

Affirmed and Opinion filed April 26, 2001.



In The

Fourteenth Court of Appeals

NOS. 14-00-00040-CR & 14-00-00041-CR

JIMMY BABINEAUX, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 818,905 & 818,906**

OPINION

A jury convicted appellant, Jimmy Babineaux, of injury to a child younger than fifteen years of age and robbery. The jury sentenced appellant to twelve years confinement in the Institutional Division of the Texas Department of Criminal Justice for the offense of injury to a child and ten years confinement for the offense of robbery. Appellant brings forward four issues on appeal: (1) the trial court erred by denying appellant's Motion to Suppress In-Court Identification of Defendant because the "one-person show-up" identification of appellant was unduly suggestive and it subsequently tainted the in-court identification; (2) the trial court

erred by denying appellant's Motion to Suppress Evidence because the State did not show any reasonable suspicion and/or probable cause for the Defendant's detention and arrest; (3) the trial court erred in refusing to admit a defense exhibit documenting the present physical condition of appellant; and (4) the trial court erred by refusing to instruct the jury on the issue of the legality of the evidence obtained under the provisions of article 38.23 of the Texas Code of Criminal Procedure. We affirm.

On May 15, 1999, at approximately 8:00 P.M., appellant approached two women and their six young children on a street in downtown Houston. The women and children were walking to the Star of Hope Mission. Appellant approached the group on the street, grabbed one child, a four year old boy, and demanded money from the women. The child's mother grabbed his arm and attempted to pull him away from appellant. The other woman shook up a bottle of soda and sprayed appellant. Appellant struck the woman who sprayed him, grabbed her backpack, grabbed the other woman's diaper bag, and fled on foot.

The victims immediately proceeded to the Star of Hope Mission and called the Houston Police Department. Houston Police Sergeant Andrew King arrived at the Star of Hope Mission within ten minutes of the victims' call. The women and one of the children, a thirteen year-old girl, gave Sgt. King a detailed description their assailant. The victims described their attacker as a stout black male approximately 5'6" to 5'8" tall, with no hair, wearing a red pullover that was soaked with soda. Sgt. King then drove four to five blocks in the direction of the robber's flight and discovered appellant in the 900 block of Hutchins Street. Appellant's appearance matched the victim's description, but he was not wearing a red pullover. However, upon approaching appellant, Sgt. King noticed that appellant had a red pullover stuffed in his pants and protruding from his waistband. Believing the appellant sufficiently fit the victim's description to authorize an investigative detention, Sgt. King searched appellant for weapons and contraband. Sgt. King removed a wet, red pullover from appellant's waistband that appeared to have been splashed or sprayed with cola. Sgt. King then placed appellant in the rear seat of

his patrol car and returned to the Star of Hope Mission. Upon Sgt. King's return, the victims positively identified appellant as the perpetrator.

In his first issue, appellant asserts that the trial court erred by denying his Motion to Suppress In-Court Identification of the Defendant due to the fact that the "one-person show-up" identification of appellant was unduly suggestive and tainted the in-court identification. Appellant avers that his Due Process rights, under the United States and Texas Constitutions, were violated. Appellant contends that the victims failed to give Sgt. King an adequate description of their assailant to warrant appellant's detention, that the victims were informed that their attacker was in custody prior to the identification, and that the police had adequate time to arrange a line-up rather than a "one-person show-up" because three to four hours elapsed before the victims were asked to identify appellant. The record contradicts appellant's allegations, and there is no evidence to support his assertion that his state and federal constitutional rights were abridged.

A pretrial identification procedure may be so suggestive and conducive to mistaken identification that the subsequent use of that identification at trial would deny the accused due process of law. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The *Stovall* Court recognized the widespread criticism and the inherent suggestiveness of the practice of showing suspects singly to persons for the purpose of identification. *Id.* The Court held, however, that whether a violation of due process occurs is dependent upon the totality of the circumstances. *Id.* In *Garza v. State*, the Court of Criminal Appeals conceded that an "on-the-scene" confrontation has some degree of suggestiveness, but the court, relying on *Stovall*, held that its use is necessary in some situations. 633 S.W.2d 508, 512 (Tex. Crim. App. 1982). The court noted that quick confirmation or denial of identification expedites the release of innocent suspects, thus preventing the further detention of an innocent suspect and affording the police the opportunity to continue their diligent search for the actual perpetrator. *Id.* The court also recognized that an on-the-scene confrontation allows witnesses to test their recollection while their memory is still fresh and accurate. *Id.* The court further noted that any possible

prejudice resulting from such a confrontation can be exposed through a rigorous cross-examination of the witness. *Id.*

A two-step analysis is used to determine the admissibility of identification testimony: (1) whether the pre-trial identification procedure was impermissibly suggestive and (2) whether that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). Even if the pre-trial identification procedure is found to be impermissibly suggestive, identification testimony is nevertheless admissible if the totality of the circumstances show no substantial likelihood of misidentification. *Cooks v. State*, 844 S.W.2d 697, 731 (Tex. Crim. App. 1992). The totality of the circumstances demonstrate the identification was not conducive to irreparable misidentification. When determining whether there is a substantial likelihood of misidentification we must consider five non-exclusive factors, which are all issues of historical fact: (1) the opportunity of each witness to view the person at the time of the crime; (2) their degree of attention; (3) the accuracy of any prior description; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the offense and the confrontation. *Loserth*, 963 S.W.2d at 772-73. These factors, viewed in this light, must then be weighed *de novo* against the “corrupting effect” of the suggestive pre-trial identification procedure. *Id.* at 773-74.

The trial court made no findings of fact, thus we must view the facts in a light favorable to the trial court’s ruling. *Id.* at 74. The testimony of the adult victims, as well as the juvenile, establishes: (1) they had ample opportunity to view appellant at the time of the crime; (2) their attention was focused on appellant during his commission of the crime; (3) their descriptions were wholly accurate; (4) they were completely certain about their identifications; and (5) there was an abbreviated time between the offense and the confrontation. Accordingly, appellant’s first issue is overruled.

Appellant's asserts in his second issue that the trial court erred by denying his Motion to Suppress Evidence because the State did not show any reasonable suspicion or probable cause for appellant's detention and arrest, thus rendering his arrest unlawful under article 14.01(a) and article 14.01(b) of the Texas Code of Criminal Procedure, the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, section 9 of the Texas Constitution. When reviewing a trial court's decision on a motion to suppress, we view the evidence in the light most favorable to the trial court's ruling. *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). Generally, a trial court's ruling on a motion to suppress is reviewed under an abuse of discretion standard. *Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). The trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight given their testimony. *Ballard*, 987 S.W.2d at 891. Accordingly, we afford almost total deference to trial courts' determinations of historical facts supported by the record and their rulings on application of law to fact questions, also known as mixed questions of law, when those fact findings and rulings are based on an evaluation of credibility and demeanor. *Maestas v. State*, 987 S.W.2d 59, 62 (Tex. Crim. App. 1999). Thus, the reviewing court may not disturb supported findings of fact absent an abuse of discretion. *Ballard*, 987 S.W.2d at 891. However, when the issue is whether an officer had probable cause to effect a warrantless seizure of a suspect under the totality of the circumstances doctrine, we apply a *de novo* standard of review. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

Appellant relies on his interpretation of *Amores v. State* to support his contention that Sgt. King lacked legal authority to detain and subsequently arrest him. 816 S.W.2d 407 (Tex. Crim. App. 1991). Appellant asserts that *Amores* supports the proposition that because Sgt. King did not personally observe appellant commit the offense, he had no legal authority to detain or arrest appellant. Appellant misinterprets the breadth and scope of *Amores*. In *Amores*, the Court of Criminal Appeals held that a police officer did not have the probable cause required for the warrantless arrest of a black male sitting in a motor vehicle when the

officer's sole justification was a radio dispatch reporting a possible burglary of a motor vehicle in progress by a black male coupled with the officer's belief that there were not many blacks in that area. *Id.* at 413-14. The *Amores* court restated the rule that we must look to the totality of the circumstances when determining probable cause for a warrantless arrest and seizure, and that probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a particular person has committed or is committing an offense. *Id.* at 413.

Each search and seizure question is dependent upon the facts of that particular case. *Guzman*, 955 S.W.2d at 90. In this case, the record establishes that Sgt. King had probable cause to detain and arrest appellant. The victims provided Sgt. King with a detailed description of their assailant. The victims advised Sgt. King that their attacker fled the scene on foot and advised Sgt. King of the direction of their attacker's flight. Sgt. King drove his patrol vehicle in the direction of the suspect's flight and discovered appellant. Appellant's appearance, with the exception of the red pullover, matched the victims' description of their assailant. Furthermore, Sgt. King noticed the pullover protruding from the suspect's waistband. Sgt. King then detained appellant,¹ returned to the victims' location, and the victims identified appellant as their attacker. The totality of the circumstances clearly establish that Sgt. King had the necessary probable cause to effect a warrantless arrest of appellant. Appellant's second issue is overruled.

In his third issue, appellant asserts the trial court erred in refusing to admit a defense exhibit documenting the present physical condition of appellant. At trial, appellant's counsel attempted to introduce a document that allegedly established appellant's physical inability to

¹ To justify an investigative detention, an officer merely has to have specific articulable facts, that in the light of his experience and personal knowledge, coupled with inferences from those facts, would reasonably warrant the intrusion on the freedom of the citizen detained. *Josey v. State*, 981 S.W.2d 831 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

commit the charged offenses. The State made a hearsay objection, and appellant's counsel responded by claiming the document was admissible under an exception to the hearsay rule set out in TEX. R. EVID. 803(3) because it constituted a statement of appellant's then existing physical condition. The trial court sustained the State's objection and refused to admit the document.

A trial court's decision to admit or exclude evidence will not be reversed absent an abuse of discretion. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay is not admissible except as provided by statute or the Texas Rules of Evidence or by other rules prescribed pursuant to statutory authority. TEX. R. EVID. 802. A statement of the declarant's then existing physical condition is not excluded by the hearsay rule, unless it is offered to prove the fact remembered or believed. TEX. R. EVID. 803(3). Appellant concedes he attempted to offer the document to "show the jury" his physical inability to commit the offenses charged. Thus, the exception defined by Rule 803(3) is inapplicable. Accordingly, appellant's third issue is overruled.

In his fourth issue, appellant contends the trial court erred by refusing to instruct the jury on the issue of the legality of the evidence as authorized by Texas Code of Criminal Procedure article 38.23. Appellant insists that he put at issue the validity of the detention, search, and subsequent arrest, thus he has an absolute right to a jury instruction on the validity of the search. TEX. CODE CRIM. PROC. ANN. Art. 38.23 (Vernon Supp. 2000). Appellant, however, ignores the controlling case law that holds he is only entitled to an instruction under article 38.23 if the evidence raised a factual issue concerning whether the evidence was obtained in violation of the United States Constitution, the Texas Constitution, or any of its laws. *Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996). Appellant did not contradict or dispute the facts surrounding his detention and arrest, thus he is not entitled to an instruction

under article 38.23. *Id.*; *Markey v. State*, 996 S.W.2d 226, 231 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Accordingly, appellant’s fourth issue is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Senior Chief Justice Murphy, Former Justice Amidei, and Justice Hudson.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.