

1 14-10-00840-CR.

2 *Ramon Torres v. State*, No. 14-98-01441-CR.

3 *Montgomery v. State*, 810 S.W.2d 372.

4 And *Robbins v. State*, 1939-00.

5 Let me start back. 88 S.W.3d 256. Sorry.

6 THE COURT: I know he is five minutes
7 away.

8 MR. BURDETTE: I told him 11:00 a.m.
9 sharp, Judge. This is on him. I'm sorry.

10 THE COURT: I'm worried about the jury.
11 They have been waiting all moaning. They get cranky.
12 They think we are not doing anything, so --

13 THE REPORTER: May I take a very short
14 break?

15 THE COURT: Yes, please do. We can't do
16 anything until Officer Duran arrives.

17 *(Short recess.)*

18 THE COURT: The jury is still out and
19 Mr. Burdette has called this next witness, Officer
20 Duran.

21 MR. BURDETTE: May I proceed?

22 THE COURT: You may.

23 MR. BURDETTE: Thank you, Judge.
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J. DURAN,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BURDETTE:

Q. Officer Duran, I would like to go back to April 12th, 2011, after the defendant had been arrested for the aggravated robbery of Jose Castillo. Okay?

A. Yes, sir.

Q. At that point was his vehicle searched?

A. Yes, sir.

Q. Did you come across a silver cell phone?

A. I did, sir.

Q. And at what point did you come across that phone? After he was arrested for the other aggravated robbery?

A. Yes. It was after he had been determined to be the robbery suspect.

Q. Okay. So at that point, you're searching the vehicle incident to arrest?

A. Yes. At this point incident to arrest and we're going into much more detail now, looking for more items. Now we know what we're looking for.

Q. So at some point you find a silver cell phone?

A. I do, sir. I remember it was called incognito phone and it was silver. And the face of the phone

1 looked like a mirror.

2 Q. Was it a flip phone?

3 A. Yes -- more like a slide-out phone.

4 Q. Did you open it?

5 A. There was already something displayed on the
6 face.

7 Q. Okay. Did you read what was displayed on the
8 face?

9 A. Yes, sir.

10 Q. Do you recall what it said?

11 A. Yes, sir. From my recollection, it read
12 something of like: I can't believe you robbed me and my
13 friend. Karma's a bitch. God is going to pay you back.

14 Q. At that point do you know whose phone that is?

15 A. No, sir.

16 Q. Did you know that it was evidence of a crime or
17 contraband?

18 A. No, sir, not at the time. I kind of believed
19 that was the defendant's cell phone.

20 Q. But were those text messages suspicious to you?

21 A. Yes, sir.

22 Q. So what did you do based on that information
23 that you had seen?

24 A. Based on the text messages, I copied down the
25 cell phone number on my notepad.

1 Q. Which cell phone number is that?

2 A. The cell phone that had sent the text messages.

3 Q. You were able to see the number that sent those
4 text messages to that phone?

5 A. Yes, sir.

6 Q. What did you do with the phone?

7 A. I placed it back on top of the seat while I
8 continued my search.

9 Q. Then was the car towed?

10 A. It was.

11 Q. Did you leave the phone inside the vehicle?

12 A. I did. It got lost amongst all the rubble and
13 clothing and everything else.

14 Q. But at that point when you send the phone off
15 in the vehicle, did you know that it was stolen?

16 A. No, sir.

17 Q. You said you had believed it was the
18 defendant's phone at that time?

19 A. I did.

20 Q. Was there any reason to tag it?

21 A. Not in my opinion, no, sir.

22 Q. Okay. What did you do after the car was towed
23 and he was arrested with the information you gathered
24 from the cell phone?

25 A. The next day on the 13th of April, I called the

1 cell phone number just to follow up, just to make sure
2 it wasn't a prank, you know, maybe a prank or a joke.
3 So I called the phone number.

4 Q. Who did you speak to?

5 A. I spoke to Ms. Kathryn Scurry.

6 Q. What did you ask her?

7 A. I identified myself as a Houston police
8 officer. I told her about a suspect we had in custody
9 for a robbery case and asked her if she had been robbed.
10 And, you know, the case before.

11 Q. What did she say?

12 A. She said, Yes, sir. Me and my friend were
13 robbed by gunpoint.

14 Q. Did she tell you when?

15 A. She said on April 10th.

16 Q. So that was two days prior to this crime?

17 A. Yes, sir.

18 Q. Based on what she tells you, what do you tell
19 her and what did you do?

20 A. I asked her -- I told her we had a possible
21 suspect in custody and asked her if she could -- her and
22 her friend -- meet me. When she said her name was
23 Rachel, they could meet me at the police station that
24 day. I told her it was my day off, but I would go in.
25 So I presented them with a photo array.

1 Q. Okay. Let me go back to the conversation.

2 Did you ask Kathryn if she had sent those
3 text messages?

4 A. I did. I asked her, How did you know the
5 suspect?

6 She said, I don't know the guy.

7 I said, Well, how did you get his phone
8 number?

9 She said, No, that's not his phone. It's
10 my friend's phone. When he robbed us, he took it from
11 us. So I sent the text message to the phone, knowing
12 that he had it in his possession, and that he would
13 possibly read it.

14 Q. All right. So you invited them to come down to
15 the police station?

16 A. Yes, sir. They couldn't make it that day, so
17 we made -- set a future date, which was the 18th of
18 April to meet at the station.

19 Q. And during that time, from the time you
20 contacted her until the time that she came down, did you
21 develop a photo array?

22 A. I did, sir.

23 Q. Did you do that by yourself or did you have
24 assistance?

25 A. I had assistance from Officer Santiago who

1 is -- he's in the IFR squad.

2 THE REPORTER: I'm sorry? Officer
3 Santiago, he did what?

4 A. IFR is investigative first responder. They
5 have a lot of more in-depth investigations. They do a
6 lot of photo arrays. They do a lot of follow-ups.

7 Q. (BY MR. BURDETTE) Okay. So he was a little
8 bit more qualified to develop the photo array than you?

9 A. Yes, sir, much more.

10 Q. Do you recall what day that was done?

11 A. That was done on the same day that I met the
12 complainants, on the 18th of April.

13 Q. Okay. Now, how many photo arrays did you
14 generate?

15 A. I did two, one for each.

16 Q. And they were the same photo array?

17 A. Same photo array.

18 Q. With two copies?

19 A. Two copies of six suspects with similar
20 characteristics.

21 Q. Okay. Now, before -- well, when the witnesses
22 came down, did you show them the photo array together or
23 did you separate them?

24 A. Separate, sir.

25 Q. When you separated them and before you showed

1 them the photo array, did you give them any
2 admonishment?

3 A. Yes, sir. Similar to what's on the form, I
4 basically tell them they don't have to feel compelled to
5 make a selection. I also made them aware that the
6 person that robbed them might or might not be on the
7 photo array. I asked them to take their time and pick
8 whoever they remembered seeing that night robbing them.

9 Q. Are those the standard admonishments you give
10 to anyone anytime you present a photo away?

11 A. Yes, sir, pretty standard.

12 Q. The department has standard admonishments,
13 right?

14 A. Yes, sir. We have standard admonishments and
15 we have to also follow general standard guidelines.

16 Q. You did that?

17 A. Yes.

18 Q. Had your witnesses, Ms. Scurry or Ms. Dorval,
19 seen any photos that were put into that photo array
20 before?

21 A. No, sir.

22 Q. Did you and Officer Santiago or any other
23 officer in any way suggest which photo either of them
24 should pick?

25 A. No, sir. I was in the interview room by myself

1 with them.

2 Q. Okay. So it was only you?

3 A. It was only me. Officer Santiago only showed
4 me how. He made it for me and then I took it to them.
5 But I know how to do it myself now.

6 Q. Okay. How many photographs were shown to each
7 lady?

8 A. Six photographs, six difference suspects,
9 similar characteristics.

10 Q. Was Ms. Dorval able to identify the person who
11 committed this crime?

12 A. Yes, immediately.

13 Q. Did she tell you that?

14 A. Yes, sir.

15 Q. How did she tell you that?

16 A. As soon as I put the paper down in front of
17 her, she immediately pointed onto his face.

18 Q. If you can take a look at State's Exhibit 17
19 here. Is that the photo away you showed her?

20 A. Yes, sir. I had her circle the suspect that
21 she believed was the suspect that was responsible for
22 robbing her. And also she put her initials.

23 THE COURT: Could you circle on the screen
24 there which one it is?

25 THE WITNESS: Yes, sir. (Complies.)

1 MR. TANNER: I'm sorry. For the record,
2 which woman identified him?

3 THE COURT: Ms. Dorval he said.

4 MR. TANNER: Thank you.

5 Q. (BY MR. BURDETTE) Now, is the person who
6 Ms. Dorval identified in the courtroom today?

7 A. Yes, sir.

8 Q. Could you please point to him and identify him
9 by an article of clothing?

10 A. Sitting right over here, black male wearing a
11 black suit.

12 MR. BURDETTE: Judge, may the record
13 reflect that the person in the lineup that was
14 identified by Ms. Dorval as being identified as being in
15 the courtroom by Officer Duran?

16 THE COURT: It will. There are two people
17 that are in dark suits. The gray-haired guy or the
18 dark-haired guy, which one?

19 THE WITNESS: The dark-haired guy, sir.

20 THE COURT: It will reflect.

21 MR. BURDETTE: Thank you, Judge.

22 Q. (BY MR. BURDETTE) Are these photographs here
23 in State's Exhibit 17 in the same condition today as
24 they were when they were shown to Ms. Dorval?

25 A. Yes, sir. It's the same one. Same photo

1 array.

2 Q. How long did this procedure take, showing her
3 the photo array?

4 A. For -- I'm sorry. For Rachel?

5 Q. Yes, for Rachel, Ms. Dorval.

6 A. I mean, it was pretty quick. I had sat her
7 down. I read her the admonition form, had her read it
8 herself, had her sign it and it was really quick.

9 Q. Were all the photographs of black males?

10 A. Yes, sir.

11 Q. Were they all generally of the same size and
12 build?

13 A. Yes, sir.

14 Q. And do they all share general or similar
15 characteristics?

16 A. They do, sir.

17 Q. Do they all have the same hair color?

18 A. Yes, sir.

19 Q. And approximate haircut as well, length of
20 hair?

21 A. Yes, sir.

22 Q. Was there anything unique or different about
23 the defendant's photograph that suggested he was the
24 person that committed the offense?

25 A. No, sir. We're always sure that they don't

1 have anything that stands out from anybody else.

2 Q. Now, let's take a look at State's Exhibit 16.
3 And I'll ask the same questions. Do you recognize
4 State's Exhibit 16?

5 A. I do, sir.

6 Q. Is that the photo array that was shown to
7 Ms. Scurry?

8 A. It was, sir.

9 Q. Is it in the same or similar condition as it
10 was the day you presented it to her?

11 A. Yes, sir, exactly the same.

12 Q. Did you admonish Ms. Scurry about picking a
13 person out of the lineup?

14 A. I did, sir. Sat her down and read her this
15 admonition form.

16 Q. And did you in any way suggest that she needed
17 to pick out a particular person in the photo array?

18 A. I did not, sir. I told her not to feel
19 compelled to pick anybody if she didn't believe he
20 wasn't on there.

21 Q. Was she able to pick out the suspect in this
22 case?

23 A. She picked the wrong suspect in this case.

24 Q. So she was not able to pick out Chad Collins?

25 A. No, sir. She was not.

1 Q. Did she select anyone out of the photo array?

2 A. She did, sir. She selected the No. 3.

3 Q. And that is not Chad Collins, right?

4 A. No, sir.

5 Q. How much time did she spend looking at the
6 photo array before making her determination?

7 A. She took a longer time. She looked and looked
8 and then finally, she picked somebody.

9 Q. Was she hesitant about her identification at
10 all?

11 A. Yes, sir. While she was picking -- while she
12 was trying to decide who she believed the suspect was,
13 she stated that she didn't get a really good look, just
14 using her peripheral, she saw a little bit, just a
15 little bit.

16 Q. When she made this identification of the person
17 in the No. 3 position, did she indicate to you that she
18 was positive of that identification?

19 A. No, sir.

20 Q. Okay. How did she characterize it to you?

21 A. She stated -- I believe she stated, I think
22 this is him.

23 Q. And, again, these are the same photographs that
24 you showed Ms. Dorval?

25 A. Yes, sir. She also stated she wasn't too sure

1 because of the time she had a pistol to the side of her
2 face and she didn't want to turn her face all the way to
3 look at the suspect.

4 Q. Okay. At any point before you showed the photo
5 arrays to either of those women, did you tell them the
6 defendant's name?

7 A. No.

8 Q. Did you tell them that you had recovered
9 Ms. Dorval's cell phone or at least seen her cell phone
10 in his vehicle?

11 A. I told her the day I called her.

12 Q. Okay. Who did you tell?

13 A. Ms. Scurry. I advised her that I found the
14 cell phone in the vehicle.

15 Q. In a vehicle or --

16 A. In a vehicle. And that's how I got her phone
17 number, that I wrote it down.

18 Q. But in any way did you tell her that it was
19 found in Chad Collins' vehicle?

20 A. No. I never gave her the suspect's name nor
21 did I advise Ms. Rachel. I never advised her that she
22 picked the wrong guy or the right guy. We're not in the
23 custom of giving names or whether they pick the right
24 guy or the wrong guy. We're not in the custom of
25 telling them that information.

1 Q. So after Ms. Scurry selected the person in
2 No. 3, did you tell her that that was not the suspect
3 that you had in custody?

4 A. No, sir. I thanked her for her time and I
5 showed her the exit.

6 Q. What about Ms. Dorval, who did identify the
7 suspect, Chad Collins? Did you tell her she had
8 identified the suspect in custody?

9 A. No, sir. I thanked her for her time as well
10 and asked her to wait outside.

11 Q. After that, after the identification of the
12 suspect, what did you do?

13 A. After the identification of the suspect, I
14 showed them to the exit and I proceeded to look for the
15 cell phone, which I was told that it -- the vehicle had
16 been released already.

17 Q. So you went back to where the vehicle had been
18 towed to?

19 A. Yes, sir.

20 Q. Were you able to recover the cell phone?

21 A. No, sir, I was not.

22 Q. At that point were additional charges filed on
23 the defendant?

24 A. Yes, sir. At that point I called the Harris
25 County District Attorney's Office and spoke to an

1 Assistant District Attorney and I got additional charges
2 for aggravated robbery.

3 MR. BURDETTE: Judge, I'll pass the
4 witness at this time.

5 THE COURT: Okay. Thank you.

6 Mr. Tanner.

7 MR. TANNER: Thank you, Judge.

8 **CROSS-EXAMINATION**

9 **BY MR. TANNER:**

10 Q. The one woman, Officer, who made the incorrect
11 ID, you showed her the photo spread and she pointed out
12 that was the person, correct?

13 A. Ms. Scurry.

14 Q. Right.

15 A. Yes, sir.

16 Q. And she picked the wrong person, right?

17 A. Yes, sir.

18 Q. Did she tell you at that point that was a
19 positive ID?

20 A. She told me -- she said, I think this is the
21 guy.

22 I wouldn't say it was positive.

23 Q. Huh?

24 A. I wouldn't say that was positive identification
25 because she had some doubt.

1 Q. Well, you didn't note that, though, in your
2 offense report, correct? You just, at that point, say
3 that you questioned her about where -- you know, her
4 view from the angle she was at, correct?

5 A. Yes, sir. I did put in there she didn't pick
6 the right suspect.

7 Q. She didn't pick the right person?

8 A. Correct.

9 Q. Now, the phone, Officer, when you first looked
10 at the phone and you saw the suspicious messages --

11 A. Yes, sir.

12 Q. -- you did not take the phone and mark it; is
13 that correct?

14 A. No, sir.

15 Q. Did you try to get it back at a later time?

16 A. Yes.

17 Q. What steps did you take to get the phone back?

18 A. I called the storage lot where the vehicle was
19 taken to and I spoke to the person that worked up there.
20 I gave him the license plate number and I asked her she
21 could check to see if the car as still stored at the
22 storage lot. She called me back maybe 30 minutes later
23 and she said, the car was released a few days prior.

24 Q. Now, after this identification, are you the
25 person who filed charges on the defendant in this case?

1 A. Yes, sir.

2 Q. You filed it in the name of, I guess,
3 Ms. Scurry?

4 A. For Ms. --

5 Q. In the name of Ms. Droval (sic)?

6 A. Yes, sir.

7 THE COURT: What name?

8 MR. TANNER: Rachel Droval.

9 THE COURT: It's Dorval.

10 Q. (BY MR. TANNER) Who chose the spot in the
11 photo spread to put the defendant?

12 A. The mug shot database, it chooses random spots
13 for you. Depending on the officer, they kind of choose
14 where to place the suspect or you can choose for the
15 computer to choose for you.

16 Q. Did you think of showing the two women the
17 photos independently of one another, like one at a time,
18 sequentially, instead of all at once?

19 A. I have never seen it done like that except for
20 maybe on the department's own television, but as far as
21 I know, I've always seen other investigators do it the
22 way I do.

23 Q. Did you think of ever doing a live lineup?

24 A. No, sir.

25 Q. Did you ever discuss doing a live lineup with

1 anyone?

2 A. No, sir. It's not a necessity.

3 Q. Okay. Thank you.

4 THE COURT: Okay. Mr. Burdette, anything
5 further?

6 MR. BURDETTE: Nothing for this witness at
7 this time.

8 THE COURT: Thank you, Officer.

9 THE WITNESS: Thank you, sir.

10 THE COURT: Any additional witnesses?

11 MR. BURDETTE: I don't have any additional
12 witnesses, Judge, for the extraneous.

13 MR. TANNER: We would like to recall
14 Ms. Scurry for one question, Judge.

15 THE COURT: Okay. Ms. Scurry.

16 And, Myrna, would you put Officer Duran
17 was previously sworn and is still under oath?

18 Ms. Scurry, come on up. Just one or two
19 more questions. You're still under oath.

20 **KATHRYN SCURRY,**

21 having been first duly sworn, testified as follows:

22 **FURTHER RECROSS-EXAMINATION**

23 **BY MR. TANNER:**

24 Q. Ms. Scurry, do you recall telling the police
25 officers -- do you remember if one officer came to the