Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00881-CR

ADRIAN DEWAYNE GRAVES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 833,863

O P I N I O N

Appellant pled not guilty to an indictment charging him with the felony offense of aggravated robbery. Over his plea, a jury found appellant guilty and assessed punishment at ten years' confinement in the Texas Department of Criminal Justice, Institutional Division, probated for ten years, and a fine of $10,000.00. Appellant appeals his conviction on nine points of error, and complains (1) that the trial court erred in overruling his motion to suppress both an allegedly overly suggestive show up, and complainant's in-court identification that was tainted by the overly suggestive show up, (2) that the trial court erred in limiting his cross-examination of a police officer concerning proper

identification procedures, (3) that the evidence was factually insufficient to support a conviction for aggravated robbery, and (4) that the trial court erred in overruling an objection to the prosecutor's argument that allegedly injected new and harmful facts into the case and impermissibly injected the prosecutor's personal opinions about the case to the jury. For the reasons set forth below, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

The complainant in this case was robbed while delivering a pizza at 10:30pm. When complainant drove up to the residence where he was to make the pizza delivery, he saw a man standing outside, apparently waiting for him. Thinking that this man had ordered the pizza, complainant got out of his car, greeted the man, and opened the back door of his car to get the pizza. As complainant turned back around, the man was face-to-face with him. Next, the man put a gun into complainant's abdomen, told him to give him all his money, and to kneel. Complainant acquiesced. The man took complainant's money, threatened to kill him, kicked him, pointed the gun at him, then ran away.

After being robbed, complainant knocked on the door of the residence where he was scheduled to deliver the pizza, and explained what had just happened. Although the female answering the door denied ordering a pizza, she let him in to use the phone to call 911. Shortly after this, complainant saw appellant come out of a house four or five houses down the street, get in a car, and drive down the street. Complainant thought that appellant was the man who robbed him, and noted that appellant was wearing a different jacket than he had on when he robbed him. When the police arrived, complainant told them that a tall, skinny, black man, between the ages of fourteen and nineteen, wearing dark pants, a black and blue checkered flannel jacket with a hood pulled over his head, and black shoes with laces tied inside the shoes had robbed him. He said he only viewed the robber's face for a "couple of seconds" before the robber told him to kneel. Complainant then returned to work.

Police knocked on the door of the house that complainant told them appellant had exited. Appellant's mother, who also lived at the house, told police that her son matched their description, but that he was not home. She also said that her son had been outside earlier, listening to music in his car. The police searched the area, and after an hour, the

police returned to the street where the robbery occurred. At that time, they saw appellant near his house. The police noted that appellant's friends were whistling, apparently attempting to get his attention, when the patrol car entered the vicinity. The officers pulled their weapons, told appellant to lie on the ground, handcuffed him, and placed him in the back of the patrol car.

After arresting appellant, the officers took him to complainant's place of business. The police asked complainant to identify whether the man they had in custody was the one who robbed him. Complainant identified appellant as the person who robbed him, but only after (1) seeing appellant handcuffed in the back of a squad car, (2) asking the officers to pull his jacket over appellant's head, (3) asking appellant to move to a darker area of the squad car, and (4) looking at appellant's sneakers.

DISCUSSION AND HOLDINGS

A. The Show Up Identification

In his first four issues for review, appellant complains that the overly suggestive show up procedures violated his constitutional rights and tainted the subsequent in-court identification of appellant with the same constitutional violations. We find that the show up was not a violation of appellant's constitutional rights, and thus the subsequent in-court identification was not tainted. Therefore, the trial court did not err in denying appellant's motions to suppress these identifications.

We begin by noting that a defendant who contends on appeal that a trial court erred in allowing an in-court identification of him by a witness has a difficult and heavy burden to sustain; he must show by clear and convincing evidence that the witness's in-court identification of the defendant as the suspect was tainted by improper pretrial procedure and confrontations. *In re G.A.T.*, 16 S.W.3d 818, 827 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). A one-man show up, without more, does not violate due process. *Neil v. Biggers*, 409 U.S. 188 (1972); *Garza v. State*, 633 S.W.2d 508, 512 (Tex. Crim. App. 1981) (op. on reh'g) (1982); *Lewis v. State*, 751 S.W.2d 895, 897 (Tex. App.—Houston [14th Dist.] 1988, no pet.). Nevertheless, the Supreme Court has recognized the widespread criticism and the inherent suggestiveness of showing a single suspect to persons for the purpose of identification. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The

Court held, however, that a claimed violation of due process in the conduct of confrontation depends on the totality of circumstances. *Id*. at 302.

In *Garza v. State*, the Texas Court of Criminal Appeals agreed that an "on-the-scene" confrontation has some degree of suggestiveness. 633 S.W.2d 508, 512 (Tex. Crim. App. 1982). However, the court, relying on *Stovall*, held that its use is necessary in some situations. *Id*. The court noted that quick confirmation or denial of identification expedites the release of an innocent suspect, thus preventing his or her further detention, and affords the police the opportunity to continue their diligent search for the actual perpetrator. *Id*. The court also recognized that an on-the-scene confrontation allows witnesses to test their recollection while their memory is still fresh and accurate. *Id*. The court further noted that, without suppressing the in-court identification, any possible prejudice resulting from such a confrontation can be exposed through a rigorous cross-examination of the witness. *Id*.

A two-step analysis is used to determine the admissibility of the identification testimony: (1) whether the pre-trial identification procedure was unnecessarily suggestive, and (2) whether that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Losearth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998).

In reviewing the first prong of the test, we note that, by its very nature, a one-on-one confrontation entails many suggestive elements, such as the suspect being handcuffed and in police custody. *Lewis*, 751 S.W.2d at 897. As a result, in deciding the first prong of the test, we ask whether the confrontation was so unnecessarily suggestive as to deny due process to the accused.

If the pre-trial identification is found impermissibly suggestive, identification testimony is, nevertheless, admissible under the second prong of the test, if the totality of circumstances show no substantial likelihood of misidentification. *Cooks v. State*, 844 S.W.2d 697, 731 (Tex. Crim. App. 1992). To determine whether there is a substantial likelihood of misidentification we must consider five non-exclusive factors, all relating to issues of historical fact: (1) the opportunity of the witness to view the person at the time of the crime; (2) their degree of attention; (3) the accuracy of any prior description; (4) the

level of certainty demonstrated by the witness; and (5) the length of time between the offense and the confrontation. *Losearth*, 963 S.W.2d at 772-73. These factors must be weighed *de novo* against the "corrupting effect" of the suggestive pre-trial identification procedure. *Id*. at 773-74.

Here the trial court made no findings of fact; thus, we must view the facts in a light favorable to the trial court's ruling. *Id*. at 774.

Our review of the record indicates that this show up was not unnecessarily suggestive. Appellant was handcuffed and sitting in the back of a police car when complainant identified him. One of the officers testifying at trial was asked, "you told him you had a suspect in custody that you believed was the person who had robbed [complainant] and that you needed him to make an identification." The officer responded, "Correct." Complainant, who stated at trial that English was not his first language, wavered between testimony that the police did or did not say that they thought the suspect was the person who robbed him.

Ultimately, however, complainant made it clear that he knew appellant was a suspect, but might not be the person who robbed him. He plainly indicated that he understood that the fact that the police suspected a person in a crime did not necessarily indicate that the person committed the crime. For example, he stated, "They [the police] say [sic], [']We got [sic] a suspect and you have to identify he [sic] the right person who robbed you or not [sic].['] They didn't say they believed. They say [sic], [']We got [sic] a suspect and you have to identify [whether] he's the right person or not.[']" Complainant also went on at some length about being certain he identified the right person. He said, ". . . this is someone's life problem, sir. I don't want to show [sic] this is the wrong person and say this is the wrong person. . . . That's the reason I didn't say, This is the guy. I want to be – make sure everything I saw the person [sic]. That's the reason I took my time and that's the reason officers told me, Don't be scared, don't take [sic] a rush. Take your time. Make sure you choose the right person." It appears from the record that, indeed, complainant took his time in identifying appellant, making sure to recreate the environment as closely as possible to when he saw appellant face-to-face.

The officer who stated that he told complainant we have a suspect who we think

robbed you, also stated the officers told complainant, "to take his time, we're dealing with somebody's life here . . . we don't want you to make a mistake." The other officer also testified that they told complainant they had a suspect. Because it is obvious by his testimony that complainant did not believe that the suspect was necessarily the person who robbed him, the only circumstances at the show up that indicate suggestiveness were the fact that appellant was handcuffed and in the back of a police car. That is not enough, in and of itself, to be unnecessarily suggestive. *In re G.A.T.*, 16 S.W.3d 818, 827 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). All the other circumstances that appellant questions – that complainant took his time, wanted appellant's jacket pulled over his head, wanted to see appellant in a light more like where appellant robbed him, wanted to see appellant's shoes – all bolster what is already apparent; complainant took a great deal of time in identifying appellant, and wanted to recreate the environment in which he saw appellant, all in an effort to identify the right person.

Appellant points to the fact that at the time of the identification, complainant was still shaky from the robbery, no other evidence linking appellant to the robbery was found, appellant was wearing a different jacket when complainant identified him, and the pizza store manager, who is a friend of appellant's, testified that after the police left the pizza store, complainant said he was unsure of the identification he had just made. Such matters go to the weight to be given the evidence, and not to its admissibility. *Garza v. State*, 633 S.W.2d 508, 513 (Tex. Crim. App. 1981). The jury was allowed to consider all the relevant information concerning complainant's identification of appellant, and it was the jury's duty to determine the credibility of the testimony, and the weight it should be afforded. *Id*. at 514.

Having determined that under the totality of circumstances the identification was not unnecessarily suggestive, we need not evaluate whether the procedure created a substantial likelihood of misidentification. *In re G.A.T.*, 16 S.W.3d at 827. Appellant's first two issues are overruled.

Complainant's in-court identification of appellant clearly indicates that it was based on his observations at the time of the robbery, not at the time of the show up. Furthermore, since the show up did not violate due process, neither did complainant's in-court identification. We therefore overrule appellant's third and fourth issues.

B. Limits on Cross-Examination

In his fifth and sixth issues, appellant complains that the trial court violated his constitutional rights of confrontation and due process when it did not allow appellant's defense counsel to examine the police officer about proper identification procedures. We hold that by failing to make an offer of proof or to perfect a bill of exceptions, on this issue, appellant presents nothing for our review.

During defense counsel's cross-examination of Deputy Rocamontes, the following transpired:

Defense:	All right [sic]. Now, Deputy, the safest practice and the best way to try to get an identification of a suspect would be to put together—either to put together a photo spread or to do a physical lineup, wouldn't it?
State:	Your Honor, I'm going to object to this question.
The Court:	Sustain the objection.
Defense:	Have you had occasion to make arrests of suspects that were placed in photo spreads or placed in physical lineups?
The State:	Your Honor, I object to relevance.
The Court:	Sustain the objection.
Defense:	I'm sure you will agree with me that this identification process that you went through is not as reliable as some other identification procedures.
The State:	Your Honor, I'm going to object.
The Court:	Sustain the objection.

Typically, to preserve error for appellate review when testimony is excluded, the aggrieved party must make an offer of proof or a bill of exceptions. Specifically, "[w]hen the trial court prevents a defendant from eliciting certain *specific* responses from a State's witness, defense counsel preserves error by either (1) calling the witness to the stand outside the presence of the jury and having the witness answer specific questions, or (2) making an offer of proof on questions he would have asked and answers he might have received." *Stults v. State*, 23 S.W.3d 198, 203 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

However, in certain instances, an offer of proof or bill of exceptions is not necessary to preserve error. If the trial court generally denies a defendant the opportunity to question a witness for the State, in the presence of the jury, about what might have affected the witness's credibility, such as malice, ill-will, motive, or bias, defense counsel preserves error by establishing what general subject matter he desired to examine the witness about during cross-examination and, if challenged, show on the record why such should be admitted into evidence. *Virts*, 739 S.W.2d at 29; *Stults*, 23 S.W.3d at 204; *see also Canto-Deport v. State*, 751 S.W.2d 698, 700 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (holding that because it was clear from the context of the questions that appellant was seeking to introduce testimony regarding her reputation for honesty and fair dealing, error was not waived by failing to make an offer of proof).

Here appellant clearly wanted to determine Rocamontes's opinion about the reliability of show up procedures. In other words, appellant was searching for a specific answer — what that answer would have been, we do not know. To avoid waiving error by failing to make an offer of proof, appellant attempts to characterize the sought-after testimony as relating to an issue of Deputy Rocamontes's credibility. Appellant argues that any answer would indicate the Deputy's professionalism, and therefore his credibility. We disagree. Nowhere in our research, or in this record,[1] can we find any indication that show up identifications, alone, are an indicia of lack of professionalism. Consequently, this questioning does not probe generally into the Deputy's credibility. Since the line of questioning would not reflect directly on Rocamontes's credibility, defense counsel was required to make a bill of exceptions showing what Rocamontes would have said. *See Love v. State*, 861 S.W.2d 899, 901 (Tex. Crim. App. 1993) (holding that the offer of proof was inadequate because it did not provide the trial judge with a concise statement of the content of the testimony counsel proposed to elicit from the witness); *Navarro v. State*, 863 S.W.2d 191, 199 (Tex. App.—Austin 1993), *pet. ref'd* 891 S.W.2d 648 (Tex. Crim. App. 1994) (holding that a bill of exception was not perfected because counsel failed to

[1] If counsel believed that the use of show-up identifications reflects a lack of professionalism, he could have presented testimony from an expert on the issue. As it is, the record contains nothing to reflect that show-up identifications are inherently unreliable, and that an officer who uses them is unprofessional. Additionally, appellant has not pointed us to any research supporting this claim.

show what the witness's answers would have been to the questions propounded by counsel). He did not do this. As a result, nothing is preserved for our review. *See Navarro*, 863 S.W.2d at 199. We overrule appellant's fifth and sixth issue.

C. Factual Sufficiency

In his seventh issue, appellant contends that the evidence at trial was factually insufficient to support a conviction for aggravated robbery. After reviewing the record, we disagree.

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if, (1) it is so weak as to be clearly wrong and manifestly unjust; or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id*. The *Johnson* Court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9. We are mindful, however, that due deference is not absolute deference. *Id*. at 7.

Appellant was charged with committing theft and in the course of that intentionally and knowingly threatening and placing the complainant in fear of imminent bodily injury or death, and using a deadly weapon. At trial, appellant's defensive theory was mistaken identity and alibi.

The State's evidence showed that complainant identified appellant as the man who robbed him. Testimony at trial revealed that complainant saw appellant leave on foot, later walk out of his house wearing a different jacket than what he wore when he robbed appellant, and, shortly after the robbery occurred, was able to identify appellant as the robber. When the police searched for appellant at his home, his mother said that appellant matched the description provided by complainant.

Appellant, as well as those who were with him on the night of the robbery, testified

at trial that appellant did not rob complainant. Appellant said he was sitting at the street corner when he saw the robbery occur, and then left shortly thereafter with his friends to go get dinner. His friends confirmed this account of the events.

Reviewing the evidence with appropriate deference to the jury's verdict, we find that the evidence is not so weak as to be factually insufficient. After comparing the evidence that proves appellant's identity, to the evidence that disproves it, we hold that this evidence was factually sufficient to support the jury's verdict. Accordingly, appellant's seventh issue is overruled.

D. Closing Argument

In his eighth and ninth issues for review, appellant contends that the trial court erred in overruling his objection to the prosecutor's closing argument which allegedly (1) introduced new facts, harmful to the accused, and (2) conveyed to the jury the prosecutor's opinion of the case.

Proper closing argument must fall within one of the following four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985).

During his closing argument, appellant's trial counsel stated, "Let me just tell you this, folks. We don't just get all these folks together and huddle them up in a circle and go over the stories with them, go over their versions, their recollections of what happened . . . . They don't get together and compare versions." The State, in its closing argument, responded that, "Those guys that were allegedly out there with the defendant that night, they might have been out there, but it didn't go down—nothing happened the way they said it did. . . . They can't keep their stories straight. I guarantee you they huddled on this case before. They're all friends. The defendant told you they're all friends. Derrick, Dwaine, and this defendant. And Tarik. You don't think they talked about this case before?"

The State's argument that appellant huddled up with his friends did not introduce new and harmful facts. On the contrary, we find this was a response to defense counsel's

argument that they did not huddle up. Such a response is permissible. We overrule appellant's eighth issue.

Appellant did not make a timely objection to the State's statement, "I guarantee you they huddled on this case before," which he claims, in his ninth issue, injected the prosecutor's personal opinion into the case. In order to preserve error on an improper jury argument, a defendant must, first and foremost, make a timely and specific objection. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Appellant's objection was not timely as to this comment. Appellant has therefore failed to preserve this complaint for our review. Accordingly we overrule appellant's ninth issue.

Having overruled all issues raised by appellant, we affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Sears.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Ross A. Sears sitting by assignment.