Affirmed and Opinion filed August 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00690-CR

LEWIS OLIVER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1175124

O P I N I O N

A jury found appellant, Lewis Oliver, guilty of aggravated robbery, and the court sentenced him to fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. On appeal, appellant contends (1) the evidence is legally and factually insufficient to support his conviction and (2) the court erred in admitting expert testimony in violation of the Confrontation Clause. We affirm.

I. BACKGROUND

Shortly before midnight on the evening of April 9, 2009, the complainants, Chang Zeng and his wife, Yan Zeng, were cleaning up their restaurant after closing when two

armed men entered. One man wore a flowered bandanna over his face and the other, later identified as appellant, wore a white, "Jason"[1]-type mask. The robbers approached Chang and Yan, held them at gun-point, and ordered them to turn over the cash in their register and wallets, which totaled over a thousand dollars. They also took Chang's wallet, license, credit cards, cell phone, and keys as well as some cooked chicken and shrimp from the kitchen.

After the robbers left, Chang and Yan called the police. When the police arrived, Chang and Yan described the robbery. While searching the premises, the police recovered a mask, which Yan identified as worn by one of the robbers. Near the area where the mask was found, the police spotted pieces of chicken on the ground. Chang and Yan described the robber who wore the mask as a black, 5'11" to 6' tall, short-haired, muscular male dressed in a black shirt and black pants.

Less than two hours later, Houston Police Officer Margarito Perales pulled over a vehicle on a routine traffic stop. None of the three occupants had identification, and she ordered them out of the vehicle and detained them for further investigation. As they were exiting the vehicle, Officer Perales noticed a gun on the floorboard. She ultimately conducted a search of the vehicle and recovered two loaded guns, over a thousand dollars in cash, papers with Asian writing, and Chang's driver's license, credit cards, and personal checks. She also later learned that one of the passengers—a 6' tall, short-haired, black male in black clothing who had given her a false name—was appellant.

Appellant was subsequently arrested and charged with aggravated robbery. A DNA test revealed the mask contained DNA from two people. All three passengers provided DNA samples. A DNA comparison revealed appellant and an unknown person were the contributors. At trial, Mary Green, an expert in DNA analysis, testified that appellant was the major contributor, meaning that of the contributors, he had worn the mask most recently. The DNA comparison also revealed that the other two passengers

[1] "Jason mask" is a term widely recognized for the white, hockey-type mask worn in the *Friday the 13th* movies.

were not contributors.

The jury convicted appellant as charged, and the court sentenced him to fifteen years' confinement. On appeal, he contends (1) the evidence is legally and factually insufficient to support his conviction and (2) the court erred in admitting expert testimony that violated the Confrontation Clause.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Standard of Review

In a legal-sufficiency review, we consider all of the evidence in the light most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Reed v. State*, 158 S.W.3d 44, 46 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). We may not substitute our judgment for the jury's and will not engage in a reexamination of the weight and credibility of the evidence. *Id.*; *Brochu v. State*, 927 S.W.2d 745, 750 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

By contrast, we review the evidence in a neutral light when conducting a factual-sufficiency review. *Reed*, 158 S.W.3d at 46. We must set aside the verdict if (1) the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust, or (2) the proof of guilt, although legally sufficient, is greatly outweighed by contrary proof. *See Vodochodsky v. State*, 158 S.W.3d 502, 510 (Tex. Crim. App. 2005). However, because the jury is in the best position to evaluate the credibility of the witnesses, we must afford appropriate deference to its conclusions. *Pena v. State*, 251 S.W.3d 601, 609 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

Analysis

In support of his insufficiency claims, appellant argues the evidence linking him to the robbery is circumstantial, Cheng and Yan were unable to identify him from a photo

array and at trial, and none of Cheng's items were actually found on his person.

It is well-established, however, that each fact need not point directly and independently to appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Id.*

Here, appellant fit the physical descriptions of race, structure, height, hair, and clothing provided by Cheng and Yan both prior to and during trial. Additionally, DNA evidence is admissible to prove identity and here, appellant's DNA was found on the mask recovered at the scene.[2] *See Glover v. State*, 825 S.W.2d 127, 127 (Tex. Crim. App. 1992). Finally, when Officer Perales pulled over the vehicle, appellant appeared nervous and gave a false name. In a subsequent search of the passengers and the vehicle, Officer Perales recovered two loaded guns, nearly a thousand dollars in cash, papers with Asian writing, and Cheng's license, personal checks, and credit cards.[3]

Viewing the evidence in the light most favorable to the verdict, we hold the evidence is legally sufficient to support appellant's conviction. *See Reed*, 158 S.W.3d at 46. Viewing the evidence in a neutral light, we hold the proof of guilt is neither so

[2] The DNA comparison results revealed appellant was the major contributor to the DNA mixture, and the other two passengers were not contributors. Mary Green, the State's DNA expert, testified the person who wore the mask most recently would be the major contributor, as opposed to those who had worn it less recently, because DNA degrades over time. Appellant argues DNA is insufficient to prove his identity because Green could not show when or how appellant's DNA was deposited on the mask. However, the fact that appellant was the major contributor, when coupled with the other facts here sufficiently proves identity. Additionally, the jury, having heard Green's testimony, could have taken into question the concerns appellant voices here when evaluating Green's credibility. *See Pena*, 251 S.W.3d at 609; *Reed* 158 S.W.3d at 46.

[3] Appellant argues the evidence is insufficient to show he was one of the robbers because none of Cheng's items were actually found on his person. To support his argument, he points out the cash and Cheng's license, his personal checks, and some of his credit cards were found on the other two passengers. Nevertheless, the record reveals two loaded guns, papers with Asian writing, and more of Cheng's credit cards were found in the vehicle. We hold the evidence, taken as a whole, is sufficient evidence to sustain appellant's conviction.

obviously weak that the verdict is clearly wrong and manifestly unjust, nor greatly outweighed by contrary proof. *See Vodochodsky*, 158 S.W.3d at 510; *Reed*, 158 S.W.3d at 46. Accordingly, we overrule appellant's first issue on appeal.

B. CONFRONTATION CLAUSE

Appellant contends that his Sixth Amendment right to confront the witnesses against him was violated because Green testified concerning DNA testing performed by other analysts.

Standard of Review

In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), the Supreme Court held the Sixth Amendment confrontation right applies not only to in-court testimony, but also to out-of-court statements that are testimonial in nature. *Wood v. State*, 299 S.W.3d 200, 207 (Tex. App.—Austin 2009, pet. ref'd) (citing *Crawford*, 541 U.S. at 51). The Confrontation Clause forbids the admission of testimonial hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Id.* Whether a particular out-of-court statement is testimonial is a question of law. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008). It is the State's burden to establish the admissibility of the testimony it seeks to introduce at trial. *See id.*

We review a trial court's admission of evidence for an abuse of discretion. *Ramos v. State*, 245 S.W.3d 410, 417–18 (Tex. Crim. App. 2008). The ruling will be upheld if it is reasonably supported by the record and is correct under any applicable legal theory. *Id.* at 418. The trial court is the sole trier of fact and the judge of the credibility of witnesses and the weight given to their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). We give almost total deference to a trial court's determination of historical facts and review *de novo* the trial court's application of the law to those facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

DNA Comparison

In support of his contention, appellant urges us to apply *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009). In *Melendez-Diaz*, the State introduced at trial reports produced by a State chemist that contained the chemist's analysis of drug test results. *Melendez-Diaz*, 129 S.Ct. at 2532. The Supreme Court held the chemist was a "witness" for purposes of the Sixth Amendment and his report fell within the "core class of testimonial statements." *Id.* Therefore, the Court held the introduction of the report without the opportunity to confront its author violated the Confrontation Clause. *Id.*

Melendez-Diaz, however, did not specifically address the issue at bar—whether the Confrontation Clause is violated if an expert offers oral opinion testimony based in part on work performed by another who does not testify. *See Hamilton v. State*, 300 S.W.3d 14, 21 (Tex. App.—San Antonio 2009, pet. struck). *United States v. Washington* and *Hamilton* are instructive in this regard. *See United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007); *Hamilton*, 300 S.W.3d at 21.

In *Washington*, the Fourth Circuit held "raw" toxicology data generated by lab machines is not testimonial. *Washington*, 498 F.3d at 230. Accordingly, the Confrontation Clause is not violated where an expert, not involved in the actual testing, relies on such raw data to form the basis of his opinion. *Id.* Likewise, in *Hamilton*, the Court of Appeals held DNA reports generated by scientific instruments are not testimonial. *Hamilton*, 300 S.W.3d at 21. Thus, the Confrontation Clause is not violated where an expert, not involved in the actual testing, relies on the testing performed by another to form the basis of her opinion. *Id.*

In the present case, Green testified the medical examiner's office employs a procedure termed "batch testing" when testing DNA. She explained that in "batch testing," numerous analysts test the genetic matter in an assembly-line-type process. The tests of the materials in this case were performed by approximately fifteen analysts using

machines.[4]

As in *Washington* and *Hamilton*, here, the machines generated raw-data results, and Green used those results to form the basis of her opinion—that appellant was a contributor. *See Washington*, 498 F.3d at 230; *Hamilton*, 300 S.W.3d at 21. Applying the holdings of *Washington* and *Hamilton* here, we conclude the raw-data reports are not testimonial. *See id.* Thus, the Confrontation Clause was not violated by Green's testimony. Accordingly, we overrule appellant's second issue.

III. CONCLUSION

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

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.
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[4] We note that appellant does not challenge the validity of the underlying test results.