AFFIRMED; Opinion Filed December 6, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01329-CR

AHMED ABDALLA MOHAMED, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F-1435183-I

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Lang

Following a plea of not guilty, appellant Ahmed Abdalla Mohamed was convicted by a jury of aggravated robbery. Punishment was assessed by the jury at fifteen years' imprisonment and a fine of $3,000.

In four issues on appeal, appellant contends the evidence is insufficient to support his conviction and the trial court erred by overruling his objections to certain evidence. We decide appellant's four issues against him. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

Joseph Harvey testified at trial that he is a student at Brookhaven College. Additionally, he makes money by reselling "rare and very limited" athletic shoes that he purchases from

retailers. He posts information online to find buyers, then meets with the buyers in person at "a mall or somewhere kind of safe" to "do the deal."

Harvey stated that on approximately December 23, 2014, he received a text message on his personal cell phone expressing interest in two pairs of athletic shoes he had advertised for sale on Craigslist. He testified he recalled part of the phone number from which he received the text as being "516." At that point, counsel for the State asked Harvey if he would like to look at his "cell phone records" to refresh his recollection. Harvey stated he would like to do so. Then, the following exchange occurred between Harvey and counsel for the State:

> Q. . . . Mr. Harvey, I'm going to show you a page from your cell phone records. If you'll just take a look at that and read it to yourself, just in your head. Does that help refresh your recollection?
>
> A. Yes.
>
> Q. And when we're looking at this record, can you tell that this comes from your cell phone?
>
> A. Yes.
>
> Q. How can you tell that?
>
> A. Because it has my mom's work phone number on there.
>
> Q. Okay. So you can recognize some of the other numbers of incoming and outgoing calls?
>
> A. Yes.
> . . . .
> Q. Okay. And are you able to refresh your memory on the phone number there?
>
> A. Yes. Yes.
> . . . .
> Q. Okay. Well, Mr. Harvey, if it says 469-516-0841, does that sound right?
>
> A. Yes. Yes.
> . . . .
> Q. Okay.
>
> [COUNSEL FOR STATE]: Judge, I'll go ahead and offer State's Exhibit 4, which is just that page from his records that he's identified.

Following that exchange, defense counsel asked to "take the witness on a voir dire." In response to questioning by the defense on voir dire, Harvey testified his own phone number was not listed on State's Exhibit Number 4. Defense counsel objected to that exhibit "for predicate" and stated, "It's not his number. His number is not here. He's not in a position to authenticate this document." That objection was overruled. Then, the State's direct examination of Harvey continued as follows:

> Q. And, Mr. Harvey, did you actually give this record to the detectives in this case?
>
> A. Yes. I got it off my Sprint account online, so it's still up there, too.
>
> Q. It doesn't list your phone number because these are all the contacts coming in and out of your phone?
>
> A. Yes, coming to me.

At that point, State's Exhibit Number 4 was admitted into evidence.

Harvey testified that after receiving the text message described above, he agreed to meet with the prospective buyer at midnight in the parking lot of a "Wal-Mart Super Center" near Irving Mall. Harvey's girlfriend, Maria Nguyen, accompanied him to that meeting place. According to Harvey, at 12:09 a.m. on December 24, while sitting in his car with Nguyen at the meeting place, he received a phone call from the prospective buyer, a male. During that phone call, Harvey saw the prospective buyer and another man start walking across the parking lot toward Harvey's car to "come check out the shoes." Harvey stated the parking lot was not well lit. He got out of his car and took the shoes out of the trunk. Also, he turned on the flashlight on his cell phone so the prospective buyer could inspect the shoes. Nguyen remained in the front passenger seat of Harvey's car. Harvey testified he "got a good look" at the prospective buyer's face for several minutes while that individual was "right there next to me looking at the shoes." Harvey stated the prospective buyer "had like an Afro with like some blonde stripes" and was

tall, skinny, and "very aggressive." At that point in his testimony, Harvey identified the prospective buyer in open court as appellant.

According to Harvey, the price for both pairs of shoes was $700. Harvey testified appellant pulled out $300 in cash and said the rest of his cash was in his car. Harvey got back into his car, intending to follow in his vehicle as appellant and the other man walked to their car. Harvey stated that at that point, appellant and the other man "hopped in" the back seat of his car and told him to "keep driving to the end of the parking lot." Harvey testified he was surprised and nervous. He stated that when he reached the end of the parking lot, appellant pulled out a small, black gun, put it to Harvey's head, and told him to drive out of the parking lot. Harvey stated he was scared and shocked and followed appellant's instructions. Appellant demanded that Harvey and Nguyen give him their cell phones, shoes, and money, which appellant handed over to the other man. Then, appellant told Harvey to stop the car. The other man got out of the car and ran away with their belongings.

Harvey testified appellant remained in the car and told him to keep driving. While Harvey drove, appellant talked to Harvey and Nguyen, "just rambling and saying some weird stuff." Harvey stated appellant "spoke in a very distinct manner." Further, Harvey testified that at one point while he was driving, appellant "clicked the gun." According to Harvey, "He was like, just to let you know this gun is real, and I will shoot you." Harvey stated that after approximately fifteen minutes of driving, they arrived at an apartment complex. Appellant pointed out a trash can near the front of the complex and told Harvey he was going to take Harvey's car keys and would leave them in the trash can. Then, he instructed Harvey to drive to a dead end near the back of the complex. They stopped near a creek and appellant got out of the car. Appellant took Harvey's car keys and told Harvey and Nguyen to wait ten minutes before leaving the car. After ten minutes, Harvey and Nguyen left the car. They looked for the car keys

in the trash can, but the keys were not there. Then, they saw a couple "doing their laundry" and asked them for a cell phone to call police.

Harvey stated that when the police arrived, he gave them a description of appellant. Further, Harvey stated that on the following day, he logged into his Sprint account and provided police with the phone number appellant had called him from. Several days after the incident, Harvey went to the police station and viewed a photographic lineup. Harvey stated he was given six photographs to view. He testified he identified appellant in the lineup as the person who had robbed him and felt confident he had "picked out the right person." A copy of the photographic lineup, with markings by Harvey showing his selection of appellant, was admitted into evidence. Also, Harvey testified that while preparing for trial, he viewed a videotaped interview of appellant by a police detective and recognized the same "voice and mannerisms" he had heard during the incident in question.

On redirect examination, Harvey testified in part as follows:

> Q. Okay. And on your phone records, you weren't indicating that you remember any particular phone number, right?
>
> A. Yes.
>
> Q. You remembered a phone call that came in at a particular time?
>
> A. Yes.
>
> Q. And that was what time?
>
> A. 12:09 a.m.
>
> Q. Okay. So when you looked back on your records and brought that to the detective, you were showing where the call came from that you received at 12:09?
>
> A. Yes.
>
> Q. And that was at the time that you watched the defendant walking towards you on the phone?
>
> A. Yes.

Additionally, Harvey stated that while being held at gunpoint in his car, he heard appellant call the other man "Chris" and heard the other man call appellant "Drey."

Nguyen testified that on the night in question, she was with Harvey in the Wal-Mart parking lot when he received a phone call from the prospective buyer on his cell phone. At that time, she saw two men approaching the car in which she and Harvey were sitting. She stated she got a "good look" at the prospective buyer. She identified him in open court as appellant. Also, she stated (1) she was able to hear appellant's voice after he got into the car and held her and Harvey at gunpoint and (2) the gun used by appellant was silver.

Nguyen testified that several days after the incident she viewed a photographic lineup at the police station. She selected appellant in that lineup as the person who had robbed her and Harvey. She stated she "felt certain" when she made that identification. A copy of that photographic lineup, marked by her and showing her selection of appellant, was admitted into evidence. Additionally, Nguyen testified she later viewed a videotaped interview of appellant by a police detective. She stated she recognized appellant's voice and appearance in that videotape and is "confident" appellant is the person who robbed her and Harvey.

Officer Matthew Roth of the Irving Police Department testified he was on patrol on the evening in question and responded to a "robbery call" at an Irving apartment complex at approximately 12:40 a.m. According to Roth, the "victims" were a "young African-American man and a young Asian female." The victims (1) told him the crime occurred in the parking lot of a nearby Wal-Mart and (2) described the perpetrators as two black males, one "dark skinned" and one "lighter."

Officer Robert Turner of the Irving Police Department stated that on January 3, 2015, he arrested appellant on a warrant for aggravated robbery. According to Turner, police received a call on that date respecting an individual in a 7-Eleven store in Irving "stating that he was upset

with the clerk." Turner went to that location and found the individual described, who was appellant. After identifying him, Turner discovered he had an outstanding warrant for an aggravated robbery that had occurred on December 24, 2014. Appellant was arrested and taken into police custody.

Detective Boyce Wyatt testified he is assigned to the Criminal Investigation Division of the Irving Police Department. He stated that after the December 24, 2014 incident described above, he spoke with Harvey and Nguyen. He testified they sent him "the phone number that [Harvey] had on his phone that he had made contact or this arranged sell of shoes with that phone." Specifically, Wyatt identified State's Exhibit Number 4 as the "screen printout" that was given to him by Harvey and Nguyen and testified that exhibit "showed an incoming phone call" at 12:09 a.m. on Christmas Eve from "phone 469-516-0841." At that point, State's Exhibit Number 4 was published to the jury without objection.

Wyatt testified he "Googled the phone" and "came up with a hit on an Instagram account" under the name "king_ahmed 96." Wyatt stated appellant's first name is Ahmed and he was born in 1996. The State offered into evidence State's Exhibits Numbers 5 through 9, which were described as screen shots of photographs from the Instagram account described above. State's Exhibits Numbers 5 and 9 were admitted into evidence without objection "for all purposes." Those two exhibits showed photographs of the head and face of the same individual, a black male. Appellant objected to State's Exhibits Numbers 6 through 8 on the grounds that those exhibits had "nothing here that will be used to identify [appellant] as King Ahmed," were "more prejudicial than probative," and were "cumulative in nature because Exhibit Number 5 and 9 actually shows, based on the witness's testimony, information identifying the person in the picture as King Ahmed." State's Exhibits Numbers 6 through 8 were admitted for record purposes only.

Additionally, Wyatt testified he entered the phone number 469-516-0841 into "official law enforcement databases" and "it came back for the defendant." Specifically, according to Wyatt, appellant had listed that phone number as his contact number on municipal court documents in Irving and Denton. Wyatt stated that at that point, he assembled photographic lineups to "confirm that they—the victims could identify the individual who I was suspecting based on the information I had just gained."

Wyatt testified he spoke with appellant several days after his January 3, 2015 arrest. He stated appellant denied any involvement in the robbery. Also, appellant told Wyatt that although 469-516-0841 was his cell phone number, his phone had been lost or stolen in approximately mid-December. According to Wyatt, (1) during his interview with appellant, appellant was "aggressive and very animated and kind of just rambling," and (2) appellant's hair was "two-toned" with "kind of light tips on the top" and "kind of a—the old afro style." The State published to the jury a portion of Wyatt's videotaped interview with appellant.

Detective John Schingle of the Irving Police Department testified he presented the photographic lineups described above to Harvey and Nguyen, separately. According to Schingle, both identified appellant as the person who robbed them.

Deputy Irving Romero testified he is a city marshal with the City of Irving. He testified he arrested appellant on November 3, 2014 "for various things" and appellant provided 469-516-0841 as his "contact number" at the time he was arrested.

Detective David Carmical of the Irving Police Department testified he works in the Electronic Evidence Unit. He testified he examined "some cell phone records that [appellant] was a subscriber on" and those records showed (1) appellant is the subscriber for "Cricket phone 469-516-0841" and (2) a call from that number was made to Harvey's phone at 12:09 a.m. on December 24, 2104. Additionally, Carmical testified the cell phone records for "Cricket phone

469-516-0841" show at least two other phone numbers that were "being dialed" numerous times "between the date range of November 1 through 3, December 22, 23, 24 and 25, and January 1, 2 and 3." According to Carmical, it is a "correct assumption" that "if that phone had been stolen sometime in December, the person who stole that phone is calling the same two phone numbers that the defendant was calling" prior to the time the phone was stolen. Additionally, Carmical stated (1) he examined "Sprint telephone records" listing Harvey as the subscriber and (2) those records show that phone number received a call from 469-516-0841 on December 24, 2014 at 12:09 a.m. On cross-examination, Carmical testified the cell phone records examined by him (1) show appellant's phone was used after he was incarcerated and (2) do not show who actually made any of the calls listed.

Following the jury's finding of guilt, the parties presented testimony respecting punishment. Detective Eric Curtis of the Irving Police Department testified he is "familiar" with appellant because he "filed three separate cases on [appellant] for forgery and counterfeit money" in 2012. Those cases involved counterfeit money that was "being passed" at Irving High School, where appellant was a student at that time. Further, over appellant's objections on the grounds of relevancy and hearsay, Curtis testified (1) another person "involved in this ring of passing currency" was an individual named "Honeycutt"; (2) as part of appellant's punishment respecting those counterfeiting cases, appellant was ordered not to "associate with" Honeycutt; (3) Curtis saw "on the news" that Honeycutt was later "involved in a car chase" in Louisiana and "[t]here was a wreck, people ran, and there was counterfeit currency kind of found inside the car"; and (4) "this wasn't this defendant, but the person that he was not allowed to hang out with."

Officer Curtis Shield of the Irving Police Department testified he is a school resource officer at Irving High School. He stated he was the investigating officer on two of the 2012

counterfeiting cases described above. After arresting appellant on a warrant in one on the cases, he found seventeen counterfeit bills in appellant's pocket. Further, Shield testified appellant did not treat the teachers and staff at the high school with respect.

Officer Ken Goodman of the Irving Police Department testified that in November 2012, he stopped a vehicle in which appellant was a passenger. According to Goodman, (1) all three occupants of that vehicle "wound up being arrested for forgery"; (2) "there was over a thousand dollars in counterfeit currency located inside the car"; and (3) there was an odor of marijuana "emanating from inside the vehicle." Further, Goodman stated (1) because appellant was a juvenile at that time, he decided to release appellant to his father; (2) appellant "had attitude with his father" and "backtalked him"; and (3) he has seen appellant treat law enforcement officers disrespectfully.

Officer Jason Scherer of the Irving Police Department testified he came into contact with appellant on March 15, 2015, while appellant was "on bond" for the aggravated robbery in this case. Scherer stated he responded to a call respecting "somebody getting held up with a weapon" near MacArthur High School. He saw a vehicle coming from the crime scene that matched the description of the vehicle involved in the offense and followed that vehicle for several blocks. Then, he initiated a traffic stop. Scherer testified (1) there were five people in the vehicle; (2) appellant was a passenger in the back seat; (3) a gun was found in the front passenger area of the vehicle; (4) there was a "camouflage-colored brass knuckle," with a knife attached, on the floor near where appellant was sitting; and (5) colored bandannas, counterfeit money, several packets of marijuana, and scales were found in the vehicle.

At that point, the State requested that State's Exhibits Numbers 6, 7, and 8, which, as described above, consisted of screen shots from an Instagram account, be admitted into evidence "for all purposes." Appellant stated he was asserting the "same objection" he had made earlier

as to those exhibits.[1] The trial court overruled appellant's objections and those three exhibits were published to the jury. State's Exhibit Number 6 showed several photographs of piles of paper money and a photograph of a cell phone. State's Exhibit Number 7 showed photographs of piles of paper money and a photograph of two individuals, one of whom is the same individual pictured in State's Exhibits Numbers 5 and 9. State's Exhibit Number 8 showed the same individual pictured in State's Exhibits Numbers 5 and 9 holding up his middle finger, with the caption, "I'm rich now [expletive] the laws." Also, the trial court held a hearing outside the presence of the jury respecting the admissibility of State's Exhibit Number 8A, which was described as a video file posted to the same Instagram account described above. Appellant objected to that exhibit on the grounds that it was cumulative and lacked an adequate "nexus" or "connection." The trial court overruled appellant's objections.

Sumayia Izzeldin Akashi testified through an interpreter that she is appellant's mother. She testified (1) appellant is a high school graduate and has attended college and (2) she does not "know of any problems that [appellant] has." She stated that if appellant receives probation, she will "take care of him" and "make sure that he is in the right direction." On cross-examination, Akashi stated (1) the person pictured in State's Exhibit Number 8 is appellant and (2) appellant is one of the persons pictured in State's Exhibit Number 7.

Following the jury's verdict as to punishment, appellant filed a timely motion for new trial, which motion was overruled by operation of law. This appeal timely followed.

[1] As described above, appellant had previously objected to those three exhibits during trial on the grounds that the exhibits had "nothing here that will be used to identify [appellant] as King Ahmed" and were "more prejudicial than probative" and "cumulative in nature."

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

When reviewing a challenge to the legal sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of the witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Rather, we determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the adjudication. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992). The fact-finder is the sole judge of the witnesses' credibility and their testimony's weight. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). The fact-finder may choose to disbelieve all or any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Each fact need not point directly and independently to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is enough to warrant conviction. *See Kennemur v. State*, 280 S.W.3d 305, 313 (Tex. App.—Amarillo 2008, pet. ref'd). Circumstantial evidence is as probative as direct evidence and can be sufficient alone to establish an accused's guilt. *See id.*

B. Applicable Law

A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011). The

offense becomes aggravated robbery if the person uses or exhibits a deadly weapon. *Id*. § 29.03(a). A firearm is a deadly weapon. *Id*. § 1.07(a)(17)(A) (West Supp. 2016).

C. Application of Law to Facts

In his first issue, appellant contends "the evidence is legally insufficient to support the conviction for the offense of aggravated robbery." According to appellant, (1) "[t]he sufficiency of the evidence in this case is based on many circumstances where the State's evidence fails to meet the burden of proof" and (2) "[t]he record establishes, at best, only a 'mere modicum' of evidence of Appellant's guilt, which will not support a conviction beyond a reasonable doubt." Specifically, appellant asserts (1) the fact that the phone number 469-516-0841 was "listed to" appellant "was the only solid piece of evidence that police had to go on"; (2) appellant "maintains that the phone with this number was stolen before the offense occurred and it was not him who called the complainants and subsequently met with them and committed the offense"; (3) Harvey and Nguyen each viewed a videotaped interview of appellant before testifying at trial; (4) their testimony at trial describing the person who robbed them differed from the description they initially gave police; (5) "it was too dark for [Harvey] or [Nguyen] to have a good look at the suspect's face"; (6) the names "Chris" and "Drey" are not associated with appellant or his stolen phone; (7) the testimony of Harvey and Nguyen differed as to the color of the gun used during the robbery; and (8) police failed to view surveillance video of persons "going in and out of the Walmart store near the time of the offense," process Harvey's vehicle for fingerprints, or "speak with the couple at the apartments who let the complainants use their phone to call the police."

The State responds that the evidence is sufficient to support appellant's conviction for aggravated robbery because (1) appellant was identified as the robber by Harvey and Nguyen,

both in a photographic lineup and in court, and (2) phone records show Harvey received a phone call from appellant's cell phone just before the robbery.

The record shows the evidence that led police to consider appellant as a suspect included the cell phone number "listed to" appellant. However, in addition, both Harvey and Nguyen, independently, identified appellant in separate photographic lineups and in open court as the individual who had robbed them at gunpoint. Further, while Harvey and Nguyen initially described the robbers to police as two black males, one "dark skinned" and one "lighter," and then later gave a more detailed description of appellant at trial, the record does not show those descriptions are inconsistent. Additionally, as to all of the testimony described by appellant in his sufficiency challenge, the fact-finder was the sole judge as to the credibility and weight of that evidence. *See Bonham*, 680 S.W.2d at 819; *Sharp*, 707 S.W.2d at 614. On this record, we conclude the evidence is sufficient to support appellant's conviction. *See Kennemur*, 280 S.W.3d at 313.

We decide appellant's first issue against him.

III. ADMISSIBILITY OF EVIDENCE

A. Standard of Review

A trial court has great discretion in admitting evidence at trial. *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See, e.g., Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). When considering a trial court's decision to admit or exclude evidence, we will not reverse the ruling unless it falls outside the "zone of reasonable disagreement." *See Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009); *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007).

B. Applicable Law

Texas Rule of Evidence 901(a) provides, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). This provision does not limit the type of extrinsic evidence which may be used. *Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991).

It is well settled that error in the admission of evidence is cured where the same evidence comes in elsewhere without objection. *See Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004); *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003).

Article 37.07 of the Texas Code of Criminal Procedure states in part that "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and . . . any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2016).

Pursuant to Texas Rule of Appellate Procedure 44.2, "[i]f the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a). "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b). Generally, the erroneous admission or

exclusion of evidence is nonconstitutional error governed by rule 44.2(b). *See Gray v. State*, 159 S.W.3d 95, 98 (Tex. Crim. App. 2005) ("when only a statutory violation is claimed, the error must be treated as non-constitutional for the purpose of conducting a harm analysis"); *Bagheri v. State*, 119 S.W.3d 755, 762–63 (Tex. Crim. App. 2003) (erroneous evidentiary rulings rarely rise to level of denying fundamental constitutional rights). When evaluating harm under rule 44.2(b), we "need only determine whether or not the error affected a substantial right of the defendant." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). To make such a determination, we must decide whether the error had a substantial or injurious effect on the jury verdict. *Id*. Substantial rights are not affected by the erroneous admission or exclusion of evidence "if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). This court must consider the entire record, including testimony, evidence, voir dire, closing arguments, and jury instructions to determine whether the jury was affected. *Id*. at 355–56; *see also Bagheri*, 119 S.W.3d at 763. Additional factors include the nature of the evidence supporting the verdict, the character of the alleged error, and how the alleged error may be considered in connection with other evidence in the case. *Bagheri*, 119 S.W.3d at 763.

C. Application of Law to Facts

1. State's Exhibit Number 4

In his second issue, appellant contends the trial court erred by overruling his objection to State's Exhibit Number 4. According to appellant, the trial court abused its discretion by admitting the complained-of evidence because such evidence was "not properly tied to the defendant" and "not properly authenticated." Further, appellant asserts the admission of that evidence violated his (1) "Sixth Amendment right to confrontation" and (2) "substantial right to a fair trial."

The State responds that the trial court "properly admitted State's Exhibit Number 4, a page from the complainant's cell phone records, over Appellant's authenticity objection" because "[t]he complainant gave these records to police and identified them as his." Further, the State argues (1) "[s]ince the same evidence about which Appellant complains came in elsewhere without objection, any error was cured," and (2) appellant's contention respecting violation of his Sixth Amendment right to confrontation does not comport with his objection at trial and is inadequately briefed.

As described above, defense counsel objected to the admission of State's Exhibit Number 4 "for predicate" and stated, "[Harvey's] number is not here. He's not in a position to authenticate this document." Harvey testified that exhibit was a document listing "all the contacts coming in and out of" his cell phone and stated "I got it off my Sprint account online." The record shows appellant's objection respecting State's Exhibit Number 4 pertained to the absence of Harvey's own cell phone number on the document to show he was the receiver of the call from 469-516-0841. However, Harvey testified the document was a page from his Sprint account and listed calls to and from his cell phone. On this record, we conclude State's Exhibit Number 4 was properly authenticated. *See* TEX. R. EVID. 901(a).

Moreover, the record shows that during Wyatt's testimony, State's Exhibit Number 4 was published to the jury without objection and Wyatt stated, without objection, that it pertained to Harvey's phone and showed an incoming phone call from 469-516-0841 at 12:09 a.m. on December 24, 2014. Therefore, because the same evidence about which appellant complains was admitted elsewhere without objection, any error respecting the admission of State's Exhibit Number 4 was cured. *See Lane*, 151 S.W.3d at 193; *Martinez*, 98 S.W.3d at 193.

Additionally, as to appellant's Sixth Amendment complaint, the record does not show that complaint was asserted in the trial court, nor does appellant provide any argument in his

appellate brief respecting that contention. We conclude that complaint presents nothing for this Court's review. *See Holland v. State*, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991) (defendant waived constitutional right to confront witness by not objecting at trial); *Neal v. State*, 186 S.W.3d 690, 692 (Tex. App.—Dallas 2006, no pet.) ("A defendant in fact waives his constitutional right to confront witnesses if he does not object at trial."); *Mitchell v. State*, 238 S.W.3d 405, 408 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (concluding defendant waived review of confrontation issue on appeal because he did not object to testimony on Sixth Amendment grounds at trial); *see also* TEX. R. APP. P. 38.1(i); TEX. R. APP. P. 33.1.

We decide against appellant on his second issue.

2. State's Exhibits Numbers 6, 7, & 8

In his third issue, appellant asserts the trial court erred by overruling his objections to State's Exhibits Numbers 6, 7, and 8. According to appellant, (1) "[t]he potential for abuse and manipulation of a social networking site by someone other than it's purported creator and/or user requires a greater degree of authentication than merely identifying an image in a photograph in order to reflect the defendant as its creator"; (2) "insufficient facts were provided to support a reasonable jury determination that the evidence proffered was authentic"; (3) "the prejudicial effect outweighed the probative value since State's Exhibits 5 and 9 identified the person in the picture as 'King Ahmed'; therefore the other Exhibits would be cumulative"; and (4) "this evidence harmfully contributed to the jury's verdict that substantially denied Appellant his right to a fair trial."

The State responds that the trial court properly admitted that evidence during the punishment phase of trial. Further, the State contends any error in overruling appellant's objections to those exhibits was harmless.

As described above, (1) State's Exhibit Number 6 showed several photographs of piles of paper money and a photograph of a cell phone; (2) State's Exhibit Number 7 showed photographs of piles of paper money and a photograph of two individuals, one of whom is the same individual pictured in State's Exhibits Numbers 5 and 9; and (3) State's Exhibit Number 8 showed the same individual pictured in State's Exhibits Numbers 5 and 9 holding up his middle finger, with the caption, "I'm rich now [expletive] the laws." As to appellant's contention that those three exhibits are "cumulative" of State's Exhibits Numbers 5 and 9 thus more prejudicial than probative, we disagree. State's Exhibits Numbers 5 and 9 do not show photographs of piles of money or an individual holding up his middle finger with the caption described above. Further, as to supporting evidence of authenticity, the record shows (1) appellant's mother testified during the punishment phase of trial that appellant is the person pictured in State's Exhibit Number 8 and is one of the individuals pictured in State's Exhibit Number 7 and (2) other witnesses testified as to appellant's involvement in counterfeiting and his disrespectful attitude toward police and others.

Moreover, as described above, the erroneous admission of evidence is generally nonconstitutional error governed by rule 44.2(b). *See Gray*, 159 S.W.3d at 98; *Bagheri*, 119 S.W.3d at 762–63. Appellant does not contend, and the record does not show, that rule 44.2(b) is inapplicable. TEX. R. APP. P. 44.2(b). Therefore, we "need only determine whether or not the error affected a substantial right of the defendant." *Morales*, 32 S.W.3d at 867. Substantial rights are not affected if, based on the record as a whole, we have a fair assurance that the error did not influence the jury or had but a slight effect. *Motilla*, 78 S.W.3d at 355. The record shows (1) appellant was found guilty of aggravated robbery based on evidence that included testimony by two eyewitnesses and (2) during the punishment phase of trial, the jury heard testimony respecting appellant's involvement in counterfeiting, his disrespectful attitude toward

police and others, and an incident subsequent to the robbery in question in which appellant was a passenger in a vehicle stopped by police during another robbery investigation, which vehicle contained weapons, drugs, and counterfeit money. Further, the record does not show the exhibits in question were mentioned in closing arguments or any portion of the trial other than those described above. After reviewing the record as a whole, we conclude the admission of the exhibits in question did not influence the jury or had but a slight effect.[2] *See Motilla*, 78 S.W.3d at 355.

We decide against appellant on his third issue.

3. Testimony Respecting Associate of Appellant

In his fourth issue, appellant contends the trial court erred by overruling his objection during the punishment phase of trial to Detective Curtis's testimony respecting an associate of appellant, i.e. Honeycutt. Specifically, appellant asserts (1) the trial court improperly allowed the state to elicit "irrelevant hearsay evidence" about acts of Honeycutt that were not tied to appellant and (2) "the introduction of hearsay effected [sic] a substantial right to a fair trial and was harmful error requiring reversal."

The State responds that the trial court did not commit reversible error by admitting the complained-of testimony because "[g]iven Appellant's commission of seven other offenses, the sentence assessed by the jury would not have been affected by evidence that Appellant's associate was involved in a car chase in Louisiana."

Even assuming without deciding the trial court's denial of appellant's objection to the testimony in question constituted an abuse of discretion, the record shows, and appellant does not dispute, that the applicable harm analysis is that described in rule 44.2(b). *See Gray*, 159 S.W.3d

[2] In his argument pertaining to his third issue, appellant also addresses the video file that was described at trial as State's Exhibit Number 8A. Although the trial court overruled appellant's objections to that exhibit, the record does not show State's Exhibit Number 8A was published to the jury. Therefore, to the extent appellant asserts error respecting the admission of State's Exhibit Number 8A, we conclude any such error was harmless. *See* TEX. R. APP. P. 44.2(b).

at 98; *Bagheri*, 119 S.W.3d at 762–63. Under that standard, we consider "whether or not the error affected a substantial right of the defendant." *Morales*, 32 S.W.3d at 867. As described above, the record shows that in testifying as to the acts of Honeycutt, Curtis specifically stated "this wasn't this defendant, but the person that he was not allowed to hang out with." Also, (1) appellant was found guilty of aggravated robbery based on evidence that included testimony by two eyewitnesses and (2) other evidence presented during the punishment phase of trial described appellant's counterfeiting and disrespectful attitude, as well as the more recent incident described above in which appellant was a passenger in a vehicle stopped by police during another robbery investigation. Further, the record does not show the complained-of testimony respecting Honeycutt was mentioned during closing arguments or at any point during trial other than that described above. After reviewing the record as a whole, we conclude the admission of the complained-of testimony respecting Honeycutt did not influence the jury or had but a slight effect. *See Motilla*, 78 S.W.3d at 355.

We decide appellant's fourth issue against him.

IV. CONCLUSION

We decide against appellant on his four issues. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AHMED ABDALLA MOHAMED,
Appellant

No. 05-15-01329-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
No. 2, Dallas County, Texas
Trial Court Cause No. F-1435183-I.
Opinion delivered by Justice Lang, Justices
Myers and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 6th day of December, 2016.