

Affirmed as Modified and Opinion Filed October 3, 2023



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-21-00945-CR

**RODERICK WAYNE NELSON, Appellant
V.
THE STATE OF TEXAS, Appellee.**

**On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F-1924910-I**

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Smith, and Justice Breedlove
Opinion by Chief Justice Burns

In two issues, appellant Roderick Wayne Nelson challenges his conviction for aggravated sexual assault. *See* TEX. PENAL CODE § 22.021. Appellant raises insufficiency of the evidence and ineffective assistance of counsel as error below. In our own review of the record, we find the judgment lists the incorrect offense, and we modify the judgment. The judgment of conviction is affirmed as modified.

I. BACKGROUND

On July 18, 2018, sixteen-year-old K.C. was sexually assaulted as she walked to work at a fast-food restaurant in Garland, Texas. When K.C. was close to the

restaurant, she took a shortcut through an alley that ran behind the restaurant. She was wearing her earbuds and did not notice anything unusual until she passed a dumpster bay in the alley. She then realized someone was walking towards her. When she looked up, she saw a man, later identified as Appellant, pointing a firearm in her face.

Appellant told K.C. to walk into the dumpster bay and remove her pants. Appellant then bent K.C. over and penetrated her vagina with his penis multiple times. He also forced her to her knees and made her perform oral sex on him. The assault caused K.C. a lot of pain. At some point, Appellant ejaculated on his shirt. After the assault, Appellant asked K.C. for her personal information. He threatened to shoot K.C. if she was not truthful.

When Appellant finally let K.C. go, she ran to the fast-food restaurant where she was employed and tried to enter, but the door was locked. However, a woman who worked in the spa across the street saw K.C. and noticed that she appeared distressed. The woman saw that K.C. was frightened, her hair was messed up, and she was covered with dirt and debris. K.C. told the woman she had been raped at gunpoint. The woman took K.C. into the spa and called police.

K.C. described the man who assaulted her to police as approximately five feet six inches in height and “pretty skinny.” She stated that he was dressed in all black including his boots, pants, and shirt, and that he carried a gun that was small, silver, and looked “like a revolver.”

K.C. was subsequently transported by ambulance to the hospital where she underwent a sexual assault exam. The lead investigator on the case, Garland police Detective Aristina Lyda, forwarded swabs taken during K.C.'s sexual assault exam to the Texas Department of Public Safety (DPS) crime lab for analysis. Additionally, after interviewing K.C., Detective Lyda arranged for K.C. to meet with a Dallas police detective to create a sketch of her assailant. The sketch was sent to Garland police.

Additionally, as part of their investigation, Garland police searched the area where the assault had occurred for security cameras. Police obtained video footage of the alley where the assault occurred from surveillance cameras located at the Oak Glen Apartments. The apartment's video showed: (1) a black car entering the area by the dumpster bay, (2) a man's head visible in the dumpster bay, (3) K.C. approaching the area, (4) K.C. leaving the dumpster bay, and (5) the black car driving away from the dumpster bay area.

Detective Lyda reviewed the apartment's surveillance video and identified the car in the video as a Hyundai Elantra. A mechanic at a Hyundai dealership confirmed the car on the video was indeed a Hyundai Elantra.

Sometime in August of 2018, the Garland Police Department issued a media release in an attempt to locate and identify K.C.'s assailant. The release included a still photo of the vehicle seen on the video, the sketch of the suspect, and a still photo of the top of the suspect's head in the dumpster bay.

In late September 2018, a woman named K.L. saw the media release about K.C.'s assault on Facebook. K.L. contacted Garland police Detective Michael Mallison to report she believed the assailant in the video and the man in the composite sketch was appellant. According to K.L., appellant raped her and then later shot her. K.L. reported the sexual assault to police on the day that it occurred, however, she later decided that she did not want to prosecute the case.

After speaking with K.L., Detective Mallison began investigating appellant. During his investigation, Detective Mallison located appellant's vehicle, a Hyundai Elantra, in the parking lot where he worked—which was about a mile away from where K.C. had been sexually assaulted.

A DNA analyst with the Department of Public Safety's crime lab tested K.C.'s sexual assault kit. External vaginal swabs and anal swabs taken from K.C. showed male DNA. The amount of male DNA was too small to develop a DNA profile. The analyst was able, however, to test the DNA to determine if appellant could be excluded as a contributor of the DNA found in K.C. The test showed that appellant could not be excluded as a contributor of the DNA.

Additionally, as a part of their investigation, Garland police obtained appellant's cell phone and conducted a search of the phone. The search showed that on August 29, 2018, appellant's phone searched Garland News for a story regarding a "Reward offered after girl sexually assaulted at gunpoint behind Garland business" and "police release sketch of man who raped girl at gunpoint behind Garland strip

mall.” Additionally, appellant’s cell phone showed a search of Garland police news and the story “Garland police looking for man connected to sexual assault.”

Appellant was subsequently charged with aggravated sexual assault with a deadly weapon. He pled not guilty, but the jury convicted him of committing the offense. The trial court set punishment at life imprisonment. Appellant filed a motion for new trial, and it was overruled by operation of law. This appeal followed.

II. ANALYSIS

A. Sufficiency of the Evidence

In his first issue, Appellant contends the evidence is insufficient to support his conviction because the State failed to prove he was the person who committed the offense. To support his claim, appellant points to K.C.’s inability to identify him in a pre-trial photo lineup and to her description of the attacker which he characterizes as not specific enough for the jury to have tied him to the offense. Appellant also asserts there was no evidence connecting him to the vehicle in the security footage and there was no proof his Hyundai Elantra was the car at the scene of the assault. Finally, appellant dismisses the DNA evidence because it did not conclusively prove that he committed the assault. In sum, appellant asserts that each piece of evidence is insufficient on its own, and, therefore, the evidence is insufficient.

1. Standard of review

We review a sufficiency challenge by considering all the evidence in the light most favorable to the verdict and determine, based on the evidence and reasonable

inferences therefrom, a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We defer to the fact finder’s credibility and weight determinations because the fact finder is the sole judge of the witnesses’ credibility and the weight to be given to their testimony. See *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). We presume the factfinder resolved any conflicting inferences in favor of the verdict, and we defer to its resolution. *Brooks*, 323 S.W.3d at 922. The fact finder can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

The prosecution must prove beyond a reasonable doubt the defendant is the person who committed the offense charged. *Palomo v. State*, No. 05-16-01459-CR, 2018 WL 636105, at *3 (Tex. App—Dallas Jan. 31, 2018, pet. ref’d) (mem. op., not designated for publication). Identity may be proved by “either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence.” *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2005). The testimony of a single eyewitness may be sufficient evidence to identify a defendant as a perpetrator. *Palomo*, 2018 WL 636105, at *3.

2. The evidence is sufficient to support the conviction.

First, as to appellant's claim that K.C failed to identify him in a pre-trial photo lineup and that her description of the attacker was not specific enough for the jury to tie him to the offense; we note that K.C. identified appellant as the man who sexually assaulted her in open court. Because the positive identification of a defendant as the perpetrator is sufficient to support a conviction, K.C.'s in-court identification of appellant as her attacker was, by itself, sufficient to establish his guilt. *Cate v. State*, 124 S.W.3d 922, 928 (Tex. App.—Amarillo 2004, pet. ref'd) (per curiam); see *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (concluding that the testimony of an eyewitness alone was sufficient to support the jury's verdict.); *Sandoval v. State*, No. 08-11-00283-CR, 2013 WL 5873296, at *14-15 (Tex. App.—El Paso Oct. 30, 2013, pet. ref'd) (mem. op., not designated for publication) (holding that victim's in-court identification of defendant as perpetrator of aggravated robbery was legally sufficient to support a conviction). Moreover, the State provided expert testimony from Leslie Boutte, a licensed professional counselor and assistant director of clinical services at the Dallas Children's Advocacy Center. Boutte explained that the way a person processes trauma can impact the person's memory. For example, she stated that after a trauma such as K.C. experienced, a victim may not recognize an assailant in a photograph but could very well recognize the assailant upon encountering him or her again in person.

Additionally, while appellant argues that the State failed to prove it was his 2014 black Hyundai Elantra seen in the video, we note the State did prove that

appellant was in the area where K.C. was assaulted, the morning K.C. was assaulted, driving his 2014 black Hyundai Elantra after dropping his wife off at a IHOP restaurant. Further, the State proved appellant possessed a revolver, the type of gun used in the assault. And while it is true that the DNA evidence did not conclusively prove appellant attacked K.C., his DNA could not be excluded from the male DNA found in K.C. following the assault. Finally, the State proved that after the assault, appellant used his iPhone to search for news stories about the assault and the police's investigation.

Even if there had been discrepancies or conflicts in the evidence about appellant's identity, such discrepancies would not render the evidence insufficient. *See Martin v. State*, 635 S.W.3d 672, 679 (Tex. Crim. App. 2021) (holding the factfinder alone judges the evidence's weight and credibility). Accordingly, after reviewing the evidence, we conclude that a rational jury could have found that appellant sexually assaulted K.C. with a deadly weapon beyond a reasonable doubt. We conclude the evidence is sufficient to support appellant's conviction and overrule appellant's first issue.

B. Ineffective Assistance of Counsel

In his second issue, appellant argues his attorney was ineffective by not questioning K.L. regarding a crime stoppers monetary reward she received from the Garland Police Department.

A successful ineffective assistance claim depends on (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In determining whether counsel’s representation was deficient, we indulge a strong presumption counsel’s conduct falls within a wide range of reasonable professional assistance, including the possibility counsel’s actions were strategic. *Id.* at 689. We focus on the totality of the representation afforded and not on individual alleged errors. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). We consider the adequacy of assistance as viewed at the time of trial, not in hindsight. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). We may not second-guess counsel’s strategic decisions and his trial strategy cannot be considered ineffective assistance of counsel simply because another attorney would have used a different strategy. *Herrera v. State*, No. 05-19-00021-CR, 2020 WL 4435309, at *10 (Tex. App.—Dallas Aug. 3, 2020, no pet.) (mem. op., not designated for publication).

To defeat the presumption of reasonable representation, an allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017); *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). A silent record provides no explanation for counsel’s actions and will not overcome the strong presumption of reasonable assistance. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Moreover, “trial counsel should ordinarily be afforded

an opportunity to explain his actions before being denounced as ineffective.” *Rylander*, 101 S.W.3d at 111. Where trial counsel is not given an opportunity to explain his actions, counsel should only be found ineffective if counsel’s conduct was “so outrageous that no competent attorney would have engaged in it.” *Id.* at 117 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

Here, appellant did not raise his claim that his counsel was ineffective in the trial court by a motion for new trial.¹ Because the trial court record is silent as to the reasons for the actions of appellant’s attorney, we cannot conclude that the record firmly demonstrates that the attorney’s performance fell below an objective standard of reasonableness. *See Goodspeed*, 187 S.W.3d at 392 (stating that appellate courts ordinarily will not conclude counsel’s performance was deficient without a record demonstrating that counsel had the opportunity to explain his actions). Nor does the record reflect that counsel’s conduct was “so outrageous that no competent attorney would have engaged in it.” *Rylander*, 101 S.W.3d at 111. We overrule appellant’s second issue.

C. Modification of the Judgment

In our review of the record, we note the judgment does not properly reflect appellant’s convicted offense. The indictment and jury charge both reflect appellant was charged with “Aggravated Sexual Assault.” And on the record, the trial court

¹Appellant submitted a motion for new trial solely on the grounds that the verdict was contrary to the law and the evidence.

convicted appellant of “Aggravated Sexual Assault” with a deadly weapon. The judgment, however, states appellant was convicted of “Aggravated Sexual Assault of a Child.”²

We have the power to modify a judgment when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d) (en banc). When the oral pronouncement and the written judgment conflict, the remedy is to reform the judgment. *See Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003). We therefore modify the judgment to reflect that appellant was convicted of aggravated sexual assault.

CONCLUSION

We overrule appellant’s sufficiency issue because the evidence is sufficient to support the trial court’s judgment convicting appellant of aggravated sexual assault with a deadly weapon. We overrule appellant’s second issue because appellant failed to carry his burden of establishing ineffective assistance of counsel. As reformed, we affirm the trial court’s judgment.

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TEX. R. APP. P. 47.2(b).
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/Robert D. Burns, III/
ROBERT D. BURNS, III
CHIEF JUSTICE

²The judgment includes the deadly weapon finding.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

RODERICK WAYNE NELSON,
Appellant

No. 05-21-00945-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District
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Trial Court Cause No. F-1924910-I.
Opinion delivered by Chief Justice
Burns. Justices Smith and Breedlove
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

We therefore modify the judgment to reflect that appellant was convicted of aggravated sexual assault and not aggravated sexual assault of a child.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered October 3, 2023