Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00480-CR

TRUNG TAN VAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 831681

O P I N I O N

A jury found appellant, Trung Tan Vay, guilty of burglary of a habitation. *See* TEX. PEN. CODE ANN. § 30.02 (Vernon Supp. 2002). In three points of error, appellant claims the State improperly introduced evidence of a pretrial identification made in violation of his right to counsel, and the trial court erred in denying his motion to suppress the in-court identification. We affirm.

Factual and Procedural History

When the complainant, William Selva, and his wife returned to their home in Pasadena, they saw a blue pick-up truck with a weed eater in the bed parked in their

driveway. Mr. Selva went inside to investigate and saw an unknown Asian male, later identified as appellant, standing six to ten feet away from him. Mr. Selva went back outside to alert his wife that someone was in their house. Shortly thereafter, appellant emerged from the side of the house, looked at both Mr. Selva and his wife, got into the blue pick-up and drove away. The police were called and given a description of appellant and his truck and the direction he was last seen traveling.

Officer C.S. Shafer of the Pasadena Police Department responded to the call and questioned Mr. Selva. Shortly thereafter, Officer Shafer received notice that appellant had been stopped about two miles away in a blue truck that had a weed eater in the bed. The officer took Mr. Selva to the scene of the traffic stop. Officer Shafer testified that Mr. Selva positively identified the truck as the one he had seen in his driveway and identified appellant as the same man he encountered moments earlier in his home. Appellant was arrested and charged with the offense of burglary of a habitation.

On the morning of trial, the State's attorney showed both Mr. Selva and his wife a single photograph of appellant and asked if they recognized him. Both indicated they recognized appellant as the person they had seen at their home. In court, both witnesses positively identified appellant as the burglar. Appellant was convicted of burglary of a habitation. The jury assessed punishment at thirty-five years' confinement, enhanced by one prior conviction. This appeal followed.

Right to Counsel

Appellant first argues that when the State's attorney showed the complaining witnesses a single photograph of appellant the morning of trial, prior to an in-court identification, it violated appellant's rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, sections 10 and 19 of the Texas Constitution.[1]

[1] Appellant failed to separately brief his state and federal claims. The State argues that by failing to provide separate authority for his state constitutional claims, appellant waives them. *See Heitman v. State*, 815 S.W.2d 681, 690 n.23 (Tex. Crim. App. 1991). The decision to deem a multifarious point of error waived has always been discretionary. *See, e.g., Hicks v. State*, 815 S.W.2d 299, 301 (Tex. App.—Houston

Specifically, appellant argues he was entitled to have counsel present when the State's attorney showed the complaining witnesses the photograph. Appellant relies on *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967) and *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967). In both of those cases, the Supreme Court found that post-indictment lineups were "critical stages" of the proceedings. However, not every event following the inception of adversary judicial proceedings constitutes a "critical stage" so as to invoke the right to counsel under the Sixth Amendment. *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994). In *United States v. Ash*, 413 U.S. 300, 321, 93 S. Ct. 2568, 2579 (1973), the Supreme Court held that a post-indictment photographic display used to test witness identification prior to trial is not a "critical stage." Accordingly, appellant's reliance on *Wade* and *Gilbert* is misplaced. Here, similar to the scenario in *Ash*, the prosecutor displayed a photograph to the witnesses prior to trial. Because this was not a critical stage of the proceedings, appellant was not entitled to have counsel present. Appellant's first point of error is overruled.

Appellant next argues that the State improperly buttressed its case-in-chief when it introduced evidence of the photograph. The prosecution cannot buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of the appellant's Sixth Amendment rights. *See Moore v. Illinois*, 434 U.S. 220, 231, 98 S. Ct. 458, 466 (1977). However, because we have found that the pretrial identification in this case was not in violation of the Sixth Amendment, no error is shown. Accordingly, point of error two is overruled.

Due Process

In his third point of error, appellant alleges the trial court erred in denying his motion to suppress the in-court identification. Appellant argues that the witnesses' in-court identifications were irreparably tainted when the State showed the Selvas appellant's photograph prior to trial, thus appellant's due process rights were violated.

[1st Dist.] 1991 no pet.). We will address appellant's claims together.

The standard of review for a motion to suppress is abuse of discretion. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). In reviewing a motion to suppress, the appellate court should afford almost total deference to a trial court's determination of the historical facts suggested in the record, especially when the trial court's findings are based on an evaluation of credibility and demeanor. *Rocha v. State*, 16 S.W.3d 1, 12 (Tex. Crim. App. 2000).

Determining the admissibility of an in-court identification requires a two-step analysis. First, we consider whether the pretrial identification procedure was impermissibly suggestive. *See Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). Second, if the procedure was impermissibly suggestive, we determine whether the procedure gives rise to a very substantial likelihood of irreparable misidentification. *See id.* (citing *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)). The defendant bears the burden to prove these two elements by clear and convincing evidence. *Barley*, 906 S.W.2d at 34.

It is well established that, even where the pretrial identification procedure is impermissibly suggestive, in-court testimony of an identification witness will still be admissible as long as the record clearly reveals that the witness's prior observation of the accused was sufficient to serve as an independent origin for the in-court identification. *Jackson v. State*, 657 S.W.2d 123, 130 (Tex. Crim. App. 1983). Reliability is the "linchpin" question in determining admissibility of identification testimony. *See Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977); *Barley*, 906 S.W.2d at 34. Testimony is reliable if the totality of the circumstances reveal no substantial likelihood of misidentification despite a suggestive pretrial procedure. *See Simmons*, 390 U.S. at 383, 88 S. Ct. at 971; *Jackson*, 657 S.W.2d at 128. In *Neil v. Biggers*, the Supreme Court enunciated five, nonexclusive factors we use to assess reliability. 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972). The factors include (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. *See id*.

In this case, Mr. Selva took the stand and positively identified appellant as the man he encountered in his home. Mr. Selva had more than ample opportunity to observe appellant for twenty to thirty seconds at close range in the home, and again at an even closer distance when appellant exited the house and walked by the Selvas. Mr. Selva also watched appellant as he drove away. The description given by Mr. Selva to the police was consistent with appellant's appearance when he was arrested a short time later. When Mr. Selva was taken to the scene where appellant had been stopped, he made a positive identification.

Mr. Selva's wife also took the stand and positively identified appellant. She explained that her in-court identification was based on "the way he looked at us, [October 1, 1999] his face, I remember him. He was trying to hide his face, but I was sitting in the passenger side; and when he came out that – I was thinking 'I want to know how he looks so I can describe him when the police comes'."

We find the record shows that the witnesses' prior observations of the accused were sufficient to serve as an independent origin for the in-court identifications. Accordingly, even assuming that appellant could establish that the pretrial identification procedure was impermissibly suggestive, he has not shown any likelihood of misidentification. Accordingly, appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 7, 2002.
Panel consists of Justices Yates, Edelman, and Draughn[2].
Do Not Publish — TEX. R. APP. P. 47.3(b).

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