

Affirmed and Opinion filed June 1, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00190-CR

MANUEL AURELIO ROJAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 29,659-A**

O P I N I O N

Appellant, Manuel Aurelio Rojas, appeals his conviction by a jury of aggravated robbery. The jury assessed life imprisonment. Appellant contends the court erred in admitting an enhanced surveillance tape-recording of the robbery because the audio portion of the tape was (1) “unreliable” under TEX. R. EVID. 702, and (2) not a “duplicate” under TEX. R. EVID. 1001(d). We affirm.

Facts

On August 20, 1997, appellant, Daniel Valencia, Larry Lerma, Keith Cobbin, and several other friends were at the Food Spot convenience store in Richmond. While there, some members of the group noticed a large sum of money under the cash register. The group jokingly told Valencia to “bust [the clerk, Rafiq Ali] upside the head and take the money.” Two days later, Cobbin heard appellant and Lerma talk about robbing the Food Stop. Shortly after, Cobbin witnessed them dressed in black clothes and carrying firearms.

That night, Shaukat Momin and Ali were working at the Food Spot, when two masked gunmen entered the store. One of the gunmen shot and killed Ali.

From outside, Cobbin and Valencia also witnessed part of the robbery and heard the fatal gunshot. They returned to appellant’s house. Cobbin heard someone ask appellant, “What happened at the store?” Appellant responded, “[E]verything messed up, we didn’t get no money, but I didn’t shoot him. Larry Lerma shot him in the head.”

In his investigation of the offense, Richmond Police Lieutenant Kovar retrieved a surveillance videotape, recorded in time-lapsed mode, from the Food Spot. The tape was sent to Agent George Clark of the FBI in Quantico, Virginia. Clark made copies of the tape using equipment to enable it to be viewed in real time, reduce background noise, and make the voices slightly louder and easier to hear.

The police played the enhanced tape for Cobbin and asked him to identify the voices. Cobbin stated the voices of the robbers were appellant’s and Lerma’s.

Officer Maxwell then met with appellant, who was jailed on other charges. After receiving his warnings, appellant confessed, on videotape, to his involvement in the robbery. At trial, the confession tape was admitted and played for the jury.¹

¹ Appellant contested the voluntariness of his confession in a pretrial motion and in an issue to the jury, however, that issue is not before us on appeal.

Also played at trial was the enhanced surveillance tape. When the State attempted to introduce the tape through Clark, appellant took him on voir dire. Appellant elicited testimony from Clark that he had run the audio portion of the tape through a “band pass filter.” This filter removed audio frequencies below 160 and above 4,000 hertz. Clark stated that people sometimes speak in the range between 20 and 160 hertz. Appellant then objected to the admission of the tape because it was (1) an “alteration” of the original tape, and (2) under *Kelly v. State*, 824 S.W.2d 68 (Tex. Crim. App. 1992), it was not “repeatable,” “trustworthy,” or “reliable.” The court admitted the tape over appellant’s objections. Back on direct examination, Clark testified that although the human voice is sometimes in the range of 20 to 160 hertz, no voices on that specific tape were in that range; therefore, no parts of any voices were eliminated. Clark also testified that the enhancements did not change the quality of the voices. Rather, he stated, it only made them slightly louder and removed some of the background noise. Finally, Clark testified that the enhanced tape was a true and accurate duplicate of the original tape, which had already been admitted into evidence.

Appellant now contends the court erroneously admitted the enhanced tape because (1) the State did not prove the enhancement technique used on the tape was reliable under TEX. R. EVID. 702, and (2) the enhanced tape was not admissible as a duplicate under TEX. R. EVID. 1001(d).

Reliability under Rule 702

Appellant first argues the court abused its discretion in admitting the videotape under Rule 702.² Recently, the court of criminal appeals announced a less rigorous “translation” of the factors set forth in *Kelly*. In *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the court stated that when addressing fields that are based upon experience or training as opposed to the scientific method, the appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject

² We agree with the State that it was not clear from appellant’s objection at trial nor in his appellate brief how the technique used to enhance the tape was unreliable or produced an unreliable result. Therefore, the point is arguably not preserved for appeal. We will, however, address appellant’s point in accord with his argument.

matter of the expert's testimony is within the scope of the field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Id.* at 561.

Clark's technique is clearly not one in which he employed the scientific method. Rather, it was a straightforward application of the use of recording equipment.³ Therefore, we believe the technique employed by Clark is more appropriately addressed under the *Nenno* factors.

First, Clark established his field of forensic evaluating, copying, and enhancing audio and video tapes was a legitimate one by his testimony that as an FBI agent, he has reproduced and enhanced audio and video tapes in the same or similar manner for law enforcement agencies all over the world. Further, Clark stated he had testified as an expert in related matters in more than fifty cases over a period of twenty years. Clark established the second prong of *Nenno* with his testimony that the technique appellant challenged — utilization of the band pass filter — was within the scope of his field. Finally, the third prong was established with Clark's testimony that he followed manufacturing guidelines and used his training, education, and expertise in using the band pass filter.

With these factors established, along with Clark's uncontroverted testimony that the quality of the voices on the original tape were not altered, we hold the State showed the enhanced tape was reliable and trustworthy, as was the technique in producing it. Therefore, court did not abuse its discretion in admitting the videotape.

We overrule appellant's first point of error.

Duplicate Under Rule 1001

³ In a sense, Clark's enhancement of the audiotapes is not significantly different than operating a photocopier. Though the underlying technology may be greatly complex, its operation is not.

Next, appellant argues that because the tape was enhanced, it was not a duplicate under Rule 1001(d),⁴ which states, in pertinent part, “

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⁴ Rule 1003 governs the admissibility of duplicates. Since appellant does not raise this rule we likewise do not address it.

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Appellant’s argument boils down to contending the means of reproduction did not “accurately reproduce” the original. We first observe that the rule does not necessarily require an identical reproduction, as appellant seems to imply, only an accurate one.

The court of criminal appeals has already addressed similar circumstances in at least two opinions. In *Angleton v. State*, 971 S.W.2d 65 (Tex. Crim. App. 1998), a witness heard both the original and enhanced audiotapes of a conversation. He testified the enhanced copy of the tape only reduced background noise in the original tape and that the enhanced copy was an accurate copy of the relevant contents of the original tape. The court held this testimony was sufficient to for the trial court to admit the enhanced tape as an accurate copy of the original. *Id.* at 67-68. In *Narvaiz v. State*, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992), an FBI technician testified she had enhanced a 911 tape by removing a background hiss. Again, the court of criminal appeals held that despite the minor alteration, the evidence demonstrated the enhanced tape was an accurate reproduction of the original. *Id.* at 431.

Here, Clark testified that the quality of the voices on the tape was not altered and that the enhanced tape was an accurate copy of the original. Though appellant elicited testimony from Clark that he had enhanced the original tape by running it through a band pass filter, Clark also testified that the sole effect of his technique was to make the voices on the tape a little louder and easier to hear. Appellant offered no evidence to the contrary. As such, *Angleton* and *Narvaiz* are materially on point with our case and likewise dictate the same conclusion that admitting the enhanced tape as an accurate reproduction of the original was not an abuse of discretion. We therefore overrule appellant’s second point of error.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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