Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00651-CR

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SHANNON ROY HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 773,921

O P I N I O N

Shannon Roy Howard appeals his conviction by jury for aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). The jury assessed punishment at thirty years in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant contends the trial court erred in (1) denying the motion to suppress the lineup identification of appellant because it was impermissibly tainted by a prior photospread, (2) admitting testimony during the punishment phase that appellant was a member of a gang, and

(3) overruling a motion for mistrial because of prosecutorial misconduct. For the reasons stated below, we affirm the judgment of the trial court.

BACKGROUND

On January 24, 1998, Minh Trin and his boss, Ms. Pham, were working in a convenience store owned by Ms. Pham. An attractive black female entered the store, made a purchase, and walked out. As soon as she left, two black men entered the store. They proceeded to rob the store at gunpoint.

On January 26, 1998, Deputy Vines was on patrol in the vicinity of Pham's store when he saw a small, red car pull out of a convenience store. Deputy Vines had been informed that there had recently been a string of aggravated robberies in the general area. He had been told that there were three robbers, two black men and one black woman, and that the robbers drove a small, red car. Vines saw the red car park next to another convenience store. As Vines drove by, he saw that there were two black men and one black woman in the car. The occupants of the car saw Deputy Vines and drove away until Vines lost sight of them.

Vines drove around until he again spotted the red car. It was parked next to the same convenience store where the deputy had first seen it. The female was behind the wheel. When she saw Deputy Vines, she immediately started the car. Vines activated the emergency lights and walked over to the car. As a safety precaution, he frisked the passengers. One of the passengers, David Carr, had a pistol strapped to his chest in a sling. Appellant was the other male passenger. The three were placed under arrest.

Ms. Pham later identified in a lineup the two men as the individuals who had robbed her store and the woman as the same one she had seen prior to the robbery.

POINT OF ERROR ONE

By point one, appellant complains that the trial court erroneously allowed Ms. Pham to identify appellant before the jury during her direct examination because her in-court

identification had been tainted by an impermissibly suggestive pretrial identification procedure. A phtotospread was shown to Ms. Pham two days after the robbery and approximately twelve hours before the in-person lineup. The defendant's pictures were included in the photospread. Pham identified David Carr from the photographs but was unable to identify the other suspects. However, she was able to identify all three during a series of lineups. Appellant now asserts that the viewing of the photographs tainted Ms. Pham's identification at the lineup, since he was the only one in his particular lineup whose pictures also appeared in the photospread. We disagree.

The test is whether, considering the totality of the circumstances, the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *See Simmons v. United States*, 390 U.S. 377 (1968); *see also Madden v. State*, 799 S.W.2d 683, 695 (Tex. Crim. App. 1990). Reliability is the critical question:

> [I]f the totality of the circumstances reveals no substantial likelihood of misidentification despite a suggestive pretrial procedure, subsequent identification testimony will be deemed "reliable," "reliability [being] the linchpin in determining the admissibility of identification testimony."

Webb v. State, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988) (*quoting Manson v. Brathwaite*, 432 U.S. 98 (1977)). 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 identification, and (5) the length of time between the crime and the identification. *See Neil v. Biggers*, 409 U.S. 188 (1972); *Webb v. State*, 760 S.W.2d at 269; *Cantu v. State*, 738 S.W.2d 249, 252 (Tex. Crim. App. 1987). We consider these five factors, all issues of historical fact, deferentially in a light favorable to the trial court's ruling. The factors, viewed

in this light, are then weighed de novo against the corrupting effect of the suggestive pretrial identification procedure. *See Loserth v. State*, 963 S.W.2d 770, 773-74 (Tex. Crim. App. 1998).

After a close examination of the record, we find that the trial court could readily have found that at least four of the five factors specifically enumerated in *Neil v. Biggers* militate in favor of the conclusion that no substantial likelihood of misidentification could have resulted from the photospread. Ms. Pham had ample opportunity to view the robbers in her store. The testimony shows that she was attentive to them. The description she gave to the officers, however, was very general.[1] Ms. Pham was uncertain of her identification during the photospread. She made a tentative identification of co-defendant Carr but could not identify the other defendants. Nonetheless, during the line-up she quickly identified all three defendants. Only two days passed between the crime and the identification procedure. These circumstances tend to support the trial court's conclusion that admission of the identification testimony would not violate due process of law.

Ms. Pham positively identified appellant and testified that the identification was based on what she observed during the offense and not on any intervening photographs she may have viewed. Even assuming, *arguendo*, that the pre-trial photospread was improper, the in-court identification is admissible because Ms. Pham's ability to identify appellant had an origin independent from the pre-trial procedure. *See McFarland v. State*, 928 S.W.2d 482, 507 (Tex. Crim. App. 1996). Weighing this evidence of reliability against the suggestiveness of the pretrial identification procedures, we conclude that no substantial risk of irreparable misidentification was created so as to deny appellant due process. The trial court did not err in allowing the identification testimony before the jury. Point of error number one is overruled.

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[1] Ms. Pham described the suspects as being "about 18, 20 or 16, around a young age." Deputy Beezley testified he was given a description of "two black males; ages 18 to 20; possible 5.6 to 5.10; a hundred fifty to a hundred and eighty."

POINT OF ERROR TWO

In his second point of error, appellant asserts that the court erred in allowing the State to introduce evidence of appellant's gang affiliations at the punishment stage of trial. Over defense objection, the trial court allowed the prosecutor to present evidence that appellant had a gang affiliation with the Black Disciples. Appellant does not claim that the evidence was insufficient to prove his gang affiliation. Rather, his sole claim is that such evidence was inadmissible. We disagree.

Evidence of a defendant's membership or association with a gang and the gang's character and reputation are admissible at the punishment phase of trial. *See Jones v. State*, 944 S.W.2d 642, 652-53 (Tex. Crim. App. 1996); *Beasley v. State*, 902 S.W.2d 452, 457 (Tex. Crim. App. 1995). Because the evidence of which Stevenson complains is of that nature, we hold that the trial court did not err in admitting such evidence. Point of error two is overruled.

POINT OF ERROR THREE

In his final point of error, appellant claims that the trial court erred in refusing to grant a mistrial for "prosecutorial misconduct." The basis for the alleged misconduct arose from the way in which the prosecutor handled the weapon used in the robbery. Appellant complains that at various times during the trial and the closing argument, the prosecutor brandished the weapon in such a manner as to influence or intimidate the jury. The proper method of preserving error for review in cases of prosecutorial misconduct is to object on specific grounds, request an instruction that the jury disregard the improper actions, and move for a mistrial. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App.1993). An exception exists when prosecutorial argument is so prejudicial that an instruction to disregard the argument could not cure the harm. *See Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim.

App.1989). In such an instance, neither a timely objection nor an adverse ruling is required to preserve error for review. *See id*.

The record before us does not reflect how the prosecutor handled the firearm. We only have appellant's self-serving assertion that the prosecutor's actions "were clearly calculated to inflame the minds of the jury." However, the record does establish that appellant's motion for mistrial was not made until the day after the alleged misconduct. The motion for mistrial was untimely, preserving nothing for review. *See* TEX. R. APP. P. 33.1; *Wilkerson v. State*, 881 S.W.2d 321 (Tex. Crim. App. 1994); *Johnson v. State*, 803 S.W.2d 272, 291 (Tex. Crim. App. 1990); *Hernandez v. State*, 914 S.W.2d 218 (Tex. App.–El Paso 1996, pet ref'd); *Kendrick v. State*, 729 S.W.2d 392, 395 (Tex. App.–Fort Worth 1987, pet ref'd). Point of error three is overruled.

We affirm the judgment of the trial court.

/s/ Norman Lee
Senior Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Edelman, Lee, and Draughn.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justices Norman R. Lee and Joe L. Draughn sitting by assignment.