COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

KAIRI SHOREA JERNIGAN,	§	
	§	No. 08-18-00086-CR
Appellant,	§	
	§	Appeal from the
v.	§	143rd Judicial District Court
	§	
THE STATE OF TEXAS,	§	of Ward County, Texas
	§	
Appellee.	§	(TC# 17-06-05848-CRW)
	§	

O P I N I O N

Appellant, Kairi Shorea Jernigan, appeals from a jury verdict, finding him guilty of robbery. Electing to have the jury assess punishment, the jury sentenced him to life imprisonment. Jernigan appeals from the trial court's alleged overruling of his objection of the complaint's in-court identification of Appellant. We affirm.

BACKGROUND

Appellant was indicted for the second-degree felony robbery of a gift and cosmetics store. Appellant's indictment was enhanced by four prior felony convictions. TEX.PENAL CODE ANN. § 12.42(c)(1).

The robbery occurred April 4, 2017, after 3:30 p.m. The store owner, Renee Heflin, and her daughter, Dawna, were the only individuals in the store when the perpetrator came in to buy

some scented candles, "wax melts." Shortly before, a security company had been at the store to update the security system, leaving about 3:00 p.m., including installing a "panic button." Although the security contractors had reprogrammed the panic button, they had not completely installed it.

The perpetrator wore a black shirt, jeans, white tennis shoes, and a hat.[1] Heflin looked carefully at his face, because she thought his purchase was unusual; the perpetrator did not smell or otherwise closely examine the wax melts. Heflin and Dawna waited on him, standing on either side of him. Once the perpetrator quickly selected two wax melts to buy at $5.50 each, they went to the check-out counter for Heflin to finalize his purchase. There, the perpetrator gave Heflin a $20.00 bill to pay for his selections. When Heflin started to make change, he reached into her cash register drawer and grabbed the cash out of it, totaling about $178.00.[2] When Heflin screamed, and tried to close the drawer, the perpetrator hit her shoulder. He then leaned over, and hit her on the head, quickly running out of the store to his van, which was parked near the rear of the store. Immediately after the perpetrator fled, Heflin pushed the panic button, which, although not completely installed, was functional. Security personnel answered, and Heflin asked them to call the police.

Within minutes, law enforcement met with Heflin, who described the perpetrator. After they broadcast the description, patrol officers detained two black males, which they then showed Heflin in a "show-up." Heflin said neither was the perpetrator. Obtaining surveillance camera

[1] Heflin did not remember the hat, but Dawna did.

[2] Dawna did not actually witness this part of the event as Heflin had sent her to the back of the store to finish her homework.

footage from adjacent government buildings, the police downloaded video, which showed: (a) a man matching Heflin's description of the perpetrator, who had parked a van near the back of the store; (b) the same man walking towards the front of the store; and (c) the same man running back to the van, and driving away. The footage showed the van's license plate number, from which the officers determined the van was registered to Appellant. Obtaining a picture of Appellant from his Texas driver's license, the officers took a cell phone photograph of it (cell photo), and showed it to Heflin, who immediately identified Appellant as the perpetrator. This led to Appellant's arrest in Odessa, Texas.

Before trial, Defense Counsel did not move to suppress Heflin's identification, or, at trial, move *in limine* to exclude that testimony. TEX.CRIM.PROC.CODE ANN. art. 28.01, § 1(6). During the State's case-in-chief, Defense Counsel did not object to Heflin's identifying Appellant in court. After Heflin did so, the State offered State's Exhibit #5, the cell photo of Appellant's driver's license, into evidence. The trial judge initially admitted the cell photo, but eventually sustained Defense Counsel's objection. The cell photo was not preserved and therefore, is not found in the record. Later, at trial, officers testified, without objection, that they had obtained a Texas driver's license photograph of Appellant with a birth year of 1965, which they then showed to Heflin.

DISCUSSION

Issue

In his sole issue, Appellant argues that the trial court erred by overruling his objection to Heflin's in-court identification of him at trial. Specifically, he argues the trial court violated his due process rights by refusing to suppress Heflin's in-court identification because the pretrial

identification procedure was impermissibly suggestive, which created a substantial likelihood of misidentification.

Waiver

At trial, Heflin identified Appellant in-court as the individual who robbed her absent any objection from Defense Counsel. After Heflin identified Appellant, nine minutes later, the State began to introduce State's Exhibit #5. State's Exhibit #5 was identified as the photograph of Appellant's driver's license which was shown to Heflin on a cell phone. Heflin testified State's Exhibit #5 was a picture of the individual that robbed her. The State offered Exhibit #5 into evidence, however, Defense Counsel objected and asked to take Heflin on *voir dire*, which the trial court granted. During Heflin's *voir dire* examination, she stated she recognized Appellant immediately and identified him as the perpetrator. At the conclusion Heflin's *voir dire,* the record reflects the following:

Defense Counsel:	Judge, we object to it as not being an adequate representation of what the person that was in the store was, how he was dressed and the time. This was taken sometime earlier and whoever this picture is – we object to it.
	. . .
State:	Your Honor, we're not offering it to set out that it truthfully, accurately depicts what it purports to depict; simply that the photograph – the person pictured in that photograph is one and the same person that had been in the store shortly before that and robbed the witness. It's for identification purposes only.
Court:	The objection is overruled, but the Court will give a limiting instruction. Ladies and gentlemen of the jury, you are instructed that State's Exhibit 5 is not to be considered as evidence of how the defendant appeared on April 4th, 2017; rather, it's to be considered

only for purposes of identification.
Note your exception.

After this exchange, and fourteen minutes after Heflin positively identified Appellant in-court as the individual who robbed her, Defense Counsel began his cross-examination of her. Heflin attested to the fact that she was shown only one photograph of the Appellant. The record reflects the following:

Defense Counsel: Okay. And again, you were not – you were not given any other pictures to look at, were you, as identifying anybody? The person – identify for the person that came into your store?

Heflin: No.

Defense Counsel: Your Honor, again, we're going to object to it because that does not follow proper protocol and there should be at least six pictures involved in each identification to make a comparison as to it who might have been and that there was just one picture. She didn't have a choice; so, we object to that again.

The trial court recessed the jury and entertained argument from counsel. The record reflects the following:

Court: Before the recess, the Court indicated it would take up the Defendant's objection to – renewed objection to Exhibit No. 5, which can be referred to as the cell phone photograph and let the record reflect that present in the courtroom are the attorney for the State, the attorney for the Defendant and the Defendant himself, and the jury is not present here in the courtroom.

We're going to conduct a hearing on this issue outside the presence of the jury. [Defense Counsel], you may state your objection or make any further argument that you wish.

Defense Counsel: Well, Your Honor, just like I said, as I understand the rules is that when you have a photographic lineup, you got to have more than one picture. Now, if there is an exception to the rule where that if the person has been apprehended that you can take the person to the victim and they can either identify or not identify without anybody

else. But when they start doing the pictures, that they're supposed to have similar pictures so they can pick out who the person they saw was.

After the State's response, the trial court outlined the issues regarding the admissibility of State's Exhibit #5. The trial court specifically referenced the *Barley* factors. *Barley v. State*, 906 S.W.2d 27 (Tex.Crim.App. 1995). A full sixty minutes after Heflin identified Appellant in court as the individual who robbed her, the trial court announced its decision on the record:

Court: The lineup procedures for photographic identification are – as suggested in the Code of Criminal Procedure – are the suggested procedure and the issue that is addressed by that procedure is one of suggestiveness of the photograph. That's the issue as to this particular Exhibit 5, whether it's suggestive or not. And the Court would note that in this case, the testimony of Ms. Heflin, who was the witness, described a number of factors that are identified in the case of Barley versus State, which is a Court of Criminal Appeals case from 1995. I draw Counsel's attention to the discussion on pages 34 and 35 of that opinion talking about identification.

In this case, the Court notes that Ms. Heflin described the – her testimony addressed the factors that are listed in that opinion. Those factors that should be addressed in the Court making a determination as to whether a very substantial likelihood for irreparable misidentification has been created. These are the factors that were outlined.

One, the witness's opportunity to view the criminal act.

Two, the witness's degree of attention.

Three, the accuracy of the suspect's description.

Fourth, the level of certainty at the time of confrontation.

And five, the time between the [crime] and the confrontation.

The Court notes further that Ms. Heflin's testimony regarding the incident that is alleged to have taken place on the 4th of April, 2017, was presented to the jury and an in-court identification was made before there was any discussion of State's Exhibit No. 5.

There's two separate issues we're talking about. One is the in-court identification, the other is the Exhibit 5, which is the – what we're calling the cell phone photograph. Those procedures that are

> outlined in the Code of Criminal Procedure are meant to address the question of due process in photographic lineups or show-up. The Court notes that because those are two separate issues and considering the argument of counsel and the circumstances of the evidence in this case, the Court withdraws its earlier admission of Exhibit 5 and sustains the Defendant's objection to State's Exhibit No. 5. However, the Court wants to make it clear that the sustaining of that objection to State's Exhibit 5, which is not to be considered as evidence and is to be withdrawn, does not negate the testimony -- the in-court identification testimony of this witness that was adduced here at trial.
>
> . . .
>
> Court: Is there anything else to come before the Court in this hearing before we bring the jury back in?
>
> Defense Counsel: Not on behalf of the Defendant, Your Honor.

Texas courts apply the contemporaneous objection rule in the context of suggestive identification procedures. *Perry v. State*, 703 S.W.2d 668, 670 (Tex.Crim.App. 1986). Without a timely objection to the in-court identification, or testimony based on an allegedly suggestive identification procedure, no error is preserved. *Id.* at 671; *see* TEX.R.APP.P. 33.1(a). Failure to complain about or object to the in-court identification constitutes procedural default and waiver of any complaint on appeal. *Wallace v. State*, 75 S.W.3d 576, 584 (Tex.App.—Texarkana 2002), *aff'd on other grounds*, 106 S.W.3d 103 (Tex.Crim.App. 2003).

In *Darcy*, defense counsel learned during trial about a possible right-to-counsel violation, which occurred before trial. *Darcy v. State*, 488 S.W.3d 325 (Tex.Crim.App. 2016). The issue concerned a witness's note, which she had written to Appellant at the request of the State's investigators. *Darcy*, 488 S.W.3d at 326. Appellant argued he was not required to object to the admission of the note because he was unaware that it was a "counterfeit document" at the time it

was admitted into evidence. *Darcy*, 488 S.W.3d at 330. But after defense counsel became aware of the facts concerning the note, he still raised no complaint. He also failed to object as additional evidence regarding the note was elicited. *Id.* As the court in *Darcy* stated:

> If an objectionable event occurs that a party could not have reasonably foreseen, the party must still seek to cure any prejudice flowing from that event by requesting an instruction to disregard or a mistrial. And the party must lodge an objection if needed to cut off discussion of the objectionable subject matter, and prevent the further accumulation of harm. If appellant had made a belated complaint to the trial court, we would need to assess whether his initial unawareness of the character of the note as a ruse would sufficiently excuse the lateness of his complaint so as to make it timely. But appellant failed to raise any complaint to the trial court with respect to Morris's note and sought relief for the first time on appeal. He has failed to preserve error. [Footnotes and citations omitted].

Id. at 330. Thus, the court found the appellant in *Darcy* had forfeited his complaints by not raising them at trial. *Darcy,* 488 S.W.3d at 326.

Turning to the case at hand, Appellant did not raise a contemporaneous objection to the complaint's in-court identification of him. Appellant objected to the introduction into evidence of the cell photo of his driver's license, State Exhibit #5, which was sustained by the trial court. Here, Appellant argues the trial court erred in overruling his objection to Heflin's in-court identification of him. However, as our recitation demonstrates there was no contemporaneous objection to Heflin's in-court identification of Appellant only to the introduction of the cell photo of Appellant's driver's license. Further, once the trial court made clear he was not ruling on the in-court identification of Appellant by Heflin, but only the admissibility of State's Exhibit #5, Defense Counsel affirmatively represented Appellant had no further objection. Ostensibly, the trial court offered Appellant a belated opportunity to object to Heflin's in-court identification which was declined. Appellant, therefore, failed to preserve error, and waived any objections regarding

the suggestiveness of the pretrial procedure effect on Heflin's in-court identification.

But even assuming Appellant's complaint is preserved, his contention would be without merit because Appellant fails to show a very substantial likelihood for irreparable misidentification exists, depending on several non-exclusive factors. *See Barley*, 906 S.W.2d at 33–34; *Neil v. Biggers*, 409 U.S. 188 (1972). Those factors are: (1) the witness' opportunity to view the criminal act, (2) the witness' degree of attention, (3) the accuracy of the suspect's description, (4) the level of certainty at the time of confrontation, and 5) the time between the crime and confrontation. *Barley*, 906 S.W.2d at 34-35. These factors are weighed against the corrupting effect of any suggestive identification procedures. *Id*. at 35.

Applying the *Barley* factors, we find they weigh in favor of the State. First, Heflin and Appellant, in the afternoon, conferred over his purchases, then proceeded to the check-out counter, finalizing his purchase when he reached into her cash register drawer, and grabbed the cash, hitting her on the head. Thus, she unavoidably had an excellent view for some time while Appellant was in the store during broad daylight. Second, immediately before the robbery, Heflin looked carefully at Jernigan's face because she thought that his purchase was unusual; he did not smell or otherwise closely examine the wax melts. Third, she gave good description of Jernigan's clothing, a black shirt, jeans, and white tennis shoes. Her description exactly matched the surveillance camera video, confirming the color of the clothing she described, of a man parking a van, walking towards Heflin's store, and then running back to the van and driving away. Fourth, once Heflin was shown the cell photo, she immediately identified him. There was no discrepancy between the cell photo identification and Heflin's in-court identification. The cell photo was shown to Heflin the same

day the robbery occurred while she was still at her store. Lastly, while not entirely sure of the *exact* time of Heflin's cell photo identification, we know that it occurred between 3:30 p.m. the day of the robbery and 7:21 p.m. that night, when officers arrested him. Consequently, the time between the crime and the confrontation was short. We note that in *Barley*, the court found that twelve months was not too long an interval. *Barley*, 906 S.W.2d at 35.

CONCLUSION

For these reasons, we affirm.

May 22, 2020

YVONNE T. RODRIGUEZ, Justice

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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