

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-14-00184-CR

RONALD EISLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 11-13042

MEMORANDUM OPINION

Arguing that the trial court erred by failing to exclude the testimony of the complaining witness, who identified the defendant during the trial as the person who robbed him, Ronald Eisley appeals a judgment convicting him of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03(a)(2) (West 2011). We conclude that the complaining witness's identification testimony was not tainted by the procedures that police followed in presenting the complaining witness with an array that contained Eisley's image. We affirm the trial court's judgment.

Background

Around 9:30 p.m. on October 13, 2011, two men robbed T.R.¹ while he was delivering pizza to a residence in the southern part of the City of Beaumont. In the robbery, one of the two men involved shot T.R. with a handgun in the right arm. Approximately five weeks after the robbery occurred, police showed T.R. a photo array to determine if he could identify the individuals that robbed him. During his interview by police, T.R. identified Eisley's image from those that were in the array, and indicated Eisley was the person who shot him. T.R. also told the police during the interview that he could not identify the other individual who was present when the robbery occurred based on a separate six-man photographic spread they showed him the same day.

Prior to the trial, Eisley sought to suppress the testimony that he expected the State to elicit from T.R. identifying Eisley as the person who had committed the robbery. In his motion, Eisley argued that police procedures that were followed in presenting T.R. with the six-man photographic array were overly suggestive, causing T.R. to misidentify Eisley as the person who had robbed him.

¹ To protect the victim's privacy, we identify him by using initials. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

Before anyone testified at Eisley's trial, the trial court conducted a suppression hearing outside the jury's presence on Eisley's motion to suppress. Two witnesses, T.R. and Detective Aaron Lewallen, testified during the suppression hearing. Detective Lewallen presented T.R. with the two photographic arrays approximately five weeks after the robbery occurred. During the hearing, Detective Lewallen testified that he presented T.R. with a sheet that contained black-and-white images of six African-American males. According to the detective, five of the six images on the sheet were selected by a computer program used by police to generate photographs of people with characteristics similar to the suspect. Detective Lewallen indicated that the similarities between the images involved characteristics such as age, race, skin color, and height. Detective Lewallen described the method that he used in presenting T.R. with the images. Although Detective Lewallen stated that he could not recall the exact words he had used in presenting the arrays, he testified that, to the best of his recollection, he said: "I've got some pictures I'd like you to take a look at. Don't know if the guy's in it or not, but here it is." According to Detective Lewallen, he followed the same procedure with T.R. that he generally used in presenting photo lineups around the time period he presented the array to T.R. that is at issue in the appeal.

T.R. also testified during the suppression hearing. According to T.R., he observed the faces of the men involved in the robbery for a period of approximately five seconds before being distracted by the gunshot. When he was first interviewed by police, about one week after the robbery, T.R. stated that he told the police the two men who robbed him were African-American males, between the ages of 15 and 19, and between 5'11" and 6' tall. However, during the hearing, T.R. did not indicate that in his initial interview that he gave police any other significant details about the physical appearances of the men who robbed him.

Approximately five weeks after the robbery, T.R. went to the police station where Detective Lewallen presented him with a sheet containing the photos of six men. Although T.R. was not exactly sure what the officer said to him when presenting him with the array, T.R. testified that the officer, after handing him the array, told him to point out the person who had shot him. Immediately afterwards, T.R. again stated that he could not recall what the officer actually said when presenting the array, and he then changed his testimony to state that the officer just told him that the police had a lineup.

T.R. explained that after identifying the photo in the first array, he was then asked if he could identify the other person involved in the robbery from a second

sheet of six images. According to T.R., he told the officer that he could not recall what the other person involved in the robbery looked like; T.R. then testified that the officer asked him to guess which of the images looked like the other man from the images in the second array. T.R. testified that he told the officer he could not identify the other man. When T.R. was asked directly about whether the police ever indicated to him that the suspect's image was in the images on the first sheet, T.R. testified that they had not.

During the suppression hearing, as he more fully explained when he testified during the trial, T.R. described how he found photos of the man he believed had shot him on a popular social media website on the Internet. T.R. found the images on the Internet that he believed to be the person who robbed him approximately four weeks after the robbery occurred. T.R. indicated that he conducted his own investigation into the robbery before seeing the photo array without the assistance of the police. According to T.R., he initiated his investigation by calling the number of the cellphone that he dropped on the ground when the robbery occurred. T.R. stated that no one answered the phone call, but he heard a voicemail message that had been created by a female who gave people calling his old phone number her first name. After hearing her message, T.R. explained that he searched a popular social media website for persons with the same name as the female who

was apparently using his old phone. In the process, T.R. found a webpage created by a person with the name left in the voicemail message on a social media website. On that person's webpage, T.R. obtained information about the female, including her name, and he noted that she had listed his former cellphone number as her number on the webpage that he viewed. According to T.R., the female's webpage contained various photographs, including one that looked like the man who shot him. On cross-examination, T.R. acknowledged that viewing the posted images on the female's webpage possibly aided his memory in recalling who shot him, and had possibly influenced his ability to identify Eisley when interviewed by police.

When the prosecutor asked whether the person who shot him was present, T.R. pointed to Eisley. According to T.R.'s testimony at the hearing, he could have identified Eisley based solely on his recollection from the shooting without having seen Eisley's photo in the six-man array shown to him by the police. T.R. also stated that the men who robbed him were standing on a porch, and that he was standing on the ground as he approached the house where he was delivering the pizzas. According to T.R., the fact the men were on the porch might have interfered with his ability to accurately determine their heights. When asked during the suppression hearing how tall he thought Eisley was, even after Eisley stood up, T.R. estimated Eisley's height at 5'11" tall. The jail intake record in evidence

shows that Eisley is 5'6" tall. During the trial, T.R. indicated that he would not disagree with the suggestion made by the defense attorney that Eisley is 5'7" tall.

At the conclusion of the suppression hearing, the trial court denied Eisley's motion. The trial court then made oral findings to support its ruling, finding that the lineup, as presented to T.R. by police, had not been overly suggestive. The trial court also found that T.R. seemed certain of his identification of Eisley, and the trial court chose to credit T.R.'s testimony that T.R.'s identification had been based on information that was independent of the manner Eisley's image had been presented.

During the trial, T.R. pointed to Eisley when the prosecutor asked T.R. if the person who shot him was in the courtroom. At the conclusion of the guilt-innocence phase of the trial, the jury found Eisley guilty of aggravated robbery. Following Eisley's punishment hearing, the jury assessed a sixty-year sentence.

Analysis

In his sole issue, Eisley complains the trial court erred by refusing to exclude T.R.'s testimony identifying Eisley as the person who committed the aggravated robbery. On appeal, Eisley contends that the evidence shows that T.R. had only a limited opportunity of about five seconds in which to view the shooter's face, that he failed to provide significant details about the person who he claims committed

the robbery when initially interviewed by police, that he described a height for the person who shot him in his initial interview that is inconsistent with the evidence showing Eisley's actual height, and in presenting the array to T.R., police suggested that the suspect's image was in the array or pointed to Eisley's image before T.R. identified Eisley as the person who robbed him. Additionally, Eisley argues that the trial court should have found that, given the approximate five-week delay between the robbery and the day that police presented the array to T.R., together with the circumstances about how T.R. identified Eisley, a substantial risk of misidentification existed concerning whether Eisley was the person who committed the robbery. According to Eisley, the trial court should have granted his motion to suppress and prevented T.R. from identifying him as the robber during the trial.

When police use procedures that are overly suggestive of the suspect's identity in conducting lineups, the defendant can challenge the admissibility of the testimony of the witness being used to identify the defendant as the person who committed the offense being tried. *See Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App. 1995) (stating that "a pre-trial 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"). The Court of

Criminal Appeals has stated: “An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pretrial photographic identification.” *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008). The test to determine whether police used overly suggestive lineup procedures requires that courts examine the totality of the circumstances in evaluating whether the procedures were impermissibly suggestive and created “a very substantial likelihood of irreparable misidentification.” *Id.* (quoting *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999)).

Courts analyze arguments asserting that the procedures followed by police were overly suggestive by examining the manner that the police conducted the procedure, as well as the content of the array that police used when the witness identified the suspect. *See Burns v. State*, 923 S.W.2d 233, 237-38 (Tex. App.—Houston [14th Dist.] 1996, pet. ref’d). For instance, police procedures may tip the identity of their suspect to the witness based on “the manner in which the pre-trial identification procedure is conducted, for example by police pointing out the suspect or suggesting that a suspect is included in the line-up or photo array.” *Barley*, 906 S.W.2d at 33. If the trial court finds the allegations criticizing the procedures followed to be credible, the comments the court believes that police made to the witness in the lineup may indicate that the police signaled to the

witness that an image of the suspect is among the images in the photographic array presented to the witness. Here, Eisley argues the police suggested to T.R. that the suspect's image was in the photo array based on the rather equivocal testimony by T.R. about what he remembered police said to him in presenting him the array. And, according to Eisley, the detective who conducted the photo lineup actually pointed to Eisley's image among the images given to T.R. when presenting the array.

However, the record does not show the trial court found that T.R.'s rather equivocal testimony about what Detective Lewallen said in presenting the array was credible. During the suppression hearing, the trial court considered both T.R.'s and Detective Lewallen's testimony regarding their respective recollections about what was said when T.R. was asked to look at the array. The versions of the witnesses conflict to some extent, so the trial court was required to resolve the discrepancies in the accounts that addressed what Detective Lewallen said in presenting the array. During the suppression hearing, Detective Lewallen described the procedure that he followed in presenting T.R. with the array. Importantly, Detective Lewallen testified that he never suggested who T.R. should pick out in the lineup or suggested that the suspect's picture was in the array.

The thrust of Eisley's complaints about T.R.'s identification testimony revolve around whether Detective Lewallen pointed Eisley out or suggested that the image of the person suspected in the robbery was in the array. While T.R.'s initial account implies that Detective Lewallen indicated the person suspected of the robbery was among the images that Detective Lewallen gave T.R., T.R. subsequently clarified his testimony, explaining that before he viewed the images the officer who presented the array did not say the suspect's picture was in the group of photos he had been asked to review. T.R. also testified that he did not recall if Detective Lewallen actually said in their meeting "[i]s this the guy who shot you."

The trial court apparently chose to believe Detective Lewallen's account that he never said to T.R. before T.R. identified Eisley's image that the image of the suspect was in the array. According to Detective Lewallen, he told T.R. that he had some pictures for him and he did not "know if the guy's in it or not[.]" In its oral findings, the trial court credited Detective Lewallen's account about what Detective Lewallen said to T.R. in presenting him with the array. In its findings, the trial court specifically noted that both the detective and T.R. indicated that the detective did not indicate that the suspects were in the lineup. The trial court also found that the lineup, as presented to T.R., was not suggestive, thereby refusing to

credit any of the testimony suggesting that Detective Lewallen had pointed out Eisley's image to T.R. when presenting him with the images in the array.

In this case, the trial court could have reasonably resolved any conflicts in the testimony by choosing to credit Detective Lewallen's account of what he said in presenting T.R. with the photo array, deciding, as a matter of fact, that Detective Lewallen never signaled to T.R. that the robbery suspects image was among those in the array that T.R. was asked to review. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009) (noting that in a suppression hearing, the trial court is the sole factfinder, and as such, "it may believe or disbelieve all or any part of a witness's testimony"); *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998) (noting that when the trial court's decision in a suppression hearing relates to in-court-identification testimony of a witness turns on an evaluation of credibility and demeanor, trial courts are afforded almost total deference with respect to the determination it made of historical facts). Although there is some conflict in the accounts about what was said when police presented T.R. with the array, the trial court was free to believe Detective Lewallen's account about what occurred. *Id.*

The array from which T.R. identified Eisley was admitted into evidence during Eisley's trial; it contains six photographs that depict men of similar ages and features. Eisley's photo, which is among those included in the array, contains

no distinctive features, like tattoos or scars, from which T.R. might have distinguished Eisley from the other photos in the array. We conclude that the array containing Eisley's image, of itself, was not overly suggestive. None of the images in the array are odd or unique as they relate to the appearances of the men depicted in the array or their clothing. *See Barley*, 906 S.W.2d at 33 (holding that array of six males with similar features and of similar heights was not overly suggestive). We see nothing in the images to indicate they are suggestive in ways that would have indicated to T.R. that Eisley was the person that police suspected had committed the robbery.

Eisley's remaining complaints regarding his alleged misidentification concern the short period of time in which T.R. had the opportunity to view the person who robbed him, T.R.'s failure to give police any significant defining physical descriptors of the suspect when he was initially contacted by police, the approximate five-week delay that ensued between the crime and date that T.R. was presented with the array, and the fact that T.R. initially described a person shorter than Eisley in describing the person who robbed him. However, these are all matters that are unrelated to any official acts by the police, and matters the jury was free to weigh in deciding whether to accept T.R.'s testimony that Eisley committed the robbery.

In Eisley's case, the jury was not solely dependent on T.R.'s testimony identifying Eisley as the person who committed the robbery. The evidence before the jury included significant circumstantial evidence connecting Eisley to the robbery. The evidence shows that Eisley's mother's cellphone was used to order the pizzas being delivered by T.R. to the location where the robbery occurred and that Eisley's girlfriend was a female whose first name T.R. obtained from the voicemail message he related hearing when he called his old phone number. After the robbery, individuals were seen running from house to house in the vicinity of Eisley's house, and these houses were in the neighborhood where the boxes of pizza were found the day after the robbery occurred. There was also testimony that individuals were seen running on the night of the burglary from the house where the pizza boxes were later found to the house where Eisley's mother lived. Thus, in the context of all of the testimony before the jury in the trial, T.R.'s testimony does not indicate that a substantial risk exists regarding Eisley's alleged misidentification.

Given the trial court's role as the factfinder with respect to the suppression ruling that is being appealed,² when viewed in light of the trial court's findings

² Eisley has not argued, and we have not considered, whether T.R.'s testimony identifying Eisley should have been excluded on the basis that T.R. conducted his own investigation using a social media website approximately one

following the suppression hearing, and given the similarity of images that police used in the array presented to T.R. by the police, we hold that the trial court did not abuse its discretion by denying Eisley’s motion to suppress. *See Amador*, 275 S.W.3d at 878-79; *Loserth*, 963 S.W.2d at 772. We overrule Eisley’s sole issue, and we affirm the judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on July 8, 2015
Opinion Delivered May 18, 2016
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Before Kreger, Horton, and Johnson, JJ.

week before he saw the array presented to him by the police. Nonetheless, we are aware that in *Perry v. New Hampshire*, 132 S.Ct. 716, 720-21 (2012), the United States Supreme Court stated that it has “not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers.”