Opinion Issued July 24, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00594-CR

KEITH DARRELL STOVAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1107867

MEMORANDUM OPINION

Appellant, Keith Stoval, pleaded not guilty to aggravated robbery. *See* TEX.

PENAL CODE ANN. § 29.03 (Vernon 2007). The jury found Stoval guilty and assessed punishment at forty-nine years' confinement. Stoval contends that the evidence is factually insufficient to support the verdict. He further contends that the trial court erred in denying admission of certain evidence and that his counsel rendered constitutionally ineffective assistance. We affirm.

Background

On April 15, 2006, Carlos Martinez and Guillermo Arce were working on Arce's car outside of their apartment complex. A person later identified as the appellant, Keith Stoval, approached Martinez and Arce, inquired about the year of Martinez's car, and asked whether Martinez would be interested in selling his car. Martinez told him that he was not interested in selling his car, and Stoval left. A few minutes later, Stoval returned, pulled a gun from his waistband, and pointed the gun at Arce. Stoval then fired the gun five times at Arce and two times at Martinez. Both Arce and Martinez fled while Stoval stole Martinez's silver Hyundai Sonata.

Eight days later, a Bellaire police officer observed a silver Hyundai Sonata and, after checking its license plate on his computer, realized that the car had been reported stolen. The officer initiated a traffic stop and identified Stoval as the driver of the stolen car. Police placed Stoval's picture in a photo array and

presented the array to Arce to identify his attacker. Arce tentatively identified Stoval as the man who shot him but requested a live line-up to see the features of each man more clearly. During the live line-up, Arce positively identified Stoval as the shooter.

Martinez was unable to positively identify Stoval as the attacker because at the time of the attack, he was more focused on Arce and his condition. Martinez identified two men during a live line-up who could have been his attacker, and one of the men he identified was Stoval. Martinez also testified in court that Stoval "looked like" the man that attacked him.

The first jury trial resulted in a mistrial. Following a second trial, the jury found Stoval guilty of aggravated robbery and assessed punishment at forty-nine years' confinement.

Factual Sufficiency

In his second issue, Stoval asserts that the evidence is factually insufficient to sustain his conviction. He specifically contends that the evidence was insufficient to identify him as the assailant. When evaluating factual sufficiency, we consider all the evidence in a neutral light to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We will set the verdict aside only if

(1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a verdict is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson*, 204 S.W.3d at 417. Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id*. Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id*. We must also discuss the evidence that, according to the appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

The fact-finder alone determines the weight to place on contradictory testimonial evidence because that determination depends on the fact-finder's evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). As the determiner of the credibility of the witnesses, the fact-finder may choose to believe all, some, or none of the testimony presented. *Id.*

at 407 n.5. As an appellate court, we must avoid re-weighing the evidence and substituting our judgment for that of the fact-finder. *Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998); *see also Wilson v. State*, 863 S.W.2d 59, 65 (Tex. Crim. App. 1993); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

The robbery occurred at night in a parking lot with covered parking spaces. At trial, Stoval elicited testimony that the lighting was dim where Martinez and Arce were working on the cars, because every two spaces shared a light with a 40-watt bulb. Stoval also pointed out that both Martinez and Arce were drinking beers as they worked on the cars. Stoval contends that because of the dim lighting, the effects of alcohol, and the fact that the encounter happened within a matter of seconds, the identification of him as the attacker is not enough to convict him for aggravated robbery. Stoval also contends that only one witness, Arce, actually identified him as the attacker that night.

The jury also heard testimony, however, that although the offense happened quickly, Arce had the opportunity to see Stoval twice—once before the robbery and once during the robbery. Arce also testified that although the lighting was not bright, it was also not dim. Arce testified that he identified Stoval tentatively in a photographic array and then positively in a live line-up. Although Martinez

testified that he did not get a good look at the assailant, he testified that he was able to narrow down the line-up to two men, including Stoval. In addition, the police arrested Stoval while he was driving the stolen car. Finally, the jury heard testimony from the surgeon that treated Arce that while the witnesses did drink beer the night of the attack, neither man was intoxicated based on their blood alcohol level.

The jury was free to evaluate all of the testimony and evidence and believe some, all, or none of it. *See Glockzin v. State*, 220 S.W.3d 140, 147 (Tex. App.—Waco 2007, pet. ref'd) ("the jury was free to accept [victim's] testimony over that of other witnesses, including [defendant], and disregard any 'inconsistencies'"); *see also Perez v. State*, 113 S.W.3d 819, 838–39 (Tex. App.—Austin 2003, pet. ref'd). We defer to the jury's findings. "A jury decision is not manifestly unjust merely because the jury resolved conflicting views of evidence in favor of the State." *Herrero v. State*, 124 S.W.3d 827, 835 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (quoting *Cain*, 958 S.W.2d at 410). The State's evidence was not so obviously weak or contrary to the overwhelming weight of the evidence as to be factually insufficient. *See Poncio v. State*, 185 S.W.3d 904, 905 (Tex. Crim. App. 2006) (holding that unexplained possession of property recently stolen in robbery permits inference that defendant committed robbery). We hold that factually

sufficient evidence supports the verdict.

Exclusion of Evidence

In his third issue, Stoval contends that the trial court erred in refusing to admit the audiotape of his interrogation by Detective Steve Guerra. Stoval asserts that the trial court incorrectly ruled that the tape was inadmissible hearsay when it was actually being offered to attack Guerra's credibility because it would have shown Guerra lying to Stoval during the interrogation. The State responds that Stoval failed to assert at trial that the statements in the interrogation tape were necessary to expose an alleged bias or motive of Detective Guerra, and thus Stoval failed to preserve error. We agree.

A party offering evidence has the burden to establish admissibility and, when the theory of admissibility is not presented to the trial court, argument is not preserved for appellate review. *Johnson v. State*, 963 S.W.2d 140, 142 (Tex. App.—Texarkana 1998, pet. ref'd). Stovall did not argue to the trial court that he was relying on Rule 613(b) as a basis for eliciting testimony from Guerra that he had lied to Stoval during Stoval's interrogation. Stoval also did not request the trial court to rule on the admissibility of Stoval's interrogation tape as impeachment to show Guerra's bias or interest. *See Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1999) (op. on reh'g) (concluding that objection under Rule

608(b) did not preserve complaint under former Rule 612(b), now Rule 613(b)); *Loredo v. State*, 32 S.W.3d 348, 351 (Tex. App.—Waco 2000, pet. ref'd) (concluding that appellate argument that excluded testimony would have shown bias or motive was not preserved for appeal because appellant had neither presented such argument to trial court nor obtained ruling).

Moreover, "[e]rror in the exclusion of evidence may not by urged unless the proponent perfected an offer of proof or a bill of exceptions." *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999). Stoval did not make or request the opportunity to make an offer of proof or bill of exception to identify for the record what the excluded testimony would have been. Absent a showing of what such testimony would have been, or an offer of a statement concerning what the excluded evidence would have shown, nothing is presented for review. *See id.*; *see also* TEX. R. APP. P. 33.2; TEX. R. EVID. 103(a)(2).

We hold that Stoval did not preserve error as to his third issue, and thus we need not address its merit.

Ineffective Assistance of Counsel

In his first issue, Stoval contends that he was denied effective assistance of counsel when his trial attorney failed to discover, develop or investigate evidence of Stoval's potentional mitigating factor of mental retardation.

Standard of Review

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) his counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Thus, the defendant must prove objectively, by a preponderance of the evidence, that his counsel's representation fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The second prong requires the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *see also Thompson*, 9 S.W.3d at 812. "A [reviewing] court [should] indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must [also] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "Any allegation of ineffectiveness must be firmly founded in the record, and the

record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 813 (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Analysis

Stoval asserts that his trial counsel focused only on competency and sanity and failed to investigate his mental retardation through available information. In criminal cases, competency is a criminal defendant's ability to stand trial, measured by the capacity to understand the proceedings, to consult meaningfully with counsel, and to assist in the defense. TEX. CODE CRIM. PROC. ANN. art. 46B.003 (Vernon 2006).

During interviews between Stoval and his trial counsel, Stoval never appeared to demonstrate difficulty in understanding his attorney. After the trial, Stoval's performance on an IQ test was 80 with an error in measurement of plus or minus five points. Scores ranging from 65-75 indicate mild mental retardation. During the motion for new trial, Stoval offered no evidence of retardation other

than his post-conviction performance on the intelligence test. Based on her evaluation of Stoval's test scores, his mental health expert described him as "borderline retarded." But she agreed that, even with an IQ of 75, Stoval is able to function, hold a job, and be educated. She further acknowledged that, based on the range of possibilities, Stoval could be of low average intelligence.

Also, during the hearing on Stoval's motion for new trial, Stoval's trial counsel testified that he did not have any reason to believe that Stoval was mentally retarded. Stoval's trial counsel met with him, his mother and brother many times and also hired a private investigator. No one indicated to Stoval's counsel that Stoval might be mentally retarded or that he had exhibited behavior to suggest it. Nothing in his jail medical records indicated mental retardation. Although Stoval's counsel was aware that Stoval dropped out of ninth grade twice, Stoval's mother told him that it was because Stoval was hanging around with the wrong crowd and because of Hurricane Katrina. No one suggested that Stoval had dropped out of school because of an inability to grasp the curriculum. Moreover, Stoval's mother testified during the punishment phase of the trial that Stoval had been a great child growing up and was a good student when he was in school. Stoval's counsel further testified that because Stoval continued to deny committing the crime, he chose to not present mitigating evidence based on a theory that Stoval

committed the crime because he was mentally retarded. Based on this strategic decision, he did not subpoena Stoval's school records or more fully investigate Stoval's background.

In light of the conflicting evidence as to the strength of Stoval's mitigation evidence, Stoval has not shown that the trial court erried in concluding that Stoval's trial counsel's performance did not fall below that of a competent attorney. Thus, we hold that Stoval fails to prove the first prong of the *Strickland* test for ineffective assistance.

Conclusion

We conclude that the evidence is factually sufficient to support the jury's verdict and that Stoval did not preserve error as to the admissibility of evidence. We further conclude that Stoval received constitutionally effective assistance of counsel. We therefore affirm the trial court's judgment.

Jane Bland
Justice

Panel consists of Justices Taft, Jennings, and Bland.

Do not publish. TEX. R. APP. P. 47.4.