Affirmed and Memorandum Opinion filed April 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01054-CR

ANGELO ERIC MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1363476

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

Appellant Angelo Eric Miller appeals his conviction for capital murder, asserting insufficiency of the evidence to support his conviction and challenging the trial court's denial of a hearing on his motion for new trial and the trial court's rulings admitting out-of-court and in-court identifications of appellant. We affirm.

I. BACKGROUND

Camille Ross was shot and killed at a Houston apartment complex on June

10, 2012, during a robbery. Evidence presented at trial showed that Ross's sister, Clarissa Sedwick, was attempting to purchase narcotics from one of the assailants when the transaction turned deadly.

The day before the killing Sedwick had asked her niece to provide contact information for drug dealers. After receiving phone numbers from her niece, Sedwick contacted Antwone Betters and agreed to meet him in Houston to purchase cocaine.

The next day, Sedwick drove from Austin to Houston. Ross accompanied Sedwick on the trip. Their cousin, Quineasha Anderson, also came along. Sedwick did not tell Ross or Anderson that the purpose of the trip was to buy cocaine. When they arrived in Houston, Betters kept changing the location where they were to meet for the cocaine transaction. Finally, Betters directed Sedwick to an apartment complex located at 201 Rosamund. It was still daylight when Sedwick and her passengers arrived at the apartment complex. Betters was in a pickup truck with appellant and an Hispanic male. Sedwick was expecting Betters to be alone.

Betters ordered Sedwick to get out of her vehicle and get into his truck. When Sedwick got into Betters's truck, she saw that he was wiping down everything with a T-shirt and a bandana, like he was trying not to leave fingerprints. Betters drove to the back of the apartment complex. Ross moved into the driver's seat of Sedwick's vehicle, followed Betters, and parked next to the pickup truck. One of the other men, who had a tattoo of a Chinese symbol on his neck, ordered Sedwick to get out of the pickup truck. The tattooed man walked Sedwick into the apartment complex, where he said they were going to his aunt's apartment to see the cocaine.

Sedwick heard a gunshot and she started running to her vehicle, but was

stopped. Sedwick saw appellant standing by her vehicle, bringing the gun out of the vehicle. Sedwick was pushed to the ground. Appellant tossed a gun to the tattooed man.[1] At gunpoint, Sedwick gave them her wallet and a cell phone. Unbeknownst to the assailants, Sedwick had a second cell phone, which she did not give to them. Appellant and the other man left her because Betters was leaving in the truck.

Meanwhile, Anderson, who was in the back seat of Sedwick's vehicle, could not see who was driving the truck because the windows of the pickup truck were tinted. Betters and appellant jumped out of the pickup truck. Appellant calmly demanded the keys to the women's vehicle, their cell phones, and their purses. Ross asked the men for her identification, but they would not return it to her. Anderson heard a gunshot. Then she heard the shooter say, "my bad, baby." With the sound of gunshot, people were starting to come outside. Betters got into the driver's seat of the pickup truck and appellant and the other man followed. With Betters at the wheel, the assailants drove away. The assailants took $4,000 or $5,000 from Ross[2] and $3,000 from Sedwick.

Ross had called her niece (who had supplied Betters's phone number) and was on the phone with the niece when Ross was shot in the chest. The niece testified at trial that Ross was scared. The niece could hear a man's angry voice, but it was not Betters's voice. Then the niece heard the gunshot.

Emergency responders arrived at the scene first and pronounced Ross dead. The first police officers to arrive described Sedwick as "torn up" and "very hysterical" and was crying and screaming. According to the officers, Sedwick was

[1] Sedwick did not tell the police that the appellant tossed a gun to the man who had exited the truck with Sedwick. Sedwick explained that she did not want to cooperate with the police.

[2] The $4,000 or $5,000 in Ross's purse was from Ross's tuition check.

"crumbled down, holding her head, wailing at times." Anderson was "[p]hysically distraught, upset . . . kind of freaking out." Initially, Sedwick would not cooperate with the police. Anderson was more cooperative and forthcoming. The police separated the witnesses.

Later that night, the police used separate vehicles to transport Anderson and Sedwick to the Homicide Division's office, and kept them separated for more in-depth interviews. The police were able to develop Betters as a suspect because Betters's cell phone number was on Sedwick's phone (the one the assailants did not take).

Once the police had Betters's name, they showed Anderson a photo array that included a prior booking photo of Betters. Anderson identified Betters. Upset, Sedwick did not really seem to look at the photos, but she appeared to react when she saw Betters's photo. Still, she did not identify Betters in the photo array. The police developed no other suspects that night.

The police obtained a warrant for Betters's arrest and a warrant for his cell phone records. Phone records revealed that Betters's phone had been used in "an extreme amount of communication throughout . . . [the] day [of the shooting]." Subscriber data for that phone revealed it was subscribed to appellant's mother. The calls between those two cell phones ended at 6:16 p.m. the evening Ross was shot. At 6:51 p.m., the phone for which appellant's mother was the subscriber was used to either make a call or received a call while in the cell phone tower area that covered the apartment complex on Rosamond. Betters received a call about the same time in the same tower area.

As part of their investigation, Officers Robert Odom and Mark Coleman travelled to Austin about four months after the shooting to show Sedwick and Anderson four different photo arrays. One of the photo arrays included a

photograph of appellant. The other three photo arrays were for other three additional potential suspects. Each photo array contained a photograph of a suspect and five other individuals or "fillers." Odom and Coleman first showed the photo arrays to Anderson, who tentatively identified one of the fillers from one of the arrays. No charges were brought against anyone based on Anderson's tentative identification.

Odom and Coleman next showed the photo arrays to Sedwick, who picked appellant out of a photo array. Sedwick identified appellant as the shooter. Sedwick did not give the police a description of appellant the night of the shooting. When she saw appellant's photo, Sedwick started crying and shaking. According to Odom, Sedwick was "visibly emotional" "[a]s soon as she saw" appellant's picture. Sedwick "blurted out, he's the one that shot my sister." Sedwick picked out an Hispanic male, who was a filler, as another possible suspect, but she was not as sure about the second selection as she was about appellant.

At trial, Sedwick identified appellant as the shooter. Sedwick testified that appellant, who was sitting in the front passenger seat of the truck, turned around where she could see his face.

According to Anderson's trial testimony, when Betters and appellant were robbing her and Ross, she looked down so that she would not be looking at appellant. Anderson stated that "Betters was the only person [she] got a good look at." Anderson, however, identified appellant as the shooter at trial. Anderson explained that she was able to identify appellant over three years after the shooting because "[s]eeing his face, it all come back."

Samuel Garcia, who knew appellant during the summer of 2012, testified in this case in exchange for a "benefit" in two aggravated-assault cases. Garcia heard appellant and appellant's cousin, Jose Rufino Espinoza, talking about Espinoza

accidentally shooting someone at the apartment complex. Earlier, Garcia had told the police that he could not tell from that conversation between appellant and Espinoza who actually was speaking or who the shooter was. Espinoza and appellant were "joking" about the gun going off and the shooter saying "my bad, baby." Appellant and Espinoza would say "my bad, baby" if they made a mistake.

Garcia spoke to Espinoza alone on occasion. From those conversations with Espinoza, Garcia had the impression that Espinoza had shot someone accidentally. Garcia earlier had told police that Espinoza had two shotguns, one was a pump shotgun and the other was a sawed-off shotgun, and Garcia believed that Espinoza accidentally had killed someone with a sawed-off shotgun. In another interview with a prosecutor, Garcia was "pretty absolutely sure that Espinoza had made an admission that he had shot someone with a shotgun." In a more recent interview, just a few weeks before appellant's trial, Garcia told the current prosecutor that "[Espinoza] had accidentally shot this person."

Moreover, according to Garcia, appellant "set up the robbery." Three people "came to the robbery with guns." Espinoza had a shotgun and appellant had a .45, but Garcia did not know anything about the third person. Garcia heard from appellant and Espinoza that the third person had a gun.

According to Garcia, appellant "hang[s] out" in the area of the Rosamond apartment complex. Garcia first heard the name Antwone Betters from the police and had never seen Betters until the police showed a picture of him. Betters is black. Garcia never knew appellant to associate with any black persons.

A prosecutor interviewed Garcia in jail; during the interview, Garcia gave the prosecutor details and he was sure Espinoza had made an admission—that Espinoza had shot someone with a shotgun. In an interview with a different prosecutor before appellant's trial, Garcia stated again that Espinoza accidentally

shot someone. Garcia testified that appellant set up the robbery and appellant "made everything happen."

Garcia heard appellant and Espinoza talking about a stolen black Dodge truck and three "black girls" were robbed. Garcia saw appellant and Espinoza with money after the date of the robbery and shooting, and Garcia said that the money came from the robbery and shooting. But, it was during Garcia's testimony at appellant's trial that Garcia first mentioned having seen appellant and Espinoza with money. Instead, Garcia told the current prosecutor that appellant had shown him two pounds of marijuana allegedly taken during the robbery.

At the end of guilt-innocence phase of the trial, the jury found appellant guilty of capital murder, and appellant was automatically sentenced to life imprisonment without parole. Appellant timely appealed his conviction.

II. ISSUES AND ANALYSIS

A. Is the evidence sufficient to support appellant's conviction for capital murder?

In his fourth issue, appellant asserts that the evidence is insufficient to support his conviction for capital murder. Because this issue would afford appellant the greatest relief, we address it first.[3]

In evaluating a challenge to the sufficiency of the evidence supporting a criminal conviction, 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

[3] We address appellant's fourth issue before the other issues because, if sustained, it would require an acquittal.

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 capital murder if the person intentionally commits the murder in the course of committing or attempting to commit robbery. Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2016). A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of property, he intentionally, knowingly, or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code Ann. § 29.09(a)(1), (2) (West 2011). A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property. Tex. Penal Code Ann. § 31.03(a) (West Supp. 2016). Appropriation of property is unlawful if it is without the owner's consent. *Id.* § 31.03(b)(1).

A person is a criminally responsible party to an offense "if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code Ann. § 7.01(a) (West 2011). A person is criminally responsible for the conduct of another if, acting "with intent

to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." Tex. Penal Code Ann. § 7.02(a)(2) (West 2011).

To determine whether an individual is a party to an offense, the reviewing court may look to events before, during, and after the commission of the offense. *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). A court also may rely on circumstantial evidence to prove party status. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996)). There must be sufficient evidence of an understanding and common design to commit the offense. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Each fact need not point directly to the guilt of the defendant, as long as the cumulative effect of the facts are sufficient to support the conviction under the law of parties. *Gross*, 380 S.W.3d at 186. The mere presence of a person at the scene of a crime, or even flight from the scene, without more, is insufficient to support a conviction as a party to the offense. *Thompson v. State*, 697 S.W.2d 413, 417 (Tex. Crim. App. 1985).

Appellant's issue focuses on the witnesses' identification of him. Appellant's defense at trial was that he was not at the scene of the shooting and was not the shooter. Appellant does not challenge the other elements of the offense the State was required to prove.

The jury charge permitted the jury to find appellant guilty of capital murder if the jury found that "[appellant] with the intent to promote or assist in the commission of the offense of robbery, if any, solicited, encouraged, directed, aided, or attempted to aid Antwone Betters and/or Jose Rufino Espinoza and/or an unknown person or persons in shooting Camille Ross, if he did, with the intention of thereby killing Camille Ross[.]"

Sedwick arranged to meet Betters in Houston to purchase cocaine. Betters directed Sedwick to the apartment complex on Rosamond. The police developed Betters as a suspect because his phone number was on Sedwick's phone. Anderson was able to pick out Betters from a photo array the night of the shooting. The police were able to develop appellant as a suspect because appellant's mother was the subscriber of a phone number that had been used for frequent communication via Betters's phone on the day of the shooting.

Sedwick picked appellant's photo out of a photo array that contained five other photos. Immediately upon seeing appellant's photo, Sedwick became very emotional and "blurted out, he's the one that shot my sister." Sedwick said she could identify appellant because she rode in the truck with him and she saw his face when appellant, who was in the front passenger seat, turned around to face Sedwick. Sedwick also said she could identify appellant because he came to the place where the first assailant had pushed her down.

Sedwick did not tell the police during the interview that a second assailant threw a shotgun to the first assailant. Sedwick said she did not want to cooperate with the police.

Anderson testified that she kept her head down during the robbery so as to not look at the assailant who held a gun on Ross. Anderson was able to identify appellant in court because "[s]eeing his face, it all come back."

Garcia testified that appellant set up the robbery. According to Garcia, he noticed that appellant and Espinoza had money after the robbery and shooting and appellant was at the scene of the robbery. Garcia testified that appellant had a .45 caliber weapon and Espinoza had a sawed-off shotgun. Espinoza accidently shot someone with the sawed-off shot gun. Anderson testified that she heard the shooter say "my bad, baby." Garcia also heard appellant and Espinoza talking

about having shot someone and saying "my bad, baby."

The testimony of a single eyewitness can be sufficient to support a conviction. *Aguilar v. State*, 468 S.W.3d 75, 77 (Tex. Crim. App. 1971). The jury alone decides whether to believe eyewitness testimony, and the jury resolves any conflicts in the evidence. *Romero v. State*, 406 S.W.3d 695, 697 (Tex. App.—Houston [14th Dist.] 2013), *rev'd on other grounds*, 427 S.W.3d 398 (Tex. Crim. App. 2014). Inconsistencies in witnesses' testimony do not render the evidence insufficient. *Id.* If the charge authorizes the jury 'to convict the defendant on more than one theory, as it did in this case, the "verdict of guilt will be upheld if the evidence is sufficient on any theory authorized by the jury charge.'" *Campbell v. State*, 426 S.W.3d 780, 786 (Tex. Crim. App. 2014) (quoting *Anderson v. State*, 416 S.W.3d 884 (Tex. Crim. App. 2013)). We conclude the evidence is sufficient to support a finding that appellant was either the principal actor in shooting Ross or a party to the offense.

We overrule appellant's fourth issue.

B. Did the trial court abuse its discretion by denying appellant a hearing on his motion for new trial?

In his first issue, appellant asserts that the trial court abused its discretion by denying appellant a hearing on his motion for new trial.

The purpose of a hearing on a motion for new trial is to decide whether the cause shall be retried or to prepare a record for presenting issues on appeal in the event the motion is denied. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). A hearing on a motion for new trial is not an absolute right. *Id.*; *Smith v. State*, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). No hearing is required when the matters raised in the motion for new trial are subject to being determined from the record. *Smith*, 286 S.W.3d at 338. On the other hand, a trial court abuses its

discretion by failing to hold a hearing on a motion for new trial when the motion raises matters that cannot be determined from the record, denying the accused meaningful appellate review. *Id.*

"[A]n unrestricted requirement of a hearing on matters not determinable from the record could lead to 'fishing expeditions.'" *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993). Therefore, even if the accused raises matters that cannot be determined from the record, he is not entitled to a hearing on his motion for new trial unless he establishes the existence of reasonable grounds showing that he could be entitled to relief. *Smith*, 286 S.W.3d at 339. When the grounds in the motion are based on matters not already in the record, the motion must be supported by an affidavit, either of the defendant or someone else, specifically setting out the factual basis for the claim. *Id.* We review the trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Hobbs*, 298 S.W.3d at 200; *Smith*, 286 S.W.3d at 339.

In his motion for new trial, appellant contended that he was raising matters outside the trial record. Appellant averred that Betters cleared him of shooting Ross. According to appellant, Betters pleaded "guilty" to a reduced charge of aggravated robbery from capital murder in exchange for testifying against appellant. Appellant's trial counsel obtained a "rough draft" of the transcript of the hearing during which Betters pleaded "guilty" and the State proffered the testimony Betters would provide under oath at appellant's trial. The State ultimately did not call Betters as a witness in appellant's trial. Attached to the motion for new trial was the "rough draft" of the transcript of Betters's guilty-plea hearing with the proffered testimony.

On appeal, appellant contends that Betters's version of the events supports

appellant's theory that an unknown third party was the shooter.[4] At Betters's plea hearing, Betters testified that there was never a plan to rob anyone, but only to sell drugs. Betters further testified that appellant was with Sedwick when an unidentified person shot Ross. Based on these statements, appellant contends that Betters cleared him of the robbery and the murder. Because the State did not call Betters as a witness at trial, the transcript of Betters's testimony was never offered into evidence. Appellant argues that a hearing on his motion for new trial was the only way the transcript with Betters's account could be made a part of the record so that appellant could raise this issue in a direct appeal.

Appellant could have called Betters as a witness at his trial, but did not do so. Moreover, appellant has not established the existence of reasonable grounds showing that he could be entitled to relief. *See Smith*, 286 S.W.3d at 339. Garcia testified that appellant set up the robbery and participated in the robbery, but that Espinoza shot Ross. The jury was instructed that appellant was guilty of capital murder if appellant was a party to the offense. Betters's testimony placed appellant at the scene of the robbery and shooting and, according to Betters, another unknown person was the shooter. In light of Garcia's testimony, and the jury-charge instruction permitting the jury to convict appellant of capital murder if it found that appellant was a party to the offense, Betters's testimony would not have entitled appellant to relief.

The trial court did not abuse its discretion by denying appellant a hearing on his motion for new trial. *See id.* We overrule appellant's first issue.

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[4] In his motion for new trial, appellant also asserted as grounds for a new trial that (1) Sedwick's and Anderson's respective identifications of him were "insupportable"; and (2) having been described as having a Spanish accent, appellant could not prove that he did not have a Spanish accent without waiving his Fifth Amendment right not to testify. Appellant has not asserted these grounds on appeal for his entitlement to a hearing on his motion for new trial.

C. Did the trial court err by admitting Sedwick's out-of-court identification of appellant?

In his second issue, appellant contends that the trial court erred by admitting Sedwick's out-of-court identification. According to appellant, the identification procedure was unconstitutionally suggestive.

Appellant filed a motion to suppress Sedwick's pretrial identification of appellant based an allegedly inappropriate photo-array procedures. Appellant argued that the police did not follow "the new procedures established under [Article] 38.20 of the Code Criminal Procedure." The trial court did not rule on appellant's motion to suppress. An adverse ruling or an objection to a trial court's refusal to rule is required to preserve the complaint for appellate review. *See* Tex. R. App. P. 33.1(a)(2)(A), (B); *Martinez v. State*, 17 S.W.3d 677, 686 (Tex. Crim. App. 2000).

During the testimony of Officer Robert Odom, the State offered into evidence the photo array of six pictures from which Sedwick selected appellant's photo and identified appellant as the shooter. Appellant objected to admission of the photo array as "bolstering and hearsay."[5] The trial court admitted the photo array into evidence.

On appeal, appellant asserts the trial court should have suppressed Sedwick's pretrial identification. Specifically, appellant argues that the fillers—the individuals other than appellant featured in the photo array—did not match appellant's appearance because of differences in the fillers' weights, skin tone, amounts and types of facial hair, hairlines, and age.

Appellant's objections to the admission of the photo array from which

[5] Appellant's counsel argued to the trial court: "[W]hat a witness identified or did not identify when that witness is here or available to testify, the officer testifying to what he observed her do and say as bolstering [sic] And it's also hearsay."

Sedwick identified appellant do not comport with the complaints appellant raised in his pretrial motion to suppress (on which the trial court ruled) or his objections to the admission of the evidence at trial. To preserve a complaint for appellate review, the record must show that appellant made a specific and timely complaint in the trial court and that the court ruled on the complaint. Tex. R. App. P. 33.1(a). A complaint is not preserved for appellate review if the legal basis for the complaint on appeal varies from the complaint made at trial. *Lovill v. State*, 319 S.W.3d 687, 691–92 (Tex. Crim. App. 2009); *see also Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016) (noting that ,"[i]f a trial objection does not comport with arguments on appeal, error has not been preserved"); *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014) (stating that, "[w]e are not hyper-technical in examination of whether error was preserved, but the point of error on appeal must comport with the objection made at trial"). Therefore, appellant has waived his complaints concerning the trial court's admission of the pretrial identification.

Even if appellant had not waived his complaints about the alleged suggestiveness of the photo array, these complaints would afford him no relief on appeal because the record reflects that the photo array was not impermissibly suggestive.

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that using the identification at trial would deny the accused due process of law. *Conner v. State*, 67 S.W.3d 192, 200 (Tex. Crim. App. 2001) *Mendoza v. State*, 443 S.W.3d 360, 363 (Tex. App.—Houston [14th Dist.] 2014, no pet.). When determining the admissibility of a pretrial identification, we apply a two-step analysis, inquiring (1) whether the pretrial procedure was impermissibly suggestive; and (2) if so, whether the suggestive pretrial procedure gave rise to a

very substantial likelihood of irreparable misidentification. *Aviles-Barroso v. State*, 477 S.W.3d 363, 381 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The analysis under these steps requires an examination of the totality of the circumstances surrounding the particular case and a determination of the reliability of the identification. *Conner*, 67 S.W.3d at 200. Even if it is determined that the pretrial identification procedure is impermissibly suggestive, identification testimony is admissible when the totality of the circumstances shows no substantial likelihood of misidentification. *Mendoza*, 443 S.W.3d at 363.

Suggestiveness may arise from the manner in which a pretrial identification procedure is conducted. *Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). For example, a police officer may point out or suggest that a suspect is included in the line-up or photo spread. *Id.* An identification also may be suggestive if the suspect is the only individual closely resembling the pre-procedure description. *Id.* "To be impermissibly suggestive, the identification procedure utilized must in some way be so defective as to indicate or suggest the [individual whom] the witness is to identify." *Aviles-Barroso*, 477 S.W.3d at 381 (internal quotations & citations omitted).

Appellant became a suspect after the police saw communications between Betters's cell phone and a number for which appellant's mother was the subscriber. Officer Coleman created photo arrays for appellant and three other individuals associated with appellant. Coleman used the most recent photos he could obtain of the four individuals and then completed the spreads using photos of five other individuals with similar physical characteristics so that "there [wa]s no indication that you have tried to steer the witness into selecting someone."

Appellant complains that the weights, skin tones, amounts and types of facial hair, hairlines, and ages of the other individuals in the photo array did not

resemble his physical characteristics. A pretrial identification procedure is suggestive when the accused is placed with persons of distinctly different appearance, race, hair color, height, or age. *Withers v. State*, 902 S.W.2d 122, 125 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (citing *Foster v. Cal.*, 394 U.S. 440, 442–43 (1969)). Every photo array must contain photographs of individuals who roughly fit the description of the suspect. *Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985). Neither due process nor common sense requires exactitude. *Id.* Minor discrepancies among participants will not render a pretrial identification procedure impermissibly suggestive. *In re M.I.S.*, 498 S.W.3d 123, 132 (Tex. App.—Houston [1st Dist.] 2016, no pet.).[6]

A review of the photo array does not show that the other participants are greatly dissimilar in appearance from appellant so that the photo array is impermissibly suggestive. *See Withers*, 902 S.W.2d at 125 (citing *United States v. Wade*, 388 U.S. 218, 232–33 (1967)). We overrule appellant's second issue.

D. Did the trial court err by admitting Sedwick's in-court identification of appellant?

In his third issue, appellant asserts that the trial court erred in admitting Sedwick's in-court identification because, he claims, it was unreliable when considering the totality of the circumstances. An in-court identification is inadmissible if it has been tainted by an impermissibly suggestive pretrial

[6] *See also Williams v. State*, 675 S.W.2d 754, 757 (Tex. Crim. App. 1984) (holding lineup was not impermissibly suggestive even though most of the participants appeared younger than the suspect); *Turner v. State*, 600 S.W.2d 927, 932–33 (Tex. Crim. App. [Panel Op.] 1980) (holding argument that lineup was not impermissibly suggestive where the only two other participants with a beard were not physically close to appellant in size and color); *Ward v. State*, 474 S.W.2d 471, 476 (Tex. Crim. App. 1971) (holding photo array, in which the appellant was the only person wearing his hair in an afro style, was not so impermissibly suggestive as to deny the appellant due process of law); *Mallard v. State*, 661 S.W.2d 268, 277 (Tex. App.—Fort Worth 1983, no pet.) (holding lineup was not impermissibly suggestive where the appellant was the only participant with no obvious facial hair in light of the substantial similarity of the participants in other respects).

identification procedure. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App.1999). Appellant, however, did not object when Sedwick made an in-court identification of him during trial. Nor did he voice the complaints in the trial court that he now raises on appeal. Appellant's failure on appeal to complain or object in the trial court to an in-court identification waives any complaint regarding the in-court identification. *See Mendoza*, 443 S.W.3d at 363. Moreover, because we have concluded that the pretrial photo array was not impermissibly suggestive, we need not address whether the procedure created a substantial likelihood of misidentification. *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988). We overrule appellant's third issue.

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise.
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