) The manager, Kenneth Dubree, identified appellant as one of the robbers when presented with a photo array after the robbery. (4 RR 23) Dubree testified that appellant had a hood over his head, but his face was visible. (4 RR 13-14) Dubree also identified appellant in court. (4 RR 13)

Dubree also identified another person, Elliott Baptiste, in the photo array. (4 RR 41) Sergeant Shane McCoy of the Harris County Sherriff's department testified that he filed charges against both appellant and Baptiste based upon Dubree's identifications. (4 RR 41) Sergeant McCoy further testified Baptiste confessed to the Game Stop robbery. (4 RR 41) Appellant objected to the testimony regarding Baptiste's confession on the grounds that it was non-responsive to the question asked. The trial court sustained appellant's objection. (4 RR 41) The trial court also gave a limiting instruction, telling

the jury to disregard the information about Baptiste's confession. (4 RR 41) Appellant then moved for a mistrial based upon his relevance objection, which the trial court denied.

DISCUSSION

I. Was the Evidence Factually Sufficient?

Appellant argues the State's evidence is so weak that the verdict was manifestly unjust. Appellant believes the evidence is inherently weak because: (1) Najera's photo array identification may have been tainted by the belief that a suspect must be included in a photo array; (2) neither Najera nor Rosok could identify appellant in court; (3) even if appellant participated in the Game Stop robbery, it does not prove he participated in the cellular phone store robbery. He also argues the evidence against him is outweighed by conflicting evidence that Broadway provided appellant with an alibi for the entire time of the robbery. We address each of the sub-issues in turn.

A. Standard of Review

A majority of the judges of the Texas Court of Criminal Appeals have 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*, No. PD-0210-09, 2010 WL 3894613, at *1 (Tex. Crim. App. Oct. 6, 2010) (plurality op.).[1] Therefore, in this case we will review the evidence under the standard set out in *Jackson v. Virginia,* and we do not separately refer to legal or factual sufficiency.

[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 a sufficiency review, we view all evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury, as the sole judge of the credibility of the witnesses, is free to believe or disbelieve all or part of a witness' testimony. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses to, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the jury's discretion and such conflicts alone will not call for reversal if there is enough credible evidence to support a conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). An appellate court may not reevaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd.).

B. Was Najera's Photo Array Identification Tainted?

A pretrial identification must be set aside if the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App. 1995).

This court must apply a two step analysis to determine if the process was impermissibly suggestive. *Simmons*, 390 U.S. at 384; *Barley*, 906 S.W.2d at 33. First, we decide if the pretrial identification procedure was unreasonably suggestive. *Simmons*,

390 U.S. at 384; *Barley*, 906 S.W.2d at 33. If so, we must determine if the procedure created a very substantial likelihood of irreparable misidentification. *Simmons*, 390 U.S. at 384; *Barley*, 906 S.W.2d at 33. The factors to weigh in determining whether there was an impermissibly suggestive identification procedure are (1) the witness's opportunity to see 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 criminal; (4) the level of certainty demonstrated by the witness at the time of the confrontation; (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Jackson v. State*, 657 S.W.2d 123, 130 (Tex. Crim. App. 1983). This is a fact-specific analysis of each individual case. *Simmons*, 390 U.S. at 384.

The defendant bears the burden of showing the pretrial identification procedure was impermissibly suggestive. *Barley*, 906 S.W.2d at 33–34. Appellant's brief provides no allegations that the identification procedure in this case was actually tainted. Instead, appellant relies solely on the argument that in any photo array situation, a witness might believe the suspect is included in the police photo array.

The court has not found evidence of an impermissibly suggestive identification in the record. Najera testified that he looked at an unobstructed view of appellant's face for some period of time. (3 RR 31-33) He also testified he understood the instructions regarding the photo array, including that no suspects might be included. (3 RR 47) Najera had no doubt that the person he chose in the photo was the man who held him at gunpoint. (3 RR 48) Deputy Fleming testified Najera identified only the appellant out of three separate photo arrays of various potential suspects. (3 RR 81) Deputy Fleming and Najera testified that Deputy Fleming had not influenced the identification process, and that the other people in the photo array were all African-American men in street clothing.

Appellant has not met his burden of showing that the identification process in this case was impermissibly suggestive. Thus, we need not reach the issue of whether the

procedure irreparably tainted the identification process. The portion of appellant's first issue addressing the photo array is overruled.

C. What is the Probative Value of Najera's Inability to Identify Appellant in Court, the Game Stop Manager's Testimony, and Appellant's Alibi Witnesses?

Appellant argues Najera's inability to identify appellant in court weighs against the factual sufficiency of the evidence supporting the State's case, which we will construe as against the legal sufficiency of the case. The identity of a defendant can be proven by direct or circumstantial evidence. *Earls v. State,* 707 S.W.2d 82, 85 (Tex. Crim. App. 1986). Failure to make a positive in-court identification is not fatal to the witness' testimony; the failure goes to the weight and credibility of the testimony. *Meeks v. State,* 897 S.W.2d 950, 955 (Tex. App.—Fort Worth 1995, no pet.) Najera testified to the entire crime, providing details about where he was, where the robbers were in relation to him, and a chronology of events. He was unable to tell the jury other details, including many identifying features of the robbers, including height and weight, type of clothing worn, and whether any of the men had facial hair. (3 RR 57-59). Najera made a positive identification of appellant in the mug shot, which has probative value even in the absence of an in-court identification. *See Bickems v. State,* 708 S.W.2d 541, 543 (Tex. App.—Dallas 1986, no pet.) (evidence found sufficient to sustain a conviction when the victim made a positive photographic identification and circumstantial evidence existed that the defendant committed the crime, even though victim could not make a positive in-court identification).

Similarly, Game Stop manager Kenneth Dubree testified to the details of the robbery committed at his store. Photographic evidence from Game Stop's surveillance video of the robbery was admitted. Dubree positively identified appellant as one of the robbers in both a photo array and in court. (4 RR 13, 22) As appellant notes, proof that

appellant committed the Game Stop robbery is not proof that he committed the charged offense. (AB 10) The jury could nonetheless consider the evidence and determine its weight and credibility in determining a material fact at issue, namely the appellant's identity. *Jones*, 984 S.W.2d at 257; *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996)

Sandra Kinnerson testified that appellant often spent the night at her house, but she could not be sure if appellant spent the night and day at her home on February 20, 2008. (4 RR 128) Clinton Broadway provided appellant with an alibi for the time of the robbery. (4 RR 136)

In this case, the evidence largely turned on which witnesses to credit. The jury is the sole judge of witness credibility and the weight of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). Jurors are also allowed to make reasonable inferences from facts. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When there is conflicting evidence, this court "presume[s] the trier of fact resolved any such conflict in favor of the prosecution." *Fuentes*, 991 S.W.2d at 271.

Najera's inability to identify appellant in court goes only to the weight of his testimony, which is a factual determination to be made by the jury. *Id.* The same is true regarding Broadway's alibi testimony. *Id.* A reasonable jury could have chosen to believe Najera and discount Broadway's version of events. While Dubree's testimony does not prove appellant committed the Sprint store robbery, the jury could have chosen to believe Dubree, which undercuts appellant's mistaken identity defense. *Id.* We conclude a reasonable jury could believe Dubree's testimony and considered it in light of appellant's defense. Based upon the evidence presented, a reasonable jury could have found appellant was one of the participants in the Sprint store robbery beyond a reasonable doubt.

Appellant's issue addressing sufficiency is overruled.

II. Did the Trial Court Err by Refusing to Grant a Mistrial?

To preserve error for appellate review, the party must make a specific objection and obtain a ruling on the objection. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). The error at trial must be the same as the error complained of at the appellate level. *Wilson v. State*, 71 S.W.3d 346, 350 (Tex. Crim. App. 2002).

Appellant claims in his next issue that the trial court was required to grant a mistrial after Sergeant McCoy stated that Baptiste confessed to the Game Stop robbery. Appellant argues in his appeal that Deputy McCoy's statement violated the Confrontation Clause of the United States Constitution because appellant had no ability to cross examine Baptiste. *See* U.S. CONST. amend. VI; *Bruton v. U.S.*, 391 U.S. 123 (1968); *Lilly v. Virginia*, 527 U.S. 116 (1999).

Appellant, however, did not make this objection at trial. Appellant received a running objection to Sergeant McCoy's testimony under the Texas Rules of Evidence. (4 RR 35) In particular, the running objections were for relevance, probative value substantially outweighed by unfair prejudice of the testimony, and using other crimes to prove culpability in the charged offense. *See* Tex. R. Evid. 401, 403, 404(b). When Sergeant McCoy referenced Baptiste's confession, appellant also objected on the grounds of a non-responsive answer, which the trial court sustained. (4 RR 37) Upon motion, the trial court issued a limiting instruction to the jury, requiring them to disregard Sergeant McCoy's remark. (4 RR 41) None of these objections implicate the Confrontation Clause. *See* U.S. CONST. amend. VI.

The purpose of requiring a trial court objection is "to give the trial court or the opposing party the opportunity to correct the error or remove the basis for the objection." *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000). In this case, the basis for appellant's objections was the Texas Rules of Evidence. Consequently, appellant did not preserve error because he voiced no complaint based on the Confrontation Clause. *See, e.g., Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) (concluding an objection

to a trial court's refusal to admit evidence under the Texas Rules of Evidence did not preserve a Confrontation Clause error); *Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004) (noting a hearsay objection did not preserve Confrontation Clause claims).

Because the Confrontation Clause error was not preserved at the trial court, we are unable to review appellant's claim. Therefore appellant's second point of error is overruled.

CONCLUSION

Having considered and overruled both of appellant's points of error, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown.
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