In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-22-00148-CR
No. 02-22-00149-CR
No. 02-22-00150-CR

DEVUNTRA CLAY, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court Nos. 1685361D, 1685364D, 1685367D

Before Bassel, Womack, and Walker, JJ.
Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

I. INTRODUCTION

Appellant Devuntra Clay was charged by indictment with nine offenses:

- three counts in appellate cause number 02-22-00148-CR (trial court cause number 1685361D) with Dieudonne Nyembo[1] named as the complainant,
- three counts in appellate cause number 02-22-00149-CR (trial court cause number 1685364D) with Kalenga Kayaba named as the complainant, and
- three counts in appellate cause number 02-22-00150-CR (trial court cause number 1685367D) with Stephano Musese named as the complainant.

Except for the complainants, all three indictments alleged the same three counts and were essentially identical:

(1) engaging in organized criminal activity; Tex. Penal Code Ann. § 71.02;

(2) aggravated robbery with a deadly weapon (a firearm); *id.* § 29.03; and

(3) aggravated assault with a deadly weapon (a firearm); *id.* § 22.02(a)(2).[2]

After a trial, a jury convicted Clay on all counts. Regarding punishment, the jury assessed:

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[1]The indictment identifies this complainant as Dieudonne Nyembwe and Deiudonne Nyembwe. At trial, the complainant identified himself, but he did not spell either his first or last name. The court reporter wrote his name as Deiudonne Nyembo. We refer to him as Dieudonne Nyembo.

[2]For the third count, the allegations differed slightly. For Nyembo, the third count alleged that Clay intentionally or knowingly caused bodily injury to him by shooting him with a firearm. For Kayaba and Musese, the third count alleged that Clay intentionally or knowingly caused bodily injury to them by striking or hitting them in the head with a firearm or other hard object.

- 75 years' imprisonment for Count 1 of all three indictments,
- 60 years' imprisonment for Count 2 of all three indictments,
- 40 years' imprisonment for Count 3 of the indictments involving Kayaba and Musese (in which Clay was accused of striking them in the head with a firearm or other hard object), and
- 99 years' imprisonment for Count 3 of the indictment involving Nyembo (in which Clay was accused of shooting him with a firearm).

The trial court sentenced Clay accordingly and further ordered the sentences to run concurrently.

Clay appealed. He asserts three points:

> (1) "The evidence is insufficient to sustain each conviction in all three cases[] because there was not sufficient evidence to corroborate the accomplice testimony."
>
> (2) "Mr. Clay received ineffective assistance of counsel when his trial attorney failed to object when Detective Cartwright repeatedly testified to the contents of a surveillance video, which was not in evidence."
>
> (3) "Mr. Clay received ineffective assistance of counsel when his trial attorney failed to object when Detective Cartwright repeatedly testified to a digital forensic report and phone records, which were not in evidence."

Because we hold that (1) sufficient evidence corroborates the accomplice testimony and thus sufficient evidence supports the convictions and (2) the record does not support Clay's claims of ineffective assistance of counsel, we overrule all three points and affirm the trial court's judgments.

II. EVIDENCE

Two women, Aaliyah Gunnell and Bryle Yandell, met Nyembo, Kayaba, and Musese first in a Walmart,[3] then in a park for a barbecue, and finally—either that same day or on some other day—at an apartment complex to further socialize with the men. While there, using her cell phone camera, Gunnell showed her boyfriend, Presley Demerson, videos of their hosts flashing money, so Demerson—a gang member who had previously committed offenses while both Gunnell and Yandell were present—instructed her to come pick him up. Using the pretext that they were leaving to get more girls, Gunnell and Yandell left Nyembo, Kayaba, and Musese.

After Gunnell and Yandell picked up Demerson, they then picked up Clay and a third man whose name the women did not know. Clay was also a gang member who had previously committed robberies with Demerson while Yandell was present.

The five of them then returned to the apartment complex in which Gunnell and Yandell had been socializing with Nyembo, Kayaba, and Musese. Gunnell and Yandell entered the men's apartment first, and Demerson, Clay, and the unidentified third man entered the apartment moments later and proceeded to beat and rob

[3]Whether Yandell was with Gunnell at the Walmart is not clear. Yandell's testimony picks up with the barbecue in the park. Similarly, Nyembo, Kayaba, and Musese all identified the barbecue in the park as the place where the story began. Kayaba's cell phone had text messages with Gunnell in which Gunnell used the alias "Liyah Walmart." Because neither Yandell nor Gunnell testified that their appearance at the barbecue in the park was fortuitous, we begin the story at the Walmart.

Nyembo, Kayaba, and Musese. At some point, one of the robbers shot Nyembo, which caused the robbers to leave the apartment.

Gunnell and Yandell had already left the apartment and were in the process of moving Gunnell's car closer to the robbery location to pick up Demerson, Clay, and the unidentified third robber. When the men did not appear soon enough, Gunnell drove off into another part of the complex without them. Gunnell tried to call the men she had left behind only to discover that two of them had left their cell phones in the back seat of her car.

The apartment complex in which all of this took place had only one entrance, and that entrance had a guard shack and a security officer. While Gunnell drove around the complex looking for the three robbers, Kayaba ran to the guard shack to alert the security guard of what had taken place. When Gunnell and Yandell eventually drove up to the exit, both Kayaba and the security guard were waiting for them, and the security guard stopped Gunnell and Yandell. After the police arrived, they placed Gunnell and Yandell in separate squad cars for questioning.

Later, police took both Gunnell and Yandell downtown for further questioning. Gunnell and Yandell initially lied to the police about the identities of the men who had helped them rob Nyembo, Kayaba, and Musese. After the interviews, Detective Cartwright[4] released both Gunnell and Yandell.

[4]Detective Cartwright did not provide his first name when testifying.

Back at the crime scene, police found a shell casing and a spent bullet. About a month after the robbery, the police arrested Clay. While doing so, the police discovered that Clay had a firearm on his person. After a forensic analysis, the police determined that the firearm Clay possessed at the time of his arrest was the same gun that had fired the casing found in the apartment where the robbery had taken place. The bullet was consistent with the make of Clay's firearm.

Meanwhile, Detective Cartwright had obtained and reviewed the surveillance videos from the apartment complex and conducted follow-up interviews with Gunnell and Yandell. Gunnell and Yandell relented and identified Demerson and Clay as two of the robbers. Both Gunnell and Yandell reached plea deals in exchange for their testimony.

A forensic analysis later identified one of the cell phones found in Gunnell's car as Clay's. Yandell also corroborated that the phone belonged to Clay.

III. POINT ONE: ACCOMPLICE-WITNESS TESTIMONY

In Clay's first point, he asserts, "The evidence is insufficient to sustain each conviction in all three cases[] because there was not sufficient evidence to corroborate the accomplice testimony." We disagree. The evidence is sufficient to support both the accomplice-witness testimony and each conviction.

A. THE ACCOMPLICE-WITNESS RULE

Article 38.14 of the Code of Criminal Procedure sets out the accomplice-witness rule: "A conviction cannot be had upon the testimony of an accomplice

unless corroborated by other evidence tending to connect the defendant with the offense committed[,] and the corroboration is not sufficient if it merely shows the commission of the offense." Tex. Code Crim. Proc. Ann. art. 38.14. Article 38.14 governs evidentiary sufficiency determinations when an accomplice testifies; it does not govern the admissibility of evidence. *Qualls v. State*, 547 S.W.3d 663, 675 (Tex. App.—Fort Worth 2018, pet. ref'd). Not mandated by common law or the constitutions of the United States or Texas, Article 38.14 reflects a legislative determination that accomplice testimony inculpating another person should be viewed with a measure of caution because accomplices—seeking to avoid punishment or shift blame to someone else—may lie. *Hernandez v. State*, 585 S.W.3d 537, 549 (Tex. App.—San Antonio 2019, pet. ref'd).

When evaluating the sufficiency of corroboration evidence under the accomplice-witness rule, we "eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime." *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008). To meet the requirements of the rule, the corroborating evidence need not prove the defendant's guilt beyond a reasonable doubt by itself. *Id.* Nor is it necessary for the corroborating evidence to directly link the accused to the commission of the offense. *State v. Ambrose*, 487 S.W.3d 587, 593 (Tex. Crim. App. 2016) (citing *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999)). Rather, the direct or circumstantial corroborating evidence must show that

rational jurors could have found that it sufficiently tended to connect the accused to the offense. *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011).

We judge the sufficiency of nonaccomplice evidence according to the particular facts and circumstances of each case. *Malone*, 253 S.W.3d at 257. Circumstances that are apparently insignificant may constitute sufficient evidence of corroboration. *Simmons v. State*, 205 S.W.3d 65, 73 (Tex. App.—Fort Worth 2006, no pet.). We do not construe the nonaccomplice evidence de novo but instead defer to the factfinder's resolutions. *Smith*, 332 S.W.3d at 442.

B. DISCUSSION

After eliminating Gunnell's and Yandell's testimony, the record contained evidence tending to connect Clay to the commission of the offenses. Specifically, the shell casing and Clay's cell phone tended to independently connect Clay to the offenses.

First, the casing found at the scene of the offenses was fired from the gun that Clay possessed about a month after the offenses occurred. Of all the firearms on the planet, Clay alone possessed the gun that was used to shoot Nyembo. Possession of the firearm used to shoot Nyembo tended to connect Clay to the offenses. *See id.*; *cf. Dillard v. State,* 550 S.W.2d 45, 51 (Tex. Crim. App. 1977) (stating that possession of fruits of a crime may be sufficient corroboration); *Powell v. State*, 219 S.W.3d 498, 505 (Tex. App.—Fort Worth 2007, pet. ref'd); *Keith v. State*, 384 S.W.3d 452, 458 (Tex. App.—Eastland 2012, pet. ref'd) ("A defendant's unexplained possession of property

recently stolen permits an inference that the defendant is the one who committed the theft.").

Second, Nyembo, Kayaba, and Musese all linked the appearance of the robbers with Gunnell's and Yandell's return. Clay's cell phone was in Gunnell's getaway car. A rational factfinder could have reasonably concluded that Clay traveled with Gunnell to the apartment complex to commit the robberies and that he intended to leave with her after they were completed. Thus, Clay's phone tended to connect him to the offenses. *See Smith*, 332 S.W.3d at 442.

Within this point, Clay also asserts that leading questions do not constitute evidence. *See Madden v. State*, 242 S.W.3d 504, 513 n.23 (Tex. Crim. App. 2007); *Stobaugh v. State*, 421 S.W.3d 787, 837 n.238 (Tex. App.—Fort Worth 2014, pet. ref'd). Clay then shows that the prosecutor relied extensively on leading questions.[5]

[5]What Clay does not show are objections to the prosecutor's leading questions. The State called both Gunnell and Yandell as its witnesses. Both were afraid to testify. Gunnell testified that she had received two threats shortly before trial and had left her home. Yandell testified that she had been receiving threatening phone calls from unknown numbers. The Texas Rules of Evidence do not forbid asking leading questions to a party's own witnesses; the rules contemplate that some leading questions are acceptable as "necessary to develop the witness's testimony." *See* Tex. R. Evid. 611(c); *Rasberry v. State*, Nos. 02-14-00128-CR, 02-14-00141-CR, 2015 WL 6081891, at *12 (Tex. App.—Fort Worth Oct. 15, 2015, pet. ref'd) (per curiam) (mem. op., not designated for publication); *Myers v. State*, 781 S.W.2d 730, 732–33 (Tex. App.—Fort Worth 1989, pet. ref'd). Because Clay presents this argument within his evidentiary sufficiency issue, we construe it as an attack on whether leading questions produce usable evidence.

As we understand Clay's argument, when counsel asks a leading question, only the witness's "yes" or "no" response is the evidence. But without knowing the question, a "yes" or "no" response communicates nothing. The answer and the question, when considered together, determine the substance of a witness's testimony. Although questions will not be evidence, the answers to those questions might be. *Madden*, 242 S.W.3d at 513; *Wells v. State*, 730 S.W.2d 782, 786 (Tex. App.—Dallas 1987) ("Questions put to a witness are not evidence. The answers and not the questions are determinative . . . ."), *pet. ref'd*, 810 S.W.2d 179 (Tex. Crim. App. 1990) (op. on reh'g).

For example, the leading question "You robbed Frank, didn't you?" and a "no" response is not evidence that the witness robbed Frank. *See*, *e.g.*, *Harvey v. State*, Nos. 02-16-00036-CR, 02-16-00037-CR, 2017 WL 1173835, at *3 (Tex. App.—Fort Worth Mar. 30, 2017, no pet.) (mem. op., not designated for publication); *Stobaugh*, 421 S.W.3d at 837 n.238. Implicit in the "no" response is the answer, "No, I did not rob Frank." But the leading question "You robbed Frank, didn't you?" and a "yes" response is evidence that the witness robbed Frank. *See Trevino v. State*, No. 13-02-702-CR, 2004 WL 3217729, at *1 (Tex. App.—Corpus Christi–Edinburg July 29, 2004, no pet.) (mem. op., not designated for publication); *Jones v. State*, 857 S.W.2d 108, 110–11 (Tex. App.—Corpus Christi–Edinburg 1993, no pet.). Implicit in the "yes" response is the answer, "Yes, I robbed Frank." Consequently, we reject Clay's

argument that we are restricted to the witness's "yes" or "no" answer without regard to the question prompting the response when we perform a sufficiency analysis.

Moving on to Clay's evidentiary sufficiency challenge, Clay's arguments are based on removing the accomplice-witness testimony and accepting his contention that leading questions produce no evidence. Clay does not present a sufficiency challenge independent of either contention. Because we reject both arguments, we further hold that a rational factfinder could have found the offenses' essential elements beyond a reasonable doubt. *See Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017) (providing the standard of review).

We overrule Clay's first point.

IV. POINTS TWO AND THREE: INEFFECTIVE ASSISTANCE OF COUNSEL

In points two and three, Clay argues, "Mr. Clay received ineffective assistance of counsel when his trial attorney failed to object when Detective Cartwright repeatedly testified to the contents of a surveillance video, which was not in evidence," and "Mr. Clay received ineffective assistance of counsel when his trial attorney failed to object when Detective Cartwright repeatedly testified to a digital forensic report and phone records, which were not in evidence." We hold that Clay has not met his burden of showing that his counsel rendered ineffective assistance.

A. STANDARD OF REVIEW

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel. *Ex parte Scott*, 541 S.W.3d 104, 114 (Tex. Crim. App. 2017); *see* U.S. Const. amend. VI. To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that his counsel's representation was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). The record must affirmatively demonstrate that the claim has merit. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In evaluating counsel's effectiveness under the deficient-performance prong, we review the totality of the representation and the particular circumstances of the case to determine whether counsel provided reasonable assistance under all the circumstances and prevailing professional norms at the time of the alleged error. *See Strickland*, 466 U.S. at 688–89, 104 S. Ct. at 2065; *Nava*, 415 S.W.3d at 307; *Thompson*, 9 S.W.3d at 813–14. Our review of counsel's representation is highly deferential, and we indulge a strong presumption that counsel's conduct was not deficient. *Nava*, 415 S.W.3d at 307–08.

An appellate court may not infer ineffective assistance simply from an unclear record or a record that does not show why counsel failed to do something. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012); *Mata v. State*, 226 S.W.3d 425, 432 (Tex. Crim. App. 2007). Trial counsel "should ordinarily be afforded an opportunity

to explain his actions before being denounced as ineffective." *Menefield*, 363 S.W.3d at 593. If trial counsel did not have that opportunity, we should not conclude that counsel performed deficiently unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308. Direct appeal is usually inadequate for raising an ineffective-assistance-of-counsel claim because the record generally does not show counsel's reasons for any alleged deficient performance. *See Menefield*, 363 S.W.3d at 592–93; *Thompson*, 9 S.W.3d at 813–14.

B. DISCUSSION

Clay's complaints focus on the surveillance videos and the forensic report identifying one of the cell phones in the back seat of Gunnell's vehicle as his. We address each complaint in turn.

1. Surveillance Videos

Detective Cartwright testified about what he saw on the surveillance videos. The videos themselves were not admitted into evidence. But stills taken from the videos were.

Detective Cartwright acknowledged that the videos themselves were insufficient to identify the three men with Gunnell and Yandell. They were, however, sufficient to confirm that three men were with Gunnell and Yandell.

The jury saw the still photographs taken from the surveillance videos showing three men getting out of Gunnell's car. When the trial court erroneously admits evidence, its admission is harmless if comparable evidence was admitted elsewhere.

See Lopez v. State, 615 S.W.3d 238, 265 (Tex. App.—El Paso 2020, pet. ref'd). Furthermore, Detective Cartwright (and the jury) had to rely on something other than the surveillance videos to identify Clay as one of the robbers. Assuming, without deciding, that defense counsel erred by allowing Detective Cartwright to testify about the surveillance videos, we hold that any error was harmless. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.").

2. Forensic Report Identifying One of the Cell Phones as Clay's

Detective Cartwright testified that forensics had identified one of the two phones found in the back seat of Gunnell's car as belonging to Clay. The forensic report itself was not introduced into evidence. Beyond identifying the phone as Clay's, forensics was not able to access the phone.

For purposes of the accomplice-witness testimony, the phone was not the most damning piece of evidence against Clay. A defendant's mere presence at the scene of a crime is insufficient to corroborate accomplice testimony. *Malone*, 253 S.W.3d at 257. But proof that the defendant was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect him to the crime so as to furnish sufficient corroboration to support a conviction. *Smith*, 332 S.W.3d at 443.

For accomplice-witness purposes, the most damning piece of evidence was the casing found in the apartment that forensics determined had been fired from Clay's gun. No evidence suggested that anyone other than Clay possessed or exercised control over that gun.

Once the accomplice-witness hurdle had been satisfied, Yandell identified one of the cell phones as Clay's, so the State did not have to rely strictly on the forensic report to link one of the cell phones to Clay. Thus, assuming, without deciding, that defense counsel erred by allowing Detective Cartwright to testify about the forensic report identifying one of the cell phones as Clay's, we hold that any error was harmless. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069; *Lopez*, 615 S.W.3d at 265.

We overrule Clay's second and third points.

V. CONCLUSION

Having overruled all of Clay's points, we affirm the trial court's judgments.

/s/ Brian Walker

Brian Walker
Justice

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Delivered: September 7, 2023