Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00968-CR

RICKY EDWARD JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 810,379

O P I N I O N

A jury convicted appellant, Ricky Edward Johnson, of aggravated robbery and sentenced him to seventy-five years imprisonment. In two points of error, he complains that the evidence is legally insufficient to support the jury's verdict and that the trial court reversibly erred by denying his motions to suppress the pre-trial and in-court identifications. We affirm.

I. Background Facts

In the early morning hours of October 11, 1997, as Kathryn Biggs walked to her car in the parking lot of the grocery store she just left, she was approached by a man holding a knife who said, "Don't run and don't scream; just hand it over." After she gave the assailant her purse, he told her to drive away and gestured with his knife. The assailant then began to walk away, but noticed she had not done as he had ordered. He again told her to drive away, but she told him she could not because her car keys were in the purse he just took. He returned the purse to her so she could retrieve her keys. After this exchange, the assailant told Biggs to drive away and then fled on foot. When she saw him leave, she turned her car around, drove to the front of the grocery store, and had someone inside the store call police. When the police arrived, she described her assailant as a black male, approximately 21 years old, 5'7" to 5'8", and weighing around 145 pounds.

In December of the following year, Houston Police Officer J.A. Saldivar was conducting a lineup in an unrelated robbery. The suspects in that robbery were two black males, one light- and the other dark-complected. Saldivar gathered six black males, some of whom were light-complected, others of whom were dark-complected. The lineup was videotaped. Fellow Officer John Villareal, who was investigating the Biggs robbery, asked to include appellant in Saldivar's lineup. Accordingly the lineup was composed of seven black males, including appellant, who occupied the number four position in the middle. The lineup, as composed, consisted of individuals bearing the following descriptions:[1]

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[1] The State and appellant disagree about the heights, weights, and ages of the lineup members. Appellant's numbers apparently come from the testimony of Saldivar, who testified from a supplemental offense report which was not admitted into evidence. The State's numbers, on the other hand, apparently come from the lineup itself, as the members were asked to provide their respective heights, weights, and ages during the videotaping of the lineup. The discrepancies are mostly minor. For instance, although both sides agree there was only one member in the lineup who was 28, 5'9" and 170 lbs., Saldivar's testimony indicates this suspect was in the number two position, while the State contends he was in the number three position. Similarly, although the State contends suspect number two was *27*, 6'1" and *160* lbs., Saldivar testified suspect number three was *19*, 6'1" and *170* lbs. There was only one suspect who was 6'1". Saldivar's testimony did not indicate the age of the lineup member in the seventh position; accordingly, our chart does not provide the age of that suspect.

Position	Age	Height	Weight
1	21	5' 10"	160 lbs.
2	28	5' 9"	170 lbs.
3	19	6' 1"	170 lbs.
4	41	5' 7"	135 lbs.
5	38	5' 10"	170 lbs.
6	38	6' 2"	185 lbs.
7		6' 5"	193 lbs.

Officer Villereal called Biggs to tell her he had a videotape of a lineup with a possible suspect that he would like her to see, and he offered to take it to her house so she could watch it. Biggs agreed and identified appellant as the man who robbed her.

II. The Out-of-Court Lineup

In his first point of error, appellant complains the trial court erred in failing to grant his motions to suppress the eyewitness identifications because the pre-trial videotaped lineup was unnecessarily suggestive. Specifically, he argues that the other individuals in the lineup did not "closely resemble" him. Further, he argues that Officer Villereal compounded this error when he told Biggs that he wanted her to view the videotape lineup which contained a possible suspect.

In deciding whether a pre-trial identification was too suggestive to afford the accused a fair trial, we conduct a two-step inquiry. First, we must decide whether the out-of-court identification was *impermissibly* suggestive. If so, we must then decide whether the lineup produced a *substantial likelihood* of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384 (1968); *Cantu v. State*, 738 S.W.2d 249, 251 (Tex. Crim. App. 1987); *Brown v. State*, 29 S.W.3d 251, 253–54 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The burden is on the defendant to show, by clear and convincing evidence, that the in-court identification was irreparably harmed by the impermissibly suggestive practices used in the out-of-court identification process. *Herrera v. State*, 682 S.W.2d 313,

318 (Tex. Crim. App. 1984) (citing *Jackson v. State*, 628 S.W.2d 446 (Tex. Crim. App. 1982)). The admissibility of an identification is a mixed question of law and fact which the appellate court reviews *de novo*. *Brown*, 29 S.W.3d at 254; *cf. Loserth v. State*, 963 S.W.2d 770, 772–73 (Tex. Crim. App. 1998) (stating where mixed question of law and fact does not turn on credibility of witness, *de novo* standard is applied). Stated differently, if the issue we must decide turns on the credibility of a witness or witnesses only the trial court heard, we review its ruling *de novo*, but in light of the facts as found by the trial court. *Loserth*, 963 S.W.2d at 773–74 (stating *Biggers*[2] factors, as well as all issues of historical fact are afforded great deference, but the law is applied *de novo* to the facts as found).

A. Suggestiveness of Lineup

A lineup is not "unduly suggestive [unless] the other participants are greatly dissimilar in appearance from the suspect. A suspect may be greatly dissimilar . . . because of his distinctly different appearance, race, hair color, height or age." *Brown*, 29 S.W.3d at 254. Suggestiveness may also be created by the manner in which a pre-trial identification procedure is conducted, perhaps by the police pointing out the suspect or even by suggesting a suspect is in the lineup. *Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995).

We find that the lineup here was not unduly suggestive. First, although appellant notes that he was older than anyone else in the lineup by three years, this fact, if anything, would actually tend to benefit him because immediately after the robbery, Biggs reported that her attacker was only 21 years old. The fact that appellant was actually 41 years old and older than anyone else, therefore, would tend to make him the least likely person in the lineup to be the suspect. Second, although appellant may have been the shortest suspect in the lineup, three of the other six possible suspects were within three inches of

[2] *Neil v. Biggers*, 409 U.S. 188 (1972).

appellant's height.[3] Third, although appellant weighed less than anyone else in the lineup, Biggs testified that her attacker weighed 145 pounds. While appellant weighed 10 pounds less than this description, another suspect weighed only 15 pounds more, and two more suspects were within 25 pounds of Biggs's description. Finally, taken together, what the raw numbers from the chart suggest is that the men in this lineup were slender in build.

Appellant also attacks Officer Villereal's suggestion to Biggs that the appellant was in the lineup. Appellant argues that the following testimony by Villereal at the suppression hearing, both on direct- and later on cross-examination, establishes that he suggested to Biggs that the suspect was in the lineup.

> Q. [BY THE PROSECUTOR] And prior to viewing or presenting the videotape of the lineup to Ms. Biggs, did you give her any instructions regarding the videotaped lineup.
>
> A. I just basically told her she had no obligation to pick anybody from the lineup. I told her to keep in mind that hair styles, facial hair can always possibly be changed and just not -- basically she's not obligated to pick anybody.
>
> * * *
>
> Q. [BY THE DEFENSE] And you called her, said you had a suspect in a lineup that you wanted her to look at?
>
> A. I had a possible suspect that I'd like her to look at, yes.
>
> Q. She was aware there was somebody in the lineup that was a possible suspect?
>
> A. No.

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[3] Biggs and Villereal both testified that Biggs recognized appellant the instant he walked into the lineup room, although only a couple of seconds elapsed before all members in the lineup were in the room. They further testified that Villareal cautioned Biggs to wait to make a decision until she watched the entire videotape, which includes closeups of the suspects' faces, and told her not to feel pressure to pick anyone at all from the lineup. Thus, even though appellant was shorter and darker than everyone else, we hold that, because the witness testified that it was appellant's face that caused her to remember him as her attacker, the lineup was not suggestive. *See, e.g.*, *Barley*, 906 S.W.2d at 34 (finding lineup not suggestive where, although participants in lineup varied in height by "several inches," witnesses testified they were concentrating on the defendant's facial features).

Q. So you didn't tell her there was a suspect, you just coming out to her house to visit with her?

A. I told her I had a possible suspect I'd like for her to look at.

Q. She had a reason for you coming out and for you to show her this videotape . . . .

A. Yes.

It is not a matter of semantics to say there is a difference between telling a witness that the suspect *is* in the lineup and telling her that a lineup contains a *possible* suspect. Rather, an example of an impermissible comment by the police is found in *Rawlings v. State*, 720 S.W.2d 561 (Tex. App.—Austin 1986, pet. ref'd). There, the court held that a statement by the police to the witness that "four of the suspects were Mexican, that one was white[,] that one of the suspects was her neighbor," and only one suspect had a tattoo on his hand was impermissibly suggestive in light of the fact that (1) the witness knew all of her neighbors except one, (2) the neighbor she did not know had a tattoo on his hand, (3) the only way she was able to identify her attacker was by the tattoo on his hand even though she saw his face prior to the attack, and (4) the tattoo she described was substantially dissimilar in both color and design from the one on the neighbor's hand. *Id.* at 567–76. Similarly, as the United States Supreme Court noted, "[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." *Simmons v. United States*, 390 U.S. at 383–84.

Nothing close to the comments made in *Rawlings* or *Simmons* was done here. In addition, as noted above, the lineup of possible suspects did not present Biggs with persons who were "greatly dissimilar in appearance" from appellant. Nor can we say that appellant met his burden of demonstrating Officer Villereal's statement to Biggs unnecessarily influenced her decision to pick appellant from the lineup.

B. Irreparable Misidentification

Even if the lineup were unconstitutionally suggestive, appellant also has failed to demonstrate, by clear and convincing evidence, that there was a substantial likelihood of irreparable misidentification as a result. At the motion to suppress hearing, Biggs testified—and the trial court found—that her recollection of appellant was not based on the fact that she saw him in the videotaped lineup, but because she saw him when he robbed her. Our review of a trial judge's factual findings is limited to whether they are supported by the record. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *see also Loserth*, 963 S.W.2d at 773–74. If so, we will not disturb them on appeal, but will address only whether the trial court improperly applied the law to the facts. *Id.*

The factors we consider in determining whether a witness's memory was impermissibly tainted include (1) the opportunity to observe the criminal act; (2) the discrepancy, if any, between a pre-lineup description and the defendant's actual appearance; (3) any identification, prior to the lineup, of another person; (4) the identification, by picture, of the defendant prior to the lineup; (5) the failure to identify the defendant previously; (6) the lapse of time between the crime and the lineup identification; (7) the witness's degree of attention; and (8) her certainty in her identification at the time of confrontation. *Brown v. State*, 29 S.W.3d 251, 254–55 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

The facts indicate that the third, fourth, and fifth factors do not apply in this case, as Biggs never tried to identify her attacker prior to seeing the videotaped lineup. And the remaining factors, taken as a whole, support the trial court's finding. She faced her attacker and, in a hand-to-hand transaction, twice turned over her purse to him. She also testified the robbery may have taken up to five or six minutes. Her pre-lineup physical description (5'7" to 5'8" and 145 lbs.) was nearly identical with appellant's actual physical description (5'7" and 135 lbs.). Although it was more than a year since the robbery, Biggs testified that, as soon as the videotape showed appellant walking into the lineup room, she knew it was him; Officer Villereal testified he had to coax her into watching the entire

video before making up her mind.

We hold that the record supports the judge's finding. Accordingly, appellant's first point of error is overruled.

III. Legal Sufficiency of the Evidence

In his second point of error, appellant challenges the legal sufficiency of the evidence. First, he argues that the evidence is insufficient because of the "impermissible suggestiveness of this [identification] testimony" and the absence of any other evidence linking appellant to the crime. Second, he argues that Biggs's description of the knife was not sufficient to establish appellant used a deadly weapon. Having overruled appellant's first point of error, we need not address the first prong of his legal insufficiency argument, as it is well-established that the victim's testimony, standing alone, is sufficient to establish the identity of the accused. *Escovedo v. State*, 902 S.W.2d 109, 115 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

We also find that the remainder of appellant's second point of error lacks merit. Texas law has long permitted courtroom demonstrations aimed at clarifying a witness's testimony. *Rogers v. State*, 756 S.W.2d 332, 336 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (citing *Lewis v. State*, 486 S.W.2d 104, 106 (Tex. Crim. App. 1972)). At trial, Biggs testified that appellant had a "big knife." The following exchange then took place.

> Q. Can you describe the knife for this jury?
>
> A. It looked about this long (indicating). That was the blade. And it was probably about this big, wide (indicating).

The foregoing testimony must be viewed as supporting the jury's verdict. *Id.* (citing *Gaona v. State*, 733 S.W.2d 611, 613 & n.1 (Tex. App.—Corpus Christi 1987, no pet.) (holding that witness's statements "like that" and "like this" in describing how accused held gun was to be viewed as supporting jury's verdict). As in *Rogers*, "[t]he undescribed testimonial gestures . . . could have, and undoubtedly did have, a significant impact on the

jury's assessment" of the size of the knife and whether they believed the State satisfied its burden in proving the knife appellant exhibited during the robbery was a deadly weapon. *Rogers*, 756 S.W.2d at 336–37. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

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Leslie Brock Yates
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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