TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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NO. 03-00-00124-CR

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Kenneth Wayne Perkins, Appellant

v.

The State of Texas, Appellee

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FROM THE DISTRICT COURT OF TRAVIS COUNTY, 390TH JUDICIAL DISTRICT
NO. 0990905, HONORABLE LARRY L. FULLER, JUDGE PRESIDING

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Appellant Kenneth Wayne Perkins was convicted by a jury of burglary of a habitation.[1] *See* Tex. Penal Code Ann. § 30.02(a)(3) (West Supp. 2000). The trial court assessed punishment at twenty-five years' imprisonment after finding appellant had been previously convicted of a felony theft offense as alleged for enhancement of punishment.

Point of Error

In his sole point of error, appellant urges that the "trial court erred in admitting single witness's in-court identification of appellant, which followed impermissibly suggestive photo identification, and which, under the totality of circumstances gave rise to a very substantial likelihood of irreparable misidentification." We will affirm the conviction.

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[1] Appellant was jointly indicted and tried with co-defendant Dudley Campbell Clark. *See Clark v. State*, No. 03-00-00202-CR (Tex. App.—Austin), this day decided.

Facts

The sufficiency of the evidence to sustain the conviction is not challenged. A brief recitation of the facts will place the only contention in proper perspective.

John Saenz, greens-keeper at the Morris Williams Golf Course, lived in a city-owned house near the golf course. On the morning of March 1, 1999, about 8:30 a.m., Saenz was on the golf course when he noticed a gray van parked in the driveway of his home. He immediately drove to his house and approached the van. A man, later identified as the co-defendant Clark, was seated in the passenger seat of the van. Saenz asked Clark if he could help Clark. Clark replied that "we" had come to visit a friend named Ernest. When informed by Saenz that "no Ernest" lived there, Clark turned away and said nothing else.

Saenz went inside the house to further investigate. While inside, Saenz looked out a window and saw a man, later identified as appellant Perkins, walking away from the house with some tools. Saenz walked back out to the van and asked appellant if he could help him. Appellant replied, "No, I already found what I needed." While appellant was loading the tools into the van, Saenz radioed his golf course supervisor and co-workers at the nearby golf pro-shop that he was being burglarized. He asked that they call the police. He described the van and recited the van's license plate number. Appellant drove away in the van with Clark and the tools. Co-workers in the pro-shop wrote down the license plate number and called the police. Saenz obtained the written license plate number and gave it to Austin Police Officer Ivey Yancy when he responded to the call.

After Officer Yancy left to pursue the van, Saenz further examined his residence. He discovered that a back window had been opened and a number of items from his house were laying on the ground outside the window. Saenz determined that some tools were missing, including an

electric drill and a buffer or polisher, and a set of custom-made tires and rims. Saenz testified that he saw appellant carrying the drill and the buffer.

The record further shows that at 8:55 a.m. on the same day, Clark pawned three tools at a pawn shop in northeast Austin, including a buffer. Later, at 10:23 a.m. that morning, Clark pawned a Sears cordless drill and an air chisel at another pawn shop. Still later, at 11:34 a.m., Clark pawned an electric drill at yet another pawn shop in east Austin.

That afternoon, Officer Yancy received a call that another police officer had apprehended a van meeting the description of the one seen at Saenz's house. Yancy arrived at the scene and verified that the van, the license plate number, and the occupants matched the information provided by Saenz. The officers determined that the van belonged to Clark, arrested appellant on unrelated traffic offenses, and released Clark and the van. No tools were found in the vehicle.

Detective Michael Eveleth contacted Saenz that afternoon and told him the police had apprehended two men. Saenz went to the police station, reviewed photographic arrays, and identified appellant and Clark who appeared in separate arrays. Clark was arrested two days later and his van impounded. Detective Eveleth attempted to recover the pawned property but discovered that Clark had already retrieved the items.

Background of Appellant's Claim

Appellant filed a pretrial motion to suppress his in-court identification by the complaining witness claiming that it was tainted by an impermissibly suggestive photographic array likely to lead to an irreparable misidentification. Detective Eveleth was the only witness at the suppression hearing. The motion was overruled. By this ruling, appellant preserved for review the

issue presented without the necessity of a further objection. *See Livingston v. State*, 739 S.W.2d 311, 334 (Tex. Crim. App. 1987); *Gearing v. State*, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985). The issue preserved would normally be limited to the evidence adduced at the suppression hearing. *Hardesty v. State*, 667 S.W.2d 130, 133 n.6 (Tex. Crim. App. 1984). Appellant does not claim that the trial court erred in its suppression ruling. He cites only to trial testimony to support his point of error. No mention is made of the suppression motion or ruling.

At trial, appellant objected to the complaining witness Saenz's in-court identification of him on the same basis as the suppression motion. When the objection was overruled, he made no effort to voir dire the witness or otherwise develop other evidence in the absence of the jury. When the State attempted to support Saenz's in-court identification with the pretrial identification via a photographic spread, appellant again unsuccessfully objected. On cross-examination of Saenz and Eveleth, appellant expanded the circumstances surrounding the pretrial identification procedure.

It appears clear that appellant sought to preserve the error he presents on appeal, and also sought to make the jury aware of the circumstances surrounding the pretrial photographic array to impugn the weight the jury should accord Saenz's identification of him at trial. In fact, appellant's counsel in his opening statement to the jury immediately following the State's opening statement, was the first to bring to the jury's attention that Saenz's identification of him was tainted by an impermissibly suggestive photographic spread. Counsel described just how the pretrial procedure was flawed and informed the jury that he would offer Dr. Charles Weaver, a Baylor University professor, as an expert in eyewitness identification. Without objection, Dr. Weaver later testified about reconstructive memory, that individuals were "not very good" at identifying people from old

photographs, and that those who prepare photographic spreads and are present at the identification procedure "subconsciously suggest" to the crime victim which photograph to select.

Identification Procedure

In *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967), the United States Supreme Court held that a pretrial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial may deny the accused due process of law under the Fourteenth Amendment to the United States Constitution. *See also Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App. 1995); 40 George E. Dix & Robert O. Dawson, *Criminal Practice and Procedure* § 14.31, at 658 (Texas Practice 1995) (hereinafter *Dix*). The Supreme Court formulated a two-step analysis to determine admissibility under the due process rule in *Manson v. Brathwaite*, 432 U.S. 98 (1977). First, it is necessary to determine whether the pretrial identification was impermissively suggestive. If that is the situation then, second, it is necessary to determine if that suggestive process gave rise to a very substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33 (citing *Simmons v. United States*, 390 U.S. 377 (1968)); *Dix*, § 14.31 at 659.

An analysis under these steps requires an examination of the totality of circumstances of the particular case and a determination of the reliability of the in-court identification. *Loving v. State*, 947 S.W.2d 615, 617 (Tex. App.—Austin 1997, no pet.). Reliability is the linchpin in determining the admissibility of identification testimony. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999); *Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988). If indicia of reliability outweigh suggestiveness, then an identification is admissible. *Barley*, 906 S.W.2d at 34. The defendant must show by clear and convincing evidence that the identification has been irreparably

tainted before the conviction will be reversed. *Id.*; *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993); *Jackson v. State*, 628 S.W.2d 446, 448 (Tex. Crim. App. 1982). Thus, the burden of proof is on the defendant.

The following five non-exclusive factors should be weighed against the corrupting effect of any suggestive identification procedure in assessing reliability under the totality of the circumstances:

1. The opportunity of the witness to view 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 confrontation, and
5. The length of time between the crime and confrontation.

Neil v. Biggers, 409 U.S. 188, 199 (1972); *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1988).

The foregoing *Biggers* factors and other relevant factors that are issues of historical fact will be considered deferentially in the light most favorable to the trial court's ruling. The factors viewed in this light are then weighed *de novo* against the corrupting effect of the suggestive pretrial trial procedure. *Ibarra*, 11 S.W.3d at 195-96.

Discussion

Turning to the first prong of the analysis, we address the "suggestiveness" of the procedure at issue and any justification or excuse for it. Normally, "the kind of suggestiveness at

issue concerns the conveying to the witness of the authorities' perception that the defendant is the guilty person and thus the person whom the witness 'should' identify." *Dix*, § 14.34 at 660. Suggestiveness may be created by the manner in which the pretrial identification procedure was conducted. *Barley*, 906 S.W.2d at 33. An individual procedure may be suggestive or the cumulative effect of the procedure may be suggestive. *Id.*

We examine the testimony of Detective Eveleth, who was the only witness at the suppression hearing, and the trial testimony as to the pretrial identification procedure. *See Barley*, 906 S.W.2d at 31 n.2; *Webb*, 760 S.W.2d at 272 n.13; *Hardesty*, 667 S.W.2d at 133 n.6. Eveleth testified that he telephoned Saenz that the police had stopped a van with two men in it; that he did not tell Saenz that the two men matched the description Saenz had earlier given; and that Saenz was positive that he could identify from a photographic spread the persons involved in the burglary of his house that morning.

Using a computer, and selecting certain age, gender, and race groups, Eveleth obtained 500 photographs. From this group, the heavier individuals and bald-headed men were filtered out. Eveleth selected six photographs for each of the two photographic spreads. Eveleth was able to obtain an older booking photograph of appellant with facial hair and placed it in the first photographic spread with similar appearing men of approximately the same age, all with facial hair. Eveleth did not use the Polaroid picture of appellant taken when appellant was arrested that day "because it would stand out" in the photographic spread.

Eveleth told Saenz that the photographs could be new or old, that the suspect may or may not be in the photo spread, to point out anyone he could identify, and "if you don't, then that's fine." According to Eveleth, Saenz made an immediate and positive identification of appellant as the

third man in the photo spread; that he asked Saenz to be sure; that Saenz indicated that he was pointing out that appellant was now heavier with short hair and a receding hairline; and that Saenz explained he had studied facial features and structures as a mortician's assistant.

Saenz testified that he was called and told that the police had "caught the guys." He affirmatively responded when asked if he could identify the men. Saenz related that he was shown older pictures and immediately selected appellant's picture in one spread and Clark's in another; that he double checked at Eveleth's suggestion; that he had worked in a Laredo hospital and watched pathologists perform autopsies, had sometimes assisted, and had been instructed by pathologists concerning facial features and structures and aging. Saenz explained that all the photographs in the spread were men of similar age, clothing, and the same general appearance.

Appellant contends that there was suggestiveness here because Eveleth told Saenz the suspect was in custody, and asked Saenz if he could identify the suspect. Appellant also points out that after Saenz identified him in a photographic array, Eveleth informed Saenz that Saenz had correctly selected appellant. A photographic array is not rendered impermissibly suggestive merely because the complainant is informed that it contains a "suspect," because a complainant would "normally assume that to be the case." *Harris v. State*, 827 S.W.2d 949, 959 (Tex. Crim. App. 1992); *Webb*, 760 S.W.2d at 270-73; *Kelly v. State*, 18 S.W.3d 239, 243 (Tex. App.—Amarillo 2000, no pet.); *Johnson v. State*, 901 S.W.2d 525, 534 (Tex. App.—El Paso 1995, pet. ref'd). Moreover, Eveleth's statement to Saenz did not directly inform Saenz that the suspect's picture would be in the photographic array shown Saenz. *See Johnson*, 901 S.W.2d at 534.

Although it may not have been proper for Detective Eveleth to have informed Saenz that he picked the right man out of the photographic array, the pretrial identification procedure was

not rendered unduly suggestive where the remark was not made prior to the identification procedure, but uttered only after Saenz had made his selection and then double checked at the officer's insistence, and where sufficient evidence exists that the in-court identification was of independent origin. *Kelly*, 18 S.W.3d at 243; *Johnson v. State*, 466 S.W.2d 735, 736-37 (Tex. Crim. App. 1971). We find that Saenz's training in the hospital morgue permitted him to make an accurate identification despite the use of an older photograph which made appellant look younger. In composing a photographic spread, it is better practice to use photographs which portray individuals whose every feature match. *Mungia v. State*, 911 S.W.2d 164, 168 (Tex. App.—Corpus Christi 1995, no pet.). However, neither due process nor common sense require such exactitude. *Herrera v. State*, 682 S.W.2d 313, 319 (Tex. Crim. App. 1985). Here, Detective Eveleth carefully selected for the array photographs of men of the same age group as appellant with the same physical features. Slight differences in the photographs in an array will not taint a pretrial identification procedure. *Garcia v. State*, 988 S.W.2d 862, 864 (Tex. App.—San Antonio 1999, no pet.).

We find that if the pretrial identification process was suggestive, it was not impermissibly so. This should end the inquiry. Nevertheless, in the event we are mistaken, we shall pursue the second step of the analysis and determine that if the process was impermissibly suggestive whether it gave rise to a very substantial likelihood of irreparable misidentification. In doing so, we shall consider the non-exclusive factors of *Biggers*, 409 U.S. at 199.

First, we examine the opportunity of the witness to view appellant at the time of the crime. Saenz first saw appellant at the rear of Saenz's home, confronted him at the van parked in the driveway, and had a conversation with appellant as appellant loaded the items into the van. Saenz was within five feet of appellant at 8:30 a.m. on a March morning. There is nothing in the record to

show Saenz's ability to observe appellant was obscured in any way. Second, Saenz's degree of attention was clearly focused on appellant whom Saenz suspected was taking items from Saenz's home. There was no evidence that Saenz's attention was distracted. While Saenz's attention was centered on appellant, he was able to use his prior training pertaining to facial features. Third, we examine Saenz's prior description of appellant.

Appellant claims three discrepancies between Saenz's prior description and appellant's appearance when arrested. Saenz told Officer Yancy, the first officer on the scene, that both men (appellant and Clark) had mustaches. When appellant was arrested four or five hours later, he was clean-shaven. There was ample time for appellant to have shaved after the offense. The older photograph of appellant used in the array showed facial hair and appellant had a mustache at the time of the trial. Saenz described appellant as wearing a long-sleeved gray shirt or sweater at the time of the burglary. When arrested several hours later, appellant was attired in a short-sleeved shirt. Officer Yancy related that the March morning was cool and suggested appellant may have removed his sweater as the weather got warmer. Saenz reportedly described appellant as being six-foot, two-inches tall when appellant was actually five-foot, nine-inches in height. Detective Eveleth noted that co-defendant Clark was approximately six-foot, two-inches tall and there might have been some confusion in detailing Saenz's descriptions. Officer Yancy observed that Saenz was not very tall and may not have been a good judge of the height of taller individuals. Despite these minor discrepancies, Saenz's overall description of appellant, Clark, the van, and the license number clearly enabled the police to stop the van and detain the two men matching the general description given.

Fourth, we turn to the level of certainty demonstrated by Saenz at the confrontation. Saenz quickly, without hesitation, identified appellant from the photographic array, and made

accurate observations concerning the difference in appellant's appearance in the photograph and at the time of the offense. Detective Eveleth was impressed with Saenz's powers of observation.

Fifth, we observe that the length of time between the offense and the confrontation was only seven or eight hours. Eleven months later, Saenz again had no difficulty in identifying appellant and Clark at trial.

From the totality of the circumstances, and keeping in mind that reliability is the linchpin in determining the admissibility of an identification, we conclude that appellant has failed to sustain his burden of proof by clear and convincing evidence that the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The record demonstrates that the out-of-court pretrial identification procedure was not improperly conducted, and further that Saenz's in-court identification was of an independent origin. *See McFarland v. State*, 928 S.W.2d 482, 507-08 (Tex. Crim. App. 1996); *Jackson v. State*, 628 S.W.2d 446, 448 (Tex. Crim. App. 1982); *Belton v. State*, 900 S.W.2d 886, 896 (Tex. App.—El Paso 1995, pet. ref'd). The single point of error is overruled.

The judgment is affirmed.

John F. Onion, Jr., Justice

Before Justices Kidd, Yeakel and Onion*

Affirmed

Filed: January 11, 2001

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* Before John F. Onion, Jr., Presiding Judge (retired), Court of Criminal Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).