Affirmed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01388-CR

CARLOS ARNOLDO REYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 837,488

O P I N I O N

Appealing his conviction of aggravated robbery and sentence of twenty-five years' confinement, appellant Carlos Arnoldo Reyes contends that the trial court violated his rights to due process in admitting in-court identifications allegedly tainted by impermissible pretrial procedures. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2000, two armed men, wearing ski masks, entered the Cash America Pawn Shop. One of the armed men approached Margarita Capistran, who was working

behind the counter, and instructed her, in a loud voice, to open the cash register and give him the money contained inside. Unable to comply, Capistran dropped to the floor, telling her assailant that she did not know how to open the cash register. With no hesitation, the men broke the glass counters and absconded with several pieces of jewelry.

The Houston police immediately arrived on the scene and began speaking with Capistran and others who were in the shop at the time of the robbery. Norma Sanchez, an employee who was working in the security booth, observed the masked men through security monitors. Two customers, Sonia Chavez, who was with her daughter, and David Mata also witnessed the robbery. Shortly after the police interviewed these witnesses, Houston police officer Sergeant David Ryza conducted a follow-up investigation of the robbery.

Sergeant Ryza obtained a video line-up of appellant and other participants who had similar physical features. The line-up participants were generally the same size, build, and race as appellant and none had any features which made them stand out from the others or from appellant. All of the participants were asked to speak the words uttered by the robber who approached Capistran in the pawn shop and demanded money from the cash register. Sergeant Ryza had each of the witnesses view the video line-up individually. Capistran, Sanchez, Chavez and Mata each viewed the videotape and identified appellant (standing in position four) as the robber who had confronted Capistran on the day of the incident. However, only Capistran and Chavez could identify appellant in the courtroom, during a pretrial hearing, as the same individual they had identified from the video line-up.

Appellant was indicted for the felony offense of aggravated robbery. Appellant filed a motion to suppress the pretrial and in-court identifications. After a hearing, the court denied appellant's motion to suppress. Appellant pleaded not guilty. The jury found appellant guilty as charged and assessed punishment at twenty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division and a fine of $10,000.

II. ADMISSIBILITY OF EVIDENCE

In two related points of error, appellant claims the trial court erred in denying his motion to suppress and erroneously admitted in-court identifications. Specifically, appellant contends the in-court identifications made by Capistran (shop worker) and Chavez (customer) were the result of suggestive pretrial identification procedures that presented a risk of misidentification. Although appellant's brief mentions the testimony of Mata (customer) and Sanchez (security booth worker) as well, appellant does not challenge the trial court's admission of their testimony during trial. Neither Mata nor Sanchez were able to make in-court identifications of appellant at the pretrial hearing on appellant's motion to suppress. Appellant appears to be challenging only the in-court identifications, not the pretrial identifications made during the video line-up. Appellant's trial counsel stipulated to the admissibility of the video line-up itself. Because appellant did not object to the admission of the video line-up, he waived any error as to the pretrial identifications initially preserved by way of his motion to suppress. *See Sanders v. State*, 855 S.W.2d 151, 153 (Tex. App.–Houston [14th Dist.] 1993, no pet.). Thus, only the in-court identifications made by Capistran and Chavez are at issue.

A. Preservation of Error

The State points out that appellant failed to object at trial to either Capistran's or Chavez's in-court identifications and claims appellant thereby waived any defects associated with impermissible or suggestive out-of-court identifications. More specifically, the State contends the only issue at the suppression hearing was the identifications of appellant pursuant to the video line-up itself and not to the in-court identifications of appellant. The State claims the record fails to demonstrate whether appellant was objecting to the admission, during the trial, of the video line-up itself *or* of testimony regarding the in-court identifications. We disagree with the State.

The record clearly shows that appellant's written motion to suppress requested the suppression of *both* pretrial and in-court identifications of appellant. Appellant's motion to suppress states:

> . . . Due to the fact that the lineup in the instant case was conducted in contravention of the Defendant's rights under the Sixth Amendment to the United States Constitution, any evidence concerning an identification at this lineup must be suppressed.
>
> Defendant further asserts that the unconstitutional lineup identification has so impermissible [sic] tainted any *in-court identification* that may be made by the witness that this identification must also be suppressed.

(emphasis added). The record further shows that on the day of the suppression hearing, the trial court denied the motion to suppress, noting its ruling on the written motion. When a pretrial motion to suppress evidence is overruled, the accused need not object to the admission of the same evidence at trial in order to preserve error. *Livingston v. State*, 739 S.W.2d 311, 334 (Tex. Crim. App. 1987); *Sanders*, 855 S.W.2d at 153. We find appellant properly preserved his complaint as to the in-court identifications.

B. In-Court Identifications

Turning to the merits of appellant's issues, we begin by noting that in reviewing the trial court's ruling on a motion to suppress evidence, we apply an abuse of discretion standard. *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App. 1991). If supported by the record, a trial court's ruling on a motion to suppress, will not be overturned. *Hill v. State*, 902 S.W.2d 57, 59 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd). At a motion to suppress hearing, the trial judge is the sole finder of fact. *Arnold v. State*, 873 S.W.2d 27, 34 (Tex. Crim. App. 1993). A such, she is free to believe or disbelieve any or all of the evidence presented. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

An in-court identification is inadmissible if tainted by unduly suggestive pretrial identification. *See Loserth v. State*, 963 S.W.2d 770, 771 (Tex. Crim. App. 1998). In determining whether the trial court was correct in admitting an in-court identification, we

apply a two-part test. *See Simmons v. United States*, 390 U.S. 377, 383–84 (1968). We first examine whether the identification procedure was impermissibly suggestive. *Id.* If we conclude that it was, then we examine the totality of the circumstances to determine whether the impermissibly suggestive procedure gives rise to the substantial likelihood of irreparable misidentification. *Jackson v. State*, 657 S.W.2d 123, 127 (Tex. Crim. App. 1983). It is the risk of in-court misidentification that taints the identification. *See Webb v. State,* 760 S.W.2d 263, 269 (Tex. Crim. App. 1988). The accused has the burden to show by clear and convincing evidence that the in-court identification is unreliable. *See Delk v. State,* 855 S.W.2d 700, 706 (Tex. Crim. App. 1993). We review the admissibility of an identification *de novo*. *Loserth*, 963 S.W.2d at 773.

1. First Prong: Suggestiveness of Pretrial Line-up

In the first prong of the analysis, we evaluate the pretrial line-up itself to determine whether it was impermissibly or unduly suggestive. Appellant contends the methods Sergeant Ryza utilized while showing the video line-up to the witnesses were impermissibly suggestive and thus violated his right to due process.

As to Capistran, appellant specifically complains that the procedures were impermissibly suggestive because she viewed the video line-up in her home. Appellant also states that after Capistran identified the individual standing in position four (appellant), Sergeant Ryza told her that she "did good." In regard to Chavez, appellant contends the procedures were suggestive because Chavez and her daughter viewed the video line-up together and Chavez identified him primarily on voice recognition rather than his physical appearance.

"A lineup is considered unduly suggestive if other participants are greatly dissimilar in appearance from the suspect." *Withers v. State*, 902 S.W.2d 122, 125 (Tex. App.–Houston [1st Dist.] 1995, pet. ref'd.). A suspect may be greatly dissimilar in appearance from the other participants because of his distinctly different appearance, race, hair color, height or age. *See id*. However, minor discrepancies among line-up participants will not render a line-

up impermissibly suggestive. *See Partin v. State*, 635 S.W.2d 923, 926 (Tex. App.–Fort Worth 1982, pet. ref'd). The participants in a line-up do not have to be identical to satisfy the requirements of due process. *See Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985). Sergeant Ryza testified that the video line-up contained all males whose descriptions were similar. None of the line-up participants had any physical characteristic which made them stand out from one another or from appellant. All of the participants were given the same instructions and asked to say a phrase similar to the one the armed robber had uttered during the robbery.

The fact that Capistran and Chavez viewed the video line-up in their homes was not suggestive. *See Thomas v. State*, 788 S.W.2d 887, 888 (Tex. App.–Houston [14th Dist.] 1990, no pet.). The record shows that Sergeant Ryza told both witnesses that they were not under any obligation to identify anyone from the video line-up or choose any particular participant. Sergeant Ryza further instructed them not to discuss the video line-up or their choice with any other witness. There is no evidence that indicates that Capistran and Chavez disobeyed Sergeant Ryza's instructions. Both Capistran and Chavez identified appellant (the individual in position four) without any prompting or reinforcement from Sergeant Ryza.

Capistran testified that she identified appellant in the video both by his body build and by his voice. The fact that *after* Capistran identified the individual placed in position four, which happened to be appellant, the police officer said to her, "[y]ou did good," is not impermissibly suggestive because this statement came only *after* Capistran had identified appellant. Because the officer's statement came after the identification, it cannot fairly be construed as any prompting or suggestion from Sergeant Ryza to choose appellant from the line-up. Moreover, Capistran testified that her identification of appellant was based on her own recollection of him and his voice at the time of the robbery.

As to Chavez, the fact that she viewed the line-up with her daughter was not impermissibly suggestive. *See id.* at 889. Although present during the robbery, Chavez's daughter did not remember much of the incident. Sergeant Ryza testified that although

Chavez and her daughter viewed the video line-up together, they were interviewed separately and not in the presence of each other. Chavez testified that during the robbery, she was able to observe appellant from where she was standing in the store, generally recognized his body build, and was able to identify him based primarily on voice recognition.

Chavez and Capistran both testified that the pawn shop was well-lit at the time of the robbery. Chavez and Capistran provided similar descriptions of appellant's body build and were able to identify appellant in the video line-up based on his physique and voice. The fact that these witnesses' encounters with the robbers was very brief and neither viewed appellant for more than a couple of minutes is not determinative. Identifications can be based on very brief encounters. *See e.g., Delk,* 855 S.W.2d at 706; *Williams v. State,* 985 S.W.2d 240, 243 (Tex. App.–Beaumont 1999, no pet.) (holding that viewing the perpetrator for several seconds is long enough to support a trial court's ruling on the admissibility of the identification).

We find nothing impermissibly suggestive about the video line-up or the procedures Sergeant Ryza utilized. Because the pretrial identification procedures were not impermissibly suggestive, the in-court identifications of Capistran and Chavez were not tainted. Thus, the trial court did not err in admitting them.

Finally, even if we were to conclude that the pre-trial identification procedures were impermissibly suggestive, that finding would not change the result in this case because the record contains subsequent identification testimony. Such testimony is deemed reliable and admissible, if the totality of circumstances reveals no substantial likelihood of misidentification. *See Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988) (reliability being the "linchpin" in determining the admissibility of identification testimony).

2. Second Prong: Reliability of In-Court Identification

Under the second prong of the analysis, we must consider whether a substantial likelihood of misidentification has occurred. *United States v. Wade,* 388 U.S. 218 (1987).

In doing so we weigh, *de novo*, the "corrupting effect" of the suggestive identification against the following eight factors, often referred to as the "indicia of reliability":

(1) the witness's opportunity to view the criminal act;

(2) the existence of any discrepancy between any pre-line-up description and the defendant's actual description;

(3) the identification of a person other than the defendant prior to the line-up;

(3) the identification by picture of the defendant prior to the line-up;

(4) the failure to identify the defendant on a prior occasion;

(5) the time between the crime and the line-up;

(6) the witness's degree of attention during the crime; and

(7) the level of certainty at the time of identification.

See id.; *see also Barley v. State*, 906 S.W.2d 27, 34-35 (Tex. Crim. App. 1995). Because Capistran and Chavez testified at both the pretrial hearing on appellant's motion to suppress and at trial, we consider testimony from both sources in our review. *See id.* at 31 n.2 (considering evidence adduced at trial and at pretrial hearing in reviewing admissibility of in- court identification).

In considering the first factor, the extent to which Capistran and Chavez had an opportunity to view the robbery, we note that the record shows Capistran and Chavez were at the scene, in the presence of the two robbers for four to five minutes. Both witnesses identified appellant's voice as the voice they heard during the robbery. Capistran testified that appellant was only a few feet away from her when he loudly instructed her to open the cash register drawer. Chavez testified that she was able to view appellant's body build and hear his voice from where she was standing in the pawn shop. Although brief, this

encounter provided sufficient opportunity to view the perpetrators. *See, e.g., Williams*, 985 S.W.2d at 243 (holding that viewing the perpetrator for several seconds is long enough to support a trial court's ruling on the admissibility of the identification). Given the witnesses' short distance from appellant and the duration of the episode, each had the opportunity to view appellant's physique and hear the sound of his voice. In fact, Capistran testified that she remembered appellant's build and voice solely from the robbery. Chavez testified at trial that she remembered appellant only from the videotape, not from the robbery. However, Chavez also testified that she identified appellant on the videotape from what she remembered about appellant's physique and voice at the time of the robbery.

The second factor calls for a comparison of the descriptions Capistran and Chavez gave prior to the video line-up with the actual description of appellant. Capistran and Chavez gave detailed and similar descriptions of the robber to the police, an indication that they had adequate time to view him. Both stated that the robber was average in height and in weight. Capistran and Chavez each stated that although the robber wore a mask, his eyes were visible. The witnesses' descriptions are not inconsistent with the actual description of appellant.

Factors three and four do not apply in this case. There was no identification of any other individual and no failure to identify appellant prior to the video line-up. Furthermore, neither Sergeant Ryza nor any other officer showed photographs of appellant with other line-up participants to Capistran or Chavez prior to the video line-up. In addition, both witnesses' first identifications of appellant were made during the pretrial video line-up. Therefore, because neither witness failed to identify appellant on an occasion prior to the video line-up, the fifth factor is also inapplicable.

The sixth factor looks at the passage of time between the criminal episode and video line-up. The record reveals that Sergeant Ryza brought the videotape line-up to the homes of Capistran and Chavez less than a week after the robbery. This brief lapse of time is not likely to have had any effect on the witnesses' memory.

In considering the seventh factor, we scrutinize the witnesses' degree of attention to the perpetrator during the criminal episode. Both Capistran and Chavez testified that, except for a few seconds toward the end of the robbery, they paid close attention to appellant's instructions and mannerisms, a good indication that their attention was focused during the brief time they had to view the perpetrators. Capistran testified that she closely viewed appellant before she crouched down on the floor. Chavez was confident in her ability to view appellant from where she stood in the pawn shop. Chavez and Capistran also testified that the shop was well-lit at the time of the robbery.

Finally, in considering the eighth factor, we look at the level of certainty of the witnesses' identifications during the pretrial line-up. Sergeant Ryza testified that upon viewing the video line-up, Capistran immediately identified appellant without hesitation. Capistran became visibly shaken and upset as soon as she viewed appellant in the line-up. Capistran testified that she was certain that the individual in position four (appellant) was the robber. Although Chavez requested that Sergeant Ryza show her the video line- up twice so that she could be certain of her identification, she testified that as soon as the participants spoke, she was certain.

Both witnesses were able to identify appellant largely on voice recognition. Voice identification, based on the perpetrator's statements during the criminal episode, is sufficient to identify the defendant as the person who committed the crime. *See McInturf v. State*, 544 S.W.2d 417 (Tex. Crim. App. 1976) (holding that voice identification based upon statements made during the commission of the offense, was direct evidence identifying the defendant as the person who committed the crime); *Williams v. State*, 747 S.W.2d 812, 813 (Tex. App.–Dallas 1986, no pet.) One's voice, like one's fingerprint, height or stance is an identifying physical characteristic. *Wade*, 388 U.S. at 222-23. Although voice recognition is a large part of the witnesses' recognition, it is not the only identification evidence in this case nor is it the only evidence that linked appellant to the crime. Both witnesses also testified as to appellant's general physical description and build.

Based on the totality of the circumstances, we find that Capistran's and Chavez's in-court identifications were reliable and admissible. The combination of the witnesses' opportunity to view appellant, their ability to recognize appellant's voice and body build on the videotape, and the confidence they exhibited in their identification indicates appellant did not show by clear and convincing evidence, that the pre-trial line-up created a substantial likelihood of misidentification. Furthermore, Capistran's in-court identification would be admissible regardless of whether the line-up was impermissibly suggestive because her identification relied solely on her recollection from the robbery, and thus had a basis independent of any improper pretrial identification procedure. *See Buxton v. State*, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985).

We find the trial court did not err in denying appellant's motion to suppress and admitting Capistran's and Chavez's in-court identifications. Accordingly, we overrule appellant's two points of error.

Having found no error, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 17, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

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