Affirmed and Opinion filed November 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14–00-00697-CR

ERIC JEROME EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 813,704

O P I N I O N

Appellant Eric Jerome Evans seeks reversal of his conviction for the felony offense of aggravated robbery. At issue in this case is the legal and factual sufficiency of the evidence supporting appellant's conviction as well as the propriety of the trial court's denial of appellant's motion to suppress pretrial and in-court identifications. We affirm.

I. FACTUAL BACKGROUND

On April 15, 1999, at about 9:20 p.m., three African-American men entered the home of Edward and Mary Stephens. David Stephens, the couple's teenage son, was in a room

at the back of the house. After hearing some noises, David turned around to discover three intruders dressed in black and wearing ski masks. Armed with guns, the masked men began barking orders at the teenager. One of them got behind David, held a gun to his head, and ordered him to go into the living room. At gunpoint, David proceeded into the living room, where Edward and Mary were watching television. After ordering all three family members to get on the floor, the three masked men removed jewelry and valuables from them. Forcing Mary, Edward, and David into the bedroom, the intruders commanded all three to lay face down on the floor. They bound their victims' legs with duct tape, and tightly bound their arms behind their backs. The three men began interrogating the family, demanding to know the precise location of valuables. They searched the house for twenty to thirty minutes and left with many valuables from the Stephenses' home, including coins that Edward collected. After the masked intruders departed, Edward and Mary began chewing through the heavy tape that bound David's legs. When David was finally freed, he ran to a neighbor's house and called the police.

The next day, Frank Fanniel[1] went to Gulf Coast Coin, to sell various items, including coins and jewelry. Later in the day, Edward Stephens called Gulf Coast Coin to inform store employees that he had been robbed and to be on the lookout for the stolen items. Edward spoke to Tom Tower, a manager of the store, and described in detail some of the coins and jewelry that had been stolen from his home. Shortly thereafter, Fanniel returned to Gulf Coast Coin to sell some additional coins. Tower determined that the coins Fanniel offered for sale were the ones Edward had described. Tower immediately called the police. When they arrived, they arrested Fanniel at the store. In the investigation that followed, Tower recounted that Fanniel had been accompanied by an African-American man named "Eric" on a few occasions while visiting Gulf Coast Coin. From this lead, the police developed appellant as a suspect. Tower initially failed to identify appellant in a photographic line-up,

[1] Fanniel was a co-defendant in a separate proceeding and was identified as one of the three suspects who participated in the robbery of the Stephenses' home.

but after the police substituted a more recent photograph of appellant, Tower identified him in a photographic line-up.

A month after the robbery at the Stephenses' home, the police arrested appellant. The police prepared a video line-up for the Stephenses to view, which included appellant in position two. Edward, Mary, and David viewed the videotape to determine whether they could identify any of the men in the line-up. Although Edward could not conclusively identify any of the men in the video line-up, both Mary and David, acting independently, identified appellant as one of the men who had participated in the robbery. Mary and David also identified appellant, at trial, as one of the intruders who had broken into their home and stolen their valuables.

A jury found appellant guilty of aggravated robbery. The trial court sentenced appellant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

II. ISSUES PRESENTED FOR REVIEW

Appellant raises six points of error claiming: (1) - (2) the evidence is legally and factually insufficient to support appellant's conviction for aggravated robbery; (3) the trial court erred in denying appellant's motion to suppress the pretrial identification of appellant; (4) the trial court erred in denying appellant's motion to suppress the in-court identification of appellant; and (5) - (6) the trial court denied appellant due process of law in violation of the Fourteenth Amendment and Article I, sections 13 and 19 of the Texas Constitution, by allegedly allowing suggestive pretrial identification evidence, which appellant claims led to an to irreparable misidentification.

III. ANALYSIS

A. Legal Sufficiency

In reviewing the legal sufficiency of the evidence, we must consider all of the evidence in a light most favorable to the verdict. *Garret v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). Our task is to determine whether a "rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Corpus v. State*, 30 S.W.3d 35, 37 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). In conducting our review, we may not reevaluate the weight and credibility of the evidence, but only ensure that the jury reached a rational decision. *Johnson v. State*, 32 S.W.3d 388, 393 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Two of the eyewitnesses to the robbery, Mary and David, positively identified appellant as one of the intruders in their home. They made these identifications based on recognition of the appellant's voice, eyes, and body build. Because the men's faces were largely hidden under the ski masks, appellant challenges the complainants' ability to even make an identification. Our review of the evidence, under the applicable standard, convinces us that a rational trier of fact could have concluded, beyond a reasonable doubt, that appellant was one of the masked intruders.

Appellant's arguments focus almost entirely on the complainants' emphasis on his body build as the basis for their identification of him. Before addressing these arguments, we note that while Mary and David emphasized this particular feature, they made their identification of appellant based on more than his muscular build. Both also recognized appellant's eyes and voice.

David testified that the voice of the man in position two (appellant) sounded "very, very familiar," and that he recognized the man's eyes. His mother gave similar testimony. However, appellant's extremely muscular build stood out in their minds as quite distinctive, and it was this physical feature that they emphasized in their identifications of appellant.

David testified that the first of the three men stood approximately six feet, three or four inches tall. The second intruder was about five feet, ten or eleven inches. Both men had average builds. However, the third man, whom he later identified as appellant, was shorter, standing about five feet, eight or nine inches tall, and had a very well developed musculature. This muscular build was such a prominent feature that both Mary and David specifically mentioned it in identifying appellant during the video line-up.

Appellant contends that using body build to identify him as the third intruder is "preposterous." However, identification based upon an individual's muscular build, when corroborated with additional evidence, can be legally sufficient. *See Hutchinson v. State*, 42 S.W.3d 336, 342 (Tex. App.—Texarkana 2001, pet. granted) (holding that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt where court allowed several individuals to testify that a person had similar build and gait to the defendant because there was also testimony indicating that the hat worn by that person on the tape was found in the defendant's truck). Here, both Mary and David relied on more than body build to identify appellant; they recognized the voice of the man in the second position as appellant's voice. Each testified that appellant "barked orders" throughout much of the forty-five to fifty minute ordeal, giving them ample opportunity to hear and remember the voice. In *Williams v. State*, the court recognized that voice identification, based on statements made during the crime, was sufficient to identify the defendant as the person who committed the crime. 747 S.W.2d 812, 813 (Tex. App.—Dallas 1986, no pet.) (relying on *McInturf v. State*, 544 S.W.2d 417, 419 (Tex. Crim. App. 1976)). Similarly, in *Lunn v. State*, the court found evidence sufficient to sustain a defendant's conviction for sexual assault based upon the victim's testimony that she recognized the defendant's eyes, voice and words used during the course of the assault. 753 S.W.2d 492, 495–96 (Tex. App.—Beaumont 1988, no pet.). Here, two eyewitnesses (Mary and David) each relied on three features in making the identification: eyes, voice, and body build.

Tower identified appellant as the person who, on several occasions, accompanied Fanniel to the store. Fanniel was in possession of property stolen from the Stephenses' home. Appellant argues that Tower's failure to identify appellant in the first photo line-up makes his identification unreliable. However, in a second photo line-up, with a more recent photo of appellant, Tower was able to make a positive identification. The trial court noted that the photo of appellant used in the first photo line-up was dated and that appellant looked much different in the older photograph.

Viewing the evidence in the light most favorable to the verdict, we find that a rational trier of fact could have found beyond a reasonable doubt that appellant participated in the robbery of the Stephenses' home. The evidence is legally sufficient to support appellant's conviction. Accordingly, appellant's first point of error is overruled.

B. Factual Sufficiency

Having found the evidence is legally sufficient, we now consider whether the evidence is factually sufficient. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). In making this determination, we view all of the evidence without the prism of "in the light most favorable to the prosecution" and will set aside the verdict only if it is so contrary to the overwhelming weight of evidence as to be clearly wrong or unjust. *Id.* While we may disagree with the fact-finders' determination, we give due deference to the members of the jury so that we do not substitute our judgment for theirs. *Johnson v. State*, 32 S.W.3d 388, 393 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In sum, we 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. *Id.*

Appellant further contends that the pretrial and in-court identifications were impermissibly suggestive and, thus, the weight of the evidence was so weak that no rational

trier of fact could find that the identifications were reliable. Appellant argues that identifying a suspect based only on build, eyes, and voice is insufficient and unreliable. Appellant contends that the only evidence connecting him to the Stephens' home invasion is Mary Stephens's and David Stephens's identification of him one month after the incident.

Appellant also argues that Mary's identification was not an identification of a person but an identification of "a set of eyes and a distinguishable build." Appellant points out that Mary picked the appellant out of the video lineup because, in her own words, "there was not many--not anyone else in that lineup that I felt like met the physical characteristics of Mr. Evans." She further indicated, "that's about all I can do for you."

Regarding David's identification, appellant points out that when asked "where the eyes and mouth were visible, could [he] see any additional part of their head. Was their skin visible--?" David answered, "No." David testified, referring to appellant's muscular build, "there were about three guys I thought had a possibility; but when they finally zoomed in on him, I was pretty sure it was that guy." Counsel asked what it was about the appellant that made David narrow it down to him from the three which he thought could have possibly been the third intruder in his home and David replied, "In the lineup he was really, really muscular. I mean you could tell his chest was huge. He was the same height, same weight, same body figure. . . . [A]nd when I looked right into his eyes I thought it was him."

While it is true that neither Mary nor David had the opportunity to view the intruders' uncovered faces, they were able to observe other physical features and characteristics over the course of a forty-five to fifty minute ordeal. Both Mary and David recognized appellant's voice as the voice of the masked man who barked orders at them during the invasion of their home. Texas courts have allowed voice recognition as the *sole* basis for an identification. *See Williams*, 747 S.W.2d at 813 (recognizing that voice identification based on statements made during the crime is sufficient to identify the defendant as the person who committed the crime). Voice recognition was not the only identification evidence in this case nor is it the only evidence that linked appellant to the crime. David recognized the eyes of the man

in the second position from the video line-up as the eyes of the intruder, which he testified he was able to see through the holes in the ski mask. Moreover, appellant is left-handed, just as the intruder that held David at gunpoint.

Other testimony, from Tower, the manager of Gulf Coast Coin, linked appellant to the stolen property. Tower made a positive identification of Fanniel. Mary made a "strong-tentative" identification of him. Tower recounted how he had seen Fanniel at Gulf Coast Coin several times, with a man named "Eric," while Fanniel was selling jewelry and coins stolen from the Stephenses' home. Tower not only recognized appellant's picture in the photo line-up as the man he knew as "Eric" but also remembered appellant's first name from his visits to Tower's store.

Based on our review of the record, we cannot conclude the evidence is so weak as to undermine confidence in the jury's determination of appellant's guilt. The record contains positive identifications from two eyewitnesses who, separately and independently, identified appellant as one of the men who broke into their home and stole their valuables. Testimony from a third witness established a connection between appellant and the stolen property. There is no contrary evidence as to appellant's whereabouts on the night of the robbery. We find this evidence is sufficient to withstand a factual sufficiency challenge. Accordingly, appellant's second point of error is overruled.

C. Motion to Suppress the Pretrial Identification

In his third and fourth points of error, appellant challenges the court's denial of his pretrial motion to suppress. In reviewing whether the trial court erred in denying a motion to suppress a pretrial (out-of-court) identification, the reviewing court must determine (1) whether the pretrial identification procedure was impermissibly suggestive; and, if so, (2) whether the suggestive nature of the pretrial identification procedure created a very substantial likelihood of irreparable misidentification. *Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995).

During the viewing of the video line-up, the Stephenses were not allowed to talk to one another, to make eye contact with one another, or to use hand signals, such as pointing. They were each questioned separately, out of earshot of their family members, and asked if they could identify any of the men in the line-up as one of the three men who had broken into their home. Appellant does not argue that the manner in which the identification procedure was conducted made the witnesses' identification of the appellant unreliable. Instead, he contends the discrepancy in appearance among the line-up participants made the line-up impermissibly suggestive. To prevail on this argument, appellant must satisfy the two-prong *Barley* test by clear and convincing evidence. *Id*. at 34.

Suggestiveness can be created when the accused is placed in a line-up with people who are distinctly different in appearance, or by the manner in which the identification procedure is conducted. *See id.*; *see also State v. Withers*, 902 S.W.2d 122, 125 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (determining that different appearance, race, hair color, height and age can make a pretrial identification unduly suggestive). However, due process does not require that the participants be identical. *Id.*

Even upon showing that the pretrial identification procedure was impermissibly suggestive, appellant must show that this created a very substantial likelihood of irreparable misidentification (second prong). *Barley*, 906 S.W.2d at 33. To determine whether appellant has satisfied the second prong, the reviewing court must weigh, *de novo*, the "corrupting effect" of the suggestive identification against the following eight factors, often referred to as the "indicia of reliability:"

(1) the extent of the witness's opportunity to observe the criminal act;
(2) the existence of any discrepancies between the pre-line-up description and the defendant's actual description;
(3) the identification of a person other than the defendant prior to the line-up;
(4) the identification by picture of the defendant prior to line-up;
(5) the failure to identify the defendant on a prior occasion;

(6) the amount of time passed between the criminal act and the line-up;
(7) the witness's degree of attention during the crime; and
(8) the level of certainty at the time of identification.

Brown v. State, 29 S.W.3d 251, 254–55 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

We begin our analysis by noting that courts allow for some discrepancy in appearance among line-up participants. *Withers*, 902 S.W.2d at 125 (allowing discrepancy in weight range up to forty pounds, height range up to five inches, and an age range of twenty years). Appellant argues that he was identified mainly because of the very muscular build of his body. There is no question that appellant has an extremely muscular upper body. David described him as "barrel-chested." The men who robbed the Stephenses' home wore masks. Although the holes for the eyes and mouth were wide, Mary and David were not able to discern most of their facial features. Consequently, in making their identifications, they relied more on the body build of the suspects. Thus, a significant discrepancy in the body builds of the line-up participants under these circumstances could impact the accuracy of the identifications.

Our *de novo* review of the video line-up reveals that the line-up participants had similar body builds. Moreover, they all fall within the same general height and weight range.[2] The following chart summarizes the heights and weights of the line-up participants, all of whom were young, dark-skinned African-American men:

Line-Up Position	Height	Weight
1	5'7"	194
2 (appellant)	5'7"	180
3	5'8"	185
4	5'8"	177
5	5'8"	196

[2] David testified that the third man that entered their home, whom he later identified as appellant, was 5'8" or 5'9" tall.

While the men are all of similar body build, appellant was arguably the most muscular of the five line-up participants. This fact, however, does not render the line-up impermissibly suggestive.

Other courts have allowed up to forty-pound ranges among the line-up participants. *Withers*, 902 S.W.2d at 125. Here, there is less than a thirty pound spread among the participants' weight and only a one-inch difference in height. The difference in the size of appellant's musculature compared to the others, while discernible, is not unduly suggestive.

Even assuming, *arguendo*, that the video line-up was impermissibly suggestive, our evaluation of the eight factors listed above would not result in a determination that the suggestiveness created a very substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33. This conclusion is further supported by the fact that the eyewitnesses used other distinguishing features (eyes and voice) to make the identifications and did not base them solely on appellant's body build.

1. Likelihood of Irreparable Misidentification

The first factor is the extent to which the witnesses had an opportunity to observe the criminal act. Both Mary and David were in the presence of the three intruders for forty-five to fifty minutes. Both identified appellant's voice as the voice they heard many times throughout the robbery. Given the length of the criminal episode, each witness had ample opportunity to hear the sound of his voice and observe his mannerisms. Also, David testified that he looked into the third man's eyes for about eight seconds from a distance of five feet. He testified that he recognized appellant's eyes.

2-4. Discrepancies Between Pre-Line-Up and Actual Description, Pre-Line-Up Identification of Others, and Pre-Line-Up Photo Identification

The descriptions of the intruders the Stephenses initially gave to law enforcement officers is not in the record. Therefore, we can make no determination as to any discrepancies between the pre-line-up description and the actual description of appellant.

There was no identification of another individual prior to the line-up. The officers showed no pictures of the appellant with other line-up participants to Mary and David prior to the video line-up. Therefore, factors two, three, and four do not apply in this case.

5. Failure to Identify On Previous Occasions

Mary and David's first identifications of appellant were made during the pretrial videotape line-up viewed at their house. Neither failed to identify appellant on a prior occasion.

6. Passage of Time Between Criminal Act and Line-Up

Approximately thirty days after the robbery, Mary and David made the identification of appellant from a videotape line-up. In *Barley*, the court found that a lapse of twelve months did not have an effect on the witnesses' memory. 906 S.W.2d at 35; *see also Brown v. State*, 29 S.W.3d 251, 256 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (finding that sixty-seven days was not a sufficient lapse of time for the witnesses' memory to fade). Therefore, we find that the thirty-day lapse of time between the robbery and the pretrial line-up did not impair Mary or David's ability to remember the intruder and identify him in the line-up.

7. Witnesses' Degree of Attention

In this case, both Mary and David were very attentive while the robbery was in process. Despite being repeatedly told not to look at the intruders, Mary and David were able to see the intruders for about ten minutes before their heads were covered. Mary, and especially David, looked directly into the eyes of the man that held David at gunpoint. Throughout the criminal episode, the intruder they later identified as appellant continued to give orders and make demands. Mary and David were able to recall many of the things the intruders said, such as: "You've got to have more"; "We're going to shoot your dog" and "Keep your head down."

8. Level of Certainty At Time of Identification

Finally, during the pretrial identification, both Mary and David were quite certain that appellant, who was the line-up participant in position two, was the shorter and more well built of the three men who robbed them. According to Officer Clarke, Mary said "that man [in position two] was in my house" because she recognized his body build and his voice. David recalled that "when I looked right into his eyes, I thought that was him." Also, David said, "His voice sounded - - sounded very, very familiar . . . I just had a good feeling that he was the one."

Weighing the above facts and testimony with due deference to the findings of the trial court, we find that the identifications by Mary and David were reliable. The combination of voice recognition, body build, amount of time the witnesses observed the intruders, and the confidence the eye-witnesses exhibited in their identifications, indicates appellant did not show, by clear and convincing evidence, that the pretrial line-up created a very substantial likelihood of misidentification**.**

We reach the same conclusion with respect to the photographic line-up from which Tower identified appellant. Unlike Mary and David, who were unable to see the faces of the men who intruded their home, Tower saw appellant's face on several occasions and even remembered his name. Although Tower was unable to identify appellant the first time, the record indicates that the reason he was unable to do so was because the police showed him an out-of-date photograph. When they showed Tower a more recent picture of appellant, he was able to identify appellant as the man Fanniel called "Eric" when the two men came into the coin store. We find that appellant failed to demonstrate, by clear and convincing evidence, that Tower's photo identification of appellant was impermissibly suggestive or that it created a very substantial likelihood of misidentification.

D. Motion to Suppress In-Court Identification

In determining whether the trial court erred in denying a motion to suppress an in-court identification, the reviewing court must decide (1) whether the pretrial identification procedure was impermissibly suggestive; and (2) whether the suggestive nature of the pretrial identification procedure created a very substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33. The analysis of whether the in-court identification was tainted is the same as the pretrial identification except for a third element: whether the in-court identification was based solely on what the witnesses observed during the crime as opposed to the pretrial line-up. *Id.* at 34. This element recognizes the possibility of taint when a witness makes a misidentification from a line-up and then retains the image of the misidentified person rather than the image of the actual criminal. *Rawlings v. State*, 720 S.W.2d 561, 575 (Tex. App.—Austin 1986, pet. ref'd). Having already addressed the first two elements in the pretrial line-up analysis, we consider only the third element.

Mary identified appellant (in position two of the video line-up) as the third intruder, who was the shorter and more well built of the three men who invaded her home:

> STATE: As you look at the defendant in court today - - and by that, I mean the person you just identified - - are you identifying him now because you saw him in your home on April the 15th of 1999 [date of the robbery]?
>
> MARY STEPHENS: That is correct.

The State asked a similar question of David:

> STATE: I'll ask you now as you look around the courtroom can you tell us whether anybody in this courtroom is the same person that you identified on that videotape and is the same person that was the third suspect in your home that held a gun to your head?

DAVID STEPHENS: I feel very strongly that he is in here.

David then identified appellant as the third intruder.

Both Mary and David's in-court identifications of appellant were based on their memory of the robbery in their home, and not on the video line-up. Accordingly, appellant's third and fourth issues for review are overruled. Because we find that the pretrial and in-court identifications were not impermissibly suggestive and did not create a very substantial likelihood of irreparable misidentification, the appellant's fifth and sixth appellate issues are also overruled.

Having overruled all appellant's issues for review, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 21, 2001.
Panel consists of Justices Edelman, Frost, and Murphy.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Chief Justice Paul C. Murphy sitting by assignment.