Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00784-CR

NO. 01-10-00785-CR

BRANDON LENARD MILES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case Nos. 1247284 & 1264436

MEMORANDUM OPINION

A jury convicted appellant, Brandon Lenard Miles, of the first degree felony offenses of aggravated assault on a public servant and aggravated robbery and

assessed punishment at twelve years' confinement for both offenses, to run concurrently.[1] In two issues, appellant contends that the trial court erred in (1) overruling his objection to the prosecutor's argument referencing appellant's appearance during the guilt-innocence phase of trial and (2) overruling his objection that this argument was outside of the record and injected new and harmful facts into the proceeding.

We modify the judgments of the trial court and affirm as modified.

Background

On August 26, 2009, Houston Police Department ("HPD") Officer P. Marquez was working an off-duty job as a security officer at Amegy Bank in Northeast Houston. Shortly before the lobby of the bank closed, two men entered the bank and walked directly to the teller stations. Officer Marquez noticed the men because both were wearing long-sleeved shirts or jackets in late August. One of the men, later identified as Anthony Onibokun, wore a white towel around his neck. The other man, later identified as appellant, wore a white hat. At trial, Officer Marquez identified appellant as the man wearing the white hat during the robbery.

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[1] *See* TEX. PENAL CODE ANN. §§ 22.02(b)(2)(B), 29.03(a)(2) (Vernon 2011). The charge for aggravated assault on a public servant was tried in trial court cause number 1247284 and resulted in appellate cause number 01-10-00784-CR. The charge for aggravated robbery was tried in trial court cause number 1264436 and resulted in appellate cause number 01-10-00785-CR.

As the men stood at the teller stations, Officer Marquez saw one of the men pull something from his waistband, and Marquez recognized the grip of a handgun. Officer Marquez testified that he identified himself as a police officer and told the men to drop their weapons. The men turned around to face Officer Marquez, and appellant pointed a gun at Marquez, who had also drawn his weapon. Marquez, Onibokun, and appellant exchanged gunfire, and Onibokun and appellant then fled the bank. No one was injured during this incident.

HPD Sergeant C. Howard showed Officer Marquez a photo-array several months after the robbery. Officer Marquez gave a "100% positive" identification of appellant. Officer Marquez testified that the picture of appellant in the photo-array—in which appellant wore his hair in braids and had no facial hair—looked like appellant did at the time of the robbery. Officer Marquez further testified that appellant did not look the same at trial as he did in the photo-array. Specifically, appellant's hairstyle was different, he had a goatee, and he looked a little bit heavier at trial. The trial court admitted into evidence the photo-array, still photographs from the bank's surveillance video, and the surveillance video itself.

FBI Bank Robbery Task Force Officer J. Michael testified that he created the photo-array that contained appellant's picture. Officer Michael stated that he had difficulty creating the photo-array because appellant had an "unusual hairstyle"—he wore his hair braided or in dreadlocks. Officer Michael showed the

photo-array to Rosita Flores and Rosa Crespin, two of the tellers at Amegy Bank, and both women positively identified appellant as the man wearing the white hat during the robbery. On cross-examination, defense counsel showed Officer Michael a still photograph from the surveillance video, and Officer Michael agreed that the man wearing the white hat had "protruding" and "prominent" ears.

Harris County Sheriff's Department Deputy Persand, who arrested appellant, testified that, at the time of his arrest, appellant had in his pocket a "worn" and "quite folded-up" wanted poster issued after the robbery that displayed a still photograph from the bank's surveillance video. Deputy Persand further testified that the picture of appellant used in the photo-array is what he looked like in December 2009, when the array was created. Deputy Persand acknowledged that appellant's appearance had changed between the date of the photo-array and the date of trial, but he agreed with the State that the picture in the array was "still very clearly the defendant." Deputy Persand also testified that at the time of trial, appellant wore his hair in a "small Afro."

Rosita Flores testified that both men initially walked to her teller station and appellant stood there for "a few seconds" before he walked over to Rosa Crespin's station. Onibokun told Flores that he wanted to cash a check, and, when she asked him for his identification, he pulled out a gun, pointed it at her, grabbed her hand, and told her to put all of her money in a bag. Onibokun was still holding her hand

when he turned to face Officer Marquez. Flores hid under her station when the men and Officer Marquez started firing their weapons. Appellant did not say anything to Flores, but she did see him display a gun. Flores stated that she identified appellant as the man in the white hat while viewing the photo-array, and she identified him a second time at trial. She testified that appellant wore his hair in a "mini-Afro" at the time of the trial.

Flores also testified that she viewed the still photographs from the surveillance video on the Internet on at least three different occasions before Officer Michael showed her the photo-array. She stated that her out-of-court identification was based solely on her recollection of the incident and not on the surveillance photographs that she viewed. She agreed with defense counsel that she only looked at the man in the white hat for a few seconds.

Rosa Crespin testified that she "[got] a really good look" at the men as they walked into the bank and as they stood at Flores's station. She did not hear either man say anything as they stood before Flores. Appellant then walked to her station, and "before [she] was able to push away, he grabbed [her] hand." Appellant pulled out a gun as he grabbed Crespin's hand, pointed the gun at her, and told her to give him her money. Crespin stated that appellant's hat did not obstruct her ability to see his face because he was standing so close to her station. She also testified that she watched the surveillance video of the robbery, but she

did not see this video until Onibokun's trial,[2] and, therefore, it did not influence her out-of-court identification of appellant. She further testified that appellant's distinctive features included his ears, which "stick out."

During the guilt-innocence phase argument, the following exchange occurred:

> [State]: So that's why they put the photo array together. Let me show you this. I'll walk this past you one-by-one. Here he is right here. And if you look at him today, he's gained weight. He doesn't have his hair in braids. He is trying to cover his ears maybe from you, but here is his picture.
>
> [Defense counsel]: Your Honor, I object to that being a comment on the defendant's appearance.

The trial court overruled this objection. Defense counsel did not object on the grounds that the State's argument was outside of the record or that it injected new and harmful facts into the proceeding.

The jury found appellant guilty of the offenses of aggravated assault on a public servant and aggravated robbery and assessed punishment at twelve years' confinement for each offense, to run concurrently.

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[2] Onibokun was convicted of aggravated assault on a public servant and aggravated robbery. The Fourteenth Court of Appeals affirmed the convictions. *See Onibokun v. State*, No. 14-10-00480-CR, 2011 WL 1466408 (Tex. App.—Houston [14th Dist.] Apr. 19, 2011, pet. filed) (mem. op., not designated for publication).

Improper Jury Argument

A. Comment on Defendant's Appearance

In his first issue, appellant contends that the trial court erred in overruling his objection to the prosecutor's reference to appellant's courtroom appearance during the guilt-innocence phase argument.

Proper jury argument falls within four general categories: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *Gallo v. State*, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007). To determine whether the argument properly falls within one of these categories, we consider the argument in light of the record as a whole. *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). We review a trial court's ruling on an objection to jury argument for an abuse of discretion. *See Cole v. State*, 194 S.W.3d 538, 546 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (concluding that trial court did not abuse its discretion in overruling defense counsel's objections to State's arguments).

A prosecutor is permitted, during argument, to "draw from the facts in evidence all inferences which are reasonable, fair and legitimate, but he may not use jury argument to get before the jury, either directly or indirectly, evidence which is outside the record." *Jordan v. State*, 646 S.W.2d 946, 948 (Tex. Crim.

App. 1983); *see also Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997) (holding that State has "wide latitude" in drawing inferences from evidence, as long as inferences are reasonable and offered in good faith). The State may call the jurors' attention to that which they had an equal opportunity to observe, provided that such information is reflected in the record or is of such common occurrence "that its recognition requires no expertise before proper comment thereon may occur." *Jordan*, 646 S.W.2d at 948.

In *Good v. State*, the Court of Criminal Appeals held that although the State may allude during argument to a testifying defendant's demeanor while he testified, the State may not reference the defendant's non-testimonial courtroom demeanor as evidence of guilt. 723 S.W.2d 734, 736 (Tex. Crim. App. 1986); *see also Wead v. State*, 129 S.W.3d 126, 130 n.8 (Tex. Crim. App. 2004) ("We have recognized that, during closing argument at the guilt/innocence phase, a prosecutor may not properly comment upon the defendant's demeanor in the courtroom, since the defendant's demeanor in the courtroom is not evidence of guilt."). The court noted that a defendant's demeanor during a witness's testimony was not a proper subject for argument because "[i]t was not offered into evidence through any legally recognizable method of proof." *Good*, 723 S.W.2d at 736. "Allowing the State to summarize appellant's nontestimonial demeanor impermissibly placed appellant's demeanor before the jury through the prosecutor's unsworn jury

argument." *Id.* The Court of Criminal Appeals has also noted, however, that if the record reflects that the defendant "misbehaved or conducted himself in the jury's presence in an unacceptable manner," this conduct is a proper subject for discussion during argument. *See Dickinson v. State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984).

In both *Good* and *Dickinson*, the prosecutor referred to the defendant's orderly non-testimonial behavior as evidence of the defendant's lack of remorse and contrition. *Good*, 723 S.W.2d at 735; *Dickinson*, 685 S.W.2d at 322. In both of these cases, the record did not include admitted evidence concerning the defendant's actual courtroom behavior and demeanor. *Good*, 723 S.W.2d at 736 ("Appellant's demeanor during the complainant's testimony was not evidence subject to reference by the prosecutor."); *Dickinson*, 685 S.W.2d at 323 ("[W]e have yet to find, and the State does not refer us to any place in the record, any act on the part of the appellant that might enable us to conclude that he misbehaved or conducted himself in an improper manner during the course of his trial."); *see also Jordan*, 646 S.W.2d at 947 (noting that record contained no evidence to support prosecutor's argument telling jurors to "look at the needle tracks on [appellants' arms]").

Here, in contrast, the issue is not appellant's demeanor but his appearance. The record contained evidence that appellant's appearance had changed in between

the time of the robbery and the time of his trial. *See Van Zandt v. State*, 932 S.W.2d 88, 93 (Tex. App.—El Paso 1996, pet. ref'd) (holding, in case where evidence was admitted that defendant's appearance had changed between time of offense and time of trial, that although "prosecutor's comment concerning the proclivity of individuals charged with crimes to change their appearance to thwart identification was speculative and beyond the scope of the evidence at trial," error was harmless given complainant's unobjected-to statement of identification). Officer Marquez, who positively identified appellant both in and out-of-court as the man who wore the white hat during the robbery, testified that appellant's appearance had changed since the offense. Specifically, appellant had gained weight, he had a goatee, and "[h]is hair [was] different." Officer Michael, who created the photo-array, testified that at the time of his booking photograph, which was the picture used for the photo-array, appellant wore his hair in braids, which was an "unusual hairstyle" and made it difficult for Michael to find five similar "fill-ins" for the array. Officer Michael also agreed, when shown a still photograph from the surveillance video on cross-examination, that the man who wore the white hat had "protruding" and "prominent" ears.

Deputy Persand, who arrested appellant, agreed that the picture used in the photo-array was what appellant looked like when he was arrested in December 2009, and, although appellant's appearance had changed since his arrest, the photo-

array picture was still recognizable as appellant. Deputy Persand also described appellant's hairstyle at trial as a "small Afro." Rosita Flores, who also identified appellant as the man in the white hat both in and out of court, agreed that appellant's hairstyle at trial was a "mini-Afro." Rosa Crespin, who also positively identified appellant, testified that one of appellant's distinctive features was ears that "stick out." The trial court admitted into evidence the photo-array, still photographs from the surveillance video, and the surveillance video itself.

Thus, there is evidence in the record that, at the time of the offense, appellant wore his hair in braids, which lay flat against his head and clearly displayed his "protruding" and "prominent" ears. There is also evidence in the record that, at the time of the trial, appellant had, in addition to gaining weight and growing a goatee, styled his hair into a small "Afro," a hairstyle that is full and puffy and that obscures the ears. As appellant acknowledges, the sole factual issue in this case was the identity of the man wearing the white hat during the robbery. We therefore conclude that the State's argument that appellant's appearance had changed and that he was "trying to cover his ears maybe from [the jury]" is a reasonable deduction from the evidence and, thus, constitutes proper jury argument.

Even if the State's argument was improper and the trial court erred in overruling defense counsel's objection, we would hold that the error was harmless.

An erroneous ruling regarding comments made during argument is non-constitutional error subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). TEX. R. APP. P. 44.2(b); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). We disregard any non-constitutional error that does not affect a defendant's substantial rights by having a "substantial and injurious effect or influence in determining the jury's verdict." *Jabari v. State*, 273 S.W.3d 745, 754 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)); TEX. R. APP. P. 44.2(b). We should not reverse a conviction for non-constitutional error if, after examining the record as a whole, we have "fair assurance that the error did not influence the jury, or had but slight effect." *Jabari*, 273 S.W.3d at 754 (citing *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)).

When determining whether the trial court committed reversible error in overruling an objection to improper jury argument, we consider three factors: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Mosley*, 983 S.W.2d at 259; *Cole*, 194 S.W.3d at 547.

Here, the prosecutor stated that appellant had gained weight and changed his hairstyle since the picture that was included in the photo-array. The prosecutor then opined that "maybe" appellant was trying to cover his ears from the jury. Three eyewitnesses identified appellant as the man who wore the white hat during the robbery. Several witnesses testified without objection that appellant had gained weight and that he had changed his hairstyle during the time between the photo-array and the trial, and two witnesses testified on cross-examination that the man who wore the white hat had distinctive ears. The prosecutor's statement that "maybe" appellant was trying to hide his distinctive ears from the jury was brief, and he did not repeat this argument or belabor the inference that appellant deliberately changed his appearance before the trial to cast doubt on his identity as a participant in the robbery. Instead, the prosecutor focused on the fact that appellant had a well-worn copy of a wanted poster from the robbery in his pocket when he was arrested and the fact that three different eyewitnesses all positively and unequivocally identified appellant as one of the robbers. *See Van Zandt*, 932 S.W.2d at 92–93 (holding similar argument harmless even though prosecutor repeatedly argued that defendant's appearance had changed and that it was to "gang member" defendant's advantage to appear "nice and clean cut" at trial).

Although the trial court overruled defense counsel's objection, and thus did not give a curative instruction to disregard, the evidence supporting the verdict was

so strong that appellant's conviction was certain even absent the alleged misconduct. Three different eyewitnesses identified appellant in-court as the man who wore the white hat during the robbery, even though they all acknowledged that appellant's appearance had changed since the robbery. Each witness testified that during the robbery, they had a clear, unobstructed view of appellant. These witnesses were unequivocal in their in-court identifications. All three witnesses also unequivocally identified appellant out of court as one of the robbers based on a photo-array. The trial court admitted into evidence the photo-array, still photographs from the bank's surveillance video, and the surveillance video itself.

Considering the record as a whole, we conclude that the prosecutor's argument, even if improper, did not influence the jury and thus was harmless error. *See id.* at 93 ("While the State, on several occasions, mentioned the proclivity of individuals to change their appearance at trial, we fail to perceive how the statements had much additional impact over the unobjected-to statement [of identification] of the victim.").

We overrule appellant's first issue.

B. Argument Outside the Record

In his second issue, appellant contends that the trial court erred in overruling his objection that the prosecutor's argument referencing his appearance was outside the record and injected new and harmful facts into the proceeding.

To preserve error, an objection at trial must comport with the complaint made on appeal. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("To avoid forfeiting a complaint on appeal, the party must 'let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.' This gives the trial judge and the opposing party an opportunity to correct the error.") (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)). We have previously held that an appellant fails to preserve error when he objects at trial that the State's argument is a comment on the appellant's failure to testify but argues on appeal that the argument was outside of the record. *See Coffey v. State*, 744 S.W.2d 235, 239 (Tex. App.—Houston [1st Dist.] 1987), *aff'd*, 796 S.W.2d 175, 180 (Tex. Crim. App. 1990) (finding our reliance on two past Court of Criminal Appeals decisions holding same "well placed"); *see also Hawkins v. State*, 135 S.W.3d 72, 83 (Tex. Crim. App. 2004) ("Appellant objected that the argument was a 'misstatement of law,' *not* that it was an improper attempt to get the jury to apply parole law to appellant. The latter complaint was procedurally defaulted by appellant's failure to raise it in an objection.") (emphasis in original).

At trial, after the prosecutor argued that appellant was "trying to cover his ears maybe from [the jury,]" defense counsel objected solely on the ground that

this statement was a "comment on the defendant's appearance." Defense counsel did not argue that this argument was outside of the record or that it injected new and harmful facts into the proceeding.

We therefore conclude that by failing to object to the trial court on the grounds that the State's argument was outside of the record and injected new and harmful facts, appellant has failed to preserve this issue for appellate review.

We overrule appellant's second issue.

Modification of Trial Court Judgments

We observed that the trial court judgments fail to reflect that the jury made an affirmative finding that appellant used a deadly weapon, a firearm, during the commission of the offense.

An appellate court has the authority to reform a judgment to make the record speak the truth when the matter has been called to its attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (holding that appellate court could reform judgment to reflect jury's affirmative deadly weapon finding and adopting reasoning in *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party had or has not objected in the trial court.")); *see also* TEX. R. APP. P. 43.2(b) (allowing appellate court to modify trial court

judgment and affirm as modified). "This power [to modify] includes adding a deadly-weapon finding to a judgment that erroneously omitted a factfinder's deadly-weapon finding and deleting a deadly-weapon finding that was erroneously entered in the judgment without a factfinder's first having made the finding." *Cobb v. State*, 95 S.W.3d 664, 668 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (Vernon Supp. 2010) ("On an affirmative [deadly weapon] finding under this subdivision, the trial court shall enter the finding in the judgment of the court. On an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in its judgment."). "A jury, as the trier of fact, makes an 'express determination' that a deadly weapon was used when it (1) finds the defendant 'guilty as charged in the indictment' and the indictment alleged the use of a 'deadly weapon' . . . ." *Edwards v. State*, 21 S.W.3d 625, 627 (Tex. App.—Waco 2000, no pet.).

Here, relative to the charge of aggravated assault on a public servant, the indictment alleged that appellant "did then and there unlawfully intentionally and knowingly threaten with imminent bodily injury P. MARQUEZ, hereafter called the Complainant, while the Complainant was lawfully discharging an official duty, *by using and exhibiting a deadly weapon, namely A FIREARM*, knowing that the Complainant was a public servant." (Emphasis added.) The jury found appellant guilty of aggravated assault on a public servant "as charged in the indictment."

Similarly, for the aggravated robbery charge, the indictment alleged that appellant "intentionally and knowingly threaten[ed] and place[d] ROSA CRESPIN in fear of imminent bodily injury and death, and the Defendant did then and there *use and exhibit a deadly weapon, to-wit: A FIREARM*." (Emphasis added.) The jury found appellant guilty of aggravated robbery "as charged in the indictment."

Thus, the jury made an affirmative deadly weapon finding for both offenses. *See French*, 830 S.W.2d at 609 (noting that jury made affirmative deadly weapon finding when indictment alleged "use of a deadly weapon, namely, a knife" and jury found defendant guilty "as charged in the indictment"); *Edwards*, 21 S.W.3d at 627. Both of the trial court judgments, however, state: "Findings on Deadly Weapon: N/A."

We therefore conclude that the judgments in trial court cause number 1247284, appellate cause number 01-10-00784-CR, and in trial court cause number 1264436, appellate cause number 01-10-00785-CR, should be modified to reflect the jury's affirmative finding that a deadly weapon, a firearm, was used.

Conclusion

We modify the judgment of the trial court in trial court cause number 1247284 and trial court cause number 1264436 to reflect the jury's affirmative finding that a deadly weapon, a firearm, was used. We therefore modify the "Findings on Deadly Weapon" portion of both judgments to state: "Yes: A Firearm." We affirm both judgments as modified.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do Not Publish. TEX. R. APP. P. 47.2(b).