Opinion issued April 24, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00155-CR

EVERADO ZUNIGA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1079161

MEMORANDUM OPINION

A jury found appellant, Everado Zuniga, guilty of aggravated robbery, and the trial court assessed punishment at 30 years in prison. In five issues, appellant

contends that (1) the evidence is legally and factually insufficient to sustain the conviction, (2) there was a fatal variance between the trial testimony and the indictment, (3) trial counsel was ineffective for failing to investigate his sanity and competency, (4) there was improper jury argument, and (5) the trial court erred by denying his motion for new trial.

We affirm.

Background

On June 2, 2006, Guadalupe Garcia was standing by his truck, smoking a cigarette and listening to the truck radio outside a medical clinic where his infant daughter was being treated. Appellant approached Garcia, put a knife to his stomach, and asked for the keys to the truck. Garcia handed over the keys and his rings, watch, and wallet, and appellant drove away in the truck. Garcia described appellant's unique tattoos to the police—a star on his head and the number "45" and Jesus' face were tattooed on his arm. The next day, the police found the truck, which had been completely stripped. Appellant was developed as a suspect, and Garcia identified him in a photo spread.

Screwdriver vs. Knife

In issue one, appellant argues that the evidence is legally and factually insufficient to establish that appellant used a knife in the commission of the offense.

In a related issue, appellant contends that there is a "fatal variance between the trial testimony that appellant robbed [Garcia] by exhibiting a screwdriver, and the indictment which alleged a knife."

Sufficiency

In evaluating the legal sufficiency of the evidence, we view it in the light most favorable to the verdict and determine whether any 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, 99 S. Ct. 2781, 2789 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The same standard applies to both direct and circumstantial evidence cases. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995).

We do not weigh any evidence or evaluate the credibility of any witnesses, as this was the function of the fact finder. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992). Instead, we must 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 verdict. *See Adelman*, 828 S.W.2d at 422. In making this determination, we resolve any inconsistencies in the evidence in favor of the verdict. *Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991).

In conducting a factual sufficiency review, we view all of the evidence in a neutral light. *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999). Our factual sufficiency review must include a discussion of the most important and relevant evidence that supports the appellant's complaint on appeal. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). We will set aside the verdict 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). We may not conclude that the evidence is factually insufficient simply because we disagree with the verdict. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). The fact finder alone determines the credibility of the witnesses and may choose to believe all, some, or none of their testimony. *Cain v. State*, 958 S.W.2d 404, 407 n.5 (Tex. Crim. App. 1997).

A person is guilty of aggravated robbery if he uses or exhibits a deadly weapon in the course of committing robbery. TEX. PEN. CODE ANN. § 29.03(a) (2) (Vernon 2003). Appellant contends that the evidence is legally and factually insufficient to support the finding that appellant used or exhibited a *deadly weapon*.

When discussing the events surrounding the aggravated robbery, the State asked Garcia the following questions:

Q. Who arrived?

A. The one that robbed me.

Q. What happened next?

A. He put that thing to my stomach.

Q. Before he put the thing to your stomach did anything happen?

A. No.

Q. So did he say anything before he put the knife to your stomach?

A. No.

Q. What did he say, if anything, when he put the knife to your stomach?

Appellant: Objection, your Honor. Assumes facts not in evidence.

Court: Sustained.

Q. When he pulled his knife did he say anything?

A. Yes. To give him the keys.

Q. What did you say?

A. No. Well then I gave them to him and everything else.

Q. What did the knife look like?

A. Like a screw driver.

. . .

Q. Where was the knife?

A. In his pocket.

. . .

Q. And where did he put the knife to you?

A. My stomach.

. . .

Q. And the person you gave all that stuff to when you—was the knife out the whole time while you were giving it to him?

A. Yes.

. . .

Q. And I'm not sure if I asked you this or not Mr. Garcia when he put the knife to your stomach were you scared?

A. Yes.

Appellant argues that, because the State's weapons expert did not testify that a screwdriver could be a deadly weapon, the State has failed to prove an essential element of its case. We disagree.

Garcia testified that the knife *looked like* a screwdriver. He did not testify that appellant was wielding a screwdriver. Furthermore, Garcia was asked if appellant said anything when he put the *knife* to Garcia's stomach or when he pulled the *knife*. Garcia answered both questions and many more without qualifying that appellant had

a screwdriver and not a knife.

We hold that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, the evidence is not so weak that the verdict is clearly wrong and manifestly unjust, and the verdict is not against the great weight and preponderance of the evidence. Accordingly, we overrule issue one.

Variance

In issue two, appellant contends that there is a "fatal variance between the trial testimony that appellant robbed [Garcia] by exhibiting a screwdriver, and the indictment which alleged a knife."

As a general rule, a variance between the indictment and evidence at trial is fatal to a conviction. *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995); *Reyes v. State*, 3 S.W.3d 623, 625 (Tex. App.—Houston [1st Dist.] 1999, no pet.). This rule, however, applies only to a material variance, or one that misleads the defendant to his prejudice. *Id*.

Having held that the evidence was legally and factually sufficient to support the conviction, we overrule issue two.

Prosecutorial Misconduct

In issue four, appellant asserts that the prosecutor erred when she injected her personal opinion of the witness's credibility and injected facts outside the evidence.

Appellant complains of two instances where the State engaged in prosecutorial misconduct. The first instance occurred during voir dire when the State attempted to explain why the first officer on the scene would not be testifying. The State commented as follows:

> The evidence will show you that you will not hear from that police officer though. He has pancreatic cancer and is literally on his death bed, cannot come to court but the complainant, Mr. Guadalupe Garcia, will testify that's what he told that officer.

Appellant did not object.

The second instance occurred during closing argument when the State commented as follows:

> So, . . . this victim, who, my opinion doesn't look like he would be in here lying . . to me . . . . [L]ook at the credibility of Mr. Garcia up there on the stand. I know I could tell and I hope you could through his demeanor that he was scared of [appellant].

Appellant did not object to either of these closing argument statements.

"To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). The essential requirement is a timely, specific request that the trial court refuses. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). When a defendant receives the relief requested but has not requested a mistrial, the error, if any, is waived. *Gleffe v. State*, 509 S.W.2d 323, 325 (Tex. Crim. App. 1974).

Even if the error was such that it could not be cured by an instruction, the defendant must object and request a mistrial to preserve the error. *Mathis v. State*, 67 S.W.3d 918, 927 (Tex. Crim. App. 2002). The same preservation rule applies to comments made during voir dire. *See Fuentes v. State*, 991 S.W.2d 267, 276 (Tex. Crim. App. 1999); *Blackwell v. State*, 193 S.W.3d 1, 20 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

Here, the record shows that appellant did not object, and thus did not obtain an adverse ruling from the trial court on this issue. Because appellant did not obtain an adverse ruling from the trial court, he has failed to preserve error, if any, on this issue.

We overrule issue four.

Ineffective Assistance of Counsel

In issue three, appellant argues that his trial counsel was ineffective because he (1) failed to explore appellant's sanity and competency, (2) failed to call mitigating witnesses, and (3) failed to call a psychiatric expert. In issue five, appellant contends that the trial court erred by denying his motion for new trial.

Standard of Review

In order to prove an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and, but for his counsel's unprofessional error, there is a reasonable

probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that his performance falls within the wide range of reasonable professional assistance or trial strategy. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Trial counsel has the duty "'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996) (*quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066). A trial counsel's decision to not investigate "'must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to [trial] counsel's judgments.'" *Id*. (*quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066). When a defendant has given trial counsel "reason to believe that pursuing certain investigations would be fruitless or even harmful, [trial] counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066; *see Posey v. State*,

763 S.W.2d 872, 877 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

Also, an appellate court will not find a trial counsel's performance as incompetent and unprofessional based on "speculation." *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). In fact, when no evidence exists as to why a trial counsel made a certain decision, "an appellate court 'commonly will assume a strategic motivation if any can possibly be imagined,' and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (citation omitted) (quoting 3 Wayne R. LaFave et al., Criminal Procedure § 11.10(c), at 717 (2d ed.1999)).

Moreover, when a defendant complains that his trial counsel was ineffective for failing to call a witness at trial, the defendant must make a preliminary showing that the witness would have been available to testify at trial and that the witness's testimony would have been beneficial. *Ex parte McFarland*, 163 S.W.3d 743, 758 & n.48 (Tex. Crim. App. 2005). Likewise, when a defendant complains that his trial counsel rendered ineffective assistance by failing to call an expert witness, the defendant must first show that the expert would have testified in a manner beneficial to him. *See Cate v. State*, 124 S.W.3d 922, 927 (Tex. App.—Amarillo 2004, pet. ref'd); *Teixeira v. State*, 89 S.W.3d 190, 194 (Tex. App.—Texarkana 2002, pet.

ref'd). Also, before we may conclude that appellant's trial counsel rendered ineffective assistance in failing to object to certain evidence, appellant must show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004).

A trial court is given wide latitude in determining whether to grant or deny a motion for new trial. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). We review the trial court's decision for an abuse of discretion. *See Salazar v. State*, 38 S .W.3d 141, 148 (Tex. Crim. App. 2001); *Escobar v. State*, 227 S.W.3d 123, 126 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). We do not substitute our judgment for that of the trial court; we decide only whether the trial court's decision was arbitrary or unreasonable. *Escobar*, 227 S.W.3d at 126. A trial court abuses its discretion only when no reasonable view of the record could support the court's ruling. *Id*. The trial court is the sole judge of the credibility of the witnesses at the hearing on the motion for new trial. *Lewis*, 911 S.W.2d at 7.

Sanity and Competency

Appellant contends that his trial counsel was ineffective for failing to request a motion for psychiatric examination to determine his competency and sanity, given the medical evidence presented at the motion for new trial hearing. The evidence allegedly shows "lengthy MHMRA care and treatment for schizophrenia, bipolar

disorder, depression and other mental illnesses, as well as a serious brain injury in 2002 in an automobile accident, which resulted in further mental illness." Appellant argues that "there is absolutely no plausible trial strategy to justify not having a psychiatrist make a determination if Appellant was sane and competent given his extensive psychiatric history, some of which was known by counsel." He believes he was "entitled to a lawyer who would at least investigate the mental health issues and perhaps present punishment witnesses in that regard."

During the hearing on appellant's motion for new trial, appellant's trial counsel testified that he met with appellant eight times before trial, and appellant was always able to communicate about the facts of the case and possible defenses. He testified that he never saw signs of mental incompetence or insanity. After learning that appellant was bipolar, moderately depressed, had used marijuana and cocaine, had an antisocial personality disorder, and had a brain injury, appellant's trial counsel sent out a letter of inquiry seeking advice. He received confidential information and determined that appellant could not use mental incompetency or insanity as a defense. Trial counsel requested a 21-day evaluation after appellant's mother told him about appellant's mental health issues. The record reflects that appellant's trial counsel considered appellant's mental history, but his trial strategy rejected the mental health trial tactic.

Mitigating Witnesses

Appellant asserts that his trial counsel was ineffective for failing to call mitigating witnesses at punishment, "including friends and family members, who would be extremely helpful regarding mitigation, especially in light of his brain injury and mental illness" and for failing to call psychiatric expert witnesses at punishment who may have been beneficial to his case.

There was no evidence that the witnesses were available and willing to testify. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) (while failing to produce witnesses may be a basis for an ineffective assistance claim, appellant must show that the witnesses were available and willing to testify). Appellant has not shown that his counsel was ineffective.

Motion for New Trial

Appellant contends that the trial court abused its discretion by denying his motion for new trial, which alleged that his trial counsel was ineffective.

Having held that appellant has failed to satisfy the *Strickland* test, we further hold that the trial court did not abuse its discretion in denying appellant's motion for new trial.

We overrule issues three and five.

Conclusion

We affirm the trial court's judgment.

George C. Hanks, Jr.
Justice

Panel consists of Justices Nuchia, Hanks, and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).