

Affirmed and Memorandum Opinion filed November 13, 2014



In The

Fourteenth Court of Appeals

NO. 14-13-00690-CR

CORDERO JARREAL STEVENSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1299880**

M E M O R A N D U M O P I N I O N

A jury convicted appellant Cordero Jarreal Stevenson of aggravated robbery with a deadly weapon¹ and sentenced him to confinement in the Institutional Division of the Texas Department of Criminal Justice for thirty-three years. Appellant filed a timely notice of appeal. We affirm.

¹ See Tex. Penal Code Ann. §§ 29.02(a)(1), 29.03(a)(2) (West 2011).

Appellant raises four issues. In his first issue, appellant claims the trial court erred in denying his motion to suppress an out-of-court identification because the procedure was unconstitutionally suggestive. Appellant's second issue argues the trial court erred in admitting the complainant's in-court identification because it was unreliable considering the totality of the circumstances. Issue three contends the trial court violated appellant's right to due process by admitting evidence of the complainant's out-of-court identification without instructing the jury on the unreliability of eyewitness identification. Finally, appellant asserts the evidence is insufficient to support his conviction.

BACKGROUND

An aggravated robbery occurred on April 8, 2010, at the Java Gold store. The business was owned by Hehmood Ghaznavi. Ghaznavi was deceased at the time of trial. Rosendo Morales was present in the store to fix Ghaznavi's computer. Two men came into the business. Approximately five minutes later a third man entered. All three men pulled guns out and pointed them at Ghaznavi and Morales. The men started asking for money and searching for it. Morales identified appellant as the third person that came into the store and as the man in the video surveillance wearing a red shirt. Morales testified appellant searched Ghaznavi's pockets and took what Morales had in his pockets, a wallet containing "probably couple hundred dollars" in cash and a silver cross. The men took Morales's two cell phones and two guns from inside the store. One of the other men took Morales's keys and they stole his car. The car was found about four or five blocks from the store, but everything in it was taken – a computer, computer screens, and laptops. Fingerprints were taken at the scene but none were identified as appellant's.

Sergeant Antonio Guzman, an investigator with the robbery division of the Houston Police Department, testified that he first spoke with Morales and Ghaznavi six days after the robbery. He obtained a surveillance video and it was shown on local television around April 16, 2010. On March 22, 2011, Guzman received a Crime Stoppers tip regarding appellant. He obtained a photograph of appellant and prepared a photo array. When Guzman showed the array to Morales, he immediately identified appellant.

DENIAL OF MOTION TO SUPPRESS OUT-OF-COURT IDENTIFICATION

Appellant's first issue contends the trial court erred in denying his motion to suppress his out-of-court identification by Morales. Appellant claims the out-of-court identification procedure gave rise to a substantial likelihood of an irreparable misidentification.

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). “[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.” *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001). We apply a two-step analysis to determine the admissibility of an in-court identification: (1) whether the pretrial identification procedure was impermissibly suggestive, and, if so, (2) whether that suggestive procedure gave rise to a substantial likelihood of an irreparable in-court misidentification. *Id.* An appellant must establish both of these elements by clear and convincing evidence. *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (citing *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993)).

Suggestiveness may arise from the manner in which a pretrial identification procedure is conducted. *Barley v. State*, 906 S.W.2d 27, 33–34 (Tex. Crim. App.

1995). For example, a police officer may point out the suspect or suggest that a suspect is included in a lineup or photographic array. *Id.* Also, the content of a lineup or photographic array itself may be suggestive if the suspect is the only individual who closely resembles the description given by the witness. *Id.* An individual procedure may be suggestive or the cumulative effect of procedures may be suggestive. *Id.*

In his motion to suppress, appellant claimed the photo spread did not contain photos of other individuals who are similar in appearance to the defendant. Sergeant Guzman testified that he prepared the photo array from a database of mug shot photographs in the Houston Police Department (“HPD”) criminal files. Appellant was placed in the No. 6 position. He then contacted the victims of the robbery, Morales and Ghaznavi. Guzman testified that he usually gives witnesses a standard HPD admonishment. He instructs them the suspect or the person who committed the crime may or may not be in the array, to look at each photo carefully, to take their time and, if they see the individual, point him out. Guzman testified that he did not, in any way, point out the individual that he wanted identified. Further, he testified that all the individuals in the photo array are of the same race, around the same age, and have similar facial hair. Guzman testified that he handed Morales the array and after a few seconds, Morales pointed at the No. 6 position and said, “That’s him.” Guzman identified appellant as the individual Morales selected from the array.

Appellant argued at the hearing that only the person in position No. 5 had a complexion as dark as his, but that person’s features were much broader and bulkier than appellant’s slender build. On appeal, appellant asserts that he and the person in position No. 5 were the two darkest-complexioned individuals in the array and that the face of the person in position No. 5 was noticeably “thicker”.

The photo array is comprised of six pictures of black men of similar age, facial features, skin color, and hair styles. All are dressed in white t-shirts. The person in position No. 2 is also wearing a collared shirt or jacket and the person in position No. 5 has on a black jacket. The person in position No. 5 does have the darkest complexion but appellant's complexion is also similar to that of the person in position No. 3. All six men have the same haircut and very similar facial hair. The face of the person in position No. 5 is broader than appellant's but his face is also closer to the camera. The faces of the other men reflect a similar build to appellant.

A photo array is not improperly suggestive merely because the photographs of six individuals can be distinguished in some manner. *See Mungia v. State*, 911 S.W.2d 164, 168 (Tex. App.—Corpus Christi 1995, no pet.). “[L]ineup participants need not be identical to satisfy due process requirements.” *Luna v. State*, 268 S.W.3d 594, 607–08 (Tex. Crim. App. 2008). We conclude appellant did not prove, by clear and convincing evidence, that the out-of-court identification procedure used here was impermissibly suggestive. Accordingly, the trial court did not abuse its discretion in denying appellant's motion to suppress. Because appellant did not establish the photo array was unduly suggestive, we need not address whether the procedure gave rise to a very substantial likelihood of irreparable misidentification. Issue one is overruled.

ADMISSION OF IN-COURT IDENTIFICATION

In his second issue, appellant claims the trial court erred in allowing Morales to identify him in-court because, considering the totality of the circumstances, it was unreliable. The record reflects Morales identified appellant in court as one of the men who came into the store to commit the robbery. There was no objection to his testimony. Subsequently, Morales was asked if “the man in the red shirt in

State's Exhibit 7" was appellant. An objection was made to "a leading question" after Morales answered, "Yes."

The record does not reflect any objection was made to Morales's in-court identification of appellant. Generally, to preserve error, a party must make a timely, specific objection to apprise the trial court of the basis for the request, objection, or motion and receive an adverse ruling. *See* Tex. R. App. P. 33.1(a)(1). Accordingly, appellant's argument presents nothing for our review and we overrule issue two.

INSTRUCTION ON UNRELIABILITY OF EYEWITNESS IDENTIFICATION

Appellant's third issue claims the trial court erred in failing to instruct the jury on the unreliability of eyewitness identification. Appellant neither requested such an instruction nor objected to its omission at trial.

We first determine whether there was error in the charge when reviewing a claim of charge error. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). If the appellant objected at trial, we must reverse if there was error and the error caused some harm. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Barrios*, 283 S.W.3d at 350. If the appellant did not object, however, we reverse only if there was error and it caused egregious harm. *Almanza*, 686 S.W.2d at 171. The analytical framework for assessing harm does not apply unless we first find error in the jury charge. *Posey v. State*, 966 S.W.2d 57, 61 (Tex. Crim. App. 1998).

"[A] defendant must object to the charge before he may be heard to complain on appeal about 'errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts.'" *Id.* (quoting Tex. Code Crim. Proc.

art. 36.14). Therefore, “when *Almanza* speaks of ‘erroneous’ omissions of issues in the court’s charge, it speaks of omissions of issues upon which a trial court has a duty to instruct without a request from either party or issues that have been timely brought to the trial court’s attention.” *Id.* at 63–64. And although the trial judge has “an absolute sua sponte duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged,” he does not have a “similar sua sponte duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues. These are issues that frequently depend upon trial strategy and tactics.” *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007); see *Taylor v. State*, 332 S.W.3d 483, 487 (Tex. Crim. App. 2011) (“We have previously held that [a]rticle 36.14 imposes no duty on trial courts to sua sponte instruct the jury on unrequested defensive issues.... An unrequested defensive issue is not the law applicable to the case.”) (citing *Posey*, 966 S.W.2d at 62).

In this case, appellant neither requested an instruction on the unreliability of eyewitness identification nor objected to the omission of such an instruction at trial. Because the trial court had no duty to sua sponte instruct the jury regarding all potential defensive issues and evidentiary theories, appellant cannot complain of this omission for the first time on appeal. See *Delgado*, 235 S.W.3d at 249–50; *Posey*, 966 S.W.2d at 61–64. See also *Webber v. State*, 29 S.W.3d 226, 233 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d) (“a defensive issue is not part of the law applicable to the case unless the accused requests it to be or objects to its omission.”). Accordingly, appellant’s third issue is overruled.

SUFFICIENCY OF THE EVIDENCE

Appellant’s fourth issue claims the evidence is insufficient to support his conviction. Appellant points to evidence that he had an alibi, there was no physical

evidence linking him to the crime, and he was not found with any of the stolen items.

Cilia Green, appellant's wife, testified that on the day in question he was home with her for the entire day. On cross-examination Green admitted that she had never talked to the police or the prosecutors and told them of appellant's alibi.

Appellant argues "the only evidence tying [him] to the incident was Morales's problematic identification almost one year after the incident occurred." "The testimony of a single eyewitness can be enough to support a conviction." *Bradley v. State*, 359 S.W.3d 912, 917 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). The jury resolves any conflicts or inconsistencies in the evidence and decides whether to believe eyewitness testimony. *Id.* The jury weighs the evidence and may find guilt without physical evidence linking the accused to the crime. *Id.* In addition to Morales's identification of appellant, the record reflects the surveillance video from the store was admitted into evidence, as well as seventeen still photographs from the video. The jurors were able to view the video and the photographs before determining whether appellant was one of the robbers.

Although Green provided appellant with an alibi, we defer to the jury's resolution of conflicting witness testimony. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The jury was free to credit the testimony of the eyewitness and disbelieve Green's testimony. *See Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986) (holding jury is sole judge of witness credibility and may believe some witnesses and refuse to believe others).

Viewing all the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Isassi*, 330 S.W.3d at 638; and *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We hold the evidence is

legally sufficient to support appellant's conviction. Appellant's fourth issue is overruled.

CONCLUSION

Having overruled all of appellant's issues, the judgment of the trial court is affirmed.

/s/ Marc W. Brown
Justice

Panel consists of Justices McCally, Brown, and Wise.
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