Affirmed and Opinion filed January 3, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00117-CR

JOHNNIE PUNCH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 859,154

O P I N I O N

Appellant, Johnnie Punch, appeals from his felony conviction for aggravated robbery. A jury found appellant guilty and assessed punishment at fifteen years' imprisonment. In two issues, he contends: (1) that the trial court abused its discretion in refusing to suppress the eyewitness identification; and (2) that the evidence is factually insufficient to support the verdict. We affirm.

Background

On March 8, 2000, three robbers, two in masks and one dressed in a police uniform, invaded the home of Trumika Miller and Walter Hall. One of the robbers beat Hall while the others ransacked the home searching for money. Initially, the robbers kept Miller in the bathroom, where she sat on the floor holding her child. One of the masked robbers came into the bathroom several times, spoke to her several times, and eventually took her child from her. She testified that this robber lifted his mask approximately four times, as though it irritated him. She stated that this allowed her to see the bottom portion of his face.

Detective Tom Keen, a Harris County Sheriff's Deputy, presented a spread of six photographs to Miller and gave her the standard instructions regarding photographic identifications. She stated to the detective that the eyes of the person in photograph number six frightened her. Keen told her to look at the part of the face that she could identify. Miller then identified the appellant, whose photograph was in the second position, as the robber whose face she had seen.

The Photo Lineup

Appellant first contends that the trial court abused its discretion in denying the motion to suppress the eyewitness identification because the sheriff's deputy presenting the photo spread used impermissibly suggestive procedures. A defendant who makes such a contention has a heavy burden to overcome, because unless it is shown by clear and convincing evidence that the in-court identification was tainted by improper pretrial procedure the in-court identification is always admissible. *In re G.A.T.*, 16 S.W.3d 818, 827 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (citing *Jackson v. State*, 628 S.W.2d 446, 448 (Tex. Crim. App. 1982)).

The test is whether, considering the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Ibarra v. State*, 11 S.W.3d 189, 196 (Tex. Crim.

App. 1999)(citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The reliability of any subsequent in-court identification is the critical issue. *See id*. The following five non-exclusive factors should be "weighed against the corrupting effect of any suggestive identification procedure in assessing reliability under the totality of the circumstances": (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Ibarra*, 11 S.W.3d at 196 (citing *Neil v. Biggers*, 409 U.S. 188 (1972)). Because the *Biggers* factors each concern issues of historical fact, we examine the factors in a light favorable to the trial court's ruling. *Ibarra*, 11 S.W.3d at 196. The factors, viewed in this light, are then weighed *de novo* against the corrupting effect of the suggestive pretrial identification procedure. *Loserth v. State*, 963 S.W.2d 770, 773-74 (Tex. Crim. App. 1998).

At the suppression hearing, Detective Keen testified that he gave Miller the standard instructions regarding photographic identifications and then presented a photographic lineup to her consisting of six photographs. He said that she told him that the eyes of the person in photograph number six scared her, but he then told her to look at the part of the face that she could identify. He stated that she had told him previously that she only saw the lower portion of the subject's face. Miller then identified the appellant, whose photograph was in the second position, as the robber whose face she had partially seen.

Appellant and the State interpret Detective Keen's suggestion to Miller in alternate ways. Appellant maintains that, by his statement, the detective meant to indicate that the person in photo number six was not the suspect and that Miller should choose another. Keen, however, suggested in his testimony that he made the comment only to remind her to look at what she told him she saw, the lower portion of the face. Miller testified that she remembered the detective telling her to concentrate on remembering what she saw in her home. And the State indeed argues that the statement did no more than to redirect her from

whether someone's eyes were scary to using what she remembered seeing on the morning of the robbery to determine if one of the robbers was depicted in the photo lineup. Both of these interpretations are reasonable under the circumstances. Given our deference to the trial court on matters of historical fact and the appellant's heavy burden to show through clear and convincing evidence that the identification is unreasonable, we find that such procedure was not impermissibly suggestive. *See In re G.A.T.,* 16 S.W.3d at 827.

Furthermore, even if the procedures were to some degree suggestive, they did not give rise to a "very substantial likelihood of irreparable misidentification." *See Ibarra*, 11 S.W.3d at 196. In making this determination, we viewed the record in light of the five *Biggers* factors. Miller testified in the suppression hearing that she saw the robber lift his ski mask approximately four times and that two of these came while they were mere inches apart in the bathroom, with the lights on, and with nothing obstructing her view of him. She said that she was able to see his face "from the chin to his eyes." Her attention was almost certainly on the robber as he had invaded her home, spoke to her several times, and took her young child away from her. Detective Keen testified that Miller indicated that she was positive in her identification at the time he presented the photo spread, and Miller herself confirmed this in her testimony. She additionally testified that she was able to identify appellant's photograph as the robber because she remembered him from the morning of the robbery, a mere two weeks prior to the photographic lineup. Although Miller's testimony concerning her prior description of the robber suggests that her description may not have been particularly detailed, she did recall describing his build and clothing to the officers. In sum, when examined in a light favorable to the trial court's ruling, the five *Biggers* factors weigh heavily in favor of the reliability of Miller's in-court identification. *See Ibarra*, 11 S.W.3d at 196.

The photographic identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Ibarra*, 11 S.W.3d at 196. Appellant's first issue is overruled.

Factual Sufficiency

Appellant next contends that the evidence was factually insufficient to support the verdict. In reviewing the factual sufficiency of the evidence, we examine all of the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). We consider all of the evidence in the record and not just the evidence which supports the verdict. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). However, a factual sufficiency review must be appropriately deferential to avoid substituting the appellate court's judgment for that of the fact finder or intruding upon the jury's role as the sole judge of the weight and credibility of testimony. *Johnson*, 23 S.W.3d at 7. Unless the record clearly reveals that a different result is appropriate, we must defer to the jury's determination concerning the weight given to contradictory testimony. *Id*. at 8.

In challenging the sufficiency of the evidence, appellant initially reiterates the attack on the in-court identification by Miller. Because we have already upheld the trial court's determination as to the reliability of that identification, we need not revisit the analysis in its entirety here. Miller specifically stated that she was certain it was the appellant who robbed her. Appellant contends that Miller's identification is not reliable because she saw the robber from an angle, as she was sitting in the bathroom and he was standing, and because she did not mention that he had gold teeth, as his mother and wife testified. Miller, however, also testified that she saw appellant raise his mask later in the living room, as well as having seen him do it at close range in the bathroom. Furthermore, there is no evidence to demonstrate that she ever actually saw his teeth. The fact of her failure to note the gold teeth is therefore not very compelling.

Additional eyewitness testimony was elicited from Juan Murillo, who admitted to being the robber dressed in a police uniform, and who affirmatively identified the appellant as the robber who spoke with Miller in the bathroom and took her child from her. Murillo and Miller also both identified the appellant's car as the one used in the robbery. The car was a dark-colored sedan and was apparently used because it resembled a police vehicle.

The State also called Chad Farrington to the stand, and he testified that he has known the appellant and Derrick Eldridge, who was also arrested for the robbery, for about twelve to fifteen years. He stated that one morning appellant, Eldridge, and Murillo came to his house and that he then observed appellant's car in the driveway and Eldridge and appellant engaged in an "altercation." Farrington, however, was unable to place a specific date on this occurrence.

Appellant points out that, although the police checked the house where the robbery occurred for fingerprints, they were unable to establish that any prints in the house belonged to him. Two sets of prints were identified, one as belonging to Murillo and the other as belonging to Eldridge. A third set of prints was found but could not be linked to anyone. The State points out, however, that the item on which the two robbers' prints were found, a legal pad, came from outside the home. No other prints found in the house were linked to the two print-identified robbers. Thus, the fact that no prints connected to appellant were found in the house is not very illuminating. Furthermore, the State's fingerprinting expert testified at length regarding the difficulties in finding identifiable fingerprints. Although the jury certainly could have considered the lack of fingerprint evidence, it is not sufficient to require reversal in light of the other strong evidence against the appellant.

Appellant presented two alibi witnesses, his mother and his wife. They both testified that appellant was initially at home and then took his daughter to school during the time that the robbery occurred. Although this evidence is to some degree compelling, the jury is the sole judge of the weight and credibility to be given the witnesses' testimony. *Johnson*, 23

S.W.3d at 7. The jury was free to believe all, part, or none of the witnesses' testimony. *Elkins v. State*, 822 S.W.2d 780, 783 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

Considering all of the evidence, we find that the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson*, 23 S.W.3d at 7. Accordingly, we overrule appellant's second issue.

The judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Senior Justice

Judgment rendered and Opinion filed January 3, 2002.
Panel consists of Justices Yates, Edelman, and Draughn.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Joe L. Draughn sitting by assignment.