Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00127-CR

PATRICK EUGENE MALLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1452036

MEMORANDUM OPINION

The trial court found appellant, Patrick Eugene Malley, guilty of the first-degree felony offense of aggravated robbery with a deadly weapon and assessed his punishment at twenty-five years' imprisonment. In two points of error, appellant

contends that (1) the trial court erred by denying his motion to suppress because the complainant's out-of-court and in-court identifications were impermissibly suggestive and (2) the written judgment of conviction should be reformed to delete the notation "25 YEARS TDC" under "Terms of Plea Bargain" because appellant did not enter a plea bargain. We modify the judgment and affirm as modified.

Background

On the evening of November 22, 2014, Jimmy Ahler went to JT's bar in Atascosita and drank several pitchers of beer. While he was at the bar, he contacted his friends, Melissa Odom and Bobby Mitchell, who asked Ahler for a ride to the store to buy cigarettes. Ahler agreed and left the bar around midnight to pick them up.

When Ahler arrived, Odom and Mitchell were in a room and appellant, who Ahler knew as "Cracker," was cutting his hair in a corner of the room. Ahler had met appellant in October when Ahler drove Lisa Thrasher, appellant's girlfriend, to Orange, Texas. Ahler helped appellant cut his hair and then drove Odom and Mitchell to a gas station to buy cigarettes. After they returned, they hung out together for a few hours while Odom, Mitchell, and appellant smoked methamphetamine.

Ahler got up to leave around 2:00 a.m. and appellant asked him for a ride to his girlfriend's home. Ahler agreed and they left. When they arrived, appellant told

Ahler to park some distance away so that they would not wake anyone. Appellant got out of the vehicle and told Ahler that he would give him some money for gas. Ahler got out of his truck and walked behind a tree to urinate. As Ahler returned to his vehicle, appellant walked around the front of the truck with his hand in his pocket and told Ahler, "hey, here is your gas money." Appellant pulled his hand out of his pocket and stabbed Ahler with a knife. A struggle ensued as appellant stabbed Ahler several more times. Ahler shoved appellant causing him to fall backwards. Ahler ran to his truck and tried to start the engine but appellant took the key from the ignition, grabbed the steering wheel, and repeatedly stabbed Ahler with the other hand. Ahler found a spare key and began driving in circles in an attempt to throw appellant off of the car. When the vehicle stopped, appellant grabbed Ahler out of the truck causing Ahler to fall down an embankment. Appellant approached Ahler, stomped on his face, and told him that he was going to die. Appellant got in Ahler's truck and drove away.

Ahler used his cell phone to call 911. Later, at the hospital, Ahler told police that "Cracker" had attacked him and stolen his Suburban. A day or two later, he called Odom and Mitchell from the hospital and they told him that "Cracker's" first name was Patrick. Ahler gave this information to his father who went online and found appellant's Facebook page which listed both appellant's full name and the nickname "Cracker." Ahler's father showed Ahler a photo of appellant from

appellant's Facebook page, and Ahler told his father that this was his attacker. Appellant's full name was given to Sergeant David Angstadt with the Harris County Sheriff's Office.

On December 5, 2014, Sergeant Angstadt and another officer interviewed Ahler at his father's house. During the interview, Sergeant Angstadt presented Ahler with a photographic array consisting of a photo of appellant and five other individuals with similar physical appearances to appellant. Ahler positively identified appellant from the array, made a written notation on the instruction sheet that he was "100% sure" of his identification, and signed the sheet. With the help of appellant's girlfriend, the police subsequently arrested appellant in San Angelo and recovered Ahler's vehicle.

On February 12, 2019, following a bench trial, the trial court found appellant guilty of aggravated robbery with a deadly weapon. The court found the enhancement paragraph "true" and assessed appellant's punishment at twenty-five years' imprisonment.[1] This appeal followed.

Admissibility of In-Court and Out-of-Court Identifications

In his first point of error, appellant contends that the trial court erred by denying his motion to suppress because Ahler's out-of-court and in-court

[1] The enhancement paragraph alleged that appellant was convicted of aggravated assault in 2002.

identifications were impermissibly suggestive. He further argues that the error was harmful.

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence for abuse of discretion. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). A trial court abuses its discretion when its ruling is arbitrary or unreasonable. *State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). A trial court's ruling on a motion to suppress will be affirmed if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009).

We apply a bifurcated standard when reviewing a trial court's ruling on a motion to suppress evidence. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). Under this standard of review, we afford "almost total deference to a trial court's determination of historical facts" if supported by the record. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). The trial court's application of the law to those facts is reviewed de novo. *See id.*

The trial judge is the sole trier of fact and exclusive judge of the credibility of the witnesses and the weight to be given to their testimony. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). Absent a showing that the trial court abused its discretion by making a finding unsupported by the record, we defer to the

trial court's findings of fact and will not disturb them on appeal. *See State v. Johnston*, 336 S.W.3d 649, 657 (Tex. Crim. App. 2011).

B. Applicable Law

A pretrial 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. *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995). 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) (citing *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999)).

We employ a two-step analysis to determine the admissibility of an in-court identification when a defendant contends that suggestive pretrial identification procedures tainted the in-court identification. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998); *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). First, we determine if the pretrial identification procedure was impermissibly suggestive. *Loserth*, 963 S.W.2d at 772; *Santiago v. State*, 425 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Second, if we conclude that the procedure was impermissibly suggestive, we then determine if the impermissibly suggestive procedure gave rise to a very substantial

likelihood of irreparable misidentification. *See Santiago*, 425 S.W.3d at 440. The defendant must prove both elements by clear and convincing evidence. *Barley*, 906 S.W.2d at 33–34. Only if we determine that the pretrial identification procedure is impermissibly suggestive do we examine whether it tainted the in-court identification. *Id*. at 34.

C. Analysis

Appellant contends that the pretrial identification procedure was impermissibly suggestive because Ahler's father showed Ahler a photo of appellant from appellant's Facebook page before Ahler identified appellant as his attacker. He argues that the photo array, in which only appellant's photo would have been previously seen, reinforced Ahler's identification of appellant. He further argues that Ahler's out–of-court identification tainted his subsequent in-court identification.

We are guided by the Court of Criminal Appeals's opinion in *Rogers v. State*, 774 S.W.2d 247 (Tex. Crim. App. 1989), *overruled on other grounds*, *Peek v. State*, 106 S.W.3d 72 (Tex. Crim. App. 2003). In *Rogers*, several witnesses identified a capital murder suspect from a lineup the day after they had seen a newspaper picture of the defendant's arrest. *See Rogers*, 774 S.W.2d at 259. At trial, the witnesses again identified the defendant. *Id*. On appeal, the defendant complained that the trial court should have suppressed the witnesses' in-court identifications because they were tainted by the suggestive out-of-court photograph. *Id*.

In rejecting the defendant's argument, the Court reasoned:

> Given the absence of any official action contributing to the likelihood of misidentification in this case, the constitutional sanction of inadmissibility should not be applied, regardless of the extent to which any witness's in-court identification might have been rendered less reliable by prior exposure to the newspaper photograph. . . . Since the police procedure was not itself suggestive, the fact that several eyewitnesses were exposed to a media photo of appellant one day before attending a police lineup might, at most, be taken to affect the weight, although not the admissibility, of their trial testimony.

Id. at 260 (citations omitted). *See also Perry v. New Hampshire*, 565 U.S. 228, 232 n.1 (2012) (noting that "what triggers due process concerns [regarding the admission of eyewitness identification] is police use of an unnecessarily suggestive identification procedure.").

Here, as in *Rogers*, there is no evidence that the police had any part in Ahler's father's independent research on Facebook, his discovery of a photograph of appellant, and presentation of that photo to Ahler before Ahler viewed the photographic array. Because appellant does not challenge the suggestiveness of the pretrial photographic array or the manner in which Sergeant Angstadt presented the array to Ahler, and because no state action was involved in Ahler's viewing of appellant's Facebook photo, appellant has failed to demonstrate that the out-of-court identification procedures in this case were impermissibly suggestive. *See id.*; *Gilmore v. State*, 397 S.W.3d 226, 239 (Tex. App.—Fort Worth 2012, pet. ref'd) (concluding witnesses' viewing of defendant's picture in television news broadcast

about shooting incident did not support determination that witnesses' identification of defendant as shooter was result of impermissibly suggestive identification procedures where no state action was involved in witnesses' sighting of defendant's photograph on news); *Craig v. State*, 985 S.W.2d 693, 694 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding sexual assault victim's in-court identification of defendant was not subject to suppression on ground that victim's out-of-court identification from news report was result of unduly suggestive procedure, where there was no police involvement in news report); *see also Bell v. State*, No. 03-11-00247-CR, 2012 WL 3797597, at *6–9 (Tex. App.—Austin Aug. 28, 2012, no pet.) (mem. op., not designated for publication) (rejecting defendant's argument that witness's in-court identification was tainted by having previously viewed photograph on Internet identifying defendant as suspect in offense). Further, the record shows that Ahler had previously met appellant and that, on the night in question, he spent hours with appellant at Odom and Mitchell's home, including time spent in close proximity to appellant while he helped appellant cut his hair. The fact that Ahler saw a social media photograph of appellant before viewing the police's photographic array "might, at most, be taken to affect the weight, although not the admissibility," of Ahler's testimony and in-court identification of appellant. *See Rogers*, 774 S.W.2d at 260. Because appellant has not satisfied the first step of the analysis, we do not reach the second step, i.e., whether the procedure gave rise

to a very substantial likelihood of irreparable misidentification. *See Santiago*, 425 S.W.3d at 440.

The trial court properly denied appellant's motion to suppress Ahler's out-of-court and in-court identifications of appellant. We therefore overrule appellant's first point of error.

Reformation of Judgment

In his second point of error, appellant contends that the trial court's written judgment of conviction should be reformed to delete the language "25 YEARS TDC" that appears beneath the heading "Terms of Plea Bargain" because appellant did not enter a plea bargain.

"An appellate court has the power to correct and reform a trial court judgment 'to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Morris v. State*, 496 S.W.3d 833, 835–36 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (quoting *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] Houston [1st Dist.] 2001, no pet.)) (internal quotations omitted); *see also* TEX. R. APP. P. 43.2(b) ("The court of appeals may . . . modify the trial court's judgment and affirm it as modified."). Here, the record reflects—and the State agrees—that the trial court's written judgment inaccurately lists "25 YEARS TDC" under the notation "Terms of Plea Bargain" because appellant did not enter a plea

bargain with the State but rather pleaded not guilty and proceeded to a trial before the court. We therefore modify the trial court's written judgment to delete the notation "25 YEARS TDC" under "Terms of Plea Bargain." Accordingly, we sustain appellant's second point of error.

Conclusion

We modify the trial court's judgment to delete the notation "25 YEARS TDC" under "Terms of Plea Bargain," and we affirm the trial court's judgment as modified.

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Kelly, Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).